SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

BOERUM HILL ASSOCIATION, CARROLL GARDENS NEIGHBORHOOD ASSOCIATION, COBBLE HILL ASSOCIATION, RIVERSIDE TENANTS' ASSOCIATION, WYCKOFF GARDENS ASSOCIATION, INC., and KATE MACKENZIE,	
Petitioners,	Index No. 13007/13 Hon. Johnny Lee Baynes, J.S.C.
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	
-against-	AFFIRMATION IN OPPOSITION
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 State Department of Health,	
Respondents.	

Frank V. Carone, an attorney admitted to practice law before the courts of the state of New York, affirms under the penalties of perjury:

1. I am a member of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, attorneys for respondents State University of New York and Trustees of the State University of New York (together "SUNY").

2. I submit this affirmation in opposition to Petitioners' Order to Show Cause to amend the February 24, 2014 so-ordered Stipulation of Settlement. Masquerading as an application to "enforce" the "so-ordered" Stipulation, petitioners' motion in fact asks this Court to discard the parties' negotiated settlement, by-pass the procedural mechanisms embodied therein (which were included largely at petitioners' request) and simply anoint their hand-picked

candidate as the successful offeror, all at SUNY's expense. In making this motion, petitioners breach the very document they purport to be enforcing, New York State Procurement laws and fundamental principles of equity.

SUNY PROVIDED INSTRUCTIONS TO THE TECHNICAL EVALUATION COMMITTEE AND ANY ATTEMPTS TO PROVIDE ADDITIONAL INSTRUCTIONS WERE OBJECTED TO BY PETITIONERS

3. At the outset, in his Affirmation, Mr. Walden bases his application for the disqualification of certain scores, in part, on the assertion that "SUNY never elaborated or provided specific instructions to the Technical Evaluation Committee on how to score various elements of each proposal." (See Walden Affirmation, ¶6). However, this statement is patently false.

4. First, the selection criteria were contained in the Request for Proposal X002654, Healthcare Services at Long Island College Hospital ("LICH") and Purchase of Property (the "RFP"). (See "Exhibit D", Page 24, Section L entitled "Selection Criteria"). The selection criteria contained in the RFP were made a part of the so-ordered Stipulation of Settlement. As this Court is aware, it was worked on cooperatively by the parties extensively.

5. In addition, an Evaluation Methodology, containing additional instruction, was provided. (See Evaluation Methodology annexed hereto as "Exhibit G"). For example, the Evaluation Methodology provides as follows:

> The offeror's proposal must adhere to the outline that was required in the RFP and should include succinct narratives for each section of the RFP, including the offeror's approach to the transaction and its understanding of SUNY's objectives.
>
> The RFP at Part 2, Section A, indicates the key technical objectives include (emphasis added relating to evaluation):
>
> 1. Proposals that offer a ***realistic*** method to continue health care operations after SUNY exits from continuing health care operations which may occur as

soon as May 7, 2014, and thereby avoiding any gap in the provision of health care services at the LICH campus at no additional cost to SUNY are preferred. While offering more comprehensive health care services is preferred as the long-term plan (as described below), the proposals that provide for maintenance of some health care operations during the interim period between SUNY's withdrawal and implementation of the ultimate plan will be eligible for a higher technical score. The Dormitory Authority of the State of New York may determine that such transition method would require defeasance of Personal Income Tax bonds (estimate defeasance amount of $118,000,000). If so, such transition proposal must provide for the defeasance of said bonds.

6. Second, when SUNY and DOH made themselves available for questions from the evaluators concerning the regulatory process via a telephone conference, Mr. Walden objected, claiming that such knowledge would somehow be prejudicial and inappropriate. (See Walden Letter dated March 26, 2014 annexed hereto as "Exhibit H"). Mr. Walden was reminded that petitioners did not want to impose a requirement for expertise in health care matters on their designated evaluators. Rather, SUNY thought that an opportunity for discussion on Article 28 hospital regulations would assist these evaluators. (See Carone Letter annexed hereto as "Exhibit I"). To continue our efforts to amicably resolve issues such as these, SUNY agreed to an Additional Stipulation and Proposed Order, so-ordered by Judge Baynes on March 31, 2014, wherein the evaluators were directed as follows: to "disregard any information conveyed to them, or information they read in the media, concerning the regulatory process for approval of a hospital operator. You should be ranking only according to the instruction provided on March 13, 2014." (See Additional Stipulation and Proposed Order annexed hereto as "Exhibit J"). Therefore, it is quite shocking to read Mr. Walden's Affirmation now claiming that no such instructions were given when in fact such an attempt to do so was specifically objected to by Mr. Walden himself.

PETITIONERS SEEK TO INTERFERE WITH THE AGREED UPON EVALUATION PROCESS

4. Moreover, the parties' settlement included evaluators of the proposals submitted in response to the RFP representing all of the various interested parties, to assure the process would be fair to all. The agreed-to process now appears to have resulted in a ranking of proposals other than petitioners anticipated and not to their liking. Their solution – which this Court should reject -- is to disregard the so-ordered settlement agreement and have the Court declare their hand-picked designee the victor.

5. The most glaring flaw in petitioners' motion is that it ignores the core principle behind the process to which they agreed. The nine proposals submitted were not evaluated by one person applying a strict formulaic metric; they were evaluated by 18 different people from various walks of our community each applying their unique business, medical and community acumen and experience, recognizing the virtue of consensus borne of divergent perspectives. (See List of Evaluators annexed hereto as "Exhibit F") This process afforded the evaluators wide latitude in scoring informed by the evaluators' opinions and assessment of the viability of the proposals. Under the evaluation criteria set forth in the RFP, as agreed upon by the petitioners, the individual evaluator was asked to determine whether a proposal was highly viable, above average, average or less than viable. Then the evaluator could add points for incentive factors such as a proposal to operate a full-service hospital.

6. The parties' agreement to designate a diverse group of evaluators who were given broad discretion highlights the baselessness of petitioners' proposal "[d]isqualifying ***certain*** scores registered by the technical committee" (emphasis added) (Walden affirmation at paragraph 3). Petitioners' counsel seeks disqualification of evaluators who did not score full-service hospitals higher because, presumably, his clients prefer a full-service hospital to other models of health care services. At the same time, two of the technical evaluators designated by

petitioners awarded the highest possible score to a proposal that conditioned the provision of a full-service hospital on the offeror's ability to obtain an "operating certificate" within two years, failing which, and failing for any reason, it would provide no medical services whatsoever. In short, those evaluators gave perfect scores to a proposal that makes no commitment to the provision of any healthcare beyond submitting a certificate of need application to the Department of Health, much less to the provision of continuity of care, both key criteria of the RFP.

PETITIONERS MISSTATE THE PURPOSE OF THE RFP AND SEEK TO SUBSTITUTE THEIR CHOICE FOR THE EVALUATORS' ASSESSMENTS

7. Petitioners' counsel has selectively recast the stated purpose of the RFP to suit his needs and thereby misleads the Court. In paragraph nine of his affirmation, counsel states: [t]he RFP unambiguously restated the purpose of the process was to provide, ideally, an acute care hospital (preferably a teaching hospital)".

In fact, the RFP states:

> [t]herefore, SUNY is requesting proposals from qualified parties who could provide or arrange to provide, ideally, an acute care hospital (preferably a teaching hospital), and/or other health care services at the LICH campus, consistent with the medical services described in this Part 2, and consistent with the health care needs of the community as described during the mandatory Offerors Meeting described in section O, below, and to purchase the LICH core property, plant, equipment and non-core property (the "Property")."

8. In short, the purpose of the RFP was to secure the most viable proposal of medical services with a financial proposal for the purchase of the property that satisfies the minimum non-contingent purchase price requirement, not a full-service hospital at all costs.

9. Therefore, petitioners' premise that full-service hospital proposals must necessarily have been ranked highest and that only where no viable full-service hospital emerges from the evaluation process would petitioners be bound to accept a non-hospital operator as the successful offeror is erroneous. The criteria as set forth in the RFP at section L of Part 2 as negotiated between the parties are:

- Commitment to provide health services consistent with the objectives set forth in Part 2, Section A (2) above
- Financial capacity of Offeror to deliver the medical services that it proposes in a sustainable way.
- Non-financial capacity of Offeror to deliver the medical services that it proposes in a sustainable way.
- Prior successful experience with similar transactions
- Approach to the transaction and its understanding of the objectives set forth in Part 2, Section A above
- Ability to commence some health care services at the LICH campus in May 2014 and prior to closing the transactions contemplated by the Agreement thereby avoiding any gap in the provision of health care services
- Technical expertise
- References

(See Stipulation of Settlement and RFP annexed hereto as "Exhibit D").

11. Thus proposals for full-service hospitals that lacked commitment, financial capacity, non-financial capacity, prior successful experience, ability to commence services in May 2014, technical expertise or exhibited an unreasonable approach to the transaction or a lack of understanding of the objectives need not to have been evaluated with a higher score than a

proposal for less than a full-service hospital that did meet these criteria. Further, petitioners' counsel fails to recognize that 30% of the composite evaluation score was based on the financial evaluation. As set forth in more detail in the accompanying affidavit of Ruth E. Booher, three of the four full-service hospital proposals (Prime Healthcare, Trindade Value Partners and Chinese Community Accountable CareGroup) could have been evaluated to have failed to meet the Section L criteria. These three proposals offered only the minimum purchase price. The fourth, Brooklyn Health Partners Development Group, LLC ("BHP") was ranked the highest proposal, offered a significantly higher purchase price and was awarded the initial opportunity to enter into a transaction with SUNY. A proposal that conditions the proposed healthcare on licensing and in addition relies upon SUNY to operate the hospital during some interim time period amounts to no proposal at all because SUNY is exiting LICH on May 22, 2014.

12. Significantly, petitioners fail to acknowledge that the weighted rankings based on the technical scores alone ranked the full-service hospital proposals 1, 2, and 3:

Rank	Offerors	Promised Service
1	Trindade Value Partners	Full Hospital
2	Prime Healthcare Foundation	Full Hospital
3	Brooklyn Health Partners Development	Full Hospital
4	Fortis Property Group, LLC	
5	Chinese Community Accountable Care	Full Hospital
6	The Peebles Corporation	
7	The Brooklyn Hospital Center	
8	The Chetrit Group	
9	Lana Acquisitions LLC	

12. However, that highest ranked proposal could result in no medical services at all if licensing is not secured within a two-year period for any reason, including a failure by the offeror to pursue it. After the financial evaluation was factored into the equation, and the composite score was calculated, the rankings changed just as the parties intended.

13. In sum, petitioners are improperly asking the Court to amend the Stipulation by altering the weight accorded the financial versus technical components because they don't like the result. Such an effort eviscerates the parties' settlement and any expectation that agreements settling actions and proceedings are binding and can be relied upon as such by the parties and the public at large.

THE SO-ORDERED STIPULATION IS A BINDING AND CONCLUSIVE AGREEMENT WHICH PETITIONERS ARE BREACHING

14. Stipulations of settlement are judicially favored, will not lightly be set aside, and "are to be enforced with rigor and without a searching examination into their substance" as long as they are "clear, final and the product of mutual accord." *Bonnette v. Long Is. Coll. Hosp.*, 3 N.Y.3d 281, 286, 785 N.Y.S.2d 738, 819 N.E.2d 206 (2004); see *Cooper v. Hempstead Gen. Hosp.*, 2 A.D.3d 566, 768 N.Y.S.2d 371(2d Dep't 2003). To be enforceable, stipulations of settlement must conform to the requirements of CPLR §2104 see *DeVita v. Macy's E., Inc.*, 36 A.D.3d 751, 828 N.Y.S.2d 531 (2d Dep't 2007); "Pursuant to CPLR §2104, a stipulation of settlement is not enforceable unless it is made in open court, reduced to a court order and entered, or contained in a writing subscribed by the parties or their attorneys." *Starr v. Rogers*, 44 A.D.3d 646, 647, 843 N.Y.S.2d 371(2d Dep't, 2007); see *Matter of Dolgin Eldert Corp.*, 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228(1972). Petitioners do not (because they cannot)

assert the absence of any of the criteria mandating rigorous enforcement of the Stipulation of Settlement.

15. New York courts have demonstrated great reluctance to eviscerate a binding settlement agreement upon one party's claim that they didn't understand it or that they've changed their minds. "A stipulation or release is subject to interpretation as a contract and, where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court." *Mosberg v. National Property Analyst, Inc.*, 217 A.D.2d 482, 487-88 (1st Dep't 1995); accord, *Chaudhry v. Garvale*, 262 A.D.2d 518, 519 (2d Dep't 1999) ("Where the language [of a release] with respect to the parties' intent is clear and unambiguous, it will be given effect, regardless of one party's claim that he intended something else.").

16. Moreover, "the releasor ... must sustain the burden of persuasion if he is to establish that the general language of the release, valid on its face and properly executed, is to be limited because of a mutual mistake, or otherwise does not represent the intent of the parties." *Mosberg*, 217 A.D.2d at 483-84 (citing *Mangini v. McClurg*, 24 N.Y.2d 556 (1969)) (emphasis added). Here, the language of the So-Ordered Settlement Agreement is clear, and the petitioners cannot meet their burden of showing that the intent of the parties was otherwise.

17. When this Court gave its imprimatur upon the parties' settlement agreement, the Court seized upon the opportunity to remind all parties that SUNY will exit from LICH on May 22, 2014, and there was no certainty regarding a successor.

> If you do not have, I will just say, for lack of a better word, a bona fide purchaser by the 22nd day of May of the year 2014, Long Island College Hospital is going to close. Okay. It's sending cringes through my spine, because I have been on this case for well over a year now. There is always the possibility that the 240 million dollar bid which was put on the table may or may not come again.
>
> ...

> Now, it's my understanding, of this particular arrangement, that whichever entity comes to the table with the greatest amount of healthcare will most likely get it, okay, as long as they meet the minimum criteria. But there is always a chance, and I want everybody going into this with their eyes wide open, that the reverse could happen, that things could go bad.

(Transcript of Proceedings February 21, 2014, at page 15 annexed hereto as "Exhibit E").

PETITIONERS IMPROPERLY SEEK TO INTERFERE WITH A STATE PROCUREMENT PROCEEDING

18. As recited in greater detail in the Affidavit of Ruth Booher, petitioners' application to change the RFP evaluation team violates New York State Law, Rules and Regulations. SUNY, as a state agency, is required to adhere to the New York State Finance Law, specifically Article IX, Contracts and Article XI, State Purchasing. The RFP is governed by the aforementioned statutory requirements which provide that written evaluation criteria must be established prior to initial receipt of proposals, must be applied uniformly, and may not be changed after receipt of proposals." (SUNY Procedure 7553, Purchasing and Contracting (Procurement), II(E)(1), annexed hereto as "Exhibit B").

THE OTHER RELIEF SOUGHT BY PETITIONERS IS BASELESS

19. Petitioners' application also requests the maintenance of current medical services by rescinding a notice of ambulance diversion. Petitioners asked SUNY to modify the planned closure process to shorten the diversion of ambulances prior to closure. SUNY presented the request to DOH. DOH initially responded that based on the state-wide length of hospital stay, a 10 day prior diversion is appropriate to protect patient safety. Recognizing that LICH has a lower average length of stay, DOH permitted reduction of the prior diversion to 7 days. Petitioners were informed of the DOH determination and indicated their agreement.

20. The Settlement Stipulation explicitly provides that SUNY may close "on or after May 7, 2014, unless a reduction in force is implemented as part of the hospital closure, in which case SUNY may close LICH only on or after May 22, 2014." In addition to the DOH requirements specified above, there are natural implications associated with a reduction in force authorized in the settlement agreement just as there are natural implications of the hospital's closure on May 22, 2014. Frankly, it is startling that, with the imminent closure of LICH on May 22, 2014, the petitioners' argument has devolved to the micromanagement of medical services. The hospital is closing next week, and the petitioners are spending their time getting affirmations from physicians complaining that LICH isn't performing colonoscopies, an invasive procedure that has not been performed on a scheduled basis since June 2013.

21. Petitioners also allege that other medical services were diminished. (See Walden Affirmation, ¶19-22). However, Petitioners know from the many discussions and meetings that took place that this is simply not true. SUNY has in fact maintained all current levels of medical services to date. Additionally, SUNY, at the request of Petitioners, appointed two different medical experts to hear complaints as they arise; Dr. Moro Salifu, Chair of Medicine and Margaret Jackson, Chief Nurse.

22. SUNY has been extremely cognizant that as its workforce was "rightsized" in preparation for closure on May 22, 2014, any reduction, if implemented, would not affect its ability to maintain the level of medical services. (See Carone Letter dated April 10, 2014 annexed hereto as "Exhibit K").

23. Indeed, when Petitioners previously raised such issues, SUNY met with Petitioners and their counsel to answer their questions both written and oral, including whether or not any equipment was removed from the facility. It was not. (See Miller & Lucchesi Affidavits annexed hereto).

24. Petitioners also complain that SUNY violated the stipulation of settlement by not providing to the petitioners:

> the written reports to the Office of the Attorney General described in that certain letter dated October 26, 2010, from Clifford D. Stromberg, Esq., Counsel to SUNY Downstate to Paula Gellman, Esq., Assistant Attorney General, and her response thereto (the "Report"), for calendar years 2013 and 2014, up to the date of the cessation of operations by SUNY. (Walden Affirmation at ¶23).

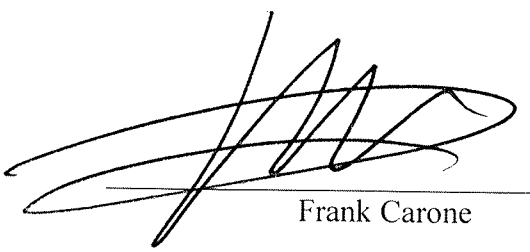
25. While petitioners' counsel next states "[y]et SUNY never provided the documentation. This is a violation of the Settlement Stipulation", it's difficult to believe he didn't read the very next line of the stipulation, which states:

> Within 90 days of the transfer of ownership, SUNY will deliver the 2013 Report to the Petitioners. The 2014 Report shall be delivered on the first anniversary of delivery of the 2013 Report.

The transfer of ownership not yet having occurred, the delivery dates for the reports have not yet occurred.

26. For the foregoing reasons and those stated in the accompanying affidavit of Ruth E. Booher, petitioners' motion should be denied in all respects.

Date: Brooklyn, New York
May 13, 2014



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