SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE NEW YORK STATE NURSES ASSOCIATION, 1199SEIU UNITED HEALTHCARE WORKERS EAST, CONCERNED PHYSICIANS OF LICH, LLC AND CARL BIERS,

Plaintiffs-Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF HEALTH, NIRAV SHAH, MD, IN HIS CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HEALTH, STATE UNIVERSITY OF NEW YORK, TRUSTEES OF STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK DOWNSTATE MEDICAL CENTER, STATE UNIVERSITY OF NEW YORK DOWNSTATE MEDICAL CENTER COUNCIL, AND JOHN F. WILLIAMS, MD, IN HIS CAPACITY AS PRESIDENT OF STATE UNIVERSITY OF NEW YORK DOWNSTATE MEDICAL CENTER,

Defendants-Respondents.

Index No. 5814/13
Justice Baynes

BOERUM HILL ASSOCIATION, BROOKLYN HEIGHTS ASSOCIATION, CARROLL GARDENS NEIGHBORHOOD ASSOCIATION, COBBLE HILL ASSOCIATION, RIVERSIDE TENANTS' ASSOCIATION, WYCKOFF GARDENS ASSOCIATION, INC., AND KATE MACKENZIE

Plaintiffs-Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

STATE UNIVERSITY OF NEW YORK, TRUSTEES OF STATE UNIVERSITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF HEALTH, AND NIRAV R. SHAH, as Commissioner of the New York Department of Health,

Defendants-Respondents.

Index No. 13007/13
Justice Baynes

MEMORANDUM OF LAW IN OPPOSITION TO CERTAIN RELIEF REQUESTED IN THE MAY 8, 2014 ORDER TO SHOW CAUSE

Introduction

Plaintiff-Petitioner 1199SEIU United Healthcare Workers East ("1199") submits this Memorandum of Law in partial opposition[1] to the May 8, 2014 Order to Show Cause ("OTSC") filed by Petitioners Boerum Hill Association, Brooklyn Heights Association, Carroll Gardens Neighborhood Association, Cobble Hill Association, Riverside Tenants' Association, Wyckoff Gardens Association, Inc., and Plaintiff-Petitioners the Concerned Physicians of LICH[2] (collectively, "Movants"), only to the extent that the OTSC seeks to "[d]isqualify[] certain scores registered by Technical Committee members during a Request for Proposal dictated by the Settlement Stipulation, thereby certifying Prime Healthcare as the second-highest-ranked bidder and Peebles as the third-highest-ranked bidder[.]" ("Movants' Requested Relief"). 1199 takes no position with regard to the remainder of the relief sought in the OTSC. Nothing in this submission should be construed as an endorsement of or support for any particular Offeror[3] who responded to the Spring 2014 Request for Proposals X002654 ("RFP") issued by Defendant-Respondent State University of New York ("SUNY").

Facts

The facts as set forth in the exhibits to the Affirmation of Jim Walden In Support of Order to Show Cause ("Walden Aff.") are not disputed.

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[1] 1199 takes no position as to whether this Court should enter an Order to enforce a Stipulation of Settlement regarding items (b) through (f) of the OTSC.

[2] The OTSC and supporting Affirmation do not identify which Petitioners are parties to the motion. However, it is 1199's understanding that the seven (7) parties listed herein are the only parties to OTSC.

[3] The term "Offeror" used herein refers to any party responding to the RFP, and such party's submission is referred to herein as an Offer.

Argument

POINT I.
THE COURT SHOULD DENY THE MOVANTS' REQUESTED RELIEF BECAUSE MOVANTS FAIL TO DEMONSTRATE THE STIPULATION HAS BEEN VIOLATED

Movants fail to submit sufficient factual or legal support demonstrating any violation of the February 25, 2014 Stipulation of Settlement ("Stipulation"). The Movants' claim that SUNY acted in bad faith or otherwise breached the Stipulation is without merit. Movants admit that SUNY instructed Technical Evaluation Committee members ("Evaluators") to "adhere to the terms of the [Stipulation]" (See Walden Aff. ¶ 16), but evidently fault SUNY for failing to "elaborate[] or provide[] specific instructions to the Technical Evaluation Committee on how to score various elements of each proposal" and failing to convene the Technical Committee. See Walden Aff. ¶ 6. However, even if true, neither element is required by the Stipulation, and such omission cannot rise to the level of bad faith required to justify the dramatically inappropriate remedy Movants seek, i.e., to strike the scores of those Evaluators that do not comport with the Movants' narrow view of the Stipulation and RFP.

Movants claim that Evaluators violated the Stipulation must fail as a matter of fact and law. Evaluators, while designated pursuant to the Stipulation, (See Stipulation, ¶2(d)(ii)), indisputably, are not parties, and therefore are not bound, by that agreement themselves. Nor could they have been – at the time the Court Ordered the Stipulation, the Evaluators had yet to be selected or identified by the Parties to the Stipulation. Movants' unsupported claim that Evaluators were "agents of the Parties to the [Stipulation]" (Walden Aff. ¶ 16) should similarly be rejected. As a legal matter, an "agent" is "[o]ne who is authorized to act for or in place of another; a representative." Black's Law Dictionary (9th ed. 2009). Nothing in the Stipulation supports the proposition that Evaluators were acting on behalf of the parties that designated

them. To the contrary, Evaluators were required to use judgment and discretion in their evaluation. Although limited by the confines of the RFP, which itself provides discretion, designees were not appointed to act in the place of the parties who designated them.

However, even if they were parties to the Stipulation, Movants make no assertion that any member of Evaluators violated the Stipulation through misconduct or bad faith. Rather, the Movants seem to claim that the scores of certain Evaluators should be struck simply because they failed to score the Offers as the Movants would have like them to be scored. This effort to substitute movants' judgment for that of Evaluators flies in the face of the fact that these individuals were designated to use their judgment to evaluate and score Offers. As discussed below, given the overly narrow interpretation of the Stipulation submitted by the Movants in support of their relief, it should come as no surprise that they were dissatisfied with six (6) out of thirteen (13) – nearly half – of the Evaluators' scores. The Movants' dissatisfaction notwithstanding, there is absolutely no legal basis (and, tellingly, Movants cite none) upon which to discard selected Evaluators' scores, and thus to upset the entire carefully negotiated RFP process.

POINT II.
THE COURT SHOULD DENY THE MOVANTS' REQUESTED RELIEF BECAUSE MOVANTS CANNOT SHOW EVALUATORS' SCORES WERE OUTSIDE OF THE BOUNDS OF THE RFP AND STIPULATION

The Movants' interpretation of the Stipulation and RFP narrowly emphasizes, to the exclusion of all else, the goal of finding a full service hospital. However, neither the Stipulation nor the RFP state that the inclusion of a full-service hospital is a mandatory element such that it would assure an Offer will be ranked above all others. Moreover, Movants improperly minimize the importance of certain other elements, such as an Offer's inclusion of a plan for the continuity

of care and the viability of the commitments contained in the Offer. As such, Movants' result-oriented effort to rewrite the Stipulation should be rejected.

While the Stipulation sought to encourage Offers to include full-service hospitals at the LICH site, such inclusion was not mandatory (and it could have been), and in no way guaranteed that by including a hospital in an Offer it would be ranked above all other elements. The Stipulation provides that:

- Offers that do not "include a...full-service emergency room, an intensive care unit, and in-patient beds...will be *subject to* receiving a *lower* technical score" (Stipulation ¶2(a)(i))) (emphasis added);
- Offers that include a "full-service hospital with at least 100 in-patient beds...*will be eligible for* a *higher* technical score[;]" (Stipulation ¶2(a)(ii) (emphasis added)), and
- Offers that include a "teaching hospital or an affiliation with a teaching hospital *will be eligible for* a *higher* technical score." Stipulation ¶2(a)(iii) (emphasis added).

Movants misrepresent these provisions to mean that Offers including or lacking any of these desired elements will receive a higher or lower ranking than all other Offers. The Stipulation simply does not provide for such a dramatic result. Whether an Offer receives a score that is "higher" or "lower" than what that Offer would have otherwise received without those desired elements, says nothing about the ultimate ranking of that Offer relative to other Offers. Furthermore, each scoring enhancement is conditioned with the term "subject to" or "eligible for"; meaning that the mere inclusion of any of the previously mentioned elements in ¶2(a)(i)-(iii) of the Stipulation does not guarantee a higher score or higher ranking, but merely offers the

possibility of such a result. Of course, an Offer's technical score and ultimate rank must depend on the full constellation of factors under consideration, including but by no means limited to whether the Offer merely promises a full-service hospital.

Movants also fail entirely to account for the importance of continuity of care at the LICH site as reflected in the Stipulation and RFP, or the importance of assessing whether the promises made in an Offer are realistic. Movants would have this Court believe that merely stating an Offeror's intent to provide continuous services is sufficient to get the full allotment of points for continuity of care -- no matter how illusory the promise, how cursory the proposal, or how limited the scope of health services. To the contrary, the Stipulation makes clear that "Offers providing a *realistic* method to continue health care operation after SUNY exits from healthcare operations [on May 22, 2014], and thereby avoid any gap in the provision of health care services at the LICH campus at no additional cost to SUNY, are preferred." Stipulation, ¶2(a)(iv) (emphasis added). Movants provide no factual support for their assertion that all "the full-service hospital proposals...provided plans for continuous medical services" and therefore "should have received a higher technical score than non-hospital proposals." See Walden Aff. ¶ 12. Certainly, the ability to evaluate whether the promise of continuity of care is "realistic" requires more than the mere statement that an Offeror will "immediately take over the daily operations and management at LICH." See Walden Aff. ¶ 12. Movants fail entirely to account for how Evaluators are to assess whether an Offer provides a "realistic method" for continuity of care at the LICH site. Movants also fail to make any mention of how an Offerors ability to perform what it promises can be reflected in the Technical score. However, failing to take such a that into account leads to absurd results – where simply the promise of a hospital, without even a

minimal level of competence, guarantees an Offer will be ranked above all others. This was simply not what the parties to the Stipulation agreed to.

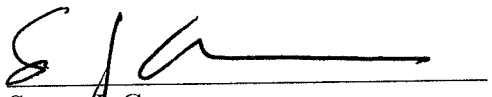
In scoring Offers Evaluators were required to use their judgment in evaluating an Offers scope of health services proposed, scope and quality of continuity of care plans, and overall viability of the Offer. To be sure, it is the combination of all these factors that resulted in the final overall ranking. At its core, Movants claim that the final overall ranking should be based solely on whether an Offer includes a full-service hospital. That has no basis in the Stipulation or the RFP. On that basis alone Movants' dramatic remedy - "to disqualify the scores from the [Technical Evaluation Committee members] who scored non-hospital proposals highest" (See Walden Aff. ¶17) should be rejected. 1199 opposes this motion and respectfully urges the Court to allow the process agreed to in the Stipulation to continue with all due speed.

Conclusion

For the foregoing reasons, 1199 respectfully requests that the Court deny Movants' request that certain scores registered by Evaluators be disqualified.

Dated: May 14, 2014
New York, New York

LEVY RATNER, P.C.



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Certificate of Service

I hereby certify that the foregoing Memorandum of Law in Opposition to Order to Show Cause was served on May 14, 2014, by electronic mail upon:

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