



## State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PURCHASE AND PROPERTY  
OFFICE OF THE DIRECTOR

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July 21, 2016

Via Email [lforbes@kentmcbride.com] and USPS Regular Mail

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Re: Request for a Stay of Award of Contract #T2435  
RFP# 14/15-X-22848 *Environmental Emergency Response Services: NJDEP and Statewide*

Dear Mr. Forbes:

This letter is in response to your correspondence dated July 15, 2016, submitted on behalf of Ken's Marine Service, Inc. (Ken's Marine) to the Division of Purchase and Property (Division). In that letter, you indicate that Ken's Marine intends to file an appeal of the Division's July 8, 2016 final agency decision (FAD) to the Superior Court Appellate Division and accordingly requests a temporary stay of the award of a contract for the subject solicitation to Allstate Power Vac, Inc. (Allstate) and Atlantic Response, Inc. (Atlantic). In the alternative, if the contract has already been awarded, Ken's Marine requests a stay of the performance of the contract by Allstate and Atlantic pending Ken's Marine's exercising its appeal rights. The contract at issue is for statewide Environmental Emergency Response Services including, but not limited to, response, cleanup, removal, transportation, storage, treatment, disposal, inspection and investigation of hazardous substance discharges, asbestos, waste and other hazardous substances.

To begin, as of the date of this letter, the Procurement Bureau of the Division has not awarded the T2435 contract. As such I have considered your letter as a request for a stay of the contract award to Allstate and Atlantic Response. In considering this request for a stay of contract award, I rely on the facts as I found them in my July 8, 2016 Final Agency Decision in response to Ken's Marine's February 16, 2016 protest of the contract award. In summary, in the July 8 FAD, I found that Ken's Marine's failure to name an Asbestos subcontractor with a current New Jersey Type A license to be a material defect and disqualified Ken's Marine from a contract award.

Turning now to this request for a stay of the contract award, I note that 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. Serv. 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 its discretion to grant a request for stay, an agency must find that the requestor has satisfied each of the well-familiar prongs of the test enunciated in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982):

- (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).]

To the extent that Ken's Marine included information which may be used to evaluate its request for a stay under Crowe, I find as follows:

**1. Ken's Marine will not suffer an irreparable harm.**

Ken's Marine alleges it will face irreparable harm because "it will not have the opportunity to perform under the [c]ontract, after the conclusion of the transitional period, while its rights are still being adjudicated." Ken's Marine further states that "if it is subsequently determined that Ken's Marine should be awarded the [c]ontract, Ken's Marine will be without remedy" because an unsuccessful bidder may not recover money damages, even if it successfully challenges the award of contract. See Delta Chemical Corp. v. Ocean Cnty. Utils. Auth., 250 N.J. Super. 395, 400 (App. Div. 1991) (citing M.A. Stephen Constr. Co. v. Borough of Rumson, 125 N.J. Super. 67, 75 (App. Div. 193)).

Ken's Marine is one of the incumbent contractors, who will lose business from the State when the contract resulting from this RFP is awarded. While Ken's Marine will not reap the economic benefits of having its current contract with the State extended indefinitely pending the outcome of its appeal, 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. Stated differently, "[h]arm is irreparable if money damages would not adequately redress the harm." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997) (internal quotation omitted). Ken's Marine points out that "[a]n unsuccessful bidder may attack the award of a contract but may not recover money damages, even if the challenge succeeds." Delta Chem. Corp. v. Ocean Cnty. Utils. Auth., 250 N.J. Super. 395, 400 (App. Div. 1991). However, the Delta court exclusively dealt with the situation where the low bidder was seeking to recover damages, not where the bidder challenging the award was held to have submitted a non-responsive bid due to a non-waivable material defect, as is the case herein. Id. at 396, 400.

Here, this situation is not "all or nothing" which limits even the financial harm that Ken's Marine might suffer if it succeeds on appeal. The purpose of this contract is to provide environmental emergency services as needed by the State and using agencies, primarily the New Jersey Department of Environmental Protection, during the term of the contract. See RFP #14-X-22848 §§1.1, 1.2. This means that in the unlikely event that Ken's Marine would be successful on appeal it could be added as a contractor (the contract was a multiple award contract) at that time, and it would be able to participate along with the other contractors in the receipt of work for the balance of the three-year contract term, which may be extended for all or part of two (2) one-year periods. See RFP #14-X-22848 §5.2.

Finally, I note that 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 New Jersey, Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Here, the public has a great interest in ensuring that environmental emergency response services are performed by a responsive, responsible

State contractor and that the contractor and any subcontractors are all licensed to do the sensitive work that this particular contract requires. As stated in the RFP, “[t]he importance of an emergency response capability to environmental emergencies, particularly hazardous substance incidents, cannot be minimized . . . [and] . . . [a]meliorating the emergency condition as soon as possible and minimizing the risk of damage of life, limb, property, and environment are the objectives of the emergency response mission.” RFP #14-X-22848 §1.2.

For these reasons, I do not find that Ken’s Marine will suffer irreparable harm if a stay is not granted, as that standard has been interpreted by the courts. Moreover, even if I had found that Ken’s Marine would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to permit me to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

**2. Ken’s Marine cannot show that the legal right underlying its claim is well-established.**

Ken’s Marine cannot show that the legal right underlying its claim is well-established. In fact the opposite is true. It is well-settled that a bid proposal must satisfy all of the material requirements of the contract. The test for materiality, long-established by the courts and well-stated in Township of River Vale v. R. J. Contstr. Co., 127 N.J. Super. 207, 216 (Law. Div. 1974), is a simple two-prong test which does not support Ken’s Marine’s claim. Under the River Vale test, I must consider first whether the deviation would deprive the State of the assurance that the contract will be entered into and performed according to its specific requirements and second whether the deviation would adversely affect competitive bidding by placing one bidder in a position of advantage over the others or undermine the standard of competition. Ibid. It is well established that the type of deviation in Ken’s Marine’s proposal, failure of the firm or a subcontractor to have a current license to perform some of the work, is material and not waivable.

As I found in the July 8, 2016 FAD, Ken’s Marine’s failure to name an Asbestos subcontractor with a current New Jersey license would deprive the State of the assurance that the sensitive work of the contract would be performed by a properly licensed firm. I also found that allowing Ken’s Marine’s proposal to be considered, even though it did not include a New Jersey licensed asbestos company, would undermine competition because other potential bidders, similarly situated who did not bid but could have, were not given the same opportunity to cure material deviations in their proposals.

**3. Although the material facts are uncontroverted, Ken’s Marine has not demonstrated a reasonable probability of ultimate success on the merits of its claim.**

Ken’s Marine asserts it has a strong likelihood of success on the merits “for the numerous reasons it has previously conveyed to the Bureau.” That notion is contrary to the findings in my July 8, 2016 FAD, which held in pertinent part:

. . . RFP Section 4.4.4.4(H), *Personnel Requirements*, required a bidder’s proposal to identify a New Jersey licensed company with a Type A license, one asbestos worker with a Supervisor’s Permit, and one asbestos worker with an Asbestos Worker Permit to perform work under this contract. This Section of the RFP further specified: “The license/permits shall be in good standing and effective at the time of proposal submission and a copy of the license/permits shall be submitted with the proposal.”

....

A review of Ken’s Marine proposal submitted in response to the subject solicitation reveals it included Nova on its *Subcontractor Utilization Plan* to provide “asbestos” services. However, Nova failed to possess a valid New Jersey Asbestos Company Type A license at the time of proposal submission. A review of the OACL records confirmed that Nova did not possess the requisite Type A license at the time of proposal opening.<sup>1</sup> Additionally, Ken’s Marine’s proposal failed to include an asbestos worker with a New Jersey Supervisors Permit

and an asbestos worker with a New Jersey Asbestos Worker Permit.

....

... Ken's Marine argues that Nova's lack of a valid New Jersey Asbestos Company Type A license should be considered a waivable, non-material defect, as Nova possessed a valid New York license and currently possess a valid New Jersey license. While it appears that Nova was properly licensed in New York at the time of proposal opening (April 21, 2014), the RFP specifically required the named subcontractor possess a "NJ Asbestos Company Type A license" that was "in good standing and effective at the time of proposal submission." The Division is unable to accept a New York license in the place of a New Jersey license: first, the RFP was clear in requiring the appropriate New Jersey licenses; and second, as advised by the Department of Labor and Workforce Development, Office of Occupational Health and Safety, Asbestos Control and Licensing, the agency responsible for issuing asbestos licenses, asbestos abatement in New Jersey must be performed by an asbestos contractor with a New Jersey asbestos abatement license. See N.J.S.A. 34:5A-32 et seq.

....

Ken's Marine also asserts that, as the incumbent T2435 contractor, it responded "to over 550 environmental emergencies" and "just 2 of those environmental emergency responses required the use of an asbestos subcontractor." Therefore its "bid irregularity" should be considered minor and waivable. This argument is without merit. Because the subject solicitation will result in a contract to be used on an as-needed basis responding to unforeseen environmental emergencies, previous usage is irrelevant: the need and type of services will vary from year to year. Furthermore, whether a deviation from the terms of the RFP is considered waivable or non-waivable is not dependent on amount of usage; rather, as discussed above, it is determined based on whether or not the deviation was material. Here, the deviation is clearly material and therefore, non-waivable.

....

... Ken's Marine was not permitted to supplement its proposal by adding a subcontractor. As expressed in RFP Section 6.6, Oral Presentation and/or Clarification of proposal; "Clarifications cannot correct any deficiencies or material omissions or revise or modify a proposal ... In this case, Ken's Marine is attempting to modify/alter its proposal by adding a subcontractor, an alteration which is clearly impermissible under the express terms of the RFP.

I also add that it is well recognized that to fully achieve the purpose of public bidding laws, "... all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 36 (1994) (quoting Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975)). It is a longstanding tenet of public procurement law that "any bidding practice which tends to favor one bidder over another, or impairs the equal basis upon which bids are computed ... cannot be tolerated, whether or not the practice in fact exerts a harmful effect in the given situation." In re the Award of the Contract for the Constr. Of Bayonne Park, 168 N.J. Super. 33, 39 (App. Div. 1979) (see also Terminal Constr. Corp., *supra*, 67 N.J. at 410). In evaluating Ken's Marine's appellate claim that its deviation from the proposal specifications was not material and that it should have been allowed to substitute a subcontractor after contract award, I was mindful that allowing Ken's Marine to do so would put Ken's Marine in the position of being able to later recruit an asbestos subcontractor at a better price than its competitors did, given that it would then be able to assure the later selected, licensed asbestos subcontractor that it would receive the available asbestos work under the contract. By contrast, when recruiting subcontracts and getting prices, Ken's Marine's competitors could not provide that guarantee of the asbestos work under the contract, and their subcontractor's prices may have reflected this uncertainty.

In evaluating Ken's Marine's reasonable probability of success on the merits on appeal it will have to provide the Appellate Division with a basis to find that the FAD was "arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole." Barrick v State, 218 N.J. 247, 259 (2014) (citing In re Stallworth, 208 N.J. 182, 194 (2011)). "That standard is applicable on appellate review of an administrative agency's actions regardless of whether that action followed a quasi-adjudicative hearing or, as in this case, an assessment of the relevant submissions and standards by an administrative head." Ibid.

Ken's Marine has not set forth any facts to demonstrate that the Division's determination was arbitrary, unreasonable or capricious. The failure to name a company with a current asbestos license was a material, non-waivable defect, and as noted above, because Ken's Marine's proposal was deemed non-responsive, it could not be considered for award of the contract.

In light of the appellate standard of review of the FAD, the applicable legal standard, and the dearth of facts to support Ken's Marine's position, Ken's Marine has failed to show a likelihood of success on the merits of its bid protest.

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

As to the balance of the relative hardships, Ken's Marine has not established that the balance of equities weighs in its favor warranting the granting of a stay. Although Ken's Marine asserts that it is the most qualified bidder and it cannot obtain money damages if that determination is reversed on appeal, the public interest in the appropriate conduct of a public procurement process is paramount and weighs in favor of denying the request for a stay.

Our Supreme Court has reiterated "[t]he public interest underlies the public-bidding process in this State." Barrick, supra, 218 N.J. at 258. The "public bidding statutes exist 'for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good.'" Ibid. (quoting Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 256 (1985)). The object of the public bidding statutes is "to guard against favoritism, improvidence, extravagance and corruption; [the] aim is to secure for the public the benefits of unfettered competition." Ibid. (internal quotations omitted).

Also, 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 fully achieve the purpose of public bidding laws, ". . . all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 36 (1994) (quoting Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975)). It is a longstanding tenet of public procurement law that "any bidding practice which tends to favor one bidder over another, or impairs the equal basis upon which bids are computed . . . cannot be tolerated, whether or not the practice in fact exerts a harmful effect in the given situation." In re the Award of the Contract for the Constr. Of Bayonne Park, 168 N.J. Super. 33, 39 (App. Div. 1979) (see also Terminal Constr. Corp., supra, 67 N.J. at 410).

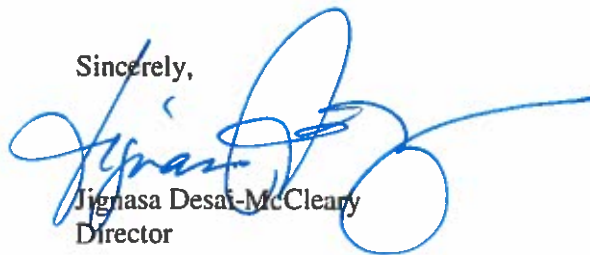
Moreover, our courts have recognized "the important role the public interest plays when implicated, as here, and have held 'that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" Waste Mgmt. of New Jersey, Inc. v. Morris County Mun. Utils. Auth., 433 N.J. Super. 445, 454 (App. Div. 2013) (quoting Waste Mgmt., supra, 399 N.J. Super. at 520-21).

In this case, the public interest in continuing with the award of this contract outweighs Ken's Marine's interest in a stay of the award of a State contract for critical emergency environmental response

services. A stay would solely protect Ken's Marine's ability to continue to serve as one of the State's contractors for the services being procured. As is evident from the nature of the RFP itself, the State has a strong interest in engaging a qualified pool of contractors for the provision of statewide environmental emergency response services, including assurances that its contractor has all of the proper licenses and qualified licensed personnel to perform all of the services that may be needed by the State. The substance of Ken's Marine's underlying protest asks the Division to unlevel the playing field with other bidders, as it seeks a special waiver of a material defect in its bid proposal. Now, Ken's Marine is seeking to further tilt the scales, to the possible detriment of the State, the safety of its citizens and the taxpayers, by attempting to stay the procurement process. As noted above, because this is a multiple award contract, Ken's Marine could be added as a contractor at a later date. Therefore, the balancing of the equities in this case does not weigh in favor of granting a stay.

Accordingly, because Ken's Marine has not satisfied the Crowe factors, the request for a stay of the award of a contract for the subject solicitation, pending the outcome of the appeal of the Division's FAD, is denied.

Sincerely,



Jignasa Desai-McCleary  
Director

JD-M: DF

c: P. Michaels  
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