

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019

527178

In the Matter of ASSOCIATED
GENERAL CONTRACTORS OF
NEW YORK STATE, LLC,
Appellant,

v

MEMORANDUM AND ORDER

DORMITORY AUTHORITY OF THE
STATE OF NEW YORK et al.,
Respondents.

Calendar Date: April 23, 2019

Before: Garry, P.J., Egan Jr., Clark, Mulvey and Pritzker, JJ.

Couch White, LLP, Albany (Jennifer K. Harvey of counsel),
for appellant.

Letitia James, Attorney General, Albany (Allyson B. Levine
of counsel), for respondents.

Clark, J.

Appeal from a judgment of the Supreme Court (McCarthy, J.), entered November 15, 2017 in Albany County, which partially dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review five determinations of respondents denying petitioner's Freedom of Information Law requests.

In an effort to increase the participation of minority-owned business enterprises (see Executive Law § 310 [7]) and women-owned enterprises (see Executive Law § 310 [15])

(hereinafter collectively referred to as MWBE) on state contracts, state agencies are required to set specific MWBE participation goals for every individual state contract and to notify contractors of these contract-specific participation goals in, among other things, bid documents and requests for proposal (see Executive Law § 313 [1], [2-a]; 5 NYCRR 142.2 [a], [b]). In determining the appropriate MWBE participation goals for a particular contract, state agencies must consider 10 delineated factors, including the number and types of MWBEs available to perform the contract work (see 5 NYCRR 142.2 [d]). In accordance with these requirements, respondents Dormitory Authority of the State of New York (hereinafter DASNY), Department of Environmental Conservation (hereinafter DEC), Department of Transportation (hereinafter DOT), Office of Temporary and Disability Assistance (hereinafter OTDA) and New York State Insurance Fund (hereinafter NYSIF) each announced that certain of their respective public procurement projects would include, as a contract specification, a 30% MWBE participation goal.

Thereafter, petitioner – a trade association representing, among others, construction managers, general contractors and subcontractors – submitted separate Freedom of Information Law (see Public Officers Law art 6 [hereinafter FOIL]) requests to DASNY, DEC, DOT, OTDA and NYSIF seeking any and all documents underlying their respective MWBE participation goal determinations. Each of petitioner's requests was denied. Specifically, DOT, OTDA and NYSIF stated that, to the extent that they possessed any responsive documents, the documents were exempt from disclosure under the intra- or inter-agency material exemption (see Public Officers Law § 87 [2] [g]). DASNY and DEC claimed that their respective responsive documents were exempt from disclosure as inter- or intra-agency material (see Public Officers Law § 87 [2] [g]) and as material that, "if disclosed[,] would impair present or imminent contract awards or collective bargaining negotiations" (Public Officers Law § 87 [2] [c]). Petitioner administratively appealed and each of those appeals was denied. Consequently, petitioner commenced this CPLR article 78 proceeding seeking, among other things, to compel DASNY, DEC, DOT, OTDA and NYSIF to disclose the requested

documents and an award of counsel fees and costs. Following an in camera review of the relevant documents, Supreme Court granted the petition to the extent of directing OTDA and DOT to disclose certain documents to petitioner, but otherwise dismissed the petition. Petitioner now appeals, arguing that the responsive documents sought from DASNY are not exempt from disclosure and that it was entitled to an award of counsel fees and costs.

Initially, petitioner's challenge to DASNY's denial of its FOIL request has been rendered moot, as petitioner has been provided with all documents that are responsive to its FOIL request (see Matter of Cobado v Benziger, 163 AD3d 1103, 1105 [2018]; Matter of Johnson v Annucci, 146 AD3d 1259, 1260 [2017]; Matter of Bottom v Fischer, 129 AD3d 1604, 1605 [2015]). In particular, DASNY included the subject documents in its response to an analogous FOIL request made by petitioner in October 2017, after the underlying public procurement contract had been awarded. Contrary to petitioner's contention, the exception to the mootness doctrine is inapplicable (see Matter of Global Tel*Link v State of N.Y. Dept. of Correctional Servs., 68 AD3d 1599, 1600-1601 [2009]; see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]).

Further, we discern no abuse of discretion in Supreme Court's determination to deny petitioner's request for counsel fees and costs (see Public Officers Law § 89 [4] [former (c) (i)]; Matter of Mineo v New York State Police, 119 AD3d 1140, 1142 [2014], lv denied 24 NY3d 907 [2014]). Supreme Court could have, in its discretion, awarded petitioner "reasonable [counsel] fees and other litigation costs reasonably incurred" if petitioner "substantially prevailed" in this proceeding and respondents "had no reasonable basis for denying access" to the records sought (Public Officers Law § 89 [4] [former (c) (i)]; accord Matter of Whitehead v Warren County Bd. of Supervisors, 165 AD3d 1452, 1453 [2018]). Even if we were to conclude that petitioner substantially prevailed in this proceeding because Supreme Court directed OTDA and DOT to produce certain documents and because petitioner ultimately obtained the records sought from DASNY, albeit in connection with a separate FOIL request,

we would nonetheless find that OTDA, DOT and DASNY had a reasonable basis in law for denying petitioner access to the records at the time of the underlying FOIL requests (see Public Officers Law § 89 [4] [former (c) (i)]; Matter of Rome Sentinel Co. v City of Rome, 174 AD2d 1005, 1005 [1991]; compare Matter of Acme Bus Corp. v County of Suffolk, 136 AD3d 896, 897-898 [2016]). As such, there is no basis upon which to disturb Supreme Court's denial of petitioner's request for counsel fees and costs.

Garry, P.J., Egan Jr., Mulvey and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court