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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

L&M Bus Corp.

-v-

The New York City Dept. of Education

12-17-08 CK

INDEX NO. 104001-2008

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

NYS SUPREME COURT RECEIVED DEC 17 2008 IAS MOTION SUPPORT OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the first cause of action is granted to the extent that it is ORDERED and DECLARED that the following specifications are unlawful and that respondents are permanently enjoined from soliciting bids for Pre-K and EI Bus Transportation Services upon such specifications, opening any bids already submitted, or awarding any contracts based on such specifications:

(1) Section 4.24, "Employee Protection Provisions";

(2) Section 1.100(B), regarding DOE's right to change the service requirements in the Contractor's Manual at any time without prior notice;

(3) Section 4.10, to the extent it permits DOE to add entire schools and programs in the vendors' service requirements without adjusting the vendors' prices;

(4) Section 4.10, to the extent it provides for a price adjustment only in the event there a loss of ridership in excess of 30%;

(5) Section 1.48, "Liquidated Damages";

(6) Section 1.35, "Discount for Prompt Payment";

(7) Section 1.71, "MacBride Principles Provisions for Board of Education Contracts"

and it is further

FILED DEC 17 2008 NEW YORK COUNTY CLERK'S OFFICE

Dated: _____ _____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that respondents shall include the addresses of all children presently at the schools to and from which children are to be bused; and it is further

ORDERED that respondents limit its insurance requirements in Section 2.6.14 to coverage that its commercially available; and it is further

ORDERED that the branch of the petition seeking an order and declaration that the following specifications are unlawful and made in excess of authority, and revising and/or striking same is denied:

(1) Section 1.5A, "Termination for Convenience";
(2) Section 1.93, "Dispute Resolution";
and it is further

ORDERED that the branch of the petition which seeks a declaration that NYC Admin. Code 6-115.1 is in conflict with the public bidding laws is denied; and it is further

ORDERED that the second cause of action is for an order directing DOE to solicit bids only upon revised specifications as determined by the Court is granted to the extent noted above; and it is further

ORDERED that the third cause of action seeking a declaratory judgment that the specifications are unlawful and made in excess of authority and that that may not be employed by DOE for the purpose of soliciting bids or awarding contracts for Pre-K and EI bus transportation services is granted to the extent noted above; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated 12/17/08 ENTER: , J.S.C.

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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L&M BUS CORP., B&F SKILLED, INC., BOBMAR TRANSPORTATION INC., CAROL BUS TRANSPORTATION CORP., DON THOMAS BUSES INC., FORTUNA BUS COMPANY, INC., HAPPY CHILD TRANSPORTATION LLC, HAPPY DAY TRANSIT, IRIDIUM SERVICES CORP., USA BUS CORP., MARCH TRANSPORTATION INC., MISSY TRANSPORTATION, INC., NANNY'S BUSES INC., P&O TRANSPORTATION, PENNY TRANSPORTATION, INC., PINNACLE BUS SERVICE, INC., PRIDE TRANSPORTATION SERVICES INC., RIMAR TRANSPORTATION, ROBIN TRANSPORTATION LTD., ROUND TRANSPORTATION, SMART PICK THOMAS BUSES, INC.,

Index #104001-2008

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and DAVID N. ROSS, in his official capacity as Executive Director of the Division of Contracts and Purchasing,

Respondents.

LOCAL 1181 OF THE AMALGAMATED TRANSIT UNION,[1]

Intervenors.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioners, comprising various pupil bus transportation companies in New York City, commenced this Article 78 proceeding as a result of the New York City Department of Education's insertion of, *inter alia*, "employee protection provisions" ("EPPs") into bid

[1] The Court previously granted Local 1181 of the Amalgamated Transit Union ("Local 1181") leave to intervene in this proceeding.

specifications for Pre-Kindergarten ("Pre-K") and Early Intervention ("EI") bus transportation contracts. Petitioners claim that as such provisions violate New York's public bidding laws, this Court should issue a declaration that the specifications are unlawful and made in excess of authority, and that respondents, the New York City Department of Education ("DOE"), the Board of Education of the City of New York ("BOE")[2] and David N. Ross (collectively, "respondents") "failed to perform a duty enjoined by law." Petitioners also seek to permanently enjoin DOE from soliciting bids for such transportation services upon the specifications, from opening any bids already submitted, and from awarding any contracts based on the specifications (first cause and third causes of action). Petitioners further seek an order directing DOE to solicit bids only upon revised specifications as determined by the Court (second cause of action).[3]

Background[4]

Until 1979, the BOE administered "Special Education" and "General Education" contracts with private bus companies to transport disabled children and the general population of

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[2] In 1992 under Mayor Michael Bloomberg, the BOE became the DOE.

[3] Petitioners seek the following revisions: that DOE (1) remove the EPPs, (2) provide the addresses of all children which are to be bused, (3) remove Section 1.100(B), (4) remove or revise Section 4.10 to the extent it permits DOE to add or delete entire schools and programs without adjusting vendor pricing, (5) remove or revise Section 4.10 which provides for a price adjustment only in the event there is a loss of ridership in excess of 30%, (6) eliminate the "liquidated damages" set forth in Section 1.48, (7) remove Section 1.35, (8) remove section 1.28, (9) remove or revise Section 1.5A, (10) remove the dispute resolution procedures under Section 1.93, (11) remove Section 1.71, requiring compliance with the MacBride Principles, and (12) limit its insurance requirements in Section 2.6.14 to coverage that its commercially available. Further, petitioners request that if the Court deems it necessary to strike the MacBride requirements from the specifications, to issue a declaration that NYC Admin. Code 6-115.1 is in conflict with the public bidding laws.

The MacBride Principles, recommended by Dr. Sean MacBride, Nobel Peace laureate, relate to "nondiscrimination in employment and freedom of workplace opportunity" for employers doing business in Northern Ireland (NYC Adm. Code § 6-115.1; United Technologies Company, Fed. Sec. L. Rep. P 76,635; 1993 WL 48821).

The request to remove section 1.28 was withdrawn (*see* Memorandum Decision, dated September 5, 2008, fn 5).

[4] Familiarity with the background facts are assumed, in light of the Court's September 5, 2008 decision, and are repeated herein only as relevant to this Court's determination.

school-aged children to their schools. Contracts were awarded pursuant to the competitive bidding procedure under New York Education Law §305, and included the following provision:

> . . . employees of private bus companies who lose their jobs as a result of the loss of the contract by a previous contractor must be given priority in hiring according to seniority by any replacement contractor.

When the BOE attempted to exclude the above provision from certain solicitations, certain employees from the Amalgamated Transit Union ("ATU") commenced a strike. The BOE, Local 1181, and major bus companies subsequently entered into a court-ordered settlement agreement, known as the "Mollen Agreement"[5] whereby EPPs were required to be included in the specifications for the 1979 Special Education and General Education contracts. The EPPs established a "Master Seniority List" (the "List") requiring contractors with the BOE to give priority in hiring to employees on the List, until the List is exhausted, when such employees become unemployed due to the reassignment of routes.

Meanwhile, the New York City Department of Transportation ("DOT") had been administering transportation contracts for children in the Pre-K and EI programs by competitive sealed bidding, *without* such EPPs.

In 2006, DOT transferred its Pre-K and EI contracts to DOE. Local 1181, which represents approximately 325 drivers and escorts who work for Pre-K and EI school bus companies, asked DOE to include the EPPs in the Pre-K and EI transportation contracts to be solicited. As the Family Court Act §236 (3)(b) (the "FCA") requires that such contracts be procured by competitive sealed bidding and awarded to the lowest responsible bidder, DOE sought an amendment to the FCA to permit solicitation through a "Request for Proposals"

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[5] Local 1181 Verified Answer, ¶¶ 322-326.

("RFP") process, wherein DOE would be permitted to award contracts which "could be required to include protection of bus company employees." This proposed legislation was rejected. Yet, DOE included EPPs in its solicitation, under Section 4.24.1.2 as follows:

> "Any new contractors, *i.e.*, those who did not provide service pursuant to contract expiring June, 2008 . . . shall give priority in employment in July, 2008 or thereafter on the basis of seniority to every operator (driver) . . . and attendant (escort-matron) performing such service pursuant to such contract starting from the first employee from the MSLs until such MSLs are exhausted."

The Petition

According to petitioners, DOE's solicitation is anti-competitive and creates uncertainties which cause vendors to inflate their bids. As a result, the solicitation violates the twin goals of the public bidding statutes, which are to protect the public fisc by obtaining the best work at the lowest possible price and prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts.

The EPPs contained in the solicitation are anti-competitive because they make it impossible for bidders to put in a calculated bid. Under the EPPs, a new contractor must give priority in employment to every driver, mechanic, and escort and who will be without a job (and placed on the List) after DOE awards contracts. A contractor does not know who is going to be unemployed and to be given priority in hiring until after the bidding process is complete. Therefore, contractors must submit an inflated bid to cover this eventuality, the very result public bidding statutes were intended to prevent.

Petitioners also claim that the solicitation violates the public bidding statutes in other respects. The solicitation does not contain the addresses or boroughs of the children to be bused to a given school, as did DOT's prior solicitation. Since the number of buses needed depends on

where the students live in relation to each other and the schools they attend, bidders cannot calculate the number of buses they will need to carry students to schools. Section 1.100 reserves DOE's right to change the rules in the Contractor's Manual "at any time without prior notice" after the contract is awarded. Thus, contractors cannot submit bids with full knowledge of their responsibilities under the contract. Likewise, under Section 4.10, DOE can require that a bidder service any new school that enters a particular geographical "Zone" after the contract is entered into, at the same unit price originally bid, without permitting the bidder to adjust its price. And, DOE's recent amendment to this Section permits an adjustment only in the event of a decrease in ridership, and fails to consider that a vendor's cost is based on the number of buses required.

In addition, section 1.48, the liquidated damages provision, does not represent an equitable attempt to cover damages DOE reasonably expects to suffer from any violation, and Section 2556(11) of the Education Law does not permit the inclusion of such damages in contracts for transportation services. Since Section 1.49 assesses $250 to "cover the administrative costs" to "take corrective action due to the failure of the contractor to perform in accordance with the contract," there is no basis for the liquidated damages ranging as high as $1000 for the 48 violations listed in 1.48, other than to impose a penalty. Such penalties deprive the vendors of the flow of funds necessary to properly transport children.

Section 1.35, which permits DOE to "deduct" 2% from invoices submitted by the contractor if payment is made within 30 days, misapplies the Chancellor's "prompt vendor payment" priority of assuring timely payments to vendors and penalizes the contractor for prompt payments made by DOE. No such provision is imposed upon General Education contract providers, who could absorb a potential loss to the vendor resulting from a prompt payment by

DOE.

Section 1.93's dispute resolution procedure, which requires disputes to be resolved by DOE's Chief Executive for School Support Services, is unsupported by statutory law.

Further, Section 1.71, which limits bidders to those having no business operations in Northern Ireland or who abide by the MacBride Principles imposed by local law, conflicts with the public bidding laws. Additionally, the specifications pertaining to insurance coverages are so broad and vague, and encompass coverage that is not commercially available.

DOE's Answer

DOE argues that public bidding laws are intended to benefit taxpayers, and should be construed with sole reference to the public interest. The bid specifications were approved as to form by Corporation Counsel and reflect the expertise of DOE as to how best to provide for the transportation of Pre-K and EI students. DOE's acts should be accorded a presumption of regularity, which petitioners failed to overcome. DOE has wide authority and discretion to create the bid specifications at issue, which are rational and reflect DOE's business judgment.

As union officials have threatened to strike if the EPPs are not included in the contracts, the EPPs ensure that the subject transportation services proceed without disruption. Further, EPPs facilitate the retention of staff familiar with the needs of Pre-K and EI children, thereby yielding better overall performance results. EPPs further minimize certain pension-related "withdrawal liability" risks that dissaude many prospective bidders from bidding.[6] And,

[6] Under Federal law, an employer that participates in a "multi-employer" pension plan, but later withdraws, is required to pay a certain amount into the plan. However, EPPs in DOE contracts have resulted in certain exemptions from withdrawal liability, on the basis that the exemption poses no risk to the insurance system, and a multi-employer plan is not harmed by the normal attrition of employers where "successful bidders hire workers" who are on a seniority list.

employee protection provisions similar to those herein have been in DOE's school-aged children bus contracts for decades, and the Legislature recently approved the extension of these contracts. That the proposed amendment was rejected in the legislature does not indicate legislative disapproval.

The standard of legal review applied to PLAs, which establish labor unions as the exclusive collective bargaining representatives, limit work on a project to contractors that sign pre-negotiated agreements with unions, and impose other constraints on employment, is inapplicable to the EPPs here.

DOE's solicitation is a "requirements contract" designed by contract "class," and the class consists of two zones of pre-schools and program sites within a geographical area. Because the actual number of children to be transported varies from year to year and throughout the year, and the number of pre-schools and programs in a zone can change, the solicitation requires the bidder to provide services to all eligible children in a zone based upon a fixed price per child per day. Requiring the bidder to provide transportation services to all program participants at a fixed price, even when the number of children fluctuates significantly is consistent with the purposes served by requirements contracts. The fact that the actual number of students transported within a zone may change during a given year is no different from the variation that exists under any basic requirements contract, and does not create an uncertainty on which it is impossible to bid.

A substantial number of Pre-K and EI students are not in the same school or in the same residence from year to year, making their current addresses meaningless.

In addition, the termination for convenience clause, without a provision requiring good faith, is valid. Petitioners do not have a vested property interest in any public bid or contract

with terms to their liking. And, DOE may require that bidders follow the School Bus Contractor's Manual, and any claim that DOE will amend such rules in an arbitrary manner is unfounded and premature.

The liquidated damage provision is proper, and applies to serious violations, and there is no showing that this provision is grossly disproportionate to the damages risked or involves a loss capable of precise estimation in all circumstances. Further, sanctions against employers for acts of its employees are permissible.

The 2% discount DOE receives is fair, serves the public interest, and applies equally to all invoices that are paid within the specified time periods. All bidders can take these discounts into account when computing the amount of their bids.

Alternative dispute resolution clauses involving a governmental entity which provide that the arbiter of disputes be an employee of such entity are also permissible.

Also, petitioners lack standing to challenge the MacBride Principles in Section 1.71 as they failed to allege that they have any business operations in Northern Ireland. There is no barrier to bidding if a bidder does not have business operations in Northern Ireland.

Nor is there any indication that insurance for coverage is commercially unavailable. Vendors have entered into contracts with DOE that have included insurance requirements, and a bidder can seek a waiver or alternate coverage if it is unable to meet the insurance obligations.

Moreover, petitioners failed to demonstrate that they will suffer irreparable harm if a stay is not issued. Petitioners may challenge the specifications after the bids are accepted and contracts awarded. If the Court finds that the bids are improper, DOE can reject all bids or rescind an award. If new contracts are not awarded and in place by the time the current Pre-K

and EI contracts expire, and students, their parents, and DOE will be irreparably harmed.

Finally, the equities favor the DOE. Providing safe, timely and effective transportation of Pre-K and EI students is best accomplished by proceeding with the acceptance, opening, and award of the competitive bids.

Local 1181's Answer

Local 1181 argues that EPPs are not linked to corruption.[7] In 2006, following the indictments of two of Local 1181's officers, the ATU placed Local 1181 into trusteeship and appointed two International Vice Presidents to serve as co-trustees to take control over Local 1181's operations. Ann Chiaravano, the former manager of the welfare and pension funds associated with Local 1181 who pleaded guilty to obstructing a federal investigation, was not an officer or employee of Local 1181. Further, the allegation that former Recording Secretary, Michael Cordiello ("Mr. Cordiello") violated the National Labor Relations Act by committing acts of coercion and intimidation was dismissed. To ensure that Local 1181 remains free of any corrupt influences, the Trustees have retained attorneys, forensic auditors and other financial and fiduciary experts to review all of Local 1181's operations, policies and procedures.

Further, the EPPs promote the recruitment and retention of highly qualified workers by ensuring that employees enjoy security in their job, and wage and benefits. According to a report issued to respondents by KPMG Peat Marwick LLP in 1995 (the "1995 KPMG report"),[8] the "system works well and delivers safe, reliable, high quality service. . .which has taken a lot of

[7] Local 1181 takes no position with respect to the legality of the other specifications.

[8] KPMG Peat Marwick LLP reviewed the BOE's pupil transportation procurement process and prepared two reports, one in 1994 entitled "Study of Transportation Services for Preschool Children With Disabilities in New York City" (the "1994 KPMG report") and a "final report" in 1995 entitled "Report to the Chancellor Review of Pupil Transportation Procurement Issues" (the 1995 "KPMG report").

years to achieve. . . ." The workforce is "largely experienced, passed all background and other tests of the City," and if EPPs were eliminated, "it is not clear whether the resulting bus service would be comparable in terms of safety, reliability and performance. . . there would probably be at least a decrease in service at the beginning."

In contracts without EPPs, there are problems with retaining a qualified workforce; representatives of two bus companies serving Pre-K students indicated that there is a 75% turnover rate of employees monthly, and that there is a constant shortage of Pre-K drivers. And, in the absence of EPPs, contractors may not be able to retain more senior and more qualified employees. DOE can also investigate and penalize drivers and escorts found to have engaged in misconduct. In addition, DOE's support of an amendment to the Family Court Act to permit DOE to require EPPs indicates that DOE discerned that EPPs ensure that contractors would be "responsible" by helping retain experienced drivers.

EPPs also promote labor peace and stability and uninterrupted completion of public contracts, and that the avoidance of strikes saves the respondents and citizenry substantial costs. According to the 1994 KPMG report, DOE included the EPPs in conformity with its own policy and precedent, as well as Local 1181's preparedness to strike if DOE did not include the EPPs. The 1994 KPMG report reflects that in 1989 when the BOE was responsible for Pre-K student bus transportation, BOE included EPPs in its bid documents. However, due to an anti-trust lawsuit against it, BOE proposed to remove the EPPs. When Local 1181 advised that a strike would ensue, the City reassigned responsibility over such contracts to DOT, and agreed with Local 1181 to pay drivers according to the collective bargaining agreement.

The 1995 KPMG report indicates that if work is bid without EPPs, there "will likely be

an immediate strike." Since the employers of the workers are private sector companies, their employees are not prohibited by the Taylor Law from striking. Local 1181 also has millions of dollars in resources from the international union and a strike fund to mount an effective strike. And, Local 1181 has the resolve to fight for EPPs, which they secured after the 1979 strike. Last year, Local 1181 held a 10-day strike, resulting in Local 1181 obtaining a favorable collective bargaining agreement with the New York City Transit Authority. Also, Local 1181's collective bargaining agreements with school bus companies performing DOE work, including the current agreement, contain a waiver of the no-strike provision and may be reopened in the event DOE promulgates bid specifications without the EPPs. Local 1181 points out that the members' resolve to strike is also demonstrated by their past actions: according to a 1995 *New York Times* article, when the City threatened to end the EPPs, there was a wildcat strike by employees of one company. And, under the DOT regime, a newspaper reported that there was at least one strike.

Local 1181 contends that contrary to petitioners' claim that Local 1181 has not agreed to refrain from a labor strike, the school bus companies agreed not to cause strikes during the term of their contracts with DOE under a clause similar to RFB §1.50. It was not necessary to include a commitment not to strike in the Mollen Agreement in 1979, as the commitment was already included in the collective bargaining agreement. While no one wants a strike, a strike is neither unlawful nor unreasonable.

And, awarding contracts without EPPs "threatens extreme disruptions to the educational program with no guarantee that cost savings will be achieved or service quality will be maintained." Following the transfer of Pre-K school bus contracts from DOT to DOE in 2006, Mr. Cordiello of Local 1181, advised DOE that Local 1181 was not opposed to competitive

bidding or contract extension as long as EPPs were included, and that if EPPs were not included, a strike would ensue. Mr. Cordiello pointed out that the collective bargaining agreement with the General Education school bus employers contained the exception to the no-strike clause that permits a strike in such circumstances. At a later meeting, DOE advised Mr. Cordiello that DOE was considering submitting a proposed bill at the state legislature. Thus, DOE correctly took seriously the possibility of a citywide strike in the event EPPs are not included.

Local 1181 also adds that it will seek to incorporate the EPPs directly in its collective bargaining agreement with industry employers in next year's negotiations, since it would be the product of collective bargaining with private sector employers, and would not be subject to challenge as inconsistent with New York's competitive bidding laws.

Given incumbent employers' inherent advantages in competitive bidding even in the absence of EPPs, it is unlikely that there will be mass displacement of work or of existing employees from their jobs with their present employers.

Although petitioners' claim that a new company seeking to obtain Pre-K and EI work will need to hire its workforce from the List, virtually all of the petitioners are already providing Pre-K and EI school bus services under DOE contracts. Existing companies that win additional work through the bidding process may continue to perform contracts with their existing employees. Thus, existing contractors that win and lose work, but experience a net loss of work, may not need to hire any employees from the List. Existing contractors that only win work or win and lose work, but experience a net gain of work need only hire employees from the List. Even for those few petitioners who are not existing contractors, since Local 1181 only has a collective bargaining agreement with one employer providing Pre-K and EI school bus services, petitioners

exaggerate the likelihood that a new contractor will need to absorb a higher paid workforce.

Further, any material impact of the EPPs on labor costs for companies that obtain Pre-K and EI transportation contracts will not be due to Local 1181 wages and benefits. The EPPs will affect, at a maximum, approximately 250 Local 1181 members who are employed by two of the approximately 37 employers providing Pre-K and EI transportation services. And, the highest wage rate for these 250 members is lower than the start rate for Local 1181 members covered by Local 1181's collective bargaining agreements with General Education employers. Nor does Local 1181 maintain any control over DOE and the costs of school bus operators, as petitioners claim.

Local 1181 avers that the EPPs are valid. DOE has authority to award the work at issue and to determine bid specifications in accordance with state bidding laws, and the discretion to include the EPPs. Further, EPPs do not have an anti-competitive impact on competitive bidding. EPPs do not exclude any of the petitioners from bidding, and petitioners are simply unwilling to meet the EPPs requirement. The absence of the EPPs specification has proven anti-competitive, as larger companies have not bid for Pre-K work but may do so if EPPs are included. Furthermore, petitioners' claims lack merit. To date, no petitioner submitted an affidavit explaining that it could not calculate a meaningful bid due to EPPs. And, argues Local 1181, none of the affidavits submitted by petitioners state a reason for opposing the EPPs, and attribute the inability to calculate a reasonable bid to the absence of the home addresses of the children, a separate bid specification. Petitioners cannot show that they are put in the position of submitting bids without full knowledge of their responsibilities. Further, EPPs do not make it impossible to submit a calculated bid. DOE conducted several bids for General and Special Education bus

transportation work after it began requiring EPPs. As depicted in the 1995 KPMG report, after 1979, DOE awarded 13 school bus transportation contracts through bidding. Thus, companies were able to submit calculated bids notwithstanding the inclusion of EPPs. Further, petitioners' claim of the impact of EPPs on their costs is exaggerated. Since displaced employees are often low in seniority, in the limited circumstance where an employee is hired off the List, such employee may or may not be paid at a higher wage rate than an employee hired from another source. Even in the absence of EPPs, petitioners could be in the same position of uncertainty as to the wage rate at which they could hire employees. In any event, argues Local 1181, a specification is not invalid due to uncertainty, and as the EPPs ensure that performance goals are achieved, any uncertainty is immaterial. Thus, EPPs do not violate competitive bidding laws.

Even if the EPPs have an anti-competitive effect, they are rationally related to the twin purposes of competitive bidding and essential to the public interest. EPPs help to recruit and retain qualified bus transportation employees for the safe transport of children and avoid labor disputes that would result in costly disruptions to school bus service. Avoiding a disruption of these vital services is essential to the public interest. EPPs also prevent favoritism, improvidence, fraud, and corruption because they do not elevate one type of company over another. Unionized companies are not at an advantage over non-union companies, and no company gains an advantage material to the EPPs by entering a collective bargaining agreement with any particular union. Since EPPs promote continuous high quality service, they are not improvident. All existing drivers, escorts, mechanics and dispatchers employed by school bus companies performing DOE Pre-K and EI work stand equally to benefit from the proposed EPPs, whether they are members of Local 1181, some other union, or unrepresented. The EPPs protect

employees whether they lost employment with a company whose employees are represented by Local 1181, another union, or no union. The EPPs as proposed for Pre-K and EI contracts would work in the same way as the EPPs in General and Special Education. Further, there is no evidence of corruption or fraud in the awarding of public contracts or any abuse connected to the EPPs.

Ensuring labor peace was not DOE's primary reason for inserting the EPPs. Nor are hearsay allegations contained in newspaper articles sufficient to support the contention that the performance of school-age transportation employees have been substandard when compared with pre-school transportation employees who have operated without the benefit of EPPs. A majority of the allegations concerning Local 1181 members were unsubstantiated. Further, if newspapers articles are to be considered, then reports regarding Pre-K school bus employees alleging similarly serious misconduct should also be considered.

Nor was DOE's decision to include EPPs based on *post hoc* rationalizations or Local 1181's threat of a strike, but on DOE's longstanding practice of requiring EPPs in Pre-K ad EI school bus transportation contracts, securing labor stability, uninterrupted completion of public contracts, and related cost savings. Since 1979, DOE has twice been assigned the responsibility for procuring such contracts, and in both instances, DOE sought to include EPPs in such contracts.

There is no evidence that DOE supported amending the Family Court Act simply because Local 1181 wanted the EPPs. DOE solicited Pre-K and EI bids through RFP No. B0553, containing EPPs as well as other specifications to secure responsible bidders. Other RFPs require bidders to avoid labor disruptions, describe recruitment and retention policies, have 20

months of prior managerial experience, provide safe driving documentation, and meet detailed vehicle and vehicle operator and attendant standards.

DOE should be directed to correct the record, pursuant to CPLR 7804(e), and Local 1181 should be permitted discovery in light of the newly discovered 1994 and 1995 KPMG reports.

Petitioners' Reply to DOE

The threat of a strike does not justify the insertion of conditions on competitive sealed bidding. Nor is Local 1181 in any position to strike.[9]

No legislation supports DOE's inclusion of EPPs and DOE cannot claim that legislation is unnecessary when it sought legislation to allow DOE to award pre-school transportation contracts through an RFP.

The EPPs stifle competition when a non-unionized bus company is able to win, for example, two contracts with a low bid, and must later give priority to and hire unionized employees at higher wages than they received from the prior employer.

Unlike PLAs, which affect a single project, EPPs affect an entire industry of pupil transportation. Also, in PLAs, the unions make a certain concession to the agency for the life of the project, which may result in cost savings. However, with EPPs, unions make no concessions or commitments, resulting in no cost reductions.

Ensuring labor peace, uninterrupted services, and experienced workers are not stated goals of the public bidding laws. Nor would EPPs ensure labor peace, since Local 1181 has not agreed to refrain from striking in exchange for the insertion of EPPs. Nor do the alleged savings

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[9] According to petitioners, Local 1181's President pleaded guilty to racketeering; its Secretary-Treasurer died in October 2007, and its former Director of Employees Pension and Welfare Fund pleaded guilty to obstruction of an FBI's investigation.

incurred by avoiding labor disruptions satisfy the goals of the public bidding law. The goal of reducing costs has been satisfied where unions made concessions, and Local 1181 has made none. DOE failed to provide a record of the projection of costs savings, even *post hoc*.

Further, the concept of worker retention provisions in DOE school bus transportation contracts have not been endorsed by the Legislature, as DOE suggests. There is no indication that the Legislature permitted the extension of school-age transportation contracts because it approved of EPPs. Also, the amendment to the Education Law to permit DOE to extend school-age transportation contracts *in lieu* of public bidding does not apply to Pre-K/EI contracts. The City could have inserted EPPs in Pre-K/EI contracts long before receiving threats from Local 1181. The Legislature's failure to amend the public bidding law to endorse worker retention provisions in pre-school contracts, implies that competitive bidding without EPPs is preferred.

DOE did not anticipate that any significant savings would result from the use of EPPs. Nor is there any evidence that a potential bidder has ever or will be deterred from bidding on a Pre-K/EI contract for fear of incurring "withdrawal liability." EPPs favor one class of bidders over all others, since only unionized employers participate in "multi-employer" plans. Thus, the exemption from "withdrawal liability" cited by DOE applies only to Local 1181. Further, "withdrawal liability" does not deter unionized contractors from bidding on pre-school contracts. Nor were vendors given any "exemption," but were afforded a special rule defining when withdrawal from the Union's pension plan occurs. And, it is highly unlikely that such a vendor could effect a "complete withdrawal" so as to incur withdrawal liability.

Including EPPs would deter non-union contractors from bidding. Any successful bidder would be required to contribute to Local 1181's pension plan as a result of hiring employees from

the List for whom contributions were made to the plan by a prior employer. If sufficient Local 1181-covered employees come on board, resulting in the unionization of the company, such company will seek to remain unionized, because any successful effort to remove union status would result in "withdrawal liability." Further, in the event EPPs are later removed, employers will remain bound to comply with pension and other benefit requirements afforded by a prior employer, without any way to fund them by winning further contracts.

Collective bargaining agreements with pre-school providers unionized by Local 1181 do not contain obligations to contribute to the Union pension plan. Such concessions will disappear if the costs, and hence the bids, of all preschool providers are progressively driven up by the insertion of mandatory EPPs in preschool contracts.

Given that an ordinance requiring participation in an apprenticeship training program as a precondition to award of a construction contract was found invalid, the Court should likewise find invalid the DOE specifications inserting EPPs.

The contracts sought in its solicitation are not requirements contracts, in which the vendor's bid amount is the vendor's unit of compensation. In school transportation contracts, there is no relationship between the actual costs of the bidder (costs to provide a bus) and the price per child; the cost to carry three children may be the cost to carry 20. The vendor cannot predict the number of children, as well as entire schools, that will be served over the course of the contract. Nor can the vendor rely on the number of children estimated by DOE for a given "Zone," which can change at any time.

Further, without children's addresses and ages, existing vendors will know from which Zones to transport the children and which children will age out, while other bidders may not.

Such information is critical to calculating price per pupil per day and a meaningful bid.

Also, petitioners' challenge to the liquidated damages clause as a penalty is not premature. The employment of more personnel and other costs to investigate and record violations are not legally cognizable bases for such damages. And, the liquidated damages clause permits damages where no loss is anticipated. In one situation, DOE imposed new obligations on vendors, and then physically prevented one vendor from operating five of his buses for failing to comply. DOE later assessed liquidated damages against the vendor for failing to provide services. The vendor ultimately agreed to give up his contracts in exchange for DOE's waiver of the damages it assessed. There is also systemic bribery between vendors and DOE officials, empowered by liquidated damage provisions in DOE's contracts. And, in exchange for payoffs from school-aged transportation providers, Local 1181 officials promised not to unionize their companies.

DOE's right to change the requirements in the Manual in the event that the new requirements are more costly to observe, without a price adjustment, prevents bidders from knowing their responsibilities before they bid. Petitioners may challenge this specification prior to the award of any contract.

Nor is petitioners' concern about the termination clause speculative, as DOE suggests, since DOE has recently terminated all the contracts of Carol Bus Transportation Corp., USA Bus Corp., and GVC Ltd. under such a clause.

DOE's 2% "prompt payment discount" deduction from timely paid invoices favors school-age contractors who bid for the Pre-K/EI contracts, because DOE has an agreement with existing school-age contractors not to take the 2% deduction to which it is entitled under the

general education contracts. And, DOE does not explain how the 2% discount will serve any of the public bidding goals or the interests of children, or how this discount will not drive up bids.

Although petitioners do not have a business in Northern Ireland, they still have standing to challenge Section 1.71's MacBride Principles. And, L&M Bus, a New York City taxpayer, has standing under General Municipal Law § 51.[10]

Further, according to an insurance brokerage executive, the liability insurance coverage for sexual molestation mandated by the specifications is unavailable. And, since vendors now know that they cannot obtain such insurance, or an equal alternative, winning bidders agreeing to the specifications will be considered in default for misrepresenting their ability to obtain it.

DOE's Sur-Reply

DOE asserts that it is premature to declare a liquidated damages provision as an improper penalty when the facts or circumstances that may arise in which a particular provision will be applied are unknown; the time to challenge a particular liquidated damages provision is when the liquidated damage is assessed, and petitioners have four months to challenge the provision imposed by DOE.[11] Petitioners can submit bids based on the presumption that the liquidated damages are going to be enforced as written. Further, if there are circumstances in which the provision can be applied without it being a penalty, then the Court must await an "as applied" challenge to determine whether the provision is in fact invalid. Further, the liquidated damages clause may be upheld even where they are intended solely to compensate for the inconvenience

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[10] Should the Court conclude that petitioners lack standing to challenge the insertion of 1.71, then petitioners seek leave to amend the petition to permit the challenge to proceed as one brought by a taxpayer.

[11] DOE took this position at oral argument.

incurred by the public, rather than any economic loss suffered directly by the State itself. The inconvenience and injury suffered by the public may be regarded as actual damages compensable under liquidated damages provisions. Further, DOE argues, the legislative history of Education Law 2556(1) demonstrates that liquidated damages do not require legislative authorization: the purpose of the bill was to continue the rule that courts uphold such clauses unless they are considered penalties, and to curtail the "sham defenses" raised in litigation. Courts have enforced liquidated damages provisions in Board of Education contracts prior to the passage of the bill.

Petitioners' complaint that the bid specifications are so indefinite that even the DOE does not know how to compute a per-child per-day bid is speculative, and ignores the bidders' expertise, given the routing flexibility of the bidder as a result of the large size of each zone. Under caselaw, the government has a responsibility to focus on the "bigger picture" of overall rate competition and cost savings to the government.

Petitioners' Sur-Reply to DOE

Petitioners argue that the DOE cannot now claim that the purpose of the liquidated damages clause is to compensate for the inconvenience incurred by the public, and abandon its original claim that the liquidated damages clause defrays the costs DOE incurs when transportation contractors violate the contract. The Court must determine the legality of the liquidated damages provision according to the initial representations made by DOE, and DOE cannot now circumvent the caselaw that invalidates the initial reason given. Petitioners also point out that the rationale initially proposed by the DOE for the liquidated damages provision is stated in the liquidated damages provision itself. And, DOE failed to demonstrate a reasonable

relationship between each of the 48 conceivable violations and the particular "liquidated" sums to be imposed for their breach. For example, there is no reasonable relationship between Violation #2, infliction of corporal punishment on a child and the $1000 fine; the fine does not deter the matron, since the matron does not pay the fine, and the fine goes to the DOE, not the child. Further, a court has invalidated a liquidated damages clause in a school transportation contract that provided for "damages" of $100 per day for each bus not in operation. Whether the liquidated damages provision is a penalty is interpreted as of the date of execution, not as of the date of its breach. The transportation contract here does not resemble the types of contracts for construction or similar jobs, where the liquidated damages clause is utilized to cover the monetary loss inherent in any delay in the completion of construction or in the delivery of services or equipment.

In the event DOE is permitted to change the purpose and justification of the liquidated damages provision from that articulated in its Verified Answer, petitioners request discovery concerning the relationship between each of the 48 violations and the liquidated sum attributed to it. If DOE takes the position that whether the liquidated damages provisions constitutes a penalty cannot be determined at this juncture, and that petitioners cannot show how such provisions will apply, discovery must be had to look into other contracts and how provisions therein were applied.

Petitioner's Reply to Local 1181's Answer

The EPPs may not be justified on the basis that they do not increase corruption, but on the showing that they are likely to prevent it.

Since Local 1181 negotiates a single contract with the companies performing work under

contracts with DOE, and every company must provide the same wages and benefits to the same employees they are compelled to retain, costs are the same for everyone, bidding is pointless and competition is dead.

Further, that Local 1181 could commence a legal strike does not justify the imposition of EPPs on pre-school contracts in response to a threat of one. Whether the threatened strike would be lawful or likely to occur is not a question central of any question before the Court. In any event, there is no evidence that the employees of school age transportation companies have anything to gain from striking. The jobs and salaries of employees whose employers have contracts containing EPPs are not affected by the absence of EPPs in the contracts of the relatively minuscule number of preschool providers, most of whose employees are not even Local 1181 members. Their EPPs will continue in the school age contracts, regardless of this case. The school age transportation workers, who populate Local 1181, have nothing to gain from a strike of their employers; although they faced the immediate loss of their EPPs in 1979, here, they face only the loss of the "principle" of EPPs. They also have a great deal to lose from a strike; the City pays millions of dollars more each year for school age transportation services than it would otherwise pay but for the inclusion of EPPs in the applicable contracts. The City is less likely to continue paying these costs if such employees strike their employers. Further, any strike would be an unlawful secondary boycott in violation of the National Labor Relations Act. A strike by Local 1181 against the General and Special Education contractors to force them to "cease doing business with" DOE would not be based on any such contractor's refusal to accept EPPs, but in retaliation for acts taken by petitioners and/or DOE. The strike would be illegal also because it is directed toward acquiring new work, *i.e.*, preschool work, that its members did not

traditionally perform and the contracting employers, *i.e.*, the school age transportation vendors, do not have the power to give their employees preschool transportation work. Nor does Local 1181's collective bargaining agreement with school age transportation employees permit a strike where DOE issues preschool contracts not containing EPPs. The waiver of the no strike clause in such collective bargaining agreement does not include bid specifications for preschool contracts. Even if the employers subject to this collective bargaining agreement did do preschool work, they could not incur withdrawal liability (a quoted "integral part" of the collective bargaining agreement) and their obligations as preschool transportation employers would not be set forth in such agreement, but in a wholly separate collective bargaining agreement for preschool services. The collective bargaining agreement for preschool transportation services does not contain a provision permitting Local 1181 to deem the no-strike clause waived in the event DOE issues preschool specifications without EPPs.

The development of a skilled workforce is not one of the interests embodied the competitive bidding statutes and instances of misconduct does not establish that EPPs have any positive effect on an employee's skills. Nor is there any growing demand for bus transportation employees, but rather, layoffs and consolidations of bus companies.

Local 1181 failed to submit any evidence showing that EPPs are likely to prevent or reduce favoritism, fraud or corruption in public contracting. Local 1181 did not submit the alleged determination that there was no misappropriation of funds. Further, in 2007 the *New York Times* reports that the independent counsel retained to investigate Local 1181 concluded that organized crime "infiltrated and controlled it." The *New York Times* also reports complaints by bus drivers that the two trustees appointed to oversee Local 1181 had hired 11of Local 1181's

executive board members who had worked under its former president, who was facing trial for extortion, bribery, and hiding Mafia involvement in the Union. Further, the letter of dismissal of charges against Cordiello does not state why the claim was dismissed or that the dismissal was on the merits.

The two KPMG reports contradict what Local 1181 states as the history of the EPPs. An examination of preschool transportation in 1994, a time before preschool transportation contracts were even subjected to sealed competitive bidding, may not be used as a basis to encumber a fully competitive industry with EPPs. The 1994 Report noted that DOT contracts had not been effected by the EPP provisions of the 1979 BOE negotiated strike settlement, which do impact BOE administered services. The 1994 Report advised that awarding contracts without competitive bidding has not saved money and that substantial cost savings could be realized by changing to a competitive procurement process for all contracts. Further, if DOE, instead of DOT, instituted a competitive process for transportation of preschool children with disabilities, difficulties could arise if the terms of the Mollen agreement "are found to apply to the transportation of preschool children." The historical context of preschool transportation contracts has been one free of EPPs, free of strikes, and free of Local 1181.

The 1995 Report indicates that competitive bidding with EPPs is likely to discourage new competition. Further, EPPs did not reduce costs or allow for rationally calculated bids. According to the 1995 Report, many winning bidders in 1979 had to relinquish their contracts when DOE told them that they would have to agree to the assignment of union employees from losing companies, who were at cost levels that could not be supported by the lower prices bid by the winners.

Local 1181's claim that the General and Special education contracts DOE awarded in 1979 were based on a bidding process that ultimately included EPPs is misleading. In the case Local 1181 cites to for support of this claim, the BOE inserted EPPs into contracts that had already been awarded pursuant to the Mollen Agreement. The successful bidders had the option to accept the awards with the newly added EPPs or submit new bids at a later time for contracts that would include EPPs. Further, any contract involving five or fewer buses was exempt from the EPP requirement. Ultimately, the labor component was either known beforehand to the bidders, or where it was unknown beforehand, winners who had bid on specifications before the EPPs were added could opt out.

The 1994 Report also recommended changes to the system to lower the price of bids, such as replacing the unit price utilized by the City from "cost per child per day" with "cost per bus per day." The 1994 Report also indicated that the DOT's then practice of providing vendors with only school address and estimated student ridership information was insufficient to permit vendors to estimate their costs and submit their lowest bids.

DOE's Reply to Local 1181's Answer

DOE asserts that the 1994 and 1995 KPMG Reports were not prepared in connection with the bid solicitation at issue and that DOE did not rely on these reports in deciding to include EPPs in the 2008 bid solicitation. Thus, Local 1181's claim that DOE submitted an incomplete record to the Court by failing to include such documentation lacks merit.

Analysis

General Municipal Law § 103 (1) mandates that "all contracts for public work . . . be awarded . . . to the lowest responsible bidder." Education Law § 305 likewise mandates that

"contracts for the transportation of school children . . . shall be awarded to the lowest responsible bidder, which responsibility shall be determined by the board of education or the trustee of a district." It is uncontested that the two central purposes of New York's competitive bidding laws are to (1) protect the public fisc by obtaining the best work at the lowest possible price and (2) prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts (*Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 666 NYS2d 996 [1997]; *New York State Chapter, Inc. v New York State Thruway Auth.*, 88 NY2d 56 [1996]). Statutes requiring such competitive bidding "are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest" (*Surdell v City of Oswego*, 91 Misc 2d 1041, 399 NYS2d 173 [Sup Ct Oswego County 1977] *citing Jered Contracting Corp. v New York City Transit Auth.*, 22 NY2d 187 at 193, 292 NYS2d 98 at 102 [1968]).

The record fails to demonstrate that the EPPs are rationally related to the twin purposes of competitive bidding and essential to the public interest.

According to the DOE, the EPPs ensure that Pre-K and EI transportation services proceed without labor disputes that would result in costly disruptions to school bus service and that avoiding such disruptions is essential to the public interest. However, although mentioned in the context of invalidating a PLA, it has been stated that appeasing unions through favorable treatment in order to ensure labor peace is antithetical to the idea of open and honest competition and does not further the goal of obtaining lowest responsible bidders (*New York State Chapter, Inc. v New York State Thruway Auth., supra*).

Even assuming DOE relied upon the 1995 KPMG report in deciding to include EPPs in the current bid solicitation, the same excerpts in the 1995 KPMG report upon which Local 1181 relies (*see* Verified Answer ¶329, citing pages 18-20) indicate that the impact of competitive bids with the inclusion of EPPs "on contract prices have been mixed; however, the most significant bid . . . resulted in a notable price increase which cost an estimated $17 million over the five-year term of the contract. . . . We do not believe that it is possible to predict with certainty the impact that a truly competitive bidding process (with no restrictions such as EPP) could have on current prices for pupil transportation . . . ." (Conclusion Regarding BOE's Competitive Bidding Experience, pages 19-20). Indeed, the "requirement of having to assume someone else's full-time unionized workforce is a major disincentive to a new or outside company from becoming involved in the New York market." (Page 30). Further, bidding out contracts without EPPs created the potential for substantial cost savings because companies "would know that if they bid a lower price based on lower labor cost assumptions that the City would not automatically make them take over a different workforce at a much higher compensation and benefit level."

Although, as Local 1181 points out, a strike by its members is likely and consistent with their past actions, the same 1995 *New York Times* article cited by Local 1181 which reported a wildcat strike when the City threatened to eliminate EPPs, reports that EPPs provide "lifetime job guarantees for workers and no real competitive bidding among companies, because no company can escape the fixed personnel costs." The article notes that the last time the DOE attempted "to open bids and change the system, in 1979, it set off a three-month strike that was marked by violence and ended with the city's capitulation, solidifying a system that has made New York's school transportation costs among the highest in the nation." The article also

indicates that in "[t]rying to break that pattern and cut $100 million from the $316 million in costs" the City and DOE agreed to risk a strike by Local 1181.

Further, the same 1994 *New York Times* article cited by Local 1181 which reported a strike under the DOT regime, also reported that "New York City is the only school district in the state that does not award such bus contracts [for preschool children] by competitive bidding . . . The studies found that negotiated contracts for preschool transportation led to an average cost this year of $36.09 a student each day, compared with competitive bids of $27.10 in Nassau County and $25.60 in Suffolk County."

And, the likelihood of a strike is also questionable. Although a finding that EPPs violate the public bidding statutes threatens the future imposition of EPPs in subsequent school age transportation bid solicitations, it is unlikely that employees of school age transportation employers would go "without pay for weeks, no less months" to force EPPs on a small group of Pre-K providers, most of whose employees are not even Local 1181 members. Such employees are not likely to invite a hardship on their own lives simply to impose EPPs in Pre-K and EI contracts which, for the past decade, have not included such EPPs anyway, and which they have not previously challenged. The preschool collective bargaining agreement does not provide for any exemption from its no-strike clause in the event DOE issues bid specifications for preschool transportation contracts without EPPs.

DOE's authority and discretion to award bus transportation contracts and determine bid specifications is not absolute; the award must not violate state bidding laws. Therefore, that the EPPs do not *expressly* exclude any of the petitioners from bidding, does not mean that the EPPs are not anti-competitive; the effect of the EPPs inhibit competition that fosters the ability to

obtain quality services at the best possible price. Nor is the absence of an affidavit fatal to the petition; the petition, which adequately describes the inherent difficulty in submitting a calculated bid is verified. That DOE conducted several bids for General and Special Education bus transportation work after it began requiring EPPs is not persuasive nor does it negate the fact that bids submitted under the specifications at issue may be inflated. Further, there is no indication that the List containing individuals who must be given priority in hiring is limited to employees "low in seniority" such that they would be paid at a lower wage rate than an employee hired from another source.

DOE and Local 1181 further claim that EPPs facilitate the retention of staff familiar with the needs of Pre-K and EI children, thereby yielding better overall performance results and that EPPs help to recruit and retain qualified bus transportation employees. However, the record as fully developed by all parties demonstrates that the existence of EPPs neither facilitates nor undermines an employer's ability to recruit and maintain skilled or better performing workers. This argument in favor of EPPs, in and of itself, is defeated by the fact that instances of misconduct among workers still arise, either under contracts with EPPs or without EPPs.

Nor is there any showing that exposure to withdrawal liability resulting from the removal of EPPs will cause school bus contractors to refrain from the bidding process. DOE's claim in this regard is speculative and undeterminable at this juncture. Moreover, the effect of withdrawal liability, if any, does not affect this Court's determination that the EPPs violate the goals of the public bidding statutes. The simple allegation, without more, is insufficient to establish that an employer will be forced to pay a certain amount into a plan in the absence of EPPs.

Although existing drivers, escorts, mechanics and dispatchers employed by school bus

companies performing DOE Pre-K and EI might equally benefit from the proposed EPPs, the benefit to such employees and the lack of any perceived favoritism does not outweigh the anti-competitive effect of the EPPs or the EPPs tendency to cause bidders to submit inflated bids.

The Court commends Local 1181's position in seeking to maintain the job security for its members that EPPs have provided and would continue to provide. However, the EPPs have the effect of increasing bid prices for Pre-K and EI bus transportation contracts, contrary to public policy, and the costs of maintaining EPPs have been shown to outweigh their benefits to the public. Therefore, as the EPPs violate the public bidding laws, they must be stricken from the bid specifications.

DOE must also provide the addresses of all children who are to be bused. The number of children that may be served by a given bus depends on where they live in relation to each other and their distance from their schools. Contractors must calculate the number of buses it will need to carry the children to and from the schools in a DOE zone. If, for example, only six children can be served by a given bus, the price per child per day will be greater than if 18 children can be served by the same bus. Without knowing the addresses or boroughs of the children, a contractor may initially anticipate that it needs three buses to transport 60 children to a school in a given zone, but then discover after being awarded a contract that it needs six buses to transport the same 60 children, and DOE is not required to increase the price per pupil per day the contractor contemplated in using only three buses. Thus, contractors are compelled to submit bids at a higher rate of price per pupil to cover the possibility that additional buses may be needed.

DOE must also remove Section 1.100(B), which gives DOE the "power and sole

discretion to add, delete, revise, update, reissue and/or otherwise change any or all rules, procedures, and/or requirements contained in the Contractor's Manual at any time without prior notice to the Contractor . . . ." The right to change the requirements, without providing contractors with a corresponding price adjustment if necessary, prevents bidders from submitting a bid with full knowledge of their responsibilities under the contract. Contractors base their bids in part on requirements under the contract. The possibility that DOE may change the contract requirements, after awarding the contract and without providing for a corresponding price per pupil adjustment necessitated by such changes, may cause bidders to inflate their price per pupil bids, or refrain from participating in the bidding process at all, thereby diminishing competition to the detriment of the public.

Likewise, DOE must remove or revise Section 4.10, to the extent it permits DOE to add or delete entire schools and programs in the vendors' service requirements without an adjustment in the vendors' unit prices. Section 4.10 permits DOE to require that a contractor service any new school after the contract is entered into, at the same unit price originally bid, without permitting the bidder to adjust its price. DOE's recent amendment to this Section permits an adjustment only in the event of a decrease in the number of children transported. However, a contractor's cost is also based on the number of buses required, and the costs of such buses increase where the number of children to be transported increases. Thus the failure to provide for an adjustment in price per pupil where the increase in the number of buses needed causes an increase in the price per pupil. For example, if it costs $50 per pupil for a single bus to transport 20 students to school, and another school is added requiring another bus to transport only three students, the price per pupil for the additional bus will be significantly greater than the cost per

pupil on the first bus; yet, DOE does not provide for an adjustment in price per pupil. Contractors cannot calculate a bid to cover this eventuality, and are forced to submit an inflated bid or refrain from participating in the bidding process at all, thereby diminishing competition to the detriment of the public.

Similarly, DOE must remove or revise that portion of Section 4.10 which provides for a price adjustment only in the event there is a loss of ridership in excess of 30%, DOE's adjustment for ridership that drops by 30% causes contractors to inflate their bids by 30% to cover this eventuality, contrary to obtaining services at the lowest possible price under the public bidding laws.

Also, petitioners' request that DOE be ordered to remove the "liquidated damages" demanded in Section 1.48 is granted.

At the outset, the Court notes that as suggested by the petitioners, Education Law 2556 (11)[12] grants DOE authority to include a liquidated damages provision in its contracts involving the "construction, repair, alteration or remodeling of buildings or for the purchase of supplies, furniture or equipment," and thus, does not appear to support the inclusion of such a provision in contracts for school bus transportation. However, Education Law 2556 (11) cannot be read as precluding the DOE from including such a provision, provided that such provision does not

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[12] Education Law § 2556 (11) provides that

> In all contracts by a board of education . . . for the construction, repair, alteration or remodeling of buildings or for the purchase of supplies, furniture or equipment, a stipulation may be inserted for liquidated damages for any breach, failure or delay in the performance thereof; and such board of education is authorized and empowered to remit the whole or any part on such damages as in its discretion may be just and equitable; and in all suits commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for such board, whether plaintiff or defendant, to prove actual or specific damages sustained by reason of any such breach, failure or delay, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

constitute an improper penalty. Whether a liquidated damages provision constitutes an improper penalty is a question of law for the court, to be determined by relevant caselaw (*LeRoy v Sayers*, 217 AD2d 63, 635 NYS2d 217 [1st Dept 1995]).

A liquidated damages provision is "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement" (*Crown It Services, Inc. v Koval-Olsen*, 11 AD3d 263, 782 NYS2d 708 [1st Dept 2004] *citing Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424, 393 NYS2d 365 [1977]). The parties are free to provide for such an agreement as long as the provision "is neither unconscionable nor contrary to public policy" (*id.*). However, if "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced" (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d at 425). On the other hand, such a provision will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation (*id.* at 425). Thus, a liquidated damages provision will be upheld upon a showing that "damages flowing from the alleged breach were, at the time the parties entered into the agreement, difficult to ascertain and that the provision fixing damages is a reasonable measure of the anticipated probable harm" (*Benjamin Partners, LLC v 583-587 Broadway Condominium*, 34 AD3d 311, 824 NYS2d 631 [1st Dept 2006] *citing Truck Rent-A-Ctr., Inc.*, 41 NY2d at 423-24).

A party requesting that a court strike down a liquidated damages provision as an unenforceable penalty must demonstrate that the damages are not a reasonable measure of the actual loss resulting from the breach, and the actual loss is readily ascertainable (*see Bates Adv.*

USA, Inc. v 498 Seventh, LLC, 7 NY3d 115, 818 NYS2d 161 [2006]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379-380, 795 NYS2d 502 [2005]; *Irving Tire Co. v Stage II Apparel Corp.*, 230 AD2d 772, 773, 646 NYS2d 528 [1996]; *Vernitron Corp. v CF 48 Assoc.*, 104 AD2d 409, 478 NYS2d 933 [1984]). Where the opponent of a liquidated damages provision fails to demonstrate a triable issue of fact regarding whether the damages flowing from the alleged breach were readily ascertainable at the time the parties entered into the agreement, or as to whether the damages fixed in the agreement are conspicuously disproportionate to the losses sustained, the provision will be upheld (*see Benjamin Partners, LLC, supra citing Bates Adv. USA, Inc. v 498 Seventh, LLC,* 7 NY3d 115, 120, 818 NYS2d 161 [2006] and *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380, 795 NYS2d 502 [2005]). However, "where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty" *(Pyramid Centres and Co. Ltd. v Kinney Shoe Corp.*, 244 AD2d 625, 663 NYS2d 711 [3d Dept 1997] *citing Willner v Willner*, 145 AD2d 236, 240-241, 538 NYS2d 599 [2d Dept 1999]).

Where a contract contains a number of covenants of different degrees of importance, and the loss resulting from the breach of some of them will be clearly disproportionate to the sum sought to be fixed as liquidated damages, especially where the loss in some cases is readily ascertainable, the sum so fixed will be treated as a penalty (*Seidlitz v Auerbach*, 230 NY 167 [1920]). The strength of a chain is that of its weakest link (*id.*).

As suggested by DOE, cases determining the enforceability of a liquidated damages provision arise where there is a breach of a contract and ensuing attempt to enforce the provision

(*see Tenber Assocs. v Bloomberg L.P.*, 51 AD3d 573, 859 NYS2d 61 [1st Dept 2008]; *SMD Capital Group LLC v EPR Capital LLC*, 45 AD3d 314, 846 NYS2d 89 [1st Dept 2007]; *Ehrenworth v Kaufelt*, 8 Misc 3d 10, 797 NYS2d 238 [NY Sup App Term 2005]; *Crown It Servs, Inc. v Koval-Olsen*, 11 AD3d 263, 782 NYS2d 708 [1st Dept 2004]; *Motichka v Cody*, 5 AD3d 185, 773 NYS2d 46 [1st Dept 2004]). Thus, the issue of enforceability does not appear to arise *prior to* the entering of a contract (*see Zeer v Azulay*, 50 AD3d 781, 860 NYS2d 527 [2d Dept 2008] [to the extent that the plaintiffs seek summary enforcement of so much of the stipulation as purports to entitle them to liquidated damages *in the event any liens or encumbrances are filed against their property,* as they envisioned, such relief could only have been considered within the context of a plenary action for breach of the stipulation]). However, the challenge herein is ripe for determination to the extent that the provision violates the public bidding statutes by having an anticompetitive effect on public bidding.

In substance, the liquidated damages section assesses $1000.00 in situations where: (1) a child enters or leaves a bus while in motion, (2) an employee uses corporeal punishment on a child, (3) a disqualified employee provides transportation services, (4) an attendant is not provided on a vehicle, (5) there is insufficient seating for students, (6) transportation services are not provided as scheduled, (7) a child is excluded from a run, (8) an accident or incident is not reported within one-half hour of the event, (9) a driver is found guilty of a moving violation while transporting children, (10) a child is dropped off at an improper location, or (11) a child is left unattended.

An assessment for $750 applies in instances where (1) the vendor failed to implement an anti-drug policy or drug test, (2) the vendor or its employee fails to comply with federal, state,

city and/or DOE laws, (3) a vehicle is not equipped with a fire extinguisher or first aid or sanitation kit, or (4) a driver or attendant is not provided with proper training.

DOE imposes a $500 assessment when (1) a bus fails to post proper signage, (2) a bus lacks sufficient storage, equipment, and trained personnel, (3) the vendor lacks sufficient number of vehicles for the contracted work, (4) the vendor fails to ensure direct telephone access to the vendor's garage to provide the status of vehicles and children, (5) the vendor fails to provide fax and computer equipment to communicate with DOE, (6) the vendor fails to designate a person to be made available for after-hour emergencies, (7) the driver leaves a site before all students have boarded, or (8) the driver improperly transfers a student from one bus to another.

The remaining assessments, ranging from $175 through $250, involve situations, including but not limited to, failing to equip buses with a two-way radio, make a full stop at a railroad crossing, use the vehicle sanitation kit to clean soiled equipment, notify parents of any delay due to a breakdown, and maintain maintenance records. In addition to these assessments, DOE imposes a $250 fee to cover the administrative costs of taking "corrective action due to the failure of the contractor to perform in accordance with the contract."

Except as to a vendor's failure to provide fax and computer and two-way radio equipment, there is no evidence as to whether, at the time the bid specifications were issued, that the assessments associated with the remaining violations represent a reasonable prediction of the losses DOE would suffer in the event of their breach. Each of the obligations imposed in the liquidated damages provision pertains to promoting and securing the safe transport of children to and from their intended destinations. The breach, therefore, of any of the violations has the potential to expose the DOE to some form of liability for any personal injury or property damage

suffered by a child in the event a breach causes harm to a student. Thus, it appears that the injury or harm to DOE resulting from a breach of any of the provisions is incapable of precise estimation. However, there is no indication that the actual violation by either the transportation provider or its employee is proportionate to the actual loss to the DOE. Nor is there any indication of what the administrative cost consists of in the event a contractor breaches the contract or that such amount cannot be ascertained. It appears from many of the assessments, that the sums imposed are intended to secure performance by threat of a large payment rather than to provide a reasonable assessment of probable damages (*see e.g., Huntington Coach Corp. v Board of Ed. of Union Free School Dist. No. 10, Commack, Towns of Huntington and Smithtown*, 49 AD2d 761, 372 NYS2d 717 [2d Dept 1975] [where towns sought to recover $32,500 under liquidated damage clause from school bus provider for failing to provide 65 buses for each of five consecutive days, and did not seek other transportation for that period and was not billed by plaintiff for the five-day period, the liquidated damage provision is unenforceable, as it is in the nature of a penalty]; *Zervakis v Kyreakedes*, 257 AD2d at 620, 684 NYS2d 291 [2d Dept 1999][provision of the stipulation, which required the defendants to pay more than twice the $40,000 agreed upon, despite the fact that they timely tendered payment of 90% of the amount due, is so disproportionate to the actual damages caused by the delay in payment that it constitutes an unenforceable penalty]; *Pyramid Ctrs. & Co. v Kinney Shoe Corp.*, 244 AD2d at 626-627, 663 NYS2d 711 [3d Dept 1997] [lease provision entitling plaintiff to double the fixed rent or the average annual percentage rent, whichever was greater, upon defendant's breach was intended to coerce defendant's performance rather than compensate plaintiffs for defendant's breach]).

Therefore, since the liquidated damages clause appears to impose penalties against the bus transportation provider, it may discourage many would-be bidders from submitting bids or cause those who chose to bid to inflate their contract prices. Both outcomes are contrary to the purpose of the public bidding statute. Given the absence of any proof that the various violations are reasonably proportionate to any anticipated loss suffered by the DOE as a result of a breach by the school bus provider, this provision shall be stricken.

The Court also finds merit in petitioners' request for an order directing DOE to remove Section 1.35, which entitles DOE to deduct 2% of the vendor's compensation whenever DOE pays the vendor's invoice within 30 days of receipt. It is uncontested that section 4-06 of the Rules of the New York City Procurement Policy Board declares that "[i]t is the policy of the City of New York to process contract payments efficiently so as to assure payment in a timely manner . . ." and that the City pays an interest penalty on most vendor invoices that it fails to pay within 30 days. Yet, Section 1.35 does not impose a penalty upon the DOE for failure to make timely payments, but imposes a detriment to the contractor if DOE makes a timely payment. This provision encourages bidders to inflate their bid prices by 2% to anticipate the eventuality that DOE will deduct 2% from its invoices. Such an increase in the bid, unrelated to the services to be provided, contravenes the goal of securing quality services for the lowest possible price.

Further, DOE must remove Section 1.71, requiring compliance with the MacBride Principles. Section 1.71 states that

> "In accordance with section 6-115.1 of the Administrative Code of the City of New York, Contractor stipulates that such Contractor and any individual or legal entity in which the Contractor holds a ten percent or greater ownership interest in the contract either (a) have no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the

MacBride Principles. . . ."[13]

In order to have standing to challenge this provision, the petitioners must show that they have suffered an injury-in-fact within the "zone of interests" sought to be protected by the statute under which the agency acted, that the injury is different in kind or quality from that suffered by the public at large, and that there is no clear legislative intent negating review (*Madison Square Garden, L.P. v New York Metropolitan Transp. Auth.*, 7 Misc 3d 1030, 801 NYS2d 236 [N.Y. Sup. 2005]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773, 570 NYS2d 778 [1991]). In the event a school bus transportation contractor wins a bid containing Section 1.71, it will be bound to comply with all of the filing and substantive requirements of the MacBride Principles. While the purposes of the public bidding statutes is to benefit taxpayers, foster competition, and avoid corruption and fraud, compliance with NYC Admin. Code 6-115.1 carries with it a burden of compliance which a contractor must bear.

Further, it cannot be contested that the school transportation contracts at issue is a matter of general public interest (*Albert Elia Bldg. Co., Inc. v New York State Urban Dev. Corp.*, 54 AD2d 337, 388 NYS2d 462 [1976] [the preparation of specifications and "awarding contracts for a public project is a matter of acknowledged public interest which relieves the petitioner of the obligation to show that it is an aggrieved party or that it has any special interest . . . standing has been granted absent personal aggrievement where the matter is one of general public interest (8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7802.01, n.2). Therefore, that petitioners do not

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[13] In a conference call with counsel for petitioners and DOE, the Court explored the arguments in favor and against this section. The Union took no position regarding this specification and as such, was not included in this conference call.

have business in Ireland does not deprive them of standing to challenge a provision to be made part of an agreement to which they may be a party, and, which may not serve the purposes of the public bidding statutes.

Specifications having an anti-competitive effect on the bidding process can be justified only by proof that they are designed to save the public money by causing contracts to be performed at smaller cost or without disruption. Thus, that petitioners may or may not have business operations in Northern Ireland is immaterial to the determination of whether such provision violates public bidding statutes. Here, DOE provides no justification for this provision, or any explanation of how such provision advances either of the goals of the public bidding statutes (*Council of City of New York v Bloomberg*, 6 NY3d 380 [2006] [equal benefits law, which prohibited city agencies from contracting with contractors that failed to provide their employees' domestic partners with employment benefits equal to those provided to employees' spouses conflicted with and, thus, was preempted by competitive bidding statute, GML §103]). Thus, there is no basis to include Section 1.71 in the bid specifications at issue.[14]

However, as this petition only concerns pupil bus transportation service contracts, the Court declines petitioners' request for such a broad overreaching finding that NYC Admin. Code 6-115.1 is improper or in conflict with public bidding laws.

Additionally, petitioners' request that the Court limit the insurance requirements in Section 2.6.14 to coverage that is commercially available is granted.

Section 2.6.14 requires that the contractor maintain commercial general liability

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[14] *The Court does not reach the issue of whether NYC Code § 6-115.1 is illegal as a matter of law, at this juncture.*

insurance "for bodily injury, personal injury and property damage"in the amounts of $1,000,000 per occurrence and $2,000,000 in the aggregate. DOE further specifies that "there shall be **no** endorsement exclusions in any such policies for sexual molestation, sexual harassment, sexual assault or similar acts." (Section 2.6.14.1, emphasis supplied). The record includes an affidavit of Steven Levy ("Mr. Levy"), Regional Vice President of Capacity Coverage Company of New Jersey, Inc., a company experienced in transportation industry insurance. Mr. Levy, who has over 15 years of experience in procuring school bus transportation insurance, avers that he canvassed four major insurance carriers in the transportation industry, and located one carrier which was willing to write a million-dollar policy, although not a general liability policy, for sexual misconduct. However, such policy contains exclusions for sexual misconduct perpetrated by another minor, another student, and "another patient." Mr. Levy further states that this carrier was not willing to waive these exclusions, and that he does not believe any other carrier would provide the insurance DOE requires. Although DOE contends that the insurance requirements in the bid specifications are included in other DOE contracts for professional services and vendors have entered into contracts with these requirements, DOE submits no documentation in support of its claim, from which the Court may assess whether contractors can comply with Section 2.6.14. Furthermore, although Section 2.6.4 gives contractors the right to request a waiver or approval of alternate coverage, the contractor must "in good faith" believe that "an equal alternative can be supplied." The record indicates an "equal" alternative, or insurance "materially equal in all respects" *i.e.,* insurance coverage with no exclusions for sexual molestation, sexual harassment or sexual assault, cannot be supplied. Therefore, as the record indicates that Section 2.6.14 requires insurance that is unobtainable, such provision may dissuade

bidders from participating in the bidding process, thereby limiting the pool of potential responsible bidders, to the detriment of taxpayers.

However, petitioners' request for an order directing DOE to remove Section 1.5A which provides that any contract "may be terminated at any time for the convenience of the NYCDOE upon a minimum of thirty (30) days advance written notice by the Director . . . " is denied. Petitioners' claim that an absolute right to terminate a contract for no reason places contractors at the mercy of public officials, placing upon them economic pressures to comply with demands that may not necessarily be anticipated at the time the contract is bid upon and awarded. It is well-established "that when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms" (*Red Apple Child Development Center v Community School Districts Two*, 303 AD2d 156, 756 NYS2d 527 [1st Dept 2003]). Contracts affording the BOE an absolute "unqualified right to limit its life by notice of termination that right" has been upheld (*id.* [stating that "[a] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive" and the BOE's decision to terminate the contract was an exercise of a contractual right not subject to judicial review]). There is no factual support for petitioners' claim that contractors will be forced to comply with demands not contained in the contract. Therefore, it cannot be said that Section 1.5A reflects an abuse of authority or otherwise violates public bidding laws, and petitioners' request for an order striking or amending this provision is denied.

Likewise, Section 1.93 is also proper. Section 1.93 provides dispute resolution

procedures for all questions "arising out of, under or in connection with, or in any way related to, or on account of, this Contract." Section 1.93(c) designates "NYCDOE Chief Executive for School Support Services" to act as the Dispute Resolution Officer to decide such questions. Petitioners' unawareness of any statutory or regulatory authority for the imposition of such dispute resolution procedure does not render this provision invalid. It has been held that public policy does not preclude a provision for alternative dispute resolution in a municipal contract pursuant to which an employee of a government party was designated as final arbiter of any disputes arising under the contract (*see Westinghouse Electric Corp. v New York City Transit Auth.*, 82 NY2d 47, 603 NYS2d 404 [1993] [holding that alternate dispute resolution provision in contract between city and metropolitan transportation authorities and contractor, which authorizes employee of transit authority to make final and binding determination in issues arising under contract, and which provided for judicial review, did not violate state public policy]; *Sprinzen v Nomberg*, 46 NY2d 623, 632, 415 NYS2d 974, 979 [1979] [waiver of both disqualification at the outset and the right to vacate an award on the ground of bias occurs where the original contract designates an arbitrator known by the aggrieved party to have a substantial relationship with the other party, including that of employer and employee]; *Siegel v Lewis*, 40 NY2d 687, 389 NYS2d 800 [1976] [a "fully known relationship between an arbitrator and a party," including one as employer and employee "will not in and of itself disqualify the designee"]). Here, Section 1.93(E) expressly permits a contractor who "protests a decision" of the dispute resolution officer to appeal by the "commencement of a special proceeding in Supreme Court, New York County under Article 78. Therefore, there is no basis to strike Section 1.93 and petitioners' request in this regard is denied.

Conclusion

Based on the foregoing it is hereby

ORDERED that the first cause of action is granted to the extent that it is ORDERED and DECLARED that the following specifications are unlawful and that respondents are permanently enjoined from soliciting bids for Pre-K and EI Bus Transportation Services upon such specifications, opening any bids already submitted, or awarding any contracts based on such specifications:

(1) Section 4.24, "Employee Protection Provisions";

(2) Section 1.100(B), regarding DOE's right to change the service requirements in the Contractor's Manual at any time without prior notice;

(3) Section 4.10, to the extent it permits DOE to add entire schools and programs in the vendors' service requirements without adjusting the vendors' prices;

(4) Section 4.10, to the extent it provides for a price adjustment only in the event there is a loss of ridership in excess of 30%;

(5) Section 1.48, "Liquidated Damages";

(6) Section 1.35, "Discount for Prompt Payment";

(7) Section 1.71, "MacBride Principles Provisions for Board of Education Contractors"; and it is further

ORDERED that respondents shall include the addresses of all children presently at the schools to and from which children are to be bused; and it is further

ORDERED that respondents limit its insurance requirements in Section 2.6.14 to coverage that its commercially available; and it is further

ORDERED that the branch of the petition seeking an order and declaration that the following specifications are unlawful and made in excess of authority, and revising and/or striking same is denied:

(1) Section 1.5A, "Termination for Convenience";

(2) Section 1.93, "Dispute Resolution";

and it is further

ORDERED that the branch of the petition which seeks a declaration that NYC Admin. Code 6-115.1 is in conflict with the public bidding laws is denied.

ORDERED that the second cause of action is for an order directing DOE to solicit bids only upon revised specifications as determined by the Court is granted to the extent noted above; and it is further

ORDERED that the third cause of action seeking a declaratory judgment that the specifications are unlawful and made in excess of authority and that that may not be employed by DOE for the purpose of soliciting bids or awarding contracts for Pre-K and EI bus transportation services is granted to the extent noted above; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 17, 2008

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD