Rod Knox Architect v. Department of General Services
OATH Index No. 304/93 (December 10, 1992)

Summary: This is an appeal by petitioner of the revocation of its prequalified vendor status by respondent, the Department of General Services ("DGS"). The appeal is brought pursuant to section 324 (b) of the New York City Charter, the Rules of the Procurement Policy Board, 9 RCNY section 7-06 (c) (June 30, 1991) (hereinafter "PPB Rules"), and Chapter 3 of the Rules of Practice of the Office of Administrative Trials and Hearings, 48 RCNY § 3-01 et. seq. (September 30, 1991) (hereinafter "OATH Rules").

Petitioner is an architectural firm whose prequalified vendor status was revoked by respondent due to what respondent alleged was petitioner's poor and unsatisfactory performance on a recent prior contract to renovate certain Department of Transportation facilities, which contract was terminated for cause by respondent. Petitioner vigorously disputes respondent's assessment of its performance in the prior contract, and the propriety of respondent's termination of that contract for cause, and argues that respondent had no basis for revoking its prequalified vendor status. Petitioner seeks reversal of that agency action and reinstatement of its prequalified status.

Respondent contends that its assessment of petitioner's unsatisfactory performance on the prior contract is nonreviewable on this appeal, and that it had more than sufficient cause under PPB Rules to revoke petitioner's prequalified status.

Upon the record and papers submitted to me, including the Petition, the Answer, and the Reply papers with annexed supporting documentation, as well as certain affidavits submitted post-docketing of the appeal, I find that the agency's action in revoking petitioner's prequalified status was neither arbitrary nor capricious, but taken with some basis in fact, and thus the petition on appeal is **denied**.[1]

RAY KRAMER, *Administrative Law Judge*

BACKGROUND

Petitioner, Rod Knox Architect, is an architectural firm headed by Mr. Knox, an architect.

On February 7, 1990, the firm entered into a contract with respondent (Contract No. HWC068) to

[1] The "record" to be reviewed in these appeals should include any and all material, documents and information that was before the agency head at the time of the decision to revoke a vendor's prequalified status. Where information relied upon was not written, it should be reduced to writing to be made a part of the record. *See* OATH Rule § 3-04 (b) (September 30, 1991).

In this case, respondent failed to clearly delineate the specific documents, information and materials that were relied upon at the agency level to revoke petitioner's prequalified status. However, since there was no dispute that most of the material constituting the present petition was previously submitted to and considered by the agency head in his review of the revocation decision (*see* Petition, p. 2; Respondent's Memorandum of Law), I am including that material as part of the record to be reviewed here.

provide architectural and consultant services in connection with the renovation and improvement of various bathroom facilities at specified Department of Transportation ("DOT") yards.[2] Documents submitted by the parties indicate that the project was considered to be of an "emergency" nature, with completion contemplated within a period of months, in order to quickly afford proper bathroom facilities for the workers in the affected yards.

Instead, the project dragged on for almost two years, punctuated by numerous meetings (the petitioner submitted minutes of some 17 meetings between March 1990 and September 1991), correspondence, discussions about proposed designs, disagreements over suggested changes and revisions, and periodic submission and resubmission of plans. Moreover, the record was clear that in that time span the working relationship between the parties, at first seemingly cordial and cooperative, degenerated into one of distrust, bickering, fingerpointing, and charges and countercharges over who was responsible for the delays and over what petitioner was required to do under the contract.

In the end, what was referred to at one place in the record as a 150-day project *(see* Exh. 18 annexed to Petition), had still not passed beyond the design phase almost two years later, when respondent, in a terse letter dated January 29, 1992, and effective February 5, 1992, finally terminated petitioner's contract for cause (*see* Exh. D annexed to Answer).

Sometime thereafter, petitioner apparently filed two claims with the City Comptroller's Office, the nature of which were not immediately made clear, but apparently seeking certain compensation for work performed to that point under the contract (see Reply, p. 8). Those claims are still pending. Petitioner, however, did not challenge the agency's termination of its contract in

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[2] Documents submitted by petitioner indicate that petitioner provided certain consultant and pre-contract services on this project beginning in 1989.

an Article 78 proceeding, and the four-month statute of limitation period for such challenge expired on June 5, 1992. See CPLR § 217 (McKinney 1990).

On June 16, 1992, respondent's Executive Consultant Selection Committee met and determined to revoke petitioner's prequalified vendor status. The Committee based its decision on petitioner's poor and unsatisfactory performance on Contract No. HWC068, which resulted in the termination of that contract for cause. Petitioner was so notified by respondent by letter, dated July 14, 1992, from Allen D. Hausman, the Agency Chief Contracting Officer (*see* Exh. F annexed to Answer).[3]

As per PPB Rule § 7-06 (b), petitioner thereafter, by letter dated July 28, 1992, appealed the Committee's decision to the agency head, in this case to Deputy Commissioner Michel Lipton, who was designated to hear such appeals by Commissioner Kenneth Knuckles. On August 13, 1992, Deputy Commissioner Lipton upheld the Executive Committee's decision revoking petitioner's prequalified vendor status. In his letter of that date, Deputy Commissioner Lipton advised Mr. Knox that the materials the latter had submitted in support of petitioner's appeal, which, as noted, were also submitted here, did not persuade him to reverse the Committee's decision to revoke based on petitioner's prior unsatisfactory performance in Contract No. HWC068 (*see* Exh. A annexed to Answer).

Petitioner has now filed the pending appeal challenging the agency's action pursuant to section 7-07(c) of the PPB Rules and Chapter 3 of OATH's Rules.

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[3] According to the letter, the Committee considered the "poor evaluation" given petitioner's firm for its performance on Contract No. HWC068 and the subsequent termination of that contract, and decided that "[b]ecause of the Committee's learning of the unsatisfactory performance evaluation on the DOT project above [Contract HWC068], it has voted to revoke your prequalified status pursuant to Chapter 3, Section 3-11(m) [of the PPB Rules]." (Exh. F annexed to Answer).

ANALYSIS

In part because this is the first prequalified vendor appeal brought before this tribunal under the recently enacted PPB Rules, and in part because of the nature of this particular appeal, some discussion of the standard of review and the role of this tribunal in these proceedings is warranted.

Under PPB Rules, the standard of review which this tribunal is required to apply in determining an appeal of an agency's revocation of a vendor's prequalified status is whether the agency's action was "arbitrary" or "capricious." *See* PPB Rule § 7-06 (c). While that standard is not further defined in PPB Rules, substantial caselaw and other legal authority discuss the nature of such standard with respect to special proceedings brought pursuant to Article 78 of the Civil Practice Law and Rules, where one of the standards for court review is the same. *See* CPLR § 7803 (3) (McKinney 1981). That discussion is appropriate to consider here, where the nature of the matter being reviewed, as in analogous Article 78 proceedings, is an administrative determination reached without benefit of an adjudicatory hearing.

The courts have held that in an Article 78 review of an administrative determination reached without the requirement of a quasi-judicial or evidentiary hearing, the proper test on review is whether there was a "rational basis" for the administrative determination. *Colton v. Berman,* 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 651 (1967). "All that is required is that the agency's determinations have a rational basis in the 'record' before it and that its determinations not be arbitrary or capricious." *Colton,* 21 N.Y.2d at 334, 287 N.Y.S.2d at 655.

Whether an action is arbitrary or capricious "'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" *Pell v. Board of Education*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974), *citing* 1 N.Y. Jur., Administrative Law, § 184, p. 609. Stated another way, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell,* 34 N.Y.2d at 231, 356 N.Y.S.2d at 839. The courts have made clear that "rationality" is what is being reviewed under the arbitrary and capricious standard. *Id.; see also Ray v. Haveliwala,* 107 A.D.2d 316, 487 N.Y.S.2d 134 (3d Dep't 1985).

Once it is determined that a "rational basis" exists to support an administrative determination or discretionary agency action, the court's power to interfere is ended. *Pell*, 34 N.Y.2d at 230-31, 356 N.Y.S.2d at 839 (1974); *Delta Chemical Manufacturing Company*, 81 A.D.2d 507, 437 N.Y.S.2d 12, 13 (1st Dep't 1981). "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." *Pell*, 34 N.Y.2d at 232, 356 N.Y.S.2d at 840 (citations omitted); *see also Gomez v. Christian,* 104 Misc.2d 354, 428 N.Y.S.2d 431 (Sup. Ct. Queens Co. 1980). While reasonable people may reasonably differ about the soundness of an administrative decision, "the agency or person saddled with the responsibility of decision, absent fraud, collusion, illegality or action clearly arbitrary and without foundation, should have its decisions upheld." *Kayfield Construction Corp. v. Morris,* 15 A.D.2d 373, 225 N.Y.S.2d 507, 515 (1st Dep't 1962).

The applicable rules and procedures governing prequalified vendor appeals intend a similarly circumscribed role and standard of review for this tribunal. The purpose of the appeal at this stage is to permit limited and expedient review of a decision already made by the agency, not to provide for a *de novo* fact-finding proceeding at which that decision will be made by this tribunal anew. While OATH's Rules (§ 3-04) permit this tribunal to conduct an evidentiary hearing in its discretion, that power will be exercised in only the most limited and extraordinary circumstances where a determination could not otherwise be reached, and not simply whenever there are facts in dispute. As a rule, however, the only question presented for review here will simply be whether, on the record presented on appeal, there was a reasonable or rational basis to support the agency's determination to revoke petitioner's prequalified vendor status.

It was undisputed that the basis for the agency's action in this case was petitioner's alleged unsatisfactory performance on Contract No. HWC068, leading to the termination of that contract for cause.[4] Chapter 3 of the PPB Rules sets forth the criteria for the revocation of prequalified vendor status. Specifically, section 3-11 (m) (2) provides that prequalified vendor status may be revoked on the basis of "changed circumstances, conditions or status of the firm and its personnel or additional information acquired by the agency or further analysis of the information upon which the original prequalification decision was made, where the new information or further analysis indicates that the vendor no longer meets the established criteria for prequalification." The criteria for prequalification specifically include past performance. *See* New York City Charter § 324 (a) (New York Legal Publishing Corp. 1990); PPB Rule § 3-11 (e).

There can be little question that petitioner's alleged poor performance on Contract No. HWC068, resulting in the termination of the contract for cause, once determined, would constitute such "changed circumstances" or "additional information" under PPB Rules as would be sufficient to warrant revocation of petitioner's prequalified status. Petitioner's contention on appeal, however, is that it did not perform poorly at all on the prior contract, that the contract was improperly terminated for cause, and that there was no basis rational or otherwise for the revocation of its prequalified status. In a voluminous petition, consisting of three bound volumes replete with documents and correspondence purporting to support its position (not all of it relevant to this

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[4] In its Answer, respondent described the basis for its Executive Consultant Selection Committee's decision to revoke petitioner's prequalification status as the poor evaluation petitioner received for its performance in the contract at issue and the subsequent termination of that contract for cause (*see* Exh. F annexed to Answer).

appeal), Mr. Knox, on behalf of petitioner, engaged in a point by point refutation of the agency's numerous complaints about its unsatisfactory performance, denying certain allegations and conceding others but with a justification proffered for its conduct. Petitioner further seeks to litigate on appeal the entire issue of its past performance on Contract No. HWC068 and, to that end, requested a full evidentiary hearing.

In contrast, respondent argued in its Answer and accompanying Memorandum of Law that there was nothing for this tribunal to review on appeal beyond confirming the existence of a prior termination of a contract with petitioner for cause. Respondent maintained that since petitioner never challenged that prior termination via an Article 78 proceeding, within the four-month statutory time limit for review (by June 5, 1992), that action was final, binding, and nonreviewable at the time of the agency's decision to revoke petitioner's prequalified status on June 16, 1992, and as such, was properly relied on in the revocation decision. Respondent further argued that as a matter of law, revocation based upon a termination of a prior recent contract for cause was rational and could not be found to be arbitrary and capricious. According to respondent, no further review of the circumstances underlying the contract termination was necessary, and, in fact, would be jurisdictionally impermissible.

Both parties misconstrued the scope of this tribunal's review. Respondent, in its arguments, seeks to circumscribe the role of this tribunal far too narrowly. If respondent's view were to prevail, the propriety of the revocation decision would ultimately be determined less on its merits rather than whether petitioner timely filed an Article 78 challenge to a prior adverse agency action. An agency, in fact, could attempt to circumvent meaningful review of a revocation decision by terminating a contract for cause on the hope that there would be no direct challenge, waiting four months for the statute of limitations to run on that action, and then arguing on appeal here that the revocation decision was essentially nonreviewable.

This tribunal's role, however, is something more than a mere formality in the administrative review process. Where, as here, a petitioner alleges that there was no basis at all for the termination of its prior contract for cause, or, where a petitioner alleges, for example, that a prior contract termination was the result of some fraud, or collusion, or the pretext for some discriminatory or other invidious motive to remove it from the prequalified list, then this tribunal must look beyond the mere fact of the contract termination to the underlying reasons.

Such review does not involve a trespass into another forum's jurisdiction. The purpose of this review is not to reevaluate and/or reverse the agency's assessment of a contractor's performance on a prior contract, or the legal propriety of its termination of that contract. It is simply to determine whether, where those actions were used as the basis for revoking a vendor's prequalified status, which *is* the subject of OATH's jurisdiction, there was some foundation in fact for the agency's underlying actions.

Nor should the fact that the Article 78 statute of limitations has run without challenge to those underlying actions, be determinative of the scope of this review, rather than simply a factor to consider in the "rational basis" analysis. An agency's decision to terminate a contract for cause is final the moment it is made, and thus can immediately be relied upon in subsequently revoking the vendor's prequalified status, even though the Article 78 statute of limitations has not yet run. The agency is not required to wait until the limitations period has run before taking further action to revoke the vendor's prequalified status, and, in fact, in some cases may be required to take immediate action in the public's interest. In cases where the limitation period has not yet run, respondent would presumably not dispute that the underlying reasons for the prior contract termination would properly be subject to some review, since it is ultimately the vendor's poor performance or underlying conduct that is at the heart of the revocation proceeding, rather than just the mere fact of the contract termination.

By the same token, there may be instances where a vendor could reasonably determine that it was not in its legal or financial interest to challenge a particular contract termination for cause in an Article 78 proceeding, rather than simply to sue for breach of contract, or for damages or compensation alleged to be due. Given petitioner's filing of claims with the Comptroller's Office, that may be in fact the assessment it made in this instance. To permit the failure to file an Article 78 challenge, no matter what the reasonableness of that election, to foreclose meaningful review of a subsequent and more far ranging adverse agency action, *i.e.,* the removal of a contractor from the prequalified vendor list, seems misplaced and fundamentally unfair.

Thus, I reject respondent's arguments that the mere fact of the unchallenged prior termination of Contract No. HWC068 forecloses any review of the underlying reasons for that termination or the basis of the agency's negative evaluation of petitioner's performance on that contract.

At the same time, petitioner seeks a more expansive review of the agency's revocation decision than was provided for or intended by the PPB procedures. As already noted, this is not the forum to litigate in the first instance whether petitioner performed poorly on Contract No. HWC068, or was properly terminated under that contract for cause. Rather, the record presented on appeal was sufficiently extensive to allow for the limited determination of whether the agency's underlying assessment of petitioner's prior performance, which formed the basis for revocation of its prequalified status, had some foundation in fact.

Moreover, petitioner's reliance on *Cohen v. Board of Education of East Ramapo Central School District,* 84 A.D.2d 536, 443 N.Y.S.2d 170 (2d Dep't 1981), to support its argument that the underlying reasons for the revocation decision could be litigated in full on this appeal, was misplaced. *Cohen* was decided on the basis of collateral estoppel and *res judicata* principles which have no applicability here, where there has been no prior adjudication of any kind. In addition, *Cohen* appeared to involve equity concerns not at issue here. In any event, *Cohen* stands for no more than the premise that the petitioner in that case (a teacher), having been time-barred from raising an issue in a first proceeding, would not be barred from raising it in a second and distinct proceeding, to the extent of whatever process was due.[5]

In this case, petitioner was not barred from raising at the agency level, the underlying issues of its prior performance on Contract No. HWC068, or the propriety of the contract's termination. Revocation of its prequalified vendor status did not follow automatically upon the termination of its prior contract. Rather, petitioner was given notice of the revocation decision and had an opportunity to be heard regarding the sufficiency of the reasons for that decision, including its prior contract performance, in accordance with the procedures set forth in PPB Rules. Petitioner, in fact, availed itself of that opportunity, submitting to the designee of the agency head, as noted, an extensive set of documents and materials which were submitted on this appeal as well. There is no provision under the PPB procedures, which were designed for expeditious determinations, for a full adjudicatory hearing on disputed facts or issues at the agency level, nor would such an adversarial

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[5] *Cohen* involved a teacher who was initially removed from her position under the applicable provision of the Education Law, based on what the appellee-school district ultimately conceded was an erroneous calculation of her seniority status. The teacher's belated challenge to that action in an Article 78 proceeding was dismissed as time-barred by the four-month statute of limitations. In a subsequent reinstatement proceeding, initiated by the teacher under a different provision of the Education Law, where her seniority was again at issue, the school district sought and was granted a summary judgment motion by the Supreme Court on the grounds that the issue of her seniority had been finally determined against her in the prior removal proceeding by the dismissal of her challenge as time-barred. The Appellate Division, reversed, holding that the reinstatement proceeding involved a different cause of action based on different, intervening events; that the challenge to the removal proceeding had been dismissed under the "technicalities" of CPLR 217 (the statute of limitations); and that since the seniority issue had never previously been litigated, *res judicata* and collateral estoppel principles did not apply.

hearing appear to be constitutionally required. Rather, petitioner has been accorded all the process that was due to this point. *See Schiavone Construction Co. v. Larocca,* 117 A.D.2d 440, 503 N.Y.S.2d 196 (3d Dep't 1986); *Nanco Environmental Services v. Jorling,* 172 A.D.2d 1, 576 N.Y.S.2d 619 (3d Dep't 1991); *see also King v. New York State Department of Health,* __ Misc.2d _, 583 N.Y.S.2d 338 (Sup. Ct. Albany Co. 1992).

Thus, the task for this tribunal on appeal is not to resolve all of the various disputed issues of fact raised by petitioner. Nor is it to ignore completely the underlying reasons for the agency's revocation decision and simply determine if there was a prior contract involving petitioner which was terminated for cause. Rather, this tribunal must determine whether the respondent agency had a rational basis to support its revocation decision, meaning more specifically in this case, whether the agency had sufficient basis in fact to support its evaluation of petitioner's performance on the prior contract at issue as poor and unsatisfactory, which in turn is a criterion for revocation of petitioner's prequalified status, regardless of whether the prior contract was terminated. The record presented to me reveals ample rational basis for the agency's assessment of petitioner's performance on the prior contract as poor and unsatisfactory.

First, the fact that the prior contract was terminated for cause and never directly challenged in an Article 78 proceeding, while not determinative of this appeal, is a factor to consider in support of the rationality of the agency's revocation decision. Petitioner's failure to directly challenge the agency's assessment of its performance in this fashion gives rise to an inference, at least, that the assessment had some basis in fact.

Second, respondent's Answer recited a litany of general and specific complaints about petitioner's performance, and specifically about the conduct of its chief architect, Mr. Knox, spanning the two-year period leading up to the agency's termination of Contract No. HWC068 for cause which were amply documented in the record (*see* Exh. B annexed to Answer). Such complaints included Mr. Knox's failure to attend various meetings and forcing others to be rescheduled,[6] his late and incomplete submissions of plans, his refusal to accept or incorporate comments and suggested revisions in the plans, his failure to turn over certain documents (*e.g.*, the "mylars") as directed, and his generally disruptive and uncooperative conduct, among others.

The record revealed that these complaints had some basis in fact and were not simply fabricated or pretextual for otherwise invidious or improper action. The fact that petitioner disputed them on appeal and now offers different versions of the facts or explanations for its conduct, is of no moment. Petitioner, as the aggrieved party, bears the burden of demonstrating in this proceeding that the agency's revocation of its prequalified status was without any basis in fact, or the product of some illegality, fraud, abuse of discretion or other improper conduct by the agency in order to warrant this tribunal's interference in the agency's determination to revoke. This burden it has failed to meet.

Third, even putting aside for a moment those complaints about petitioner's prior performance that were disputed, there was ample material in the record which was undisputed that supported the agency's negative evaluation of petitioner's performance, and therefore its revocation decision.

Thus, for example, there was no dispute that this project was delayed significantly beyond the period the contract contemplated. While petitioner blamed the respondent and DOT for all the delays, and respondent blamed petitioner, it is reasonable to infer from the record that both sides

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[6] This complaint including a specific allegation that petitioner missed the project's kick-off meeting scheduled for March 13, 1990, despite notice and without sufficient cause, inconveniencing various agency personnel and forcing the meeting to be rescheduled to March 22, 1990. This allegation was vigorously denied by petitioner and was the subject of post-docketing submissions of affidavits from both sides, which I accepted. It would be difficult to decide this dispute in the absence of an evidentiary hearing, but, for the reasons noted further in this Decision, its resolution is not required for the determination of the appeal.

shared in the blame. For purposes of this proceeding, however, the fact that respondent or DOT may have contributed to any of the delay is of no moment. The question, rather, is whether any of the delay could fairly be attributed to petitioner. The record indicates several instances where it can be.

There was an instance where petitioner was charged with obtaining certain Department of Building approvals for the sites to be renovated. It was undisputed that petitioner did not obtain those approvals in a prompt fashion. Mr. Knox accused respondent of giving him inaccurate information causing the delay in obtaining the approvals. All of the building applications were returned by him to respondent. Yet, the record supported the agency's assessment that much of the information provided had been correct, that at least some of the approvals could have been obtained, and that, in any event, the primary responsibility for obtaining the approvals was petitioner's (*see* Exh. B annexed to Answer; Exh. 35 annexed to Petition).

There was another undisputed instance, in October 1990, when petitioner submitted certain Preliminary Design Phase documents late and with a "construction program" for only one of the eleven facilities to be renovated. Petitioner did not deny this incomplete submission, but indicated to respondent that he misunderstood the contract requirements and thought that the submission at that stage was only to be representative of the documents to be prepared (Exh. B annexed to Answer). He ultimately submitted the required documents a month later.

The record revealed other undisputed instances of late or incomplete submissions of plans, as well as the submission of certain plans at different phases of the project without incorporating changes requested by respondent or DOT (*see* Exhs. B and C annexed to Answer; Exh. 7 annexed to Petition), for which petitioner offered various explanations or excuses. While the parties pointed the finger of blame in different directions, it is not for me to now determine the credibility of their respective claims. Rather, this review is limited to determining only whether there was a rational or reasonable basis for respondent to hold petitioner accountable, as it did. The record clearly revealed such basis.

It was further undisputed that in May and June 1991, Mr. Knox vigorously opposed and initially refused to accept and incorporate into his plans comments made by an architect at the Mayor's Office for People with Disabilities (*see* Exh. B annexed to Answer; Exhs. 47-H (Minutes of Meetings Nos. 15, 16 and 17), 47-M, 47-N, 47-O, 47-P, 47-R annexed to Petition). Although Mr. Knox maintained that he ultimately complied with the directions to incorporate those suggested revisions, he argued with respondent and DOT about whether the revisions were required by local law, contending that they were essentially gratuitous and beyond the scope of his contract, and that he was thus not required to incorporate them. In this appeal, he continued to argue those points, reiterating his view that he was improperly forced to consider these proposed revisions (*see* Exh. 46, pp. 7-8, annexed to Petition).

Regardless of whether he was technically correct as to the requirements of the local law or the contract, there was no dispute as to petitioner's repeated noncompliance with the respondent's directions in this regard. There was likewise no dispute that a delay of at least two months resulted. Thus, there was a reasonable basis on these facts for the agency to attribute the delay to petitioner and to evaluate its performance unfavorably.

A further basis for the agency's unfavorable assessment of petitioner's performance on Contract No. HWC068 was the latter's undisputed failure to meet a final deadline set by respondent for submission of certain outstanding plans and documents. The record reveals that, although certain officials were requesting the termination of petitioner's contract as early as February 1991, the parties continued to persevere through the project until the end of 1991. At that point, however, the working relationship had deteriorated to the point where Assistant Commissioner Arthur Symes wrote a letter to Mr. Knox on December 4, 1991, which was essentially an ultimatum, requiring petitioner to perform certain specific tasks and make certain specific submissions to bring the project to a closure no later than December 20, 1991 (*see* Exh. C annexed to Answer).

The record was clear that petitioner failed to submit the required plans and documents by that deadline. Instead, Mr. Knox responded with a contentious four-page letter to Assistant Commissioner Symes, dated December 5, 1991, maintaining that no outstanding work was due, disputing the need to make any further submissions or revisions as directed, and insisting upon a "change order" in the contract as well as certain purported overdue payments before any further work would be performed (*see* Exh. 7 annexed to Petition). The failure to meet the required deadline and the tone of petitioner's response to the ultimatum, clearly supported the agency's judgment about the quality of petitioner's performance.

Finally, and perhaps most significantly, there was a reasonable basis in the record to support the agency's various characterizations of Mr. Knox as "disruptive," "obstructive" and "uncooperative," and of its working relationship with the agency as "poor." Thus, for example, there was no dispute that Mr. Knox insisted on tape recording meetings with agency personnel, despite the discomfort of, and even outright objection of, some of the participants (*see* Exhs. 25, 47-H (Minutes of Meetings Nos. 10 and 12) annexed to Petition). It is not hard to imagine how insistence on taping meetings, combined with the often slanted tone of the minutes he prepared (*see* Exhs. 6, 25, 47-H, 47-J annexed to Petition), would exacerbate the strained relationship and atmosphere of distrust and tension which developed between the parties.

Moreover, while the parties differ as to where the blame lies, there can be no dispute, as the record clearly reveals, that over the course of two years the working relationship between petitioner, and respondent and DOT, the client agency, deteriorated to one of charges and countercharges, undeniably adding to the gridlock on this project. Various letters from Mr. Knox, such as the December 5, 1991 letter noted above, the minutes of various meetings, and, to a degree, even the content and extent of the petition submitted on appeal here, reveal the degree of deterioration in the working relationship and the adversarial posture of the parties (*see* Exhs. 7, 22, 25-27, 29, 32, 33, 35, 37, 47-H (Minutes of Meetings Nos. 11, 12, 16, and 17), 47-J, 47-K, 47-N, 47-P, 47-R, 47-S, 47-KK, 47-QQ annexed to Petition). Moreover, as documentary evidence annexed to the petition makes clear, the hostile working relationship continued despite various changes in project managers and agency personnel working on this project, indicating that the contentiousness was not the result of a limited personality clash, but persisted and existed almost regardless of whom petitioner was working with from DOT or respondent.

A review of the relevant portion of the contract submitted by respondent, indicates that it gave the Commissioner fairly wide latitude to terminate the contract for a variety of reasons (*see* Exh. E annexed to the Answer). But regardless of whether the contract was terminated at all, the agency was still permitted to evaluate petitioner's performance for purposes of determining whether its services should be retained in the future. Moreover, of necessity, that performance evaluation may have included subjective factors, like the assessment of the working relationship between petitioner and respondent or the contracting agency, in addition to more objective criteria. Clearly, the agency was unhappy with its relationship with petitioner as evidenced by specific correspondence (*see* Exh. C annexed to Answer; Exhs. 26, 47-H (Minutes of Meetings Nos. 11 and 16), 47-J, 47-SS annexed to Petition) and by its actions in ultimately terminating the contract.

It is not the role of this tribunal upon appeal, to second-guess the agency's subjective assessment of its working relationship with petitioner or the impact of that relationship on contract performance and on timely completion. Whether I might review the various documents, consider the circumstances and arrive at a different opinion as to the quality of petitioner's performance is of no moment. As the Court of Appeals has noted, "if the acts of the administrative agency find support in the record, its determination is conclusive . . . a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." *Sullivan County Harness Racing Association, Inc. v. Glasser,* 30 N.Y.2d 269, 277-78, 332 N.Y.S.2d 622, 627 (1972) (citations omitted).

Nor would a full evidentiary hearing at this stage, as requested by petitioner, invalidate the more subjective agency assessments of the quality of petitioner's performance made at the time, the judgment of which cannot now be second-guessed. As already noted, "[i]t is not the function of judicial review in an Article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis. In so doing we are permitted to consider the facts established as well as inferences reasonably to be drawn therefrom" *Kayfield Construction Corp.,* 15 A.D.2d at _, 225 N.Y.S.2d at 514 (citations omitted). No more is required or permitted in this administrative appeal.

In sum, the record here amply demonstrated that the agency's action in revoking petitioner's prequalified vendor status was neither arbitrary nor capricious, but rather was grounded in a reasonable and rational basis, *i.e.,* a reasonable and rational assessment of petitioner's performance on a prior contract as being poor and unsatisfactory. Such assessment is sufficient under PPB Rules to revoke petitioner's prequalified status. Petitioner failed to meet its burden in demonstrating arbitrariness or irrationality, or some other illegal or improper conduct on the part of the agency. The agency's revocation action is therefore affirmed, and the petition on appeal is **denied**.

P R E S E N T: **RAY KRAMER,** *Administrative Law Judge*

A P P E A R A N C E S:

DAVID MIGDAL, *Attorney for Petitioner*

MICHAEL BARRON, *Attorney for Respondent*