



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 6, 2018

Via Electronic Mail [aimbesi@testalawyers.com] and USPS Regular Mail

Anthony M. Imbesi, Esquire
Testa Heck Testa & White, P.A.
424 Landis Avenue
Vineland, NJ 08360

Re: I/M/O Bid Solicitation #18DPP00205 Stephens Contracting
T0777 Snow Plowing and Spreading Services
Protest of Notice of Intent to Award

Dear Mr. Imbesi:

This letter is in response to your correspondence of August 30, 2018, on behalf of Stephens Contracting (Stephens), to the Division of Purchase and Property's Hearing (Division) Unit. In that correspondence Stephens requests reconsideration of the Division's August 27, 2018 Final Agency Decision which upheld the August 24, 2018, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau). The August 24, 2018 NOI set forth the Division's intent to award a Master Blanket Purchase Orders (Blanket P.O.s)¹ to several Vendors {Bidders} for Bid Solicitation #18DPP00205 - T0777 Snow Plowing and Spreading Services (Bid Solicitation). With the request for reconsideration, Stephens also requests a stay of the award of the Blanket P.O.s

In the request for reconsideration, Stephens alleges that there must have been problems with the State's **NJSTART** eProcurement system which precluded it from properly uploading its price sheet. In

¹ For consistency, this decision uses terminology employed by the State of New Jersey's **NJSTART** eProcurement system. For ease of reference, the following is a table which references the **NJSTART** term and the statutory, regulatory and/or legacy term.

NJSTART Term	Statutory, Regulatory and/or Legacy Term
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

support of its allegation Stephens points to final agency decisions on the Division's website stating that a majority of the decisions related to the subject procurement concern Vendor {Bidder} Quotes which were rejected for missing forms.

At the outset I note that Stephen's current request for reconsideration amounts to a third-bite at the apple. Stephen's Quote was automatically rejected for failing to submit pricing information with the submitted Quote. On April 12, 2018 Stephens submitted a protest, and on April 23, 2018 the Division issued its Final Agency Decision sustaining the Notice of Proposal Rejection. If Stephens was dissatisfied with that decision, its recourse was to file an appeal with the Appellate Division. The Division's governing regulations state in part that "final agency determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey." N.J.A.C. 17:12-3.1. Further, "appeals from final decisions or actions of state administrative agencies or officers...shall be taken within 45 days from the date of service of the decision or notice of the action taken." New Jersey Court Rule 2.4-1(b). As such, Stephens Trucking should have submitted its appeal of the Division's April 23, 2018, Final Agency Decision to the Appellate Division by June 7, 2018.

Rather, Stephens waited until the issuance of the August 24, 2018 NOI to file a second protest essentially seeking a reconsideration of the Division's April 23, 2018, Final Agency Decision. Though it was not required to do so, the Division accepted Stephens August 27, 2018 letter. On that same date, the Division issued as decision again sustaining the Proposal Review Unit's Notice of Proposal Rejection and the August 24, 2018 Notice of Intent to Award.

Only now in yet another challenge to the August 24, 2018 NOI does Stephens allege that there must have been problems with the State's *NJSTART* eProcurement system which precluded it from properly uploading its price sheet.

Though not required to do so, the Division will briefly address Stephens' request for reconsideration. In consideration of Stephens' request for reconsideration I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render a decision.

By way of background, on January 30, 2018, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Transportation (NJDOT), to solicit Quotes from qualified Vendors {Bidders} to provide snow plowing and spreading services on all State interstates and highways under the jurisdiction of NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Statewide Blanket P.O.s to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered. Ibid.

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. On March 16, 2018, the Division's Proposal Review Unit opened 163 Quotes received by the Division by the submission deadline of 2:00 pm eastern time. 130 Quotes were received through the State's *NJSTART* eProcurement system, 33 Quotes were submitted in hardcopy format.

The record of this procurement reveal that Stephens submitted its Quote on March 13, 2018, prior to the Quote submission deadline.

Quote 00001882 - Stephens Contracting

[General](#) | [Items](#) | [Questions](#) | [Subcontractors](#) | [Terms & Conditions](#) | [Attachments](#) | [Evaluations](#) | [Preference](#) | [Reminders](#) | **[Summary](#)**

Header Information

Quote #:	00001882	Bid #:	18DPP00205	Status:	Submitted
Organization:	Division of Purchase and Property	Delivery Days:	0	Discount Percent:	0.0
Description:	T0777 Snow Plowing and Spreading Services - NJDOT	Alternate Bid:	Yes	Shipping Terms:	F.O.B. - Destination
Bid Flag:	Yes	Ship Via Terms:		Payment Term:	Net 30
Freight Terms:		Info Contact:	Stephens Contracting Brent Stephens 609-381-1096	Quote Total	\$16.00
Promised Date	03/16/2018	User Last Updated:	Brent Stephens	User Created:	Brent Stephens
Comment:	We bid on current contract.				
Date Last Updated:	03/13/2018 09:47:56 AM				
Print format:					

Vendor accepts the terms & conditions with no exceptions.

Bid Acknowledgements:

Document	Amendment Note	Notifications	Acknowledged Date/Time
Amendment 1	Bid Amendment #1 030118 Responses to Electronic Questions, Revised Bid Solicitation, Revised Attachment #1 and Revised Price Schedule/Sheet, Attachment File Changes, Header 1 File 'T0777 Bid Amendment 1 030118.docx', File 'T0777 Bid Amendment 1 030118.docx' added. 2. File 'Attachment 1 T0777 -Revised Snow Plowing and Spreading Services- NJDOT.docx', File 'Attachment 1 T0777 -Revised Snow Plowing and Spreading Services- NJDOT.docx' added. 3. File 'T0777 Revised RFP Snow Plowing and Spreading Services- NJDOT 030118.docx', File 'T0777 Revised RFP Snow Plowing and Spreading Services- NJDOT 030118.docx' added. 4. File 'T0777 Revised Price Schedule - Snow Plowing and Spreading Services- NJDOT.xlsx', File 'T0777 Revised Price Schedule - Snow Plowing and Spreading Services- NJDOT.xlsx' added.	At bid acknowledgement	03/13/2018 10:58:55 AM

The Division has no record of any emails or phone calls from Stephens Contracting indicating that it was having issues locating or uploading any of the documents, forms, files, or attachments to its Quote submission.

As noted in the prior decisions, thirty-two Quotes were automatically rejected by the Proposal Review Unit for failure to conform to the mandatory administrative requirements for Quote submission. The Quotes submitted by those Vendors {Bidders} were not rejected because they were unable to locate and upload all forms required. In fact these Vendor {Bidders} located and uploaded the majority of the forms required. Rather, the Quotes submitted by those thirty-two Vendor {Bidders} were rejected because they failed to include a statutorily mandated form.

In addition, the Division has no record or indication of any down time or system-wide issues impacting the submission of Quote through **NJSTART** during the timeframe that this procurement was advertised to the Quote opening date. Additionally, as noted above, 131 Vendors {Bidders} were able to submit Quotes via **NJSTART** in response to the Bid Solicitation, further supporting the conclusion that there was no system-wide issue that prevented the upload or otherwise interfered with the submission of Quotes via **NJSTART**.

Accordingly, for reasons set forth in the Division’s April 23, 2018 and the August 27, 2018 decisions, I sustain the Proposal Review Unit’s Notice of Proposal Rejection and the August 24, 2018 Notice of Intent to Award.

In connection with the request for reconsideration, Stephens requests that the Division simply “roll-over existing snow removal service contracts and re-bid” the procurement. See, August 30, 2018 letter, p. 6. The New Jersey Courts have long recognized that the purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” Barrick v. State of New Jersey, 218 N.J. 247, 258. (2014); citing, Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244,

256 (1985). Simply to extending the existing snow plowing contracts exactly contravenes the purpose of public bidding as it removes competition and the benefits to the public derived therefore.

In the alternative, Stephens requests that the Division stay the award of the Blanket P.O.s pending the outcome of its appeal. See, August 30, 2018 letter, p. 6. 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).]

Stephens has not established each of the Crowe factors by clear and convincing evidence such that a stay of the award of the Blanket P.O.s is warranted.

1. Stephens will not suffer irreparable harm if the stay of the Blanket P.O. award is denied.

Stephens will not suffer irreparable harm if the stay of the Blanket P.O. award is denied. Stephens submitted a protest, as it was permitted to do, and the Division substantively ruled on the basis of the protest as set forth above below.

Undoubtedly, Stephens as an incumbent contractor, will lose business from the State when the Blanket P.O.s resulting from this Bid Solicitation are awarded. However, no vendor, regardless of the time and resources expended to provide services to the State, is entitled to a contract in perpetuity. When considering a stay, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public contract, not every request for stay that concerns a public contract award is granted. See, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs., 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of contract). This is one of the pillars underlying the public bidding law.

The Division finds that Stephens has not suffered irreparable injury. As noted in the August 24, 2018 Notice of Intent to Award, there are several snow plowing and spreading sections which have yet to be awarded. Those sections will be re-procured in the near future. Stephens should monitor the New Jersey Department of Transportation's, the Division's and the NJSTART websites for future bidding opportunities for these services. Even if Stephens 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. Further, as noted above, the public interest is greatly affected if the State, as Stephen's proposes, simply rolls over or extends the current contract which set to expire on October 1, 2018.

2. Stephens has the legal right to request a stay of the Contract award.

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 a contract to another. M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

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

Stephens has not established a reasonable probability of success on the merits. The purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the "public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good." Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997).

A review of the record of this procurement reveals this procurement was conducted in conformity with the Division's statutory and regulatory requirements. Stephen's statements that there must have been issues with the NJSTART eProcurement system is based on nothing more than conjecture. The Division's review of the procurement and the NJSTART eProcurement system website indicates that there was no down time or system-wide issues impacting the submission of Quotes through NJSTART. For the reasons set forth in the Division's April 23, 2018 and the August 27, 2018 decisions, and above, Stephens has not shown a reasonable likelihood of success on the merits.

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

Lastly, Stephens has not established that the balance of equities weighs in favor of granting of a stay.

As to Stephens' argument that the Crowe factors should be relaxed for its stay request, while the Court in Waste Mgmt. of New Jersey, Inc. v. Morris County Mun. Util. Auth., 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 "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.

Stephens 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 Court in Waste Mgmt. 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. The State's and the public's interest in moving forward with the award of the Blanket P.O.s, outweighs any of Stephens' legally cognizable interests. Stephens will not lose anything to which it is entitled if the stay request is denied. Conversely, the public will suffer hardship if the procurement process does not continue.

Based upon the foregoing, I must deny Stephens' request that the Division simply "roll-over existing snow removal service contracts and re-bid" the procurement and its request for a stay.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Michaels
L. Spildener
M. Groninger