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

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,

For a Judgment Pursuant to Article 78

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

Index No. 114304/09
IAS Part 7
Justice Stallman

MEMORANDUM OF LAW OF RESPONDENT FOREST CITY RATNER COMPANIES, LLC IN OPPOSITION TO THE PETITION

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Preliminary Statement

Respondent Forest City Ratner Companies, LLC ("FCRC") respectfully submits this memorandum of law in opposition to the Article 78 petition in this case. The petition seeks annulment of the June 24, 2009 resolution of the Board of Directors of respondent Metropolitan Transportation Authority (the "MTA") and two affiliates (the "MTA Board"), approving modifications to the business terms approved by the MTA in 2005 and again in 2006 regarding the MTA's conveyance of the property and development rights for the Vanderbilt Yard rail facility to FCRC. The petition claims that the MTA failed to comply with the Public Authorities Law, as amended by the Public Authorities Accountability Act of 2005 (the "PAAA").

The Vanderbilt Yard rail facility occupies nearly nine acres in downtown Brooklyn, within the site of the 22-acre Atlantic Yards Land Use Improvement and Civic Project (the "Project"). Acting under the auspices of the New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), two affiliates of FCRC are the sponsors of the Project. ESDC adopted a General Project Plan (the "GPP") for the Project in December 2006, and approved modifications to the GPP in September 2009.

This petition is just one more in a long line of attempts by the Project's well-organized opponents to throttle the Project. Before 2009, the Project's opponents, including petitioner Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), commenced *six* separate lawsuits challenging actions and determinations taken by ESDC, the MTA and other public agencies in 2005 and 2006 in connection with the Project.[1] All of these challenges have failed (although the appellate process has not yet been completed in two of the litigations).

The present challenge is equally meritless. Not only is this proceeding subject to threshold defenses that include the statute of limitation and lack of standing to sue, but the petition is premised on the false theory that the MTA's 2009 approval of limited modifications to the business terms of its deal with FCRC – modifications that do not alter the essence of the parties' deal – somehow rendered the MTA's prior decision to select FCRC as the Vanderbilt Yard's developer a complete nullity. However, the MTA acted properly and reasonably and approving these modifications. It is clear that the petition is merely a desperate effort to

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[1] DDDB and several neighborhood groups commenced another Article 78 proceeding almost simultaneously with this one. Entitled *Develop Don't Destroy (Brooklyn), Inc., et al. v. Empire State Development Corporation, et ano.*, New York County Index No. 114631/09, it challenges ESDC's September 17, 2009 approval of modifications to the GPP.

cobble up still another bogus legal theory for the sole purpose of delaying the Project through litigation, in the hope that further delay at this crucial juncture will kill the Project.

Statement of the Case

The relevant facts are set forth in the affirmative statement of the case that appears in FCRC's answer (*see* ¶¶ 93-143) as well as the MTA's answer, affidavits and record, to which the Court is respectfully referred.

Argument

I.

TO THE EXTENT THAT PETITIONERS CHALLENGE THE MTA'S REJECTION OF THE EXTELL BID, THAT CLAIM IS TIME-BARRED

The petition and supporting memorandum of law contain several allegations concerning Extell's bid in response to the MTA's 2005 RFP, including allegations that mischaracterize the relative worth of Extell's bid compared to FCRC's bid, and a complaint that the "MTA rejected Extell's bid outright, and chose to negotiate exclusively with FCR" (Pet. ¶¶ 29-34; Pet. Mem. at 2, 7).

The statute of limitation for challenging the MTA's decision to reject Extell's bid and accept FCRC's bid is four months. CPLR § 217. The MTA resolved on September 14, 2005 that it would take no further

action with respect to Extell's proposal, and instead negotiate exclusively with FCRC. The statute of limitation applicable to any claim based on the MTA's rejection of the Extell bid thus expired on January 14, 2006. Any objection to the MTA's determination to choose FCRC over Extell has thus long been time-barred.

II.

NONE OF THE PETITIONERS HAS STANDING TO CHALLENGE THE MTA'S JUNE 24, 2009 RESOLUTION

To have standing to sue, a petitioner must show (1) that it has suffered an injury in fact that is distinct from that of the general public, and (2) that the claimed injury falls within the "zone of interests" sought to be protected by the statute that the petitioner invokes. *See* *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991). This requirement ensures that a group or individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Id.* *See also* *Save the Pine Bush, Inc. v. Common Council of City of Albany*, ___ N.Y.3d ___, 2009 WL 3425317 (No. 134, Oct. 27, 2009) (*Society of Plastics* recognizes that "litigation 'can generate interminable delay and interference with crucial governmental projects,'"

and therefore requires a "showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large'").

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. *Transactive Corp. v. N.Y.S. Dep't of Social Services*, 92 N.Y.2d 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 Madison Square Garden, L.P. v. N.Y. Metropolitan Transportation Authority*, 7 Misc.3d 1030(A), 2005 WL 1310274 (Sup. Ct. N.Y. Co. June 2, 2005), *aff'd*, 19 A.D.3d 284 (1st Dep't), *app. dsmssd.*, 5 N.Y.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. City of New York Parks & Recreation*, 13 Misc.3d 1220(A), 2006 WL 2918059 (Sup. Ct. N.Y. Co. Aug. 2, 2006) (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).

Here, none of the petitioners meets this essential threshold requirement for standing to sue.

DDDB. DDDB does not have standing to challenge the June 24, 2009 determination of the MTA. It claims that it has standing as a "potential bidder" and is within the zone of interests to be protected by the PAAA (Pet. ¶¶ 10, 11; Pet. Mem. at 9-10). It further claims that its mission is to "advocat[e] for accountability on the part of the MTA to the public in its disposal of the Vanderbilt Yard, so as to maximize the benefit to the MTA, and, thereby, to the public-transit-using public as a whole, and to ensure that the Yard is redeveloped for the benefit of the residents and communities of Brooklyn" (Pet. ¶ 10). DDDB also alleges that it "wished to bid against FCR for the Vanderbilt Yard and to develop it in accordance with the Unity Plan, but was denied that opportunity by the MTA" (*id.* at ¶ 11). These allegations are irrelevant.

First, DDDB was not a bidder. There is no dispute that DDDB did not submit a bid in response to the MTA's 2005 RFP. Therefore, it does not have standing for that reason alone. *See* *Transactive*, 92 N.Y.2d at 587-88.

Second, although this Court stated in *Madison Square Garden* that even a "potential bidder" would have standing to challenge the award

of a public contract (2005 WL 1310279 at *11), DDDB was not a "potential bidder." It is obvious that DDDB's only intention in submitting an "offer" to purchase the development rights in the Vanderbilt Yard on June 24, 2009 (Pet. Ex. D), four years too late, was to attempt to obtain standing to bring a lawsuit.

The Court of Appeals held in *Transactive* that a non-bidder that cannot show that it met the criteria in an RFP does not have standing to challenge the award of a public contract. 92 N.Y.2d at 587. Here, it is clear that DDDB could not have met the criteria in the MTA's RFP (*see* FCRC Ans. ¶ 103). DDDB's offer of $120 million (Pet. ¶ 72) was not a *bona fide* offer, but a sham. According to DDDB's 2007 "Annual Filing for Charitable Organizations" with the New York State Department of Law and its "Return of Organization Exempt from Income Tax" filed with the Internal Revenue Service, DDDB's total revenue in 2007 was $294,467, and its expenses were $411,764 (FCRC Ans. Exs. E and F). In addition, DDDB's only sources of income appear to have been donations, walkathons, dance parties and concerts, at which no more than several thousand dollars is raised (FCRC Ans. Ex. G). It is inconceivable that DDDB could raise $120 million to pay for the development rights, or obtain the necessary financing.

DDDB has no track record of developing any projects, let alone a project on a scale as large as this one.

Nor does DDDB have associational or organizational standing (Pet. Br. at 9). None of its members was a bidder or potential bidder, and therefore, none of its members has standing to sue. *See* Society of Plastics, 77 N.Y.2d at 775. As petitioners recognize, moreover (Pet. Mem. at 10), the fact that some of its members live in proximity to the rail yard (Pet. ¶ 10) is not enough to confer standing. *See* Madison Square Garden, L.P. v. N.Y. Metropolitan Transportation Authority, 19 A.D.3d 284, 285-86 (1st Dep't 2005) (petitioners lacked standing to challenge the MTA's award of a contract, because although they lived near the site, their proximity had nothing to do with whether the MTA received the highest price for the site, and their interests related only to environmental impacts that were the subject of another lawsuit). Contrary to petitioners' claim (Pet. Mem. at 10), the enactment of the PAAA, which established additional rules for the disposition of property by public authorities, does not distinguish this case from the earlier ones. The provisions of the PAAA on which petitioners rely relate to competitive bidding, and therefore petitioners, as non-bidders, have not suffered a special injury that is within the zone of interests to be protected by the statute.

NYPIRG Straphangers Campaign. Petitioners claim that the Straphangers Campaign has "associational standing by virtue of its purpose of advocating for transparency and accountability on the part of MTA," and because its membership includes members of the transit riding public who will be affected by the disposition of the Vanderbilt Yard (Pet. Mem. at 10-11). Petitioners further allege that the "Straphangers has a specific interest in ensuring, in light of MTA's recent fare increases and service cuts intended to cover its budget shortfalls, that MTA obtains maximum value for its disposal of the Vanderbilt Yard" (Pet. ¶ 9).

To the contrary, the Straphangers Campaign has neither capacity nor standing to challenge the MTA's award of a contract. The petition describes the Straphangers Campaign as a "project of the New York Public Interest Research Group, Inc." (Pet. ¶ 8). The Straphangers Campaign website (www.straphangers.org), describes it as a "campaign." The corporation of which the Straphangers Campaign is a "project" is conspicuously not named as a petitioner, and nowhere on the website does it state that the Straphangers Campaign is the type of entity – *i.e.*, a corporation, or an association suing by its president or treasurer – with the capacity to bring a lawsuit. As the Court of Appeals made clear in *Community Board 7 v. Schaffer*, 84 N.Y.2d 148, 155 (1994), artificial

entities such as business corporations or unincorporated associations require statutory authority to sue and be sued. Therefore, the Straphangers Campaign, which has no such authority, lacks the capacity to bring a lawsuit.

Even if the Straphangers Campaign had capacity to sue, it does not have standing to sue in this case, because it was not a bidder or potential bidder in response to the MTA's RFP. *See* Transactive, 92 N.Y.2d at 587. In *Madison Square Garden*, 2005 WL 1310274 at *11, the Straphangers Campaign was held by this Court not to have standing to challenge the MTA's award of the development rights of the West Side Rail Yards because it had not responded to the RFP and could not show any special injury based on a claim that the MTA acted arbitrarily and capriciously. In addition, the Appellate Division held in the same case that Straphangers did not have standing because the injuries that it claimed to fear, *i.e.*, fare hikes and job losses, were not actual or imminent, and the link between those injuries and the MTA's contract award was too attenuated and speculative. *Madison Square Garden Corp.*, 19 A.D.3d at 286. The situation is exactly the same here, and there is no reason to reach a different result. Straphangers only has alleged an interest in the award of development rights to Vanderbilt Yard to maximize the benefit to

the MTA so that fare increases and service cuts can be prevented (*see* Pet. ¶ 9). Thus, the Straphangers Campaign does not have standing to challenge the MTA's award of development rights to FCRC.[2]

Elected Officials. The remaining petitioners – petitioners Montgomery, Brennan, Millman and James – all are state or local elected officials. As such, they have neither capacity nor standing to bring this proceeding. The petition alleges that these petitioners "supported and voted in favor of the PAAA" (Pet. ¶¶ 4 -7), and that their "constituents use and depend upon MTA's mass transit system and facilities, and by reason of their proximity to the Vanderbilt Yard, are directly affected by MTA's disposal for development" (Pet. ¶¶ 4-7).

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[2] The cases cited by petitioners do not demonstrate that the Straphangers Campaign has standing (Pet. Mem. at 11). In *New York Public Interest Research Group Straphangers Campaign v. Metropolitan Transp. Authority*, 196 Misc. 2d 502 (Sup. Ct. N.Y. Co. 2003), the Straphangers were found to have standing to assert that the MTA violated a provision of the Public Authorities Law that was not a competitive bidding section, but that explicitly required the MTA to hold a public hearing when contemplating fare changes; the Straphangers alleged that the MTA's public notice for the hearing was deficient, and thus clearly alleged special injury that was within the zone of interests to be protected by the statutory notice requirement. Similarly, in *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), NYPIRG, not the Straphangers, was held to have standing to challenge federal oversight authority in the state/federal regulatory scheme established by the Clean Air Act ("CAA"). NYPIRG's members, who lived within a few miles of a facility required to obtain a permit under the CAA, alleged that they might suffer health injuries as a result of the federal agency's failure to enforce the CAA – clearly, special injuries within the zone of interests to be protected by the statute. Here, Straphangers is not within the zone of interest to be protected by the competitive bidding provisions of the PAAA, and the only potential injuries that it has alleged – possible future fare increases or service decreases – are not sufficient to give its standing to challenge a contract award.

The only ostensible injury that the petition alleges that any of these elected officials will suffer by the MTA's alleged violation of the PAAA is that their votes in favor of the PAAA purportedly will be "rendered meaningless" by the MTA's actions. This allegation does not confer capacity or standing to sue for enforcement of the statute. The Court of Appeals has adopted "stringent criteria for legislator standing" to sue. *Skelos v. Paterson*, 13 N.Y.3d 141 (2009). Legislators have the capacity or standing to sue in their official capacities only in limited situations, particularly political disputes about the usurpation of power. *See Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001).

Here, the validity of the PAAA is not being called into question, which is the type of situation where a legislator might have standing to vindicate his or her vote. This case is unlike *Silver v. Pataki* and unlike *Sullivan v. Siebert*, 70 A.D.2d 975 (3d Dep't 1979), both of which are cited by petitioners without explanation (Pet. Mem. at 11). In *Silver*, a Member of the Assembly alleged that the Governor had improperly vetoed line items in a bill. The case therefore directly involved the legislator's prerogatives and responsibilities as a legislator. Similarly, in *Sullivan*, an Assembly Member sought to compel heads of Executive Departments to make timely annual reports to the Legislature, as required by statute, because the failure to

provide these reports interfered with the Assembly's ability function. The present case is nothing like these cases, and petitioners' allegations that they supported or voted for the PAAA do not confer capacity or standing.

In addition, elected officials do not have standing to sue on behalf of their constituents. *See* Urban Justice Center v. Pataki, 10 Misc.3d 939 (Sup. Ct. N.Y. Co. 2005), *aff'd*, 38 A.D.3d 20 (1st Dep't 2006) (holding that an Assembly Member and a Senator did not have standing to represent constituents in an action claiming that the practice of voting on bills without a public record violated their constituents' right to know the positions of their representatives). According to this Court, "the relationship of an elected official to his or her constituents is not analogous to that between an organization and its members." *Id.* at 947-48. And, of course, unless they were bidders (and none were), the elected officials' constituents do not have standing by virtue of being transit-riders or living in proximity to Vanderbilt Yard.[3]

[3] Petitioners also claim that denying them standing would "effectively preclude any judicial review of the MTA's unlawful action" (Pet. Mem. at 12). This assertion is not true, because an authentic but unsuccessful bidder would have had standing. Here, Extell was a competitive bidder in 2005 and would have had standing to challenge the modifications to the business terms between the MTA and FCRC.

III.

THE MTA COMPLIED WITH THE PUBLIC AUTHORITIES LAW, AS AMENDED BY THE PUBLIC AUTHORITIES ACCOUNTABILTY ACT, IN ALL RESPECTS

Petitioners claim that the MTA violated the PAAA by approving the sale of property rights to the Vanderbilt Yard to FCRC without soliciting competitive bids, without considering a bid by DDDB, without obtaining an independent appraisal of the rail yard, and for a "bargain-basement" price (Pet. ¶¶ 2, 42, 59, 62, 67, 74, 80-83; Pet. Mem. at 6-8). Throughout their papers, petitioners mischaracterize the MTA's June 24, 2009 determination as a new transaction with FCRC. This characterization is wrong, because the MTA's determination approved insubstantial modifications to the 2005-06 business terms, and did not change the essential nature of the MTA's transaction with FCRC.

Nevertheless, regardless of whether the modifications are characterized as substantial or insubstantial, the MTA complied in all respects with the PAAA.

A. The MTA Was Not Required to Solicit New Bids

1. The MTA's Amendment of the Terms of the Agreement With FCRC Fell Within the PAAA's Exception to Public Bidding

The MTA's approval of revised business terms for the disposition of the Vanderbilt Yard property and development rights to

FCRC fell squarely within an explicit exception to the PAAA's public bidding requirements. The PAAA does not require a public authority 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." PAL § 2897, subd. 6(c). Specifically, 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 interest of the state or a political subdivision (to include but not be 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 ....

PAL § 2897, subd. 6(c) (emphasis added).

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 p. 5.)

It is beyond dispute that the Project – of which the sale of development rights attributable to the Vanderbilt Yard is an integral part – is intended to further the public health, safety and welfare as well as the economic interests of the City and the State. Every court that has reviewed the Project – including the U.S. Court of Appeals for the Second Circuit and the Appellate Divisions for the First *and* Second Departments – has held that the Project serves a public use, benefit or purpose. *See, e.g.,* Goldstein v. Pataki, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008); Goldstein v. N.Y.S. Urban Development Corp., 64 A.D.3d 168 (2d Dep't), *app. pending* (heard Oct. 14, 2009); Develop Don't Destroy (Brooklyn), Inc. v. Urban Development Corp., 59 A.D.3d 312 (1st Dep't

2009), *lv. to app. denied*, __ A.D.3d __ (1st Dep't June 30, 2009), *motion for lv. to app. pending* (Motion No. 2009-903).

Under the modified business terms that the MTA Board approved, FCRC remains obligated to: (1) pay a total of $100 million in cash, plus interest, for the acquisition of the Vanderbilt Yard development parcels that are part of the Project; (2) construct a replacement rail yard for the MTA, to the LIRR's specifications; (3) perform environmental remediation at the Vanderbilt Yard; (4) indemnify the MTA for increases in its net operating costs; (5) construct mass transit improvements, including a new subway entrance; and (6) pay the MTA a share of sales tax revenues to be generated by the Project (FCRC Ans. ¶ 136).

The modified terms differ from the prior terms in only two respects: (1) of the $100 million, $20 million is to be paid for the acquisition of the property rights necessary to build the arena, with FCRC having the right to acquire the remaining parcels in stages, the remaining $80 million to be allocated among those parcels according to a formula based on the amount of development rights attributable to each parcel; and (2) the design of the replacement yard has been value engineered to reduce its cost while still satisfying the LIRR's needs and specifications. Therefore, it was entirely reasonable for the MTA to determine that the proposed

disposition to FCRC – a highly experienced developer with a record of success in building very complicated projects – would further the public welfare and advance the MTA's economic interests. In addition, the Project as a whole is expected to bring enormous benefits to the City and the State by alleviating blight, creating jobs, an arena, affordable housing, community facility space and publicly accessible open space, and generating substantial tax revenues (FCRC Ans. ¶¶ 95-96). Contrary to petitioners' professed belief (Pet. ¶ 61), none of these benefits has been eliminated from the Project or put on indefinite hold.

Furthermore, it was reasonable for the MTA to conclude that it would not have been in the public interest to re-open the bidding process. FCRC was selected by the MTA as the successful bidder in 2005 in compliance with the law at the time. Despite the delays caused by litigation, ESDC and FCRC have made substantial progress on the Project since then. ESDC has concluded an extensive public review process, including completion of a comprehensive environmental review of the Project and a 7,500-page environmental impact statement. ESDC has held public hearings on the Project and made findings under the Eminent Domain Procedure Law, SEQRA and the UDC Act (FCRC Ans. ¶ 113). FCRC has spent approximately $277 million in acquiring properties in the

Project site from willing sellers and carrying those properties. In addition, FCRC has been working assiduously at the Project site since early 2007. Since then, FCRC has accomplished substantial work in furtherance of the Project (and has spent more than $83 million), including the demolition of all but two vacant buildings that it owns on the Project site (plus one City-owned building), the removal and relocation of publicly and privately owned utility infrastructure within the Project site (*i.e.*, sewer, water, telephone, gas, electricity and cable lines), and the construction and near completion of new rail yard facilities that will allow FCRC to dismantle the existing rail yard, which is an essential step for building the new arena that will be the Project's first building; this phase of the rail yard construction is expected to be completed by the end of 2009 (FCRC Ans. ¶ 120).

Given the substantial effort, time and money that already has been expended in furtherance of the Project and the benefits of the Project and the business terms agreed to by FCRC and the MTA, it would not have been in the best interest of the MTA or the public to start fresh and solicit new bids. Doing so would not only have wasted invaluable resources, but also would have delayed the benefits to the public that the Project will create.

2. Even If the MTA Were Required to Solicit New Bids, It Did Not Have to Consider DDDB's Sham Bid

Petitioners also complain that the MTA "refused to give DDDB the opportunity to submit a formal bid and proposal for the Vanderbilt Yard" and "refused to accept, entertain, or consider DDDB's Unity Plan proposal" (Pet. ¶ 74). Even if the MTA were required to solicit new bids, the MTA had no obligation to consider a proposal from DDDB, which was a non-responsible bidder.

Public Authorities Law § 2897, subd. 6(b)(iii), provides that an award to dispose of property "shall be made with reasonable promptness by notice to the *responsible bidder* whose bid, conforming to the invitation for bids, will be most advantageous to the state, price and other factors considered" (emphasis added). *See also* DeFoe Corp. v. N.Y.C. Department of Transportation, 87 N.Y.2d 754, 763 (1996) ("An agency has an obligation to consider the responsibility of a bidder, including its skill, judgment and integrity").

Determination of whether a bidder is a responsible bidder is within the discretion of the public authority or agency. *See* DeFoe (determining that the Comptroller and the Mayor did not act arbitrarily or capriciously in refusing to register the award of a contract to a petitioner who was found to be irresponsible); Municipal Testing Laboratory, Inc. v.

N.Y.C. Transit Authority, 233 A.D.2d 105 (1st Dep't 1996) (refusing to disturb a determination to award a contract to the second lowest bidder where the Transit Authority found that the low bidder may have overcharged it in a previous contract, engaged in questionable billing and employed individuals who lacked requisite qualifications).

Courts will not second-guess the determination of a municipality or public agency to reject a bidder that it deems not to be responsible as long as the rejection is based on any reasonable standards. *See C/S Window Installers, Inc. v. N.Y.C. Dep't of Design and Construction*, 304 A.D.2d 380 (1st Dep't 2003); *Kings Bay Buses, Inc. v. Aiello*, 100 Misc.2d 1 (Sup. Ct. Kings Co. 1979); *Picone v. City of New York*, 176 Misc. 967 (Sup. Ct. N.Y. Co. 1941). Furthermore, courts have interpreted a "responsible bidder" to mean one that is accountable, reliable or having moral worth, and having skill, judgment, integrity and sufficient financial resources. *See Prote Contracting Co., Inc. v. New York City School Construction Authority*, 248 A.D.2d 693 (2d Dep't 1998); *Kings Bay*, 100 Misc.2d at 5; *Caristo Construction Corp. v. Rubin*, 30 Misc.2d 185 (Sup. Ct. Kings Co. 1961); *Picone* 176 Misc. at 969.

Here, DDDB's ostensible offer of $120 million was not a *bona fide* offer, but a sham. DDDB's total revenue in 2007 was $294,467, and its

expenses that year were $411,764 (*see* FCRC Ans. Exs. E and F). In addition, DDDB's only reported sources of income were donations, walkathons, dance parties and concerts, at which no more than several thousand dollars are raised (*see* Ex. G). Unlike FCRC, moreover, DDDB has no track record of successfully developing real estate projects, let alone one as complex as this one; the RFP specifically enumerated, as one criterion for selection, the "[p]roposer's experience in the development, management, marketing and design of projects of a scale, complexity, and quality similar to that required by the Request, and its ability to implement its proposal" (Ex. D, at p. 19). The MTA therefore was entitled to conclude that DDDB never could raise the $120 million that it purported to offer, never would be able to perform if it was awarded a contract, could not meet the extensive selection criteria for a successful bidder that were specified in the 2005 RFP (*see* FCRC Ans. ¶ 91), and was not a responsible bidder. DDDB's only reason for purporting to submit an ostensible proposal clearly was to obtain standing to bring another lawsuit.

According to DDDB, moreover, its proposal was based on the Unity Plan (Pet. ¶¶ 71, 74). ESDC previously considered the Unity Plan as an alternative in the environmental impact statement for the Project, and concluded that it would result in fewer benefits to the local community and

the City.[4] Thus, even if the MTA had been required to consider new bids in 2009, it was entirely reasonable for the MTA to refuse to consider DDDB's purported "bid."

B. The MTA Was Not Required to Obtain a New Appraisal

Petitioners also claim that the MTA was required to obtain a new appraisal before adopting the June 24, 2009 resolution approving revised business terms with FCRC (Pet. ¶¶ 62-66; Pet. Mem. at 7). Petitioners allege that the 2005 appraisal, which had been obtained in connection with the RFP, was "outdated" because, "'as a result of the economic downturn, financial and credit markets have tightened considerably and the Brooklyn real estate market has markedly deteriorated,'" as acknowledged by the MTA's Finance Committee (Pet. ¶ 63).

The PAAA provides 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

[4] In particular, ESDC concluded that the Unity Plan would: (1) not meet the LIRR's requirements for the rail yard and would actually reduce rather than enhance the LIRR's operations; (2) "result in far fewer employees, residents and visitors on the project site," resulting in "reduced economic benefits"; (4) not include an on-site detention/retention system for storm water management; (5) not provide for a new subway entrance; (6) not increase pedestrian linkages through the Project site; (7) not provide the benefits of an arena; (8) not provide a substantial number of affordable housing units; and (9) not provide eight acres of street-level publicly accessible open space (FCRC Ans. Ex. N at p. 20-49

appraisal of the value of such property has been made by an independent appraiser and included in the record of the transaction." PAL § 2897, subd. 3. To the extent, if any, that this requirement was applicable to this case, the MTA did not violate the requirement.

First, the MTA was entitled to rely on the 2005 appraisal, which, according to the June 24, 2009 resolution, was included in the record of the transaction. The MTA Board's resolution thus recites that "the Boards of the MTA, LIRR and NYCT further find that an appraisal of the value of such MTA Property was previously made by an independent appraiser and *is included in the record of the transaction*" (Pet. Ex. A, at p. 5) (emphasis added). Therefore, petitioners' claim that there is no indication in the record that the Board considered the appraised value of the rail yard (Pet. Mem. at 7) is simply incorrect.

Second, it cannot be disputed that real estate values have deteriorated since 2005, and petitioners do not claim otherwise. Therefore, a new appraisal only would have confirmed that the value of the Vanderbilt Yard has declined, and would have been pointless.

C. <u>The MTA Will Receive At Least Market Value from FCRC</u>

Petitioners allege that the MTA violated the PAAA when it accepted a "bargain basement" deal in which it agreed to sell the property

and development rights in the Vanderbilt Yard to FCRC. This allegation is ridiculous, and ignores the reality of FCRC's obligations.

The PAAA requires that a public authority "may dispose of property for not less than the fair market value of such property ...." PAL § 2897, subd. 3. It is clear that the MTA has not violated this provision – far from it. The MTA's appraisal valued the Vanderbilt Yard at $271.3 million, or $214.5 million if the costs of track relocation and platform construction are deducted (Pet. ¶¶ 26-27). In 2005, the MTA Board had before it FCRC's estimate that its proposal *exceeded* the appraised value of the Vanderbilt Yard property and development rights by $173.8 million (Pet. Ex. H at p. 15).

Now, while the value of the Vanderbilt Yard has decreased, the value of 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. FCRC's modified proposal plainly exceeds the

2005 appraised value of the property and rights being sold, which has deteriorated in value since 2005 (*see* FCRC Ans. ¶ 136).

Petitioners also complain that the new rail yard that FCRC now is obligated to build for the LIRR under the modified 2009 business terms is smaller – and presumably less valuable – than the yard that FCRC proposed in 2005. However, this complaint ignores the fact that the new yard is being built to the MTA's specifications, and that the MTA has determined that the somewhat smaller yard is appropriate for its needs (FCRC Ans. ¶ 131).[5]

Therefore, it is clear that the MTA will receive at least fair market value, and more than the "outdated" 2005 appraised value. The MTA has not violated the PAAA's requirement that a public authority dispose of property for not less than the fair market value of the property.

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[5] Petitioners also allege that the MTA failed to obtain the best price for the Vanderbilt Yard by rejecting the Extell bid, which supposedly was superior to FCRC's bid because Extell offered the MTA $150 million in cash while FCRC initially offered only $50 million in cash (Pet. ¶¶ 29-32; Pet. Mem. at 2). Of course, any claim relating to the MTA's refusal to accept Extell's bid – which was rejected in 2005 – is time-barred. In addition, a comparison of these bids on their merits reveals that petitioners' claim is specious (*see* FCRC Ans. ¶¶ 105-106; Ex. J).

IV.

THE MTA WAS NOT REQUIRED TO COMPLY WITH THE PUBLIC AUTHORITIES ACCOUNTABILITY ACT IN 2009

Although the MTA unquestionably complied with the PAAA, in fact the MTA was not required to do so. The MTA issued its RFP for the purchase of the land and development rights attributable to the Vanderbilt Rail Yard on May 24, 2005. The deadline for submitting bids was July 6, 2005. On September 14, 2005, the MTA Board resolved to proceed with FCRC rather than Extell. On December 13, 2006, the MTA Board authorized the MTA's staff to negotiate and execute binding agreements with FCRC and adopted SEQRA findings.

No one has claimed a violation of the PAAA in connection with these actions, and the time to do so has expired.

On June 24, 2009, the MTA Board approved modifications to the business terms with FCRC that it previously had approved. Contrary to petitioners' contention, however, the MTA's approval of these modifications was not the approval of an entirely new transaction for the disposition of the rail yard. As the 2009 resolution was merely an insubstantial modification of the prior business terms and did not affect the essence of the disposition, the MTA was not required to comply with the PAAA's requirements.

Where changes to a public contract are not material, but merely incidental to the original contract, the public body is not required to re-solicit bids. *See, e.g.,* Decker v. Gooley, 212 A.D.2d 893 (3d Dep't 1995) (insignificant changes to a contract did not require a repeat of the bidding process). *See also* 1957 N.Y. Op. (Inf.) Att'y Gen. 108 (opining that competitive bidding would not be required where changes to a building construction contract consisted of minor adjustments to construction and related work, and there was no basic departure from the original plan for the building); 77 Op. State Dept. 6170 (1957) (opining that the modification of a school construction contract with respect to drainage, the grading of the play area and the construction of two softball diamonds did not require re-advertising for bids). It is only where modifications create an essentially different project that the re-opening of bids is appropriate. *See* SFX Entertainment, Inc. v. City of New York, No. 124059/01, 2002 WL 1363372 (Sup. Ct. N.Y. Co. June 13, 2002), aff'd, 297 A.D.2d 555 (1st Dep't 2002).

In Decker, the court held that a school district did not have to rebid a transportation contract as long as the changes were not significant enough to create a "substantial possibility" that there might be a lower bid. 212 A.D.2d at 896. The most significant change to the contract was the reduction in the term of the contract from two years to one year. Because

there was no evidence that this change gave an unfair advantage to the winning bidder or that a one-year term would have produced a lower bid, the school district did not have to repeat the bidding process.

By contrast, in *SFX Entertainment*, the City initially solicited bids for a festival entertainment facility for Randall's and Ward's Island Park that would include covered and open lawn seating and landscaped grounds. The City awarded the bid to the sole bidder, which then proposed the construction and operation of a 10,000-seat amphitheater and festival grounds with continued public park use on non-event days. Subsequently, the plan was changed again to relocate the amphitheater, increase its capacity to 19,200 permanent seats, and allow its use for concerts as well as festivals drawing up to 30,000 people, but not as parkland. The petitioner claimed that the City should have re-opened the bidding process, because the character of the project had changed fundamentally from an outdoor amphitheater to a stadium, which now, unlike the original proposal, was well-suited to the petitioner's business. The court agreed, holding that the changes were not "simply minor alterations" but were "substantial variations because they materially impact the character of the project, the cost of the project, and consequently, the bidders on the project." 2002 WL 1363372 at *7.

Here, the modifications to the MTA's business terms with FCRC do not change the essential character or main purpose of the disposition, or the character of the Project. The main purpose of the agreement and the original scope of work was for FCRC to buy the land and development rights to allow the Project to be built, construct a replacement rail yard, conduct environmental remediation, and construct mass transit improvements. This essential purpose and scope have not changed in any way. The only modifications are to the timing of the payments by FCRC to reflect staged acquisition and construction of the various Project components (which themselves are essentially unchanged) and revisions to the MTA's specifications for the size and capacity of the replacement rail yard. Similarly, the Project as a whole has not changed in any material way, but still is intended to eliminate blight from the 22-acre Project site, bring a multipurpose arena to Brooklyn, remediate environmental contamination, create between 5,325 and 6,430 units of new housing, including 2,250 units of affordable housing, as well as Class A commercial office space, community facilities and eight acres of publicly accessible open space (FCRC Ans. ¶ 95).

Therefore, the disposition of the Vanderbilt Yard to FCRC has not changed in so material and fundamental a manner as to require re-bidding, and the MTA was not required to comply with the PAAA.

Conclusion

For these reasons and those set forth in the MTA's papers, the Court should deny the petition and dismiss this proceeding.

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Respectfully submitted,

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