SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

----------X

Application of

L & M BUS CORP., 21ST AVENUE TRANSPORTATION CO. INC., ALINA SERVICES CORP., B&F SKILLED, INC., GVC LTD, HAPPY CHILD TRANSPORTATION, LLC, HAPPY DAY TRANSIT INC., IRIDIUM SERVICES CORP., LEESEL TRANSPORTATION CORP., MAR-CAN TRANSPORT CO. INC., MONTAUK STUDENT TRANSPORT, LLC, PENNY TRANSPORTATION INC., PHILLIP BUS, CORP., SELBY TRANSPORTATION CORP., SMART PICK INC., VAN TRANS LLC, and Y & M TRANSIT CORP.,

Petitioners,

For an Order pursuant to Article 78 of the CPLR,

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and CHARLETTE HAMAMGIAN, in her official capacity as Executive Director of the Division of Contracts and Purchasing,

Respondents.

----------X

Index No. 152673/2018

Decision and Order

Motion Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

On March 26, 2018, Petitioners, 17 bus companies, commenced this Article 78 proceeding to challenge a Request for Bids ("RFB") issued by The New York City Department of Education ("DOE") on December 29, 2017 for contracts for bus transportation services for children in kindergarten through twelfth grade

("school age"). The RFB is entitled "Transportation Services for Disabilities and Their Non-Disabled Peers, Serial No. B3182."[1]

Petitioners "want to bid for the work" encompassed in the RFB (Petition, 27). Petitioners challenge the RFB because it requires contracts to contain "Employee Protection Provisions" ("EPPs"). (Pet. Ex. 1 (RFB), Section 4.5). EPPs "are provisions for the retention or preference in the hiring of school bus workers, as well as the preservation of seniority, wages, pension and health/welfare benefits for school bus workers." (Pet. Ex. 6 (Memorandum from E. Lester to E. Rose et al. re New EPP Provisions in Procurements of New K-12 Bus Contracts, Dec. 26, 2017 ("Rose Memo"), p. 1). Stated differently, EPPs "provide for master seniority lists of employees who lost their jobs due to their employer's loss of a contract with DOE or the reduction of routes, and require that DOE school-age bus contractors give priority in hiring from those lists and, in connection with such hiring, preserve the employees' prior wages and maintain certain benefit contributions." (Answer, 207). Petitioners claim that these provisions are unlawful, violate the public bidding statutes, and do not satisfy the heightened scrutiny standard set forth by the Court of Appeals in *L&M Bus Corp. v. New York City Dept. of Educ.*, 17 N.Y.3d 149 (2011). DOE claims that its "decision to include EPPs (the "New EPP") in the 2017 RFB for school-age transportation contracts at issue in this case is supported by a thorough predecisional analysis of the particular challenges now facing the school-age busing sector," and would pass the heightened scrutiny standard articulated in *L&M Bus*. (Answer, 195).

On April 5, 2018, this Court granted Petitioners' application for a temporary restraining order ("TRO"). Presently before the Court is Petitioners' application for a preliminary injunction which Respondents oppose.

Procedural History

Petitioners filed this action on March 26, 2018. The Petition contains two causes of action. Petitioners' first cause of action asserts that EPPs "contravene the public bidding statutes in that they are not designed to save the public money and are not intended to obtain the best service for the lowest price or prevent

[1] On January 12, 2018, Petitioners submitted a protest of the RFB to the DOE. (Exh. 15 to Ver. Petition). On February 23, 2018, the DOE recommended denial of the protest. (Exh. 16 to Ver. Petition). Respondent Charlette Hamamgian, Executive Director of the New York City Division of Contracts and Purchasing, adopted the DOE's recommendation on February 23, 2018. (*id.*).

favoritism, improvidence, fraud, and corruption in the letting of public contracts; but rather [the EPPs] exclude a class consisting of all responsible bidders who will not agree to costly and intrusive EPPs." (Petition, 177). Petitioners' second cause of action alleges that the EPPs also "invite waste and facilitate favoritism." (Petition, 191).

On March 27, 2018, Petitioners moved by Order to Show Cause for a temporary restraining order and preliminary injunction "[r]estraining and enjoining Respondents from soliciting, accepting, opening, or awarding any contracts pursuant to the Solicitation … pending the Court's final determination of the Petition." Respondents opposed. Oral argument was held on March 27, 2018 and April 5, 2018. On April 5, 2018, after oral argument, the Court granted the temporary restraining order and enjoined the bidding process for the RFB pending the hearing and determination of Petitioners' motion for a preliminary injunction. The Court directed Respondents to file their answer by April 20, 2018, and scheduled oral argument on the preliminary injunction on April 24, 2018.[2] Respondents filed their Verified Answer on April 20, 2018. Oral argument was held on April 24, 2018.

Background

EPPs in Bus Transportation Contracts

The DOE provides transportation services to and from school for eligible students, including special education students and general education students, in both public and non-public schools. (Answer, 200).

In 1979, after a strike by employees of Local 1181, the DOE reached a settlement. This settlement, known as the "Mollen Agreement," provided for the inclusion of certain employee protection provisions in DOE busing contracts for students in kindergarten through twelfth grade ("school age children"). (Pet. Ex. 6 (Rose Memo) pp 3-4).

---

[2] Reliant Transportation, Inc. ("Reliant"), and Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("Local 1181") moved to intervene in this proceeding and alternatively, for leave to participate as *amici curiae*. On April 20, 2018, the motions to intervene were denied to avoid any further delay but they were granted leave to participate as amicus curie in support of the DOE. Reliant and Local 1181 submitted briefs on April 23, 2018.

While the DOE was administering busing contracts for school age children, the New York City Department of Transportation ("DOT") was administering separate bus contracts for children in Pre-Kindergarten/Early Intervention ("Pre-K/EI") programs. (Pet. Ex. 6 (Rose Memo) pp 3-4). The DOT had awarded Pre-K/EI contracts through competitive bidding, without EPPs. In 2006, the DOT transferred the responsibility for administering Pre-K/EI contracts to the DOE. (*Id.*) When the DOE subsequently rebid the Pre-K/EI contracts, the DOE included EPPs in its requests for bids. (*Id.*).

Petitioners, 23 bus companies, thereafter commenced the *L&M Bus* Article 78 proceeding challenging the inclusion of the EPPs in the Pre-K/EI contracts as anti-competitive and in violation of New York's public contracting laws. Respondents opposed. On March 18, 2008, the Supreme Court issued an order that "pending the determination of petitioners' motion for a preliminary injunction, the New York City Department of Education, the Board of Education of the City of New York, and David N. Ross were restrained from soliciting, accepting, opening, or awarding any contracts upon, bids for Pre-K and Early Intervention Program Bus Transportation services ...". On September 5, 2008, the Supreme Court granted Petitioners' request for an order enjoining the Respondents "from soliciting bids for pupil transportation services until certain specifications are removed or revised" and "enjoining the respondents from awarding any contracts on such bids ... pending further determination by the Court." On December 17, 2008, the Supreme Court issued a permanent injunction and declared various provisions of the specifications unlawful, including the EPPs. The Supreme Court's decision to strike the EPPs was affirmed by the First Department and the Court of Appeals. (*L & M Bus Corp. v. New York City Dept. of Educ.*, 71 A.D.3d 127, 131 (1st Dept 2009), *L&M Bus*, 17 A.3d at 158).

After the Court of Appeals' decision in *L&M Bus*, the DOE issued RFB's for school age bus contracts without EPPs in 2012 and 2013 for the 2013-2014 school years (Petition, 38, 90, 93, 119, 121-122; Answer, 38, 93, 119, 121). In response to the DOE's issuance of the RFB without EPPs on December 21, 2012, Local 1181 and other unions went on a five week strike in January 2013. (Petition, 97-102; Answer, 103; Pet. Ex. 6 (Rose Memo) pp 5-7).

The DOE thereafter halted all open solicitations without EPPs. (Petition, 123-126; Answer 123-125). The City/DOE unsuccessfully sought legislation which would have required the inclusion of EPPs in bid solicitations of DOE's school-age bus contracts. (Petition, 38, 84-89; Answer, 38, 84-88).

Currently, 49 bus companies provide transportation to school age children under DOE contracts. (Answer, 203). The DOE also provides transportation for children who attend pre-kindergarten and early intervention programs pursuant to separate Pre-K/EI Contracts. (*Id.*, 204).

Approximately sixty-two percent of the school-age bus routes are currently covered by contracts that contain EPPs which have been extended over the years and not re-bid. (Answer, 207). Approximately thirty-eight percent of the DOE's school-age routes are covered by contracts that began in September 2013 (the "2013 Contracts") and September 2014 (the "2014 Contracts") and do not contain EPPs. (*Id.*, 208). The 2013 Contracts, which cover approximately 1,641 routes, or approximately 20 percent of school-age routes, will expire on June 30, 2018. (*id.*) The 2014 Contracts, which cover approximately 18 percent of school-age routes, will expire in June 2019. (*id.*). The RFB at issue in this case seeks new contracts to replace the 2013 Contracts with contracts that contain EPPs. (*id.*, 209).

Subject EPPs

The provisions that Petitioners challenge in this proceeding are contained in Paragraph 4.5 of the RFB, which is entitled "Experienced School Bus Worker Provisions." (Pet. Ex. 1 (RFB), Section 4.5). Petitioners are not challenging any other provision.

Section 4.5.1 requires the creation of "Experienced School Bus Worker Lists" comprised of drivers and attendants ("ESBW Lists"). The contractors who win contracts with the DOE must fill "all positions for drivers and attendants . . . from the appropriate ESBW List, on the basis of position on the List until that List has been exhausted." Section 4.5.2 requires the contractors to hire employees from the ESBW Lists "on a full-time basis" and to compensate them at wages "at least equivalent to the highest wage such ESBW Hiree received for work performed as a driver or attendant, as applicable, in connection with a School Age Bus Contract or School Age Bus Sub-contract since June 30, 2010, or any higher wage for which the ESBW Hiree would now be eligible based on the wage scale that was in effect on the last date of such employment . . ."

Section 4.5.3 requires the contractors to "contribute at least $1,252.48 per month on behalf of each ESBW Hiree on a twelve-month basis towards health/welfare benefits." Section 4.5.4 requires the contractors to "make contributions to the fund or plan in which the ESBW Hiree most recently participated (the "Prior Plan") in the amount of contributions currently being made

for employees of equivalent seniority in the job function for which they are hired (i.e., driver or attendant) by the contractor or subcontractor that most recently contributed to the Prior Plan on behalf of the ESBW Hiree … (or if the contractor or subcontractor that most recently contributed to the Prior Plan on behalf of the ESBW Hiree … is no longer contributing to the Prior Plan, in the amount of contributions most recently made by such contractor or subcontractor for employees of equivalent seniority in the same job function)."

Preliminary Injunction Standard and Analysis

Petitioners seek (1) to enjoin Respondents from accepting or opening bids based on the Solicitation until the EPPs are removed; (2) to enjoin Respondents from awarding any contracts on such bids, and (3) a declaration that the EPPs are unlawful, and that no contracts shall be awarded based upon them. (Petition, 26).

CPLR §7805 provides that "On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review . . ."

It is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position. (CPLR §6301; *Doe v. Axelrod*, 73 N.Y.2d 748 (1988)).

When analyzing these factors, the Appellate Division has deemed it appropriate to maintain the status quo even when two factors are met but one is "arguable." (*Danae Art Intern. Inc. v Stallone*, 163 A.D. 2d 81, 82 (1st Dept 1990)). The determination as to whether to issue a preliminary injunction "is a matter ordinarily committed to the sound discretion of the lower courts." (*Doe*, 73 N.Y.2d at 750). The court need not "determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits." (*Tucker v. Toia*, 54 A.D.2d 322, 325–26 (4th Dept. 1976); *see also 2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 A.D.3d 573, 573 (1st Dept. 2012) ("[T]he purpose of interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held."); *Jaime B. v. Hernandez*, 274 A.D.2d 335 (1st Dept. 2000)).

Likelihood of Success on the Merits

"[T]o establish a likelihood of success on the merits, 'a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits.'" (*Barbes Restaurant Inc. v ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 [1st Dept 2016] (citations omitted). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive." (*Barbes*, 140 A.D.3d at 431).

General Municipal Law § 103(1) requires that "all contracts for public work ... be awarded ... to the lowest responsible bidder." Education Law § 305(14a) similarly requires 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." New York's competitive bidding laws "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." (*Jered Contracting Corp. v. New York City Transit Auth.*, 22 N.Y.2d 187, 193 (1968)).

The "twin purposes" of New York's competitive bidding laws are "(1) protection of the public fisc by obtaining the best work at the lowest possible price and (2) [to] prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts." (*New York State Chapter, Inc. v. New York State Thruway Auth.*, 88 N.Y.2d 56, 67 (1996); *L&M Bus*, 17 N.Y.3d at 156). "Generally, when a public entity adopts a specification in the letting of public work that impedes the competition to bid for such work, it must be rationally related to these twin purposes." (*Thruway Auth.*, 88 N.Y.2d at 67; *L&M Bus*, 17 N.Y.3d at 157).

However, when a public entity adopts a specification such as a Project Labor Agreement ("PLA")[3] that is "clearly different from typical prebid specifications in

[3] A PLA "is a prebid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project." (*Thruway*, 88 N.Y. 2d at 65). A PLA provides "that only contractors and subcontractors who sign a prenegotiated agreement with the union can perform project work," and "requires all bidders on the project to hire workers through the union hiring halls; follow

their comprehensive scope, *more than a rational basis must be shown.*" (*Thruway*, 88 N.Y.2d at 68-69 (emphasis added)). In such a case, the public entity "bears the burden of showing that the decision … [to include the atypical bid specification] had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes," which "must be supported by the record." (*Id.*). Those interests as stated above are: "(1) protection of the public fisc by obtaining the best work at the lowest possible price and (2) [to] prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts." (*Id.* at 67).

In *L&M Bus*, the Court of Appeals held that EPPs, provisions that "dictate who the contractor must hire and what salary and benefits they must provide and makes these matters nonnegotiable," are "comparable to PLAs [Project Labor Agreements] in their status as atypical, patently restrictive, comprehensive prebid specifications and in their potential for anticompetitive consequences" and as such, are subject to the same heightened scrutiny standard. (*L&M Bus*, 17 N.Y. 3d at 158).

The Court of Appeals in *L&M Bus* held that the DOE had "fail[ed] to refute the facially anticompetitive features of the EPPs, which tend to invite cost-inflation and discourage new bidders from attempting to compete with the long-term contract holders." (*L&M Bus*, 17 N.Y.3d at 158) The Court of Appeals wrote, "Even if a new bidder can ascertain the pay scale of the existing contractor, the bidder does not know how many of the predecessor's employees will need to be retained or the salaries of the individual employees, which vary by seniority and other factors." (*Id.* at 159). In such a case, "prudent bidders might inflate their bids to cover the contingency of having to pay unspecified salaries for a large number of a predecessor's work force, and the small-scale operations that currently hold the Pre–K/EI contracts might avoid the contest altogether for fear of losing the gamble." (*Id.*)

Applying "the more stringent standard" of review necessitated by the atypical, anti-competitive nature of EPPs, the Court of Appeals "turn[ed] to an assessment of whether, pursuant to *Council v. Bloomberg*, DOE has demonstrated 'proof that [EPPs] are designed to save the public money by causing contracts to

---

specified dispute resolution procedures; comply with union wage, benefit, seniority, apprenticeship and other rules; and contribute to the union benefit funds." (*Id.*). In exchange, "the union promises labor peace through the life of the contract." (*Id.*).

be performed at smaller cost or without disruption.'" (*L&M Bus*, 17 N.Y. 3d at 158 (citing *Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 391-392 (2006)). The Court held that based upon the record before it, "the DOE has not met its burden of demonstrating how EPPs reduce costs or prevent disruption." (*L&M Bus*, 17 N.Y. 3d at 160).

Analysis

Petitioners assert that the EPPs do not meet the heightened scrutiny standard because the DOE cannot establish that the EPPs are designed to save money, and the other asserted objectives for the EPPs cannot justify them under the Court of Appeals' decision of *L&M Bus*. (*L&M Bus*, 17 N.Y.3d at 158). Petitioners further assert that the EPPs promote favoritism. The DOE, in turn, argues that the heightened scrutiny standard does not depend exclusively on cost savings but also includes the consideration of other factors such as "unique challenges" and "labor history" which are present in this case and justify the inclusion of the EPPs in the RFB.[4] The DOE asserts that the decision to include the new EPPs in this RFB needs to be evaluated on its own merits. The DOE further asserts that the EPPS do not promote favoritism.

The DOE gives several reasons for the inclusion of the EPPs in the RFB. These reasons are set forth in the December 26, 2017 Memorandum prepared by Erin Lester, Special Assistant to Deputy Chancellor Elizabeth A. Rose ("Rose"), to Rose and others ("Rose Memo"), which "analyze[d] whether DOE should procure new school bus contracts for children in Kindergarten through twelfth grade ('school-age bus contracts') that will include 'New EPP provisions.'" (Pet. Ex. 6 (Rose Memo) pp. 17).

Specifically, the DOE states that the EPPs will: (a) "increase labor stability and prevent future strikes"; (b) "promote the development and retention of a skilled workforce, allow for competition, bringing in improved, modernized

---

[4] The DOE acknowledged that bidding contracts in 2013 and 2014 without EPPs led to better pricing and significant participation by bidders, estimated approximately $60 million annually in cost savings under the contracts, and included changes designed for a more efficient and economical use of vehicles such as allowing for smaller buses or more efficient routes with multiple children. (Pet. Ex. 6, p. 18).

contract terms and associated cost savings"; and (c) "potentially remov[e] threats of contractors incurring pension withdrawal liability and eliminate[e] the adverse impact of such threats on contractor-union CBA negotiations, further reducing strike risks." (Pet. Ex. 6 (Rose Memo) p. 18).

Petitioners have demonstrated a likelihood of success on the merits on the claim that the EPPs in the RFB conflict with New York's bidding statutes and do not satisfy the heightened scrutiny standard set forth in *L&M Bus*. In the record presently before the Court, there is no "proof that [the EPPs in the RFB] are designed to save public money." (*L&M Bus*, 16 N.Y.3d at 158). Furthermore, while the DOE provides other reasons for the inclusion of the EPPs, these same reasons were previously considered by the *L&M Bus* court and found not to meet the heightened scrutiny standard to justify the EPPs.

1. Labor Stability and Threat of Strikes

"[A]lthough 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." (*L&M Bus* 2008 WL 7379774 (*citing Thruway Auth.*, 88 N.Y. 2d at 85)).

In *Thruway*, the Court of Appeals considered whether a project labor agreement for a four year project to refurbish the Tappan Zee Bridge was adopted by the Thruway Authority "in conformity with the competitive bidding statutes." (*Id.* at 70). In order to make this determination, the Court of Appeals reviewed the analysis the Thruway Authority undertook prior to its decision to include the PLA in the bid documents for the bridge project. (*Id.* at 70). The Court of Appeals stated that the Thruway Authority took into account the fact that "the last time a contract had been awarded to a nonunion contractor, the Tappan Zee's first labor dispute erupted ... [which] required the assistance of the State Police to insure the safety of the contractor's employees, and the Bridge itself was picketed." (*Id.*). The Court of Appeals stated that the Thruway Authority also retained a consultant to analyze the project who "estimated labor savings if a PLA were adopted of at least $6 million, or 13.51% of the anticipated labor cost for the project" and that "[w]ith a PLA, the Authority would maximize its ability to maintain toll revenues throughout the construction period." (*Id.* at 70). Based on all these factors, the Thruway Authority entered into the PLA and included it in the bid documents for the bridge project. (*Id.*). The Court of Appeals held:

> The Thruway Authority's detailed focus on the public fisc—both cost savings and uninterrupted revenues—the demonstrated unique challenges posed by the size and complexity of the project, and the cited labor history collectively support the determination that this PLA was adopted in conformity with the competitive bidding statutes.

(*Thruway*, 88 N.Y.2d at 71).

Here, while the Court acknowledges that the history of the EPPs in Pre-K/EI contracts and school age contracts differs, an increased threat of a potential strike for the re-bidding of the 2013 Contracts (a fraction of the contracts) without EPPs does not justify the inclusion of the EPPs in the RFB under the heightened scrutiny standard set forth in *L&M Bus* and *Thruway*.

2. Promote Skilled Workforce

The DOE further asserts that the EPPs would "promote the development and retention of a skilled workforce, allow for competition, bringing in improved, modernized contract terms and associated cost savings." (Pet. Ex. 6 (Rose Memo) p. 18). According to the Rose Memorandum:

> Since 2014, DOE school-age bus contractors have increasingly had difficulty attracting and retaining a sufficient number of skilled, licensed bus drivers. While this shortage appears to be driven, at least in part, by the increase in the number of routes operated by DOE contractors (which created a need for additional drivers), the lack of EPPs and resulting job and wage insecurity may be part of the explanation for why contractors are having difficulty attracting drivers.

(See Pet. Ex. 6 (Rose Memo) p. 11).

When the DOE previously argued that the EPPs would ensure an experienced and skilled work force of bus drivers in *L&M*, the Court of Appeals held, "While anti-displacement provisions might be viewed as socially beneficial, the bidding laws are not the proper avenue for achieving such goals." (*L&M Bus*,

17 N.Y. 3d at 160) The Court of Appeals further stated, "Indeed, this goal could be achieved by substantially less restrictive measures, such as the imposition of an experience requirement in the bidding specifications." (*Id.* at 160). Additionally, that the purported shortage of school age bus drivers is a result of the lack of EPPs is speculative.

3. Pension Withdrawal Liability

The DOE claims that the EPPs "potentially remov[e] threats of contractors incurring pension withdrawal liability and eliminate[e] the adverse impact of such threats on contractor-union CBA negotiations, further reducing strike risks." (Pet. Ex. 6 (Rose Memo.) p. 17). The DOE claims that EPPs would encourage competition among contractors who would otherwise be deferred by the prospect of pension withdrawal liability from submitting bids. (*Id.*, p. 9).

As explained in DOE's Answer, "[m]any school-age bus contractors participate in multi-employer defined benefit pension plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). (Answer, 254). Under ERISA, when an employer who has contributed to a plan withdraws from the plan, the pension fund may assess that employer with withdrawal liability for a share of any unfunded vested benefits. (*Id.*). "When DOE competes new contracts under an RFB, there is the possibility that an existing vendor that has been contributing to a pension plan may withdraw from the pension plan by virtue of no longer having employees that are participating in the plan. In that situation, if there is no exemption from withdrawal liability, bus contractors that withdraw from an ERISA multi-employer plan would potentially face large sums of pension withdrawal liability." (*Id.*).

In 1983, the Pension Benefit Guaranty Corporation (PBGC) granted the Local 1181 Pension Fund an exemption from pension withdrawal liability because of the inclusion of EPPs in school-age bus contracts. (Answer, 254). This "effectively exempted school-age bus companies (with Local 1181 CBAs) from incurring withdrawal liability if they lost DOE work and stopped contributing to the pension fund." (*Id.*, 254). The DOE states that "PBGC appears to have granted the exemption because drivers and attendants who lost their jobs were likely to be rehired by other contractors who would pay into the 1181 Pension Fund." (*Id.*).

After the DOE issued bid solicitations for new school-age bus contracts that did not have EPPs in April 2013, "the 1181 Pension Fund amended its rules

relating to withdrawal liability" and "assessed school bus contractors with $100 million of pension withdrawal liability as contractors went out of business and ceased to contribute to the fund." (Answer, 254). DOE states, "The 1181 Pension Fund amendment stated that the Fund would again rely on the exemption in circumstances under which EPPs would be included in school-age bus contracts. Without application of the 1181 Pension Fund's special withdrawal liability exemption rule, bus companies face huge additional potential liability over time." (*Id.* at 254)

The Supreme Court in *L&M Bus* rejected as "speculative and undeterminable" DOE's claim that exposure to withdrawal liability that could result without EPPs was an impediment to bidding, finding that there was not "any showing that exposure to withdrawal liability resulting from the removal of EPPs will cause school bus contractors to refrain from the bidding process." (*L&M Bus*, 2008 WL 7379774). The Supreme Court further held that "the effect of withdrawal liability ... d[id] not affect" the Court's "determination that the EPPs violate the goals of the public bidding statutes." (*Id.*).

The DOE states the pension withdrawal liability risks currently faced by school-age contractors had not materialized at the time of the *L&M Bus* case, and now there is evidence of the significant assessments. (Pet. Ex. 6 (Rose Memo) pp. 10-11). The DOE states that "[t]he totality of liability assessed against companies with 1181 CBAs so far exceeds $100M." (*Id.*). The DOE also states that there has been a significant amount of litigation as a result over disputes concerning pension withdrawal liability, including litigation that has directly involved the DOE. (*Id.*).

Inclusion of EPPs with the hopes that Local 1881 Pension Fund will regain its exemption is speculative. That the EPPs would encourage competition among contractors who would otherwise be deferred from submitting bids because of the prospect of pension withdrawal liability is also speculative.

Accordingly, Petitioners sufficiently met their burden of establishing the likelihood of success on the merits of their claim that the EPPs in the RFB do not pass the heightened scrutiny standard. (*L&M Bus*, 17 N.Y. 3d at 158).[5]

---

[5] The Court recognizes that the new EPPs differ in some respects from the EPPs that were before the *L&M Bus* court. For example, the Court of Appeals held that the "EPP provisions at issue raise the prospect that a vendor will be required to assume a competing contractor's labor costs, requiring that the vendor's bid reflect not only the known expense of compensating its own employees but also the

Irreparable Harm and Balancing of The Equities

As set forth in the Court's April 5, 2018 decision which granted the TRO, there is irreparable harm because "[o]ne of the intentions of sealed bids is to ensure that each bidder gives its best, realistic lowest bid, not a bid created just to undercut the competition which could occur if the bids were known." (*L&M Bus*, 21 Misc. 3d 1111(A), *39-40). "If the injunction is not granted, and the bids are disclosed and it is later determined that the petitioners prevail, in the rebidding process, bidders would be aware of their competitors' earlier bids. Absent an injunction, the purpose of obtaining an honest bid is undermined, and the bidder cannot unring the bell of its competitor knowing its previous bid." (*Id.*).

"[T]he harm to plaintiff from denial of the injunction as against the harm to defendant from granting it" must "tip in plaintiff's favor" for an injunction to issue. (*Edgeworth Food Corp. v Stephenson*, 53 A.D.2d 588, 588 [1st Dept 1976]). Here,

---

unknown and potentially much greater expense of compensating a competitor's employees." (*L&M Bus*, 17 N.Y.3d at 158-159). Here, the DOE has provided an addendum to the challenged Solicitation containing information "intended to give bidders an indication of the potential pool of school bus drivers and attendants who will be on the ESBW Lists and DOE's best information as to the range of current and past salaries and pension contributions to which such employees may be entitled." (Petition, 161; Exh. 59). However, the same addendum also states, "Bidders are warned that this information is based on incomplete data which may or may not be correct, is only an approximation . . . The actual composition of the ESBW Lists may be different from that estimated below, and/or the range of salaries and pension contributions to which the school bus works on such lists will actually be entitled may be more or less than the sums indicated." Moreover, even if the information provided was complete, the Court of Appeals stated, "Even if a new bidder can ascertain the pay scale of the existing contractor, the bidder does not know how many of the predecessor's employees will need to be retained or the salaries of the individual employees, which vary by seniority and other factors. In these circumstances, prudent bidders might inflate their bids to cover the contingency of having to pay unspecified salaries for a large number of a predecessor's work force, and ... small-scale operations ... might avoid the contest altogether for fear of losing the gamble." (*L&M Bus*, 17 N.Y.3d at 159).

Petitioners have demonstrated irreparable harm in light of the purpose of sealed bids and the balance of equities tip in their favor in furtherance of the "twin purposes" of New York's competitive bidding laws which are "(1) protection of the public fisc by obtaining the best work at the lowest possible price and (2) [to] prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts." (*Thruway Auth.*, 88 N.Y.2d at 67).

Wherefore it is hereby

ORDERED that the order to show cause by Petitioners to restrain and enjoin Respondents from soliciting, accepting, opening, or awarding any contracts pursuant to the Solicitation of the New York City Department of Education for Transportation Services for Students with Disabilities and Their Non-Disabled Peers, Serial No. B3182, is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 14, 2018

EILEEN A. RAKOWER, J.S.C.