Matter of Staten Is. Bus, Inc. v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2014 NY Slip Op 30208(U)
January 16, 2014
Sup Ct, New York County
Docket Number: 100798/13
Judge: Peter H. Moulton
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[* 1]

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

PRESENT: HON. PETER H. MOULTON, J.S.C. Justice

PART 57

STATEN ISLAND BUS, INC., ET AL.

-v-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL.

INDEX NO. 100198/13

MOTION DATE

MOTION SEQ. NO. 03

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the written decision of today's date, which also decides motion sequence 02

FILED

JAN 27 2014

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/16/14

HON. PETER H. MOULTON 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

Supreme Court: New York County
Part 57

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In the Matter of the Application of

STATEN ISLAND BUS, INC., LONERO TRANSIT, INC., and PIONEER TRANSPORTATION CORP.,

Petitioners,

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

-against-

Index No. 100798/13

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, also known as THE NEW YORK CITY DEPARTMENT OF EDUCATION, and LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

Respondents.

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Peter H. Moulton, Justice

Motion sequence numbers 02 and 03 are consolidated for disposition.

Petitioners in this Article 78 proceeding are private bus contractors that have long contracted with the City to transport New York City Public School children to and from school. They challenge a Request for Bids on various school bus routes issued by respondent Department of Education ("DOE") on April 29, 2013 ("the April RFB").

In an earlier case (referred to herein as "Staten Island Bus

I")[1] the same petitioners challenged a DOE Request for Bids for school bus routes issued in December 2012 ("the December RFB"). Petitioners asserted arguments in Staten Island Bus I that are identical to arguments raised in this proceeding. In a decision dated August 9, 2013 ("August 9th decision"),[2] familiarity with which is assumed, the court rejected all of petitioners' arguments, and dismissed the petition in Staten Island Bus I.

Currently before the court is 1) DOE's motion to dismiss the petition and 2) petitioners' request for a preliminary injunction.

DOE's motion to dismiss argues that petitioners' challenge to the April RFB should have been brought within Staten Island Bus I, and that this case constitutes "claim splitting." DOE also argues that since there is another action pending between the two parties the instant action should be dismissed pursuant to CPLR 3211(a)(4). That latter argument has lost its viability with the dismissal of Staten Island Bus I: there is no longer another action pending. Finally, DOE argues that petitioners have failed to state a cause of action.

The preliminary injunction sought by petitioners seeks to prevent the DOE from soliciting, accepting, or opening any bids pursuant to the April RFB. The court previously twice denied

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[1]Index Number 100304/13.

[2]Staten Island Bus, Inc. v New York City Dep't of Education, 41 Misc3d 836.

petitioners' requests for a Temporary Restraining Order seeking to postpone the opening of bids pursuant to the April RFB. The bids were scheduled to be opened in late July 2013, which would appear to moot petitioners' request for a preliminary injunction. In any event petitioners have failed to demonstrate a likelihood of success on the merits that could warrant a preliminary injunction.

As discussed below, for the most part this proceeding is disposed of by the court's August 9th decision in Staten Island Bus I. The August 9th decision collaterally estops petitioners from making at least one argument herein. It provides persuasive authority for the rejection of a second argument. As discussed below, however, there is one argument unique to this action, not raised in Staten Island Bus I. The court finds that this argument may constitute a potential cause of action, and it survives the motion to dismiss.

BACKGROUND

DOE's authority to provide bus transportation to New York City public school students is set forth in various state and federal statutes. The other respondent, Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("Local 1181") asserts that it is the largest union representing the drivers, mechanics and matrons/escorts employed by petitioners and other school bus companies that contract with DOE.

Petitioners' fundamental claim herein mirrors their main claim in Staten Island Bus I. Petitioners assert that their existing contracts for other school bus routes - routes not covered by the April RFB - obligate them to submit bids for the April RFB containing various labor provisions that favor unionized school bus drivers, dispatchers, mechanics, and chaperones. Petitioners assert that the necessary inclusion of these provisions, called "Employee Protection Provisions" ("EPPs") embeds a cost in petitioners' bids that places them at a competitive disadvantage with respect to other bidders who are not bound by these EPPs.

An understanding of that claim requires some brief recitation of the recent history of school bus contracting in New York City.

The inclusion of EPPs in their present form in school bus contracts began in the wake of a 1979 strike by Local 1181. The strike was precipitated by DOE's removal of two provisions that had favored workers from a bid solicitation that year. First, prior to 1979 the DOE's school bus contracts contained some version of the following provision:

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

The second labor-friendly provision that was omitted from the 1979 bid solicitation was a requirement that bus companies pay their employees' wages and benefits at a rate tied to the rates

afforded New York City Transit Authority workers.

The strike lasted three months. It was concluded by a stipulation of settlement negotiated in part by Milton Mollen, then the Presiding Justice of the Second Department. The "Mollen Agreement" as it came to be known, essentially restored the first of the two provisions that DOE had sought to exclude from the RFB. The EPPs that became standard in the industry as a result of the Mollen Agreement. The Mollen Agreement established two "industry-wide Master Seniority Lists," one list for drivers, mechanics and dispatchers, and the second list for chaperones/escorts. If any employee becomes unemployed because her employer loses its contract with DOE, then the employee's name gets listed on the appropriate master list ranked by her seniority. Bus companies seeking to hire must hire their employees from these seniority lists.

With a few exceptions, since 1979 the DOE has negotiated extensions of school bus contracts, rather than putting them up for bid. The bus companies performing pursuant to the extensions would change from time to time, but remained fairly stable. EPPs were included in all extensions of contracts.

This regime was altered when responsibility for school bus contracts for pre-Kindergarten ("Pre-K") and Early Intervention ("EI") students was transferred from the Department of Transportation to DOE. The DOT contracts had not included EPPs. When it came time to rebid these Pre-K and EI contracts, DOE

included the EPP requirement in its requests for bids.

The EPPs in the Pre-K and EI RFBs were challenged by certain school bus companies, which alleged that the provisions were anti-competitive and therefore in violation of the state's public contracting laws. The trial court agreed with petitioners, and its ruling was upheld in the First Department and in the Court of Appeals in L & M Bus Corp. v New York City Dep't of Educ. (17 NY3d 149).

The Court of Appeals found in L & M that bidders on the RFB would inflate their labor costs in submitting bids because they did not know the wage rates of persons they would be forced to hire from the Master Lists. The court noted that General Municipal Law § 103 mandates that "all contracts for public work ... be awarded to the lowest responsible bidder." The Court did not find EPPs per se unlawful. Rather, the court held that since the EPPs have an anti-competitive effect they must pass a heightened scrutiny test that demonstrates the EPPs serve some other important public purpose.

The Court of Appeals looked at DOE's justifications for the EPPs and found that they did not satisfy the heightened scrutiny test. The Court found that it was "questionable" that EPPs were necessary to avert labor unrest as the Pre-K and EI contractors were not unionized and, under the DOT regime, the workforce had not benefitted from EPPs. The court also found that there were other,

less costly, means to ensure an experienced workforce.

In the wake of L & M tor the December and April RFBs the DOE determined that an EPP provision would not pass heightened scrutiny.

In Staten Island Bus I petitioners first sought a declaration that the EPPs in their existing contracts were unlawful. In the petition, they sought the removal of the EPPs from their existing contracts, contracts which will last until 2015. At oral argument and in their latter papers, petitioners changed their request for relief: instead of excision of the EPPs from their existing contracts, they sought a declaration "modifying" or "amending" the EPPs in petitioners' existing contracts to make it clear that the EPPs do not apply to any bid they make on a new RFB. They also sought preliminary and permanent injunctive relief preventing DOE from proceeding with any contracts awarded pursuant to the December 2012 RFB.

In the August 9th decision, the court rejected these arguments and dismissed the petition.

DISCUSSION

Petitioners' first theory herein is that the EPP provisions in their existing contracts require that they include EPPs in any contracts they enter into with the DOE thereafter, at least during the life of the existing contracts. Because the EPPs require a

more expensive work force, this would place petitioners' bids at a competitive disadvantage with respect to new contractors who are not bound by EPPS.

In the August 9th decision the court found that this argument was without merit. By their terms, the EPPs in existing contracts do not apply to new contracts.

The EPP provisions of the existing contracts relied on by petitioners in advancing this argument state in relevant part as follows:

> There shall be established two industry-wide Master Seniority Lists. One list shall be composed of all operators (drivers) mechanics, and dispatchers and the other list shall be composed of escorts (matrons-attendants) who were employed as of June 30, 2010, under a contract between their employers and the [DOE] for the transportation of school children in the City of New York, who are furloughed or become unemployed as a result of loss of contract or any part thereof by their employers, or as the result of a reduction in service directed by the Board during the term of the contract, in accordance with their date of entry into the industry... .
>
> Any existing contractor ... shall give priority in employment in September 2010 or thereafter on the basis of position on the Master Seniority list of any additional or replacement operators, mechanics and dispatchers... .

Petitioners interpret these portions of the EPPs in their existing contracts as binding them, during the life of the existing contracts, to hire off the Master List for <u>any</u> bus contract with the DOE, not just the existing contract. Their existing contracts

do not expire until June 30, 2015. Accordingly, petitioners contend that they would have been bound to the EPPS in bidding on the April RFB, which meant that their bids would be too high in comparison to the bids of vendors who are not bound to EPPs. For this reason they did not bother to bid on the April RFB.

This argument hinges on the meaning of the words "or thereafter" in the second paragraph quoted above.

As discussed in the August 9th decision the words "or thereafter" do not impose EPPs on petitioners in future contracts. The phrase says nothing about future contracts with the DOE. Any attempt to make the EPPs apply to future contracts would run athwart the public policy that governmental entities must be free to enter into contracts that address the changing needs of the public, the availability of public funds, and a host of other factors. As the Court of Appeals stated in Varsity Transit Inc. v Saporita (48 NY2d 767, 768):

> [T]he inclusion of certain requirements in bid specifications contained in prior public contracts does not comprise an implied representation that similar requirements will be mandated with respect to subsequent contracts. The possibility that the needs and requirements of a municipality must change so as to render useless investments made in the hope that those requirements would remain constant is a normal risk of doing business which may not be shifted to the municipality by application of an estoppel theory... .

For this reason the court declined to award petitioners any

declaratory relief in the August 9th decision. There was no need to clarify that the EPPs did not apply to the December RFB. The existing contracts are clear and do not require modification. That holding is equally true with respect to the April RFB.

Both elements necessary for collateral estoppel are present here: 1) the issue in question was presented and decided in Staten Island Bus I, and 2) petitioners had a full and fair opportunity to contest the issue in that earlier case. (See In re Hoffman, 287 AD2d 119.) Accordingly, the court's August 9th decision in Staten Island Bus I controls, and any claim that the EPPs in existing contracts require bidders to include EPPs in bids for future DOE contracts is denied on collateral estoppel grounds.

Petitioners' second theory of liability is that the April RFB itself is ambiguous regarding the inclusion or exclusion of EPPs. In the August 9th decision the court noted that petitioners made this same claim with respect to the December RFB, but only at the eleventh hour. Because this theory was not contained in the petition in Staten Island Bus I, and was raised for the first time in petitioners' reply in that case, the court held that it could not be considered by the court. (E.g. Stoves & Stone Ltd v Martinez, 17 AD3d 683.) However, the court also stated in the August 9th decision:

> Even were the court to consider this argument, it is without merit. There is nothing in the December RFB that requires bids include EPPs. There is nothing in the December RFB that

> states that existing contracts' EPPs must apply to new contracts that do not contain such provisions. Finally, the December RFB contained a merger clause that made it clear that the written contract constitutes the "whole agreement of the parties," and it incorporates no other contract by reference.

In the instant petition, petitioners now squarely place this argument before the court. They argue that the April RFB was fatally ambiguous because it did not make it sufficiently clear that EPP provisions in existing contracts are not to be included in any bid for the routes covered by the RFB.

This argument remains unconvincing. The passage from the August 9th decision could be interpreted as dicta, which would therefore not provide a basis for collateral estoppel.[3] The court therefore adopts it as the holding herein. For the reasons stated above, the court rejects the argument that April RFB is ambiguous on the question of EPPs.

Petitioners' final argument, which was not asserted in Staten Island Bus I, is contained in two repetitive paragraphs at the end of the petition. Petitioners state that they were discouraged from bidding on the April RFB because the bid was many months removed from the time of performance. As mentioned above, the April RFB

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[3]It might also qualify as an alternate holding, which might provide a basis for collateral estoppel. (See Malloy v Trombley, 50 NY2d 46.) It is not necessary to parse the difference between dicta and alternate holding here. The court simply adopts the reasoning of the August 9th decision, which rests on a straightforward reading of the RFB.

concerns work for the 2014-15 school year. This work will not commence until September 2014. According to petitioners, this is too far in advance for petitioners to "intelligently formulate a bid." The petition continues:

> Contractors need to assess the cost of vehicles, facilities, and other equipment to formulate a realistic competitive price. A lead time of more than one year before the contract is to take effect leaves too much uncertainty in future market conditions to enable contractors to do so.

Petition ¶ 52.

Respondents point out that this argument would appear to be contradicted by petitioners' repeated statement that labor costs are the only material variable that differentiates one contractor's costs from another.[4] Respondents also fault this claim for its failure to state any predicate facts tending to show that the alleged uncertainty of future costs would deter bidders.

In response, petitioners attempt to amplify this claim with the affidavit of Arthur Avedon, a former Chief Administrator of the DOE's Board of Review, which he avers was the body that adjudicated contractor disputes for DOE. Avedon states in his affidavit that the long lag time between the submission of bids for the April RFB and the performance of the contract is "unprecedented." He opines that the risk that contractor costs will go up substantially in

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[4] See eg Affidavit of Jerome L. Dente in Support of Petitioners' Motion for Injunctive Relief, dated June 20, 2013, ¶ 19.

the 14 month lag time between bid and performance will discourage some contractors from bidding, and will cause others to raise their bid amounts in order to build in a "cushion" for unexpected cost increases.

It is unclear if petitioners have standing to raise this argument because it is unclear whether they are at any greater disadvantage in bidding than any other contractor. It would appear that all contractors would face this same uncertainty concerning costs. Therefore petitioners, and all school bus contractors, would be bidding on a level playing field. Petitioners do not spell out how this would be arbitrary and capricious. It is also not clear if petitioners seek to demonstrate some violation of General Municipal Law ¶ 103 with this argument.

In its motion to dismiss, DOE argues via affirmations of counsel that RFBs for City contracts often contain a lag time of fourteen months or more. It is unclear whether this assertion includes school bus contracts. Counsel also argue that the lag time is needed because it is necessary to nail down contractors for the 2014-15 school year before DOE can seek bids for the brief summer session that precedes the 2014-15 school year. According to DOE's counsel, companies might be reluctant to commit themselves to investments, such as busses and facilities, necessary for the summer work until they know they have a longer lasting contract for the entire school year.

None of these arguments have been fleshed out in the parties' papers. Indeed, respondents rely on affirmations of counsel, rather than on affidavits from persons with personal knowledge of the facts that underpin respondents' arguments.

On a motion to dismiss a pleading for legal insufficiency, the court must accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory. (Morone v Morone, 50 NY2d 481, 484.) On a motion to dismiss, a court may consider facts alleged in an affidavit as a supplement to the pleading. (Ackerman v 305 East 40th Owners Corp., 189 AD2d 665.) Avedon's affidavit sufficiently amplifies the petition to survive dismissal on this claim.

Accordingly, the motion to dismiss this claim is denied. The DOE may answer the petition within 20 days of service of this order with notice of entry. Local 1181 has already answered the petition, but it may submit supplemental papers as the issues in this case have been narrowed by this decision and order. Any supplemental papers by Local 1181 shall be served within 20 days of service of this order with notice of entry. Petitioners may serve reply papers within 20 days after service of the City's Answer and supporting papers and service of any supplemental papers from Local 1181.

As this remaining claim could not have been included in Staten Island Bus I, the motion to dismiss on the basis that petitioners

split their claims is denied.

Petitioners motion for a preliminary injunction is denied as moot. Even if the relief sought were not moot, petitioners have failed to demonstrate a likelihood of success on the merits. (Eg 1010 Tenants Corp. v Hubshman, 26 Misc3d 1207[A] (Gische, J, New York County Supreme Court 2009.)

CONCLUSION

For the reasons stated, respondent DOE's motion to dismiss the claim that EPPs in petitioners' existing contracts require the inclusion of EPPs in any bid made on subsequent DOE contracts, is granted. Petitioners' second claim, based on the alleged ambiguity in the April RFB, is also dismissed. In all other respects, the motion to dismiss is denied.

Petitioners' motion for a preliminary injunction is denied.

Final disposition of the petition shall abide further submission of the parties as set forth above. This constitutes the decision and order of the court.

DATE: January 16, 2014

J.S.C.

HON. PETER H. MOULTON
J.S.C.