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

PRESENT: Engoron PART 52

HON. ARTHUR F. ENGORON Justice

Alina Service Corp.

- v -

NYC Dept. of Ed.

INDEX NO. 101763/12

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 8, were read on this motion to/for Amend

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is dismissed in accordance with the attached Decision + Order.

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/9/12

(E)

ARTHUR F. ENGORON J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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Application of ALINA SERVICES CORP., et al.,

Petitioners,

For an Order pursuant to Article 78 of the CPLR,

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION, et al.,

Respondents.

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Index Number: 101763/12

Decision and Order

Arthur F. Engoron, Judge

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 through 8, were used in deciding this CPLR Article 78 proceeding:

	Papers Numbered:
Moving Papers (Order to Show Cause and Supporting Papers)	1
Affirmation in Opposition (Brodie 2/17/12)	2
Reply Affirmation in Support of Injunctive Relief (Grubin 2/20/12)	3
Affidavit In Opposition to Motion for Preliminary Injunction (Goldstein 3/2/12)	4
Reply Affidavit in Support of Preliminary Injunction (Vona 3/9/12)	5
Verified Amended Answer (3/12/12)	6
Affidavit in Response to Petitioner's New Argument (3/21/12)	7
Affirmation in Response to Sur-Reply (Grubin 3/29/12)	8

Upon the foregoing papers, the instant request for injunctive relief is denied, and the petition is dismissed.

Background

As noted in this Court's "Decision Not to Grant TRO" of 2/21/12, prior to the events here in issue, the New York City Department of Transportation ("DOT") oversaw the provision of school bus transportation for pre-kindergarten and early intervention students. In 2006, respondent The New York City Department of Education ("DOE") assumed this responsibility. The old DOT contracts were then extended for several years. In or about 2008, DOE issued Requests for Bids ("RFBs") for the work, with payment to be made on a per rider, per day basis. In response, several vendors commenced a CPLR Article 78 proceeding, claiming various

deficiencies in the requests, including that they were too vague and failed to provide the location of the subject students' residences.

Said litigation was finally resolved in June 2011 in In the Matter of L&M Bus Corp. v New York City Dept. of Educ., 17 NY 3d 149 (2011). Therein, the Court of Appeals stated that DOE's agreement (in its reply brief) to provide the students' residences by cross-streets (the most specific information allowed by federal law) mooted that aspect of the litigation. The Court also noted "the difficulty of soliciting bids to meet the vast, constantly changing demand on DOE to provide transportation to New York City school children," and, accordingly, adopted a "rational basis" level of scrutiny. Id. at 160. In the final analysis, the Court "declined to second-guess DOE's business judgment that the public interest and the aims of the bidding laws are served by a system that allocates the risks of the inevitable changes in the needs of the busing system over the length of the contract to the vendors, rather than to DOE." In particular, the Court allowed bid specifications that gave DOE

> (1) "power and sole discretion to add, delete, revise, update, reissue and/or otherwise change any or all rules, procedures, and/or requirements contained in the Contractors Manual at any time without prior notice to the Contractor"; (2) power to delete entire schools and programs in the vendors' service requirements without an adjustment in the vendors' unit prices; [and] (3) power to require a contractor to service any new school after the contract is entered into, at the same unit price originally bid . . . .

Id. at 161. Clearly, the court gave DOE wide discretion in the bidding process!

On November 18, 2011 DOE issued new RFBs. After several extensions, bids were due by February 22, 2012. In the interim, various potential vendors made numerous requests for information and pointed out numerous alleged errors in the solicitation. In response, DOE corrected some errors and provided some 200 "Questions and Answers" and ever-more data (over a thousand pages, by one estimate, in just one particular instance in January), most or all of it "on-line."

According to respondents, numerous bids were submitted by the due date, contracts were agreed to, and respondents will be saving tens of millions of dollars compared to the prior DOT contracts (infra).

Obviously limited by the L&M decision, in this proceeding, as it now stands, petitioners are challenging, essentially, two aspects of the subject solicitation (Joyce Moving Aff. ¶ 34): "erroneous and misleading data in its specifications"; and the failure to include the session time that each individual student will be attending at schools that operate on multiple sessions.

Discussion

The instant petition is denied because L&M is largely controlling; because petitioners have simply failed to convince this Court that respondents were obligated to provide more, and/or more accurate, information than they have; and because the bidding process appears to be working successfully.

The L&M Litigation

As argued by respondents, petitioners have already had a bite at the apple. Reversing the lower courts, the Court of Appeals sustained RFBs similar to the ones at issue here. Petitioners now claim that they need the session times for each individual student. However, this could have been litigated in L&M.

> The 2008 bid solicitation contained *no information whatsoever* about the children's past addresses *as of any point in time.* The *L&M* petitioners did seek past addresses of children at each school, but they did not ask the courts or the DOE to have the addresses broken down by session time.

Amended Verified Answer ¶ 265 (emphasis in original). Litigation cannot be conducted seriatim, with a new case commenced every time the non-prevailing party thinks of something else that it wants. If the Court of Appeals did not find petitioners entitled to relief in L&M, this Court does not see how they can be entitled to relief here.

Also, this Court has no reason to doubt DOE's counsel's statement that "DOE is not able to obtain the data that would allow it to provide . . . children's locations *by each session time*. [I]f the DOE could have found a feasible way to provide such detail, it would have done so . . . ." Brodie Aff ¶ 32, fn. 6. The session times themselves, "based on information obtained from the program sites as of May 2011 and November 2011 were provided in the [RFBs]." Amended Verified Answer ¶ 74. Many of the schools are private; and respondents do not directly control them. See Amended Verified Answer ¶ 254: "The program sites set their own schedules . . . . Sites may change their session times to meet the needs of the clients and staff" (quoting from a 2008 DOE bid "Q&A").

Accuracy of the RFBs

L&M, and other cases of its ilk, demonstrate the liberal deference that must be accorded to a municipality's decisions and acts. The RFBs, which have been called "moving targets," are inherently subject to change, and some degree of error in the great welter of data is unavoidable. As noted in L&M, respondent's actions must be sustained if they are "rational business judgments that lie within DOE's discretion." 17 NY3d at 153. DOE has attempted to remediate the admitted errors in the original RFBs, and petitioners have not produced any evidence of bad faith, favoritism, etc. In L&M the Court of Appeals allowed DOE to allocate risk to the bidders. Id. at 161. Although that risk was that the cost of providing transportation would increase over time, the risk of some degree of inaccuracy in the RFBs is also inevitable.

According to respondents, Amended Verified Answer ¶ 68, "most of the alleged errors could not be verified as errors and/or were merely discrepancies based on data having been obtained at different points in time, and . . . any errors that were found were corrected." Even after examining petitioners' claims, some as discussed in this Court's 2/21/12 Decision, at 3, this Court cannot say otherwise.

One source of error, perhaps underplayed by petitioners and overplayed by respondents, is that student data changes over time. If respondents obtained information in 2011, and petitioners checked it in 2012, obviously there will be discrepancies.[1]

Petitioners understandably and correctly note that a "municipality is required to furnish specifications which state the nature of the work as definitely as practicable and which contain all the information necessary to enable bidders to prepare their bids." Matter of Browning Ferris Indus. of New York, Inc., 204 AD2d 1047, 1047-48 (4th Dept 1994). All things considered, petitioners have not sustained their burden of showing that the RFBs are not as specific as practicable or that petitioners cannot reasonably be expected to submit bids (many of them already have, infra).

This Court continues to believe that petitioners' strongest argument is that DOE is obligated to provide individual student session times. However, "[i]nformation about the assignment of children to specific sessions at a site does not find its way, either on paper or electronically, to DOE offices." Amended Verified Answer ¶ 277. DOE cannot provide what it does not have, and this Court would be loathe to impose upon DOE a burden that it has not itself found a need to undertake.

> It would be an incredibly arduous and time consuming task to provide each child's session information. It would require the office of Pupil Transportation . . . to

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[1] Of course, everyone wants accurate, timely information:

> "The fact is that, in the heat of the conduct of the canvas on election night, sometimes our poll workers make errors in filling out the returns of canvas," said the general counsel, Steven H. Richman. "I am sure that the N.Y.P.D. makes mistakes both in the data entry and the transmission."
>
> Such errors were unavoidable, he suggested.
>
> "People want instantaneous and perfect results," he said. "You can't get them both."

http://www.nytimes.com/2012/07/04/nyregion/calm-in-charles-rangels-district-despite-vote-count-drama.html

> contact more than 350 sites and obtain the session time information for more than 11,000 children. This information is not available in any DOE data system. Many schools have multiple session times.

Amended Verified Answer ¶ 279. Thus, even petitioners' strongest argument is unavailing.

One humorous aspect of this dry but important litigation is petitioners' claim that respondents' data is so inaccurate, it lists 26 schools that are not in operation. Respondents counter that said sites "most likely were no longer serving children but were still considered open because the DOE had not been notified that they had been officially closed by the State Education Department." Amended Verified Answer ¶ 126. If dead people can vote in Chicago, phantom schools can exist in New York City. In any event, petitioners do not appear to be claiming that the lack of students at these schools skewed the data in the RFBs.

The Submitted Bids

According to respondents, Amended Verified Answer ¶ 18, "DOE received, at the February 23, 2012 bid opening . . . , multiple bids in every service area that are well under the rates being paid under the current contracts and that DOE estimates [will] save in excess of $34 million annually." Cf. Amended Verified Answer ¶ 155 (slightly different wording). Indeed, 41 bidders participated in the auction, id. ¶ 312. While not dispositive, these bids suggest that the RFBs should pass muster in this litigation.

Conclusion[2]

For the reasons stated herein, the instant request for a injunctive relief is denied, the petition is dismissed, and the clerk is hereby directed to enter judgment accordingly.

Dated: July 2, 2012

Arthur Engoron, J.S.C.

[2]The parties hereto have put in an enormous amount of work in producing the RFBs; in analyzing them; and, in some cases, actually bidding. This litigation, following closely on the heels of L&M, is also complex and time-consuming (respondent's Verified Amended Answer runs 64 pages, with exhibits that appear to be some five times as long). Perhaps the subject bus service should be provided by The City itself ("unprivatized"), in which case it will cost whatever it costs, and nobody will be at long-term risk; but that is not the question before this Court.

Finally, this Court notes in passing that now that, through the political process, the Board of Education has become the Department of Education, and is under mayoral control, petitioners can use that same political process to register their dissatisfaction with DOE, at least every four years.