

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Yurcho, Lamar Lex,	:	
and Karen Lex, individually	:	
and t/d/b/a Lex Transportation,	:	
Appellants	:	
	:	
v.	:	No. 1430 C.D. 2011
	:	Submitted: September 10, 2012
Hazleton Area School District	:	
and The Hazleton Area School	:	
District Board of Directors,	:	
Martini Inc., and Evancho Bus	:	
Company, Inc.	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE SIMPSON

FILED: November 2, 2012

This disappointed bidder case involves school bus transportation contracts awarded by the Hazleton Area School District (District) in 2002. Plaintiffs<sup>1</sup> appeal from an order of the Court of Common Pleas of Luzerne County (trial court)<sup>2</sup> granting summary judgment in favor of two bus contract bidders, Martini, Inc. (Martini) and Evancho Bus Company, Inc. (Evancho) (together, Contractor Defendants), and the District and its Board of Directors (Board) (together, District Defendants). In granting summary judgment, the trial court

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<sup>1</sup> Plaintiffs are Mark Yurcho; Lamar Lex and Karen Lex, individually and t/d/b/a Lex Transportation.

<sup>2</sup> The Honorable Joseph M. Cosgrove presided.

determined that although Plaintiffs submitted the lowest bids for the bus routes, no contracts with the District resulted therefrom. The trial court also found no evidence of unequal treatment by District Defendants or tortious interference with a contract or business relationship by Contractor Defendants. For the reasons that follow, we affirm.

## **I. Background**

### **A. Bid Invitation**

In the Spring of 2002, District Defendants issued a bid invitation for the provision of school bus services for a three-year period with a two-year renewal option beginning with the 2002-03 school year. District Defendants prepared a detailed Request for Proposal Specifications (RFP) for interested bidders. See Reproduced Record (R.R.) at 17-41. The RFP's Statement of Purpose provided in part:

Transportation of [District] children is a specialized function. The essence of any student transportation contract is that the students be transported to and from school regularly, promptly, safely and without interruption or incident. The children's interest in transportation takes precedence over the interest of either the contractor and its drivers or the Board. The primary obligation of the contractor is to operate its affairs so the Board will be assured of continued reliable service.

Id. at 17 (emphasis added).

Section F(1) of the RFP, titled "Award or Rejection of Bid" provided in part:

The bid award for each route listed ... will be based on the lowest responsible bidder complying with the conditions of the invitation to bid is reasonable and it is to the interest of the owner to accept it. The owner, however, reserves the right to reject any and all bids or parts thereof or items therein and to waive any informality in bids received wherever such rejections or waiver is in the interest of the owner.

Id. at 19 (second emphasis by underline added). In addition, Section G of the RFP specified that in the event “equal bids” were submitted, District Defendants would consider: past performance, financial background, participation (good faith), and quality of equipment. Id. at 20.

Further, Section U(8) of the RFP, titled “Vehicles Provided,” stated (with emphasis added):

All school buses assigned to regular daily routes by the bidder pursuant to the contract shall be no older than ten (10) years based on date of chassis. Buses older than ten (10) years may be retained for use as spare buses, if designed by [sic] as such at the start of the school year.

Id. at 27.

### **B. Pre-Bid Meeting**

Plaintiffs attended the pre-bid meeting on July 9, 2002. In a Bid Proposal Questions and Answers statement prepared and issued by District Defendants in response to questions submitted by potential bidders, the District’s assistant business manager, Robert Krizansky (Assistant Business Manager) explained (with emphasis added):

We are handing out the questions that have been faxed to us by the end of the day yesterday. We have taken the time to answer them for you, and we will go over each question with you. Those will become part of the minutes, and the minutes will become part of the contract.

Supplemental Reproduced Record (S.R.R.) at 55b. The written questions and answers included the following:

Q. How will routes be awarded if for example: one contractor uses a bus in the 1-3 year age bracket versus a contractor using buses in the 4-6 or 7-10 age bracket?

A. The year of the bus is only a portion of the State formula. If everything else were equal then the newer bus would be the deciding factor.

\* \* \* \*

Q. The year of the bus, what if someone bids \$200.00 with a 2000 and someone bids \$180.00 for the exact same route with a 1995, how would you make a decision if its \$20.00 less and a five year older bus?

A. When you run the formula the newer bus will put you in a different bracket, then you will compare the formulas side by side to see which one will benefit the District.

Id. at 53b, 56b.

Regarding the age of the buses, Assistant Business Manager advised (with emphasis added):

I think as a bidder you would want to put in a newer bus. The chances are for example with a newer bus if you and someone else bidding that route and they have a newer bus and everything else is the same, you are going to probably lose that route anyway. So I would think you

would want to get the newest bus in there, even though you do not have it yet. We cannot accept anything greater than 10 years.

Id. at 56b.

Also, when asked if a bidder could use an 11 year-old spare for a bid and then get a newer bus later, the District's business manager, Tony Ryba (Business Manager), explained that he or she could not:

No, we would need the bus with the age limit by the start of school. We are going to base our analysis on the specific bus that is going to be doing that route. You are almost going to have to know what bus year you are going to buy.

Id. at 55b (emphasis added).

### **C. Plaintiffs' Bids**

Thereafter, Plaintiffs submitted bids on a total of 23 routes (five by Plaintiff Yurcho; 18 by Plaintiff Lex). On July 12, the Board opened the bids. After a discussion of the lowest responsible bidder standard, later referred to by Assistant Business Manager as Option #1, the Board tabled acceptance of the bids for later consideration. On July 23, the Board reconvened and prepared a tally sheet using Option #1, which did not take into consideration any reimbursement from the state. See R.R. at 43-44. According to the tally sheet, Plaintiff Yurcho bid on five routes and won four. Id. at 44. Plaintiff Lex bid on 18 routes and won seven. Id. However, no contracts were awarded on July 23.

### **D. Bid Awards**

On August 6, the Board reconvened. Rather than awarding the contracts based on the lowest responsible bids, the Board designated the successful bidders based upon the model year of the buses proposed for the contracts, later referred to by Assistant Business Manager as Option #4, one of the two options suggested to the Board by Contractor Defendants. As a result, Plaintiff Yurcho won only one route and Plaintiff Lex won only four.

### **E. Equity Action**

Shortly thereafter, Plaintiffs filed a complaint in equity seeking a preliminary injunction. Specifically, Plaintiffs averred the Board disregarded the lowest responsible bidder standard and awarded the contracts to the bidders with the newest model buses. Moreover, they argued this material deviation from the bid specifications warranted injunctive relief.

The trial court, however, ultimately denied Plaintiffs' requests for either preliminary or permanent injunctive relief. It determined Plaintiffs failed to prove irreparable harm and that greater harm would befall the District if the injunction were granted. In short, there would not be enough buses to transport the students. Plaintiffs filed an appeal, which this Court quashed because Plaintiffs failed to file the required post-trial motions. See Yurcho v. Hazelton Area Sch. Dist., (Pa. Cmwlth., No. 1917 C.D. 2003, filed April 24, 2004) (memorandum opinion) (hereinafter "Yurcho I").

## **F. Action for Breach of Contract; Tortious Interference; Equal Protection**

### **1. Complaint**

In September 2004, Plaintiffs filed a six-count complaint against Defendants averring breach of contract by District Defendants and tortious interference with a contract or business relationship by Contractor Defendants. Plaintiffs further averred Contractor Defendants conspired with District Defendants to improperly alter the bid specifications or the analysis applied to incoming bids to direct the bids to Contractor Defendants in violation of Plaintiffs' equal protection rights.<sup>3</sup>

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<sup>3</sup> Plaintiffs averred as follows. The Board's circulation of the RFP constituted a unilateral contract offer which Plaintiffs accepted when they provided the lowest bids for specified routes in compliance with the terms and conditions set forth in the RFP. Compl. at ¶15. However, after the contracts were opened on July 12, 2002, and before the contracts were ultimately awarded on August 6, Contractor Defendants communicated with the District's Assistant Business Manager seeking to construct a scheme of awarding bids based upon the newest bus for a given route. *Id.* at ¶21. The Board directed Assistant Business Manager to prepare such a scheme of bid awards in contravention of the bid specifications accepted by Plaintiffs. *Id.* at ¶22.

At the August 6 meeting, the Board reconsidered use of the lowest responsible bidder standard. In particular, the Board considered four more options for award of the bus contracts, each of which was based on a different standard. *Id.* at ¶23. The Board willfully disregarded the lowest responsible bidder standard (Option #1) by designating the successful bidder based upon the model year of the buses for each proposed contract (Option #4). *Id.* at ¶24. As a result of Contractor Defendants' collusion with District Defendants, and their interference with Plaintiffs' contract or business relationship with the District, District Defendants breached their contract with Plaintiffs by failing to award bus routes to the lowest responsible bidders. *Id.* at ¶25. The contracts between the parties required only that an eligible bidder use a bus that is not more than 10 years old. *Id.* at ¶26. As a result of Defendants' collusion, the District Defendants denied Plaintiff Yurcho four bus routes and Plaintiff Lex six bus routes for which they were the lowest bidders. *Id.* at ¶¶29, 30. As a result of Defendants' collusion, Plaintiffs lost income from the denied bus routes. *Id.* at ¶31. Plaintiffs also lost business opportunities and investments as a result of the lost income. *Id.* at ¶32. Plaintiffs' damages demonstrably exceed \$2,000,000. *Id.* at ¶32.

## **2. Defendants' Answers/New Matter**

Contractor Defendants and District Defendants each filed an answer denying Plaintiffs' material allegations against them. In their new matter, Defendants asserted Plaintiffs failed to state a claim upon which relief could be granted because no contracts existed and Contractor Defendants' conduct during the bidding process was privileged. They also raised a series of defenses, including statute of limitations, laches, res judicata, and waiver and estoppel.

## **3. Summary Judgment Motions**

Following the close of pleadings, six years elapsed before the parties completed discovery. In October 2010, Contractor Defendants filed a motion for summary judgment. Contractor Defendants attached the Bid Proposal Questions and Answers statement it issued at the 2002 pre-bid meeting. See S.R.R. at 52b-56b.

Contractor Defendants asserted they were entitled to judgment on Plaintiffs' claims for breach of contract and tortious interference with contract because no contract existed. Further, Contractor Defendants asserted Plaintiffs had no cause of action against them for tortious interference with a business relationship or prospective business relationship. As competitors for the school bus contracts, their actions were protected by privilege.

In addition, Contractor Defendants asserted they were entitled to summary judgment on Plaintiffs' equal protection claims. All of the bidders had



the same information and were treated the same. Contractor Defendants provided no new information to the Board after the submission of the bids.

District Defendants also filed a motion for summary judgment averring there are no genuine issues of material fact and that they are entitled to judgment as a matter of law based upon the pleadings and discovery.

#### **4. Plaintiffs' Answers to Motions for Summary Judgment**

Plaintiffs filed answers to the respective motions for summary judgment. They averred the issue of whether the District's issuance of the RFP constituted a unilateral contract offer involves a genuine issue of material fact that cannot be resolved on the basis of the pleadings and depositions of record. Plaintiffs further averred Defendants' actions in the conspiracy to alter the terms of the bid contract also remain at issue and such determinations cannot be made based on the existing record.

In addition, Plaintiffs assert, at hearing in Yurcho I, Defendants admitted knowledge of the conspiracy to alter the bid requirements. Plaintiffs attached a transcript from the preliminary injunction hearing in Yurcho I. See Pls.' Answer, Ex. A (N.T., 8/16/02 at 1-137; R.R. at 59-94).

#### **G. Trial Court's Order**

In June 2011, following oral argument and finding no genuine issue of material fact in dispute, the trial court granted Defendants' respective motions for summary judgment. In its order, the trial court reasoned (with emphasis added):

Defendant [District] requested bids for transportation of school children in 2002, and made it clear that the interests of these children superseded all other relevant interests. The [Board's] awarding the transportation contracts to the contractors with the newest buses was consistent with this provision. Further, while Plaintiffs submitted the lowest bids on the respective bus routes, no contract was ever awarded to them since the [Board] neither voted in favor of such award nor was any contract ever executed by the Board's president as required. Likewise, there is no evidence that the competing parties were treated differently nor had any impediment placed in the way of their submitting favorable proposals to the Board. For these reasons, the breach of contract claims and tortious interference claims may not proceed.

Tr. Ct. Order, 6/29/11, at 1-2.

The trial court also denied Plaintiffs' equal protection claim, noting they did not specify either a constitutional or common law claim, or indicate what state or federal constitutional provisions they relied upon. Id. at 2. In addition, the trial court found no evidence to support the equal protection violations alleged in Plaintiffs' complaint. Id.

In addition, the trial court noted Plaintiffs, as District taxpayers, "had standing to challenge the bidding process since, arguably, the lowest bid was rejected." Id. Nonetheless, Plaintiffs' taxpayer standing does not translate into a cause of action for breach of contract or tortious interference. Id.

### **H. Rule 1925 Opinion**

Plaintiffs appealed the trial court's order. In his Rule 1925 Opinion, the trial judge further explained his reasons for determining Plaintiffs' arguments

lack merit.<sup>4</sup> The court observed Plaintiffs' arguments hinge on their perception that a contract existed with District Defendants. The Board never approved a contract. Without such approval and execution, no contract exists between the parties. See Section 508 of the Public School Code of 1949 (School Code)<sup>5</sup> (affirmative vote of board majority required for entering into contracts of any kind where the amount involved exceeds \$100).

Next, the trial court found Plaintiffs' equal protection argument meritless. Plaintiffs cite no constitutional or statutory bases for their equal protection claims. As indicated in the RFP, the interest of the safety of the children took precedent over the interest of the contractors or the Board. Consequently, a contract award based on the age of the buses rather than the lowest bidder does not support Plaintiffs' equal protection claims. Tr. Ct., Slip. Op., 10/26/11, at 4-5.

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<sup>4</sup> The trial judge also found Plaintiffs failed to serve their notice of appeal upon the trial court. After being advised of the appeal by Commonwealth Court, the trial judge issued an order directing Plaintiffs to file a Concise Statement of Matters Complained of on Appeal and serve a copy of it on the trial court within 21 days. Plaintiffs did not serve their Rule 1925 Statement on the trial court until 28 days after the order. However, the trial court noted Plaintiffs apparently filed their 1925 Statement when they filed their appeal. Although receiving an affidavit of timely service by first class mail, the trial court observed that Plaintiffs provided no actual proof of the mailing date, such as a U.S. Postal Service Form 3817 (Certificate of Mailing). Thus, the trial court urged, Plaintiffs' arguments are subject to waiver and this appeal should be quashed. See Tr. Ct., Slip. Op., 10/26/11, at 2-3.

However, because the trial court addressed the merits of Plaintiffs' arguments, which Plaintiffs fully set forth in their Statement, we decline the trial court's suggestion to quash the appeal. See In re Corignani, 873 A.2d 790 (Pa. Cmwlth. 2005) (issue preserved on appeal even though statement of matters not timely filed with trial court where trial court nonetheless addressed the merits).

<sup>5</sup> Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §5-508.

In addition, the trial court determined Plaintiffs presented no evidence of tortious interference by Contractor Defendants. To that end, the trial court found no factual support for the allegations in Plaintiffs' complaint that Contractor Defendants devised or constructed a "scheme" for the awarding of contracts. Id. at 5.

## **II. Issues**

Plaintiffs state three issues for our review.<sup>6</sup> Plaintiffs contend: they have standing in this matter; the bid proposal governing the behaviors and standards of the bidding process constitute an enforceable contract; and, that issues of material fact exist regarding Plaintiffs' cause of action thereby rendering summary judgment inappropriate.

## **III. Discussion**

### **A. Standing**

Plaintiffs first contend they have standing in this matter as injured and innocent victims of both tortious acts and breach of contract, and as District

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<sup>6</sup> An appellate court's scope of review of an order granting summary judgment is plenary. Stimmler v. Chestnut Hill Hosp., 602 Pa. 539, 981 A.2d 145 (2009). Our standard of review is clear: the trial court's order will be reversed only where the trial court erred as a matter of law or abused its discretion. Id. Summary judgment is only appropriate where the record demonstrates there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Id. In considering a motion for summary judgment, the trial court must examine the whole record, including the pleadings, any depositions, any answers to interrogatories, admissions of record, if any, and any affidavits filed by the parties. Id. The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the genuine issue of material fact against the moving party. Id. Where the facts are so clear that reasonable minds cannot differ, a trial court may properly enter summary judgment. Id.

taxpayers. Plaintiffs also note District Defendants failed to raise any argument of immunity and are therefore foreclosed from so doing.

Plaintiffs assert taxpayers have standing to bring an action to protect and enforce the award of public contracts to the lowest responsible bidder. Am. Totalisator Co. v. Seligman, 489 Pa. 568, 414 A.2d 1037 (1980); Lutz Appellate Printers, Inc. v. Dep't of Prop. & Supplies, 472 Pa. 28, 370 A.2d 1210 (1977).

We agree that Plaintiffs enjoy standing as District taxpayers to challenge the legality of District Defendants' award of the bus transportation contracts. Am. Totalisator; Lutz. However, Plaintiffs do not have standing as bidders to challenge the award. Am. Totalisator; Nat'l Constr. Servs., Inc. v. Phila. Reg'l Port Auth., 789 A.2d 306 (Pa. Cmwlth. 2001). Regardless, the trial court did not determine Plaintiffs lacked standing in this matter. Rather, the trial court recognized that Plaintiffs had standing as taxpayers to challenge the bidding process as they did by seeking injunctive relief in Yurcho I.

However, as the trial court observed, Plaintiffs' standing as taxpayers does not then translate into a cause of action for breach of contract or tortious interference with a contract or prospective business relationship. See, e.g., J.P. Mascaro & Sons, Inc. v. Twp. of Bristol, 505 A.2d 1071 (Pa. Cmwlth. 1986) (although a disappointed bidder has taxpayer standing to challenge an award of a contract; a disappointed bidder does not have a claim of entitlement to a public contract based on the requirement that the contract be awarded to the lowest responsible bidder; the lowest responsible bidder requirement protects the

taxpayers; it does not vest a cause of action for breach of contract or damages in the lowest bidder).

## **B. Enforceable Contract; Tortious Interference**

### **1. Argument**

Plaintiffs next contend District Defendants' RFP, which governed the standards of the bidding process, constituted an enforceable unilateral contract offer. To that end, Plaintiffs assert District Defendants' circulation of the RFP effectively bound them to the competitive bidding process. See Conduit & Found. Corp. v. City of Phila., 401 A.2d 376 (Pa. Cmwlth. 1979) (purpose of competitive bidding is to invite competition and protect against fraud or corruption; if certain bidders are misled by the actions of the public authorities, then the bidding process lacks a level playing field). In short, Plaintiffs argue District Defendants are bound by the language in Paragraph F(1) of the RFP to award each route based to the lowest responsible bidder.

Plaintiffs further argue Contractor Defendants' conduct in persuading District Defendants to change the standard for the contract awards from lowest responsible bidder to newest buses gave rise to a cause of action for tortious interference with Plaintiffs' business or contractual relationship with District Defendants. See Joseph D. Shein, P.C. v. Myers, 576 A.2d 985 (Pa. Super. 1990) (three elements of tortious interference are: intentional action; that is improper; and results in the interference of the performance of a contract with another). As a result of the collusion of all Defendants, Plaintiffs urge they were denied the contracts for which they were demonstrably the lowest responsible bidder.

Defendants jointly respond that no contract existed for any party to breach. See Wayne Crouse, Inc. v. Sch. Dist. of Borough of Braddock, 341 Pa. 497, 19 A.2d 843 (1941) (even where school board advertises for bids for plumbing and heating work and receives what appears to be a satisfactory bid, no contractual relation arises therefrom until the parties execute a written contract embodying all material terms of the offer and acceptance).

Also, Defendants jointly cite R.S. Noonan, Inc. v. School District of City of York, 400 Pa. 391, 162 A.2d 623 (1960), where the Supreme Court recognized that a low bidder whose bid the school district rejected had no cause of action for damages against the school district. In fact, Noonan involved a construction contract governed by Section 751(a) of the School Code, 24 P.S. §7-751(a), which specifies that the contract be awarded to the lowest responsible bidder. In Noonan, the Court, citing Commonwealth, ex rel. Snyder v. Mitchell, 82 Pa. 343 (1876), observed that an unaccepted bid for certain work merely constituted a proposal that bound neither party as it was never consummated by contract. Therefore, the injury, if any, resulting from rejection of the lowest bid fell upon the public, not the low bidder. Id.

Further, as discussed above, Contractor Defendants argue Plaintiffs had no cause of action against them for tortious interference with a business relationship or prospective business relationship based on Contractor Defendants' request that District Defendants consider age of the buses as an option in awarding the bus contracts. As competitors for the school bus contracts, their actions were protected by privilege. See, e.g., Glenn v. Point Park Coll., 441 Pa. 474, 272 A.2d

895 (1971) (tortious inference claim under Pennsylvania law requires proof of: (1) existing or prospective contractual relation between complainant and third party; (2) purposeful action intended to harm existing contractual relation or to prevent a prospective one; (3) absence of privilege or justification; and (4) actual occurrence of harm or damage).

Contractor Defendants further argue the absence of an affirmative defense is an element of a tortious interference claim and must be pleaded and proven by the plaintiff. Capecci v. Liberty Corp., 406 Pa. 197, 176 A.2d 664 (1962). Where the parties are in direct and active competition with each other for a contract, the parties' actions are privileged unless it is shown that their actions violate public policy or a provision of law. Neel v. Allegheny Cnty. Mem. Park, 391 Pa. 354, 137 A.2d 785 (1958).

## **2. Analysis**

### **a. Contract**

The trial court did not err or abuse its discretion in determining that no contract between Plaintiffs and District Defendants existed. An affirmative vote of the majority of the school board members is necessary for a contract to be binding on a school district. Albert Gallatin Area Sch. Dist. v. Penn Transp. Servs., Inc., 704 A.2d 184 (Pa. Cmwlth. 1997). Even if there are no minutes or a record reflecting school board approval, solid proof of majority approval of a contract is still needed. Hazleton Area Sch. Dist. v. Krasnoff, 672 A.2d 858 (Pa. Cmwlth. 1996). Absent such proof, there can be no recovery against the school district. Id.



We also flatly reject Plaintiffs' argument that District Defendants' circulation of the RFP constituted a unilateral contract offer which Plaintiffs accepted. In National Construction Services, a disappointed bidder similarly claimed a government agency's solicitation for bid proposals, which provided that the project would be awarded to the lowest bidder, constituted an offer that it accepted when it submitted its bid. In that case, the disappointed bidder argued the agency's failure to award it a contract set forth a claim for breach of contract. In dismissing this argument, we reasoned:

What this contention ignores is that a solicitation for bid proposals is not an offer but only an invitation for parties to submit bids in response to this request. The submission of the bid is, in fact, the offer which the contracting agency is free to accept or reject. As set forth in Corbin on Contracts §2.3 (rev. ed. 1993):

[W]hen someone advertises for bids [it] is the same as that pertaining to auctions. The advertisement is not an offer. It is a request for offers. This is so even if the common practice is to accept the best bid made. Occasionally, and especially in public bid-letting procedures, the best bidder will have a statutory right to be awarded the contract. This statutory right does not create a contract.

In Pennsylvania, as in most states, the 'best bidder' has no right to have the contract awarded to it because the 'lowest responsible bidder' provisions are not there to give the bidder any rights but to protect taxpayers as evidenced by the settled law that only taxpayers have a right to seek an action to enjoin the contract.

Nat'l Constr. Servs., 789 A.2d at 309 (emphasis added).

Here, the issuance of the RFP did not bind District Defendants to award the bus contracts to Plaintiffs as the lowest responsible bidders upon submission of the lowest bids. Noonan; Wayne Crouse; Nat'l Constr. Servs.; Gallatin Area Sch. Dist. Absent acceptance of Plaintiffs' bids by a majority vote of the Board, Plaintiffs' have no cause of action for either breach of contract or tortious interference with a contract, since no contract existed. Id.

### **b. Prospective Business Relationship**

What is more, Contractor Defendants, in asking District Defendants to consider the age of the buses as an option in awarding the bus contracts, did not improperly interfere with Plaintiffs' business relationship or prospective business relationship with District Defendants. As discussed above, where the parties are in direct and active competition with each other for a contract, the parties' actions are privileged unless it is shown that their actions violate public policy or a provision of law. Neel. In other words, where an individual acts legally to advance his legitimate business interests and did not act solely to intentionally injure the interests of another, a claim of tortious interference with a prospective business relationship must fail. Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466 (1979).

Here, Contractor Defendants did nothing illegal; the RFP clearly stated that the transportation interests of the students, including safety and reliability, took precedent over the interests of the contractors or the Board.<sup>7</sup>

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<sup>7</sup> In Yurcho I, Assistant Business Manager testified the Board considered five separate options before awarding the contracts. See N.T., 8/16/02, at 61; R.R. at 75. Assistant Business **(Footnote continued on next page...)**

Further, the Bid Proposal Questions and Answers strongly advised all bidders to bid using the newest buses.<sup>8</sup> Consequently, Plaintiffs' claim for tortious interference with a prospective business relationship, based on Contractor Defendants' suggestion that the Board award the contracts based on the newest buses, must fail. Thompson Coal; Neel.

## C. Outstanding Issues of Material Fact

### 1. Argument

Plaintiffs further contend there are unresolved issues of material fact regarding their cause of action thereby rendering summary judgment by the trial court inappropriate. In considering a motion for summary judgment, Plaintiffs urge that the nonmoving party is entitled to all reasonable inferences. McFadden v. Am. Oil Co., 257 A.2d 283 (Pa. Super. 1969). The trial court's function is not to determine issues of fact, but solely to determine if there is an issue of fact to be tried. Id.

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**(continued...)**

Manager and his staff prepared the five options. Id. Contractor Defendants suggested utilization of Option #4 or Option #5, which were based on the age of the buses. See N.T. at 66; R.R. at 76. Ultimately, Assistant Business Manager testified, the Board selected Option #4 by an 8-0 vote with one abstention. Id. at 72; R.R. at 78. Elaine Curry, a Board member, testified the Board selected Option #4 in the best interest of the students. Id. at 89-90, 102-103; R.R. at 82, 85-86. Ms. Curry acknowledged that in the end, the Board did not use the lowest responsible bidder standard. Id. at 105; R.R. at 86.

<sup>8</sup> Assistant Business Manager testified the RFP permitted bidders to bid using buses they had not yet purchased. N.T., 8/16/02 at 68-69; R.R. at 77. Assistant Business Manager also stated this in the Bid Proposal Questions and Answers. See S.R.R. at 56b ("I think you would want to get the newest bus in there, even though you do not have it yet.").

Here, Plaintiffs contend a genuine issue of material fact exists as to whether District Defendants' RFP constituted a contract offer. Plaintiffs further contend the record established that a conspiracy existed between Contractor Defendants and District Defendants to alter the terms of the bid contract. For example Contractor Martini committed to purchase new buses before they awarded any routes. Plaintiffs urge this gives rise to an inference that a conspiracy existed.

## 2. Analysis

For the reasons discussed above, there are no outstanding issues of material fact as to whether a contract existed between Plaintiffs and District Defendants. The Board never accepted Plaintiffs' bids or voted to award them the contracts at issue. Therefore, no contracts existed. Noonan; Wayne Crouse; Nat'l Constr. Servs.; Gallatin Area Sch. Dist.; J.P. Mascaro.

In addition, even assuming Contractor Defendants persuaded District Defendants to award the contracts based on the newest buses, there are no outstanding issues of material fact concerning Plaintiffs' claim of tortious interference with a prospective business relationship. As noted, the RFP expressly stated the "children's interest in transportation takes precedence over the interest of either the contractor and its drivers or the Board." R.R. at 17. Therefore, Contractor Defendants, as direct competitors of Plaintiffs, did nothing illegal or improper by requesting the Board to consider the option of awarding the contracts to the bidders with the newest buses. As such, Contractor Defendants' conduct was privileged. Thompson Coal; Neel. Therefore, Plaintiffs have no cause of action for tortious interference with a prospective business relationship. Id.

#### **IV. Conclusion**

For the above reasons, we discern no error in the trial court's grant of Defendants' motions for summary judgment. Accordingly, we affirm.

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ROBERT SIMPSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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and Karen Lex, individually	:	
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Hazleton Area School District	:	
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District Board of Directors,	:	
Martini Inc., and Evancho Bus	:	
Company, Inc.	:	

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of November, 2012, the order of the Court of Common Pleas of Luzerne County granting summary judgment on behalf of Appellees Hazleton Area School District, The Hazleton Area School District Board of Directors, Martini, Inc. and Evancho Bus Company Inc., is **AFFIRMED**.

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ROBERT SIMPSON, Judge