

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

_____	X	
	:	
JOBS TO MOVE AMERICA,	:	Index No. _____
	:	
<i>Petitioner,</i>	:	VERIFIED PETITION
	:	
vs.	:	For a Judgment Pursuant to Article 78 of the
	:	Civil Practice Law and Rules
METROPOLITAN TRANSPORTATION	:	
AUTHORITY, NEW YORK CITY TRANSIT,	:	
	:	
<i>Respondent.</i>	:	Oral Argument Requested
	:	
_____	X	

PRELIMINARY STATEMENT

1. This Article 78 Proceeding asserts the right of nonprofit watchdog and labor group Jobs to Move America (“JMA” or “Petitioner”) to access important government records from the Metropolitan Transportation Authority, New York City Transit (“MTA” or “Respondent”) to allow JMA and the public to assess the compliance of rolling stock manufacturer Kawasaki Rail Car Inc. (“Kawasaki”), and that of its subcontractors and suppliers, with their contractual obligations to create quality jobs for American workers as part of a nearly \$4 billion public procurement contract paid for by American taxpayers.

2. New York’s Freedom of Information Law (“FOIL”) guarantees the public right of access to records maintained by state government agencies to effectuate the state’s commitment to open government and public accountability. *See* N.Y. Pub. Off. L. §84. As government secrecy is anathematic to our democracy, FOIL requires *all* government records to be presumptively open for public inspection and copying. *Id.* Although this broad mandate for disclosure is subject to certain exceptions, those exceptions are narrowly construed so as not to undermine FOIL’s statutory purposes, and this heavy burden falls on the government agency – here, MTA – to prove that a particular government record falls outside FOIL’s broad mandate of disclosure. *Id.*, §89(4)(b).

3. On behalf of the taxpaying public, MTA purchases subway cars and buses for New York City’s public transportation system.

4. For years, JMA has championed “U.S. Employment Plans” (“USEP”) to be incorporated into the public purchasing process, like MTA’s contracts, to leverage taxpayer dollars spent on public infrastructure for quality goods and quality American jobs to make those goods.¹

¹ *See* U.S. Employment Plan Resource, *available at* <https://jobstomoveamerica.org/resource/u-s-employment-plan-2/> (last visited Dec. 1, 2023).

5. On February 16, 2018, MTA awarded Contract R34211 (“Contract”) to Kawasaki for up to 1,612 American-made subway cars and the creation of hundreds of quality jobs for U.S. workers pursuant to the USEP. The Contract is one of the MTA’s largest subway car contracts ever awarded, with the base order alone valued at nearly \$1.45 billion and a potential total value of nearly \$3.7 billion, including options for additional cars. The Contract is ongoing. To date, MTA has ordered a total of 1,175 cars, including the base contract of 535 cars, plus 640 cars under Option 1. MTA still has a second option to order an additional 437 cars in the future.

6. Prior to awarding the Contract to Kawasaki, MTA required all contract bidders, including Kawasaki, to submit a USEP detailing, among other things, the number and dollar value of good American jobs that it would create if awarded the Contract. Kawasaki, along with its subcontractors and suppliers, committed to creating 470 quality American jobs for the base award at an estimated value of \$125 million.² If MTA exercises both options for additional subway cars, the potential value of these jobs rises to more than \$270 million.

7. Under the Contract, Kawasaki must provide interim reports to MTA with actual jobs data, supplier data, and additional information related to Kawasaki along with its subcontractors’ and suppliers’ USEP compliance.

8. Taxpayers are footing the bill for this multi-billion-dollar Contract, so they have a right to monitor Kawasaki’s USEP compliance and its contractual obligations to create and retain quality American jobs. To accomplish this objective, JMA submitted FOIL requests to access government records about Kawasaki’s USEP commitments, its interim reports, and any communications to date between MTA and Kawasaki about its USEP compliance.

² See MTA board OKs \$4 billion Kawasaki rail-car order, *available at* [https:// www .progressiverailroading.com/mechanical/article/MTA-board-OKs-4-billion-Kawasaki-rail-car-order--53772](https://www.progressiverailroading.com/mechanical/article/MTA-board-OKs-4-billion-Kawasaki-rail-car-order--53772) (last visited Dec. 1, 2023).

9. MTA, however, has refused to produce unredacted records responsive to the requests, rendering it impossible to monitor Kawasaki's compliance with its USEP obligations.

10. Accordingly, JMA respectfully seeks an order compelling MTA to search for and produce records responsive to its FOIL request about the ongoing Contract, including, the Notice of Award, Kawasaki's USEP reports, any notices of non-compliance, and USEP audits.

PARTIES

11. **JMA:** Petitioner JMA is a national nonprofit watchdog organization dedicated to ensuring that the billions of public dollars spent on public-transit systems nationwide provide quality jobs for American workers, cleaner equipment, and more opportunity for low-income people and other disadvantaged groups. JMA regularly files FOIL-type requests across the country to obtain records related to public spending on infrastructure contracts. JMA has a small staff to carry out these goals, including in New York City, New York.

12. **MTA:** Respondent, Metropolitan Transportation Authority (of which New York City Transit is a division) is an agency of New York governed by the laws set forth in the Public Authorities Law Article 5, Title 9 and a body within the meaning of Article 78 of the Civil Practice Law and Rules ("CPLR"). MTA's principal offices are located at 2 Broadway, New York, New York 10004. MTA is a public agency subject to the requirements of this State's FOIL statute.

VENUE AND JURISDICTION

13. Pursuant to CPLR §§7804(b) and 506(b), venue lies in New York County, the judicial district where Respondent withheld the records and its principal offices are located.

14. Article 78 of the CPLR, §7804(b) confers jurisdiction upon this Court over the subject matter of this petition.

15. This Court has jurisdiction over this matter because the MTA's expressive and constructive denials of JMA's administrative appeal concerning its FOIL request cannot be further "reviewed by appeal to a court or to some other body or officer." CPLR §7801(1).

STATEMENT OF FACTS

A. JMA's Watchdog Role in Monitoring Jobs Creation by Government Contractors

16. JMA is a national nonprofit watchdog organization dedicated to ensuring that the trillions of public, taxpayer dollars spent on public procurement provide quality jobs for American workers, cleaner equipment, and more opportunity for low-income people and other disadvantaged groups.

17. To maximize quality-jobs creation in the United States, JMA advocates for the inclusion of USEPs in public procurement contracts, in which agencies tie awards of contracts to guarantees of quality jobs creation in the U.S.

18. JMA and its attorneys have obtained similar information related to USEP commitments and compliance for other public procurement contracts, including in *New Flyer of America, Inc. v. Los Angeles County Metropolitan Transportation Authority et al.*, No. BC621090 (L.A. Super. Ct.). There, the court held that bus manufacturer New Flyer's USEP hourly wage and benefits commitments and compliance as to a Los Angeles Metropolitan Transportation Authority contract for 900 buses were subject to public access, resulting in the production of unredacted USEP worksheets and interim USEP reports, among other documents.

B. MTA's Public Procurement Contract with Kawasaki

19. On July 22, 2016, MTA, through its operating agency New York City Transit Authority ("NYCTA" or "NYCT"), published RFP Solicitation R34211 for the purchase of 1,025 subway cars.

20. As a result of advocacy by JMA, the R34211 RFP was among the first MTA contracts to require bidders to submit detailed plans for the creation and retention of American jobs under the Contract, including career pathways, training for new hires, outreach, and detailed worksheets about the U.S. jobs that would be created if awarded the Contract.

21. The RFP stated that the USEP's "inclusion in the evaluation criteria demonstrates NYCT's commitment to the creation and retention of jobs for US residents." The USEP proposals were evaluated as part of the "Technical Proposal and Overall Technical Qualifications" score. The instructions asked bidders to address:

- **Compensation:** Proposers are asked to describe the percentage of jobs by each job category or type that the Proposer expects will be filled at the journeyman, apprentice/trainee, untrained entry level, or any other skill level; specialized skills or certificates for each job type; plans to develop skills of new hires necessary to meet the basic qualifications of the jobs; plans to provide career pathways connecting training completion; and the extent to which such skills would be transferable to other manufacturing positions. This narrative is to be accompanied by the U.S. Employment Plan worksheet where the dollar value of these commitments may be captured.
- **Description of Jobs Created and Retained:** Proposers are asked to describe the quality and range of U.S. employment opportunities proposed to be created and retained for the project; a workforce impact analysis that identifies the workforce skills needed to complete the project and the minimum requirements for each job/skill category proposed.
- **Outreach and Recruitment Plans:** Proposers are asked to describe strategies and plans for recruitment of new employees and any special outreach for entry level positions that will include training in contemporary manufacturing skills.
- **USEP Certification:** Certification that the information provided in the USEP sets forth the Proposer's best estimate of the information.
- **Cost Accounting:** Proposer and subcontractors must certify they can segregate direct hours and costs for this contract.

22. Proposers were also required to fill out a USEP worksheet containing "the total number of new and retained full time equivalent jobs located in the U.S. that will be involved in

performance of the Contract under the USEP, the direct dollar value of those jobs, the fringe benefit costs for those jobs, and the commitment the Proposer will make to achieve that level of job creation/retention in the United States [and] an identification of the number, type (by trade or craft), and compensation ranges for each of the employment types, duration, and location of the jobs to be created and retained in the U.S.”

23. As part of its Contract bid, Kawasaki (along with its subcontractors and suppliers) committed to provide approximately 470 quality American jobs for the base award, with a total estimated value of \$125 million, with detailed wage and benefits commitments. Kawasaki included two options for MTA to continue the contract and have additional subway cars made. If MTA exercises both options, the total potential value of these new jobs is estimated to be more than \$270 million. Kawasaki also made certain workforce-development and training commitments in its bid.

24. On February 16, 2018, MTA awarded the Contract to Kawasaki for up to 1,612 American-made subway cars and delivery of its promises to create hundreds of quality jobs for U.S. workers under the USEP, which was incorporated into the Contract’s terms.

25. The Contract is one of the MTA’s largest subway car contracts awarded, with the base order alone valued at nearly \$1.45 billion and a total potential value of nearly \$3.7 billion, including the two options for additional cars. The Contract is ongoing. To date, MTA has ordered a total of 1,175 cars, including the base contract of 535 cars, plus 640 cars under Option 1. MTA still has an additional option to order an additional 437 cars in the future.

26. Under the Contract, Kawasaki must provide interim reports to MTA with actual jobs data, supplier data, and additional information about Kawasaki along with its subcontractors’ and suppliers’ compliance with the USEP. Specifically, Article 1026 of the Contract provides:

A. The Contractor shall be required to submit reports on the status and progress of the fulfillment of its US Employment Plan (USEP), which reports shall be submitted no later than one year after the date of Contract Award, and thereafter

semi-annually for a period of four (4) years, after which reporting shall be on an annual basis. The status and progress report shall include the information contained in the USEP and Attachment 19, US Employment Plan Worksheet.

1. In the event the Contractor's report demonstrates a level of fulfillment of job creation and retention below that estimated in its USEP for the period covered by the report, the report shall be accompanied by an action plan of the Contractor specifying the steps the Contractor shall undertake in the current reporting period to make up any such shortfalls in fulfillment of the USEP, including milestones during the reporting period to make up such shortfalls.
 2. In the event the Contractor's report for a prior period demonstrates shortfalls, it shall submit interim reports quarterly during the succeeding period documenting its success in achieving milestones to make up such prior shortfalls.
 3. In the event a Contractor fails to submit a report or an interim report, or an interim report fails to demonstrate tangible progress toward achieving any remedial milestones, the Authority may give notice to the Contractor that it must resolve any non-compliance with the submitted USEP within ninety (90) days. In the event of such notice being given by the Authority, the Contractor must demonstrate compliance with the USEP by the end of the ninety (90) day period, or, in the alternative, demonstrate efforts deemed satisfactory to the Authority, in its discretion, to achieve such compliance.
 4. In the event the Contractor, after receiving a notice pursuant to paragraph 3 above, fails to demonstrate compliance with the USEP by the end of the ninety (90) day period, or, in the alternative, to demonstrate efforts deemed satisfactory to the Authority, in its discretion, to achieve such compliance, the Contractor will be subject to assessment of Liquidated Damages by the Authority for non-compliance with the terms of the USEP submitted (or for failure to submit reports on the prescribed basis). The liquidated damages will be assessed at an amount equal to the total dollar value of the Contractor's USEP that is not achieved. The Authority shall have the right to deduct such liquidated damage assessments from any monies due or which may become due hereunder. If the amount due the Contractor shall be less than the amount of liquidated damages due the Authority or if there is no amount due, the Contractor shall pay the difference upon demand by the Authority.
- B. To ensure compliance with the ongoing USEP submittal requirements through the duration of this contract, the Contractor shall designate an employee as Plan Administrator for the USEP no later than the date of Notice of Award.

- C. The Plan Administrator will liaise and serve as the Authority's point of contact with the Contractor regarding its Cost Accounting System.
- D. The Contractor's USEP including its status and progress reports shall be subject to an audit, in addition to the standard audit requirements in the contract, by the Authority or its agents at any time. Following an advance notice, such audit may include field visits to the Contractor, Subcontractor/Supplier premises. Any non-compliance revealed by an audit shall be resolved in accordance with the terms of paragraph A above.
- E. Non-compliance by the Contractor with the USEP shall be reported to NYCT's Vendor Performance Unit throughout the duration of the Contract. A record of such non-compliance shall be taken into consideration when making responsibility determinations of the Contractor's eligibility for any future award of a contract or purchase order by NYCT or any other agency within the MTA, regardless of whether submission of a USEP is required for that contract.

C. MTA Delays and Unreasonably Denies JMA Access to Records Necessary to Monitor Kawasaki's Jobs-Creation Compliance

27. On February 23, 2023, JMA sent a FOIL request via certified mail to the MTA (Case #03179572 per MTA's identifying system) (the "FOIL Request"). Ex. 1.³ The FOIL Request sought eight categories of public records regarding Kawasaki's (and its subcontractors' and suppliers') USEP commitments and compliance, which is ongoing:

- 1. Kawasaki Rail Car, Inc.'s ("Kawasaki" or "KRC") response to Request for Proposals ("RFP") for Contract R34211 (the "Contract") and related NYCTA records, including forms, scoring documents, memos, correspondence, summaries, presentations made to Metropolitan Transportation Authority ("MTA") and/or NYCTA board or staff, and communications regarding the same ("Request No. 1").
- 2. February 16, 2018 Notice of Award from Stephen Plochochi of NYCTA to Yoichiro Araki of Kawasaki ("Notice of Award"), attaching the Contract including Article 1026 re: United States Employment Plan (the "USEP") and the Contract's attachments, including but not limited [to] Attachments 16-19 related to the USEP ("Request No. 2").

³ All references to "Ex. ___" are to the Affirmation of Melanie Jamileh Prasad in Support of: (1) Verified Petition; and (2) Memorandum of Law in Support of Verified Petition for Judgment Pursuant to Article 78, filed concurrently herewith.

3. All USEP reports, interim reports, action plans, and other records submitted by Kawasaki and its subcontractors/suppliers pursuant to Contract Article 1026, including but not limited to annual and semi-annual USEP reports, action plans, interim quarterly reports, milestones, and communications regarding the same (“Request No. 3”).
4. All notices to Kawasaki or its subcontractor(s)/supplier(s) pursuant to Contract Article 1026 paragraph A.3 and/or A.4 regarding USEP compliance or non-compliance, and correspondence and meetings regarding the same (“Request No. 4”).
5. Kawasaki’s designation of its USEP Plan Administrator pursuant to Contract Article 1026 paragraph B, on or about the date of the Notice of Award (February 16, 2018) (“Request No. 5”).
6. Correspondence and other records regarding Kawasaki’s Cost Accounting System referenced in Contract Article 1026 paragraph C (“Request No. 6”).
7. All audits of Kawasaki’s USEP pursuant to Contract Article 1026 paragraph D, as well as all notices, correspondence, and draft and final reports regarding the same (“Request No. 7”).
8. All records of non-compliance by Kawasaki or a subcontractor(s)/supplier(s) with the USEP, including but not limited to reports to NYCTA’s Vendor Performance Unit as set forth in Contract Article 1026 paragraph E (“Request No. 8”).

Id. at 1-2.

28. Under FOIL, MTA was required to respond to JMA’s FOIL Request by March 3, 2023, but failed to do so.

29. On March 20, 2023, JMA submitted its first administrative appeal to MTA for constructive denial of its FOIL Request, which MTA denied on April 4, 2023.

30. On March 21, JMA received a FOIL acknowledgement from MTA, stating that a response would be sent within 45 business days (*i.e.*, by May 24, 2023). MTA failed to do so.

31. On June 22, 2023, JMA submitted its second administrative appeal to MTA for constructive denial of its FOIL Request, which MTA denied as moot on July 7, 2023.

32. On June 27, 2023, MTA responded to JMA’s FOIL Request, improperly withholding and redacting records by parroting certain statutory exemptions without meaningful analysis as

detailed in the concurrently filed Memorandum of Law. Specifically, MTA's responses to the requests were as follows:

Request No. 1: MTA produced amendments 1-14 and a redacted version of TF-1 form but refused to provide amendments 15-20 or other records, citing N.Y. Pub. Off. L. §§87(2)(c), (d), and (g).

Request No. 2: MTA produced heavily redacted records based on citation to N.Y. Pub. Off. L. §§87(2)(b), (c) and (d).

Request No. 3: MTA produced heavily redacted records, citing N.Y. Pub. Off. L. §§87(2)(c) and (d).

Requests No. 4-8: Simply stated: "same as the response to your enumerated requests 2, 3 & 4 and above."

Ex. 2. In all, MTA attached 33 records, but all but four were so heavily redacted that they were rendered useless. *See, e.g.*, Ex. 3 (KNYG-C-000044-USEP Worksheet Redacted).

33. On July 27, 2023, JMA filed a third appeal to challenge MTA's withholding and redaction of records, including redactions of records sent via email on June 27, 2023.

34. On August 11, 2023, MTA responded to JMA's third appeal by denying four of eight requests (Request Nos. 1-3, 6) on the inapt basis that they were "substantially similar" to prior requests even though most records did not exist at the time of prior requests. Ex. 4.⁴ As to the other four requests, MTA: (1) remanded Request Nos. 4-5 for a supplemental response within 60 days; (2) denied Request No. 7 based on §87(2)(g)'s exemption for "inter-agency or intra-agency materials"; and (3) said no records existed as to Request No. 8. *Id.* at 4-5.

⁴ As detailed in the concurrently filed Affidavit of Mo-Yain Tham ("Aff."), JMA submitted separate FOIL requests in 2018 and 2019 (Nos. 22575 and 24386). JMA's March 2, 2018 FOIL No. 22575 request ("2018 Request") sought materials submitted by proposers in response to the Contract RFP, including Kawasaki, Bombardier Transit Corp., and CRRC MA, and materials relating to the award for consulting services for post award support. Aff., Ex. A, thereto. JMA's June 18, 2019 FOIL No. 24386 request ("2019 Request") sought Kawasaki's first annual USEP report and related documents. Aff., Ex. B, thereto.

35. On October 27, 2023, MTA provided a supplemental response to Request Nos. 4-5. *See Ex. 5.* MTA provided three documents in response to Request No. 5 but declined to provide any documents responsive to Request No. 4, without discharging its statutory duty to provide a particularized basis as to why, and simply referred vaguely to “deliberative and inter/intra-agency communications.” *Id.*

36. On November 14, 2023, JMA filed a fourth appeal challenging MTA’s refusal to provide any documents responsive to Request No. 4.

37. MTA has not responded to the fourth appeal to date, thus constructively denying that appeal as of November 29, 2023.

38. JMA timely commenced this Article 78 proceeding within four months of MTA’s August 11 appeal denial and November 29 constructive appeal denial. *See CPLR §217.*

FIRST CAUSE OF ACTION
Article 78 Review of Wrongful Denial of FOIL Request

39. JMA repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

40. Article 78 is the appropriate method of review of agency determinations concerning FOIL requests in this State.

41. FOIL recognizes the public’s right to access and review government documents, and agency records are presumed to be public and subject to disclosure under FOIL.

42. JMA has a legal right under FOIL to the public records requested in the FOIL Request, as they are within MTA’s possession and do not fall within any exemption.

43. MTA has statutory obligations under FOIL to produce responsive records.

44. MTA failed to provide responses within the statutory time.

45. MTA had no reasonable basis to deny access to some or all of the requested records.

46. JMA has exhausted its administrative remedies with MTA.

47. JMA has no other remedy at law and has not made a prior petition for the relief requested herein.

48. This Petition is timely under CPLR §217 because it is filed within four months of MTA's appeal denial on August 11, 2023, and MTA's constructive appeal denial on November 29, 2023.

49. Respondent's disregard of its duties under FOIL has forced Petitioner to invest considerable resources into obtaining the unredacted documents.

50. Due to MTA's failure to respond within the statutory time and/or lack of reasonable basis to deny access to some or all the requested records, JMA is entitled to its reasonable attorneys' fees and other litigation costs reasonably incurred pursuant to N.Y. Pub. Off. L. §89.

REQUESTED RELIEF

JMA respectfully requests a judgment from this Court under CPLR §7806 as follows:

A. Directing MTA to comply with its statutory duty under FOIL to provide JMA access to the government records requested in JMA's FOIL Request.

B. Ordering MTA to search for and produce unredacted versions of responsive records within 60 days, including:

- 1) notice of award including unredacted Contract and USEP attachments;
- 2) Kawasaki USEP reports (annual, semi-annual, quarterly) and action plans;
- 3) notices of Kawasaki USEP non-compliance; and
- 4) audits of Kawasaki USEP compliance.

C. Alternatively, requiring MTA to search for and submit any responsive records withheld or redacted to the Court for *in camera* review;

D. Awarding reasonable attorneys' fees and litigation costs under N.Y. Pub. Off. L. §89.

E. Granting such other relief as this Court deems just and equitable.

DATED: December 11, 2023

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VERIFICATION

State of New York)
)
County of New York)

I, MELANIE JAMILEH PRASAD, am an attorney duly admitted to practice law in the courts of the State of New York, affirm under the penalties of perjury:

I have read the foregoing petition and its factual contents are true to my personal knowledge, except as to the matters alleged therein to be upon information and belief and, as to those matters, I believe them to be true.

DATED: December 11, 2023



MELANIE JAMILEH PRASAD

General Information

Case Name	JOBS TO MOVE AMERICA vs. METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT
Court	New York Supreme Court
Date Filed	Mon Dec 11 00:00:00 EST 2023
Docket Number	161989/2023
Parties	JOBS TO MOVE AMERICA; METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT