L&M Bus Corp. v New York City Dept. of Educ.

2009 NY Slip Op 31607(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 104001/08

Judge: Carol R. Edmead

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SCANNED ON 7/13/2009

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

L&M BUS

INDEX NO. 104001/08

MOTION DATE 3/11/09

- v -

MOTION SEQ. NO. 004

Department of Education

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this m[illegible]to/for costs

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

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 petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to the MacBride Rider is denied;

ORDERED that petitioners' request for an order directing that DOE reimburse.petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to commercially unavailable insurance is granted; and it is further

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to 15% of their reasonable costs and attorneys' fees in responding to DOE's opposition on other issues, with the exception of EPPs, is denied; and it is further

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's position regarding EPPs, up through the issuance of the Memorandum Decision, and that DOE and the Union both reimburse petitioners for their reasonable costs and attorneys' fees in responding to their arguments thereafter in support of the EPPs, is granted; and it is further

ORDERED that all parties appear in Part 40 for a hearing on the above mentioned issues on September 21, 2009, 10:00 a.m.; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the Court.

Dated: 7/9/09

HON. CAROL EDMEAD 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

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

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Application of
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&G TRANSPORTATION, PENNY TRANSPORTATION, INC., PINNACLE BUS SERVICE, INC., PRIDE TRANSPORTATION SERVICES INC., RIMAR TRANSPORTATION, ROBIN TRANSPORTATION LTD., ROUND TRIP, SELBY TRANSPORTATION, SMART PICK INC., and THOMAS BUSES, INC.,

Petitioners,

Index No. 104001/08

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

Respondents,

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO,

Intervenor-Respondent.

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HON. CAROL R. EDMEAD

MEMORANDUM DECISION

In this action, petitioners, comprising various bus transportation companies, challenged numerous provisions in a bid solicitation issued by respondent Department of Education ("DOE") for pre-kindergarten ("Pre-K") and Early Intervention ("EI") school bus transportation

contracts. By Decision and Order dated December 17, 2008, this Court granted in part, and denied in part, the Petition.

Petitioners now move pursuant to Part 130, Subpart 130-1, of the Rules of the Chief Administrator, for an order imposing costs, including reasonable attorneys' fees, upon respondents NYC Department of Education ("DOE") and Local 1181-1061 Amalgamated Transit Union, AFL-CIO ("Local 1181" or the "Union"), for frivolous conduct in this litigation.

Petitioner' Motion

Petitioners argue that prior to submitting its Verified Answer and Declarations (Exhibits), the Union had an opportunity to review petitioners' arguments and this Court's Memorandum Decision, dated September 5, 2008 (the "Memorandum Decision") and knew that the EPPs could be sustained only if their purpose and likely effect was to lower the cost of bus transportation services or prevent fraud and corruption. The Union also knew that the effect of the EPPs was not to reduce the costs of such contracts or prevent corruption in their procurement. Nonetheless, the Union submitted an 87-page Memorandum of Law, which largely repeated the very arguments the Court had rejected in its Memorandum Decision, and made additional frivolous arguments. The Union made no attempt to show how the EPPs would prevent or even reduce favoritism, improvidence, fraud or corruption in the award of transportation contracts. Nor did the Union seriously contend that EPPs reduced the cost of such contracts. The Union argued that the EPPs facilitated the hiring of more experienced and thus more efficient employees; however, the EPPs do not require employment of the most experienced workers, there was nothing to show that efficiency grows with experience, and the Union did not dispute the fact that if experience were the issue, DOE could provide for it directly in the specifications.

The Union's additional argument that a strike would ensue if EPPs were not inserted ignored that the fact that avoidance of a strike alone had never been found to justify the insertion of anti-competitive provisions in a publicly-bid contract.

The Union also asserted material factual misstatements. There was no basis to assert that EPPs were necessary to retain an experienced pool of drivers and matrons; the KPMG reports, on which DOE did not rely, urged that these contracts should be procured by "true" competitive bidding, without EPPs; and the assertion that the city-wide strike the Union was prepared to mount would be legal was already refuted by petitioners.

Also, the Union's efforts to prevent petitioners from obtaining its standard collective bargaining agreement was frivolous because (a) it was not privileged; (b) even if it had been privileged, the privilege was waived by the Union's submission of two of its paragraphs purportedly in support of its statements; and (c) petitioners offered to enter into a confidentiality agreement prohibiting the use of the document for any purpose but the litigation of this case.

The conduct of DOE was even more sanctionable because (i) DOE had the power to discontinue the EPPs-related portion of this action, and (ii) more is expected of the City and its attorneys than of a union and its lawyers. Notwithstanding that DOE had sufficient time to consider the legal and factual bases for the positions it advocated, it adhered to untenable positions and prolonged this case. DOE knew that the insertion of the MacBride Principles (or "MacBride Rider") was in violation of law, and that the inclusion of insurance requirements that were commercially unavailable offended public bidding principles, but insisted on their inclusion nonetheless. DOE's defense of the insurance requirements demonstrated that (I) DOE had not even bothered to investigate the insurance issue itself, and (ii) the DOE's solution was to cause

would-be bidders either to submit nonresponsive bids or no bids at all; and then, only after having subjected the taxpayers and bidders to the costs of soliciting nonresponsive bids, to modify the insurance specifications and seek bids all over again.

Finally, DOE defended the insertion of the EPPs, even though DOE was aware of petitioners' March 25, 2008 letter, Petition and brief, July 25 Reply/Answering Memorandum of Law, the impending fiscal crises, the Memorandum Decision, Preliminary Injunction, and petitioners' December 8 Reply to the Union, and aware that the insertion of EPPs was unlawful without enabling legislation, *i.e.,* amendment of the Family Court Act, which in its present form did not permit EPPs. DOE knew that the EPPs would not, and were not intended to, further the goals of public bidding statutes, and could have conceded that the reason for the insertion of the EPPs was Local 118 l's threat of a strike, without advancing *post hoc* reasons to circumvent the interests of the public bidding statutes; DOE could have acknowledged the purpose of the Family Court Act amendment they submitted, rather than misrepresent it. The KPMG reports concluded that bidding with EPPs had not demonstrated the capacity for saving money and that "from a fiscal perspective, there is nothing to recommend it." DOE's assertion that EPPs saved the taxpayer money by avoiding strikes was frivolous, because it ignored the tremendous costs of the EPPs themselves and considered only the relatively minor potential costs of a strike without considering any of the potential savings.

Further, the avoidance of "withdrawal liability"was nothing more than a fabrication. Because the subject of "withdrawal liability" was complex and obscure, a great amount of time was required to gain sufficient knowledge of the topic to refute DOE's claim that the insertion of EPPs would remove a "fearsome" prospect of withdrawal liability and thereby elicit new bidders.

And, as DOE must have known, obtaining a skilled workforce is not one of the goals of public bidding and the Court of Appeals had invalidated the imposition of such a program as an illegal precondition to the award of a contract, because it was not limited to the of the competitive bidding statutes, regardless of its furtherance of otherwise enunciated public policy.

Therefore, petitioners request an order directing that DOE reimburse petitioners for (a) their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to the MacBride Rider and commercially unavailable insurance; (b) 15% of their reasonable costs and attorneys' fees in responding to DOE's opposition on other issues, with the exception of EPPs; and (c) their reasonable costs and attorneys' fees in responding to DOE's position regarding EPPs, up through the issuance of the Memorandum Decision, and that DOE and the Union reimburse petitioners for their reasonable costs and attorneys' fees in responding to their arguments thereafter in support of the EPPs.

DOE's Opposition

DOE argues that whether the Court ruled in petitioners' favor is disputed, given that the Court granted in part, and denied in part, the Petition, and DOE intends to appeal, *inter alia,* the Court's invalidation of the insertion of the EPPs.

DOE maintains that its defense that petitioners' lacked standing was correct, and that the Court's determination to the contrary was erroneous. DOE argues that petitioners failed to establish any injury in fact, since it was undisputed that petitioners did not have any business in Northern Ireland. DOE points out that petitioners' March 25 letter challenging the MacBride Principles failed to provide a single citation as to why the DOE's standing defense was frivolous. Further, the MacBride Principles in municipal contracts are required by statute, and the Court

declined petitioners' request to invalidate the Administrative Code provision requiring their inclusion.

Further, it was DOE's duty to seek protection from liability for acts of sexual molestation, especially in light of the young age and vulnerability of the children to be transported. Notwithstanding petitioners' submission of a hearsay affidavit indicating that such insurance was unavailable, in the event the required coverage were in fact not available, no bids would have been submitted, and DOE would have to revise the bid specifications or await the bidders' request for a waiver or approval of alternate coverage. Thus, DOE had a rational basis for including the challenged insurance requirement.

In addition, the issue of whether EPPs are consistent with the competitive bidding statutes was an issue of first impression, and it was not established that petitioners' view of the EPPs is correct. DOE argued that the EPPs ensured contractual performance without labor disruptions, facilitated the use of proven, experienced workers, and encouraged competition by removing the impediment of pension withdrawal liability to bidding. Petitioners have no basis for alleging that the elimination of withdrawal liability was not in fact considered by DOE in advance of including the EPPs. Further, the goal of preserving labor peace was based on experience of the 1979 strike, which cost the City more than $11 million dollars, and affected 132,000 students, and there were many incidents of violence and parents losing jobs because they had to stay home to take care of children unable to attend school. And, the KPMG Reports supported the parties' contrary viewpoints, and did not reach a conclusion as to the cost impact of the EPPs. Further, although the DOE did not rely upon the KPMG Reports to include the EPPs, the 1995 KPMG Report specifically questions petitioners' premises that EPPs increase costs. The DOE also

points out that its goal of maintaining an experienced workforce is recognized throughout the United States, and President Barak Obama recently signed an Executive Order entitled "Nondisplacement of Qualified Workers under Service Contracts," which contains similar mandates as the EPPs. Further, the DOE's support for the proposed legislation is immaterial and has no bearing on the lawfulness of the EPPs. And, DOE is permitted to argue why, under existing law, or an extension of existing law, the EPPs may be sustained without the statutory amendment. Further, although DOE's statement concerning the intent behind the proposed amendment to the Family Court Act was based on its understanding at the time of March 18th discussion in Court, DOE corrected its position at the September 18, 2009 conference. Nor did the Answer mention anything about the proposed legislation. Therefore, it cannot be said that the DOE intentionally misstated anything.

The Union's Opposition

The Union argues that simply because a court finds an argument to be unpersuasive does not mean that the argument is frivolous. While petitioners prevailed before this Court, the Union and DOE expect to prevail on appeal, the Union had no inappropriate purpose, and the Union's material factual statements were not false. A request for an award of costs and/or sanctions is unwarranted where courts address novel issues of law and the legality of the EPPs under the competitive bidding laws applicable to Pre-K transportation was an issue of first impression.

After the Court's September 5, 2008 Order, the Union carefully set forth the applicable legal principles at greater length and in greater detail in its November 12, 2008 answering brief. The Union's arguments in favor of inserting the EPPs were grounded upon Court of Appeals caselaw. Also, the Union did not know that it would need to establish that the EPPs

"purpose and likely effect" was to advance the twin goals of competitive bidding laws. The Court unambiguously identified the lesser standard as applicable in its December 17, 2008 Order. Petitioners ignore that the Union demonstrated that the EPPs prevent favoritism, improvidence, fraud, and corruption in the awarding of public contracts because they do not elevate one type of company over another. The Union explained that the EPPs are rationally related to protection of the public fisc by obtaining the best work at the lowest possible price, by promoting the existence of a more stable pool of experienced and qualified drivers, minimizing employee turnover and training, avoiding performance issues such as accidents, attendance problems, lack of familiarity with routes and procedures, and misconduct, and avoiding other costs associated with lower quality service. A specification requiring drivers to have a minimum level of experience, however, does not promote the existence of a pool of such drivers from which employers may hire. The KPMG Report concluded that the EPPs produced among the General Education school bus companies a highly skilled workforce which could be lost if the EPPs were eliminated. The EPPs may or may not increase wages and benefits. Petitioners fail to recognize other cost savings that are promoted by the EPPs. The Union's arguments are "serious" and cannot be deemed "completely without merit in law." Nor were they submitted primarily to prolong the resolution of the litigation or to harass or maliciously injure petitioners.

The Union's statement that there is a growing demand for employees was based on several sources, *i.e.*, the June 12, 2007 DOE Memo in Support of bill to amend the Family Court Act and the New York State Senate Introducer's Memorandum in Support, and nothing indicates that the Court rejected the assertion that there is a growing need for Pre-K employees. Further, although the KPMG Reports pointed out disadvantages of EPPs, (as pointed out by the Union's

letter to the Court), said Reports indisputably included information that supports DOE's decision to include EPPs in Pre-K school bus transportation contracts. DOE's inclusion of the EPPs was not only due only to alleged "threats" from the Union, but instead, DOE was favorably predisposed to the EPPs consistent with its longstanding policy of including EPPs in contracts for school bus transportation.

Additionally, the threatened strike would be legal and would be permitted by the Union's agreements with school transportation companies. The CBA expressly provides that should the DOE promulgate a bid specification without the EPPs, then the "no strike" clause in the CBA would be deemed waived. The Court also recognized that the Union had legitimate reasons for seeking to preserve the confidentiality of the CBA. In any case, the Court fully resolved the matter when it fashioned a protective order directing production of the CBA but imposing on petitioners restrictions on its use.

Finally, petitioners' motion for costs is untimely. A motion for costs and/or sanctions must be filed before the case is terminated, and here, this proceeding terminated on December 17, 2008. Thus, there was no proceeding before the Court when petitioners filed the instant motion for costs.

Petitioners' Reply

Contrary to DOE's contentions, petitioners' application is not one for "sanctions," but for the imposition of costs in order to shift the costs to the party or counsel whose frivolous conduct occasioned the expenses – in this case, the DOE, the Union, and their counsel.

Costs are sought in the instant matter because – with respect to those three issues for which costs are requested – the City's case had no basis in law or fact.

Further, this motion is not predicated on DOE's failure to withdraw its opposition to the Petition when the preliminary injunction was issued, but instead on the fact that the City continued in its opposition from March to December notwithstanding numerous demonstrations that its arguments were factually and legally without basis.

Further, DOE abandoned its appeal on two of the three issues that petitioners contend were frivolous. Petitioners point out that DOE no longer intends to appeal the Court's rulings on MacBride Rider and the insurance coverage.

Even the application as to the Union is not based on the issuance of the preliminary injunction itself. The Union's conduct was frivolous from the beginning, when it moved to dismiss the Petition. However, because the Union had not had the time the City had enjoyed for investigating the legal and factual bases of what became its arguments, and had not received as early as March 2 a letter setting forth petitioners' case petitioners gave the Union the benefit of the doubt on this application and are seeking costs incurred after the Union submitted its extensive answering papers.

In light of Corporation Counsel's own argument in *Council of the City of New York v Bloomberg* (6 NY3d 380 [2006]), and the Court of Appeal's adoption of that argument, the Law Department knew that the MacBride Rider was in violation of the public bidding laws. The Law Department failed to articulate any distinction between the equal benefits rider struck down in *Bloomberg* and the MacBride Rider it sought to continue here.

Similarly, based on the available facts and the City's refusal to have made available any other facts, DOE's attempt to insert the EPPs was not motivated by a desire to further the goals of the public bidding laws. Petitioners' letters dated March 2 and March 25 were not designed to

obtain "disclosure of privileged information;" as shown in the March 2 letter, petitioners attempted to avoid a lawsuit by convincing the City that petitioners' objections to the new specifications were sensible, just, and in the public interest. Petitioners never received a response to the letter because, petitioners' were allegedly not entitled "to disclosure of privileged information." The March 25, 2008 letter was sent after this Court had issued a temporary restraining order, but before DOE submitted its Answer. It also followed a March 7, 2008 New York Law Journal article by First Deputy Assistant Jeffrey Friedlandler, who "disclosed" that Mayor Bloomberg was a strong advocate of equal benefits for domestic partners and spouses, but was constrained to challenge the local legislation because the Corporation Counsel had informed him that the legislation violated state competitive bidding laws. The purpose of the March 25 letter was to dissuade the Law Department from opposing the removal of the MacBride Rider, by demonstrating the inconsistency of such opposition with the City's position in *Bloomberg* and the Mayor's reported reason for opposing the equal benefits rider, even though it furthered a cause he strongly supported. As noted in the Memorandum Decision, DOE never provided any justification for the MacBride Rider, or any explanation of how such a provision advanced the goals of the public bidding statutes.

DOE's opposition to removing the MacBride Rider was frivolous because, as the Court noted, DOE provided no justification for this provision, or any explanation of how such provision advances either of the goals of the public bidding statutes.

DOE's focus on standing was also frivolous. First, DOE could not, and did not, contest that petitioners were within the "zone of interests" of the public bidding laws, in that they are vendors in the school bus transportation business and prospective bidders for this very contract.

Nor could DOE contest that petitioners would suffer an injury-in-fact "different in kind or quality from that suffered by the public at large." DOE's only argument would be one based on the size or impact of the injury; however the competitive bidding statute does not become inapplicable when the sums saved by complying with it are immaterial. The DOE continued arguing that the injury must have a substantial impact on petitioners' costs in order to give them standing. Further, General Municipal Law ("GML") § 51 bestowed standing on a New York City taxpayer to prevent waste, is indisputably such a statute, and surely, a tax-paying New York City resident could have been found among two dozen petitioners to serve as a GML petitioner.

DOE's opposition could not have had any result other than to delay a resolution of the issue and impose further litigation costs on petitioners.

Further, as far as MacBride Rider is concerned, petitioners were awarded all they asked for and thus prevailed completely. Petitioners never asked the Court to invalidate the local law, unless the Court deemed such action necessary in order to strike the Rider from the specifications at issue. And, that the March 25 letter "failed to provide a single citation or explanation as to why a standing defense would supposedly be frivolous., lacks merit, as petitioners need not remind DOE of GML § 51 or of the Corporation Counsel's position in *Bloomberg*.

Additionally, although DOE knew or ought to have known that the insurance requirements could not be met, it refused to change them and, instead, made baseless arguments in order to justify doing nothing. Rather than investigate the feasibility of its insurance provisions, DOE planned to sit on its hands and wait to see whether the solicitation failed and, after the agency failed to receive a single responsive bid, only then to revise the provisions and go through the process of rebidding. DOE's counsel sees nothing amiss in this position,

notwithstanding the same respondents' earlier representations that even a temporary stay in the award of these contracts would cause the students, their parents, and DOE to suffer irreparable harm.

That the legality of the EPPs was a "case of first impression" is true, only to the extent that the legality of the previously discussed MacBride Rider was a case of first impression: no court had ruled on that specific rider before. Under such a standard, virtually every case will be one of first impression. The fact remains that the principles governing this class of cases (permissible restraints on competitive bidding) were not only well established, but recently confirmed by New York's highest court. DOE, as the Court also held, did not demonstrate that EPPs were even rationally related to the twin purposes of the public bidding statutes.

Nor did DOE, at any time, suggest that it was arguing to extend, modify, or reverse existing law. To the contrary, DOE argued that EPPs served purposes that were already encompassed within the public bidding goals, which it identified, baselessly, as (1) the avoidance of labor disruptions, (2) facilitating the use of experienced workers so that performance quality is enhanced, and (3) encouraging greater competition (not lower costs) by removing bidders' fears of withdrawal liability.

DOE also asserted that the apprentice program in Associated Builders and Contractors, Inc. v. City of Rochester, 67 N.Y.2d 854 (1986) ("City of Rochester") was invalidated because "the municipality sought solely to achieve social good. As previously observed, the Court nowhere labeled apprenticeship training a social program, nor is it one. DOE insisted that "the Court of Appeals has construed [City of Rochester] just as we presented it." According to DOE's counsel, that construction occurred not in City of Rochester itself, but in the subsequent

case of *Council v Bloomberg*. The DOE indicates that the Court of Appeals says that the provision struck down in City of Rochester was an "enactment of social policy." That is simply not true. Those words are taken from a sentence where the Court is quoting language from a case that addressed an order prohibiting discrimination by city contractors based on sexual preference, not an apprenticeship program. The Court discusses City of Rochester in a paragraph on page 390 of its opinion in Bloomberg. It states that City of Rochester "is the controlling authority" without ever suggesting that the case involved an "enactment of social policy." The "controlling authority" relied on GML § 103's predominant purpose of ""protection of the public fisc' " – a purpose which none of DOE's frivolous arguments rationally relate to EPPs.

Petitioners also point out that there was no basis why fear of "withdrawal liability" could reasonably be expected to deter school-age vendors from bidding for Pre-School contracts. DOE submitted no affidavit from any possibly affected general education bus company to attest to the ramifications upon a bid caused by the purported withdrawal liability.

Petitioners also argue that according to the Union, in 2006, if EPPs were not included in the pre-school specification, the Union would strike, and DOE was considering submitting a proposed bill at the state Legislature on the subject and asked if the Union would support DOE's efforts to pass the bill." If those facts are true, then DOE Chief Executive Eric Goldstein, who signed the DOE's Verified Answer, knew that, in submitting the bill, "DOE sought legislation to amend the [public bidding] statute to permit solicitation through an Request For Proposal process in which the contractor's willingness to go along with employee protection would constitute a requirement for selection," and his denial of that statement in the verified answer was a knowingly false statement made under oath.

DOE appears to have been more concerned about not disclosing any records than in prevailing in this matter. DOE was unable to present materials on which it relied (if any) in deciding to impose the EPPs, and, instead, was reduced merely to denying it relied on materials submitted by the Union (*e.g.*, the KPMG reports). Either DOE, as its own evidence suggests, decided to impose EPPs on competitive bidding for pre-school transportation without any serious consideration of its likely impact on the public purse or, DOE did perform analyses and made projections that, because they foresaw a harmful effect from EPPs, were disregarded and buried by the City. Whichever happened, there is no legal authority that would justify a determination to impose EPPs on competitive bidding without even a showing of their rational relationship to the reduction of transportation costs.

DOE also mischaracterized the KPMG reports. First, even were one to assume that the reports were inconclusive, they certainly waived a red flag of danger that no competent administrator would have ignored before changing the *status quo* in the specifications for preschool transportation contracts. Second, the decision DOE sought to defend was concerned with preschool contracts, which had existed without the impediment of EPPs since their inception. One of the "potential challenges" to the competitive model KPMG unequivocally recommended for preschool transportation was the possibility that EPPs would be applied to the transportation of preschool children." Third, the 1995 KPMG report was not "inconclusive" about the merits of EPPs themselves, but about what to do going forward with respect to school age busing. The inconclusiveness, moreover, came from the long history of school age transporter's bondage to EPPs and the uncertainty of what might happen should DOE try to break it free. No such considerations were applied to preschool transportation.

Petitioners contend that DOE's reliance on President Obama's recently signed executive order is misplaced. The reliance on worker retention requirements in other jurisdictions is self-defeating, because it only draws attention to their absence in New York. That executive order does not require a successor contractor to pay the carryover workers salaries at least as high and benefits at least as generous as the workers enjoyed with their previous employer. It merely requires the successor vendor to give the worker "a right of first refusal of employment." This distinction constitutes a tremendous difference that DOE fails to mention, since the federal requirement would not necessarily increase the cost of services. DOE's citations to the Los Angeles Administrative Code §§ 10.36.1, 10.36.2 and the San Francisco Municipal Code § 21.25-5 are similarly misleading. In each instance the successor company is required to offer employees discharged by the predecessor contractor only 90 days employment during a transition period.

Reply to Union's Opposition

Petitioners seek costs from the Union incurred only after September 5 because by then, the Union had no excuse for not being sufficiently familiar with the controlling precedent, including the Court of Appeals decisions. The Union submitted nothing to show that EPPs were even "rationally related" to the purposes of the public bidding statutes, no less "essential to the public interest." And, the Union's statement that it "did not know that it would need to meet the higher 'purpose and likely effect' standard and, in fact, was not required to meet it" is beyond human comprehension. The Union did not even attempt to show how EPPs would prevent favoritism, improvidence, fraud or corruption in the award of transportation contracts. The Union had no evidence to show that EPPs had any rational relationship to the reduction of

taxpayer costs, no less that they were "essential to the public interest."

The Union's arguments that EPPs result in better, more experienced employees and that the imposition of EPPs on public bidding was therefore justified have been refuted several times.

Nor do petitioners need to show that the Union's opposition to the Petition was submitted primarily to prolong the resolution of the litigation or to harass or maliciously injure petitioners, in order for petitioners to recover costs. Petitioners' application rests principally on the two objective definitions that do not depend on the motives for a litigant's misconduct, but on a finding that the conduct either was completely without merit in law and cannot be supported by a reasonable argument for a modification of the law, or asserted material factual statements that are false. The Union's conduct comes within both definitions of frivolous, whether or not it is also defined by the third.

The Union's only basis for asserting that there is a growing demand for employees came from the memoranda the City submitted to the Legislature in respondents' effort to justify amendment of the Family Court Act. However, the Union knew the actual reason for the amendment was because the Union had threatened DOE. While Subpart 130-1 may not apply to false justifications supplied to the Legislature, once they are submitted as fact to a Court to defeat a pleading, the rule applies. The Union defends its statements about a shortage on the ground that the layoffs were those of school age transportation workers. Workers laid off in school age transportation could fill job openings, if any, with preschool vendors, thereby assuring sufficient preschool transportation staff.

The language in the 1995 School Age Report delineated by the City did not pertain to preschool transportation contracts which, of course, this proceeding is all about. Nothing in the

1995 School Age Report, no less the 1994 Preschool Report, could be read to support the extension of EPPs to the transportation of preschool children.

The Union's claim that the 1994 Preschool Report demonstrates that DOE had a long-standing predisposition for inserting EPPs in preschool contracts is based on nothing beyond a single, short-lived 1989 insertion in specifications that were never let out for bidding. Between 1989 and 2006, DOE indicated no disposition of any kind regarding preschool contracts until the Union threatened to strike unless EPPs were added to them.

The Union's attorneys wrongly represented that the city-wide strike it had threatened would be a legal one. The Union deliberately confuses the legality of a strike against school age transportation employers undertaken at the present time (the threatened strike at issue) with a strike that would follow (1) an adverse result in this case, and (2) a subsequent negotiation between the Union and both preschool transportation and school age vendors to insert EPPs directly in a future collective bargaining agreement applying to both. In that case, the Union claims, any strike would be a primary strike. Based on this passage posing some hypothetical, unlikely future scenario, the Union concludes: "Thus, petitioners' arguments about secondary boycotts are frivolous." Such intentional deception warrants more than an award of costs.

Moreover, petitioners' argue, the Union boldly repeats the false representation that its collective bargaining agreement with school age transportation vendors permits the Union to conduct a strike "if DOE promulgates any [preschool] bid specifications without the EPPs." Although the Union does not include the word "preschool" in its assertion, that is what the Union means. Otherwise, the argument makes no sense.

Finally, the Union's claim that petitioners' application is untimely is based on two Third

Department opinions, issued 16 and 18 years ago, which were confusing and distinguished by the First Department. The First Department rejected the proposition that a court is without power to award costs after a judgment dismissing the case. Here, the costs sought are costs incurred "within the context of the civil action" and the Court's December 17th Decision is not denominated a judgment

Analysis

22 NYCRR § 130-1.1(a) authorizes the award of costs for reimbursement of actual expenses reasonably incurred and reasonable attorneys' fees and sanctions in a civil action for "frivolous conduct" (*see Yenom Corp. v 155 Wooster Street, Inc.*, 33 AD3d 67, 818 NYS2d 210 [1st Dept 2006]). Conduct is "frivolous" if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
>
> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.
> (22 NYCRR § 130-1.1(c)).

At the outset, the Court notes that petitioners are not seeking sanctions against the DOE and the Union, but instead costs for frivolous conduct. Therefore, that the conduct by DOE and the Union does not amount to "extreme behavior," does not defeat petitioners' request for costs.

By Memorandum Decision dated September 5, 2008, this Court set forth the standard under which the EPPs challenged by petitioners would be evaluated, by stating that: "Petitioners

sufficiently met their burden of establishing the likelihood of success on the merits of their claim that the DOE bid specification contains provisions that fail to protect the public fisc or prevent favoritism, improvidence, fraud and corruption . . . ." (Decision, p. 19). Specifically, the Court stated that DOE failed to show that the EPPs advanced the interests of the public bidding statutes. Since a new contractor would not know who is going to be unemployed, and thus, who it would be required to hire, until the results of the bidding were released, there would be no way for would-be bidders to calculate potential salaries and benefits in order to formulate a reasonable bid. Further, ensuring labor peace had "never been a legitimate goal of the public bidding laws . . . ." (Decision, p. 20), and averting a costly strike did not justify compelling would-be bidders to inflate their bids to cover the speculated costs associated in hiring former employees of contractors which did not win a contract with DOE. Nor was there any support in the record to show that the EPPs resulted in the retention of experienced staff and thus supported the twin goals of the public bidding statutes. In light of these considerations, the Court expressed the serious obstacles to the insertion of EPPs in the solicitations.

Yet, the Union presented no arguments or factual support to overcome these challenges to the insertion of the EPPs in the subject bus transportation contracts (*see Gassab v R.T.R.L.L.C.*, Slip Copy, 2009 WL 806805 [Sup Ct New York County 2009] [awarding costs because motion lacked legal merit, which should have been readily apparent given a Court's prior determination] *citing Newman v Berkowitz*, 50 AD3d 479 [1st Dept 2008] [affirming award of costs, including attorneys' fees, based on frivolous reargument motion]; and *Burr v Burr*, 51 AD3d at 434 [sanctions imposed because "arguments' lack of merit were apparent or should have been apparent"]). The Union's assertion that any strike by the Union due to the absence of EPPs in

Pre-K and EI contracts would be legal in light of the waiver of the no-strike provision in the School Age contracts was completely without basis in law or fact. Nor was any data submitted to demonstrate that hiring former employees of contractors who lost bids would result in a cost savings to the DOE; nor was there any data demonstrating that hiring such employees necessarily resulted in employees more experienced than employees hired under other methods. Further, no data was submitted demonstrating any growing demand for experienced drivers and matrons that could only be accomplished through the use of EPPs. And the Union's reliance on the KPMG Reports to support the inclusion of EPPs in the bid solicitations, when the DOE did not rely on them, was without basis.

Similarly, the DOE's insistence on defending the insertion of EPPs in Pre-K and EI bus transportation contracts was equally without basis in fact and law, for the reasons noted above and for additional reasons. Notably, the attempt to amend the Family Court Act prior to the commencement of this action) in order to include EPPs in such contracts, indicates that DOE was aware that the insertion of the EPPs under the Family Court Act in its present form was problematic; otherwise, an amendment to the Family Court Act would not be necessary. Further, the DOE's rationale that the insertion of EPPs in the subject contracts would save the City money by avoiding "withdrawal liability" was wholly unsupported by any factual data or affidavit by a person with knowledge as to the correlation between EPPs in the subject contracts and withdrawal liability.

Therefore, petitioners have demonstrated that the DOE's inclusion of the EPPs, and DOE's and Union's defense of the EPPs after this Court's Memorandum Decision were frivolous as that term in defined under 22 NYCRR § 130-1.1(c) and that DOE and the Union should

reimburse petitioners for their reasonable costs and attorneys' fees in responding to their arguments in support of the EPPs.

Although the issue of whether the insertion of EPPs in Pre-K and EI contracts violated the public bidding statute was never addressed by any New York Court, the standard by which bid solicitations on public contracts is well established: General Municipal Law § 103 (1) mandates that "all contracts for public work . . . be awarded . . . to the lowest responsible bidder" and Education Law § 305 likewise mandates that "contracts for the transportation of school children . . . shall be awarded to the lowest responsible bidder . . . ." It was uncontested that the two 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]). DOE was aware of this standard and knew that the bid solicitation at issue was subject to this standard. In advancing the aforementioned arguments that were unsupported by any factual data or evidence, both the DOE and the Union engaged in frivolous conduct, entitling petitioner to the costs, including reasonable attorneys' fees, associated with addressing such arguments.

Further, there was no showing that the requirement that school bus transportation vendors obtain insurance for coverage involving sexual molestation supported the goals of public bidding. Although DOE claimed that insurance requirements would included in other DOE contracts, DOE failed to submit any contracts requiring the coverage sought herein, or any proof that such insurance was commercially feasible. Instead, petitioners submitted proof that such

insurance was not commercially available, and DOE continued to insist in the insurance's inclusion in the subject bid solicitation. And, although DOE indicated that a waiver could be obtained, there was no indication that such a waiver was likely.

However, as to the insertion of the MacBride Rider, it cannot be said that the insertion of this provision was frivolous. The factual assertion that none of the petitioners had any business operations in Northern Ireland, thereby depriving petitioners of standing to challenge the provision, was not incorrect. And, it is uncontested that the DOE was statutorily mandated to include such a provision in its municipal contracts. Although the Court found that the MacBride Rider did not support the goals of the public bidding statute, the DOE's basis for its insertion was not completely without merit.

And, with respect to petitioners' request for an order directing that DOE reimburse them for costs in responding to DOE's opposition to the challenge on other issues, with the exception of EPPs, such request is denied. Petitioners' papers do not address how DOE's defense of any issues other than the EPPs, insurance requirements, and the MacBride Rider constitute frivolous conduct.

Conclusion

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to the MacBride Rider is denied;

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to commercially unavailable insurance is granted; and it is further

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's opposition to the challenge to 15% of their reasonable costs and attorneys' fees in responding to DOE's opposition on other issues, with the exception of EPPs, is denied; and it is further

ORDERED that petitioners' request for an order directing that DOE reimburse petitioners for their reasonable costs and attorneys' fees in responding to DOE's position regarding EPPs, up through the issuance of the Memorandum Decision, and that DOE and the Union both reimburse petitioners for their reasonable costs and attorneys' fees in responding to their arguments thereafter in support of the EPPs, is granted; and it is further

ORDERED that all parties appear in Part 40 for a hearing on the above mentioned issues on September 21, 2009, 10:00 a.m.; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the Court.

Dated: July 9, 2009

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

HON. CAROL EDMEAD

FILED

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK