

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
STEWART PARK AND RESERVE
COALITION, INCORPORATED,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION AND
JUDGMENT

-against-

NEW YORK STATE DEPARTMENT OF
TRANSPORTATION and NEW YORK STATE URBAN
DEVELOPMENT CORPORATION, d/b/a EMPIRE
STATE DEVELOPMENT CORPORATION,

Respondents.

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Albany County Special Term: February 26, 1999
RJI No.: 01-98-ST9469
Index No.: 7625/98

Justice Anthony Kane, Presiding

APPEARANCES: John W. Caffry
Attorney for Petitioner
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KANE, J.:

The petitioner, Stewart Park and Reserve Coalition, Inc.
[hereinafter "SPARC"] has instituted this Article 78 proceeding
seeking, inter alia, a judgment of this Court annulling the
decisions of respondents New York State Department of

Transportation [hereinafter "DOT"] and New York State Urban Development Corporation, d/b/a Empire State Development Corporation [hereinafter "ESDC"] which denied disclosure of certain documents held by each of the respondents regarding the proposed privatization of the Stewart International Airport located in Orange County, New York.

The essential facts may be briefly stated. On July 1, 1998, petitioner requested of the respondents pursuant to the Freedom of Information Law [Public Officers Law Art 6] that it be given access to certain records held by respondents. These records related to bidders seeking, in response to a June 1997 request for proposals (hereinafter "RFP") issued by respondents, to lease from respondent DOT the Stewart International Airport and/or to purchase lands [hereinafter "Buffer Lands"] adjoining the airport.

Respondent DOT temporarily denied petitioner's request by letter dated September 18, 1998 citing Public Officers Law ["POL"] section 87(2)(c) and State Finance Law section 163(9) as its grounds. Respondent ESDC partially denied petitioner's request by letter dated July 24, 1998 citing POL section 87(2)(c) and State Finance Law section 163(9) as its grounds. Respondent ESDC made a release of documents it considered non-exempt on August 10, 1998. The released documents related to the corporate finances and past experiences of some of the bidders not to the bids, the RFP or to Stewart International Airport.

Petitioner appealed the denial decision of respondent ESDC by letter dated August 14, 1998, which appeal was denied by letter

dated August 27, 1998. Petitioner appealed the denial decision of respondent DOT by letter dated September 22, 1998, which appeal was denied November 12, 1998. However, petitioner was afforded a review and release of non-exempt material.

Petitioner commenced this proceeding alleging that State Finance Law section 163(9)(c) does not apply to the lease or sale of the airport property in question and thus does not bar the public disclosure of the requested records; and that respondents have not met their burden of proving that public disclosure of the requested records will impair the awarding of a contract.

Respondents have taken the position that as the bid process in the matter of the privatization of Stewart Airport is not completed, negotiations with the preferred bidder would be impaired by the release of the records and documents at issue herein and therefore, such materials were properly denied pursuant to POL section 87(2)(c). Respondents further assert that the complex nature of the transaction, service aspects and the 99-year lease provision, in which improvements will accrue to the State, make the said contract subject to the strictures outlined in State Finance Law section 163. Finally, respondents seek dismissal of the petition as to respondent ESDC based on the petitioner's alleged failure to serve said respondent.

Initially, the Court will address respondents' argument that petitioner failed to gain jurisdiction over respondent ESDC. It is respondents' contention that ESDC is a public benefit corporation and not a state agency and thus service was improperly effected

pursuant to CPLR section 307. The Court must reject respondents' argument. In the first instance, the New York State Urban Development Corporation, doing business as the Empire State Development Corporation, is statutorily defined as "a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation" (McKinney's Unconsolidated Laws section 6254[1])(emphasis added).

Aside from the unequivocal statutory definition, the Court finds further support for its position in a formal opinion rendered by the Office of the Attorney General wherein the Attorney General addressed the question of whether the Governor had authority under State law to designate ESDC to administer a federal project without State legislative approval. The Attorney General stated, in relevant part:

...In our view, UDC is an instrumentality of the State under the federal definition. Federal law, in defining 'state' to mean any state or instrumentality of the state, reasonably was intended to include state agencies and instrumentalities such as the Urban Development Corporation...(Op. Att'y Gen. No. F 97-12).

Bereft of any decisional law which is dispositive as to the status of respondent ESDC, the Court concludes, in light of the foregoing, that said respondent is indeed a state agency. There being no dispute that respondent ESDC was properly served pursuant to CPLR section 307, the Court finds that it has obtained jurisdiction over the ESDC.

The Court begins its analysis of the merits of the instant

proceeding with the settled principle that "[a]ll government records are ... open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law section 87(2). To ensure maximum access to government documents, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption'" (Gould v. New York City Police Department, 89 NY2d 267, 274-274 [1996], quoting, Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 NY2d 106, 109 [1992]).

DISCLOSURE EXEMPTED BY STATUTE

The respondents, here, denied access to the documents and records on the basis that the statute (State Finance Law section 163 [9][c]), which outlines the procedures for the solicitation and awards of contracts for the procurement of commodities and services, limits the release of information concerning those contracts during the negotiation period. In turn, petitioner contends that while State Finance Law article 11 applies to the purchase of goods and services by the State, nothing in the statute applies its procedures to the leasing of state lands and facilities. Petitioner further argues that while Public Officers Law section 87(2)(a) provides that records that "are specifically exempted from disclosure by state or federal statute" are exempt from disclosure under FOIL, it is inapplicable herein as State Finance Law section 163(9)(c) does not apply to the transaction in question.

Instead, argues, petitioner, such sales and leasing are governed by Transportation Law section 400 and Public Lands Law section 3 and article 3.

Transportation Law section 400 (3)(b) states, in part, that the DOT may lease Stewart Airport to a third party for purposes such as the operation of the airport. The sale, lease or other disposition of the Airport's real property is governed by Public Lands Law. Neither statute, argues petitioner, contains a prohibition against the disclosure of any documents. However, notwithstanding petitioner's arguments to the contrary, it is alleged that the contract under negotiation contains service aspects which would bring such documents within the ambit of section 163 of the State Finance Law. In support of their position, respondents refer this Court to Adelaide Environmental Health Associates v. New York State Office of General Services, 248 AD2d 861 [Third Dept. 1998] for an explanation of the principles underlying section 163 of the State Finance Law. As the Appellate Division, Third Department stated, in relevant part:

In accordance with State Finance Law section 163, the State's procurement policy is to be guided by various principles, including 'promot[ing] purchasing from responsive and responsible offerers' (State Finance Law section 163 [2][a]) and 'ensur[ing] that contracts are awarded consistent with the best interests of the state' (State Finance Law section 163[2][d]). To that end, prior to awarding a contract, the relevant State agency must 'make a determination of responsibility of the proposed contractor' (State Finance Law section 163[9][f]). Where, as here, the contract is one for services, it is to be awarded 'on the basis of best value from a responsive and responsible offerer' (State Finance Law section 163[10]) (Id., at 862).

While the Court concurs with petitioner that the case relied on by respondents is not dispositive of the issue herein, it does find that it provides guidance in reaching a resolution of this matter. In applying the principles as outlined by the Adelaide court to the instant case, one cannot dispute that in negotiating the contract in question, the respondents are charged with the responsibility of seeking the "best value". The intent of the State Finance Law mandates confidentiality when the State is engaged in procuring contracts for services. The fact that only part of the contract involves service aspects does not diminish respondents' obligations. By mandating privacy with relation to the content of competing offers until such time as the contract negotiations are finalized, the statute has exempted any records or documents which are part of that procedure and the Court concludes that respondents properly denied petitioner's request under State Finance Law section 163.

DISCLOSURE PURSUANT TO POL SECTION 87(2)(C)

The statutory scheme of the Freedom of Information Law is to require each public agency to provide access to all records, with certain exceptions, and to place the burden upon any agency resisting disclosure of proving that material sought comes within the statutory exceptions (see, POL section 89[4][b]; see also, Doolan v. Board of Cooperative Educational Services, Second Supervisory District of Suffolk County, 48 NY2d 341, 346 [1979]).

Here, respondents denied the records and documents on the ground that disclosure "would impair present or imminent contract

awards" (POL section 87[2][c]). In turn, petitioner argues that all of respondents' public actions with regard to the Stewart Airport privatization process, including the filing of the application for approval of the leasing arrangement by the Federal Aviation Administration [hereinafter the "FAA"], have been consistent with a completed negotiating process. In any event, petitioner contends that even if the negotiations are not finalized, respondents have failed to articulate specific reasons for the denial of access to the requested records.

Prefatorily, the Court declines to consider the press release dated March 4, 1999 from Governor Pataki's office submitted by petitioner after the Court heard oral argument in this matter as this material was not part of the record before the respondent agencies when the determination was rendered.

Next, the Court finds that the record fails to support petitioner's contention that the negotiation process has been completed. In his Affidavit, John E. Buttarazzi, Senior Vice President, Privatization, ESDC, alleges that in June 1999, the DOT and the National Express Group [hereinafter the "NEG"], submitted an application for the privatization of Stewart Airport to the FAA (Buttarazzi Affidavit, para. 6). Mr. Buttarazzi further alleges that the filing of said application should not be confused with the consummation of a deal between respondent DOT and NEG (Id.).

In response, petitioner claims that it was not until recently that respondents had intimated that it was still possible that the NEG proposal would be rejected (Kissam Affidavit, para. 19 -

23). Thus, argues petitioner, the Court should conduct an in camera review of the materials to determine if negotiations are still ongoing. It appears, however, that petitioner's argument is founded on nothing more than conjecture.

On the other hand, respondents claim that the records which petitioner requested and which respondents have declined to produce, contain, among other things, the various bidders' proposed business plans for Stewart Airport, proposed financial payments to DOT, other proposed financial terms and conditions, proposed management and operations plans, proposed development plans, proposed marketing and investment strategies (Buttarazzi Affidavit, para. 7). It is respondents' position that the release of such documents, at this juncture, would substantially prejudice DOT and ESDC in their continuing negotiations with NEG because then NEG would be able to compare the other bidders' proposals against the one submitted by NEG. Furthermore, respondents contend that should negotiations break down between DOT and the NEG, and DOT seeks to engage other interested bidders, the premature release of such materials would be harmful to future negotiations.

Petitioner refers to an opinion issued by the Committee on Open Government, annexed to the Petition as Exhibit "A", in which Robert J. Freeman, the Committee's Executive Director, opined that in his view, the question of whether disclosure would impair the process of awarding a contract is a question of fact and that, in some instances, rather than impairing the process, it might be helpful (Freeman Opinion, at 3,4). However, Mr. Freeman provides

no basis for his statement that "disclosure of other elements of the proposals might encourage the submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal" (Freeman Opinion, at 4).

Nor does the Court consider the result reached by the Appellate Division, Third Department in Cross-Sound Ferry Services, Inc. v. Department of Transportation, 219 AD2d 346 [1995], persuasive, as petitioner so strenuously asserts. In that decision, as petitioner has conceded, the contract in question had already been conditionally awarded by the time the case was decided in Supreme Court. The Appellate Division found that DOT acted neither arbitrarily or that it was not substantially justified in refusing petitioner's request prior to the award of the final contract to the successful bidder; rather, DOT's refusal to give the petitioner an unredacted copy after the contract was awarded was unsupported by any of the facts (Id. at 351).

As further explanation as to why release of the documents would be harmful, respondents state that upon completion of contract negotiations for the airport and related services, the bid process will be reopened for the "Buffer Lands." Accordingly, if potential bidders for this property have the information contained in past bids, respondents claim that they would be at a disadvantage. Mr. Buttarazzi further alleges that the filing of said application should not be confused with the consummation of a deal between respondent DOT and NEG (Id.).

Based upon the foregoing, the Court concludes that respondents

have met their burden of demonstrating that the requested records and documents are exempt from disclosure under State Finance Law section 163 and Public Officers Law section 87(2)(c). In light of the fact that petitioner's request was temporarily denied pending completion of an award of a final contract, the Court finds that respondents sufficiently particularized their reasons for denying petitioner's access to the documents in question and that such denial was neither arbitrary or irrational. The petition is dismissed.

This shall constitute the Decision and Judgment of this Court. All papers, including this Decision and Judgment, are being returned to the counsel for respondents. The signing of this Decision and Judgment shall not constitute entry under CPLR 2220. Counsel are not relieved from the provisions of that section regarding filing, entry and notice.

Dated: April 21, 1999

ENTER



Hon. Anthony Kane, J.S.C.



Papers Considered:

- (1) Notice of Petition dated December 23, 1998
- (2) Petition verified December 23, 1998 with exhibits annexed
- (3) Petitioner's Memorandum of Law with exhibit annexed
- (4) Answer verified February 9, 1999 with exhibits annexed
- (5) Affidavit of Timothy J. Gilchrist sworn to February 8, 1999
- (6) Affidavit of John E. Buttarazzi sworn to February 8, 1999
- (7) Respondents' Memorandum of Law dated February 9, 1999
- (8) Reply Affidavit of Sandra Kissam sworn to February 23, 1999
- (9) Reply Affidavit of John W. Caffry sworn to February 24, 1999 with exhibits annexed
- (10) Reply Memorandum of Law dated February 24, 1999
- (11) Various correspondence from counsel
- (12) Copies of documents released to petitioner pursuant to FOIL