SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

SIMON V. KINSELLA,

Petitioner,

-against-

OFFICE OF THE NEW YORK STATE COMPTROLLER,

Respondent.

For a Judgment Under Article 78 of the Civil Practice Law and Rules

Index No.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Petitioner Simon V. Kinsella, in support of his verified petition against Respondent Office of the New York State Comptroller, states as follows:

PRELIMINARY STATEMENT

This Article 78 proceeding arises from the absurd premise that the *public* on one side of a *public* contract finally negotiated and executed by its *public* agent cannot know the price the *public* will pay for electricity generated under the contract. It is not a bid. It is not a proposal. It is not a draft. It is not subject to further or other negotiations. It is a final contract receiving all necessary approvals under state law. It's only distinct from other public contracts because it relates to a controversial offshore renewable wind energy project. That feature, alone, provides the state's reason for not being transparent and accountable to the public who will be purchasing, and subsidizing, electricity generated under the contract. The public has a right to know the price agreed to on their behalf in order to adequately consider the feasibility and desirability of the project.

BACKGROUND

In February 2017, Long Island Power Authority ("LIPA") and Deepwater Wind South Fork, LLC ("Deepwater") entered into a Power Purchase Agreement ("PPA). Ørsted U.S. Offshore Wind ("Ørsted") owns Deepwater. The PPA governs Deepwater's obligations to develop and operate the South Fork Wind Farm, the South Fork Export Cable, and the Interconnection Facility (collectively, the "Project"). The South Fork Wind Farm is more than four-times larger than the only other offshore wind farm in the United States.

The Project involves Deepwater generating and transmitting electricity from an offshore wind farm to LIPA's transmission and distribution system. The Project purports to address LIPA's need for new power generation sources to *cost-effectively* and reliably meet demand from the South Fork of Long Island.

LIPA and Deepwater anticipate the Project becoming operational by December 1, 2022. At that point, Long Island residents will begin paying for the electricity generated from the Project. The price they pay for that electricity will be affected by the contract price as stipulated in the PPA negotiated by Deepwater and LIPA and approved by the LIPA Board of Trustees.

On November 28, 2018, Petitioner submitted a request under FOIL ("FOIL Request") to the Comptroller for information relating to the PPA, namely the contract price agreed to by Deepwater and LIPA. Ver. Pet., Ex. A. On March 20, 2019, the Comptroller partly denied Petitioner's request by claiming that the contract price of the PPA is excepted from disclosure pursuant to FOIL § 87(2)(d), the "trade secrets" and "commercial information" exception. The Comptroller argued that the PPA contract price constitutes proprietary

information or trade secrets that could injure the competitive positions of both Deepwater and LIPA. Ver. Pet., Ex. B.

Petitioner appealed the Comptroller's partial denial on March 27, 2019. Ver. Pet., Ex. C. On April 9, 2019 the Comptroller denied Petitioner's appeal. Ver. Pet., Ex. D. The Comptroller cited New York case law in support of its argument that "commercial information…is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained." *Id.*

According to the Comptroller, FOIL § 87(2)(d) exempts from disclosure the pricing information in the PPA as records submitted to an agency by a commercial enterprise which, if disclosed, would cause "substantial injury" to the competitive position of Deepwater. The Comptroller states that this "commercial information" is confidential because it would cause "substantial harm to the competitive position" of Deepwater. *Id.* In addition, the Comptroller claims that a purported competitive threat to LIPA because LIPA would be subject to "the impairment of getting the best offer from developers as LIPA heads into a period of repeated offshore wind procurement." *Id.*

According to the Comptroller, disclosing the contract price in the PPA is especially important because LIPA is heading "into a period of repeated offshore wind procurement." Ver. Pet., Ex. D. The Comptroller, however, cannot establish that LIPA will have a more difficult time negotiating with developers in the future or receiving bids. Indeed, the Comptroller admits that the New York State Energy Research and Development Authority ("NYSERDA") received multiple bids earlier this year responding to an RFP for additional

offshore wind power projects. Specifically, the Comptroller stated that NYSERDA "is presently involved in reviewing bids it received earlier this year in response to an RFP for additional off-shore wind and will continue to issue other RFPS's in the future as it meets the goal of 9000 MW." *Id.*

ARGUMENT

The New York Legislature enacted FOIL recognizing that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government" Public Officers Law ("FOIL") § 84. Further, "government is the public's business and *** the public *** should have access to the records of government in accordance with the provisions of [FOIL]." *Id.*

Under FOIL, government agencies *must* make their records available for public inspection and copying unless they fall within a limited number of exemptions. *Matter of Madeiros v. New York State Educ. Dept.*, 30 NY3d 67, 75 (2017) (emphasis added). Courts interpret this mandate broadly, as "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Id.* (citation and internal quotation marks omitted). FOIL § 87(2) permits agencies to exempt from disclosure certain categories of information. The agency has the burden of establishing that an exemption applies. *Matter of Data Tree, LLC v Romaine*, 9 N.Y.3d 454, 463 (2007). Such exemptions must be interpreted and applied narrowly. *Id.* at 462. And the exemption from disclosure must be established with evidentiary support. *Matter of Baez v Brown*, 124 A.D.3d 881, 883 (2nd Dept 2015).

Here, the Comptroller cannot meet its burden under FOIL § 87(2)(d) for exempting from disclosure the PPA contract price. Put simply, the PPA contract price, or any contract price for that matter, is neither confidential nor a trade secret, and its disclosure cannot substantially harm Deepwater's competitive position.

I. The Comptroller Improperly Denied Petitioner's Foil Request by Redacting the PPA Contract Price

The Comptroller did not, and cannot, establish that disclosure will cause substantial injury to the competitive position of Deepwater. The FOIL Request seeks pricing information in a completed public contract. The Comptroller did not, and cannot, establish that Deepwater as the winning bidder cannot have any reasonable expectation that pricing terms in the finally negotiated PPA with a public agency would be kept confidential, and the PPA itself is not competitively sensitive.

In his appeal, Petitioner highlighted that of the six wind farm operators that have been awarded a purchase power agreement within the United States, Ørsted has a controlling interest in five, including Deepwater. Ver. Pet., Ex. C. In three other instances where an Ørsted company has finalized a power purchase agreement, the contract price has been disclosed. *Id.* Disclosing prices other contracts has not stopped Ørsted from winning new contracts on wind energy projects. And the Comptroller has not provided any evidence of bidding for wind energy contracts being chilled or how such would be chilled in the future.

Purchase power agreements vary wildly from project to project. For the three purchase power agreements entered into by Ørsted where the contract price is public knowledge, the contract price ranges from 7.4 c/kWh to 24.4

c/kWh. Because the contract prices vary widely from project to project, disclosing pricing information here cannot substantially harm the competitive position of Deepwater/Ørsted.

The public does not know the "originally negotiated price" of the PPA. Therefore, New Yorkers have no idea whether LIPA, on their behalf, have entered into a beneficial deal for them. In November 2018, the LIPA Board of Trustees voted to allow Deepwater to expand the Project's output by 40 megawatts (from 90 to 130) at a cost of $388 million. According to a Newsday article at the time, LIPA asserts that the cost of power generated from the Project will see a "substantial" reduction from the "originally negotiated price." Ver. Pet., Ex. E. Thus, the PPA is already being renegotiated under the guise of increased savings but the public can have no idea what that means.

A. The PPA Contract Price Is Not Confidential Commercial Information

Without any supporting evidence, the Comptroller asserts that the "commercial information" at issue here, the PPA price, is "confidential" and therefore exempt from disclosure under FOIL § 87 (2)(d) because disclosure "would impair the government's ability to obtain necessary information in the future." Ver. Pet. Ex. D, citing *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale*, 87 N.Y.2d 410, 420 (1995). The PPA, however, is not a bid, it is not part of due diligence materials, and it is not information the state compelled Deepwater to provide by regulation. It is a contract between the public, through LIPA, and Deepwater, freely entered into by Deepwater, containing public information subject to public disclosure.

This Court in *Verizon New York Inc. v. New York State Pub. Serv. Comm'n*, 46 Misc. 3d 858, (Sup. Ct., Albany County 2014), *aff'd*, 137 A.D.3d 66 (3rd

Dept. 2016) examined the history of the disclosure exemption under FOIL § 87 (2)(d). There, the Court examined changes made to the exemption from disclosure in 1990. It noted that the exemption for trade secrets remained unchanged from the prior law. *Id.* at 870. The 1990 amendment changed the scope of information protected from disclosure to include information submitted to and maintained by agencies generally, and not just for regulatory purposes.

The changes came at the behest of the Department of Economic Development ("DED"), which stated "This bill is needed so that commercially confidential records maintained by economic development agencies are not required to be disclosed to the public, to the detriment of the State's economic development efforts and of the businesses submitting such records." *Id.* at 871. Prior to the amendment, FOIL only exempted from disclosure records maintained by agencies that commercial entities provided under regulations. The amendment recognized only that there may be circumstances where agencies like DED may receive confidential business information for other purposes. There is, however, no evidence that the Legislature or the public contemplated this provision extending to pricing terms of public contracts.

A Legislature that has declared that "government is the public's business" (FOIL § 84) certainly could not have contemplated that price information in public contracts should not be disclosed. Put simply, if the Comptroller's position is accepted, then the price of *any* government contract in New York could never be disclosed. Finding contract prices to be confidential information that if disclosed would cause substantial competitive harm to commercial enterprises takes the exception well beyond its intended purpose.

The Comptroller's response to the Petitioner's appeal highlights this absurdity. Lacking any evidence of confidentiality, the Comptroller only relies on a conclusory statement from LIPA that Deepwater met the burden for establishing a right to non-disclosure because "As a private entity operating in a growing and competitive market to generate renewable energy, disclosure of the information in your FOIL would work a competitive disadvantage to Deepwater Wind in any future contracts it may pursue to provide renewable energy with utilities in the region." Ver. Pet., Ex. D.

That statement could apply to any commercial enterprise bidding on business with the state. Imagining Deepwater Wind as a building constructor highlights the absurdity of LIPA's statement. "As a private entity operating in a growing and competitive market to [construct buildings], disclosure of the information in your FOIL would work a competitive disadvantage to Deepwater Wind in any future contracts it may pursue to [construct buildings] with utilities in the region." The only variable here is "renewable energy," and neither the Comptroller or LIPA offer any evidence for exempting renewable energy pricing information from disclosure under FOIL.

B. Deepwater Will Not Suffer "Substantial Competitive Harm" if The PPA Contract Price is Disclosed

The Court of Appeals has confirmed that in order to meet the burden of proof in denying access to records, agencies must provide "persuasive evidence" that disclosure would cause the harm envisioned rather than a "speculative conclusion that disclosure *might potentially* cause harm" to warrant denying access to records. *Markowitz v. Serio,* 11 NY3d 43, 51 (2008) (emphasis added). The Comptroller provides no evidence that disclosing the price in the PPA could cause substantial injury to Deepwater. The Comptroller does not even

bother to speculate what injuries Deepwater may suffer, let alone bother to mention Deepwater's name.

Instead, the Comptroller, without providing any additional explanation, uses a quote from LIPA's deputy counsel in a different FOIL matter to invoke *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale*, 87 N.Y.2d 410 (1995), which is inapplicable to this matter. That case related to public records assembled by a government subcontractor, and not a public contract with a vendor. Moreover, *Encore* employed a standard for determining substantial harm from the federal freedom of information law in *Worthington Compressors v. Costle,* 662 F.2d 45 (D.C. Cir. 1981) that also is inapplicable here.

In *Worthington*, Environmental Protection Agency regulations compelled air compressor manufacturers to submit test results and design specifications in product specification reports to ensure compliance with EPA noise pollution standards. *Id.* at 48. The court there examined whether providing the records to competitors under FOIA could cause substantial competitive harm. *Id.* at 51. Those public records, however, did not come about from those companies doing business *with* the government. Rather, they came about due to the companies doing business *under* the government's regulations. Here, no one is compelling any wind energy company, including Deepwater, to do business with the state.

It is well-established that exemptions to disclosure must be interpreted and applied narrowly. *Matter of Data Tree,* 9 N.Y.3d 454 at 462. Similarly, FOIL cases applying disclosure exemptions should not be broadly applied, and the precedent in *Encore* cited by the Comptroller should not be applied here.

In *Encore*, petitioner, Encore, sought through FOIL the list of books SUNY Farmingdale sold at its university bookstore, which was operated by a subcontractor, Barnes and Noble ("B&N"). *Encore*, 87 N.Y.2d 410 at 415. B&N assembled the list by contacting faculty members as part of its contractual obligations. In a prior semester, Encore obtained the book list through FOIL and B&N established that its sales suffered as a result. *Id.* at 421. Encore conceded that its sought to sell the very same books to the very same SUNY students that patronized its competitor B&N. *Id.* And the booklist had obvious commercial value to Encore since it was targeting the exact same market. *Id.*

Encore is easily distinguishable. First, nothing compelled Deepwater to enter into its public contract with LIPA like the subcontract compelled B&N to create public records for SUNY. Second, the competitive harm in *Encore* was obvious and alleged—if Encore obtained B&N's inventory list, then it would be able to compete with B&N in the same market by offering the same books, thus harming B&N's sales.[1] Here, there is no competition to be had in this distinct market. The PPA has been awarded and Deepwater has the exclusive right to pursue the Project. Any harm to Deepwater in other projects is purely speculative, and not borne out by the evidence. The book list in *Encore*, on the other hand, had obvious, ascertainable, and non-speculative commercial value to Encore. Accordingly, the Comptroller cannot meet its burden to establish

[1] The public policy implications of *Encore* are troubling. If the book lists assembled by B&N were public records that B&N was obligated to put together under its contract, then the value of that service should have been priced into B&N's contract, and not the price of books sold to students. Perversely, the harm in *Encore* from exempting the records from disclosure fell mostly on students deprived of the convenience or savings from buying their books at Encore.

Deepwater will suffer any, let alone "substantial," competitive harm if the PPA contract price is disclosed.

C. The PPA Contract Price is Not a Trade Secret

The Comptroller improperly raised the "trade secret" exemption under FOIL § 87(2)(d) as grounds for partially denying Petitioner's FOIL Request and withholding the PPA's pricing information. FOIL provides a disclosure exemption for trade secrets because New York courts have long recognized "[t]he importance of trade secret protection and the resultant public benefit." *Verizon New York Inc.* 46 Misc. 3d at 872–73.

A contract price, however, is not a trade secret. It is the product of mutual negotiations between or among two or more parties. Trade secrets, on the other hand, are forms of exclusive intellectual property. Typically, trade secrets can be: (1) formulas (e.g., the Coca Cola recipe); (2) patterns (e.g., computer algorithms); (3) devices (e.g., patented medical devices); or (4) compilations of exclusive information (e.g., customer lists). *See* Restatement (First) of Torts § 757 Comment b; *see also Matter of Physicians Comm. for Responsible Medicine v. Hogan,* 29 Misc.3d 1220[A] (Sup.Ct., Albany County 2010).

Neither the Comptroller nor LIPA, via the Comptroller, provides any support for the argument that the price information in the PPA, a public contract, is a trade secret. First, the price resulted from negotiations between the public, through LIPA, and Deepwater. It is not exclusive to Deepwater. Nor is it uniquely known by Deepwater. As the evidence establishes, the prices in other Deepwater/Ørsted contracts are public. Ørsted, Deepwater's parent corporation, has been awarded a power purchase agreement five times. Ver. Pet., Ex. 3. The contract prices are known for three of them, and they range from 7.4

c/kWh to 24.4 c/kWh. *Id.* The Comptroller offers no evidence that the price in this PPA is unique and different in its origin from any other wind energy contract, or any other public contract, for that matter.

Trade secrets typically do not change on a case-by-case basis, like the prices for wind energy contracts that depend on a number of factors, including climate patterns, geography, and market conditions. A Deepwater competitor ascertaining the PPA contract price here is not the same as a Coca Cola competitor obtaining the recipe for Coke. Any attempt to characterize the PPA price information as a "trade secret" stretches the definition well beyond its reasonable and publicly understood bounds.

If Deepwater/Ørsted's price information was an exclusive and proprietary trade secret, then it would not have entered into contracts where it knew that information would be made public under another jurisdiction's law. Nevertheless, as Petitioner has established, several Ørsted contract prices are public information in other states. It follows that Ørsted volunteered to make those prices public because contract pricing is deal-specific. There is little for competitors to use unless they are competing on a project with the exact same parameters, but every project is very different, with different requirements and different conditions.

Again, the Comptroller's only support for treating the PPA contract price as a trade secret comes from LIPA's conclusory statement that "As a private entity operating in a growing and competitive market to generate renewable energy, disclosure of the information in your FOIL would work a competitive disadvantage to Deepwater Wind in any future contracts it may pursue to provide renewable energy with utilities in the region." Ver. Pet., Ex. D. Notably,

LIPA failed to provide any authority for the proposition that a contract price can be considered a trade secret. And its unsupported assertion would render any contract price a trade secret.

D. The FOIL § 87(2)(d) Exemption Does Not Apply to LIPA

The Comptroller's responses to the FOIL Request raise the question of whose interest the Comptroller seeks to protect. It does not appear to be the public's. Deepwater's interest in this matter is unknown, as there is no evidence that either the Comptroller or LIPA have notified Deepwater under FOIL § 89(5)(b) that Petitioner requested the PPA price information. That leaves LIPA and LIPA's purported concern that disclosing the Deepwater PPA price will harm LIPA's competitive position. LIPA, however, is a public agency. It is not a commercial enterprise subject to FOIL § 87(2)(d).

Even if the exemption could apply to LIPA, there is no evidence that disclosing the PPA price will in any way impair LIPA's ability to get the best price in future negotiations for wind energy projects. The Comptroller cannot establish that LIPA will have a more difficult time negotiating with developers in the future or receiving bids. Indeed, the Comptroller admits that NYSERDA received multiple bids earlier this year responding to an RFP for additional offshore wind power projects.

Specifically, the Comptroller stated that NYSERDA "is presently involved in reviewing bids it received earlier this year in response to an RFP for additional off-shore wind, and will continue to issue other RFPS's in the future as it meets the goal of 9000 MW." Ver. Pet. Ex. D. The Comptroller further fails to establish that the prior disclosure of PPA prices has hindered state agencies from negotiating power purchase agreements with other energy providers.

The Comptroller's position makes no sense. Contract prices have been made public in other jurisdictions, with no discernable effect on bidding for projects in New York. Presumably the public has an interest in prices of existing projects being known to encourage lower and better offers on new projects (recognizing that every project has different parameters that may make prior pricing schemes obsolete). If wind energy developers will not bid on public contracts because their prices may be made public, then the Comptroller must offer that proof and an explanation other than conjecture. At present, Petitioner can only be left with the impression that only the state has something to hide regarding the PPA contract price for the Project.

II. PETITIONER IS ENTITLED TO ATTORNEYS' FEES

FOIL § 89(4)(c) permits this Court to assess attorney's fees and litigation costs against an agency when a requestor substantially prevails, and the agency has no reasonable basis for denying access, or the agency fails to respond to a request or appeal within the statutory time. FOIL § 89(4)(c). Here, the Comptroller did not have a reasonable basis to deny access to the PPA contract price.

The legislature enacted FOIL § 89(4)(c) "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL" (Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5). Awarding fees and costs is appropriate where disclosure only occurs through a petitioner needing to use judicial process and a respondent showing a clear disregard of the public's right to open government. *Matter of New York*

Civ. Liberties Union v. City of Saratoga Springs, 87 A.D.3d 336, 339 (3rd Dept 2011).

Fees and costs should be awarded even if Respondent discloses the records Petitioner requested after this proceeding has commenced. *See, e.g., Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67 (2017) (Petitioner substantially prevailed by obtaining redacted documents in Article 78 proceeding where agency had made no disclosures prior to commencement.). FOIL § 89(4)(c) was added to the Public Officers Law for the precise purpose of stopping agencies from taking "a 'sue us' attitude in relation to providing access to public records." *New York Civ. Liberties Union*, 87 A.D.3d at 338 (*quoting* Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73).

Regardless of its intent, the Comptroller has demonstrated a clear disregard of its responsibility to be open and transparent. Litigation should not be required to compel disclosure of government contract prices. Therefore, this Court should award Petitioner his reasonable attorney's fees and litigation costs for this matter.

CONCLUSION

Petitioner respectfully requests an order granting the relief sought in his Verified Petition.

Dated: Albany, New York
July 9, 2019

Respectfully submitted,

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