



State of New Jersey

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October 21, 2016

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

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

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

Dear Ms. Cannon:

This letter is in response to your correspondence of October 14, 2016, to the Division of Purchase and Property (Division) requesting a stay of the protest period for the above referenced Request for Proposal# 16-X-24049: Enhanced Motor Vehicle Inspection/Maintenance System on behalf of Parsons Infrastructure and Environment Group, Inc. (Parsons). In that letter, Parsons states that it intends to file an application with the Superior Court Appellate Division (Appellate Division) seeking (a) "mandamus relief of the Division's refusal to provide a mechanism in the protest process to allow Parsons and other bidders the opportunity to review the un-redacted bid proposals of SGS Testcom, Inc. (SGS) and Opus Inspection, Inc. (Opus) contrary to the due process requirements for bid protests, and an opportunity for meaningful review of the subject bidding documents;" and, (b) "Parsons seeks a stay of the October 24, 2016, bid protest deadline pending disposition of its appeal of the [Superior Court Law Division's (Law Division)] October 12, 2016, Order which denied access to the un-redacted bid proposals of SGS and Opus."

In consideration of this request for stay, I have reviewed the record of this procurement, including Parsons' stay request, the Request for Proposal (RFP), the proposals submitted, Orders entered by the Courts in this matter, 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 an informed final agency decision on the merits of the request for a stay of the protest period submitted by Parsons. I set forth herein the Division's final agency decision.

By way of background, the subject RFP was issued on December 21, 2015, by the Division's 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 Division's Proposal Review Unit. All four proposals were forwarded to the Bureau,

which shared the proposals with the Evaluation Committee (Committee) for review and evaluation consistent with the criteria set forth in the RFP § 6.7 *Evaluation Criteria*. The focus of the Committee's technical review was on the strengths and weaknesses of each proposal as it related to each bidder's ability to meet the requirements specified in the RFP. Specifically, the Evaluation Committee determined that all of the proposals were responsive to the mandatory requirements of the RFP, and thus the Committee gave a technical review and score to each. Based upon that evaluation, on May 13, 2016 the Bureau issued a Notice of Intent to Award (NOI) a contract to 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 made pursuant to the common law right to challenge the award of a contract, and not 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 Division regulations, both of which incorporate OPRA by reference. Thereafter, Parsons was provided with over 3000 pages of information comprised of copies of the proposals, correspondence, the Committee report 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 however challenged the redactions made to the proposals submitted by its competitors, SGS and Opus.

At this point, rather than allowing due process to proceed by filing a protest as permitted by the Division's governing regulations, Parsons choose to file a summary action in the Law Division, on July 1, 2016, challenging the Division's document production under OPRA and the common law right of access, despite the fact that no formal OPRA request had ever been submitted.

In conjunction with its Law Division action, on June 30, 2016 Parsons filed a request for a stay of the protest period, which was set to expire on July 6, 2016, with the Division. In that original July 2016 stay request Parsons sought to stay the protest period and the contract award in order to provide it the opportunity to file an action in the Law Division to "determine the propriety of the redactions asserted by the State." See, Parsons' June 30, 2016, Request for a Stay.

On July 5, 2016, the Division extended the protest period to July 8, 2016. Also on July 5, the Division's Deputy Director, Gregg Olivera, issued a final agency decision denying Parsons' request for a stay pending review by the Law Division of the document issue.

Parsons did not file a protest by July 8, 2016. Instead, on July 7, 2016, Parsons filed an Application for Permission to File an Emergent Motion with the Appellate Division seeking a stay of then protest period. On the same date, the Appellate Division entered an order to stay the protest period until the Appellate Division had an opportunity to review Parsons' application for emergent relief and it set a briefing schedule for the motion.

On July 18, 2016, Parsons filed its Order to Show Cause Seeking Injunctive Relief under OPRA and the Common Law Right of Access, in the Law Division, naming the Division, SGS, OPUS and Applus Technologies, Inc. (Applus) as defendants. A scheduling conference was conducted on the matter on July 22, 2016, wherein the procedural issue was raised that no formal OPRA request had ever been submitted to the Division, nor had any request been submitted to the proper custodian of records for the Division. Pursuant to the Court's July 22, 2016 scheduling order, on that date Parsons submitted an OPRA request to the Division seeking substantially the same documents which were previously provided to it. The Division processed the OPRA request in the normal course and on September 8, 2016, Parsons was provided with

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 the letter and disk despite indications that it would do so.

substantially the same documents which it had previously been provided with by the Division, including a detailed exemption log.

On July 26, 2016, the Appellate Division issued an Order granting Parsons' Emergent Application for a stay of protest period until the earlier of (1) the Law Division's Review and Denial of Parsons' motion for release of documents, or (2) following the Law Division's grant of the release of documents, ten (10) days after actual release of documents sought.

On August 18, 2016, oral argument was held before the Law Division on Parsons' Order to Show Cause seeking the disclosure of documents from the Division. The Court requested that the Division provide a supplemental certification regarding the security related redactions and also that the Division provide the Court all requested documents in an unredacted form for an in camera review. The Court was provided with all of the documents requested and was also provided with a supplemental brief by Parsons responding to the Division's supplemental certification. On October 3, 2016 the Law Division placed its decision on the record denying the disclosure, under OPRA and the common law, of the bid proposal documents relating to the security measures and technical matters; the Law Division did direct that the names of the SGS employees who were identified to work on SGS' State contract be released by October 21, 2016. The names of the SGS employees were released to Parsons on October 7, 2016. On October 12, 2016, the Law Division entered an Order memorializing its decision and specifically stating, in pertinent part:

IT IS on this 12th day of October, 2016, **HEREBY ORDERED** that:

1. Plaintiff's OPRA request for disclosure of unredacted bid proposal documents of SGS, Opus, and Applus relating to security measures is DENIED.
2. Plaintiff's common law request for disclosure of unredacted bid proposal documents of SGS, Opus, and Applus relating to security measures is DENIED.
3. Plaintiff's OPRA request for disclosure of Defendant OPUS's unredacted bid proposal documents relating to technical matters is DENIED.
4. Plaintiff's common law request for disclosure of Defendant OPUS's unredacted bid proposal documents relating to technical matters is DENIED.
5. The court will make available its reasons for denying disclosure of the Opus technical information on CD to counsel for Parsons and the Division. Any other attorney may request a copy from Robert Mull at 609-571-4365.
6. Plaintiff's request for disclosure of the names of the SGS employees who have been identified to work under the state contract if the contract is finalized with SGS is GRANTED. Defendant New Jersey Division of Purchase and Property shall provide those names to Plaintiff by October 21, 2016.
7. Judgment is entered in favor of Defendants, except for release of the names of SGS employees.
8. The complaint is dismissed with prejudice.

As the name of the SGS employees were released on October 7, 2016, and in accordance with the Appellate Division's July 26, 2016 Order, the protest period expires on October 24, 2016.

Following the Law Division's Order denying Parsons' need for the security measures and technical matters of its competitors, Parsons again choose to request a stay of the protest period rather than allowing due process to proceed by filing a protest outlining its problems with the intended contract awardee and its proposal.

In support of its October 14, 2016 request for a stay, Parsons asserts, as it did before, that it "is simply interested in reviewing the un-redacted bid proposals of SGS and OPUS to determine whether they are conforming to the RFP and to thus properly consider, articulate and file a protest of the Division's proposed award." See, Parsons October 14, 2016 Request for a Stay. I address Parsons' request for stay below.

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).]

In its request for stay, Parsons did not address the individual Crowe factors. However, for the sake of completeness, I will address each of the factors here.

1. Parsons will not suffer an irreparable harm if the stay of the protest period is denied.

Parsons will not suffer irreparable harm if the stay of the protest period is denied. If Parsons files a protest, as it is permitted to do, Parsons will continue to reap the economic benefits of having its current contract with the State extended until the protest is resolved. 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. Further, even "in 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).

2. Parsons has the legal right to request a stay of the protest period.

The Division acknowledges that Parsons has standing to request a stay of the protest period. See, M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

In this case, Parsons could, but has not yet filed a protest within the time frame established by the Appellate Division based on any alleged errors it discovered in the documents that were provided to it on June 27, 2016, September 8, 2016 and October 7, 2016 (list of names). Importantly, these documents include the Committee report and recommendations to the Director which explain the essential reasons for the selection of the winning bidder. In its application for a stay, Parsons provides no explanation for how the redacted material impacts its ability to file a protest.

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. As noted above, Parsons was unsuccessful before the Law Division in seeking unredacted copies of the bid proposals under OPRA and the common law right of access. Supported by a detailed and thorough analysis on the record, the Law Division issued an Order denying all requests for relief sought by Parsons in its Order to Show Cause, with the exception of a limited number of SGS employee names, which the Division immediately provided. Parsons has a very limited likelihood of success on the merits of any appeal of the Law Division's decision, considering the standard of review on appeal. While the Appellate Division will review a trial judge's legal conclusions concerning access to public records under OPRA de novo, it will not disturb factual findings as long as they are supported by adequate, substantial, and credible evidence. See Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988). Moreover, "[i]f a court conducts an in camera review of documents and engages in a balancing of interests in connection with a common-law-based request to inspect public records, [the Appellate Division] will apply a more deferential standard of review." Paff v. Ocean County Prosecutor's Office, 446 N.J. Super. 163, 175-176 (App. Div. 2016), citing Shuttleworth v. City of Camden, 258 N.J. Super. 573, 588, 610 A.2d 903 (App. Div.), certif. denied, 133 N.J. 429, 627 A.2d 1135 (1992).

The basis underlying the Division's redactions and position in the Law Division are sound. During the protest period, Parsons requested and was provided with copies of documents it requested. All documents requested by Parsons were provided subject to the application of relevant provisions in the RFP and Division regulations, which incorporates OPRA by reference. As directed by the Division's governing regulations, N.J.A.C. 17:12-1.2, RFP § 1.4.4 *Contents of Proposal* and OPRA law, 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. Prior to the proposals being released to Parsons, the Division prepared an exemption log identifying the pages redacted and the specific reason for the redaction for both the SGS and Opus proposal 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. Approximately 70% of the redacted pages fell under the SGS's reasonable expectation of privacy. Specifically redacted under this category were Federal Employee Identification Numbers, tax registration numbers, telephone numbers, vehicle identification numbers, license numbers, identification numbers and insurance policy numbers.³ 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, Parsons was provided with a log indicating the title of the proposal sections along with all other surrounding text and the reason for the redaction.

For the proposal submitted by Opus⁴, 66 pages contained redactions. Approximately 44% of the redactions made fell under the Opus' 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, Parsons was provided a log indicating the title of the proposal sections appears along with all other surrounding text and the reason for the redaction.

With regard to Parsons' challenge to the redactions under OPRA identified on the exemption log, the Law Division has already concluded that release of the unredacted proposals, including security measures and technical matters, as requested by Parsons, is not appropriate under OPRA or the common law. The Court found that certification provided by the Division, as well as the supplemental certification submitted by the State Office of Information Technology, clearly outlined the need for confidentiality of the security related information. The Court noted that while Parsons showed a particularized interest in the information, the State's need for confidentiality outweighed Parsons' interest in obtaining the information sought.

With respect to Parsons' ability to file a protest by the protest deadline, the 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 review the proposals and determine whether or not its competitors' proposals are responsive to the specifications is not hindered. Even with the redacted proposals, Parsons is able to determine whether or not the bidders responded to the mandatory sections of the RFP. The details of the

² SGS' proposal was 623 pages.

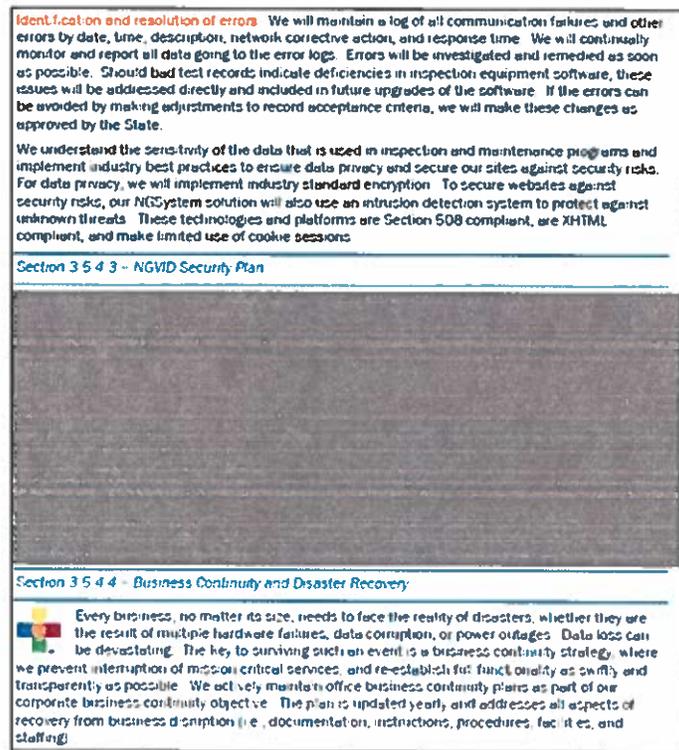
³ As noted above, to the extent that the Division redacted the names of SGS employees at the request of SGS, the Division has provided those names in an unredacted form to Parsons.

⁴ Opus' proposal was 523 pages.

respective bidder's proposal do not determine responsiveness, but rather is a scoring issue solely within the purview of the Division and the State subject matters experts. As such, Parsons' ability to file a protest is not hampered by not having access to an unredacted version of the proposals.

As noted above, in this recent request for a stay, Parsons' states that it "is simply interested in reviewing the un-redacted bid proposals of SGS and OPUS to determine whether they are conforming to the RFP and to thus properly consider, articulate and file a protest of the Division's proposed award." See, Parsons October 14, 2016 Request for a Stay. Despite the Law Division's Order denying Parsons requested access to the security measures and technical matters in its competitors' proposals, Parsons has not specified which, if any of the redactions are inconsistent with the law, it has not made any showing of the likelihood of success on the merits in its appeal of the Law Division's decision, nor has Parsons provided any explanation for how the redacted material impacts its ability to file a protest. (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.")

In redacting the proposals, the Division provided the information immediately preceding and following the redactions which allows Parsons the ability to determine the propriety of the redaction, from the context, as each redaction made left in place the title of the redacted number, item or section and all other surrounding information. For example, a redaction in Parsons' proposal appears as follows⁵:



⁵ Parsons did not request that the Division redact the security language in its proposal; however, as both SGS and Opus had requested that the Security Plan information be redacted, and for the sake of consistency, the Division redacted this information from Parsons' proposal.

All of the documents were released to Parsons on June 27, 2016 and again on September 8, 2016 following Parsons' OPRA request. Parsons is clearly able to determine whether or not the bidders responded to the mandatory sections of the RFP, and the scoring of such sections rests solely within the purview of the State. As such, Parsons' ability to file a protest has not been hampered.

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 granting of a stay. As of the September 2016, Parsons had received over 3000 pages of documents including the proposals, correspondence, Committee and Recommendation reports. Parsons has long had in its possession the documents necessary to determine whether or not the bidders responded to the mandatory sections of the RFP and to file a protest challenging the Division's NOI. In fact, Parsons still has the ability to file a protest.

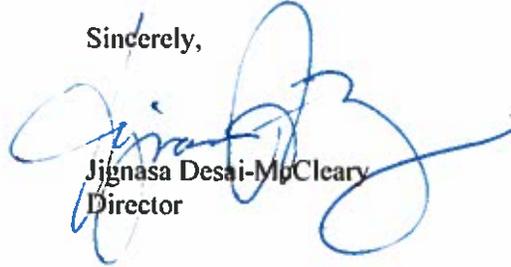
The current inspection requirements result in a payment by the State of approximately \$100,000 per day. Once the new contract is awarded, the State will realize cost savings due in part to the reduced inspection requirements. Further, a stay of the protest period will postpone the procurement process for the modernization of the State's inspection equipment. 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 consistent with the regulations implementing the Clean Air Act. Moreover, the new equipment will allow for emissions data to be more accurately analyzed, provide software enhancements to detect fraud, and capture audit data electronically on site; all features that are not available on the existing equipment.

Further, as to Parsons' argument of relaxing the Crowe factors 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 "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.

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 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 protest period, 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 protest period stay request is denied. Conversely, the public will suffer hardship if the procurement process does not continue.

Accordingly, because Parsons has not established each of the Crowe factors, the request for a stay of the protest period, currently due to expire on October 24, 2016, is denied.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: P. MacMeekin
J. Strype