

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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 In the Matter of the Application of :
 : Index No.: ____ / 2021
 COMPTROLLER OF THE CITY OF NEW YORK, :
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 Petitioner, : **VERIFIED PETITION**
 :
 For a Judgment Pursuant to CPLR Article 78 :
 :
 - against - :
 :
 CITY OF NEW YORK and :
 MAYOR OF THE CITY OF NEW YORK, :
 :
 Respondents. :
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Petitioner Comptroller of the City of New York (the “Comptroller”), by his attorneys, Smith, Gambrell & Russell, LLP, as and for his verified petition against the City of New York (the “City”) and the Mayor of the City (the “Mayor”) [together, “Respondents”], alleges as follows:

INTRODUCTION

1. On March 17, 2020, relying on Executive Law Section 24 (1), the Mayor issued Emergency Executive Order 101, Section 2 (“EEO 101”), which suspended Chapter 13 of the New York City Charter (the “Charter”) and the New York City Procurement Policy Board Rules (“PPB Rules”) related to procurement of Contracts by the City of New York (the “City”) for the statutory maximum of five days.¹

2. Since then, the Mayor has issued approximately one hundred emergency executive orders that extended the suspensions in EEO 101 and the City has registered almost \$7 billion in COVID-19-related contracts and contract actions (together “Contracts”) to procure goods, services

¹ Copies of EEO 101, the PPB Rules and Chapter 13 of the Charter are annexed as Exhibits A, B and C to the Affidavit of Lisa Flores, sworn to July 1, 2021 (the “Flores Aff.”) submitted herewith.

and construction – including purported pandemic-related Contracts that, in actuality, are unrelated to the City’s emergency response – all without Comptroller oversight.

3. EEO 101’s prolonged suspension of the Comptroller’s powers has eviscerated the Comptroller’s ability to provide checks and balances against misuse, mismanagement, waste and fraud in Contracts. As a result, the City has experienced widespread procurement failures, including overpayment and over-purchasing in this category of purported “emergency” contracting.

4. Consistent with Charter Section 315, the PPB Rules – codified in Title 9 of the Rules of the City of New York – require “the prior approval of the Comptroller and the Corporation Counsel” in the event of “an immediate and serious need for goods, services or construction that cannot be met through normal procurement methods.” PPB Rule § 3-06 (a), (c).

5. Executive Law Section 24 (1) allows the Mayor to suspend a local law, ordinance or regulation that may prevent necessary action in coping with a disaster or recovery in order to safeguard the health and welfare of the public.

6. Critically, under Executive Law Section 24 (1) (g) (i), the Mayor can extend a suspension only after a “reconsideration” based on a fresh examination of all relevant facts and circumstances.

7. The Legislature intended that emergency orders be limited and temporary in nature and, as such, any suspension can last only five days.

8. Any justification for suspending the Charter and the PPB Rules – which provide for an emergency procedure designed to expedite the procurement process – no longer exists. The supply chain issues that affected the nation sixteen months ago are largely resolved, and overcrowding of City hospitals is no longer a serious threat to public safety.

9. In February 2021, the Mayor correctly observed that it was time to go back to the normal way of governing things. Since February, the circumstances surrounding COVID-19 in New York State and New York City have continued to improve.

10. In fact, on June 25, 2021, Governor Cuomo ended the New York state disaster emergency. Nevertheless, the very next day, the Mayor extended the citywide state of emergency again through the end of July, subject to another 30-day renewal. The Mayor also continues to issue new executive orders to extend the prolonged suspension of the Comptroller's oversight powers.

11. Contrary to the Mayor's obligations under Executive Law Section 24, the Mayor has failed to reconsider the change in facts and circumstances with respect to the diminished threat posed by COVID-19 to the health and welfare of the City, and continues to extend the suspension of the Charter and the PPB Rules. Accordingly, his decision to continue to extend EEO 101 is arbitrary and capricious, an abuse of discretion, and is made in violation of lawful procedure.

12. To make matters worse, the Mayor's Office of Contract Services ("MOCS") has violated lawful procedure and its own policies with respect to Contracts registered by MOCS as related to COVID-19 emergency procurement, thereby creating an unacceptable risk in accountability and transparency.

13. Multiple government agencies, including the City Law Department, rely on the Comptroller's central document repository, filing and certification of City contracts in the furtherance of their duties.

14. Taxpayers are entitled to the safeguards afforded by the Comptroller registration process established in the Charter.

15. To fulfill these responsibilities, the Comptroller is required to gather and maintain all evidence for each City Contract (the “Contract Package”).

16. With respect to the Contracts registered by MOCS as COVID-19 emergencies, MOCS has failed to provide the Comptroller with documents and information sufficient to enable him to confirm that the Contract Packages are complete.

17. By eliminating Comptroller oversight and failing to provide the Comptroller with documents and information sufficient to enable the Comptroller to confirm that the Contract Packages are complete, the Mayor has put the financial well-being of the City at risk and has undermined the public’s trust in the procurement process.

PARTIES

18. Petitioner is the Comptroller of the City of New York. Pursuant to Chapter 5 of the Charter, the Comptroller is an independently elected official of the City and acts as the City’s chief financial officer with independent oversight authority. The Comptroller’s office is located at 1 Centre Street, New York, New York 10007.

19. Respondent City of New York is a municipal corporation, incorporated and existing under the laws of the State of New York. The principal place of business of the Mayor’s Office of Contract Services, the City agency at the heart of this matter (“MOCS”), is located in New York County.

20. Respondent Mayor of the City of New York is the chief executive officer of the City of New York, so vested by Chapter 1 of the Charter. The Mayor’s office is located in City Hall, in New York County.

JURISDICTION AND VENUE

21. This Court has jurisdiction over the subject matter of this proceeding under CPLR 301, 403 and 7804.

22. Venue is proper in this County under CPLR 504(3), 506(b), and 7804(b).

FACTUAL BACKGROUND

The Legal Framework

23. In 1989, the New York City Charter Revision Commission empowered the Comptroller to ensure vendor integrity, agency accountability, and fiscal compliance with respect to Contracts submitted for registration, as a means to keep the executive branch accountable for procurement and spending.

24. The Comptroller is responsible for rooting out waste, fraud, and abuse in local government, and for ensuring that City agencies serve the needs of all New Yorkers, including in times of crisis, such as during and after Hurricane Sandy in 2012.

25. Pursuant to Section 93(a) of the Charter, the Comptroller also has a duty to “advise the mayor and the council on the financial condition of the city or any phase thereof and make such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as he or she may deem advisable in the public interest.”

26. Under both the Charter and the PPB Rules, all Contracts for goods, services and construction with the City must be registered through the Comptroller. Registration is defined in PPB Rule 1-01(e) as “[t]he process through which the Comptroller (1) encumbers funds to insure that monies are available to pay vendors upon the satisfactory completion of contract work; (2) maintains a registry of City contracts and agreements; (3) presents objections if, in the Comptroller’s judgment, there is sufficient reason to believe that there is possible corruption in the

letting of the contract or that the proposed contractor is involved in corrupt activity, and (4) tracks City expenditures and revenues associated with those contracts and agreements.”

Normal Procurements and the Emergency Procurement Process

27. Under normal circumstances, in the absence of an emergency, City agencies purchase goods, services and construction through competitive processes that are intended to assure the best price for taxpayers and guard against fraud and abuse.

28. Under the most common process for a procurement, the City is required to solicit competitive sealed bids for goods and services, through which the contract must be awarded to the responsible and responsive bidder with the lowest price or the best value to the City (the “Normal Procurement Process”). Charter §§ 318-320; General Municipal Law (“GML”) § 103.

29. The Normal Procurement Process normally takes approximately one year from the time that the agency determines a need for goods, services or construction to the date that the contract is registered.

30. When faced with an emergency, defined by Charter Section 315 as “an unforeseen danger to life, safety, property or a necessary service,” procurements are not subject to competitive bids and can be made on an emergency basis. This system is designed to expedite the delivery of necessary goods, services and construction in the face of threats to public health or safety, or the interruption of essential City services (the “Emergency Procurement Process”). Charter §§ 315

31. An emergency does not exist if the only danger the City faces is financial.

32. Charter Section 315 provides the procedure for emergency procurement subject to the prior approval of the Comptroller, as follows:

Notwithstanding the provisions of section three hundred twelve of this chapter, in the case of an unforeseen danger to life, safety, property or a necessary service, an emergency procurement may be made *with the prior approval of the comptroller* and corporation counsel, provided that such procurement shall be made with such

competition as is practicable under the circumstances, consistent with the provisions of section three hundred seventeen of this chapter. A written determination of the basis for the emergency and the selection of the contractor shall be placed in the agency contract file, and shall further be submitted to council no later than fifteen days following contract award, and the determination or summary of such determination shall be included in the notice of the award of contract published pursuant to section three hundred twenty-five of this chapter. (Emphasis added).

33. Consistent with Charter Section 315, PPB Rule § 3-06 (a), (c) requires “the prior approval of the Comptroller and the Corporation Counsel” in the event of “an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods.”

34. Under the PPB Rules, once an agency determines that an emergency condition exists, it must request prior expedited approval from both the Comptroller and the Corporation Counsel to utilize the Emergency Procurement Process.

35. Since the response to an emergency must occur quickly to prevent some form of harm, PPB Rule § 3-06 (d) instructs agencies to apply the level of competition that is “possible and practicable” under the circumstances in the contractor selection process.

36. The Comptroller’s review of this determination also considers the following factors: whether the scope of the emergency procurement is limited to items necessary to avoid or mitigate serious danger to life, safety, property, or a necessary service; whether there is an existing contract to meet the need; and whether the procedure identified by the agency to select the contractor assures that the required items will be procured in time to meet the emergency.

37. The Emergency Procurement Process permits agencies to contract with providers on an expedited basis using a level of competition commensurate with the emergency condition.

The Mayor's Suspension of the Emergency Procurement Process

38. Executive Law Section 24 (1) authorizes the Mayor to suspend “local laws, ordinances or regulations, or parts thereof subject to federal and state constitutional, statutory and regulatory limitations,” provided that, with respect to the suspension of local laws, no such suspension shall be made that “does not safeguard the health and welfare of the public” and is not “reasonably necessary to the disaster effort.” Moreover, any such suspension order shall provide for the “minimum deviation from the requirements of the local law, ordinance or regulation suspended consistent with the disaster action deemed necessary.”

39. Executive Orders issued pursuant to Executive Law Section 24 by the Mayor cannot last longer than five days.

40. EEO 101 was issued by the Mayor on March 17, 2020, has been extended approximately one hundred times and presently remains in effect as per Emergency Executive Order 215. (Flores Aff. Ex. D.)

41. EEO 101 suspended procurement provisions found in the Charter and the PPB Rules for the purpose of responding to the COVID-19 pandemic.

42. Specifically, EEO 101 states, in relevant part:

During the State of Emergency, and to the extent such laws and rules may be suspended consistent with State law, the following laws and regulations related to procurement are suspended with respect to any procurement of goods, services or construction when an agency head determines in writing that the procurement is necessary to respond to the emergency: Chapter 13 of the New York City Charter; Title 9 of the Rules of the City of New York (Procurement Policy Board Rules); and Sections 6-101 through 6-107.1, 6-108.1 through 6-121, and 6-124 through 6-129 of the New York City Administrative Code. Nothing herein shall preclude an agency from complying with any portions of such laws or rules to the extent that the agency head determines that compliance will not interfere with the agency's emergency response.

43. EEO 101 therefore suspends the requirement under the Charter and the PPB Rules that a COVID-19-related emergency procurement must be made with the Comptroller's prior approval.

44. The Mayor's suspension of the procurement provisions established under the Charter has no precedent in New York City.

45. Indeed, upon information and belief, the Charter and the PPB Rules were not suspended in the aftermath of the September 11 Terrorist Attack or Hurricane Sandy.

MOCS Fails to Adequately Scrutinize Efforts by City Agencies to Bypass the Normal and Emergency Procurement Process in the Name of the COVID-19 Emergency

46. MOCS is a City oversight and service agency created to support procurement activities by working with City agencies and vendors to ensure efficiency and accountability in the procurement process.

47. Immediately after EEO 101 was issued, MOCS circulated to all City agencies a procedure for registering COVID-19 emergency Contracts through MOCS, rather than through the Comptroller's office (the "Guidance"). (Flores Aff. Ex. E.)

48. Pursuant to the Guidance, once an agency head determines in writing that a Contract involves goods, services or construction related to the COVID-19 emergency response, the Comptroller's emergency prior approval set forth in the Charter § 315 and PPB Rule 3-06 is waived.

49. The Guidance provides that the suspension of these provisions only applies to three categories of Contracts: (1) emergency Contracts entered into in response to the COVID-19 emergency, (2) human services Contracts and amendments that are necessary to respond to the COVID-19 emergency, and (3) task orders, amendments and change orders that are necessary to respond to the COVID-19 emergency.

50. The Guidance requires MOCS to review the agency head determinations to ensure that (1) the Contracts are within the three categories allowed by the Guidance and (2) the agency heads are appropriately determining that the procurement is necessary to respond to the COVID-19 emergency.

51. The agency is supposed to provide the Comptroller with a copy of the entire contract file within 30 days of registration of the Contract consistent with the regular Emergency Procurement Process.

52. Contrary to the Guidance, however, MOCS has failed to scrutinize adequately efforts by City agencies to bypass the Normal Procurement Process and the Emergency Procurement Process in the name of the COVID-19 emergency.

53. The following are just a few examples of why it is imperative to end the usurpation of the Comptroller's oversight powers.

Air Conditioning Units for the Following Summer

54. Upon information and belief, the City's Financial Management System database ("FMS") reflects that, on September 22, 2020, MOCS registered a Contract between the Department of Citywide Administrative Services ("DCAS") and PC Richard & Sons for the purchase and supply of air conditioning units.

55. The Contract was for over \$10 million and ran from May 29, 2020 through May 31, 2021.

56. An agency head written determination dated August 2020 reflects that in September 2020, MOCS registered a one-year contract for the supply of air conditioning units, many of which would not be used until the following summer.

57. There was no rational basis for MOCS, instead of the Comptroller, to register a one-year contract in September and an amendment in November 2020 to purchase air conditioning units that would not be used until the following summer of 2021.

58. In addition, the fact that it took approximately four months for MOCS to register this Contract runs contrary to the notion that the suspension of the procurement rules is necessary to speed up the procurement process.

59. This Contract should have proceeded pursuant to the Emergency Procurement Process outlined in the Charter and the PPB Rules.

Contract Where Agency Head Submission Indicates that the Emergency Was Known Over One Month Prior to the First Reported Case of COVID-19 in New York

60. According to a review of the data available on FMS, the Comptroller learned that MOCS registered an emergency COVID-19 contract on December 2, 2020, between New York City Department of Health and Mental Hygiene and Jamaica Hardware for the purchase and delivery of air purifiers to non-public schools. Upon information and belief, the unsigned agreement indicates a start date of October 2, 2020.

61. Per the data on FMS, MOCS took one month to register this contract following receipt of all required documentation. Even under the Normal Procurement Process (with Comptroller oversight), contracts are registered within one month of receipt. The similar timeline runs contrary to the notion that the suspension of the procurement rules is necessary to speed up the procurement process.

62. In addition, the written agency head determination indicates that the date on which the emergency was known was January 31, 2020.

63. The first reported case of COVID-19 in the State of New York was confirmed by the Mayor on March 1, 2020 (Flores Aff. Ex. F), and EEO 101 was issued on March 17, 2020.

64. Accordingly, the written agency head determination indicates that the emergency was known more than a month before the first reported case of COVID-19 in the State of New York, over seven weeks before the issuance of EEO 101, and ten months before MOCS ultimately registered the Contract.

65. This Contract should have been registered pursuant to the Emergency Procurement Process outlined in the Charter and the PPB Rules. Instead, this contract was incorrectly approved and registered by MOCS as an emergency COVID-19 contract under EEO 101.

Failure to Expend the Funds Provided for in the Purported Emergency Contracts

66. The data on FMS shows that the City has spent little to no money under many of the “emergency” COVID-19 Contracts registered by MOCS, even though these Contracts were deemed necessary to respond to the COVID-19 emergency.

67. In fact, the City registered 132 emergency Contracts under EEO 101 that had zero spend through January 8, 2021, including nine such Contracts with start dates in March 2020 and 28 Contracts with start dates in April 2020. (Flores Aff. Ex. G.)

The Suspension of the Procurement Provisions and Regulations, Coupled with MOCS’s Failure to Adequately Scrutinize Agency Submissions, Has Resulted in Widespread Fraud, Poor Vendor Integrity, Logistical Failures and Waste

68. The Charter places the responsibility on the Comptroller to review emergency Contract submissions and to provide oversight over Contract procurement, vendor integrity, agency accountability and registration.

69. Further, the Comptroller is charged with ensuring fiscal compliance, takes an active role in ensuring vendor integrity in emergency procurements, and has the expertise available to responsibly expedite the registration of emergency Contracts.

70. Prior to EEO 101, the Comptroller granted approval for nine emergency Contracts relating to COVID-19 pursuant to the Emergency Procurement Process, many of which were approved within one business day. (Flores Aff. Ex. G.)

71. For example, on March 16, 2020, within twenty-four hours of receiving a final request from DCAS, the Comptroller granted approval for the registration of a \$33 million emergency Contract for face masks relating to COVID-19 pursuant to the Emergency Procurement Process.

72. Data on FMS shows that from March 17, 2020 to June 30, 2021, the City, referencing EEO 101 as authority, registered 1,584 Contracts with a value of \$6,938,371,682.90 and spent a total of \$3,376,597,467.79 – all without the Charter-mandated oversight of the Comptroller. Upon information and belief, that sum is more than three times the value of emergency contracts that the City awarded in 2012, when Hurricane Sandy devastated the region. (Flores Aff. Ex. H.)

73. Upon information and belief, approximately 75% of the total emergency Contract funds paid out under EEO 101 has gone to first-time vendors, more than in any recent year. (*Id.*)

74. The suspension of the procurement provisions of the Charter and the PPB Rules has caused vendor integrity issues, partial or complete non-performance, and the overextending, overpaying and over-purchasing in emergency contracting pursuant to EEO 101 that has resulted in millions of taxpayer dollars being wasted.

75. Upon information and belief, the City has canceled \$525 million in agreements for virus-related goods and is trying to recover millions of dollars from vendors that failed to deliver, often through costly litigation. (Flores Aff. Exs. I and V.)

The City Sues to Recover \$4 Million for Ventilators It Never Received

76. Based on the data available on FMS, MOCS registered a contract between the City and Global Medical Supply Group LLC (“Global”) for the purchase and supply of 130 ventilators.

77. MOCS registered the contract as necessary to respond to the COVID-19 emergency without the Charter-mandated oversight of the Comptroller.

78. Upon information and belief, in connection with the transaction, the City made an advance payment of \$8,261,500 to Nations Fast Tax & Accounting, an accounting firm in Boca Raton, Florida, which Global identified as its accountant. (Flores Aff. Ex. J.)

79. The City’s PPB Rules normally require City procurement officers to determine whether the vendors they select for Contracts and purchases – which are rarely, if ever, fully prepaid – are “responsible” business partners. (*Id.*)

80. Upon information and belief, with normal vetting rules suspended, the City did not require Global to provide basic, verifiable background information, such as its date of incorporation or its business history. As a result, at the time the City made the advance payment of approximately \$8.3 million, the City had not verified Global’s claim of access to the ventilators, had been unable to verify any information concerning Global’s purported manufacturer, and had been unable even to confirm through internet and legal searches that Global even existed. (*Id.*)

81. For an emergency procurement of an equivalent dollar amount, \$8,261,500, the City’s procurement laws and rules, had they not been suspended, would have required, among other things: (1) prior approval of the emergency procurement from the Comptroller’s Office and the Corporation Counsel; and (2) the submission of an “executed contract” – one with all necessary signatures and approvals – to the Comptroller’s Office for registration within 30 days of its award. (*Id.*)

82. Upon information and belief, at the time the City wired the \$8.3 million advance payment to Global, it had not presented Global with, or obtained Global's signature on, a written contract approved as to form by New York City Corporation Counsel or any other written contract created or approved by the City. (*Id.*)

83. Upon information and belief, at the time that the City wired the advance payment of approximately \$8.3 million, Global had only been incorporated for two weeks, had no experience in the purchasing of ventilators or medical supplies, and had not even set up a bank account. (*Id.*)

84. Global failed to deliver the ventilators, forcing the City to sue to recoup its loss in *City of New York v Global Medical Supply Group LLC*, No. 9:2020-cv-81880 (S. D. Fla., Oct. 8, 2020).

85. Upon information and belief, through that litigation and negotiations with Global and its codefendants, the City reached a settlement with the defendants that, in combination with Global's pre-litigation payments, has resulted or will result in the City's recovery of \$6,402,431.06. (*Id.*)

86. In the event that the City is able to collect the full settlement amount, the City will still have suffered a loss of \$1,859,068.94. (*Id.*)

87. The City Charter and the PPB Rules already provide for expedited emergency purchases – but with safeguards and public transparency that the City's transaction with Global lacked. With such safeguards removed, City employees – pressed to acquire scarce items quickly for emergency use – were extraordinarily vulnerable both to exploitation by unscrupulous actors and to mistakes and omissions that the emergency procurement rules were designed to prevent.

The City Enters into \$8 Million Contract for Masks It Never Received

88. In March 2020, MOCS registered Contracts totaling \$91 million between Department of Citywide Administrative Services (“DCAS”) and Digital Gadgets, a New Jersey electronics dealer, for the purchase of N95 masks, ventilators and breathing kits. (Flores Aff. Ex. K.)

89. The Contract, which was registered by MOCS, provided for a first order of two million N95 masks in exchange for approximately \$8 million. (*Id.*)

90. Upon information and belief, none of the N95 masks was delivered to the City despite the City’s payment of over \$8 million for the goods. (*Id.*)

The City Awards Contract to Owner of Company Who Pleaded Guilty to Attempting to Interfere with an IRS Audit of His Business Six Months Earlier

91. In April 2020, MOCS registered a \$14 million no-bid Contract between the New York City Sanitation Department and Cariati Developers, Inc., a Connecticut-based snowplow and hauling company. (Flores Aff. Exs. H and M.)

92. Under the contract, Cariati Developers, Inc. was required to transport emergency meals to New Yorkers affected by COVID-19. (*Id.*)

93. Upon information and belief, just six weeks earlier, the owner and president of Cariati Developers, Donald Cariati, pleaded guilty to attempting to interfere with an Internal Revenue Service audit of his business, a felony punishable by up to three years in prison. (*Id.*)

94. Upon information and belief, at the time the contract was approved by MOCS, Mr. Cariati’s conviction was a matter of public record and easily discoverable with an internet search.

95. Upon information and belief, the City first learned of Mr. Cariati’s conviction through a report in the Wall Street Journal. (*Id.*)

96. The contract with Cariati Developers was subsequently terminated by the New York City Sanitation Department.

97. The contract with Cariati Developers would not have been approved had the contract been subject to the Comptroller's emergency oversight powers.

The City Pays \$348,000.00 for Non-Surgical Masks Not Approved by the FDA

98. Upon information and belief, MOCS registered a \$348,000.00 contract between DCAS and Genuine Parts Company, an Atlanta-based company that specializes in automotive parts, for the purchase of non-Latex surgical masks. (Flores Aff. Ex. L.)

99. The masks that were delivered were non-surgical masks and were not approved by the FDA. (*Id.*)

100. The items were nevertheless deemed accepted by DCAS, which paid full price and placed subsequent orders from the vendor. (*Id.*)

\$66 Million Contract Increase in March 2021 For Call Center Services

101. Based on a review of the data on FMS, in May 2020, Harkins Kolver LLC entered into an agreement with the Department of Information Technology and Telecommunications ("DoITT") to provide backup call center services for the City's 311 call center system, for \$2 million.

102. Since that time, Harkins and DoITT have entered into seven additional Contracts for City 311 call center services, with a revised contract amount of \$91,818,443.00.

103. On March 17, 2021, MOCS registered an increase of \$66,096,000.00 in Contract spending between Harkins and DoITT.

104. MOCS justified the Contract increase as necessary to respond to the COVID-19 emergency.

105. The Comptroller has yet to receive complete Contract Packages for the aforementioned Contract, nor for several of the subsequent amendments. Upon information and belief, these amendments should not have been approved without Comptroller oversight.

There Is No Longer Any Rational Basis For Continuing To Suspend The Emergency Procurement Provisions

106. Now, nearly sixteen months after the Mayor issued EEO 101, any arguable basis for the suspension of the checks and balances that govern the City's Emergency Procurement Process is no longer tenable.

107. More than eight million City residents have been vaccinated. (Flores Aff. Ex. N.)

108. With hospitalizations and cases down significantly from their peak in 2020, most of the COVID-19 restrictions in the City have been eased or lifted.

109. On March 5, 2021, New York lawmakers voted to strip Governor Andrew Cuomo of his emergency powers, on the basis that current COVID-19 circumstances no longer justify the expansive powers Cuomo was granted a year earlier. (Flores Aff. Ex. O.)

110. Explaining the basis for the legislation, New York Assembly Speaker Carl Heastie observed that “[a] year into the pandemic, and as New Yorkers receive the vaccine, the temporary emergency powers have served their purpose – it is time for them to be repealed.” (Flores Aff. Ex. P.)

111. Mr. Heastie stated “[t]hese temporary emergency powers were granted as New York was devastated by a virus we knew nothing about. Now it is time for our government to return to regular order,” noting that “[t]hese temporary emergency powers were always meant to be that - temporary.” (*Id.*)

112. Senate Majority Leader Andrea Stewart-Cousins stated, “I think everyone understands where we were back in March [2020] and where we are now. We certainly see the

need for a quick response but also want to move toward a system of increased oversight and review.

The public deserves to have checks and balances.” (Flores Aff. Ex. O.)

113. On June 25, 2021, Governor Cuomo issued Executive Order 210, ending the New York state disaster emergency declared on March 7, 2020 to fight COVID-19. (Flores Aff. Ex. Q.)

114. In Executive Order 210, the Governor cites several statistics as evidence of the success at controlling the spread of COVID-19. For example, the Governor states that:

(i) The State of New York has gone from 11,000 new cases a day, at the peak of the pandemic, to less than 300 new cases a day;

(ii) The State of New York administered more than 20,650,000 doses of COVID-19 vaccine, and more than 71% of adults in the State have received at least one dose of the vaccine; and

(iii) The State of New York has one of the lowest infection rates in the country, with a current seven-day rolling average positivity rate below 0.4%.

115. Nevertheless, on June 26, 2021 – one day after the Governor ended the statewide state of emergency – the Mayor extended the citywide state of emergency. (Flores Aff. Ex. R.) The Mayor also continues to issue new executive orders to extend the prolonged suspension of the Comptroller’s oversight powers. (Flores Aff. Ex. D.)

116. On June 28, 2021, the Mayor held a news conference at which one of his senior public health advisers observed that “the total number of people getting COVID continues to go down and the vaccines continue to be very effective.”

117. At that same news conference, the NYC Commissioner of Health and Mental Hygiene agreed, noting “the overall number of cases continues to remain low and has decreased very significantly in recent weeks.”

118. At this point in time – with the supply chain issues that affected the nation more than a year ago resolved, and overcrowding of City hospitals no longer an unforeseen threat to public safety – the Mayor’s determination to continue to extend the suspension of the Charter and the PPB Rules governing emergency procurement is arbitrary and capricious, in violation of lawful procedure, and constitutes an abuse of discretion, resulting in widespread fraud, poor vendor integrity, logistical failures and waste.

119. In the Mayor’s own words from February 2021, “[i]t’s time to go back to the normal way of governing things” and “[w]e can’t keep clinging to this situation. We’ve got to start moving forward.” (Flores Aff. Ex. S.)

120. In speaking of the Governor’s use of Executive Law Section 29-a, the Mayor correctly observed, “We’ve learned over a year how to address the pandemic” and that the “[c]ities, towns, counties know what they’re doing: let us do our job.” (Flores Aff. Ex. S.) The Comptroller agrees. It is time for the Mayor and the City to let the Comptroller and his staff do their job as it pertains to procurement.

The Comptroller Is Unable To Determine Whether MOCS Has Provided Complete Contract Packages

121. Pursuant to the Guidance, Charter Section 93(o) and (m)(1), and Administrative Code Sections 3-304 and 3-314, MOCS is required to provide the Comptroller with complete Contract Packages, which must include written agency head determinations that a Contract is related to the COVID-19 emergency (when registered under EEO 101), pertinent contractual information and vendor past performance.

122. Pursuant to NYC Administrative Code (the “Administrative Code”) Section 3-305, the Comptroller is the custodian of all City Contracts, and in that capacity, is required to maintain all evidence of contracts with the City.

123. Pursuant to Administrative Code Section 3-314, before a Contract can be introduced as admissible evidence in any trial, hearing, investigation or proceeding, the Comptroller is required to certify that it is a true and correct copy of the original.

124. Contrary to the Guidance and applicable law, MOCS has failed to provide the Comptroller with documents and information in a format sufficient to enable the Comptroller to confirm that the Contract Packages are complete.

125. In August 2020, the Comptroller wrote to the Mayor and requested complete Contract Packages, as required under the Guidance, the Charter and the Administrative Code, but received no response.

126. In October 2020, the Comptroller reiterated his request for complete Contract Packages. In response, on October 30, 2020, MOCS represented to the Comptroller that it was “currently in the process of transferring the full set of emergency contract files registered pursuant to the E.E.O.,” and that it was considering providing the Comptroller with “direct access to the City system hosting these contracts to expedite the transfer process.” (Flores Aff. Ex. V.)

127. Rather than provide complete Contract Packages in an accessible format, on December 23, 2020 and April 22, 2021, MOCS provided two large document dumps through Amazon Web Services, totaling 35 gigabytes. The Comptroller cannot ascertain from these document dumps whether the Contract Packages are complete, thus frustrating the Comptroller’s ability to fulfill his statutory responsibilities as the custodian of the Contract Packages.

128. MOCS did not identify any of these documents utilizing previously established naming conventions, and did not transfer these documents through the Automated Procurement Tracking System (“APT”). As a result, the Comptroller’s office was forced to spend hundreds of hours manually opening each file, determining the nature of the document, and transferring the document onto Citrix SharePoint system.

129. The manner in which MOCS named and transferred these files prevents the Comptroller from loading these documents onto the Comptroller’s central document repository, known as the Omnibus Automated Image Storage Information System (“OAISIS”).

130. After manually transferring the documents to SharePoint and reviewing some of the documents, the Comptroller discovered that many of the documents provided by MOCS are duplicative, unsigned, undated, and untethered to a specific, trackable procurement action.

131. In addition, the Comptroller discovered significant inconsistencies between the documents provided *via* the document dumps and certain documents provided by MOCS in response to previous requests for complete Contract Packages relating to specific Contracts.

132. As a result of all these issues, the Comptroller’s office is unable to load the documents provided by MOCS onto OAISIS, and is unable to confirm that the documents provided by MOCS through Amazon Web Services constitute complete Contract Packages.

133. Subsequent to MOCS’s second document dump on April 22, 2021, MOCS has continued to register contracts as related to the emergency COVID-19 response, but has not transferred any of these additional Contract documents to the Comptroller.

134. MOCS’s failure to provide a formal record of Contract Packages may have wide-ranging consequences.

135. Federal, State, and City entities rely on the Comptroller's repository of Contract Packages for various forms of action, remediation and compliance.

136. For example, the City Law Department has direct access to OASIS so that it can easily obtain documents and information necessary to defend the City in procurement-related litigation.

137. The New York State Comptroller, various District Attorney's Offices, and the United States Department of Justice often request Contract documents from the Comptroller in furtherance of their duties.

138. Federal and State funds that are limited to certain types of procurements may be at risk of being waived by the City due to insufficient documentation, including the COVID-19 relief funds recently made available by the federal government.

139. Until MOCS transfers complete Contract Packages through APT utilizing established naming conventions, or otherwise provides the Comptroller with direct access to its APT system or hard copy files *via* the Central Imaging Facility ("CIF"), the Comptroller will be unable to fulfill his responsibilities as the custodian of complete Contract Packages.

The Comptroller's Demands to the Mayor Have Been Ignored

140. The Comptroller wrote the Mayor twice in 2020, urging that EEO 101 should lapse or be rescinded, and that the Mayor provide complete Contract Packages. In his letters, the Comptroller set forth the bases for his request, including the dwindling need for the suspension of local procurement laws and regulations and the adverse consequences arising from EEO 101 and the suspension of applicable procurement provisions. (Flores Aff. Exs. T and U.)

141. On October 30, 2020, the City sent a letter in which it purported to respond to the Comptroller's letters, but did not address the substance of the Comptroller's letters or the Comptroller's request for the termination of EEO 101. (Flores Aff. Ex. V.)

142. On March 3, 2021, the Comptroller wrote a letter to the Mayor again urging the Mayor to rescind EEO 101, and expressing concern that the City is continuing to circumvent the Comptroller's mandated oversight role of approving and registering Contracts pursuant to the Charter and the PPB Rules. (Flores Aff. Ex. W.)

143. The Mayor has not responded to the Comptroller's March 3, 2021 letter.

144. On June 23, 2021, the Comptroller's office wrote to the Director of MOCS, urging MOCS to submit complete Contract Packages in accessible format. (Flores Aff. Ex. X.)

145. On June 23, 2021, the Director of MOCS asserted that MOCS had supplied complete Contract Packages.

146. The next day, the Comptroller's office responded, reiterating that the document dumps are completely inadequate, and requested a meeting to determine a solution. However, the Comptroller has not received a response.

147. On July 1, 2021, the Mayor issued Emergency Executive Order 215, which again extended EEO 101's suspension of the emergency procurement provisions of the Charter and the PPB Rules. (Flores Aff. Ex. D.)

FIRST CAUSE OF ACTION

Judgment Pursuant to CPLR Article 78 – Mayor's Decision to Continue the Suspensions of the Emergency Procurement Provisions

148. The Comptroller repeats and re-alleges the preceding paragraphs of this Petition as if fully set forth herein.

149. Pursuant to Executive Law Section 24 (1) (g) (i), the Mayor may issue emergency executive orders suspending local laws, ordinances or regulations lasting for five days only, reflecting the fact that such orders are intended to be limited and temporary in nature.

150. The Mayor originally issued EEO 101 on March 17, 2020 and has extended it approximately one hundred times since then.

151. The Charter and the PPB Rules address emergencies and specifically provide a procedure for expedited or even immediate prior approval of Contracts by the Comptroller.

152. Executive Law Section 24 (1) (g) (i) provides that “no suspension shall be made for a period in excess of five days, provided, however, that *upon reconsideration of all the relevant facts and circumstances*, a suspension may be extended for additional periods not to exceed five days each during the pendency of the state of emergency.” (Emphasis added.)

153. Therefore, each time that the Mayor extends EEO 101, he is required first to make a determination, based on a fresh examination of all relevant facts and circumstances, that an emergency exists that requires the suspension of the Charter and the PPB Rules as to, *inter alia*, the Emergency Procurement Process.

154. The Comptroller is the City’s chief financial officer, and the Charter places the responsibility on the Comptroller to review emergency contract submissions and to provide oversight over Contract procurement, vendor integrity, agency accountability and registration.

155. It has been almost sixteen months since the Mayor issued EEO 101. The suspension of the checks and balances that govern the City’s Emergency Procurement Process is no longer warranted.

156. Moreover, the Mayor's decision to continually renew EEO 101 has stripped the Comptroller of his oversight powers and has resulted in widespread fraud, waste and procurement failures.

157. The Mayor knows that City agencies are using EEO 101 to improperly bypass both the Normal and Emergency Procurement Processes.

158. In addition, the Mayor is aware of MOCS's failure to adequately ensure that a Contract is necessary to respond to the COVID-19 emergency when registering Contracts pursuant to EEO 101.

159. The Mayor is aware that, as a result, the City has experienced widespread procurement failures, waste and fraud.

160. The Mayor has ignored or failed to consider all of these facts and circumstances in his consistent renewal of EEO 101, contrary to his obligations under Executive Law Section 24.

161. Accordingly, the Comptroller is entitled to a judgment: (a) finding that the Mayor's decision to extend the suspension of the Charter and the PPB Rules governing emergency procurement is arbitrary, capricious, an abuse of discretion, and contrary to Mayor's obligations under Executive Law Section 24; (b) enjoining the Mayor from further extensions of EEO 101; and (c) enjoining the City from bypassing the Emergency Procurement Process.

162. No prior application for this or any similar relief has been made in this Court, and no provisional remedy has been sought or obtained in this case against the same Respondents.

SECOND CAUSE OF ACTION

Judgment Pursuant to CPLR Article 78 – MOCS's Failure to Provide the Comptroller with Documents and Information Sufficient to Enable the Comptroller to Confirm that the Contract Packages Are Complete

163. The Comptroller repeats and re-alleges the preceding paragraphs of this Petition as if fully set forth herein.

164. Pursuant to Charter Section 93, the Administrative Code, and MOCS's own Guidance, MOCS is required to provide the Comptroller with complete Contract Packages.

165. Contrary to the Guidance and applicable law, MOCS has failed to provide the Comptroller with documents and information sufficient to enable him to confirm that he is in possession of complete Contract Packages.

166. As a result, the Comptroller is unable to fulfill his responsibility to keep and file all evidence of City Contracts and to certify that each document within the Contract Packages are correct copies of the original document.

167. The Mayor has knowledge of MOCS's failure to provide documents and information sufficient to enable the Comptroller to determine whether the Contract Packages are complete.

168. Accordingly, the Comptroller is entitled to a judgment: (a) finding that MOCS's failure to provide the Comptroller with documents and information sufficient to enable the Comptroller to confirm that he is in possession of complete Contract Packages is arbitrary, capricious, an abuse of discretion, and contrary to MOCS's and the Mayor's obligations under the Guidance, the Charter and the Administrative Code; and (b) directing the Mayor to provide the Comptroller with complete Contract Packages through APT utilizing established naming conventions or in another manner sufficient to enable the Comptroller to confirm that he is in

possession of complete Contract Packages and to enable him to upload the Contract Packages onto OASIS, or alternatively, directing the Mayor to provide the Comptroller with direct access to its APT system or its hard copy files *via* CIF to upload complete Contract Packages directly.

169. No prior application for this or any similar relief has been made in this Court, and no provisional remedy has been sought or obtained in this case against the same Respondents.

PRAYER FOR RELIEF

WHEREFORE, Comptroller respectfully requests that this Court issue judgment for Comptroller against Respondents as follows:

1. On Comptroller's First Cause of Action, a judgment:
 - (a) finding that the Mayor's decision to extend the suspension of the Charter and the PPB Rules governing emergency procurement is arbitrary and capricious, in violation of lawful procedure, an abuse of discretion, and contrary to the Mayor's obligations under Executive Law Section 24 (1) (g) (i);
 - (b) enjoining the Mayor from further extensions of EEO 101; and
 - (c) enjoining the City from bypassing the Emergency Procurement Process.
2. On the Comptroller's Second Cause of Action, a judgment:
 - (a) finding that the Mayor's failure to provide the Comptroller with documents and information sufficient to enable him to confirm that he is in possession of complete Contract Packages is arbitrary, capricious, an abuse of discretion, and contrary to MOCS's and the Mayor's obligations under the Guidance, the Charter and the Administrative Code; and
 - (b) directing the Mayor to provide the Comptroller with complete Contract Packages through APT utilizing established naming conventions or in another manner

sufficient to enable the Comptroller to confirm that he is in possession of complete Contract Packages and to enable him to upload the Contract Packages onto OAISIS, or alternatively, directing the Mayor to provide the Comptroller with direct access to its APT system or its hard copy files *via* CIF to upload complete Contract Packages directly.

3. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 5, 2021

SMITH, GAMBRELL & RUSSELL, LLP

By: /s/ Roger Juan Maldonado
Roger Juan Maldonado
John G. McCarthy
Edward J. Heppt
Morgan V. Manley

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*Attorneys for Comptroller of the
City of New York*

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

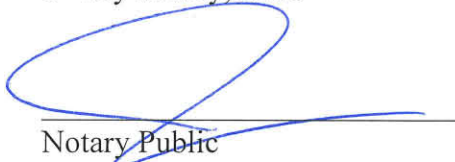
NEYSA ALSINA, being duly sworn, deposes and says as follows:

I am the General Counsel and Deputy Comptroller for Legal Affairs at the Office of the Comptroller of the City of New York (the "Office of the Comptroller"). I am fully acquainted with the facts of this matter. I have read the foregoing Verified Petition and know the contents thereof; the same are true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief as to all matters alleged in this petition is based upon my personal knowledge and my review of the materials maintained by the Office of the Comptroller of the City of New York with respect of this matter, including the exhibits annexed to the affidavit of Lisa Flores, submitted herewith.



Neysa Alsina

Sworn to before me this
5th day of July, 2021



Notary Public

PETER CHOI
Notary Public, State of New York
No. 01CH6177268
Qualified in New York County
Commission Expires 11/13/20 **23**