SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

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.

x

Index No. 621109/2021

Motion Seq: 001 MG 002 MG

Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause……	3-10; 13-20
Answering Papers…….....	22; 23
Reply…….....	24; 25
Briefs: Plaintiff's/Petitioner's……...	
Defendant's/Respondent's……	11; 21

The plaintiffs in this action seek a declaration that a Power Purchase Agreement (PPA) between defendants LIPA and South Fork Wind LLC f/k/a Deepwater Wind South Fork LLC (Deepwater Wind), executed on or about February 6, 2017, is void, and a declaration that the Long Island Power Authority (LIPA) violated the Public Authorities Law by failing to receive Public Authorities Control Board (PACB) approval of the agreement, thereby rendering LIPA without authority to enter the PPA. Finally, the plaintiffs seek to have the PPA annulled in its entirety. According to the complaint filed on November 9, 2021, the plaintiffs are residents, taxpayers, and ratepayers in the alleged affected service area, namely the South Fork of Long Island.

Each of the named defendants in this action has filed a motion to dismiss the complaint. LIPA maintains that the complaint is dismissible pursuant to CPLR §§ 3211 (a)(3), (a)(5), or (a)(7) because the plaintiffs' causes of action are subject to and barred by the four-month statute of limitations and/or laches, and because the plaintiffs lack standing to maintain their claims against LIPA. Deepwater Wind

also argues that the plaintiffs' claims are time-barred and that they lack standing, requiring dismissal of the complaint.

It is undisputed that the PPA that is the gravamen of this lawsuit was executed on or about February 6, 2017, between LIPA and Deepwater Wind, and that this action was not commenced until November 9, 2021, more than four years after the PPA's execution. The complaint asserts two causes of action.

In the first cause of action, plaintiff alleges that the contract awarded by LIPA to Deepwater Wind violated State Finance Law § 163, and General Municipal Law § 103, because the bid did not comply with the bidding requirements, and because LIPA allegedly manipulated the bidding specifications to preclude competitive bidding. The second cause of action alleges that LIPA violated Public Authorities Law §§ 1020-f(aa) and 1020-b(12-a) by failing to submit the PPA to the PACB for review and approval.

Inasmuch as the motions to dismiss are made upon the same grounds (time barred and lack of standing), they will be consolidated for determination herein.

Statute of Limitations

It is this Court's determination that the four-month statute of limitations provided for in CPLR § 217(1) applies to plaintiffs' claims asserted against the defendants despite plaintiffs' contention that, pursuant to CPLR § 213 (1), a six-year statute of limitations governing declaratory judgment actions applies here.

"In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought -- factors we have previously identified as pertinent to selection of the applicable Statute of Limitations" (***Solnick v. Whalen***, 49 NY2d 224, 229 [1980]). "If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action. In that event there is a limitation specifically prescribed by law and the catch-all provision of CPLR 213 (subd 1) is not applicable. If the period for invoking the other procedural vehicle for relief has expired before the institution of the action for declaratory relief, the latter action also is barred" (***Id***. at 229-230). "A salutary result of the application of the limitation period appropriate to the other form of judicial proceeding will be to preclude resort by a dilatory litigant to the declaratory remedy for the purpose of escaping a bar of time which has outlawed the other procedure for redress" (***Id***. at 230).

There is no dispute that LIPA is a corporate municipal instrumentality of the State of New York that is not operated for profit (***Public Authorities Law § 1020-c***). Article 78 is the mechanism for judicial review of the action or inaction of an administrative agency or officer. Plaintiffs in this case are challenging LIPA's determination to award the contract to Deepwater Wind, and alleging that LIPA failed to obtain review and approval of the contract by the PACB; therefore, their claims/causes of action could have appropriately been brought in the context of an Article 78 proceeding (e.g., ***CPLR §***

7803 [1] [the body or officer failed to perform a duty enjoined upon it by law; ***CPLR § 7803 [3]*** [a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . .]).

By their first cause of action, plaintiffs allege that LIPA awarded the contract to Deepwater Wind, although Deepwater Wind's bid did not comply with the bidding requirements, and that LIPA manipulated the bidding specifications, thereby essentially asserting that LIPA's determination to award the contract was in violation of lawful procedure, was arbitrary and capricious, and was an abuse of discretion, and in violation of State Finance Law § 163 and General Municipal Law § 103; accordingly, the proper procedural vehicle by which to challenge the determination was a proceeding pursuant to Article 78, which is governed by the four-month statute of limitations of CPLR § 217 (1) (*see* ***Matter of Long Island Power Authority Ratepayer Litigation***, 47 AD3d 899, 900 [2d Dept 2008]).

Indeed, the four-month statute of limitations applies to General Municipal Law § 103 claims alleging violation of competitive bidding requirements (***Fawcett v. City of Buffalo***, 275 AD2d 954 [4th Dept 2000]; ***Matter of Tufaro Transit Co. v. Board of Education***, 79 AD2d 376 [2d Dept 1981]; ***Matter of Quest Diagnostics, Inc. v. County of Suffolk***, 21 Misc3d 944 [Sup Ct Suffolk County 2008]) and to State Finance Law § 163 claims (***Matter of Fishman v. Mills***, 294 AD2d 764 [3d Dept 2002]; ***Matter of Windsor v. State of New York***, 26 Misc3d 1233 [A] [Sup Ct Albany County 2010];

As to their second cause of action, plaintiffs allege that LIPA "did not follow statutory provisions mandating that it seek the approval of the [PACB] before entering the PPA with Deepwater Wind," which is, at its core, a claim that LIPA failed to perform a duty enjoined upon it by law, namely seeking PACB review and approval. Plaintiffs' allegations in this regard are in the nature of mandamus to compel, and so are required to be timely brought pursuant to Article 78. In such an instance, the statute of limitations commences running after a demand upon a body or officer has been made and the body or officer refuses to act or to perform a duty enjoined by law (*see* ***Matter of Gopaul v. New York City Employees' Retirement System***, 122 AD3d 848 [2d Dept 2014]). A party is not aggrieved until an appropriate demand is made and refused (***Matter of Mitchell v. Essex County Sheriff's Department***, 302 AD2d 732, 734 [3d Dept 2003]). A proceeding in the nature of mandamus must be commenced within four months after the refusal by the body or officer (***Matter of Zupa v. Zoning Board of Appeals of Southold***, 64 AD3d 723, 725 [2d Dept 2009]).

Furthermore, "[t]he period in which action is required to be taken cannot be indefinitely extended by delaying the demand. An allegedly aggrieved party who does not proceed promptly and make a formal demand may be charged with laches" (***Agoado v. Board of Education***, 282 AD2d 602, 603 [2d Dept 2001]; ***Matter of Barresi v. County of Suffolk***, 72 AD3d 1076 [2d Dept 2010]; ***Blue v. Commissioner of Social Services***, 306 AD2d 527 [2d Dept 2003]). "The reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (***Matter of Zupa***, ***supra*** at 725). Moreover, assuming, *arguendo*, that the PPA represents a "project" within the meaning of the applicable provisions of the Public Authorities Law, thereby requiring LIPA to submit the PPA to the PACB, the complaint fails to plead that plaintiffs demanded that LIPA submit the PPA to the PACB for review and approval. That failure alone is fatal to the second cause of action (*see* ***Agoado***, ***supra*** at 603).

Here, the plaintiffs offer no excuse whatsoever as to why they never demanded that LIPA submit the PPA to the PACB during the years-long period before commencing this action. Thus, not only is the plaintiffs' cause of action in this regard barred by the applicable four-month statute of limitations (***CPLR § 217 [1]***), but their failure to make a demand and proffer any excuse for that failure warrants dismissal of their claim based on the doctrine of laches (***Sheerin v. New York Fire Department Articles 1 & 1b Pension Funds***, 46 NY2d 488 [1979] [proof of unexcused delay without more may constitute laches].

Due to their very nature as set forth herein, both causes of action asserted in the complaint would have been properly brought pursuant to Article 78 of the CPLR; thus, they are subject to the four-month statute of limitations applicable thereto in spite of the fact that the plaintiffs couch this action as one for declaratory judgment. Because this action is brought so long after the expiration of the limitations period, both causes of action are hereby dismissed as time barred.

Standing

Even if this action were appropriately brought as a declaratory judgment action, the plaintiffs are without standing to bring it. "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation [internal citation omitted]. Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (***Society of the Plastics Industry, Inc. v. County of Suffolk***, 77 NY2d 761, 769 [1991]). "Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" (***Matter of Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation***, 23 NY3d 1, 6 [2014], quoting ***Society of Plastics***, ***supra*** at 772-774; *see also* ***159-MP Corp.v. CAB Bedford, LLC***, 181 AD3d 758, 760-761 [2d Dept 2020]).

"The existence of an injury in fact -- an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action. . ." (***Society of Plastics***, ***supra*** at 772). "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" (***Id.*** at 773). "The concept of a plaintiff's aggrievement, generally necessary to secure judicial review, was therefore refined and restricted by the courts in such matters to require that plaintiffs have a direct interest in the administrative action being challenged, different in kind or degree from that of the public at large" (***Id.*** at 775). "[T]he plaintiff must show for standing purposes that the harm or injury suffered is in some way different from that of the public at large" (***Initiative for Competitive Energy v. Long Island Power Authority***, 178 Misc2d 979, 990 [Sup Ct Suffolk County 1998]).

Concerning the alleged violation of the Public Authorities Law asserted in the second cause of action, the complaint is utterly devoid of any claims that the plaintiffs have suffered, or will suffer an

injury in fact as a result of LIPA's failure to submit the PPA to the PACB. Plaintiffs simply allege that they are "taxpayers and ratepayers" in the affected service area, who will bear the cost of the PPA. This is insufficient to confer standing. "In the absence of some injury in fact, the 'zone of interest' test will not confer standing on the individual [plaintiffs] merely because they are customers of the utility" (***Matter of East End Property Company #1, LLC v. Kessel***, 46 AD3d 817, 819 [2d Dept 2007]; ***Matter of Lederle Labs v. Public Service Commission***, 84 AD2d 900 [3d Dept 1981]).

Underscoring plaintiffs' failure to allege an injury in fact that is some way different from that of the public at large are some of the statements made in their opposing memoranda of law asserting that this action is about "protecting [p]laintiffs (sic) pocketbooks from an illegal contract that will cost [p]laintiffs and their fellow ratepayers more than $1 billion in excessive cost to LIPA for power generated from [Deepwater Wind]'s offshore wind project;" that "LIPA ratepayers will be paying a price premium for this power that won't meet their needs;" and that "the exorbitant cost of the PPA to LIPA will [sic] other consumers in the affected service area, including businesses that will pass those higher costs along to plaintiffs as consumers." These arguments lay bare the non-particularized alleged injuries that cannot be distinguished from those of the general public; accordingly, these arguments are insufficient to confer standing.

Likewise, the plaintiffs do not have standing to assert their claims under the State Finance Law or the General Municipal Law under the first cause of action. "One of the purposes of article 11 of the State Finance Law is to protect those who bid on service contracts by insuring that the decisionmaking procedures are equitable" (***Transactive Corp. v. New York State Dep't of Soc. Servs.***, 92 NY2d 579, 587 [1998]). Similarly, General Municipal Law § 103 provides for the competitive advertising of bids and offers. As taxpayers and residents of the service area, but not unsuccessful bidders, the plaintiffs do not have a direct stake in the outcome of the bidding process, and so did not suffer an injury in fact (***Id***.), nor have they pled a right or interest in the controversy different from the public at large (***Tilcon New York, Inc. v. Town of New Windsor***, 172 AD3d 942, 945 [2d Dept 2019]). Notwithstanding that an issue may be of vital public concern, this alone does not entitle a party to standing (***Id***.).

"Although the doctrine of common-law taxpayer standing would excuse such lack of personal aggrievement, that doctrine requires a petitioner to establish that 'the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action'" (internal citations omitted) (***Matter of Seidel v. Prendergast***, 87 AD3d 545, 546 [2d Dept 2011] *quoting* ***Matter of Transactive Corp.***, ***supra*** at 589 and *quoting* ***Boryszewski v Brydges***, 37 NY2d 361, 364 [1975]). Here, there was no legislative action, and as noted, there is definitely no "impenetrable barrier" to judicial review of LIPA's actions that could have been sought by an Article 78 proceeding.

Plaintiffs' suggestion that they have citizen taxpayer standing pursuant to State Finance Law § 123-b is misplaced. LIPA is not funded by New York State, and the PPA does not involve taxpayer funds; instead, LIPA covers the cost of providing electricity to its customers from its ratepayers, who are not necessarily taxpayers. Accordingly, the plaintiff cannot trace the cost of the PPA to New York State funds, rendering this basis for standing inapplicable. Not only do the plaintiffs fail to specifically allege a cause of action based upon this statute, "the conclusory allegations set forth in the [complaint, to the extent that they can be so construed], [are] patently insufficient to establish that the challenged

expenditure[ ] [are] an 'illegal' use of state funds" (***Matter of East End Property Company***, ***supra*** at 825).

Of equal importance is the fact that the plaintiffs are not challenging LIPA's decision to spend money on renewable energy in general, but they merely take issue with LIPA's decision to award a renewable energy contract to this particular bidder, Deepwater Wind. Thus, plaintiffs' objections, even if construed as a claim under this statute, must fail because the purported injuries did not arise from the decision to seek renewable energy, which would carry with it a cost regardless of which bidder was chosen (*see* ***Transactive Corp.***, ***supra*** at 587).

Plaintiffs' attempt in opposition to cast their complaint as one grounded in General Municipal Law § 51 in order to escape the limitation period and confer standing is likewise misplaced and unavailing. The plaintiffs do not make any claim under this statute in their complaint, but even if they did, the limitations period for any such claim depends upon the substance of the action, since causes of action under this statute have no specific limitations period. Thus, as noted herein above, and relying on that analysis, any claim under would be subject to the same four-month limitation period provided for by CPLR § 217 (1) (*see* ***Save the View Now v. Brooklyn Bridge Park Corp.***, 156 AD3d 928, 931 [2d Dept 2017]; ***Riverview Development LLC v. City of Oswego***, 125 AD3d 1417 [4th Dept 2015]). Finally, LIPA is not subject to General Municipal Law § 51 (***N.Y. Post Corp. v. Moses***, 10 NY2d 199, 204 [1991]).

Since the plaintiffs' causes of action are time barred by the four-month statute of limitations, and because plaintiffs also lack standing to bring this action, the defendants' respective dismissal motions are granted in their entirety, and the complaint is dismissed as to each of the named defendants.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 23, 2022
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]