



State of New Jersey

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April 25, 2018

Via Electronic Mail [gtalwar@acrocorp.com] and USPS Regular Mail

Gillian Talwar, General Counsel
Acro Service Corporation
39209 W. Six Mile Rd, Suite 250
Livonia, MI 48152

Re: Request for Reconsideration, Documents, and a Stay of Award
M2001 – Temporary Staff Services

This letter is in response to your correspondence of April 16, 2018, to the Division of Purchase and Property (Division) on behalf of Acro Service Corporation (Acro) further challenging the Division's intent to award contract M2001 – Temporary Staffing Services to 22nd Century Technologies, Inc. (22nd Century), requesting a number of documents, and requesting a stay of the contract award. The Division has accepted your letter as a request for reconsideration, which is addressed below, and as a request for a stay. The documents you have requested will be forwarded under separate cover.

The Division's April 13, 2018 Response to Comment regarding the March 28, 2018 Special Notice of Intent to Participate in Cooperative Contract – NASPO ValuePoint Temporary Services (April 13, 2018 Response) is incorporated herein as if set forth in full. I add the following in response to Acro's April 16, 2018 letter.

First, Acro asserts the NASPO ValuePoint Temporary Employment Services 50-000-15-00058 Request for Proposal (New Mexico RFP) did not include Managed Service Provider (MSP) services, and therefore the State of New Jersey is prohibited from utilizing these services from 22nd Century. Acro April 16, 2018 letter, p. 1. Review of the New Mexico RFP reveals that the State of New Mexico did not use nor define the term MSP nor did it have to.¹ The New Mexico RFP was focused on temporary staffing services in the following categories: "Administrative Support (Including Office, Clerical and Sales), Commercial/Industrial Workers, Healthcare Staffing Services, Information Technology Professional

¹ It is noted that Acro's U.S. Communities Staffing Services and Related Services and Solutions Solicitation 16111-RFP lead by Maricopa County, Arizona and effective January 1, 2017 (Maricopa County RFP), defined the term "Managed Service Provider Solutions" as "[t]he complete portfolio of managed service provider solutions such as contingent workforce management strategy development, strategic vendor management technology, risk mitigation methods, employment compliance methods, rate and spend management (cost savings), efficient standard processes and workflow, staffing vendor selection and management, workforce utilization trends, in-depth program reporting and analytics, and any other managed service provider solutions offered by Proposer." Maricopa County RFP § 1.3.2 *General Definition of Products and/or Services, Managed Service Provider Solutions*.

Services, and Professional Services.” New Mexico RFP § 1.1 *Purpose*. As part of the RFP’s Scope of Work, the New Mexico RFP envisioned that the contractors would necessarily have to “provide services relating to” the provision of temporary staffing personnel. New Mexico RFP Attachment B, *Scope of Work*. These related services included a number of placement-related tasks, including providing assistance to “Procuring Agencies with the placement of any candidate(s).” New Mexico RFP Attachment B, *Scope of Work, § 4 Placement*. Essentially, the nature of the temporary staffing services called for under the New Mexico RFP necessarily requires the attendant, related administrative support services similar to the services defined as “MSP” in the Maricopa County RFP.² In this regard, and in response to this section of the Scope of Work, 22nd Century’s proposal described its placement process as follows:

4.2. Upon a request for service from the Procuring Agency, the Awarded Offeror will provide expedient temporary employment services. An e-mail, facsimile, or telephone call from the Procuring Agency will constitute a request for service.

22nd Century Response: 22nd Century work is initiated as soon as we get the task order/requirement from State. The task order is immediately entered into Zoniac, our centralized recruiting portal. The Account Manager understands the agency requirement based upon the task order received. This includes an understanding of the contract skill set, SOW, environment, qualification and experience as well as the mandatory and desirable skill set of the candidate. Accounts Manager drafts a requisition and submits the requirement in Zoniac along with sending it to Recruitment Manager. The Recruitment Manager checks whether a consultant with a matching skill set is available in-house or in our internal resume database of 400,000+ consultants. If a suitable match is found, the screening process is triggered which includes interview by our SME in the respective area before submittal to the requesting agency. If not enough qualified consultants are found in our database, job is post into the various job portals like Dice, Monster, and Career Builder etc. Also, a Boolean search is performed on these Job portals. After finding the 4-5 consultants per requirement, the screening process is triggered. The main point of contact for any request for service coming from the agency will be:

- **Name:** Karolina Plan
- **Address:** 1, Executive Drive, Suite # 285
- **City, State, Zip:** Somerset, NJ 08873
- **Phone Number:** 732-658-4023
- **Fax:** 501-421-3750
- **Email:** karolina.plan@tscti.com

[22nd Century Proposal, p. 52.]

Further, and consistent with the New Mexico RFP’s requirements, 22nd Century’s proposal outlines how it will analyze requests for staffing and assign appropriate personnel, manage background checks, evaluate personnel performance, and collect and manage personnel time and attendance. See 22nd Century Proposal, p. 16-17. Therefore, while the New Mexico RFP did not use the language that the Maricopa County RFP used to define the necessary ancillary services related to the *provision* of temporary staffing personnel, use of the Maricopa County RFP language was not necessary. Analogous services and the necessary language for their use were within the scope of the New Mexico RFP, and therefore, within the scope of the Master Agreement awarded by the State of New Mexico and New Jersey’s Participating Addendum.

Second, Acro asserts that 22nd Century has no experience in providing MSP services, and relatedly, implies that New Mexico’s competitive procurement process is deficient because the New Mexico RFP “failed to evaluate the bidders’ MSP experience or obtain any references from bidders’ MSP customers.”

² It is noted that the Maricopa County RFP did not permit additional charges for “MSP” services, supporting the conclusion that these are simply necessary, related services attendant to providing temporary staffing services. See Maricopa County RFP Attachment A, A-1, A-2, and A-3.

Acro April 16, 2018 letter, p. 1. 22nd Century’s proposal demonstrates that it has provided temporary employment services to public sector clients since 1997, and included a listing of temporary employment services contracts it holds with the Federal government and other States, Counties, and Cities throughout the United States. 22nd Century Proposal, p. 17; 19-20; 46-47. Contrary to Acro’s assertion, 22nd Century’s proposal demonstrates that it does have experience providing temporary staffing services and the necessary ancillary services related thereto. Importantly, however, it is noted that the New Mexico RFP did require bidders to demonstrate prior experience in their proposals, and expressly advised all bidders of the evaluation point summary the State of New Mexico was going to deploy in evaluating proposals it received:

5.3 Evaluation Point Summary
The following is a summary of evaluation factors with point values assigned to each. These weighted factors will be used in the evaluation of individual potential Offeror proposals by sub-category.

Factors correspond to Section 6, Attachment E and Section 7	Points Available
• Signed Campaign Contribution Disclosure Form (Attachment E.9)	Pass/Fail
• Signed Letter of Transmittal (Attachment E.10)	Pass/Fail
Factors correspond to Section 6.7 and 6.8	Points Available
6.7 Business Requirements	(350 possible total points)
6.7.1 Company Profile	Pass/Fail
6.7.2 Business Profile	
1) Customer Service/Service Delivery Strategy	125
2) Candidate Qualifications	120
3) Government Relations	35
6.7.3 Protection of Sensitive Information	70
6.8 Technical Requirements	(350 possible total points)
6.8.1 Scope of Work	350
Attachment C - Cost	(300 possible total points)
7.1 Price and Rate	300
TOTAL	1000 points

[New Mexico RFP § 5.3, *Evaluation Point Summary*.]

The New Mexico RFP Section 6.7.1, *Company Profile* required bidders to provide background information, including the year the company was founded, client retention rates, growth rates, and hours of operation. The New Mexico RFP Section 6.7.2, *Business Profile* required each bidder, in part, to describe its national capabilities for providing the required services, and to describe where in the United States it currently provides these services. While the response to the New Mexico RFP Section 6.7.1, *Company Profile* was designated as a pass/fail item, the response to the New Mexico RFP Section 6.7.2, *Business Profile*, was evaluated and scored by the sourcing team. As outlined above, the administrative services required to provide temporary staffing services were necessarily baked into the New Mexico RFP, and therefore, taken into account when evaluating bidders’ prior experience. 22nd Century’s proposal responded to these sections, and they were evaluated and scored by the State of New Mexico and the sourcing team. 22nd Century Proposal, pp. 12-34. The Sourcing Team Award Recommendation to the NASPO ValuePoint Management Board reflects the evaluation of the proposals received:

Evaluation Cumulative Totals	Technical Total	Admin Support Proposal Total	Com./Indus Proposal Total	Healthcare Staffing Proposal Total	IT Proposal Total	Professional Proposal Total
RFP Sections						
Maximum Points Available	700	1000	1000	1000	1000	1000
The United Solutions Group, Inc	356				656	
22nd Century	570	779	739	720	571	709
ATA Services, Inc	523	823	800	823	525	823
DatamanUSA, LLC	479	618	602	579	480	561
Rose International, Inc.	393	575			394	533
Staff Today, Inc. (STI)	342	635		522	343	482
Diversified Services Network, Inc (DSN)	518				520	
Mirage Software, Inc dba Bountec Solutions Inc.	367				370	
PIE Management, LLC	330	499	463	453	330	453
ITSQuest, Inc	265	401	373	357	266	359
Knowledge Services	257	415		378	258	398
LanceSoft, Inc.	253	436	422	394	254	394
CoolSoft LLC	222			363	223	363
RADgov, Inc.	212	407			213	379
Cynet Systems Inc.	186	479	486	436	188	436
Quality of Staffing of America, Inc.	139	417			140	326
IOS Acquisitions LLC	137	362		262	138	262
Government Sourcing Solutions	39					200

Accordingly, the State of New Mexico and the sourcing team evaluated and scored all bidders on the evaluation criteria established in the New Mexico RFP. To the extent that Acro asserts New Mexico’s competitive procurement process is somehow deficient because the New Mexico RFP failed to evaluate the bidders’ MSP experience or obtain any references from bidders’ MSP customers, this argument is rejected. As explained in the Division’s April 13, 2018 response and as further set forth above, the State of New Mexico followed “a competitive bidding process” as required by N.J.S.A. 52:34-6.2(b)(2). Further, the cooperative statute does not mandate the cooperative bidding process to have included an evaluation of bidders’ experience. *Ibid.* Nevertheless, New Mexico did request and evaluate bidder experience.

Finally, Acro requests “a stay of the Division’s decision to participate in the New Mexico/NASPO cooperative contract and to award the contract to 22nd Century pending further review.” Acro protest, p. 2. Other than noting that Acro intends to appeal the Division’s determination to enter a cooperative agreement with 22nd Century, Acro provides no support or argument for its position that a stay is appropriate. Nevertheless, I address Acro’s stay request below. It is noted that the Division awarded contract M-2001 – Temporary Staffing Services to 22nd Century under Master Blanket Purchase Order {Contract} number 18-GNSV2-00348 on April 13, 2018, as stated in the Division’s April 13, 2018 Response.

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. *Gauman v. Velez*, 421 N.J. Super. 239, 247-48 (App. Div. 2011); *McKenzie v. Corzine*, 396 N.J. Super. 405, 414 (App. Div. 2007); *Zoning Bd. v. Serv. Elec. Cable Television*, 198 N.J. Super. 370, 379 (App. Div. 1985). 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 Acro did not address any of the Crowe factors in its request for a stay. Nonetheless, I find as follows:

1. Acro will not suffer an irreparable harm.

Acro will not suffer irreparable harm if the stay is denied. Acro's prior contract with the State expired on March 31, 2018, in accordance with the terms of Acro's Master Agreement with Maricopa County. As the State's prior contract with Acro was founded upon and expressly referenced the term of the Master Agreement, the expiration of Maricopa County's prior Master Agreement prohibits New Jersey from extending that contract with Acro any further. Accordingly, while Acro implies that the State should extend the contract with Acro pending resolution of this dispute, there simply is nothing to extend.

Further, to the extent that Acro will suffer harm it is purely economic. 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 a court were to find that Acro 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 Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Accordingly, 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. Acro has the legal right to challenge the award of the contract.

The Division acknowledges that "as holders of the most recent contracts" for the services at issue, Acro has standing to challenge the award of the cooperative contract to another. In re N.J. State Contract A71188, 422 N.J. Super. 275, 291-92 (App. Div. 2011).

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

Acro has not established a reasonable probability of success on the merits. Acro's primary argument, that the New Mexico RFP failed to comply with New Jersey's competitive bidding procedures and therefore cannot form the basis of a cooperative agreement under N.J.S.A. 52:34-6.2(b)(2), has been expressly considered and rejected by New Jersey's courts as an improper reading of the statutory language.

The court in In re New Jersey State Contract A71188, supra, 422 N.J. Super. at 297-98, considered the argument that a cooperative agreement could not be joined by the State because the "underlying procurement was not a competitive bidding process" as required by N.J.S.A. 52:34-12, the State's advertised procurement statute. The disappointed contractor argued that the competitive process used by the lead procuring entity was defective because it only invited four potential suppliers to bid, did not indicate the criteria it used to select those four bidders, and because of advertising deficiencies. In re N.J. State

Contract A71188, supra, 422 N.J. Super. at 297. Acknowledging that the process used was different, and in some respects less stringent than New Jersey’s procurement procedures, the court ultimately concluded the process used was competitive and in many respects “consistent with the practice of the State.” Id. at 297-98.

Here, as explained in the Division’s April 13, 2018 Response:

The NASPO ValuePoint Temporary Employment Services 50-000-15-00058 Request for Proposal (“RFP”) was competitively bid by the New Mexico State Purchasing Division-General Services. That RFP was posted on the State of New Mexico’s procurement website and advertised in *The Albuquerque Journal*, *The Santa Fe New Mexican*, and *The Las Cruces Sun*, on April 22, 2016. On June 10, 2016, New Mexico received 18 proposals in response to this RFP. New Mexico’s Evaluation Committee met June 28 – June 30, 2016, to evaluate and score each proposal received. The evaluation criteria, which were established prior to the submission of proposals, were structured to evaluate the Bidders’ proposed processes and procedures, nation-wide staffing model (demonstrated ability to meet the scope of work), and cost.¹

[April 13, 2018 Response, p. 2.]

For these reasons, Acro has not demonstrated that it is likely to succeed on its challenge that the process used by the State of New Mexico in procuring the New Mexico RFP was not competitive.

Acro’s second argument, that the award to 22nd Century is not the most cost effective means of procurement, is also unlikely to succeed on the merits. As detailed in the Division’s April 13, 2018 Response, the Division considered the following and ultimately determined 22nd Century presented the most cost-effective means of procurement: (1) current limited resources within the Division; (2) the time and cost needed to complete an independent New Jersey procurement; (3) the ability to leverage the combined purchasing power of all participating entities to secure better pricing; and (4) an analysis of three separate Master Agreements under two separate cooperative procurements for the needed services including: (a) 22nd Century’s award under the New Mexico RFP, (b) ATA Services, Inc.’s award under the New Mexico RFP, and (c) Acro’s award under the new Maricopa County RFP.

As detailed in the April 13, 2018 Response, the Division used the competitively-derived pay rates and markup rates from each potential vendor³ and compared them using historical spend data to determine that 22nd Century presented the most cost-effective means of procuring the needed non-information technology temporary staffing services. Using this method, the Bureau determined that overall, the 22nd Century cooperative agreement presented projected savings of more than \$2,238,000, or 4.9%, as compared to the historical spend under the expired Acro contract. See, Recommendation Report dated March 26, 2018. Therefore, Acro’s argument that it is the most cost effective is not supported by the facts. First, Acro’s speculation that transition to a new contractor will result in \$1 million in administrative costs is not substantiated.⁴ Second, the projected estimated cost of 22nd Century’s contract under the New Mexico RFP is approximately \$2.2 million less than the projected estimated cost of Acro’s contract under the new

³ It is noted that the Procurement Bureau (Bureau) conducted a Best and Final Offer process before conducting this analysis, whereby the Bureau requested and received more advantageous markup pricing from 22nd Century, ATA Services, Inc., and Acro, making the terms more favorable to the State. N.J.A.C. 17:12-1A.3(c)(3).

⁴ 22nd Century’s cooperative agreement does not include start-up or transitioning costs. Rather, like Acro’s new Maricopa County RFP, startup and transition costs are built in to the pay rates and markups charged by each contract.

Maricopa County RFP. In addition, N.J.S.A. 52:34-6.2(b) allows the Director the discretion to choose the most cost-effective method to procure services. Accordingly, for the reasons set forth in the Division's April 13, 2018 Response, as amplified herein, Acro has not provided any evidence that the Director abused that discretion or demonstrated 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, Acro has not established that the balance of equities weighs in favor of warranting the granting of a stay. As noted above, Acro's contract expired on March 31, 2018, without available extensions. If the State grants a stay of the contract awarded to 22nd Century, it would have no contract by which the State could procure necessary and essential temporary staffing services, leaving more than 1,000 non-Information Technology positions open throughout the State and causing termination of numerous current temporary staff. For example, these positions include medical personnel within the Department of Human Services (DHS), the absence of which would have a direct impact on the health and well-being of clients and patients. In some instances, like within the Division of Family Development at the DHS, temporary staffing represents approximately 90 of the 400 person staff, or 22.5% of the agency's overall workforce. Granting Acro's request to leave the State without a contract in place to procure necessary temporary staffing services would result in immediate, catastrophic impacts to the State's agencies and operations.

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 Acro's legally cognizable interests. Acro will not lose anything to which it is entitled if the contract is awarded to 22nd Century. Conversely, the public will suffer hardship if there is no contract by which the State could procure these necessary services.

Finally, while the court in Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority, 433 N.J. Super. 445 (App. Div. 2013), 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." Id. at 453-54 (internal citations omitted). While the Crowe factors may be relaxed, justification for such relaxation does not exist here for the reasons stated above.

Here, Acro 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. (internal citations omitted).

Accordingly, because Acro 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,



Maurice A. Griffin
Acting Director

MAG:REG

c: G. Olivera
A. Davis
K. Anderson-Thomas
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