Amboy Bus Co., Inc. v Klein
2010 NY Slip Op 31356(U)
April 28, 2010
Sup Ct, NY County
Docket Number: 117760/09
Judge: Joan A. Madden
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[* 1] SCANNED ON 5/7/2010

5/7/10

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

PRESENT: Hon Joan A. Madden, Justice

PART 11

Amboy Bus Co., Inc, et. al.

- v -

Joel I. Klein, Chancellor et al.

INDEX NO. 117760/09

MOTION DATE 2/8/10

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

	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 annexed Memorandum Decision + Order.

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

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 28, 2010

________________ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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Index No. 117760/09

AMBOY BUS CO., INC., PIONEER TRANSPORTATION CORP., LONERO TRANSIT, INC., VARSITY BUS CO., INC., METRO AFFILIATES, INC., TUFARO TRANSIT CO., INC., CARAVAN TRANSIT, INC., CARAVAN SAFETY CORPORATION, and JEFFREY DeSTEFANO, Individually and as Taxpayers,

Plaintiffs,

-against-

JOEL I. KLEIN as the CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY DEPARTMENT OF EDUCATION, the NEW YORK STATE EDUCATION DEPARTMENT, DAVID M. STEINER as the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, WILLIAM C. THOMPSON, JR. as the COMPTROLLER OF THE CITY OF NEW YORK, DAVID M. FRANKEL, as the FINANCE COMMISSIONER of the CITY OF NEW YORK, THOMAS P. DiNAPOLI, as the COMPTROLLER OF THE STATE OF NEW YORK, LOGAN BUS CO., INC., LOGAN TRANSPORTATION SYSTEMS, LITTLE LINDA BUS CO., INC., LITTLE RICHIE BUS SERVICE, INC., LITTLE LISA BUS CO., INC., LORINDA ENTERPRISES, LTD., LORRISSA BUS SERVICE, INC., BOBBY'S BUS CO., INC., AND GRANDPA'S BUS CO., INC.,

Defendants.

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FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Plaintiffs move, by order to show cause, for a preliminary injunction enjoining defendants from extending or taking any steps to extend or approve the bus transportation contract between the defendant New York City Department of Education ("DOE") and Logan Bus Co, Inc. and its affiliates (collectively "Logan") or from disbursing any funds to Logan pursuant to such

extension. Defendants oppose the motion, which is denied for the reasons set forth below.

BACKGROUND

The instant dispute arises against the backdrop of DOE's efforts to negotiate and extend bus transportation contracts for school-age children which are all set to expire on June 30, 2010. The corporate plaintiffs are school bus operating companies ("the plaintiff companies") which have contracted with DOE for decades to provide bus TRANSPORTATION services, and operate approximately 47% of all bus routes in the City for school-aged children. The individual plaintiff, Jeffrey DeStefano is the Director of Operations of plaintiff Amboy Bus Co., Inc., and is suing in his capacity as taxpayer of the City and State of New York. Logan consists of the nine related bus companies named as defendants in this action, which have provided DOE with bus transportation services since 1979.

DOE is the agency of the City of New York responsible for operating the New York City school system, including transportation of school-age children, subject to the approval of the Commissioner of the New York State Education Department DOE's Office of Pupil Transportation ("OPT") is responsible for providing and coordinating bus and other transportation services for New York City's school children and contracts with approximately 44 private bus companies located in and around New York City, including the corporate plaintiffs and Logan.

The current contracts for most student transportation were awarded in 1979 following public competitive bidding. These contracts were awarded for an initial three-year term and have been successively extended or renewed to date. In addition, certain contracts for smaller groups of routes were made pursuant to the bidding process conducted in 1986, 1988, 1989, 1994 and

1995. The contracts are requirement contracts awarded for a peculiar geographical areas that will service the area and provide as many buses and routes as is necessary. Thus, the contracts contemplate and allow additional work beyond the routes originally obtained in the contract award. Furthermore, from time to time, additional routes that were once assigned are deleted and some are eventually restored. All such contracts are set to expire on June 30, 2010.

The event which triggered this action was the approval of a proposed three-year extension of Logan's contract on December 17, 2009 at a meeting of the Panel for Education Policy ("Panel")(by a vote of 8 in favor, 2 against, with 2 abstaining), pursuant to DOE's Request For Authorization. While Logan has contract for the transportation of General Education, Special Education and summer students, only the contracts for Special Education are at issue here. The Request for Authorization sought approval of an extension of Logan's contract from July 1, 2010 through June 30, 2013 at an estimated cost over three years of $618, 761,781.68, and indicated that the extension was sought pursuant to Education Law § 305(14) which permits extensions of contracts originally subject to competitive bidding. The Request for Approval states that Logan was the only bus transportation contractor that agreed to DOE's request to "hold the line and costs [and to] reasonable and significant concessions," and that the price escalations within the contract were within those "prescribed by the Consumer Price Index."

The Request for Authorization reflects that DOE was aware that Logan's principal and founder, Richard Logan, Sr., who died in 2005, was involved in criminal activity that resulted in the conviction of several DOE's former employees on bribery, extortion and conspiracy charges. In addressing such involvement, DOE pointed out that Logan's current principals had not been

charged with a crime and have cooperated with the United States Attorney's Office.[1] It also pointed to Logan's willingness to enter into a Monitoring Agreement, whereby an Independent Private Sector Inspector General (IPSIG) would be selected by DOE and hired by Logan, at Logan's sole expense, to oversee the activities of Logan during the three-year extension term. In authorizing the extension, the DOE wrote that "[s]ince 1979, the Logan affiliated companies have consistently provided safe and timely transportation to the NYC Department of Education students on more than 1,000 bus routes."

The Logan contract extension is subject to registration by the defendant Office of the Comptroller of the City of New York, and the New York State Education Department has the right to reject the proposed extension.[2]

The Action

On December 18, 2009, plaintiffs commenced this action challenging the proposed

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[1]In addition, the record indicates that DOE staff publically stated at the December 17, 2009 meeting that the DOE conferred with the United States Attorney's Office prior to entering negotiations with Logan to extend its contracts.

[2]In addition to the City defendants, plaintiffs originally brought this action against the New York State Education Department ("NYSED"), David M. Steiner, as Commissioner of Education of the State of New York (together the "NYSED defendants") and Thomas P. DiNapoli, as the Comptroller of the State of New York, and this motion sought injunctive relief against these defendants. By stipulation between the parties dated January 19, 2010, plaintiffs withdrew this motion against Mr. DiNapoli and discontinued the claims against him without prejudice. Subsequently, by stipulation between the parties dated February 16, 2010, plaintiffs withdrew this motion as against the NYSED defendants and partially discontinued the action without prejudice as to the NYSED defendants. In exchange, the NYSED defendants agreed, inter alia, to provide plaintiffs with written notice of the filing by DOE with NYSED's Pupil Transportation Unit of any request for NYSED's approval of an extension of the Pupil Transportation contracts between DOE and Logan for the period between July 1, 2010 and June 30, 2013.

extension of the Logan contract based on Logan's involvement in criminal activity, and moved by order to show cause for injunctive relief enjoining the extension of the Logan contract and prohibiting defendants from taking any further steps to approve the Logan contract or from disbursing funds to Logan pursuant to such extension.[3] The complaint asserts four cause of action for injunctive and declaratory relief: (1) for injunctive relief pursuant to General Municipal Law § 51; (2) for injunctive relief pursuant to State Finance Law § 123-b; (3) for injunctive relief pursuant to General Municipal Law § 103 and Education Law § 305 (14); and (4) for a declaratory judgment pursuant to CPLR 3001.

Plaintiffs argue that they are entitled to a preliminary injunction as the proposed contract extension is unlawful and violates New York's competitive bidding statutes and public policy principles by inequitably awarding Logan for what it asserts is a decade-long pattern of bribing OPT officials. Specifically, plaintiffs assert that the extension will result in Logan's continued assignment to bus routes initially obtained as a proximate result of bribes and kickbacks paid to OPT officials.

In support of this assertion, plaintiffs submit the transcripts of testimony given by two former OPT employees who pleaded guilty to their role in the conspiracy and testified under a cooperation agreement in the criminal trial against another OPT employee. Both former employees testified as to the involvement of Logan and other bus companies in the conspiracy

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[3]The proposed order to show cause also sought a temporary restraining order ("TRO") seeking the same relief. The court declined to issue the TRO when it signed the order to show cause on December 18, 2009 but instead indicated that argument would be heard with respect to the TRO on January 6, 2010 return date for the order to show cause. On January 11, 2010, the City defendants agreed to provide counsel for all parties and the court five business days written notice prior to filing with the Comptroller of the City of New York the Logan contract extensions that are the subject of this action. As of the date of this decision, such notice has not been given.

and plaintiffs point to testimony that the OPT employees received money from Logan for additional and extended bus routes.

Based on these facts, plaintiffs assert that they are likely to succeed on the merits since the extension of the Logan contract violates General Municipal Law § 103, as supplemented and modified by Education Law § 305(14) as well as General Municipal Law § 51 and State Finance Law § 123-b.

Plaintiffs also argue that they will suffer irreparable injury both as competitors of Logan and taxpayers if a preliminary injunction is not granted since the Logan contract extension will have precluded them from bidding on the school bus contract on an level playing field, as the proposed extension has not been obtained through competitive bidding or an appropriate extension of legitimately obtained routes.

Moreover, plaintiffs argue that under the circumstances here, as in L&M Bus Corp. v. New York City Dept. of Educ., 21 Misc3d 1111(A),*14, 15 (Sup Ct NY Co. 2008), injunctive relief is appropriate since absent such relief "the purpose of obtaining an honest bid is undermined and a bidder cannot unring the bell of its competitor." Specifically, plaintiffs assert that to permit DOE to "allocate more than $600 million in upcoming school bus transportation work threatens to skew and distort the ongoing and upcoming negotiations for extensions of the TRANSPORTATION contracts for Plaintiffs and dozens of other contractors." (Plaintiffs' Memorandum of Law, at 10). Plaintiffs also assert that once the contracts are executed it will be required to challenge the contracts via an Article 78 proceeding which would provide a heightened legal standard for review.

Plaintiffs next argue that the equities weigh in their favor as the injunctive relief sought

will preserve the status quo and prevent the irreparable harm to plaintiffs and the public that will occur if the Logan contract is permitted to be extended since negotiations with the other contractors will be skewed and distorted since the Logan contract extension involves a substantial portion of bus routes. Plaintiffs also assert that defendants will not be harmed by the injunction since the extension will not take effect until the commencement of the next school year on July 1, 2010.

Defendants oppose the motion, asserting that plaintiffs have not met their burden of demonstrating a clear right to injunctive relief, and have not satisfied any aspect of the three-part test for obtaining such relief. Defendants Joel Klein as the Chancellor of the New York City Department of Education, DOE, William Thompson, Jr., as Comptroller of the City of New York[4] and David M. Frankel as the Finance Commissioner of the City of New York (together "the City defendants") argue that plaintiffs have not demonstrated irreparable harm since the challenged contract extensions are not immediately effective but subject to registration by the City Comptroller and require approval of the State Education Department.

In addition, the City defendants assert that plaintiffs have not shown any injury to themselves resulting from the extension under the principles of competitive bidding since they have not adequately shown that the bus routes were improperly assigned and rely on incompetent evidence such as transcripts of court testimony. In support of this position, the City defendants submit the affidavit of Eric Goldstein, DOE's Chief Executive Officer of Nutrition and Transportation. According to Goldstein, "[u]nder twenty-three existing contracts, Logan ...

[4]After this motion was submitted, John C. Liu, who is now the Comptroller of the City of New York was substituted for Mr. Thompson as a defendant in this action.

[* 9]

operate[s] approximately 1195 buses during the regular school year and 801 during the summer, representing about 22% of the total number of all school-bus routes in the City. Thirteen of the Logan contracts are for Special Education students; five are for General Education students; and five are for summer students." (Goldstein Affidavit, ¶ 19). Goldstein also states that the majority of Logan's bus routes are General Education and summer school routes, and not the Special Education bus routes at issue here, which were the only type of route implicated in the criminal activity.

Goldstein further states that to the extent there is evidence that payments were made in connection with additional routes, it cannot be shown from this fact alone that the routes were assigned as a result of such payments since the assignment of routes is not completely in the discretion of the OPT inspectors. Instead, the inspectors' decisions are subject to layers of approval and constrained by various other factors, including the requirement that the additional routes be offered in the order of the lowest bid under existing contracts. (Goldstein Affidavit, ¶¶ 40-53). With respect to the procedure for awarding additional routes, Goldstein states that:

> In accepting their original contract awards, the contractors all agreed to accept busing work, within one or more geographical areas, to be provided on one or more specified types of vehicles. Each geographical area, coupled with the type of vehicle, is called an 'item.' There are often several contractors operating routes within a given item, because the original contracts were bid out in 'lots'–consisting of several routes–and in many cases, the low bidder did not bid on all of the lots within an item. The contracts allow for 'additional routes' to be added to an item as the need arises. Additional routes cannot be offered to just any contractor; rather they must be offered to contractors within an item in 'pick order.' The pick order under the original contracts required that any proposed additional route within an item be offered in the first instance to the contract that, at the time of the offer of such additional route, had the lowest weighted daily rate in such item

> ("the lowest price contractor"). If the lowest-price contractor declined the additional route, it had to be offered to the contractor with the next lowest price in the item.

(Goldstein Aff. at ¶ 42, 43).

In addition, Goldstein asserts that plaintiffs cannot show that any additional routes assigned to Logan after making payments to inspectors were either "unnecessary or ... would have been assigned to another company–much less a plaintiff company–instead of Logan" (Id., ¶ 47).

The City defendants next argue that plaintiffs cannot succeed on the merits as the matter is not ripe for adjudication since the Logan contract has not been approved and as the plaintiff companies lack standing since they cannot show they will be harmed by the extensions. The City defendants also argue that the claims asserted in the complaint do not provide any basis for relief; that the determination of the DOE to extend the Logan contract is in accordance with Education Law § 305(14) which authorizes DOE to opt for contract extensions instead of competitive bidding; and that DOE's discretion in such matters is not subject to judicial review.

As part of its discretion, the City defendants argue, it is the DOE and not the plaintiffs who are entrusted with determining whether a contractor is worthy of further contract work. Moreover, the City defendants assert that DOE properly exercised its discretion by taking into consideration Logan's cooperation with the U.S. Attorneys' Office, its willingness to enter into a Monitoring Agreement to ensure its business integrity, and the lack of any charges against Logan's current principals.

The City defendants further argue there are several factors favoring the extension of the

Logan contract all of which benefit the public, including that Logan agreed to keep price escalations within CPI limits as required by the Education Law provision governing such extensions, and made a variety of other concessions favorable to DOE[5] (Goldstein Affidavit, ¶ 26). In contrast, the plaintiff companies have not agreed to the same terms as Logan and, instead, "have insisted on large rate increases that are not possible without special legislation and that the DOE cannot afford in any event (Id, ¶ 27).

As for the balancing of equities, the City defendants argue that the equities greatly favor the defendants since an injunction would jeopardize the continued and affordable supply of needed TRANSPORTATION services commencing on July 1, 2010 since the negotiating process for these contracts is currently underway and an injunction would cause DOE to lose momentum in negotiating with other contractors. The City defendants further argue that equities weigh in favor of permitting to the extension of Logan contract to go forward since it will encourage the

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[5]According to the unrefuted affidavit of Arthur Avedon, who is a consultant to Logan, and former employee of DOE's predecessor the Board of Education, these concessions included the following modifications and new contract provisions:

a. The removal of the "Most Favored Nation Clause" which had previously entitled Logan Companies to the terms and conditions offered by the DOE to any other contractor, in the event that such terms were more advantageous to those contractors than the terms accepted by the Logan Companies.

b. The addition of the "termination for convenience clause" which allows the DOE to terminate any contract or notice without cause....

c. The removal of a demographics provision from the existing contracts, which now allows the DOE to determine the number of pupils on each bus and, to periodically evaluate the need for certain routes that may becoming unnecessary, thus resulting in a reduce costs to the City (Avedon Affidavit, ¶ 13). In addition, the contracts included a "requirement for bus companies to provide annual financial statements to the DOE, and the City to determine the ongoing fiscal health of the companies (Id., ¶ 14).

plaintiff companies to agreed to similar terms as Logan and benefit the public fiscally.

Logan's arguments in opposition to the motion for a preliminary injunction are essentially the same as those of the City defendants. In addition, Logan asserts that while Richard Logan, Sr., the founder of Logan who is now deceased, was identified in testimony as having made payments to DOE officials, plaintiffs have not produced any evidence that Mr. Logan or any other principal of Logan was actually charged with wrongdoing. Furthermore, Logan argues that injunctive relief is not appropriate as the terms of its contract extension with DOE are beneficial to the public and the only real harm is to the negotiating position of the plaintiff companies. Logan additionally argues that with respect to the balancing of equities, the court should consider that any injunction in the review process of the contract, which represents the majority of Logan's business, would bring it "perilously close" to the expiration of its contract with the DOE and jeopardize its company which has approximately 3,000 employees.

In reply, plaintiffs argue that, contrary to defendants' position, Education Law § 305(14) does not authorize DOE to extend the Logan contract without competitive bidding since a substantial percentage of the bus routes assigned under the Logan contract were obtained by illegitimate means.[6] In support this argument, plaintiffs submit a 2004 DOE report indicating

[6]Plaintiffs also argue that as the additional routes were obtained by paying bribes to OPT inspectors, any extension of the contract for such routes is invalid and unenforceable under Article 18 of the General Municipal Law. In particular, plaintiffs rely on General Municipal Law § 804, which renders void contracts "willfully entered into by or with a municipality in which there is an interest prohibited under this article." Putting aside the fact that the complaint does not contain a claim based on this statute, plaintiffs' argument is without merit since, as the City defendants stated at oral argument on January 6, 2010, section 800 et seq of the General Municipal Law is inapplicable to the City of New York and DOE. In their letter dated January 8, 2010, plaintiffs concede that General Municipal Law provisions are inapplicable but argue that the extension is voidable under certain provisions of the New York City Charter, including section 2604(b)(4) which precludes a public servant from accepting a "valuable gift." In their

that while under the original contract, Logan was awarded 164 Special Education bus routes, it now operates a total of 935 of these routes, and thus obtained 771 of the Special Education routes through a non-competitive bidding process, and that this demonstrates that the majority of Logan's 1,195 bus routes are Special Education routes and not General or Summer education routes as argued by the City defendants. Plaintiffs also assert that contrary position of the City defendants, the inspectors "have substantial discretion and ability to influence the allocation of work, even though constrained to some extent by the requirement that work be awarded to low bidders under existing contracts." (Reply Affidavit of Domenic F. Gatto, ¶ 12). In addition, plaintiffs contend that the record demonstrates that Logan retains the benefit of additional bus assignments procured from inspectors that it bribed and that there is no way to separate those assignments from the others that may have been legitimately obtained. Plaintiffs further assert that while the documentary evidence at this juncture does not indicate precisely which routes were assigned as a result of the bribes, this information is in the possession of Logan and DOE and has not been provided in opposition to the motion.

Plaintiffs also assert that contrary to defendants' suggestions otherwise, Logan's illegal activity did not involve only Richard Logan Sr., and point to testimony at the criminal trial showing that Logan continued to pay inspectors until 2007, or approximately two years after Mr. Logan's death. Plaintiffs also challenge DOE's assertion that Logan had an excellent safety

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letter dated January 14, 2010, the City defendants argue that the provisions of the City Charter merely provide the Conflicts of Interest Board discretion to render void a transaction involving the acceptance of a valuable gift by a public servant after there has been a determination that there has been a violation of the Charter provisions relating to such gifts and after consultation with the head of the relevant agency, in this case DOE. No such action by the Conflict of Interest Board has occurred in this instance. Thus, it cannot be said that the City Charter provisions, standing alone, are sufficient to void the contract at issue.

record, based on testimony by an OPT inspector that he was paid to ignore safety violations and statements in newspaper articles.

Plaintiffs further argue that they have standing to bring this action since the plaintiff companies have been injured by the failure of the DOE to bid the contracts for the school bus routes currently assigned to Logan. In support of this argument, plaintiffs submit the affidavits of various principles of the plaintiff companies stating that they would have bid a such routes. Plaintiffs also assert that they have standing as taxpayers to bring the action based on the fraudulent and illegal conduct alleged in this case.

DISCUSSION

A preliminary injunctive relief is drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief. City of New York v 330 Continental, LLC, 60 AD3d 226, 234 (1st Dept 2009); Peterson v Corbin, 275 AD2d 35 [2d Dept], lv dismissed, 95 NY2d 919 (2000). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the motion must be denied. Faberge Intern., Inc. v Di Pino, 109 AD2d 235 (1st Dept 1985). Moreover, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail." Scott v. Mei, 219 AD2d 181, 182 (1st Dept 1996). For the reasons below, the court finds that plaintiffs have not met their burden of demonstrating entitlement to a preliminary injunction.

Likelihood of Success on the Merits

Plaintiffs' action for injunctive and declaratory relief is predicated on Education Law § 305 (14), General Municipal Law § 103, General Municipal Law § 51, and State Finance Law § 123-b, and thus to demonstrate the likelihood success on the merits, plaintiffs must show that it has a "clear right" to relief under at least one of these claims.[7] City of New York v 330 Continental, LLC, 60 AD3d at 234.

Education Law § 305 (14)(a) provides 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 the district." General Municipal Law § 103(1) provides that "all contracts for public work...shall be awarded by the appropriate officer, board or agency of a political subdivision... to the lowest responsible bidder ...." The Education Law, however, provides an exception to the requirements of competitive bidding for one to five year "extensions of a contracts...involving transportation of pupils...secured either through competitive bidding or through evaluation of proposals pursuant to paragraph (e) of this subdivision." Education Law § 305 (14)(a). There is no dispute that the Logan contract was secured through competitive bidding in 1979, and that when, as here, the original bus transportation contract is awarded through the public procurement process, Education Law § 305(14)(a) authorizes DOE to extend or renew such a contract past its initial term without

[7]The City defendants' argument that the action is not ripe does not provide a sufficient basis for denying injunctive relief, nor can it be said, as a matter of law at this juncture that the plaintiff companies did not suffer any injury in connection the Logan contract extension such that they lack standing to challenge such extension. This standing issue is separate and apart from the issue of taxpayer standing which is addressed in connection with the claims under General Municipal Law § 51 and State Finance § 123-b.

competitive bidding. Thus, there is no statutory requirement that the bus routes subject to the Logan contract extension be competitively bid under either General Municipal Law § 103 or Education Law § 305(14)(a).

To the contrary, the Education Law has been interpreted to provide the DOE with discretion to opt for a contract extension instead of competitive bidding. Baumann & Sons Buses, Inc. v. Board of Education, Northport-East Northport Union Free School Dist., 46 NY2d 1061, 1063 (1979)("The Legislature has vested responsibility and discretion in boards of education and district trustees to choose whether to provide transportation services by extension of existing contracts or to let bids anew"). Furthermore, while the record indicates that the number of bus routes under the Logan contracts increased substantially since it was originally bid in 1979, there is no prohibition against such expansion and, in fact, it appears from the record that the Logan contracts, as well as the bus transportation contracts generally, provide for the awarding of additional work beyond those originally assigned in the award.

Plaintiffs argue, however, that the Education Law provision permitting the extension of competitively bid contracts does not contemplate a situation, like this one, where a substantial portion of the additional work was procured through bribing public officials, and that the extension violates principles of fairness and integrity in the bidding process. Therefore, plaintiffs assert that the bus routes should be competitively bid.

In considering plaintiffs' position, the court is cognizant that "there are 'two central purposes of New York's competitive bidding statutes, both falling under the rubric of promoting the public interest: (1) protection of the public fisc by obtaining the best work at the lowest price; and (2) prevention of 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, 55 (1997), quoting, New York State Chapter, Inc. v. New York State Thruway Authority, 88 N.Y. 2d 56, 68 (1996). In addition, while Logan's involvement in the providing illegal payments to OPT inspectors is cause for concern, the record shows that DOE considered this involvement prior to recommending the approval of the contract extension and put safeguards in place, including the requirement of a Monitoring Agreement, to address the issue. Under these circumstances, and as Educational Law § 305 (14)(a) gives DOE discretion to extend contracts, like the one at issue, without further competitive bidding, the principles underlying the competitive bidding statutes do not provide plaintiffs with a clear right such as to warrant a granting of injunctive relief.

Furthermore, the record is insufficient to demonstrate the extent to which any of the bus routes that are part of the Logan contract extension were the result of illegal payments to OPT inspectors and whether there is a casual connection between such payments and the additional bus routes assigned to Logan. While plaintiffs have submitted excerpts from of the transcript containing the trial testimony of two OPT inspectors, Jeffrey Durant ("Durant") and Geoffrey Berger ("Berger") from the criminal trial of a third OPT inspector, Milton Smith, and newspaper articles to support their position that the certain bus routes were obtained by Logan illegally, such evidence is insufficient to provide basis for granting injunctive relief. Scott v. Mei, 219 AD2d at 182.

Durant testified that in addition to Logan, he took payments from twelve other bus companies in exchange for additional routes, and that Logan was one of the top three payors . Moreover, although Durant testified that he was paid from the thirteen bus companies between

$200,000 and $250,000 for various illegal benefits, and Berger testified that he received $1,000 from Logan per additional route, it is impossible to discern from their testimony the extent to which Logan paid for additional bus routes or whether such payments had a casual connection to Logan being awarded an additional route. In fact, Durant testified that an inspector did not have complete discretion to extend bus routes but was limited by various factors, including the approval by the inspector's supervisor, and the assignment of additional routes according to the bid process based on the order of bid with the lowest bid being first offered the additional routes. Notably, Durant's testimony in this regard is consistent with the City defendants' description of the process by which contractors obtain new bus routes under existing contracts. Furthermore, both Durant and Berger testified to taking money in exchange not only for additional routes but also benefits such as extended routes and field trip routes which are not alleged to be part of the Logan contract extension.[8]

Moreover, it is undisputed that while Logan has bus contracts for the operation of General Education, Summer and Special Education routes, only the Special Education routes were implicated in the criminal activity at issue. In addition, although plaintiffs maintain that a 2004 DOE report shows that the majority of Logan's routes are Special Education routes and that Logan obtained 771 such routes outside the competitive bidding process such evidence does not demonstrate that such routes were obtained through illegal activity. Notably, as indicated above, it was contemplated by the Logan contracts and those of other bus transportation contractors, which were requirement contracts, that work would be assigned outside the competitive bidding

[8]In fact, counsel for the City defendants asserted at oral argument that both extended routes and field trip routes are one time benefits which do not carry over from year to year and thus would not be part of the Logan contract extension.

process. Additionally, the record shows that this additional work was assigned in accordance with a process requiring that the routes be offered in low bid order and that a supervisor approve the routes.[9] Furthermore, while plaintiffs' argument that the defendants are in possession of documents and information which would support their allegations of illegality is an argument in favor of discovery, given the variables involved in the process for adding routes as described above, it cannot be said at this juncture that discovery will provide support for a grant of injunctive relief.

Plaintiffs also challenge the Logan contract extension under General Municipal Law § 51 and State Finance Law § 123-b; however, neither statute provides a clear basis for relief here. General Municipal Law § 51 provides, in part, that "[a]ll officers, agents, commissioners and other persons acting, or have acted, for and on behalf of any...municipal corporation in this state, and each and any one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such...municipal corporation...."

"It is well established that a taxpayer action pursuant to section 51 of the General Municipal Law lies 'only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.'" Mesivta of Forest Hills Institute, Inc. v. City of New York, 58 NY2d 1014, 1016 (1983), quoting, Kaskel v. Impellitteri, 306 NY 73, 79 (1953), cert denied, 347 US 934 (1954).

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[9]Plaintiffs do not challenge the process by which additional work is awarded under the contracts.

see Lavin v. Klein, 12 AD3d 244, 245 (1st Dept 2004), lv dismissed, 4 NY3d 794 (2005)(dismissing plaintiffs' taxpayer claim challenging defendants' practice of procuring insurance for the school transportation providers' vehicles as violative of various statutory and constitutional provisions, on the grounds that plaintiffs failed to alleged "misconduct of the sort, i.e. fraud, collusion, corruption or bad faith necessary to justify an action pursuant to General Municipal Law § 51").

Thus, it has been held that a taxpayer's suit under General Municipal Law § 51 is not "available simply to review a determination supposedly made in violation of the law" and that challenges to the legality of government action are properly sought via an Article 78 proceeding. See e.g., Fisher v. Biderman, 154 AD2d 155, 160 (1st Dept), appeal denied, 76 NY2d 702 (1990); see also Starburst Realty Corp. v. The City of New York, 125 AD2d 148, 155 (1st Dept), appeal denied, 70 NY2d 605 (1987)(Article 78 proceeding, rather than taxpayer suit under General Municipal Law § 51, is a proper vehicle to challenge the alleged failure of City to following the provisions of the City Charter in connection with the award of cable television franchise).

At this juncture it cannot be said that the act plaintiffs seek to enjoin, i.e. the extension of the Logan contract, constitutes a fraudulent act or a waste of public funds for a completely illegal purpose such that General Municipal Law § 51 constitutes an appropriate remedy. In support of its assertion that General Municipal Law § 51 is available here, plaintiffs point to case law holding that "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds is presumed and a taxpayer is entitled to have the contract set aside without showing the municipality suffered any actual injury." Gerzof v. Sweeney, 16 NY2d 206, 208 (1965); see also, Schulz v. Cableskill-Richmondville Central School Dist. Bd. of Educ.,

197 A.D.2d 247 (3d Dept 1994)(permitting taxpayers to prosecute action pursuant to General Municipal Law § 51 based on allegations that a support management service agreement for school maintenance and custodial needs which included an automatic renewal provision was violative of the competitive bidding requirements of General Municipal Law § 103); but see, Meehan v. County of Westchester, 3 AD3d 533 (2d Dept 2003), lv denied, 2 NY3d 706 (2004)(dismissing petition brought by taxpayers challenging contract on the grounds that respondent did not comply with competitive bidding requirements, where the allegations in the petition did not state a claim under General Municipal Law § 51).

However, the cases relied on by plaintiffs presuppose that the competitive bidding requirements of General Municipal Law § 103 have not been met. Here, as indicated above, since Education Law § 305(14)(a) permits DOE to extend bus transportation contracts like the one at issue without competitive bidding, these precedents do not demonstrate a clear entitlement to relief.[10]

Plaintiffs' remaining cause of action seeks relief pursuant to State Finance Law § 123-b, which permits a "citizen taxpayer... to maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, or is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds...."

In determining whether relief is available under the statute, courts "have been inhospitable to plaintiffs who seek essentially to challenge nonfiscal activities by invoking a

[10]The court notes that General Municipal Law § 51 provides no right of action against the State defendants. Matter of New York Post Corp. v. Moses, 10 NY2d 199, 204 (1961).

convenient statutory hook." Saratoga County Chamber of Commerce v. Pataki, 100 NY2d 801, 803, cert denied, 540 U.S. 1017 (2003). "Since most activities can be viewed as having some relationship to expenditures...too broad of a reading of section 123-b would create standing for any citizen who had the desire to challenge virtually all government acts." Rudder v. Pataki, 93 NY2d 273, 281 (1999). Therefore, State Finance Law § 123-b "has been narrowly construed as a grant of 'standing to correct clear illegality of official action...'" East End Property Co. No. 1, LLC v. Kessel, 46 AD2d 817, 824 (2d Dept 2007), quoting, Matter of Abrams v. New York City Trans. Authority, 39 NY2d 990, 992 (1976). In accordance with this statutory construction, "claims which seek review of a State actor's alleged mismanagement of funds or the arbitrary or capricious distribution of funds lawfully allocated to an agency are not covered." Matter of Transactive Corp. v. New York State Department of Social Serv., 92 NY2d 579, 589 (1998).

Under this standard, plaintiffs have not shown a clear right to relief under section 123-b. As indicated above, since the Education Law authorizes extensions of bus transportation contracts without competitive bidding and based on the evidence now before the court, any expenditure of funds in connection with Logan contract extension is not fairly characterized as illegal. Moreover, since the Logan contract extension has not been approved, it cannot be said that any State actor[11] is "about to cause" an expenditure of funds as required under section 123-b. See also, Godfrey v. Spano, 13 NY3d 358, 374 (2009)(standing under section 123-b requires "some specific threat of imminent expenditure").

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[11]There is no dispute that DOE is a "State actor" within the ambit of the statute on the theory that Boards of Education are "branches of the state government charged with the administration of the educational system." Schulz v. Cableskill-Richmondville Central School Dist. Bd. Of Educ., 197 A.D.2d at 252.

Finally, to the extent that plaintiffs challenge the contract extension of the ground that DOE did not properly assess Logan's safety record, such matters are within the discretion of DOE and, in any event, the record is insufficient to grant a preliminary injunction on such ground.[12]

Accordingly, as plaintiffs have not demonstrated that they are likely to succeed on any of the causes of action in the complaint.

Irreparable Injury

Plaintiffs have also not met their burden of demonstrating irreparable harm. Plaintiffs argue that in the absence of injunctive relief enjoining the process for approving the Logan contract extension they will be irreparably harmed as they will not be given an equal opportunity to bid on the routes at issue, and that the terms of the Logan extension will distort their own contract negotiations for bus transportation contracts.

In considering plaintiffs' argument, the court notes that "the laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders and, thus should be 'construed and administered 'with sole reference to the public interest.'" Acme Bus Corp. v. Board of Educ. of Roosevelt Union Free School Dist., 91 NY2d at 54. In this case, even assuming arguendo that plaintiffs have shown that they will suffer irreparable harm in the absence of injunctive relief, they have not demonstrated that the public will suffer irreparable harm. To the contrary, the record indicates that the Logan contract extension was favorable to the

[12]In fact, at oral argument counsel for the City defendants asserted that safety inspections are performed by the City Department of Transportation and not by DOE inspectors, and that DOE inspectors are responsible for issuing non-safety violations such as a tear in a seat or graffiti.

public as Logan agreed to keep price escalations within the CPI limits and to other concessions, and the extension will benefit DOE's ability to obtain favorable contracts with other bus transportation vendors.

Furthermore, while "favoritism or irregularity in the bidding process which may produce monetary savings...is unsustainable because the complete public interest is ultimately promoted by fostering honest competition," in this case there is insufficient evidence of any favoritism or irregularity that would harm the public interest. In particular, as indicated above, the Education Law gives DOE discretion to extend bus transportation contracts without competitive bidding, and the record is insufficient to demonstrate that the bribes of OPT inspectors resulted in additional bus routes to Logan. In contrast, L&M Bus Corp. v. New York City Dept. of Educ., 21 Misc3d 1111(A), on which plaintiffs rely to argue that they will be irreparably harmed, involved alleged irregularities in a competitive bidding process. Moreover, in that case, before finding that petitioners would be irreparably harmed if the solicitation and bidding process was permitted to proceed, the court found that petitioners had shown that they were likely to succeed on the merits of their claims that "the DOE bid specification contain[ed] provisions that fail[ed] to protect the public fisc or prevent favoritism, improvidence, fraud and corruption so as to facilitate awards of school-age bus transportation contracts to the lowest responsible bidders." Id at *11. Accordingly, contrary to plaintiffs' position, the holding in L&M Bus Corp. v. New York City Dept. of Educ., does not warrant a finding irreparable harm to the public in the instant case.

Balancing of Equities

"In evaluating the balance of equities on a motion for a preliminary injunction, courts

'must weigh the interests of the general public as well as the interests of the parties to the litigation.'" L&M Bus Corp. v. New York City Dept. of Educ., 21 Misc3d 1111(A), *14, quoting, De Pina v. Educational Testing Service., 31 AD2d 744, 745 (2d Dept 1969) (internal citation omitted). Here, the interest of the plaintiff companies in protecting their right to bid on the bus routes subject to the Logan contract extension and their negotiating position with respect to other bus transportation contracts is outweighed by the interest of the defendants and the public in permitting the process of approving the Logan contract to go forward. Specifically, in the absence of any evident violations of the public bidding statutes, the equities weigh against enjoining the Logan contract extension which is beneficial to the public fisc and enhances DOE's bargaining position with other bus transportation contractors.

In addition, the negotiation process is well underway and interference with such process threatens DOE's to obtain affordable bus transportation contracts for the 2010-2011 school year. On the other hand, in the event the Logan contract extension is shown to be at odds with the competitive bidding statutes, the bus routes subject to such extension can be re-bid. Accordingly, plaintiffs have not demonstrated that the equities weigh in their favor.

CONCLUSION

In view of the above, it is

ORDERED that the plaintiffs' motion for a preliminary injunction is denied.

DATED: April 28 2010

J.S.C.

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