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Defending New York City's Request for Proposal Process

As a general rule, the City of New York is required to purchase goods and services from the lowest responsible bidder, as determined through a competitive bidding process mandated by New York State and municipal law. The purpose of this process is to protect the public fisc by obtaining goods and services at the lowest possible price, and to prevent favoritism, improvidence, fraud and corruption in the awarding of public contracts. However, when the city's goal is to generate revenue by allowing private entities to develop, manage or use city-owned property for a fee, other procedures govern.

The city authorizes the use of city property by private parties through a number of procedures. The city may, for example, award franchises for the provision of a public service, or concessions for the private use of city property for compensation, or leases for the private use of city property. There are a variety of purposes that lead the city to choose one type of relationship over another, including the generation of revenue, when it authorizes private parties to develop, manage, or use its property. In these transactions, the city often utilizes a competitive sealed proposal process, commonly referred to as a Request for Proposals, or RFP. Some of the city's most important projects for development of its property make use of this means of procurement to select a private developer.

Three divisions in the Law Department—Contracts and Real Estate, Economic Development and Commercial and Real Estate Litigation—counsel city agencies and the city's Economic Development Corporation (EDC) concerning the implementation of RFP processes. However, it is the 40 attorneys of the Commercial and Real Estate Litigation Division who, charged with defending the city in procurement, contract and real estate matters, represent city agencies and EDC in litigation relating to RFPs. This article will discuss significant recent cases handled by attorneys of that division turning on the propriety of the award of RFPs.

RFPs and Competitive Bids

Franchises and concessions are awarded by the city pursuant to Chapter 14 of the New York City Charter and the city's Concession Rules, 12 Rules of the City of New York (RCNY) §1-01 et seq. The City Council must pass an authorizing resolution before the city can proceed with the award of a franchise, which is then typically done pursuant to an RFP. Charter §363. There are also specific provisions governing the award of leases of certain property, e.g., leases of city-owned public market property, where a competitive sealed bid is not required.

In these situations, the city must follow its own rules governing the applicable RFP and, whether sealed bid requirements apply or not, must treat proposers "fairly." Madison Square Garden, L.P. v. MTA, 19 A.D.3d 284, 286 (1st Dept.), app. granted, 5 N.Y.3d 710, app. dismissed, 5 N.Y.3d 878 (2005); but see discussion of Hunts Point Terminal Produce Cooperative Association Inc. v. NYCEDC, 36 A.D.3d 234 (1st Dept. 2006), app. denied, 8 N.Y.3d 827 (2007), infra. Legal challenges to the outcomes of RFP selection processes are governed by different laws from those applicable to competitive bidding cases, and the courts recognize that there are substantive differences between the two processes.

The RFP process differs from competitive bidding in several material respects. First, RFPs are flexible and allow the city to take into account factors other than price in making an award. They allow a public body to exercise discretion and "choose between varying proposals." Starburst Realty Corp. v. City of New York, 131 Misc.2d 177, 186 (Sup. Ct. N.Y. Co. 1985), modified on other grounds, 125 A.D.2d 148 (1st Dept.), appeal denied, 70 N.Y.2d 605 (1987). For this reason, the amount of financial return offered is not solely determinative, and the agency is not obligated to award the contract to the proposer offering the highest amount. Creole Enterprises Inc. v. Giuliani, 236 A.D.2d 272 (1st Dept.), app. denied, 90 N.Y.2d 802 (1997); Citiwide News Inc. v. NYCTA, 121 Misc.2d 536, 538 (Sup. Ct. N.Y. Co. 1983), rev'd, 99 A.D.2d 1026, rev'd 62 N.Y.2d 464 (1984). In contrast, awards made pursuant to a competitive sealed bid must be to the lowest responsible bidder.

Second, RFPs do not require the city to standardize the terms of the contract at the time of solicitation. Instead, the city may accept proposals with different terms, provided they are consistent with the general criteria set forth in the RFP. Requests for bids, on the other hand, must by law contain standardized specifications. That is because cost is the determinative factor in an award made pursuant to a competitive sealed bid.1 The ability to use general criteria is beneficial because it allows flexibility to explore creative proposals for the use of city property.

Challenges in Litigation

An important project for the development of city property that was challenged in recent litigation involved the award of a franchise for the construction and use of

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newsstands, bus shelters and public toilets, commonly known as "street furniture," on city streets. NBC Decaux LLC v. NYCDOT, No. 109233/06 (Sup. Ct. N.Y. Co. Dec. 19, 2006), and Clear Channel Adshel Inc. v. Franchise & Concession Review Committee, No. 108831/06 (Sup. Ct. N.Y. Co. Dec. 19, 2006), were two Article 78 proceedings, consolidated for decision, challenging the award of that franchise to Cemusa Inc. The franchise, from which the city is expected to gain approximately $1 billion over the next 20 years, was awarded by the city's Department of Transportation (DOT) pursuant to an authorizing resolution passed by the City Council.

In making this decision, DOT was assisted not only by an evaluation committee as required by the Concession Rules, but also by two special advisory committees evaluating the design and compensation aspects of the submitted proposals. The agency's selection of Cemusa was the subject of a public hearing held by the Franchise and Concession Review Committee, which then unanimously approved DOT's franchise award.

In dismissing all of petitioners' objections to the award, Justice William A. Wetzel of the New York State Supreme Court (New York County) began his analysis by noting that most of petitioners' objections relied on bidding cases, which were inapposite. Rather, because Decaux and Clear Channel involved an RFP, the cases required "application of an entirely different body of law which recognizes the distinction between a search for the lowest responsible bidder and a competition seeking a request for proposals."

In opposing the selection of Cemusa for the street furniture franchise, petitioners' main arguments were that (i) DOT unfairly credited certain financial aspects of Cemusa's proposal by characterizing certain proposed revenue as guaranteed rather than contingent, and (ii) Cemusa had obtained an unfair advantage from the city through communications with DOT about certain other financial aspects of its proposal. However, neither of these claims found support in the record, and therefore were rejected by the court. As in Hunts Point and Dianet, discussed infra, the court found that there was nothing in the street furniture RFP process that was either "hidden or biased" in favor of Cemusa, nor was there improper communication between the city and Cemusa. The court concluded that DOT had treated all parties fairly, and that there was a rational basis for its determination.

Other Challenges

The most recent appellate decision involving a city RFP is Linden Airport Management Corp. v. New York City Economic Development Corp., 71 A.D.3d 501 (1st Dept. 2010). That case involved the solicitation by EDC, on behalf of the city's Department of Small Business Services, of proposals to renovate and manage the city-owned Downtown Manhattan Heliport, located at Pier 6 in the East River between Broad Street and Old Slip. Petitioners, disappointed proposers, challenged the Small Business Services commissioner's decision to award the concession to a competitor, claiming that they had been treated unfairly during the selection process.

The Appellate Division, First Department, upheld the commissioner's decision to award the concession, finding that the municipal respondents had complied with the Concession Rules in choosing FirstFlight Inc. to operate the heliport, and that the choice of FirstFlight, based on its fee offer, experience and capital improvement plan for heliport, was rational. The court rejected petitioners' allegations that confidential information concerning the heliport was improperly provided to a FirstFlight executive prior to issuance of the RFP. Since petitioners' allegations were based only on hearsay, and were refuted by sworn affidavits and evidentiary proof, the court found that they failed to meet their burden to demonstrate impropriety or unfair dealing in the award of the concession.

Dianet Communications LLC v. Franchise and Concession Review Committee, 2008 N.Y. Misc. LEXIS 7322 (Sup. Ct. N.Y. Co. 2008), involved the award of non-exclusive franchises for the installation of equipment and facilities needed for the provision of mobile telecommunications services "on, over and under" city-owned property. Petitioner challenged the award of one of these franchises on the ground that the RFP process was unfair and had a predetermined outcome. Like petitioners in Linden, petitioner in Dianet alleged that confidential information had been improperly conveyed during the RFP process.

New York State Supreme Court Justice Eileen A. Rakower rejected these claims, finding that petitioner had failed to demonstrate that the city was guilty of impropriety because the information at issue was not confidential, and the alleged communication was not between the city and a proposer. Based on this finding, the court concluded that the franchise award was rational and neither arbitrary nor capricious.

Standing

At issue in Hunts Point Terminal Produce Cooperative Association Inc. v. NYCEDC, supra, was a solicitation by EDC for proposals to lease a portion of city-owned public market property in the Hunts Point Food Distribution Center located in the Bronx. Petitioner, lessee of the New York City Terminal Market, challenged EDC's decision to award the lease to Baldor Specialty Foods Inc. on the grounds that the selection process was unfair and based on the use of undisclosed criteria. After a 13-day bench trial, the trial judge annulled EDC's decision, finding that although the RFP did not disclose publicly EDC's objective of providing potential relocation space to wholesalers displaced by the

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redevelopment of the Bronx Terminal Market, that objective had been communicated to Baldor, giving it an unfair advantage.

The Appellate Division, First Department, reversed, rejecting this finding and holding that the petitioner lacked standing. The court determined that there was no relevant zone of statutory interest at issue because there were no legal provisions circumscribing EDC's authority in issuing the RFP or what the content of such RFP should be. The court questioned application of the common law "fairness" requirement to EDC, since it is a not-for-profit local development corporation and not a public authority, but also found that even if that common law doctrine applied and was used for purposes of a zone of interest standing analysis, petitioner would still fail to meet that test. That is because RFPs are flexible tools which need not "spell out" evaluation criteria with specificity, and, contrary to the erroneous finding made by the trial court, there was nothing in the Hunts Point RFP selection process that was either "hidden or biased in favor" of the winning proposer. As a result, the process was not unfair.

In addition, the court held that petitioner's allegation of competitive injury was insufficient to demonstrate injury in fact for standing purposes. Nor could petitioner show actual injury because its proposal contained a series of conditions precedent to its performance, the satisfaction of which were not within petitioner's control, and were not contemplated by the RFP. As a result, petitioner improperly varied the terms of the RFP by its proposal, thus rendering the rejection of its proposal entirely appropriate. Alternatively, the court held that, even if petitioner had standing, EDC's selection of Baldor's proposal was rational because there was ample evidence in the record to conclude that Baldor's proposal was "superior."

Standing was also an issue in Friends of Dag Hammarskjold Plaza v. City of New York Department of Parks & Recreation, 2006 N.Y. Misc. LEXIS 2826 (Sup. Ct. N.Y. Co. 2006). That case involved a challenge to the decision of the Department of Parks and Recreation (DPR) to award a franchise to operate a café on Dag Hammarskjold Plaza, a city park on East 47th Street between First and Second avenues in Manhattan. The lead petitioner, a non-profit organization formed to help "revitalize" the park, was held to lack standing because it did not participate in the RFP process, and therefore had no direct stake in the outcome of the process. This was not the end of the proceeding, however, because the other petitioner, Dag Park, LLC, had participated in the RFP process. Dag Park's primary argument for setting aside the award was that the selection committee did not comply with the requirement in the Concession Rules that members who changed their scores during the proposal evaluation process should include a written explanation for the change on the scoring sheets.

New York State Supreme Court Justice Lewis Bart Stone found that although there was a technical violation of the rules in this regard, that violation by itself, unaccompanied by any credible evidence of wrongdoing in connection therewith, was at most "harmless error," and an insufficient basis on which to overturn DPR's determination

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