SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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SIMON V. KINSELLA, PAMELA I. MAHONEY and MICHAEL P. MAHONEY,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY and SOUTH FORK WIND LLC f/k/a DEEPWATER WIND SOUTH FORK LLC,

Defendants.

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Index No.: 621109/2021

Assigned Justice:
Hon. Carmen Victoria St. George

DEFENDANT LONG ISLAND POWER AUTHORITY'S REPLY MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

In this declaratory judgment action, defendant Long Island Power Authority (the "Authority" or "LIPA") submits this reply memorandum of law in further support of its motion for an Order pursuant to N.Y. C.P.L.R. 3211(a)(3), (5), and/or (7), dismissing the complaint of Plaintiffs, Simon V. Kinsella, Pamela I. Mahoney, and Michael P. Mahoney ("Plaintiffs"), as against LIPA because: (1) Plaintiffs' causes of action against LIPA are barred by the four-month statute of limitations and/or laches; and (2) Plaintiffs lack standing to maintain their claims against LIPA.

As demonstrated in LIPA's moving papers and below, Plaintiffs' action to annul and declare void a power purchase agreement between LIPA and defendant South Fork Wind LLC f/k/a Deepwater Wind South Fork LLC ("Deepwater Wind"), which was executed on February 6, 2017 (the "PPA"), is barred by the four-month statute of limitation and laches. Plaintiffs have utterly failed to rebut firmly established case law to demonstrate that their action is timely or that they have made the requisite demand to sustain their claim that LIPA violated N.Y. Pub. Auth. L. §1020-f(aa) in not submitting the PPA to the N.Y. Public Authorities Control Board ("PACB"). In addition, Plaintiffs' opposition confirms that they lack standing to maintain their claims under the LIPA Act, State Finance Law §163 and General Municipal Law §103 because they have not alleged or suffered an injury in fact that is within the zone of interest sought to be protected by the statutes they claim were violated and that is distinct from the public at large.

Accordingly, this Court should grant LIPA's motion and dismiss Plaintiffs' complaint against LIPA in its entirety, with prejudice.

ARGUMENT

I. PLAINTIFFS' CAUSES OF ACTION AGAINST LIPA ARE BARRED BY THE FOUR-MONTH STATUTE OF LIMITATIONS AND/OR LACHES

Plaintiffs' opposition brings to mind the following quote from Carl Sandburg: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell." Plaintiffs pound the table by repeating the allegations in their complaint in an attempt to obscure the law. They fail to rebut firmly established case law confirming that their claims are subject to and barred by the four-month statute of limitations and offer no plausible reason for denying LIPA's motion to dismiss.

As demonstrated in LIPA's moving papers, Plaintiffs' claims against LIPA, which challenge the 2015 procurement, LIPA's award to Deepwater Wind, and ultimately the PPA under N.Y. Pub. Auth. L. §§1020-f(aa) and 1020-b(12-a), N.Y. Gen. Mun. L. §103, and N.Y. State Fin. L. §163, are barred by the four-month statute of limitations. See LIPA's Memorandum of Law in Support of Motion to Dismiss, dated December 1, 2021 ("LIPA's Mem."), pp. 5-10. Regardless of the claim, the four-month statute of limitations applies, and Plaintiffs' action is time-barred, having been commenced more than four months (in fact, more than four years) after the PPA was executed.

Plaintiffs contend that their request to have the PPA annulled and declared void for violating state laws is subject to the six-year statute of limitations governing declaratory judgment actions under CPLR §213(1). However Plaintiffs fail to cite any case to support application of a six-year statute of limitations to the claims at issue and remedy sought.[1] The law is clear that in a

[1] The cases relied upon by Plaintiffs either do not involve a statute of limitations defense or do not support application of a six-year statute of limitations to the claims at issue or remedy sought here. See 145 Kisco Ave. Corp. v. Dufner Enterprises, Inc., 198 A.D.2d 482 (2d Dep't 1993); Bloom v. Mayor of the City of N.Y., 35 A.D.2d 92 (2d Dep't 1970), aff'd, 28 N.Y.2d 952 (1971); Matter of McArdle v. Board of Estimate of City of Mt. Vernon, 74 Misc. 2d 1014 (Sup. Ct. Westchester Cnty. 1973), aff'd, 45 A.D.2d 822 (2d Dep't 1974).

declaratory judgment action, the applicable statute of limitations is determined by the substantive nature of the claim. See Solnick v. Whelan, 49 N.Y.2d 224 (1980); Matter of Windsor v. State of New York, 26 Misc. 3d 1233(A) (Sup. Ct. Albany Cnty. 2010). Indeed, it is the nature of the remedy sought rather than the theory of liability that dictates the applicable statute of limitations Riverview Dev. LLC v. City of Oswego, 125 A.D.3d 1417, 1418 (4th Dep't 2015). If a proceeding pursuant to CPLR Article 78 would have been appropriate to settle a dispute with a governmental entity, the four-month period of limitations governing Article 78 proceedings is applicable. See CPLR §217(1); Lenihan v. City of New York, 58 N.Y.2d 679, 682 (1982); Save the View Now v. Brooklyn Bridge Park Corp., 156 A.D.3d 928, 931 (2d Dep't 2017); Matter of Simon v. New York City Tr. Auth., 34 A.D.3d 823, 823 (4th Dep't 2006).

In that Plaintiffs here are challenging an agency determination and seeking to annul a contract entered into by LIPA, a New York public authority, their challenge is governed by the four-month statute of limitations, whether it is based on an alleged violation of the LIPA Act (see In re Long Is. Power Auth. Ratepayer Litig, 47 A.D.3d 899, 900 (2d Dep't 2008); County of Suffolk v. Long Is. Power Auth, 38 Misc. 3d 1232(A) (Sup. Ct. Suffolk Cnty. 2010), aff'd, 100 A.D.3d 944 (2d Dep't 2012), appeal denied, 20 N.Y.3d 1030 (2013)), General Municipal Law §103 (see Fawcett v. City of Buffalo, 275 A.D.2d 954 (4th Dep't 2000), appeal denied, 96 N.Y.2d 701 (2001); Tufaro Transit Co. v. Board of Educ., 79 A.D.2d 376 (2d Dep't 1981)), or a violation of the State Finance Law. See Fishman v. Mills, 294 A.D.2d 764 (3d Dep't 2002); Windsor, 26 Misc. 3d 1233(A). The rationale for a short statute of limitations is apparent, in that "the operation of government will not be trammeled by stale litigation and stale determinations." N.Y. City Health & Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 206 (1994) (quoting Solnick, 49 N.Y.2d at 232).

Plaintiffs futilely try to recast their complaint as an "equitable" action resembling that brought pursuant to General Municipal Law §51 to escape the four-month limitations period. **First**, Plaintiffs' complaint does not plead a claim under Gen. Mun. L. §51. **Second**, Gen. Mun. L. §51 does not apply to LIPA. See New York Post Corp. v. Moses, 10 N.Y.2d 199 (1961). **Third**, given the nature of the claim and remedy sought, any claim brought under Gen. Mun. L. §51 is also subject to the four-month statute of limitations and would be time-barred. See Riverview Dev. LLC, 125 A.D.3d 1417; Matter of Resnick v. Town of Canaan, 38 A.D.3d 949 (3d Dep't 2007).

For the additional reasons set forth in LIPA's moving papers, Plaintiffs' claim that LIPA violated Pub. Auth. L. §1020-f(aa) and §1020-b(12-a) in failing to submit the PPA to the PACB for review and approval is barred by the doctrine of laches. See Huntington Town Council Member Eugene Cook v. Long Is. Power Auth., 2021 N.Y. Misc. LEXIS 3017 (Sup. Ct. Suffolk Cnty. Feb. 17, 2020)("Cook I"); Eugene Cook v. Public Authorities Control Board and Long Island Power Auth., Supreme Court, Suffolk County, Index No. 603885/2020 ("Cook II")(Order annexed as Exhibit D to Affirmation of Michael P. Versichelli, dated December 1, 2021 ("Versichelli Aff.")). Plaintiffs ignore Judge Emerson's decisions in Cook I and Cook II, and her determination that Plaintiffs' claim is, in essence, a claim for mandamus that requires, *inter alia*, a timely demand. It is Plaintiffs' burden to demonstrate that they made a timely demand or provide an excuse for their failure to do so. Plaintiffs have failed to proffer an excuse for their failure to make any demand, let alone a timely demand upon LIPA. Therefore, their second cause of action is also barred by the doctrine of laches.

II. PLAINTIFFS LACK STANDING TO MAINTAIN THEIR CLAIMS AGAINST LIPA

Plaintiffs' opposition confirms that they have not sustained a sufficient injury in fact to have standing to maintain their claims against LIPA. The only injury alleged by Plaintiffs is an injury to the public at large, which is insufficient to confer standing under the statutes allegedly violated by LIPA.

Specifically, Plaintiffs allege they "are ratepayers in the affected service area who will be expected to bear the cost of higher rates resulting from the exorbitant price LIPA agreed to pay Deepwater Wind and endure insufficient power supplied from an unreliable power generating source at times of peak demand." Plaintiffs' Memorandum of Law in Opposition to Long Island Power Authority's Motion to Dismiss, dated January 14, 2022 ("Plaintiffs' Mem.") at p. 7; see also id. p. 13 ("Plaintiffs will suffer injuries in fact in the higher electricity prices on their utility bills. Moreover, Plaintiffs have been harmed by LIPA failing to obtain the peak electrical demand solution it purportedly sought under the RFP."). These purported injuries are insufficient to confer standing to allege a violation of Pub. Auth. L. §1020-f(aa) and challenge LIPA's authority to enter into contract without PACB approval. See Matter of East End Prop. Co. #1, LLC v. Kessel, 46 A.D.3d 817, 825 (2d Dep't 2007), appeal denied, 10 N.Y.3d 926 (2008); Cook II, Decision and Order, dated November 3, 2021 (Versichelli Aff., Exh. D); Cook I, 2020 N.Y. Misc. LEXIS 3017. To be sure, similarly alleged injuries to ratepayers have been held to be legally insufficient to confer standing to challenge LIPA's statutory authority. See SRG Properties, LLC v. Long Island Power Auth., 2009 N.Y. Misc. LEXIS 5744 (Sup. Ct. Nassau Cnty. May 20, 2009); Initiative for Competitive Energy v. Long Island Power Auth., 178 Misc. 2d 979 (Sup. Ct. Suffolk Cnty. 1998). Plaintiffs have utterly failed to distinguish these cases and demonstrate how the Appellate Division, Second Department's decision in East End Prop. Co. #1, LLC is not controlling.

Plaintiffs' reliance on AEP Resources Serv. Co. v. Long Island Power Auth, 179 Misc. 2d 639 (Sup. Ct. Nassau Cnty. 1999) is misplaced. Unlike here, the plaintiff in AEP was an unsuccessful bidder who alleged an injury in fact that was distinct from the public at large and who timely commenced an action.

Furthermore, because Plaintiffs are not unsuccessful bidders, they cannot demonstrate the requisite injury in fact to maintain their claims under State Fin. L. §163 and Gen. Mun. L. §103. See 106 Mile Transport Assocs. v. Koch, 656 F. Supp. 1474 (S.D.N.Y. 1987); Transactive Corp. v. New York State Dep't of Social Services, 92 N.Y.2d 579 (1998); Matter of Montgomery v. Metropolitan Transp. Auth., 25 Misc. 3d 1241(A) (Sup. Ct. N.Y. Cnty. 2009); Friends of Dag Hammerskjold Plaza v. City of New York Parks and Rec., 13 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty 2006). Plaintiffs simply have not identified any direct injury that they will suffer as a result of LIPA's alleged violation of the competitive bidding rules, or that the purported injury is distinct from the public at large and, thus, lack standing to maintain their state law claims. See Transactive Corp., 92 N.Y.2d 579; Tilcon N.Y. Inc. v. Town of Windsor, 172 A.D.3d 942 (2d Dep't 2019); Matter of Troeller v. New York City Dep't of Educ., 2012 N.Y. Misc. LEXIS 1881 (Sup. Ct. N.Y. Cnty April 16, 2012).

Finally, to the extent Plaintiffs suggest that they have citizen taxpayer standing under State Finance Law §123-b, they have not and cannot allege such a claim. Because Plaintiffs cannot trace the cost of the PPA to the expenditure of State funds, State Fin. L. §123-b is not applicable. See East End Prop. Co. #1, LLC, 46 A.D.3d at 825; Schulz v. State of New York, 217 A.D.2d 393, 395 (2d Dep't 1995). Moreover, Plaintiffs are not challenging the general expenditure of State funds, but rather the award of a government contract to a particular bidder, which is insufficient to provide standing. In Matter of Harbeth, LLC v. City of New York, 2021 N.Y. Misc. LEXIS 534

(Sup. Ct. N.Y. Cnty. Feb. 8, 2021), petitioner taxpayers commenced an Article 78 proceeding to enjoin respondents from operating a "Stabilization Bed Program" at a hotel pursuant to a contract between the City of New York and Not On My Watch, a nonprofit that would operate the program. The court dismissed the petition for lack of standing. The court held that because petitioners did not bid on the contract at issue, they lacked sufficient injury in fact to challenge the government contract. 2021 N.Y. Misc. LEXIS 534, at *2 (citing Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 774 (1991); Transactive Corp., 92 N.Y. 2d at 587). The court further held that to the extent petitioners alleged they had standing as taxpayers, their contention was misplaced. The court noted that to have taxpayer standing, petitioners must challenge the expenditure of government funds in general. "Using the expenditure of money as a pretense to challenge a governmental decision is inappropriate and lacks sufficient nexus to fiscal activities of the State to provide standing." 2021 N.Y. Misc. LEXIS 534, at *2 (internal quotations and citations omitted). Although petitioners' claims were stylized as a challenge to the City's expenditure in operating any stabilization bed program, petitioners' claims challenged the city's expenditure in letting this contract to these respondents. The court held that such claims amount to a challenge to a governmental decision and are insufficient to create taxpayer standing. Id. at *3.

Similarly, here, Plaintiffs do not challenge LIPA's decision to spend on renewable energy projects but rather take issue with the bid awarded to Deepwater Wind and LIPA's contract with Deepwater Wind, which is insufficient to create taxpayer standing.

CONCLUSION

For the reasons set forth herein, this Court should grant the instant motion and dismiss Plaintiffs' complaint as against defendant Long Island Power Authority with prejudice, along with such other and further relief as this Court may deem just and proper.

Dated: January 20, 2022

Respectfully submitted,

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WORD COUNT CERTIFICATION

The undersigned counsel for Defendant Long Island Power Authority hereby certifies that pursuant to Rule 202.8-6 of the Uniform Rules for the Supreme Court and Cnty. Court, the total number of words in this Reply Memorandum of Law is 2,308 inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities and signature block.

Dated: Uniondale, New York
January 20, 2022

/s/ Michael P. Versichelli
Michael P. Versichelli