



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET

P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039

<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

AMY F. DAVIS
Acting Director

February 27, 2023

Via Electronic Mail jborek@genovaburns.com

Jennifer Borek, Esq.
Genova Burns LLC
30 Montgomery Street
11th Floor
Jersey City, NJ 07302

Re: Protest of Contract Cancellation
Master Blanket P.O. #20-TELE-15299
Enhanced Motor Vehicle Inspection Maintenance System

Dear Ms. Borek:

This final agency decision is in response to your letter dated November 15, 2022, regarding Master Blanket P.O. #20-TELE-15299 - Enhanced Motor Vehicle Inspection Maintenance System (the “Opus Contract”) which was received by the Division of Purchase and Property’s (the “Division”) Hearing Unit. In that letter, Opus Inspection, Co. (“Opus”) protests the Motor Vehicle Commission (“MVC”) and the Department of Environmental Protection (“DEP”) (collectively, with the Division, the “State”) decision to suspend work and terminate the Opus Contract, communicated by letter from the Division on October 28, 2022. Opus further requests an in-person hearing regarding the same.

BACKGROUND

Under the Clean Air Act (“CAA”) Amendments of 1990, the United States Environmental Protection Agency has authority to require metropolitan areas designated as serious, severe or extreme non-attainment for carbon monoxide or ozone, to implement an Inspection and Maintenance (“I/M”) Program. In New Jersey, the MVC and the DEP oversee the I/M Program. Following the enactment of the Federal Clean Air Mandate Compliance Act, L. 1995, c. 112 (“Chapter 112”), codified at N.J.S.A. 39:8-41 to -58, the enhanced version of the motor vehicle I/M program was adopted. This enhanced program is an integral part of New Jersey’s compliance plan with the National Ambient Air Quality Standards, and is designed to improve air quality and protect the health and safety of the State’s residents and the environment.

When the Legislature enacted Chapter 112, it authorized “competitive contracting for or privatization of motor vehicle inspections.” N.J.S.A. 39:8-42. Although MVC operates the I/M Program, DEP is the lead agency responsible for ensuring the State meets the mandates of the CAA, its amendments and federal regulations. The current I/M Program is considered a hybrid system because it utilizes both Centralized Inspection Facilities (“CIFs”) and Private Inspection Facilities (“PIFs”).

In August 1998, the State awarded a contract to privatize the centralized vehicle inspection program to Parsons Infrastructure ("Parsons"). In 2008, the contract was rebid and again awarded to Parsons. In 2016, the Division's Purchase Bureau ("Bureau") issued Request for Proposals #16-X-24049, and on May 13, 2016, notice of intent to award was issued to SGS Testcom, Inc. ("SGS"). Parsons and Opus protested that notice of intent to award. The Division issued a final agency decision on the protest on July 31, 2017. In August 2017, the Bureau rescinded the notice of intent to award to SGS, and issued a second notice of intent to award to Opus. Parsons then protested the notice of intent to award to Opus alleging that Opus's bid was not responsive and suggested that the contract be awarded to Parsons or that the procurement be cancelled and re-bid. The Division issued a final agency decision on the protest on January 3, 2018. On or about June 6, 2018, the Bureau rescinded the second notice of intent award to Opus and the procurement was cancelled. Parsons thereafter protested the Division's decision to cancel the procurement. The Division issued a final agency decision on the protest which upheld the cancellation of the procurement and rebid of the same on July 12, 2018.

PROCEDURAL HISTORY OF THE OPUS CONTRACT

On August 28, 2019, the Bureau issued Bid Solicitation #20DPP00471 (the "Bid Solicitation" or "RFP") to solicit Enhanced Motor Vehicle Inspection Maintenance Services on behalf of MVC and DEP for implementation of a next generation Motor Vehicle Inspection and Maintenance program ("NGSystem")¹ to provide mandatory periodic inspections of vehicles to assure compliance with State and federal standards. While some characteristics of the old system would be unchanged, there were also significant changes that the State sought to implement with the NGSystem; specifically, the NGSystem included the Next Generation Vehicle Inspection Data System ("NGVID"), which "encompasses Information Technology ("IT") related functionality to include primary data store, servers, processes and application code that support the inspection workstation." The NGVID was to replace the current Legacy VID.

The Bid Solicitation, among other requirements, consisted of mandatory and voluntary site visits to all CIFs during Fall 2019 and initial and supplemental question and answer periods to allow potential Bidders to submit questions, seek clarification of specifications and/or proposed modifications to the Bid Solicitation and State of New Jersey Standard Terms and Conditions ("SSTCs"). Over 150 questions were submitted and responded to via Bid Amendments and revisions to the Bid Solicitation, including eight questions received directly relating to Bid Solicitation Section 3.14 *Workforce*. On April 26 and May 18, 2021, the Bureau posted Bid Amendments #16 and #17 respectively with revised documents for review by potential Bidders.

By letter dated May 21, 2021, Parsons submitted a challenge to certain specifications of the Bid Solicitation, namely those relating to capital maintenance, repairs and renovations, the Workforce, COVID protocols and lack of reference to new and emerging technologies. The main allegation in the protest was regarding the Workforce requirement. Parsons argued Chapter 112 bound the State to require all bidders offer full time employment with the winning bidder to all current inspection workers. The Division issued its final agency decision finding that no amendments to the Bid Solicitation were necessary ("FAD 6/4/2021"). Regarding Parsons's argument that the awarded Contractor was required to offer positions to the current employees, the Acting Director noted Chapter 112 only "required that the original contractor awarded a contract for privatization [of] the State's inspection and maintenance program, offer employment

¹ The RFP defined the "NGSystem as "[t]he overall system for the next generation Vehicle Inspection Program. This includes all components such as the workstation hardware and software, the [Vehicle Information Database ("VID")] including all reporting and data storage and movement tools, auditing, PIFs and all other stations types, etc." The VID is the "primary data store that supports inspections."

to all then full time employees of the [DMV]"; it did not "require that any future contractor be obligated to hire the employees [of] any prior contractor providing the services for the State's [I/M Program]." Parsons did not appeal.

Thereafter, on June 23, 2021, the Service Employees International Union, Local 32B-J, ("SEIU") submitted a challenge to the workforce specifications of the Bid Solicitation by way of a letter addressed to Governor Phil Murphy. On June 29, 2021, the Division issued a final agency decision which found that no amendments to the Bid Solicitation were necessary ("FAD 6/23/21"). The FAD 6/23/21 explained that because the State was not a party to any existing employment agreement or collective bargaining agreement between Parsons and SEIU, the State could not require that a potential Vendor pay any specific wage, or provide any specific benefit to SEIU-represented employees, as the Workforce requirement "represent[ed] the current needs of the MVC as established by their subject matter experts."

On July 21, 2021, the Division's Proposal Review Unit opened three proposals received by the submission deadline. Proposals were submitted by Parsons, Opus, and Applus Technologies, Inc. ("Applus"). Among the numerous requirements of the Bid Solicitation was one that required that if a contract was primarily for services, then the services had to be performed in the United States. Two bidders, Opus and Applus, certified that all services would be performed in the U.S. Parsons certified that all services except software development, which it acknowledged was critical for successfully implementing the NGSytem, would be done in the U.S. After completing the initial review of the proposals, the Bureau determined that, due to the software development portion of the Parson's work being performed outside the United States, the proposal submitted by Parsons was non-responsive. The Opus and Applus proposals were forwarded to the Evaluation Committee for evaluation. On November 22, 2021, the Evaluation Committee recommended that a Contract be awarded to Opus.

On December 21, 2021, the Bureau issued the Notice of Intent to award ("NOI") advising all Bidders of the State's intent to award a Contract to Opus.² On January 10, 2022, SEIU and Parsons³ each submitted a protest of the issuance of the NOI. Parsons protested the determination that their proposal was non-responsive, again protested the bid specifications relating to the Workforce and argued that the Opus proposal should be deemed non-responsive. Parsons requested the Bid Solicitation be canceled and a new procurement issued. SEIU protested the bid specifications regarding the Workforce and alleged that Opus could not deliver uninterrupted quality services. On May 20, 2022, the Division issued separate final agency decisions to Parsons and SEIU respectively, which upheld the Bureau's issuance of the December 21, 2021 NOI ("FAD 5/20/22" refers to the Parsons's decision).

On May 20, 2022, the Bureau awarded the contract to Opus with an effective date of August 6, 2022. Two weeks after the contract's award, on June 6, 2022, Parsons submitted a request for a stay of award of the contract pending an appeal. On June 16, 2022, SEIU also requested a stay, arguing that Opus was a perfectly clear successor to Parsons and was obligated to recognize that Union, but had rebuffed all efforts by the SEIU to communicate with it. Relatedly, on June 20, 2022, SEIU filed an unfair labor practice complaint with the National Labor Relations Board ("NLRB") accusing Opus of refusal to recognize SEIU as the representative of the workforce, repudiating the existing contract with SEIU, and not engaging in

² The December 21, 2021, NOI advised all Bidders that the protest period ended at 4:00 pm on January 6, 2022. However, counsel for Parsons requested a short extension of Protest period which was granted. On January 3, 2022, all Bidders were advised that the protest period was extended to noon on Monday, January 10, 2022.

³ Parsons submitted its Protest jointly with Gregg Natosi, an employee of Parsons and a New Jersey taxpayer.

bargaining with SEIU.⁴ The State is not a party to this matter. NLRB Case Number 22-CA297901 is still pending and the NLRB does not list any activity since the case was filed and parties were notified in June.⁵

On June 22, 2022, Opus opposed the SEIU's request for stay of contract award, making note of the NLRB Case, and asserting that SEIU's filing was evidence that the NLRB was the proper venue for SEIU's claims. Further, Opus noted that SEIU already made two unsuccessful challenges to the workforce specification of the Bid Solicitation. Opus further stated: "At no time has Opus committed to hiring the workforce and entering into collective bargaining with the SEIU."

On June 28, 2022, the Division issued two final agency decisions denying the stay request submitted by both Parsons and SEIU respectively. In both instances, the Acting Director found that neither addressed the Crowe factors to meet the threshold for issuing a stay in the contract award (FAD 6/28/22).

On July 1, 2022, Parsons and Natosi filed an appeal of (1) the FAD 6/4/21, which denied Parsons's challenge to the specifications for the Bid Solicitation, (2) the FAD 5/20/22, which denied Parsons's and Natosi's protest of the Division's December 21, 2021 NOI to award the contract to Opus, and (3) the FAD 6/28/22, which denied Parsons's request for a stay of award pending its appeal to the Appellate Division. Parsons's motion for a stay pending appeal followed on July 6, 2022. On July 18, 2022, the State and Opus filed their respective oppositions to Parsons's motion. The Appellate Division denied the motion for a stay. However, the appeal was placed on an accelerated schedule.

Opus executed the contract and the contract transition period commenced on August 6, 2022 and Opus began transitional work. In particular, Opus began building the IT database (NextGen VID), preparing to replace all inspections equipment at the CIFs and that the PIFs are required to purchase, and hiring a workforce to operate the CIFs. The transition period was scheduled to be completed with the operational transition of the contract between Parsons to Opus to occur at midnight on November 5, 2022. However, on September 15, 2022, Parsons reported to MVC that "massive call outs" made it impossible to open 10 of the 25 CIFs specifically Bakers Basin, Cherry Hill, Deptford, Eatontown, Freehold, Lodi, Mays Landing, Millville, Rahway, and South Brunswick. The MVC reported the closures to New Jerseyans via its social media accounts on Twitter and Facebook.

Then, by memorandum to the Division dated October 6, 2022, the Acting Chair and Chief Administrator of MVC and the Commissioner of DEP jointly requested that the contract with Opus be immediately suspended pursuant to Section 5.6 of the SSTCs, and thereafter terminated for convenience pursuant to Section 5.7(A) of the SSTCs. The State had several concerns relating to remaining in compliance with the CAA and preventing any future disruption of operations resulting from labor unrest. In the letter the State explained that the reasons for the cancellation of the contract were: (1) the labor issues which originated with the prior vendor continue to be ongoing, and creates concerns affecting the work force which may negatively affect services to the public; (2) DEP's proposed new rule, published in the New Jersey Register on November 7, 2022, relating to medium-duty vehicles being inspected at the CIFs would have an impact on the contract and the volume of inspection thereunder; and (3) MVC's related rule to be published after adoption of the DEP's rules would also have an impact on volume of inspections and the associated costs. The resolution of these issues would have a significant and material impact on the contract. The RFP issued which resulted in the contract contained several issues that needed to be addressed, including: confusion over the scope of the inspections program; the need for significant regulatory amendments; the anticipated increased costs for personnel, equipment, programming and

⁴ On June 23, 2022, Parsons supplemented its request for stay, arguing that, given the filing of the NLRB Case, the contract should be stayed "until the labor dispute is resolved and pending Parson's appeal."

⁵ In a standard disclaimer, the NLRB website states that this docket listing does not reflect all activity in the case.

reporting; and the additional volume at the CIFs. These issues could not easily have been resolved through negotiation of a change order. A termination would allow a new RFP be developed which would address those issues. Failure to terminate and issue a new RFP would have necessitated post-award changes to the Contract that would materially alter the basis on which the Opus Contract was bid and awarded, and were therefore disallowed under *CFG Health Sys., LLC v. Cty. of Hudson*, 413 N.J. Super. 306 (App. Div. 2010).

In accordance with the MVC and DEP request, on October 28, 2022, the Division issued a letter ordering Opus to immediately suspend all work on the contract pursuant to SSTC Section 5.6, advising Opus that the Acting Director of the Division was canceling the contract for convenience pursuant to SSTC Section 5.7(A), and setting forth a brief summation of MVC and DEP's reasons for doing so (the "Notice of Contract Suspension and Termination for Convenience").

Opus protested the Notice of Contract Suspension and Termination for Convenience by letter submitted to the Division on November 15, 2022 (the "Opus Protest"). Opus asserts that the State: (1) cancellation of the contract and returning it to Parsons, who submitted a non-conforming bid, demonstrates the State's favoritism toward Parsons in violation of the public bidding laws; (2) the State acted in bad faith by terminating the Opus Contract because (i) the State never reached out to Opus to discuss changes to the contract to accommodate the inspections of the medium duty trucks and associated cost which could be implemented through change order to the contract; (ii) the State failed to comply with the procedural requirements of SSTC section 5.7(A). Opus further argues that the State is estopped from asserting a position that is different from the State's position in final agency decisions and appellate briefing taken in the various Parsons Protests relating to the award of contract to Opus. Opus asserts that "there is an evident lack of good faith" on the part of the State because the State's position regarding the sufficiency of the RFP language and resulting Contract has changed. Moreover, Opus argues that the State's decision not to engage in change order negotiations with Opus to address the concerns underlying the Contract termination shows impermissible favoritism to Parsons and/or SEIU in violation of the bidding laws.

Parsons responded to the Opus Protest with an unsolicited letter to the Division dated November 30, 2022. Parsons argues that the termination was legally appropriate and should be upheld, and the contract rebid with revised specifications.

Per N.J.A.C. 17:12-3.3(d) any "protest accepted by the Director shall be resolved by written decision on the basis of the Director's review of the written record including, but not limited to, the written protest, the terms, conditions and requirements of the RFP, the proposals submitted in response to the RFP, the evaluation committee report and/or the award recommendation document, pertinent administrative rules, statutes, and case law, and any associated documentation the Director deems appropriate." In-person presentations are fact-finding for the benefit of the Director and she has the sole discretion to determine if an in-person presentation is necessary to reach an informed decision on the matter(s) of the protest. N.J.A.C. 17:12-3.3(e). Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). In consideration of Opus's Protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, Evaluation Committee materials, Opus's Protest, prior final agency decisions Parsons's Response, 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 Protest on the written record. As such, an in-person hearing is not warranted and Opus's request for an in-person presentation is hereby denied. I set forth herein the Division's final agency decision.

DISCUSSION

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*, 218 N.J. 247, 258 (2014) (citing, *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). That said, “settled principles of public bidding dictate that no material element of a bid may be provided after bids are opened . . . this bedrock principle of our public bidding scheme applies with equal force to post-bid conduct.” *CFG Health Sys.*, 413 N.J. Super at 317 (quoting *Suburban Disposal v. Twp. of Fairfield*, 383 N.J. Super. 484, 492 (App. Div. 2006)).

A. Opus argues that the State, by cancelling the Opus contract and returning the contract to Parsons, is favoring Parsons and SEIU, in violation of the public bidding statutes.

The State’s Notice of Cancellation indicated that MVC and DEP requested the cancellation for the following reasons:

1. DEP has determined to subject medium-duty commercially plated diesel vehicles to testing, which will require testing at CIFs. As a result of DEP’s proposed new rule, to be published in the New Jersey Register on November 7, 2022, and MVC’s related proposed new rule requiring medium-duty commercially plated diesel vehicles be inspected at CIFs which will be submitted to the New Jersey Office of Administrative Law following the adoption of DEP’s proposed rule, pricing would be impacted based on additional inspection volume, estimated at about 103,000 inspections annually and at an estimated 5.4% increase in emissions inspection volume per year. Bidders based their cost on an annual inspection volume of 1,900,000 inspections annually, and MVC and DEP anticipate the estimated 5.4% increase in emissions volume would require additional staffing at the CIFs, a larger percentage increase in safety inspection volume, and additional inspection equipment, impacting the pricing of the Contract;
2. Medium-duty was not defined in the Bid Solicitation and heavy-duty was defined in several conflicting ways throughout, including in the cited regulations. Despite reviewing and approving the final Bid Solicitation and all subsequent revised versions, MVC and DEP state that they were not aware of this inconsistency, and assert that this caused confusion for the Bidders and potentially led different Bidders to anticipate different inspection volumes, impacting the Quote pricing submitted by Bidders;
3. The labor issues which originated with the prior vendor continue to be ongoing, and creates concerns affecting the work force which may negatively affect services to the public. As such, MVC is seeking to include a labor harmony agreement, similar to that required by L. 2021, c. 1, to ensure uninterrupted services available to the public at inspection, licensing, and registration facilities. Additionally, amending to include a labor harmony agreement now would require a price increase that could present a material change in cost.

MVC and DEP have the statutory and regulatory duty to design and implement the State’s I/M Program to protect the health and safety of the driving public and the environment. In order to fulfill this mission, these agencies have delegated authority and extensive experience in dealing with motor vehicle inspections. *See*

George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 51 (1994) (Handler, J., concurring) (citing *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, (1984) (recognizing that agency's expertise is entitled to great respect by courts, particularly when exercised in specialized areas covered by statutory provisions relevant to agency's purpose)).

Accordingly, to address the State's ongoing concerns with air quality and its obligations under the CAA, DEP determined to subject medium-duty commercially plated diesel vehicles to testing, which will require inspections at the CIFs. On November 7, 2022, DEP published proposed new rules in the New Jersey Register relating to the foregoing vehicles and inspections of the same. Currently, these diesel-fueled motor vehicles, which have a gross vehicle weight rating greater than 8,500 pounds but less than 18,000 pounds, are exempt from the chapter's inspection requirements pursuant to N.J.A.C. 13:20-43.2(b)(9); such vehicles are instead required to be inspected by the owner or lessee of the vehicle in accordance with N.J.A.C. 13:20-26.

Once DEP's proposed new rule is adopted, MVC will be required to propose a related rule requiring that commercially plated diesel-powered vehicles in this 8,501 – 17,999-pound weight class be inspected at the CIFs. This change will add additional inspection volume, estimated at about 103,000 inspections per year. The solicitation resulting in the current contract award required bidders to base their costs on an annual RFP-provided volume of 1,900,000 inspections per year, this is an estimated 5.4% increase in emissions inspection volume each year. It will also mean a still larger percentage increase in safety inspection volume, given that none of the passenger cars currently inspected at the CIFs require safety inspection, but these commercial vehicles will. This likely will require additional staffing at the CIFs. Relatedly this will also likely mean a need to install additional inspection equipment (for smoke tests for vehicles without on-board diagnostics (OBD) equipment and for safety inspections) at the CIFs. All of these factors will impact the pricing of the work.

In reviewing the RFP in anticipation of this new regulatory requirement, MVC and DEP determined that the term medium-duty vehicle was not defined, and the term heavy-duty vehicle was defined in several different and conflicting ways throughout the RFP, including in the cited regulations. Neither MVC nor DEP recognized the inconsistency when the RFP was available to bidders, which may have resulted in confusion for the bidders and potentially led different bidders to anticipate different inspection volumes, which bears on the price per inspection bid.

Opus argues that the contract awarded to Opus will result in significant savings for the State over the current (Parsons) contract. However, any change in the bid specifications, post award, would result in an increase cost to the State for the contract. Opus argues that the courts have approved post-bid modifications to awarded public contracts when the public entity negotiates more favorable terms. *In re New Jersey State Contract A71188*, 422 N.J. Super. 275 (App. Div. 2011). Opus's reliance on this case is misplaced. In this matter it is quite clear that with additional inspections the State cost for the contract will increase. The State is not negotiating more favorable terms. Opus further argues that the State failed to discuss the change in requirements or ask if Opus could meet the requirements and at what cost. Contrary to the Opus argument, contract amendments that materially change the terms and conditions upon which the contract was bid and awarded are disallowed. *CFG Health Sys.*, 413 N.J. Super at 316.

Potentially the most impactful of MVC and DEP's concerns is "that labor issues affecting the inspections work force may negatively affect services to the public", referencing the September 15, 2022 labor action which resulted in the closure of 10 of the 25 inspection stations for the day, and which loomed ominously above the Opus Contract thereafter. Accordingly, MVC and DEP determined that it was in the State's interest to include a requirement that the vendor enter a labor harmony agreement to avoid future labor strife that could interfere with motorists' ability to timely have their cars inspected.

Given the expertise of MVC and DEP in the specialized and complex areas covered by the various vehicle safety and environmental statutes and regulations noted above, its determination to amend the RFP is entitled to stand. *See Metromedia*, 97 N.J. 313 at 327.

Moreover, not only are the determinations of MVC and DEP concerning the controlling regulations, scope of work, and vendor obligations entitled to deference because of the expertise of the two agencies, it is clear that requiring a labor harmony agreement is too within the discretion of MVC and DEP. Furthermore, it is clear that inserting such requirements after the bid award would violate the principles articulated in *CFG Health Sys.*, 413 N.J. Super at 315-316. So, while minor or inconsequential discrepancies and technical omissions in a bid proposal may be waived, material conditions may not – “These principles apply to the initial award of a contract. They also apply to post-award changes to a contract that materially alter the basis upon which the contract was bid and awarded.” *Id.* at 315. MVC and DEP have the responsibility and discretion to develop and implement the I/M Program, but not the discretion to amend an awarded contract in such a way as to materially deviate from the Bid Solicitation.

Reference to the law on public bidding is appropriate here, as the public bidding system lies under nearly all public contracting, and it is under the public bidding laws that the Opus Contract was awarded. It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324 (1957). Our courts have established a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[*Twp. of River Vale v. R.J. Constr. Co.*, 127 N.J. Super. 207, 216 (Law Div. 1974) (adopted *Meadowbrook*, 138 N.J. at 315).]

“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222.

In the opinion of MVC and DEP, the changes necessary to properly implement the I/M Program constituted substantial changes to the existing contract specifications. The anticipated revisions have been deemed necessary by MVC and DEP to assure not only that the I/M Program is properly staffed, but that the specified requirements are in line with what is demanded by current and pending regulations.

Parallel can be drawn to *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract*, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995). In *On-Line Games* the Appellate Division held that “in clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP.” Emphasis added.

Even if Opus could have adhered to the proposed revisions to the RFP⁶, such negotiation in response would “alter what [was] there” in its Proposal. Accordingly, the required changes could not have

⁶ It should be noted that the RFP has not yet been substantially revised, in light of the regulatory proposal process currently underway.

been accomplished by negotiation of change orders, and termination for convenience was the State's only lawful means of accomplishing the directives of MVC and DEP to revise the scope of work and contractor obligations.

B. Opus argues that the State suspension and termination for convenience was done in bad faith.

Opus asserts that the reasons presented by the Division in the Notice of Cancellation are pretextual and indicative of bad faith. Opus takes issue with the State's decision not to "reach out to Opus and discuss" the determination to subject medium-duty commercially plated diesel vehicles to testing, and whether Opus could perform these additional tasks, and at what cost.

The State is entitled to deference in determining to exercise its right to suspend work and/or terminate the contract for convenience in accordance with SSTC Section 5.6 and Section 5.7(A) respectively. SSTC Section 5.7(A) *Termination of Contract For Convenience* states that "[n]otwithstanding any provision or language in this contract to the contrary, the Director may terminate this contract at any time, in whole or in part, for the convenience of the State, upon no less than 30 days written notice to the contractor." Furthermore, SSTC Section 5.6 allows the State to order a suspension of work under the contract.

A termination for convenience provision authorizes the State to terminate a contract "for any reason. . . . 'Mere error on the part of the [State], even if it would constitute sufficient ground for contractual breach were the termination clause inapplicable, is insufficient to overcome the presumption of regularity inherent in the invocation of the termination for convenience.'" *Capital Safety, Inc. v. State, Div. of Bldgs. & Const.*, 369 N.J. Super. 295, 300 (App. Div. 2004) (citations omitted) (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1303 (1976)). "[I]n the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." *Id.* at 300-01 (quoting *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)). When "a breach of contract claim requires a showing of bad faith, a party may not be held liable for simply exercising its discretionary authority under the contract for 'ordinary business purposes--reasonably within the contemplation of the parties.'" *Id.* at 301 (quoting *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 246 (2001)). Absent a showing of bad faith or "improper motive," "discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." *Ibid.* (quoting *Wilson*, 168 N.J. at 251).

MVC and DEP are entitled to deference by the Division, based on their technical expertise and statutory and regulatory responsibilities related to the I/M Program. The Division's special expertise and superior knowledge is, as stated in its Mission Statement, in "professionally and ethically procur[ing] the best valued products and services, in a timely and cost-effective manner in accordance with State laws and regulations, to enable client agencies to meet their objectives." Emphasis added. The Division facilitated the contract suspension and termination at the request of MVC and DEP, as an ordinary business decision. *See Capital Safety, Inc. v. State, Div. of Bldgs. & Constr.*, 369 N.J. Super. 295, 301 (App. Div. 2004). The Division's exercise of discretion in suspending and terminating the contract was not arbitrary, capricious, or unreasonable, as it was based on the request of the agencies with special expertise and superior knowledge of this particular field, and served to enable the client agencies to meet their objectives in accordance with State law.

C. The State is not subject to Judicial Estoppel in this matter.

Opus argues that the doctrine of judicial estoppel prevents the State from relying on the stated reasons for suspending the work and terminating the contract, because such position is inconsistent with positions taken in earlier Final Agency Decisions and on appeal. Opus misconstrues the doctrine.

Judicial estoppel protects the integrity of the judicial process. *Kimball Intern., Inc. v. Northfield Metal Products*, 334 N.J. Super 596, 606 (App. Div. 2000). To be estopped [a party must] have convinced a court to accept its position in the earlier litigation. *Id.* at 606-607. Its application is appropriate only “when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding.” *Ibid.* (emphasis added). Consequently, absent judicial acceptance of the inconsistent position, application of [judicial estoppel] is unwarranted because no risk of inconsistent results exists. *Id.* Relatedly, the Appellate Division has held that even a trial court is not prevented from revisiting prior findings concerning a party's likelihood of success on the merits following the development of additional facts. See *Waste Mgmt. of New Jersey, Inc. v. Morris Cty. Mun. Utils. Auth.*, 433 N.J. Super 445, 456 (App. Div. 2013).

Opus argues that the State advocated inconsistent positions in the earlier final agency decisions and on appeal. First in the prior protest, undertaken by vendors during and the procurement process, and the final agency decisions the State was not an advocate for any position. In the subsequent appeal undertaken by Parsons, the State advocated a position. However, the appellate court did not accept nor reject that position but rather dismissed the appeal as moot once the State terminated the contract award to Opus. The order of dismissal stated “Given the State's and the Division's positions concerning the viability of the contract with Opus and given that the Division and the State intend to issue a new bid, the issues on appeal are moot.” In *Kimball*, the court held that “because the doctrine of judicial estoppel only applies when a court has accepted a party's position, a party ordinarily is not barred from taking an inconsistent position in successive litigation if the first action was concluded by settlement. *Kimball*, 334 N.J. Super. at 607. The State has not advocated an inconsistent position which has been accepted by a court. Opus's reliance on the doctrine of judicial estoppel is misplaced.

Accordingly, MVC and DEP made a calculated and well-informed decision that the terms of the Opus Contract were insufficient under the proposed regulatory scheme, that a material ambiguity existed in the specifications, and protection against labor strife was essential, so the agencies determined to suspend work, terminate the contract for convenience, and materially revise the specifications. These concerns have not been addressed in prior litigation, meaning judicial estoppel cannot apply here.

D. Opus must pursue any claims for Breach in accordance with the State Standard Terms and Conditions.

Opus asserts that the decision to terminate its “Contract was not done in conformity with the Contract's express language, and thus qualifies as a breach of contract.” It cites this allegation as “just further evidence of [the State's] bad faith in terminating the Contract”, and states that the decision to do so should be reversed.

As noted in the Division's October 28, 2022, Notice of Contract Suspension and Pending Termination, “MVC and DEP understand that, pursuant to SSTCs Sections 5.6, Suspension of Work, and 5.7(D), Termination of Contract, the Contractor shall be compensated for work performed in accordance with the Contract, up to the date of suspension and termination. All questions regarding payment should be directed to MVC.”

SSTC Section 5.21 sets forth the procedures by which a Contractor may assert claims against the State: “All claims asserted against the State by the Contractor shall be subject to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq., and/or the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1, et seq.”

CONCLUSION

Based upon the foregoing, I find no reason to reverse the suspension of work and termination for convenience of the Opus Contract. Accordingly, I sustain the October 28, 2022, Notice of Contract Suspension and Termination for Convenience. This is my final agency decision.

Sincerely,

Amy F. Davis

Amy F. Davis
Acting Director
Division of Purchase and Property

c: M. Dunn
J. Pastuzyn
M. Cannon, Esq.