

NYRCA Affiliates, LLC v James

2023 NY Slip Op 31042(U)

April 3, 2023

Supreme Court, New York County

Docket Number: Index No. 151505/2022

Judge: Shlomo S. Hagler

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

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

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NYRCA AFFILIATES, LLC, JLJ IV ENTERPRISES, INC.,
ADC CONSTRUCTION, LLC, DIFAZIO INDUSTRIES, LLC,
PERFETTO CONTRACTING, CO., INC., and J.
PIZZIRUSSO LANDSCAPING CORP.,

INDEX NO. 151505/2022

MOTION DATE 08/05/2022

MOTION SEQ. NO. 001

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules and a Declaratory Judgment under CPLR §
3001

- v -

**DECISION + ORDER ON
MOTION**

LETITIA JAMES, in her official capacity as Attorney General
of the State of New York, THOMAS FOLEY, in his official
capacity as Commissioner of the City of New York
Department of Design and Construction, BRAD LANDER, in
his official capacity as Comptroller of the City of New York,
and the CITY OF NEW YORK,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 15, 16, 17, 18,
19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Petitioners NYCRA Affiliates, LLC (NYCRA), JLJ IV Enterprises, Inc. (JLJ), ADC
Construction, LLC (ADC), DiFazio Industries, LLC (DiFazio Industries), Perfetto Contracting,
Co., Inc. (Perfetto Contracting), and J. Pizzirusso Landscaping Corp. (JPL) (JLJ, ADC, DiFazio
Industries, Perfetto Contracting and JPL, collectively, the Individual Contractors) (NYCRA and
the Individual Contractors, together, petitioners) commenced this CPLR article 78 proceeding
and declaratory judgment action against respondents Letitia James, in her official capacity as
Attorney General of the State of New York, Thomas Foley (Foley), in his official capacity as
Commissioner of the City of New York Department of Design and Construction, Brad Lander
(Lander), in his official capacity as Comptroller of the City of New York, and the City of New

York (City) (collectively, respondents), for an order declaring the joint bidding contract provisions, revised as of November 9, 2021, found in the City's public work contracts violates New York State Constitution, article I, § 6, and General Municipal Law § 103, and for an order temporarily or permanently enjoining the City's solicitation of bids on contracts that contain the allegedly illegal contract specifications. For the reasons set forth below, the petition is granted in part.

Background

NYCRA is a domestic limited liability company whose members are members of the New York Road Contractors Association, an affiliated group of contractors who perform construction on streets and roads within the New York Metropolitan area (NYSCEF Doc No. 1, petition ¶¶ 31-42). NYCRA's members are City taxpayers with assessments of at least \$1,000 (*id.*, ¶ 44). JLJ, ADC, DiFazio Industries, Perfetto Contracting, JPL are corporations or limited liability companies organized in New York, where they maintain principal places of business and pay City and State taxes (*id.*, ¶¶ 45-59).

The New York City Department of Design and Construction (DDC) is a City agency that facilitates and carries out construction projects on the City's public infrastructure, including streets, sewers and water mains (*id.*, ¶¶ 68-70; NYSCEF Doc No. 15, answer ¶¶ 68-69 and 152 and 155). Privately-owned utility companies (the Private Utilities), such as Consolidated Edison, Inc. (Con Ed), Charter Communications, Inc. and Verizon Communications Inc. (Verizon), own facilities and equipment, such as conduits, electrical lines, vaults and fiber optic cables, beneath roads and sidewalks that may be affected by the City's construction projects (petition ¶¶ 1 and 71; answer ¶ 152). In that event, the Private Utilities' facilities and equipment must be moved or protected (the Utility Interference Work) for the public project to proceed (petition ¶ 72). The

Private Utilities have a statutory and common-law obligation to move their equipment and to pay all costs for performing the Utility Interference Work (*id.*, ¶ 73; answer ¶ 153).

Joint bidding is a practice whereby public work and Utility Interference Work are bundled together into a single contract to be performed by a single contractor selected through the competitive, sealed bidding process (petition ¶ 8; answer ¶ 154). Joint bid contracts may include certain items where the costs are shared proportionately between the City and the participating utility; examples include the costs for maintaining a field office and constructing pedestrian walkways (answer ¶ 154). DDC presently utilizes uses joint bidding for all its contracts concerning the City's infrastructure (*id.*, ¶ 155).

Senate Bill 7849, enacted as chapter 322 of the Laws of 2014 (the Joint Bidding Statute), expressly authorizes joint bidding of public work contracts that include Utility Interference Work, and provides, in relevant part:

“Notwithstanding any general, special or local law or rule or regulation to the contrary, the city of New York may include utility interference work in any contract for a public work project, provided however that chapter 357 of the laws of 1988, known as the ‘gas facility cost allocation act’, shall continue to apply as set forth therein. If the city of New York undertakes a New York city utility interference work project, the city shall award the contract to the lowest responsible bidder. In the event that the utility interference work is not included in the city's contract, nothing in this subdivision shall prevent the city from including provisions in its contracts requiring contractors to engage in alternate methods of dispute resolution regarding utility interference work.”

Section 2 of part B of the Joint Bidding Statute defines a “New York city utility interference work project” as “any public work project within the city of New York for which the city awards a contract which includes utility interference work in such contract.” More than 20 joint bid projects have been awarded and completed since the Joint Bidding Statute was enacted in 2014 (answer ¶ 162).

On November 9, 2021, DDC revised the joint bidding provisions (the JB 4.0 Provisions) in its construction contracts to employ a “Price List Method” (the Price List Method) for bidding¹ (petition ¶ 7; answer ¶¶ 21 and 164). Section A.1, entitled “Requirements for Joint Bid Work,” partially reads:

“B. The City is bidding jointly this Contract. The City has combined its Public Work and Utility Work into one bid contract package. All prospective bidders should be alerted to the fact that the City prepared all specifications, drawings, and all other necessary contract documents for the Public Work and Utility Work.

C. The City has prepared contract documents which include specifications, drawings and all other necessary contract documents for the Public Work and Utility Work. The bid items, specifications, and estimated quantities have been designed to fully compensate the Contractor for its costs to perform the Public Work and Utility Work.

D. The Contractor agrees that its bid prices and the NYC Utility Price List prices for the Public Work and Utility Work will include all incremental costs and/or additional compensation for performing Public Work and Utility Work including: coordination of its work with the Utilities, loss of productivity and efficiency, idle time, delays (including any delays occasioned by negotiation of a contract change), change in operations, mobilization, demobilization, remobilization, added cost or expense, loss of profit, other damages or impact costs that may be suffered by the Contractor because of direct or indirect obstructions due to the presence of Utility Facilities, such as conduits, ducts or duct banks containing conductors for live and/or abandoned electric, telephone, cable TV, any type of communication cables, ‘Non Cost Sharing’ gas mains and services, steam mains, and various non-hazardous encasement materials or utility structures located within the Public Work project area.

¹ The JB 4.0 Provisions were revised on February 11, 2022 (answer ¶ 7; NYSCEF Doc No. 19, answer exhibit 4). Section A, titled “Joint Bid Requirements and Standard Specifications” in the February 2022 version is largely identical to the November 2011 version. The court observes that the February 2022 version adds language in Section A.2 (F) regarding “Extra Work” items, such as utility facilities or utility scope of work the contractor believes is not covered by the contract and provides for payment on a “Time and Material Basis” (NYSCEF Doc No. 19 at 10). The February 2022 version also includes a new Section A.2 (G) discussing overtime on utility work (*id.* at 11). However, the court will limit its discussion to the November 2021 version at issue in this proceeding.

E. In the bid solicitation documents, the City has provided estimated quantities for both Specific Public Work Items, Specific Utility Work Items, and Specific Shared Items. Bidders are required to bid a unit price on all Work in the Bid Schedules. For the purposes of identifying the lowest responsive and responsible bidder, a bidder's unit prices bid must be calculated based on all Work, which includes the combined Specific Public Work Items, the Specific Utility Work Items, and the Specific Shared Items.

F. If the Utility determines that the Contractor is not qualified or best suited to perform a specific scope of Utility Work, the Utility has the right to utilize their Specialty Contractors"²

(NYSCEF Doc No. 6, Raymond J. Rudolph [Rudolph] aff, exhibit B at 6). Under the Price List Method for joint bid contracts, a contractor bids on "Bid Items" listed in a "Bid Schedule" (the Bid Schedule) (*id.* at 8 [Section A.2 (A) (1)]). The Bid Schedule contains "Joint Bid Fixed Sums ('JB FS Items') that will be used for the payment of Utility Work" (*id.* at 8 [Section A.2 (A) (3)]). Under Section A.2 (A) (2), "[t]he Contractor agrees that the prices listed for items in the Price List ('PL Items') represent full and complete compensation for the Specific Utility Work listed in the NYC Utility Price List. The NYC Utility Price List prices are fixed for the duration of the Contract, regardless of any time extensions"³ (*id.*). To the extent the "Contract contains Specialty JB items that are not covered by the NYC Utility Price List ('JB Specialty Items'), the

² The JB 4.0 Provisions defines "Public Work" as "(a) construction, reconstruction, installation, alteration, maintenance, repair, grading, re-grading, regulating and improvement of roadways, highways, streets, parkways and other thoroughfares, and bridges and (b) similarly for sewers, culverts, catch basins, chutes and water mains," and "Utility Work" as "such work as is required to be performed by the Contractor during the performance of Public Work ... in order to maintain, protect, support, shift, alter, relocate, remove, construct, and/or replace Utility Facilities at the Utilities' expense" (NYSCEF Doc No. 6 at 5-6 [Section A.1 (A) (5) and (13)]). A "Specialty Contractor" is "a contractor provided and paid for by the Utility, and includes the Utilities' in-house field forces" (*id.* at 5 [Section A.1 (a) (7)]).

³ "Specific Utility Work Items" means the "detailed set of specifications prepared by the Utilities based on the Utility's Pre-engineering that will represent the Utility Work portion of the Joint Bid Project" (NYSCEF Doc No. 6 at 5 [Section A.1 (A) (10)]). "Pre-engineering" means the "process undertaken by the Utilities ... whereby the Utilities will determine and mark-out current Utility Facilities, and design the location and/or re-location of Utility Facilities in a manner that ... avoid[s] or ameliorate[s] disturbances to the City Facilities and the Utilities Facilities, and in which the City and Utility participate in prior to the award of a Joint Bid Project contract" (*id.* [Section A.1 (A) (4)]).

Contractor will bid on the JB Special items listed in the separate JB Specialty Item Bid Schedule (*id.* [Section A.2 (A) (4)]). Under Section A.2 (B), “costs that are to be paid for by the Utility will be paid according to the JB FS Items, whether the work is a Bid Item, PL Item, or JB Specialty Item” (*id.*). For “extra work items not included in the Bid Items, PL Items, or JB Specialty Items (‘Utility Extra Work’), the Utility and the Contractor will directly negotiate unit rates or lump sum amounts” (*id.* at 9 [Section A.2 (F)]).

The solicitations for bids for the following five projects include the JB 4.0 Provisions: (1) Project RED-386 for the “Replacement of Distribution Water Mains and Appurtenances in South Avenue between Richmond Terrace and Netherland Avenue, Arlington Place between South Avenue and Arlington Avenue – Borough of Staten Island” (Project RED-386); (2) Project SANDR03 known as the “Jamaica Bay Greenway – Canarsie Pier Connector – Borough of Brooklyn” (Project SANDR03); (3) Project QED-1051 for the “Replacement of Distribution Water Mains and Appurtenances in 61st Street between Maspeth Avenue and Borden Avenue – Borough of Queens” (Project QED-1051); (4) Project HWCSCHPBX for the “Reconstruction of Safe Routes to Schools – Borough of the Bronx” (Project HWCSCHPBX); and (5) Project HWQ1193 for the “Reconstruction of Center Median in Union Turnpike, Queens, NY” (collectively, the Challenged Joint Bid Projects) (petition ¶ 114; answer ¶ 114). The bid openings for these projects were scheduled for February 23, 24 and 25 and March 2 and 9, 2022, respectively (NYSCEF Doc No. 4, Rudolph aff, ¶ 4).

Petitioners commenced this proceeding on February 18, 2022 by filing an order to show cause and verified petition asserting three causes of action (NYSCEF Doc No. 1-2). The first and second causes of action seek judgments declaring that the Joint Bidding Statute is invalid and cannot be enforced as (1) it violates the New York State Constitution and the competitive

bidding statute, General Municipal Law § 103, and (2) the term “lowest responsible bidder” is impermissibly vague and renders the Joint Bidding Statute unconstitutional on its face and unconstitutional as applied to petitioners in violation of New York State Constitution, article I, § 6. Both causes of action also seek a declaration that the City must retract the bid packages for all joint bid projects that rely on the Joint Bidding Statute. The third cause of action seeks to permanently enjoin respondents from engaging in the practice of joint bidding under the unconstitutionally vague Joint Bidding Statute and the City’s solicitation of bids for joint bid contracts with the JB 4.0 Provisions.

Respondents interposed numerous affirmative defenses in their answer, including petitioners’ lack of standing (second defense), the statute of limitations (third defense) and that the JB 4.0 Provisions do not violate General Municipal Law § 103 (fifth defense).

Petitioners have since discontinued the proceeding against respondent Letitia James, sued in her official capacity as Attorney General of the State of New York (NYSCEF Doc No. 14).

The Parties’ Contentions

Petitioners contend that the JB 4.0 Provisions ensure the City will not award the public work portion in joint bid contracts to the lowest responsible bidder as mandated by statute. Petitioners claim that the prices for completing Utility Interference Work items outlined in the “NYC Utility Price List” (the Utility Price List) are fixed, and that a contractor is prohibited from negotiating with the Private Utilities to perform this work (petition ¶ 119). They allege the Utility Price List does not reflect the true cost of performing such work and forces prospective contractors to inflate their bids on the public work component in order to properly perform and to pay their employees (*id.*, ¶¶ 13-14). Petitioners posit that, because of having to increase their bids due to the low, fixed costs assigned to the Utility Interference Work, prospective contractors

are shifting the costs for performing this work, which historically has been the obligation of the Private Utilities, from the Private Utilities to the City, and causes the City and its taxpayers to subsidize those entities (*id.*, ¶¶ 30-31). This result, petitioners posit, defeats the purpose of General Municipal Law § 103, which is to protect the public fisc (*id.*, ¶ 99). The JB 4.0 Provisions also shift the costs for performing certain Utility Interference Work on underground and overhead wires to the City (*id.*, ¶¶ 15 and 18). Specifically, Section A.3 (G) states that “[t]he Contractor will not be paid separately to modify means and methods around overhead utilities; those costs must be included in the prices bid for all work” (NYSCEF Doc No. 6 at 11). Petitioners also contend that the specifications “chill[] the market” because Local Law 1 of 2013 requires a percentage of construction contracts to be performed by minority and women owned business enterprises (MWBE), and the Private Utilities may reject a successful bidder because they disapprove of the bidder’s designated MWBE subcontractor⁴ (petition ¶¶ 34 and 37).

Submitted in support of the petition is an affidavit from Rudolph, JLJ’s treasurer, in which Rudolph describes the Utility Price List as “arbitrary” and “massively” and “grossly underpriced” and “undervalued” (NYSCEF Doc No. 4, ¶¶ 8, 11 and 13). Rudolph avers that, in connection with two Utility Interference Work contracts JLJ had been negotiating with Con Ed in late 2020 and early 2021, Con Ed proposed paying substantially undervalued unit prices for the work (*id.*, ¶ 20). Rudolph states that JLJ successfully negotiated significantly higher prices to perform this work because the projects were not subject to joint bidding (*id.*, ¶ 21). The Utility Price List, Rudolph contends, contains the same “lowball” prices on several items that Con Ed had presented to JLJ in their earlier negotiations, and bolsters his belief that the Private

⁴ Local Law 1 of 2013 amended New York City Charter § 1304 (“Division of Economic and Financial Opportunity”) and Administrative Code of the City of New York § 6-129 (“Participation by minority-owned and women-owned business enterprises and emerging business enterprises in city procurement”).

Utilities forwarded these low unit prices to respondents for inclusion in the Utility Price List (*id.*, ¶¶ 19 and 23-25). Rudolph observes that unit prices for City contract items of work have increased 156% on average from 2007 to date (*id.*, ¶ 29). However, unit prices on joint bid Utility Interference Work for Con Ed increased by less than seven percent whereas they decreased by 2.30% for ECS, a Verizon company, over the same period (*id.*). Rudolph submits that, because the costs for performing the Utility Interference Work on joint bid contracts are now fixed and non-negotiable, “the only way the contractor can receive an appropriate price for the bundled work under the Joint Bid Contracts is to overcharge the City for the City’s public work” (*id.*, ¶ 32). And, insofar as the JB 4.0 Provisions pertain to Project RED-386, Rudolph complains that the lack of pre-engineering on the part of Con Ed and Verizon for this project can impact a prospective contractor’s ability to prepare its bid (*id.*, ¶ 14).

For their part, respondents contend that the first two causes of action for a declaratory judgment are time-barred under CPLR 213 (1). Next, respondents argue that petitioners lack standing under State Finance Law § 123-b and General Municipal Law § 51 nor do they qualify for common-law taxpayer standing as they failed to (1) plead an injury-in-fact; (2) identify a zone of interest or concern sought to be promoted or protected by General Municipal Law § 103; and (3) establish associational or organizational standing.

Respondents maintain that the Joint Bidding Statute, as applied through the JB 4.0 Provisions, is not unconstitutional, either facially or as applied. The “notwithstanding” language in the Joint Bidding Statute establishes that General Municipal Law § 103 trumps the Joint Bidding Statute in any potential conflict. Additionally, respondents contend the contract specification ensures that only the lowest responsible bidder for the public work is awarded a joint bid contract because the prices for the Utility Interference Work are fixed. Respondents

assert that the inclusion of the Utility Price List in the solicitations for the Challenged Joint Bid Projects has not prohibited petitioners from submitting bids, and that petitioners' pricing analysis is unpersuasive. On this point, DDC devised the Utility Price List by revising historical bid data on past DDC projects (answer ¶¶ 173). Based on discussions with petitioners and other contractors, DDC increased the prices on the Utility Price List by 25%, added an additional cost accommodation to modify rates for unexpected nighttime and weekend work, and included a provision allowing direct negotiations between a contractor and the Private Utilities for extra work (*id.*, ¶¶ 174-175). Respondents contend that the Price List Method allows for transparency and fairness because the costs for performing Utility Interference Work is fixed, and leaves contractors free to competitively bid for the public work (*id.*, ¶¶ 169 and 171). Bids for four of the five Challenged Joint Bid Contracts were opened in February 2022, and the lowest bid for each was below DDC's "Engineer's Estimate" (the Engineer's Estimate) for the cost of the public work and the Utility Interference Work (*id.*, ¶¶ 182-183). Moreover, DiFazio Industries and JPL submitted bids below the Engineer's Estimate on three of those contracts (*id.*).

Regarding the third cause of action, respondents argue that petitioners are not entitled to injunctive relief. Alternatively, respondents argue that petitioners should be required to post a bond as respondents stand to lose \$591.6 million in funding that had been allocated to joint bidding infrastructure work for the 2022 fiscal year. Last, respondents assert that Foley and Lander should be dismissed as they are not proper parties.

Petitioners, in reply, maintain that this proceeding is timely and that they have standing under General Municipal Law § 51. As for whether the contract specifications violate General Municipal Law § 103, petitioners posit that "[t]he relevant issue is whether contractors *would bid a lower price to perform the public work* if the public work were not jointly bid under the JB 4.0

Provisions,” and not “whether the City accepts an illusory lowest *overall* bid for a given project” (NYSCEF Doc No. 23, petitioners’ reply mem at 9) (emphasis in original). Joseph Pizzirusso (Pizzirusso), JPL’s vice president, and John DiFazio (DiFazio), DiFazio Industries’ president, aver that their companies bid more on the public work portion on Project RED-386, Project SANDR03, Project HWQ1193 and/or Project QED-1051 because of the fixed prices for the Utility Interference Work (NYSCEF Doc No. 24, Pizzirusso aff, ¶¶ 1, 6, 14 and 35; NYSCEF Doc No. 25, DiFazio aff, ¶¶ 6, 29, 36 and 43). Incidentally, JPL was informed on February 24, 2022 that it was the lowest responsible bidder for Project HWQ1193, and JPL is also the lowest responsible bidder for Project SANDR03 (NYSCEF Doc No. 24, ¶¶ 13 and 35-37). In direct response to the argument that petitioners were not prohibited from bidding on the Challenged Joint Bid Projects, Cesare Perfetto (Perfetto), Perfetto Contracting’s CEO, and Domenick Cipollone (Cipollone), ADC’s president, aver that, despite having the capacity to perform the work, their companies did not submit bids because “bidding ... was prohibitive in light of the ... Utility Price List” (NYSCEF Doc No. 27, Perfetto aff, ¶¶ 1 and 12-13; NYSCEF Doc No. 28, Cipollone aff, ¶¶ 1 and 22-23). Both add “the City injured itself and its taxpayers by reducing competition to perform the City’s public work” (NYSCEF Doc No. 27, ¶ 16; NYSCEF Doc No. 28, ¶ 26).

Rudolph rejects respondents’ argument that the Utility Price List does not prohibit competition. Respondents had argued that numerous contractors bid on the Challenged Joint Bid Projects, and several bids fell below the Engineer’s Estimate. Rudolph, though, states that the lowest responsible bidder’s bid on every City joint bid project in 2022 fell below the Engineer’s Estimate, and that the lowest bid on every project with the alternative “Section U” (Section U)

specifications fell 23.8% further below the Engineer's Estimate than those projects solicited under the JB 4.0 Provisions (NYSCEF Doc No. 26, Rudolph reply aff, ¶¶ 6-10).

Petitioners also question respondents' contention that DDC drafted the Utility Price List. Petitioners' counsel affirms that he served DDC with three requests under the Freedom of Information Law (Public Officers Law §§ 84-90) (FOIL) for all versions of contract language and "Price Lists" DDC intended to use to implement "Joint Bidding 4.0," all exchanges between DDC, the City and the Private Utilities on those items, and all data DDC used in creating the Utility Price List (NYSCEF Doc No. 29, Michael D. Ganz [Ganz] affirmation, ¶ 10; NYSCEF Doc Nos. 30-32, Ganz affirmation, exhibits 1-3). On October 28, 2021, DDC responded that searches of the agency's records failed to yield any responsive records (NYSCEF Doc No. 36, Ganz affirmation, exhibit 7). DDC also failed to respond to petitioners' requests for clarification regarding the searches (NYSCEF Doc No. 29, ¶ 26; NYSCEF Doc Nos. 37-39, Ganz affirmation, exhibits 8-10). Petitioners' counsel has submitted a new FOIL request dated January 17, 2022 seeking all data DDC used to create the Utility Price List for Project RED386 (NYSCEF Doc No. 40, Ganz affirmation, exhibit 11).

Discussion

1. Timeliness of the First and Second Causes of Action

Respondents contend, and petitioners concede, that any challenge to the constitutionality of the Joint Bidding Statute enacted in 2014 is time-barred under the six-year statute of limitations in CPLR 213 (1) that is ordinarily applicable to declaratory judgment actions (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 41 [1995]). At oral argument, petitioners confirmed they were not challenging the Joint Bidding Statute and withdrew any such challenge (NYSCEF Doc No. 41, oral argument tr at 30). Instead, petitioners

have recast their claims as a challenge to invalidate “the latest iteration of the [Joint Bidding] [S]tatute ... the implementation of the statute through [the] JB 4.0 [Provisions]” (*id.*).

The court finds that this proceeding insofar as it seeks to invalidate the JB 4.0 Provisions as illegal under General Municipal Law § 103 is timely. The specifications were revised in November 2021 and were included in the bid solicitations for the Challenged Joint Bid Contracts, four of which were opened in February 2022. Petitioners commenced this proceeding that same month. Even assuming a six-year statute of limitations does not apply, the proceeding would be timely as it was commenced within four months of November 2021, when the JB 4.0 Provisions were implemented (*see e.g. Gress v Brown*, 20 NY3d 957, 956-960 [2012] [applying a four-month statute of limitations to a declaratory judgment action where the plaintiff did not challenge a resolution declaring a wage freeze in Buffalo but its application through administrative action]; *Matter of HHM Assoc. v Appleton*, 157 Misc 2d 759, 763 [Sup Ct, NY County 1993] [Article 78 seeking to stay the bidding for and enjoining the City from awarding a joint bid contract considered timely where (1) the petitioners were not aggrieved until the City solicited bids and (2) the action had not begun to accrue because the petitioners had not yet received a notice of an adverse determination]). Thus, the proceeding is timely.

2. Standing

Standing is a threshold question that concerns whether a litigant “has a sufficiently cognizable stake in the outcome so as to cast[] the dispute in a form traditionally capable of judicial resolution” (*Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [2004] [internal quotation marks and citation omitted]). Respondents argue that petitioners lack standing to maintain this proceeding. The argument is unpersuasive.

State Finance Law § 123-b (1) allows a “citizen taxpayer” to bring an action for equitable or declaratory relief against a state officer or employee who “has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.” Standing under the State Finance Law must be narrowly construed (*Kennedy v Novello*, 299 AD2d 605, 608 [3d Dept 2002], *lv denied* 99 NY2d 507 [2003]). A citizen taxpayer has standing if its claims have a sufficient nexus to the State’s fiscal activities (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813 [2003], *cert denied* 540 US 1017 [2003]), and “where the challenged expenditures can be clearly traced to identifiable State funds” (*Matter of Schulz v State of New York*, 217 AD2d 393, 395 [3d Dept 1995]). As applied here, there is no allegation in the petition that State funds are at issue (*Fischer v Biderman*, 141 Misc 2d 804, 808 [Sup Ct, NY County 1988], *affd* 154 AD2d 155 [1st Dept 1990], *lv denied* 76 NY2d 702 [1990]) or that State employees were involved (*Matter of Schulz v Cobleskill-Richmondville Cent. School Dist. Bd. of Educ.*, 197 AD2d 247, 251 [3d Dept 1994]). Accordingly, petitioners have not established that State Finance Law § 123-b confers standing.

General Municipal Law § 51 allows a taxpayer to sue an officer, agent or commissioner of a municipal corporation to prevent waste or injury to public property or funds. “A taxpayer suit under General Municipal Law § 51 ‘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’ ” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [citation omitted]). While mere illegality is insufficient (*Matter of Korn v Gulotta*, 72 NY2d 363, 371-372 [1988]), waste is presumed from a violation of General Municipal Law § 103 (*Matter of Schulz v Warren County Bd. of Supervisors*, 179 AD2d 118, 121 n 2 [3d Dept 1992], *lv denied* 80 NY2d 754

[1992] [standing under General Municipal Law § 51 found where contract awarded without competitive bidding]; *Reilly v Town of Brookhaven*, 34 AD2d 1001, 1001 [2d Dept 1970] [reasoning that the plaintiffs had standing to challenge the legality of a contract that did not comply with General Municipal Law § 103]).

As applied here, petitioners have established their standing under General Municipal Law § 51. The petition alleges that NYCRA's members and the Individual Contractors are City taxpayers whose assessments are at least \$1,000, which satisfies the condition precedent that only a taxpayer may maintain a General Municipal Law § 51 action (*Matter of Jerkens Truck & Equip. v City of Yonkers*, 174 AD2d 127, 134-135 [2d Dept 1992]). The petition further alleges that the JB 4.0 Provisions in the Challenged Joint Bid Contracts contravene General Municipal Law § 103 and seeks to enjoin the City from awarding contracts on those projects. This is sufficient to establish petitioners' standing (*see Matter of Schulz*, 179 AD2d at 121 n 2 [waste presumed from the failure to comply with the competitive bidding requirements in General Municipal Law § 103; *American La France & Foamite Corp. v City of New York*, 156 Misc 2, 3 [Sup Ct, NY County 1935], *affd* 246 App Div 699 [1st Dept 1935] [plaintiffs could bring a General Municipal Law § 51 action to enjoin the City from awarding a contract for the purchase of fire apparatus where the complaint alleged illegality and waste because the bid specifications appeared to unfairly limit competition]).

Moreover, a taxpayer action under General Municipal Law § 51 is not the only method to challenge the legality of the competitive bidding process (*Matter of Jerkens Truck & Equip.*, 174 AD2d at 134). “[T]he award of contracts for a public project ‘is a matter of acknowledged public interest which relieves the petitioner of the obligation to show that it is an aggrieved party or that it has any special interest’ ” (*Matter of Amdahl Corp. v New York State Higher Educ.*

Servs. Corp., 203 AD2d 792, 794 [3d Dept 1994], quoting *Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337, 342 [4th Dept 1976]). Inasmuch as an unsuccessful bidder has standing, “it would ... be illogical to deny standing to one who claims that the violation of the statute prevented him from entering any bid at all” (*Empire Elec. Contrs. Assn. v Fabber*, 71 Misc 2d 167, 170 [Sup Ct, NY County 1972]).

Here, two petitioners, Perfetto Contracting and ADC, claimed that the Utility Price List contained in the JB 4.0 Provisions discouraged them from submitting bids on any of the Challenged Joint Bid Projects. Thus, these petitioners have standing to challenge the legality of the bidding process utilizing the JB 4.0 Provisions (*see Matter of Trinity Transp. Corp. v Town of Brookhaven*, 166 AD3d 887, 889 [2d Dept 2018] [standing found where a violation of General Municipal Law § 120-w had prevented petitioners from participating in the competitive procurement process]; *Empire Elec. Contrs. Assn.*, 71 Misc 2d at 170 [petitioners had standing to compel compliance with General Municipal Law § 101, which required solicitation of separate bids for certain work, because respondents had solicited bids for the entire project, which prevented petitioners from bidding for the electrical work]; *but see Matter of Barrett Paving Materials, Inc. v New York State Thruway Auth.*, 184 AD3d 1173, 1174 [4th Dept 2020], *lv denied* 35 NY3d 916 [2020] [no injury where petitioner made a voluntary decision to forego participating in the bid solicitation process]).

Those petitioners who did submit bids on the Challenged Joint Bid Projects also have standing. Common-law standing to challenge governmental action requires an “injury in fact, which harm falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted” (*Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 409-410 [2000] [internal quotation marks and

citations omitted]). These petitioners have a direct stake in the outcome of this proceeding if the City awarded the Challenged Joint Bid Projects to a contractor other than the lowest responsible bidder (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]), and their harm falls within the zone of interests protected by General Municipal Law § 103 (*Matter of Jerkens Truck & Equip.*, 174 AD2d at 132).

Petitioners have standing even if they did not submit bids if the bidding procedure violates a competitive bidding statute (*see Matter of Kick v Regan*, 110 AD2d 934, 935 [3d Dept 1985], *lv denied* 66 NY2d 601 [1985] [citizen and taxpayer had standing to maintain Article 78 seeking to declare a contract as null and void because of violations of State Finance Law § 139-d and General Municipal Law § 340]; *Matter of HHM Assoc.*, 157 Misc 2d at 763-764 [contractor bringing an Article 78 proceeding to challenge the City's joint bidding procedures had standing even though it did not unequivocally indicate an intention to bid]; *Matter of General Bldg. Contrs. of N.Y. State v County of Oneida*, 54 Misc 2d 260, 261 [Sup Ct, Oneida County 1967] ["An article 78 proceeding ... may be instituted by one who is a citizen, resident and taxpayer even though there is no personal grievance or personal interest in the outcome shown"]; *Grace v Forbes*, 64 Misc 130, 139 [Sup Ct, Onondaga County 1909], citing *Gage v City of New York*, 110 App Div 403 [1st Dept 1905] [if the taxpayer can show the municipality had engaged in illegal action with respect to competitive bidding, then "[the taxpayer] is entitled to the assistance of the court"]]). In sum, petitioners have standing to maintain this proceeding.

3. The JB 4.0 Provisions

Petitioners seek a declaration that the JB 4.0 Provisions revised November 9, 2011 are unconstitutional and that the specifications violate General Municipal Law § 103 (NYSCEF Doc No. 23, petitioners' reply mem of law at 7-8; NYSCEF Doc No. 41 at 9).

“A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement” (*Town of Delaware v Leifer*, 34 NY3d 234, 247 [2019] [internal quotation marks and citation omitted]). Whereas a facial vagueness challenge requires a showing that the “statute is impermissibly vague in *all* of its applications,” an applied challenge requires a determination whether “a statute can be constitutionally applied to the defendant under the facts of the case” (*People v Stuart*, 100 NY2d 412, 421 [2003] [internal quotation marks and citation omitted]).

Petitioners have not advanced any specific arguments on whether the JB 4.0 Provisions are facially unconstitutional or unconstitutional as applied, asserting in reply only that the provisions violate General Municipal Law § 103 and must be struck down. Accordingly, the court limits its discussion to whether the specifications violate the competitive bidding statute.

General Municipal Law § 103 (1) provides, in relevant part, that “[e]xcept as otherwise expressly provided by an act of the legislature or by a local law adopted prior to [September 1, 1953], all contracts for public work involving an expenditure of more than thirty-five thousand dollars ... shall be awarded ... to the lowest responsible bidder.” The statute must be “construed and administered with sole reference to the public interest” (*see Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 148 [1985] [internal quotation marks and citation omitted]).

It is well settled that the purposes for competitive bidding under General Municipal Law § 103 are: “ ‘(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts’ ” (*Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17

NY3d 136, 142 [2011] [citation omitted]; *see also* General Municipal Law § 100-a [stated purpose is to “assure the prudent and economical use of public moneys ... and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost”]). Because competitive bidding is meant to foster honest competition to obtain the best work at the lowest price (*Associated Bldrs. & Contrs. v City of Rochester*, 67 NY2d 854, 855 [1986]), General Municipal Law § 103 is violated when bid requirements reduce or severely limit competitive bidding “for reasons which do not inure to the benefit of the public, but rather serve other, unrelated purposes” (*Brega Transp. Corp. v Brennan*, 105 AD3d 985, 987 [2d Dept 2013] [internal quotation marks and citation omitted]). For these reasons, it follows that the City’s joint bidding procedures must comply with the statute to ensure that the City selects the lowest responsible bidder on a contract for public work.

As noted earlier, the Private Utilities have an obligation to remove, protect or relocate utility equipment that interferes with public construction projects, and they bear the costs of doing so. The Private Utilities may hire the contractor on the public project to complete the Utility Interference Work, hire their own contractors or perform the work themselves (*City of New York v Verizon N.Y., Inc.*, 4 NY3d 255, 258 n 3 [2005]). While the Joint Bidding Statute allows the City to include Utility Interference Work in a public contract, the City must select the lowest responsible bidder for the public work component of that contract (answer ¶ 163). This is because Utility Interference Work is considered “private” work, as such work only benefits the Private Utilities (*Matter of Diamond Asphalt Corp. v Sander*, 92 NY2d 244, 259 [1998], *rearg denied* 92 NY2d 921 [1998]) (*Diamond Asphalt*). Thus, a bid selection procedure that awards a contract to the contractor who submits the lowest overall bid that aggregates the costs of performing both public and private utility work violates General Municipal Law § 103 (*id.*).

This was the case in *Diamond Asphalt* where the Court of Appeals invalidated a joint bidding procedure under which the City attempted to alter the definition of “public work” by incorporating private Utility Interference Work into its public contracts. In its decision, the Court reinforced the purpose underlying General Municipal Law § 103, which was “to safeguard the public interest by invit[ing] competition, and discourag[ing] favoritism, improvidence, extravagance, fraud and corruption” (*id.* at 256 [internal quotation marks and citation omitted]). Awarding contracts based on the lowest overall bid, the Court cautioned, could result in the City awarding a contract to a contractor who was not the lowest responsible bidder for the public work (*id.* at 261-262). The Court also found that the informal arrangement under which the Private Utilities agreed to pay the difference between the winning bid’s price for the public work and the lowest price bid for that work was problematic (*id.* at 261). Not only was this arrangement not part of the joint bidding agreement between the City and the Private Utilities, but the “scheme ... improperly allow[ed] the City to unilaterally allocate and direct the funds obtained and paid during the public bidding process” (*id.* at 262-263). Moreover, the Court reasoned that the entire scheme invited fraud on the part of the private contractors and the Private Utilities, who were allowed to consult with the City on the bids, to the public’s detriment (*id.*).

Public work contracts that require contractors to negotiate separately with the Private Utilities on the costs of performing the Utility Interference Work component, however, do not violate General Municipal Law § 103 (*Matter of General Contrs. Assn. of N.Y. v Tormenta*, 259 AD2d 177, 183 [1st Dept 1999], *lv denied* 95 NY2d 754 [2000]) (*Tormenta*). In *Tormenta*, the City, in direct response to *Diamond Asphalt*, introduced a new contract provision labeled Section U in DDC’s construction contracts (*Matter of General Contrs. Assn. of N.Y. v Tormenta*, 180 Misc 2d 384, 388 [Sup Ct, NY County 1999], *affd* 259 AD2d 177 [1st Dept 1999], *lv denied* 95

NY2d 754 [2000]). Section U informed prospective contractors that the contract called for the performance of both public work and Utility Interference Work, and furnished work specifications for both (*id.* at 389). Upon the award of a contract, the contractor selected by the City must commence immediate negotiations with the Private Utilities on pricing the Utility Interference Work, and if a price could not be agreed, the dispute between the contractor and the Private Utilities would be resolved through expedited binding arbitration (*id.*). In addition, Section U informed prospective contractors that the Private Utilities, not the City, would pay them directly for the Utility Interference Work (*id.*).

The trial court in *Tormenta* determined that Section U did not run afoul of *Diamond Asphalt* “because the City simply is not involved in the negotiating process between the utilities and the contractors” (*id.* at 390), and “there has been no demonstrated shifting of cost so as to violate General Municipal Law § 100-a” (*id.* at 393). The Appellate Division, First Department affirmed the trial court’s determination and found that “section U clearly bifurcates the bidding process for public work, which remains the sole preserve of the City, from negotiations for utility interference work in which the City has no role” (*Tormenta*, 259 AD3d at 183). The Court found that the private negotiations between the Private Utilities and the lowest responsible bidder on the cost of the Utility Interference Work “neither control[led] the public bidding process nor are controlled by it” (*id.*), thereby avoiding the situation in *Diamond Asphalt* where the Private Utilities played an interactive role in the public bidding process (*Diamond Asphalt*, 92 NY2d at 262). Section U allowed the City to award a contract to the lowest responsible bidder for the public work and removed pricing for the Utility Interference Work from the bid itself.

In contrast to *Diamond Asphalt*, joint bidding is now permissible under the Joint Bidding Statute, and unlike the situation in *Tormenta*, the City’s bidding process now includes the Utility

Price List, which assigns specific prices for Utility Interference Work. The JB 4.0 Provisions state that the affected utility shall pay the costs for performing that work based on the Utility Price List (NYSCEF Doc No. 6 at 8 [Section A.2 (B)]), which the City maintains DDC devised without input from the Private Utilities. The only items open for negotiation between a contractor and the affected utilities concern the cost of completing “Extra Work” (NYSCEF Doc No. 6 at 9). However, incorporating the Utility Price List into the JB 4.0 Provisions appears to be improper since “[t]he pricing mechanism ... [should] remain[] a matter for adjustment between the contractor and the [utility] company or companies concerned” (*Tormenta*, 259 AD2d at 183 [internal quotation marks and citation omitted]). As explained in *Diamond Asphalt*, Utility Interference Work “is private, and for the essential benefit of a private entity” (*Diamond Asphalt*, 92 NY2d at 259). The City has not cited any authority for the proposition that it may establish prices for private Utility Interference Work for which the affected utility will compensate the contractor for performing.⁵

The City attempts to distinguish the bidding procedure under the JB 4.0 Provisions from *Diamond Asphalt* and *Tormenta* by arguing that prospective contractors bid only on the public work component because the Utility Price List fixes the costs for the private work. However, the JB 4.0 Provisions do not “fully protect against scenarios which may be potentially adverse to the taxpayers” (*Diamond Asphalt*, 92 NY2d at 250) as they do not ensure that the City will obtain the best work at the lowest possible price, in accordance with General Municipal Law § 103. Under Section A.1 (E) of the JB 4.0 Provisions, identification of the lowest responsive and responsible bidder shall be based on the bidder’s unit prices for “all Work, which includes the

⁵ Administrative Code § 24-521 requires utility companies to relocate their facilities or equipment to accommodate municipal works projects. The failure to comply with Administrative Code § 24-521 may result in the imposition of monetary fines and imprisonment (Administrative Code §§ 19-149 and 19-150).

combined Specific Public Work Items, the Specific Utility Work Items, and the Specific Shared Items” (NYSCEF Doc No. 6 at 6). Petitioners argue that prospective contractors will bid more for the public work to make up for the allegedly low prices assigned to the Utility Interference Work, thereby shifting the costs for performing that work from the Private Utilities to the City and its taxpayers. Indeed, JPL’s and DiFazio Industries’ witnesses admitted increasing their bids on four of the five Challenged Joint Bid Contracts by thousands of dollars to account for the artificially low, non-negotiable Utility Price List, and JLJ is the lowest responsible bidder on two of those projects. While these self-serving averments are not substantiated with any supporting documents, they cannot be discounted. By inserting set, nonnegotiable prices for the Utility Interference Work directly into the public bidding process, the City accomplishes what the Court of Appeals in *Diamond Asphalt* had warned against – combining the costs of performing both public work and private work may impact the selection of the lowest responsible bidder for public work in violation of General Municipal Law § 103. Here, inclusion of the Utility Price List in the JB 4.0 Provisions List seemingly invites prospective bidders to manipulate their bids for the public work on a joint bid contract, to the public’s detriment. Furthermore, it is unclear how the JB 4.0 Provisions fosters honest competition when otherwise qualified contractors capable of performing may be prevented from bidding on a joint bid project because of the Utility Price List. Consequently, the JB 4.0 Provisions do not protect the public fisc or safeguard the public interest, a key aim of General Municipal Law § 103.

Petitioners, though, have not established how the JB 4.0 Provisions reduce opportunity for MWBE subcontractors. The provisions allow the Private Utilities to utilize “Specialty Contractors” on a specific scope of the Utility Interference Work when the affected utility determines that the contractor is not qualified or best suited to perform that work.

Administrative Code § 6-129 (d) describes MWBE participation goals in percentages of total annual agency expenditures in construction, professional services and standard services contracts and for goods contracts under \$1 million. The section does not require that an MWBE subcontractor complete the Utility Interference Work portion of a joint bid contract.

CPLR 3001 allows the court to render a declaratory judgment as to the rights of the parties to a justiciable controversy. In view of the foregoing, petitioners are entitled to a declaration on the first two causes of action that the JB 4.0 Provisions revised on November 9, 2021 violate General Municipal Law § 103.

4. Injunctive Relief

In their third cause of action, petitioners seek an injunction temporarily and permanently enjoining the City from using the JB 4.0 Provisions. A party seeking permanent injunction must demonstrate a probability of success on the merits, the danger of irreparable injury and that the balance of equities lies in its favor (*P360 Spaces LLC v Orlando*, 160 AD3d 561, 561 [1st Dept 2018]). Here, petitioners failed to show that they lack an adequate legal remedy. As such, they are not entitled to the drastic remedy of a permanent injunction.

5. Whether Foley and Lander are Proper Parties

Respondents contend that the petition against Foley and Lander, both named as defendants in their official capacities as Commissioner and Comptroller, respectively, should be dismissed because the City has been sued, and suing Foley and Lander in their official capacities is duplicative and redundant. Petitioners did not respond to this argument in reply.

Here, naming Foley and Lardner in their official capacity as defendants is the functional equivalent of suing the City. As such, the petition against Foley and Lander is dismissed (*see Matter of Kaczmarek v Conroy*, 218 AD2d 97, 101 [3d Dept 1995]).

6. Attorneys' Fees

Generally, a prevailing party cannot recover its attorneys' fees absent an agreement between the parties, a statute or court rule authorizing such an award (*see Congel v Malfitano*, 31 NY3d 272, 290 [2018]). Petitioners, though, have not cited an agreement, statute or court rule allowing it to recover its attorneys' fees. Thus, their request for attorneys' fees is denied.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition (motion sequence no. 001) is granted to the extent of declaring that the joint bidding provisions otherwise known as the "JB 4.0 Provisions" revised on November 9, 2021 and included in respondent City of New York's joint bid contracts violate General Municipal Law § 103; and it is

ORDERED, ADJUDGED and DECLARED that the joint bidding provisions otherwise known as the "JB 4.0 Provisions" revised on November 9, 2021 and included in respondent City of New York's joint bid contracts violate General Municipal Law § 103; and it is further

ORDERED that the petition against respondents Thomas Foley, in his official capacity as Commissioner of the City of New York Department of Design and Construction, and Brad Lander, in his official capacity as Comptroller of the City of New York, is severed and dismissed.

4/3/2023
DATE


SHLOMO S. HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE