

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1291

CA 09-01011

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CARNI, AND GREEN, JJ.

IN THE MATTER OF GERSTER SALES & SERVICE, INC.,
RONALD A. GERSTER AND TRANE U.S. INC.,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

POWER AUTHORITY OF STATE OF NEW YORK, STATE
UNIVERSITY OF NEW YORK, WENDEL ENERGY SERVICES,
LLC, MCQUAY INTERNATIONAL, DAIKIN INDUSTRIES, LTD.
AND MLP PLUMBING & MECHANICAL, INC.,
RESPONDENTS-RESPONDENTS.

MAGAVERN MAGAVERN & GRIMM LLP, BUFFALO (JAMES L. MAGAVERN OF COUNSEL),
FOR PETITIONERS-APPELLANTS.

TERRYL BROWN CLEMONS, WHITE PLAINS (EILEEN P. FLYNN OF COUNSEL), FOR
RESPONDENT-RESPONDENT POWER AUTHORITY OF STATE OF NEW YORK.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF
COUNSEL), FOR RESPONDENT-RESPONDENT STATE UNIVERSITY OF NEW YORK.

PHILLIP M. FRIES, AMHERST, FOR RESPONDENT-RESPONDENT WENDEL ENERGY
SERVICES, LLC.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS D. KELEHER OF COUNSEL),
FOR RESPONDENTS-RESPONDENTS MCQUAY INTERNATIONAL AND DAIKEN
INDUSTRIES, LTD.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (DANIEL E.
SARZYNSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT MLP PLUMBING &
MECHANICAL, INC.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (John M. Curran, J.), entered March 4, 2009 in a
proceeding pursuant to CPLR article 78. The judgment dismissed the
petition.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs.

Memorandum: Petitioners commenced this CPLR article 78
proceeding seeking, inter alia, to annul respondent university's
determination awarding a contract to respondent Wendel Energy
Services, LLC for the installation of new air cooling equipment in

certain state university buildings. According to petitioners, their cooling equipment had been improperly excluded during the bidding process. We conclude that petitioners' appeal from the judgment dismissing the petition as time-barred must be dismissed as moot. The evidence in the record before us establishes that the contract in question had been awarded prior to the commencement of the proceeding and it is undisputed that the project is now completed (see *Matter of Fallati v Town of Colonie*, 222 AD2d 811; *Matter of Caprari v Town of Colesville*, 199 AD2d 705; cf. *Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906). "Since petitioner[s] did not seek injunctive relief during the pendency of this appeal, we find the controversy herein to be rendered moot" (*Fallati*, 222 AD2d at 813; see *Lukas v Ascher*, 299 AD2d 262). We reject petitioners' contention that the appeal is not moot because, inter alia, the petition also sought money damages. Inasmuch as the primary relief sought, i.e., annulling the determination awarding the contract and rebidding the contract, "is no longer possible, money relief cannot be incidentally granted" (*Matter of United Pioneer Corp. v Office of Gen. Servs. of State of N.Y.*, 155 AD2d 849, 850).