

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

Decided and Entered: June 20, 2019

527257

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

v

MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY
AUTHORITY 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 (Young, J.),
entered October 20, 2017 in Albany County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 78, to review a determination of respondent New York
State Thruway Authority denying petitioner's Freedom of
Information Law request.

In March 2017, petitioner – a trade association
representing, among others, construction managers, general

contractors and subcontractors – submitted a Freedom of Information Law (see Public Officers Law art 6 [hereinafter FOIL]) request to respondent New York State Thruway Authority (hereinafter NYSTA) seeking disclosure of, as relevant here, a due diligence study prepared to assist NYSTA in deciding whether to require the use of a project labor agreement (hereinafter PLA)¹ in a design-build project involving the replacement of eight bridges. In May 2017, a records access officer for NYSTA denied petitioner's request for the due diligence study on the basis that the document was 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's subsequent administrative appeal was denied. However, petitioner was advised that, in the event that a PLA was signed and a final contract awarded for the design-build project, it could make a new FOIL request for the due diligence study at that time. Petitioner thereafter commenced this CPLR article 78 proceeding seeking to challenge NYSTA's determination. After conducting an in camera review of the due diligence study, Supreme Court, as relevant here, found that both asserted exemptions applied, upheld the denial of petitioner's FOIL request for the due diligence study, denied petitioner's request for counsel fees and costs and dismissed the petition. Petitioner appeals.

Petitioner challenges the applicability of the claimed exemptions and, thus, the propriety of NYSTA's determination that the due diligence study was exempt from disclosure at the time of its request. Petitioner's arguments, however, no longer present a live controversy because, during the pendency of this appeal, NYSTA voluntarily released the complete due diligence

¹ A PLA is "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work" (Labor Law § 222 [1]).

study.² As such, that aspect of the proceeding seeking disclosure under FOIL is moot (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]). Although the issues raised are likely to recur, we do not find them to be substantial, novel or likely to evade review (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]). Accordingly, contrary to petitioner's contention, the exception to the mootness doctrine does not apply.

Petitioner further argues that Supreme Court abused its discretion in denying its request for an award of counsel fees and costs – an argument that is not precluded by our mootness determination (see Matter of Global Tel*Link v State of N.Y. Dept. of Correctional Servs., 68 AD3d at 1601). At the time that it determined petitioner's request for counsel fees and costs,³ Supreme Court had discretion to award petitioner "reasonable [counsel] fees and other litigation costs reasonably incurred" if petitioner "substantially prevailed" in this proceeding and, as relevant here, NYSTA "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]). Assuming, without deciding, that petitioner substantially prevailed in this proceeding because it ultimately obtained the

² Specifically, the study was attached as an addendum to respondents' brief and is also available for download from the New York State Courts Electronic Filing System website as a filing in a separate, unrelated CPLR article 78 proceeding in which petitioner's counsel is involved.

³ Public Officers Law § 89 (4) (c) was amended in December 2017. Under the new provision, Supreme Court is required to grant a petitioner "reasonable [counsel] fees and other litigation costs reasonably incurred" where the petitioner "substantially prevailed" and there was no reasonable basis for the agency to deny access to the requested records (Public Officers Law § 89 [4] [c] [ii]).

due diligence study after commencing this proceeding (see generally Matter of Whitehead v Warren County Bd. of Supervisors, 165 AD3d at 1454), we agree with Supreme Court that NYSTA had a reasonable basis for denying access to the due diligence report at the time of petitioner's FOIL request (see Matter of Rome Sentinel Co. v City of Rome, 174 AD2d 1005, 1006 [1991]; compare Matter of Acme Bus Corp. v County of Suffolk, 136 AD3d 896, 897-898 [2016]). We therefore discern no abuse of discretion in Supreme Court's denial of petitioner's request for an award of counsel fees and costs (see Matter of Mineo v New York State Police, 119 AD3d 1140, 1142 [2014], lv denied 24 NY3d 907 [2014]).

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