

Empire Healthchoice Assurance, Inc. v Clement

2019 NY Slip Op 33314(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 150148/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 150148/2017

EMPIRE HEALTHCHOICE ASSURANCE, INC.,

MOTION DATE _____

Petitioner,

MOTION SEQ. NO. 001

- v -

VICTORIA CLEMENT, as Records Access Officer for the Metropolitan Transportation Authority- MTA Headquarters, THOMAS PRENDERGAST, as Records Access Appeals Officer for the Metropolitan Transportation Authority, METROPOLITAN TRANSPORTATION AUTHORITY, and AETNA LIFE INSURANCE COMPANY,

DECISION + JUDGMENT ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9-25, 27, 30, 33-40, 59, 65

were read on this application _____ pursuant to CPLR article 78.

Petitioner brings this proceeding pursuant to CPLR article 78 to challenge respondents Victoria Clement’s, Thomas Prendergast’s, and Metropolitan Transportation Authority’s (collectively, MTA) denial of petitioner’s Freedom of Information Law (FOIL) request for certain records related to its failed bid for an insurance contract with MTA. Respondents answer and oppose.

I. BACKGROUND

By decision and order dated March 20, 2018, MTA was found to have established that nonparty Aon Consulting, Inc.’s evaluative tools and methodology, on which MTA had relied, constitute trade secrets and intra-agency material that are exempt from disclosure, that some of the underlying data on which Aon had relied may also be exempt from disclosure as trade

secrets, and that MTA had waived the trade secrets exemption by not raising it in its decision denying petitioner's appeal of its determination. The data contained within intervenor-respondent Aetna Life Insurance Company's RFP response was also held to be exempt to the extent that Aon had relied on it. Thus, respondents were directed to submit, for an *in camera* review, all records used by Aon in its analysis that reflect facts and/or data, along with a copy of Aetna's response to MTA's request for proposal (RFP). (NYSCEF 27).

By order dated November 19, 2018, Aetna was permitted to intervene in the proceeding. (NYSCEF 61).

On April 10, 2019, Aetna filed its answer to the petition asserting, among other things, that the information sought by petitioner is exempt from disclosure as it constitutes trade secrets. (NYSCEF 65).

Although petitioner's counsel had not seen the *in camera* Aetna documents, at oral argument held on May 22, 2019, he contended that they likely do not contain Aon trade secrets, and thus, are not exempt from disclosure, that having untimely intervened here, Aetna may not now argue that its documents are exempt as trade secrets, and that in any event, MTA was deemed to have waived its claim in that regard.

MTA's counsel denied having waived its claim of a trade-secrets exemption as to Aetna's documents, as Aetna is a third party, on whose behalf MTA cannot waive a claim. Counsel represented that most of the Aon documents had been addressed in a proceeding before another justice of this court, and he detailed the documents produced for an *in camera* inspection here, maintaining that they are exempt from disclosure as trade secrets and intra-agency material.

According to Aetna's counsel, its documents contain no Aon trade secrets. Rather, Aon's documents contain Aetna's trade secrets and that having been permitted to intervene, it did not

waive its trade-secrets defense by an untimeliness. He observed that another justice of this court had found that MTA could not waive Aetna's trade secrets defense, as it is a third party, and thus, counsel asserted, the court should do the same here. In addition, he maintained that only Aetna's response to the RFP should be reviewed, not the documents submitted in response to follow-up questions by the MTA. (NYSCEF 68).

By letter dated October 1, 2019, Aetna identified the documents it believes are to be reviewed *in camera*, and along with MTA, submits for review binders A, B, and C, and an encrypted compact disk (CD). Aetna maintains that binders A and B and the encrypted CD are to be examined *in camera*, whereas binder C contains documents submitted in response to follow-up questions by the MTA and as part of its "Best and Final Offer," and is beyond the scope of the *in camera* review. (NYSCEF 72).

By letter dated October 1, 2019, petitioner agrees that binders A and B should be inspected *in camera*, but argues that binder C should also be so inspected, as it constitutes part of Aetna's response to the RFP. It observes that in an affidavit dated May 24, 2018, MTA's deputy chief procurement officer characterized petitioner's FOIL request as seeking "each proposer's response to the RFP, any supplemental or amended information provided in connection with the RFP and pricing information, including their Best and Final Offers" (NYSCEF 34), and that the RFP's "Estimated RFP Timetable" references documents that are contained in binders B and C (NYSCEF 1). (NYSCEF 73).

II. ANALYSIS

A. Scope of FOIL request

While respondents now maintain that the FOIL request does not cover any supplemental material related to Aetna's RFP, MTA's deputy chief procurement officer interprets the FOIL

request as including the binder C materials. Narrowing the scope of petitioner's FOIL request now, after the MTA itself afforded the request a broader interpretation, would be antithetical to FOIL's underlying policy of open government and favoring of disclosure. (*See Fink v Lefkowitz*, 47 NY2d 567, 571 [1979] [FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government"]). Accordingly, the binder C materials are within the scope of the FOIL request and are subject to the *in camera* review.

B. Waiver

A court's review of a FOIL determination is "limited to the grounds invoked by the agency." (*Madeiras v New York State Educ. Dep't*, 30 NY3d 67, 74 [2017], quoting *Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 758 [1991]). However, a FOIL exemption not previously invoked may be relied on in opposition to a CPLR article 78 proceeding where "the confidentiality rights of third parties not before the court are implicated by the disclosure determination." (*Rose v Albany Cty. Dist. Attorney's Office*, 111 AD3d 1123, 1125 [3d Dept 2013]; *see also Molloy v New York City Police Dep't*, 50 AD3d 98, 100 [1st Dept 2008] [police department's failure to respond timely to administrative appeal of FOIL request does not constitute a waiver, where confidentiality of police officer, not the department, is implicated]). Thus, the MTA may assert the trade secrets exemption as to Aetna's RFP, and to the extent it was previously held otherwise, that determination is vacated and superseded by this decision and order.

In any event, even if the MTA had waived the trade secrets exemption as to Aetna's RFP, petitioner offers no authority for the proposition that Aetna waived its right to assert the trade secrets exemption. As Aetna was permitted to intervene, it was implicitly found to have sought

intervention timely, as all motions to intervene require such a determination. (*See Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010] [“Consideration of any motion to intervene begins with the question of whether the motion is timely”]). Having been permitted to intervene as a respondent, Aetna maintains the right to oppose the petition on the ground that the requested documents are exempt from disclosure. (*See e.g., Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 567 [1986] [considering intervenor-respondent’s objection to disclosure of documents based upon FOIL exemptions]).

C. Are Aetna’s RFP response materials exempt from disclosure as trade secrets?

The parties’ contentions concerning the trade secrets exemption for Aetna’s submissions were discussed in the previous decision and order and are not repeated here.

Along with their initial contentions, respondents offer the affidavit of Aetna’s regional underwriting director for the public and labor team, in which he details why Aetna’s documents are protected trade secrets. In addition, he provides a letter from Aetna’s executive director to the MTA’s deputy chief procurement officer, which reflects which documents could be disclosed, disclosed with redactions, or withheld in their entirety. (NYSCEF 46).

Upon review of the *in camera* materials, respondents demonstrate that, like Aon’s materials, Aetna’s materials contain protected trade secrets in that they contain a “compilation of information which is used in one’s business, and which gives [it] an opportunity to obtain an advantage over competitors who do not know or use it.” (*New York Tel. Co. v Pub. Serv. Comm’n of State of N.Y.*, 56 NY2d 213, 219 n 3 [1982]).

Therefore, all of the following material is exempt from disclosure:

- (1) binder A: tab 23 and pages 2-4 of tab 24;
- (2) encrypted CD in its entirety;

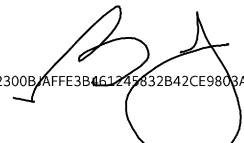
(3) binder B: all withheld documents and redactions; and

(4) binder C: all withheld documents and redactions.

III. CONCLUSION

Accordingly, as no further documents remain to be disclosed, the petition is denied, and the proceeding is dismissed.

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11/8/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE