

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

Index No.

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

-against-

VERIFIED PETITION

NEW YORK STATE DEPARTMENT OF
TRANSPORTATION,

Respondent.

For a Judgment Under Article 78 of the Civil
Practice Law and Rules

Petitioner Empire Center for Public Policy (“Empire Center”), for its Verified Petition against Respondent New York State Department of Transportation (“DoT”), alleges as follows:

BACKGROUND

Project Labor Agreements.

1. Empire Center informs taxpayers and policymakers about public policy issues, including the spending on public works contracts and the effects of Project Labor Agreements (“PLA”).

2. A PLA is a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization. PLAs establish the labor organization as the collective bargaining representative for all persons who will perform work on a public work project. They also provide that only contractors or subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work.

3. PLAs are pacts with trade unions that dictate hours, pay, and other rules on construction projects, including requirements that contractors and subcontractors hire most, if not all, trade workers through union hiring halls.

4. Mandatory PLAs may increase the public work project costs by disqualifying bidders who do not intend to sign a PLA.

5. State agencies frequently require bidders on public works contracts to enter into PLAs.

6. State law requires agencies to first make a determination that requiring bidders to sign a PLA will advance its interest in “obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any other local history of labor unrest.”

The Empire State Trail Project.

7. In early 2019 DoT sought bids for contract D264000 to construct 3.1 miles of sidewalks and bike lanes in and around the city of Syracuse and the town of DeWitt as part of the Empire State Trail Project (“Project”).

8. Contract D264000 did not include a PLA requirement. **Exhibit A.**

9. DoT estimated that the Project would cost approximately \$18.3 million.

10. The lowest of the five bids came in at \$17.3 million, about \$1 million *less* than DoT’s estimate. **Exhibit A.**

11. The lowest bidder was an open-shop contractor and likely would not have signed a PLA. **Exhibit B.**

12. DoT rejected all of the bids without explanation. **Exhibit A.**

13. DoT rebid the Project (now contract D264077) in August 2019 with almost identical specifications. **Exhibit A.**

14. The main difference was that DoT now required bidders to sign a PLA. **Exhibit A.**

15. DOT hired a consultant to study and evaluate the appropriateness of a PLA for the new contract that generated it titled "Report – Project Labor Agreement – Benefit Analysis." ("Study"). **Exhibit B.**

16. The Study included: (1) an assessment of the economic and non-economic considerations of a PLA, including an analysis of the existing applicable area collective bargaining agreements of nine labor craft unions to identify areas of improvement that may be realized through the use of a PLA to achieve potential labor cost reductions; and (2) a review of the general labor climate, labor unrest, and labor employment *statistics*. **Exhibit B.** (emphasis added).

17. The Study also:

[I]dentified potential cost savings in multiple areas based upon projected craft labor hours, wage rates currently in effect, and contractual provisions routinely negotiated into PLAs in the region. The Study estimated that a PLA could result in an aggregate cost savings of \$133,700 (three percent of the project labor costs for the Project estimated to be \$4,393,714).

Exhibit B.

18. The Study estimated that requiring a PLA for contract D264077 would produce cost savings of about \$152,000. **Exhibit B.**

19. Contract D264077 had a reduced scope of work compared to contract D264000. **Exhibit B.**

20. DoT required bidders to sign a PLA to be eligible for contract D264077 based on the Study. **Exhibit B.**

21. However, Contract D264077 attracted only three bidders and the lowest bid came in at approximately \$19 million. **Exhibit B.**

22. DoT awarded contract D264077 to the new low bidder. **Exhibit B.**

23. A PLA requirement added close to \$1.7 million to the Project's cost.

24. Put differently, the PLA requirement will end up costing New York taxpayers almost \$1.7 million more than if contract D264000 had been awarded to the lowest bidder.

25. DoT's PLA requirement also decreased the number of bidders for the Project by 40% and precluded participation by some contractors.

26. DoT can require PLAs on public works contracts when it determines that having such a requirement (among other things) meets its interest in "obtaining the best work at the lowest possible price" or if there is "the possibility of cost savings advantages."

27. For contract D264077, DoT obtained no cost savings and failed to get the lowest possible price.

28. The public can only know how its money was wasted and whether DoT complied with the Labor Law by seeing the Study DoT used in its determination to add the PLA requirement.

Empire Center's FOIL Request to DoT.

29. Empire Center submitted a FOIL Request to DoT for an electronic copy of the due diligence study cited in support of requiring a PLA on Letting D264077 on September 16, 2019.

30. Almost *six months* later DoT denied disclosure; it chose to except the Study "and/or portions thereof" under FOIL § 87(2)(g). According to DoT, the requested records:

[A]re predecisional in nature, are integral to the Department's deliberative process, and contain opinions, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter. Accordingly, access to these documents is hereby denied.

Exhibit C.

31. DoT also chose to except disclosure of the Study as a privileged attorney-client communication. **Exhibit C.**

32. Empire Center appealed and informed DoT that non-disclosure of the Study “makes it impossible to verify that the Department is complying with the Labor Law.” **Exhibit D.**

33. Further, Empire Center pointed out that the Study: (1) includes statistical or factual tabulations or data; (2) constitutes the Department’s final agency policy or determinations with respect to requiring a PLA; and (3) was an external audit performed by a DoT consultant. **Exhibit D.**

34. DoT denied Empire Center’s appeal. First, DoT argued that its application of the intra-agency materials exception was proper because the Study was prepared by an outside consultant who:

[A]ppplied his understanding of labor conditions and practices to his analysis of the project at hand in order to offer guidance to [DoT] regarding the use of a [PLA]. It is not a *collection* of statistics or data, but is instead a collection of expert opinion and analysis intended to the [DoT’s] deliberative process.

Exhibit E.

35. Second, with respect to the attorney-client privilege, DoT stated that:

The [Study] was generated at the request of Department legal counsel to aid counsel in providing legal advice to the Department regarding the use of a PLA. All communications between the Department and he consultant, including the requested document itself, were at the direction of and with participation from Department legal counsel.

Exhibit E.

PARTIES

36. Petitioner Empire Center is a domestic non-profit corporation based in Albany, New York.

37. Respondent Department of Transportation is an “agency” under FOIL § 86(3).

JURISDICTION AND VENUE

38. This Court has jurisdiction under CPLR § 7804(b) and CPLR § 506(b) because all actions at issue in this case took place within Albany County and because DoT’s main offices are in Albany County.

CAUSE OF ACTION

Wrongful Denial of FOIL Request

39. Empire Center repeats and re-alleges paragraphs 1 through 38 as if fully set forth in this paragraph.

40. An Article 78 proceeding is appropriate to review agency FOIL request denials.

41. The Study is a public record subject to disclosure under FOIL.

42. Empire Center sought and DoT denied disclosure of the Study.

43. DoT failed to meet its burden under FOIL to except the Study from disclosure.

44. Empire Center has exhausted its administrative remedies and has no other remedy at law.

45. Empire Center has not made any prior application for the relief requested.

RELIEF REQUESTED

46. Empire Center respectfully requests that this Court issue an order:

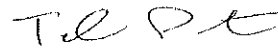
A. Declaring that DoT acted unlawfully in failing to produce the Study;

B. Declaring that DoT must release the Study within five days of the date of the Order;

- C. Awarding attorney's fees and costs to Empire Center as permitted under FOIL; and
- D. Granting such other and further relief as this Court may deem just and proper.

Dated: Albany, New York
July 20, 2020

Respectfully submitted,



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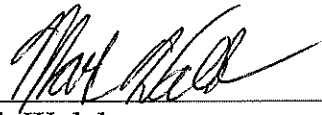
Counsel for Petitioner

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF ALBANY)
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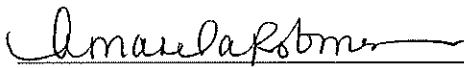
I, Mark Walsh, being duly sworn, deposes and says:

I am the Director of Operations at the Empire Center for Public Policy, Inc.,
Petitioner in the above-captioned matter. I have reviewed the foregoing Veri-
fied Petition and know its contents to be true to my knowledge.



Mark Walsh

Sworn to and subscribed before me
this 20th day of July, 2020



Notary Public

AMANDA P ROBINSON
NOTARY PUBLIC STATE OF NEW YORK
SARATOGA
LIC. #01RO6390046
COMM. EXP. 04/08/2023