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

PRESENT: _____ **PART** 7

Index Number : 114304/2009

MONTGOMERY, VELMANETTE

VS

METROPOLITAN TRANSPORTATION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 11/17/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 81

The following papers, numbered 1 to 10 **were read on this motion to/for** Art 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Petition + Exhibits (+ Memo)	1-2
Answering Affidavits — Exhibits MTA Affidavit (3,4,5,6) MTA Admin record (7) (+ memo)	3-7
CAR Petition + Exhibits (+ memo) MTA	8-9
Replying Affidavits (+ memo)	10

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and adjudged Petition 78 proceeding is determined in accordance with the annexed Memorandum decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/15/09

_____ J.S.C.

Check one: X **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7

In the Matter of
VELMANETTE MONTGOMERY, JAMES F. BRENNAN, JOAN L. MILLMAN, LETITIA JAMES, NEW YORK PUBLIC INTEREST RESEARCH GROUP/STRAPHANGERS CAMPAIGN, and DEVELOP DON'T DESTROY (BROOKLYN), INC.,

Petitioners,

INDEX NO. 114304/09

For a Judgment Pursuant to Article 78

-against-

Decision and Judgment

METROPOLITAN TRANSPORTATION AUTHORITY and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

HON. MICHAEL D. STALLMAN, J.:

This Article 78 petition seeks to annul the June 24, 2009 resolution of the MTA Board, which approved the sale of property and development rights of the Vanderbilt railyards in Brooklyn, to developer Forest City Ratner Companies, LLC (FCRC). The site is part of the Atlantic Yards development project, of which FCRC is the sponsor, under the auspices of the New York State Urban Development Corporation. The petition alleges that the MTA violated the Public Authorities Accountability Act of 2005 (PAAA), which became effective January 13, 2006. Public Authorities Law § 2895 et seq. Specifically, the petition alleges that the MTA did not obtain an appraisal before approval (Public Authorities Law § 2987 [6] [c]), and that did not follow the PAAA's provisions concerning competitive bidding. See Public Authorities Law § 2897 (6).

BACKGROUND

The challenged resolution was the culmination of a four-year-long public process. The MTA issued a Request for Proposal (RFP) in May 2005, received proposals from FCRC and another developer, Extell, which it found inadequate, and chose to work with FCRC based on its submission, in September 2005, prior to adoption of the PAAA. The subject 2009 resolution approved modification of various business terms to essentially the same plan approved with FCRC on December 13, 2006, when the MTA Board authorized the MTA staff to negotiate and execute binding agreements with FCRC and adopted SEQRA findings.

The resolution cannot be analyzed as a separate, newly minted plan in a vacuum. Rather, it was the culmination of a long negotiation process, prolonged by the extensive public land use process and debate, including environmental review and public hearings concerning the entire Atlantic Yards project, many lawsuits and the vicissitudes of planning and financing such a large development process, which was further complicated by the onset of the national economic crisis in the summer and autumn of 2008. The MTA received two proposals in 2005 in response to its RFP from two would-be sponsors: FCRC and Extell. The MTA chose FCRC and approved the essentials of the sale and development plan. To the extent that the petition seems to challenge the MTA's rejection of the Extell bid in 2005, and thus the MTA's decision to negotiate exclusively with FCRC, it is untimely. CPLR 217 (four-month statute of limitations for Art. 78 proceedings). Moreover, because it was the culmination of an ongoing process, the resolution did not have to be preceded by a new RFP or a new bidding process, notwithstanding the intervening passage of the PAAA.

Under the original plan and under the subject resolution, FCRC must pay a total of $100 million in cash, plus interest, for the Vanderbilt site; construct a replacement LIRR railyard to the LIRR's

specifications; perform environmental remediation to the Vanderbilt site; indemnify the MTA for increases in its set operation costs; construct various mass transit improvements at its expense; and pay the MTA an amount of money equivalent to sales tax revenues to be generated by the project. The resolution modified two aspects of the plan's business terms: First, it reallocated the $100 million cash payment, so that $20 million is to be paid for the property rights needed to build a sports arena, with the balance to be paid in stages, as FCRC acquires the remaining parcels, according to a formula where the amounts to be paid will be allocated to each parcel based on the value of the development rights for each parcel. Second, in cooperation with the MTA and the LIRR, the replacement railyard's design has been modified –"value engineered"– to satisfy the LIRR's needs and specifications at what is anticipated to be a lower construction cost.

Standing

Preliminarily, respondents dispute petitioners' standing to challenge the subject resolution. Respondents assert that petitioners may not challenge the MTA's compliance with specific competitive bidding provisions because petitioners are not unsuccessful bidders.

A petitioner must show that (1) it has suffered specific injury in fact – itself, as distinct from that allegedly suffered as a member of the public at large; and (2) the claimed injury falls within the zone of interests, sought to be protected by the statute, that the petitioner invokes. Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 774 (1991); see Save the Pine Bush, Inc. v Common Counsel, 13 NY3d 298 (2009).

A non-bidder does not have standing to challenge the award of a contract by a public authority, because the non-bidder has no direct stake in the outcome of the bidding process and does not suffer an injury in fact. Matter of Transactive Corp. v New York State Dept. of Social Servs., 92 NY2d 579,

587 (1998). In addition, a non-bidder's alleged injury is not within the zone of interests to be protected by competitive bidding statutes. Id. at 587. See also Matter of Madison Sq. Garden, L.P. v New York Metropolitan Transp. Auth., 7 Misc 3d 1030(A) (Sup Ct, NY County 2005) (table; text at 2005 WL 1310274), affd, 19 AD3d 284 (1st Dept), lv. dismissed, 5 NY 3d 878 (2005) (New York Public Interest Research Group Straphangers Campaign, individuals that use mass transit, a good government group and transit workers union did not have standing to challenge the MTA's award of development rights over the West Side Rail Yards); Friends of Dag Hammarskjold Plaza v The City of New York Parks & Recreation, 13 Misc 3d 1220 (A) (Sup Ct, NY County 2006) (table; text at 2006 WL 2918059)(community group that was not a bidder did not have standing to challenge the award of a franchise to operate a café in a city park).

The specific statutory provisions of the Public Authorities Law at issue here, and their alleged violation by the MTA, each concern what sort of public competitive bidding process, and property appraisal was required of the MTA. The provisions at issue, added by the PAAA in 2005 (and effective as of January 13, 2006), were intended to impose procedural safeguards and promote openness so as to limit the almost unfettered discretion that public authorities previously exercised in the disposition of public property. Sponsor's Memo. 2005 N.Y.S.B. 5927, L. 2005 Ch. 766. Accordingly, it should be interpreted so as to implement its purpose. Nevertheless, not even a liberal construction of a remedial statute can excuse lack of standing in fact.

Petitioner NYPIRG Straphangers Campaign is a transit-oriented project of the New York Public Interest Research Group, Inc. As such, it is not a corporation or other jural entity having the capacity to sue or be sued. See Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 (1994). To the extent that NYPIRG itself is a petitioner, neither it, nor the Straphangers Campaign (if it had legal

capacity) has standing here. Neither was a bidder or potential bidder and thus cannot demonstrate that it was aggrieved in fact according to the required two-pronged test of Society of Plastics Industry. NYPIRG-Straphangers alleges interest as an advocacy group in preventing fare hikes and seeking improved mass transit and therefore in maximizing the financial return to the MTA from the Vanderbilt site sale. Although these are undoubtedly laudable goals, and advocacy by public interest groups frequently can have a salutary effect on public policy debates, these goals do not give NYPIRG-Straphangers a particular interest distinct from millions of transit riders or members of the public in general. In essence, this was the same argument for standing that Straphangers made unsuccessfully in the Westside Railyards case. See Madison Sq. Garden Corp., 19 AD3d at 288. Straphangers' reliance on several cases, where it was held to have standing, is misplaced, because those cases did not concern alleged violations of competitive bidding statutes. E.g., Matter of New York Pub. Interest Research Group Straphangers Campaign v Metropolitan Transp. Auth., 196 Misc2d 502 (Sup Ct, NY County 2006), revd 309 AD2d 127 (1st Dept 2003) (Straphangers had standing to allege violation of a non-bidding-related provision of the Public Authorities Law that required public hearings on proposed fare changes; allegedly defective hearing notice constituted special injury within protected zone of interests); N.Y. Pub. Interest Research Group v Whitman, 321 F3d 316 (2nd Cir 2003) (standing to challenge a failure to enforce federal Clean Air Act, where NYPIRG members, living within a few miles of a facility required to obtain a permit, claimed health risks).

The individual petitioners are State and City elected officials who represent districts that either include, or are near the Vanderbilt yards. None were bidders or prospective bidders. The allegation that they represent users of the transit system who might be affected by the project is vague, unrelated to the competitive bidding issues and does not show specific injury or interest required for standing.

Moreover, elected representatives do not have standing to sue on behalf of their constituents, thereby asserting rights on their behalf when the constituents have not sued. See Urban Justice Ctr. v Pataki, 10 Misc 3d 939 (Sup Ct, NY County 2005), affd 38 AD3d 20 (1st Dept 2006). "[T]he relationship between an elected official to his or her constituents is not analogous to that between an organization and its members." 10 Misc 3d at 947-48. Neither does the membership of two of the representatives on a legislative committee that is concerned with the MTA suffice to confer standing in this case.

The elected state representatives also assert standing based on their having voted for the PAAA when it passed the Legislature in 2005. Under this expansive view of standing, never before recognized by New York courts, any legislator would be empowered to sue to challenge any act by another branch of government, public agency or arguably, a private person or entity, whom the legislator alleges violated a law which the legislator supported. The Court of Appeals has adopted "stringent criteria for legislator standing" (Skelos v Paterson, 13 NY3d 141 [2009]), essentially limited to usurpation of power or abrogation of legislative (or a legislator's) power and function. See Silver v Pataki, 96 NY2d 532, 539 (2001)(Assembly member had standing to assert that the Governor improperly "line-item" vetoed parts of a bill); Matter of Sullivan v Siebert, 70 AD2d 975 (3d Dept 1979) (Assembly member had standing to sue state agency to compel it to provide the Legislature with reports that the agency was statutorily required to give the Legislature; the agency's failure impaired the Legislature's function).

Petitioner, Develop Don't Destroy (Brooklyn) (DDDB), an advocacy group, claims associational standing based on the proximity of some of its members to the project site and the vague and conclusory contention that they would be adversely affected by it. Moreover, DDDB asserts that it and its members have an interest based on the PAAA's purpose of promoting accountability, transparency and ethics. Neither contention, singly or in combination, sufficiently establishes standing. DDDB's claimed basis

for standing is so broad and vacuous as to erase the concept itself. The interests claimed are indistinguishable from those of any other member of the general public.

DDDB claims standing as a potential bidder that suffered direct injury from the MTA's adoption of the challenged resolution. It is not disputed that DDDB first attempted to present what is characterized as a competing offer at the same MTA Board meeting on June 24, 2009 at which the Board was scheduled to consider the subject resolution. It did not submit a formal, detailed plan at that time. Neither did it respond to the RFP years before. DDDB does not make any showing that it met the criteria of an RFP, which has been recognized as a requirement for standing (see Matter of Transactive Corp., 92 NY2d at 587-88). Neither has DDDB shown that it meets the PAAA's own requirement that it have the qualifications of a "responsible bidder" (Public Authorities Law § 2897 [6] [b] [iii]), a status requiring "skill, judgment and integrity". Matter of De Foe Corp. v New York City Dept. of Transp., 87 NY2d 754, 763 (1996). Indeed, Public Authorities Law § 2897 (6) (b) (iii) also provides that "all bids may be rejected when it is in the public interest to do so."

DDDB has not persuaded this Court that it has demonstrated standing, assuming for argument sake that it is a rejected, alleged potential bidder. Respondents make a valid point: to accept standing on DDDB's asserted basis as a would-be bidder would only encourage any person opposed to a public project to come forward at the last moment, announce an intention to file a competing proposal, and thereby bootstrap standing to challenge the determination. To accept that would be to eliminate the concept of standing as we know it.

Petitioners, including DDDB, argue that because the contract award process, and particularly this project, are matters of public concern, the Court should relax the requirements of standing. Petitioners rely on selectively quoted dicta in Matter of Abrams v NYCTA, 39 NY2d 990 (1976) in order to urge

a broad expansion of standing to challenge alleged violation of law by public agencies. In Abrams, the then-Bronx Borough President, other elected officials and citizens sued to declare prevalent levels of subway noise illegal, and to enjoin it. The Court of Appeals affirmed dismissal, commented on the "absurdity" (id. at 992) of the suit and declared that "[s]tanding, however, has not, and should not be extended to substitute judicial oversight for the discretionary management of public business by public officials."

Assuredly, compliance with law is mandatory, not discretionary. Respondent MTA must comply with the PAAA. However, in so doing, it must also exercise discretion, as it did when formulating the RFP, vetting proposals, determining the viability of bids and the responsibility of bidders, and judging what competition is feasible under the circumstances. It exercised discretion when it determined that the 2009 appraisal remained valid in 2009. The holding of Abrams remains good law and its rationale remains valid and applicable to this proceeding, to the extent that much of what petitioners really challenge involved a high degree of discretion.

When the Abrams court commented in dicta that "[u]nder the constantly broadening view in this State of standing to sue in order to redress illegality of official action, it may no longer be necessary to establish that plaintiffs suffered special harm as distinguished from that suffered by the public at large", it neither broadened standing nor set down a path followed by later decisions; indeed, one might validly question whether the quoted observation was valid when made by the Abrams court in 1976.

New York courts have recognized a broad standard for citizen-taxpayer suits pursuant to State Finance Law §123 (b) (1) that seek to block allegedly illegal expenditure of state funds "whether or not such person is or may be affected or specially aggrieved by the challenged action". Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 813 (plaintiffs had standing under State Fin. L §

123 [b] [1] to challenge Governor's allegedly ultra vires contracting with an Indian tribe without legislative approval). This is not such a taxpayer suit and the situation here presented is very different.

It is not for this Court of first instance to depart from the recognized rules of standing. Nevertheless, this Court is troubled that, were standing interpreted too restrictively, hypothetically there could be no way of judicially challenging what could be a clear violation of the appraisal and bidding provisions of the PAAA (e.g., if a rogue agency gave away land or a contract, without appraisal or any public bidding process, to an official's relative or a political crony). It is appropriately within the province of the Court of Appeals to consider whether a different standard for standing should be applied to the subject provisions of the PAAA.

That said, a lengthy appeal on the standing issue alone, without an adjudication of the merits of this proceeding, would not be in the public interest. Such a delay would only cause uncertainty about the projects and likely increase both public and private expense. Moreover, because respondents' assertions as to standing parallel and are intertwined with their arguments on the merits of the bidding process, especially those concerning such competition as was feasible, this Court will address the petition on the merits.

Appraisal and Fair Market Value

Petitioners assert that the MTA violated Pub. Auth L. § 2897 (3) by not obtaining an appraisal prior to adopting the resolution on June 24, 2009. Petitioners assert that the 2005 appraisal which the MTA used in negotiating the plan and which is included in the resolution, is outdated and does not satisfy the requirements of the PAAA.

Public Authorities Law § 2897 (3) provides that

"Subject to section [2896] of this title, any public authority may dispose of property for

not less than the fair market value of such property by sale, exchange, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the contracting officer deems proper.... Provided, however, that no disposition of real property, any interest in real property, or any other property which because of its unique nature is not subject to fair market pricing shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record of the transaction."

Respondent has shown that an independent appraisal was made in 2005 and included in the record of the transaction, i.e., the resolution, the documentation and, indeed, the public filings during the course of the four year process. Although the Vanderbilt site, particularly the development rights at issue in the context of the larger Atlantic Yards project, is unique, it cannot be said, as a matter of law, that it is "not subject to fair market pricing". Assuming for purposes of argument that such is the case, the Court cannot say that no appraisal whatsoever was required, as FCRC seems to suggest. Rather, given the broad, remedial purpose of the PAAA, an appraisal was required. Assuredly, given the unusual nature and scope of the project, only two experienced developers – FCRC and Extell– came forward in response to the RFP in 2005, and the MTA, for rational reasons, not subject to review here, rejected Extell's bid. Later, the MTA rationally rejected petitioner DDDB's purported attempt to bid, inter alia because it was not a qualified, experienced developer and had no realistic basis of financing or executing the project.

The MTA had a rational basis for believing that no other responsible developer would come forward, and for continuing to negotiate with FCRC to refine the plan and bring it to fruition, without

yet again initiating a new bidding process. That said, despite the uniqueness of the property interests in that context and the lack of other suitors, it is not necessary to determine whether a "fair market" existed for application of Public Authorities Law § 2897 (3). That inquiry is essentially academic, given the existence and use of the 2005 appraisal. Both before and after the adoption of the PAAA, the MTA recognized that an appraisal was an important part of the process. Accordingly, the inquiry should focus on whether a new appraisal was required in 2009.

Most large public development projects take years to gain final approval, given the required RFP; the proposal submission, vetting and approval process; land use and environmental review; land acquisition (sometimes via eminent domain); public hearing and comment, and almost inevitable litigation. Many of the steps in the process, like the PAAA, are intended to promote transparency and accountability, and to open the process to public scrutiny. The ongoing process frequently prompts changes, often to respond to legal, technical, scientific, financial or community concerns, which further prolong the process. If every change were to be viewed as a new plan so as to trigger anew each mandated review process, no development plan could ever reach final approval– let alone ultimate completion.

The MTA had a rational basis for continuing to use the 2005 appraisal rather than ordering a new one in 2009. Petitioners assert that the 2005 appraisal was outdated because of the economic downturn and the ensuing decline in market values for property in Brooklyn near the site. There thus appears to be no dispute, given the decline in market values, that were a new appraisal to have been commissioned in 2009, it would have estimated the site to be worth less than the 2005 appraisal's estimate of $271.3 million (or $214.5 million if the costs of track relocation and platform construction were deducted). In 2005, it was estimated that the FCRC proposal exceeded the appraised value by $173.8 million.

Under the challenged resolution, the value of the FCRC's obligations has increased, and includes: (1) $100 million in cash, plus interest, payable over time; (2) the construction of the replacement yard (valued by the MTA at approximately $150 million); (3) environmental remediation of the MTA's property; (4) compensation for the MTA's increased net operating costs; (5) the construction of mass transit improvements, including a new subway entrance anticipated to cost more than $50 million; and (6) a share of the increased sales tax revenues generated by the Project.

Petitioners' argument that the modified plan for the new railyard, and the developer's attendant cost reduction, means that the MTA is receiving less. Petitioners' argument lacks merit because it equates FCRC's cost with the value received. The plan requires that the replacement yard be constructed to the specifications of the MTA (the parent of the LIRR) so as to meet its currently projected needs which can be met in a somewhat smaller area than originally projected.

Petitioners have not met their burden of proving that the MTA acted arbitrarily or capriciously contrary to law by continuing to use the 2005 appraisal as part of the subject resolution. Neither have petitioners demonstrated that the MTA did not receive fair market value for the sale.

Bidding

Petitioners contend that the MTA violated the bidding requirements of the PAAA. To the extent that petitioners' suggest that there were legal infirmities in the 2005 RFP and the proposal selection process, the rejection of the Extell bid, or the 2006 SEQRA environmental review, or the December 13, 2006 MTA Board resolution which, in essence, affirmed the substance of the FCRC proposal, those determinations become final when taken and are not subject to review here. CPLR 217 (4 month statute of limitations for Article 78 proceedings). To the extent that the subject 2009 resolution is based on those earlier determinations, this challenge to the subject resolution must focus on whether the 2009

resolution violated the law, and may not be used to indirectly attack the earlier final determinations. Accordingly, those earlier determinations need not be discussed in detail. However, petitioners have not come forward with any basis for concluding that any of those determinations were illegal when made, let alone that they would have tainted the challenged determination.

The Public Authorities Law, subject to certain exceptions, provides that "[a]ll disposals or contracts for disposal of property of a public authority . . . shall be made after publicly advertising for bids . . ." Public Authorities Law § 2897 (6) (a). Awards must be made to the bidder offering the proposal that "will be most advantageous to the state, price and other factors considered." Public Authorities Law § 2897 (6) (b) (iii).

An explicit exception to the PAAA's public bidding requirement, applicable here, provides that a public authority is not required to dispose of property pursuant to a public bidding process if the disposal "is intended to further the public health, safety or welfare or an economic interest of the state." Public Authorities Law § 2897 (6) (c). Specifically, that subdivision of the PAAA provides:

> Disposals and contracts for disposal of property may be negotiated or made by public auction without regard to paragraphs a [requiring public advertising for bids] and b [setting forth rules for public advertising of bids] of this subdivision but subject to obtaining such competition as is feasible under the circumstances, if:
>
> * * *
>
> (v) the disposal is for an amount less than the estimated fair market value of the property, the terms of such disposal are obtained by public auction or negotiation, *the disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the state or a political subdivision (to*

include but not limited to, the prevention or remediation of a substantial threat to public health or safety, the creation or retention of a substantial number of job opportunities, or the creation or retention of a substantial source of revenues, or where the authority's enabling legislation permits), the purpose and the terms of such disposal are documented in writing and approved by resolution of the board of the public authority....

Public Authorities Law § 2897 (6) (c).

In its June 24, 2009 resolution, the MTA Board determined that:

"the proposed disposition of the MTA Property in question is intended to further the public welfare and to advance the economic interests of the MTA by, inter alia enhancing subway and rail commuter transportation and other services related thereto within the metropolitan commuter transportation district; promoting transit-oriented economic development by spurring the construction of commercial and residential and cultural facilities in close proximity to a major transportation hub; and creating substantial sources of revenue to MTA to help finance its capital programs; and that, in addition, the disposal of the MTA Property is intended to advance the economic development interests of the City and the State of New York by facilitating the achievement of the above-noted goals and public purposes and uses of the Atlantic Yards Project , which is expected to result in the creation and retention of a substantial number of job opportunities and the creation or retention of substantial

sources of revenues to the City, State, and the MTA."

Pet. Ex. A, at 5.

It has been established that the Atlantic Yards project– of which the challenged Vanderbilt site resolution is an integral part– is intended to further the public health, safety and welfare as well as the economic interests of the city and state. The Court of Appeals, in sustaining the use of State's eminent domain power, found that the Atlantic Yards project constituted a public use under NY Const. Art. 1, § 7(a) and Act. XVIII, in that it sought to redevelop a blighted urban area, notwithstanding that the project would be privately developed, owned and operated for profit-making purposes. Goldstein v New York State Urban Dev. Corp. ___ NY3d ___, 2009 WL 4030939 (November 24, 2009); see also Goldstein v Pataki, 516 F3d 50 (2d Cir 2008), cert. denied, 128 S Ct 2964 (2008); Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp., 59 AD3d 312 (1st Dept 2009).

Thus, if the subject resolution constituted a disposition of the Vanderbilt site for an amount "less than [its] estimated fair market value" under Public Authorities Law § 2897 (6) (c) (v) quoted supra, that subdivision would be applicable.[1]

First, petitioner has not demonstrated that the plan gives the MTA less than the estimated market value. Rather, as discussed supra, the record shows that the MTA had a rational basis for believing that the plan approved in the subject resolution would, over time, give it substantially more than the appraisal,

[1]Although Section 2897 (6) (c) (v) refers to a disposal of property "for an amount less than the estimated fair market value of the property," the Attorney General has opined, as common sense suggests, that this provision is not limited to sales below fair market value but applies if "the Authority will receive the fair market value" of the property rights being conveyed. 2006 Ops Atty Gen No. 2006-F4 4, 7, 2006 NY AG LEXIS 46, * 15 (Sept. 20, 2006).

and more than the fair market value, in light of the demonstrably limited market and the economic downturn. Indeed, it appears that the resolution embodies the rational determination that the plan was the "most advantageous... price and other factors considered." Public Authorities Law § 2897 (6) (b) (iii).

Second, given the history of the project, petitioners have not shown that the MTA did not attempt to obtain such competition as was feasible under the circumstances. The MTA complied with Public Authorities Law § 2897 (6) (a) and (b) by "publicly advertising for bids". The process began with an open, competitive RFP and continued through the various stages of agency review, land use review and environmental review, all open to public scrutiny, even after plan selection, as the plan evolved details. Given the paucity of bidders for this project– unusual in scope and complexity, and speculative as to ultimate profitability for the private developer– the process was as competitive as was feasible. The economic downturn and the adverse intervening market changes that preceded the resolution's approval in June 2009 would have made solicitation of new bids a futile and unreasonable gamble. Not only was such a choice not required by law, given the single, continuous, ongoing process; it would have jeopardized the existing agreement and the agreed upon price; it might have exposed the MTA to litigation by the developer. Similarly, nothing in law or logic required the MTA to attempt to negotiate with Extell in 2009, or to solicit an alternative bid from it, particularly after all the time, expense and effort already expended in the interim by FCRC, the MTA and other public agencies in contemplation of, and after approval, of the FRCP plan in 2006. The MTA appropriately considered FCRC's assumption of substantial up-front construction costs, already begun.

Third, the MTA rationally rejected the purported alternative plan belatedly proffered by petitioner DDDB on the date the MTA was set to vote on the FCRC plan. The MTA rationally concluded that the DDDB was not a responsible bidder, that it lacked any experience for this kind of project and that it had

no reasonable expectation of obtaining financing.

CONCLUSION

Petitioners have not met their burden of demonstrating that respondent MTA acted arbitrarily or capriciously, or contrary to law, in adopting the challenged resolution.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: December 15, 2009
New York, New York

ENTER:

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).