



State of New Jersey

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July 5, 2016

Via Email [meca@stevenslee.com] and USPS Regular Mail

Maeve E. Cannon, Esq.
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100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648

Re: Request for a Stay of Award of Contract
RFP# 16-X-24049: Enhanced Motor Vehicle Inspection/Maintenance System

Dear Ms. Cannon:

This letter is in response to your correspondence of June 30, 2016, to the Division of Purchase and Property (Division) requesting a stay of the protest period and the contract award for the above referenced solicitation on behalf of Parsons. In that letter, Parsons states that it intends to file an application with the Superior Court Law Division challenging the redactions made to the proposals submitted by its competitors, SGS Testcom, Inc. (SGS) and Opus Inspection, Inc. (Opus). On July 1, 2016, Parsons filed a Verified Complaint with the Clerk of Law Division, Superior Court of New Jersey, Mercer County, seeking a judgment that the court the Division to "immediately produce all documents and records, in un-redacted form which are responsive to Parsons' records request."

By way of background, the subject Request for Proposal (RFP) was issued on December 21, 2015, by the Procurement Bureau (Bureau) on behalf of the New Jersey Motor Vehicle Commission (MVC) and the New Jersey Department of Environmental Protection (DEP). The purpose of the RFP was to solicit proposals to engage a contractor to implement a next generation motor vehicle inspection and maintenance system. (RFP § 1.1 *Purpose and Intent*.) It is the intent of the Division to award one contract to that responsible bidder whose proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. (*Ibid.*) On February 22, 2016, four proposals received by the submission deadline were opened by the Proposal Review Unit. All four proposals were forwarded to the Bureau and the Evaluation Committee for review and evaluation consistent with the criteria set forth in the RFP § 6.7 *Evaluation Criteria*. Based upon that evaluation, on May 13, 2016 the Bureau issued a Notice of Intent to Award (NOI) a contract to SGS Testcom, Inc. (SGS).

Subsequent to the issuance of the NOI, the Bureau received a request from Parsons for copies of the proposals submitted by other bidders. Although the document request was not made pursuant to the New Jersey Open Public Records Act (OPRA), prior to release of the proposals, each redaction proposed was reviewed by the Bureau and the Division of Law to ensure that redactions were consistent with and as permitted by the RFP and OPRA. Thereafter, Parsons was provided with over 3000 pages of information comprised of copies of the proposals, correspondence and BAFO responses. Along with the redacted proposals, Parsons was provided with an exemption log identifying the pages redacted and the specific reason for the redaction.

With respect to the redactions made, on June 27, 2016 the Bureau advised Parsons as follows:

...please be advised that as of this morning, the State has provided all documents it intends to release. Redactions reflected in the SGS Testcom, Inc. Proposal and Appendices are asserted by the State to protect personally identifiable information; “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;” “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize the security of the building or facility or persons therein;” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software[.]” N.J.S.A. 47:1A-1.1. These redactions are asserted by the State, not SGS.

Similarly, the redactions within the OPUS Inspection proposal and Appendices are asserted by the State to protect “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;” “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize the security of the building or facility or persons therein;” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software[.]” N.J.S.A. 47:1A-1.1. These redactions are asserted by the State, not OPUS.

Finally, please be advised that in response to your request for “DPP-3161” identified in your email of June 21, 2015, the State provided the document titled “16-X-24049 – SGS Correspondence Page.” That one-page document which was not initially provided due to a technical error is titled “Commitment to Cooperate in Defense of Company’s Confidentiality Assertions Regarding Trade Secrets and Proprietary Commercial or Financial Information” and dated May 25, 2016. The three pages of SGS’ proposal and one page of OPUS’ proposal provided by email contained revisions to the redactions initially provided with the proposals on or about May 31, 2016.

Further, on June 29, 2016, the Bureau advised Parsons as follows¹:

Please accept the attached logs and bates-stamped documents as a supplement to our email of June 27, 2016. In addition to the security-based exemptions asserted yesterday and detailed in the attached logs, please note that the following bates-stamped pages within the OPUS Inspection, Inc. proposal were in fact based on OPUS’ assertion that the information was trade secret, proprietary commercial or financial information, and that the release would give an advantage to competitors: DPP 787-88, DPP 850, DPP 868, and DPP 1051-57.

Parsons has now filed a request for a stay of the protest period, currently extended to the close of business on July 6, 2016, and the contract award for the above referenced solicitation to permit it an

¹ The June 29, 2016, letter along with a disk containing the referenced logs and documents were made available to Parsons; however, as of the close of business on July 1, 2016, Parsons had not picked up letter and disk despite indications that it would do so.

opportunity to file an action in the Superior Court Law Division to “determine the propriety of the redactions asserted by the State.” (Parsons’ June 30, 2016, Request for a Stay.)

A stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff’s claim is unsettled...
- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).]

At the outset I note, that Parsons did not address any of the Crowe factors in its request for a stay. To the extent that Parsons included information which may be used to evaluate its request for a stay under Crowe, I find as follows:

1. Parsons will not suffer an irreparable harm.

Parsons will not suffer irreparable harm if the stay is denied. While not stated, if the stay is granted, Parsons will continue to reap the economic benefits of having its current contract with the State extended indefinitely pending the outcome of its Law Division action challenging the redactions made to its competitors’ proposals. The New Jersey Courts have held that harm is generally not considered irreparable if it can be redressed with monetary damages. Crowe, supra, 90 N.J. at 132-33. Even if the court were to find that Parsons would suffer irreparable harm, that alone is not sufficient to permit the court to grant injunctive relief. “[I]n some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant.” Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). Even if Parsons would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to permit the court to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

2. Parsons has the legal right to challenge the award of the contract.

The Division acknowledges that it is well settled that a bidder claiming to be entitled to an award of a contract has standing to challenge the award of the contract to another. M.A. Stephen Construction Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

3. Parsons has not demonstrated a reasonable probability of ultimate success on the merits.

Parsons has not established a reasonable probability of success on the merits. In support of its request for a stay, Parsons relies upon the Appellate Division's decision in Hartz Mountain v. New Jersey Sports and Exposition Authority, where the court stated "that as a matter of expedition and orderly proceeding, the issue of documents, if any, to which appellants are entitled in order fully and effectively to prosecute their bid protest but to which they have heretofore been denied access must be decided first." 369 N.J. Super. 175, 181 (App. Div. 2004). In Hartz, plaintiff made OPRA requests for copies of documents associated with the solicitation and the decision to award from the NJSEA. While the NJSEA provided some of the documents, with respect to others, NJSEA provided a privilege log which asserted the reason for the non-disclosure of the document.

With respect to the subject procurement, Parsons did not file OPRA requests. Rather, during the protest period, Parsons requested and was provided with copies of documents from Bureau. All documents requested by Parsons were turned over. However, as directed by the Division's governing regulations (N.J.A.C. 17:12-1.2), RFP § 1.4.4 *Contents of Proposal*, proprietary, confidential or other information which falls under the exceptions of OPRA was redacted from the bidders' proposals. Each of the bidders, including Parsons, was provided the opportunity to designate exempt information prior to proposals being released. Like the proposals submitted by SGS and Opus, Parsons' own proposal contained redactions and each proposal contained an exemption log identifying the pages redacted and the specific reason for the redaction as follows:

- Citizens' reasonable expectation of privacy.
- administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;
- emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- trade secrets and proprietary commercial or financial information
- Information which, if disclosed, would give an advantage to competitors or bidders;
- When the contract is awarded, the names of the members of any evaluation committee members shall be made public.

With respect to the proposal submitted by SGS², 218 pages contained redactions. Seventy percent of the redacted pages fell under the citizens' reasonable expectation of privacy. Specifically redacted under this category were Federal Employee Identification Numbers, tax registration numbers, telephone number, vehicle identification numbers, license numbers, identification numbers and insurance policy numbers. The remainder of the redactions made to the proposal fell under one or more of the exceptions to disclosure noted above. For each of the redactions made, the title of the proposal sections appears, along with all other surrounding text.

For the proposal submitted by Opus³, 66 pages contained redactions. Approximately 44% of the redactions made fell under the citizens' reasonable expectation of privacy for the reasons noted above. Like SGS' proposal, the remainder of the redactions fell under one or more of the exceptions to disclosure noted above. Again, for each of the redactions made, the title of the proposal sections appears, along with all other surrounding text.

² SGS' proposal was 623 pages.

³ Opus' proposal was 523 pages.

Like its competitors, the proposal submitted by Parsons has 134 pages which contain redactions.⁴ However, unlike its competitors, only twenty-nine percent of the redacted pages fell under the citizens' reasonable expectation of privacy for the reasons noted above. The majority of Parsons' redacted pages fall under the other exceptions to disclosure noted above. For each of the redactions made, the title of the proposal sections appears, along with all other surrounding text.

In response to the document requests, Parsons was provided with an exemption log identifying the reason for each redaction made. The information immediately preceding and following the redactions were provided which would allow Parsons the ability to determine the propriety of the redaction, from the context, as each redaction made leaves in place the title of the redacted number, item or section and all other surrounding information. Despite that, Parsons has not specified which, if any of the redactions are inconsistent with the law and therefore has not made a *prima facie* showing of the likelihood of success on the merits. (See, Academy Express v. Rutgers, 2015 N.J. Super. Unpub. LEXIS 2356 *27 where the Appellate Division held Academy's assertion that it "could not ascertain the propriety of the assertion of the privilege to the redaction of First Transit's proprietary information - is belied by the record...because the pages immediately preceding the redactions were provided, [therefore] it was evident that the redacted materials were First Transit's financial statements for 2008, 2009 and 2010.")

With respect to Parsons' ability to file a protest by the protest deadline, the Procurement Bureau has fully responded to Parsons' document request providing it with all of the documents requested. Parsons has been provided with over 3000 pages of information comprised of copies of the proposals, correspondence and BAFO responses. Of the information provided, approximately 400 pages contain a redaction. In over half of those redacted pages, approximately 230, the redacted information is limited to a name or number, all other information on the page is provided. Parsons has received the bidders responses to the scope of work, with the exceptions noted above, and as such, Parsons has before it more than ample information with which it could file a protest to the intended award. Parsons ability to file a protest is not limited or hampered in any way.

Moreover, based upon the Evaluation Committee's technical review of the four proposals submitted consistent with the evaluation criteria set forth in RFP § 6.7 and the proposal pricing submitted by each of the bidders, Parsons' proposal was ranked third. While each of the proposals received a technical score in the good or very good range, the pricing proposal submitted by the intended awardee was very competitive and significantly lower than that of Parsons, resulting in a substantial savings to the State and the taxpayers for the cost of conducting inspections.

4. The balance of the relative hardship weighs in favor of denying the request for a stay.

Lastly, Parsons has not established that the balance of equities weighs in favor of warranting the granting of a stay. Here, with the award of the new contract, the contractor will be required to design, implement and manage a **next generation** motor vehicle inspection system ensuring that the new system meets current State and federal requirements.

Not only will the State not benefit from the next generation system if the contract award is stayed, but the State will also suffer a monetary hardship. Currently, the State pays Parsons \$20.29 per inspection resulting in a payment of approximately \$100,000 per day. Once the new contract is awarded, the State will pay the rate of \$6.78 per inspection; a significant savings to the State and the taxpayers. Further, a delay in the contract awards will postpone the modernization of the inspection equipment. The existing inspection equipment at the Centralized Inspection Facilities and Private Inspection Facilities are at end of the useful life. The installation of new modernized equipment is necessary and will allow for more efficient record keeping and reporting of the required data to the U.S. Environmental Protection Agency. Moreover, the new equipment will allow for emissions data to be more accurately analyzed,

⁴ Parsons' proposal was 792 pages.

provide software enhancements to detect fraud, and capture audit data electronically on site; all features that are not available on the existing equipment.

As such, the State's and the public's interest in moving forward with the contract award in order to satisfy the public purposes of procurement outweighs any of Parsons' legally cognizable interests. Parsons will not lose anything to which it is entitled if the contract is awarded in accordance with the NOI. Conversely, the public will suffer hardship if the contract is not awarded in accordance with the NOI.

Finally, while Court in Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority, stated that "a court may take a less rigid view of the *Crowe* factors...when the interlocutory injunction is merely designed to preserve the status quo," the Court limited that less rigid view to circumstances where "when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed." 433 N.J. Super. 445, 453-54 (App. Div. 2013). While the Crowe factors may be relaxed, justification for such relaxation does not exist here.

Here, Parsons has not established that the balance of the hardship weighs in its favor, that it will suffer irreparable harm or that the subject matter of the suit will be destroyed if the stay is not granted. Moreover, the Courts in Morris County recognized "the important role the public interest plays when implicated, as here, and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Ibid., citing, Union County, supra, 399 N.J. Super. at 520-21.

Accordingly, because Parsons has not established each of the Crowe factors, the request for a stay of the award of a contract from the subject solicitation is denied.

Sincerely,



Gregg Olivera
Deputy Director

JD-M:GO:RUD

c: G. Terwilliger
J. Strype