



State of New Jersey

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August 3, 2026

Via Electronic Mail Only to catherin.macduff@stevenslee.com

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Re: I/M/O Bid Solicitation #25DPP01189 Need A Can LLC
Protest of the Notice of Rescission of Intent to Award
T2634 – Scrap Metal Collection and Recycling/Disposal – Statewide

Dear Ms. MacDuff:

This final agency decision is in response to your protest application on behalf of Need A Can LLC (“Need A Can”) received by the Division of Purchase and Property’s (“Division”) Hearing Unit on July 24, 2026 (“Protest”). In that application, Need A Can protests the Division’s Procurement Bureau (“Bureau”) July 17, 2026 Notice of Rescission (“Rescission”) rescinding the Notice of Intent to Award (“NOI”) dated April 17, 2026 and attendant Recommendation Report (“Recommendation Report”) dated March 11, 2026. In their Protest, Need A Can protests the finding by the Bureau that their Quote was non-responsive for failing to properly disclose their ownership structure. Additionally, Need A Can makes numerous arguments as to why the Bureau erred in awarding the contract to Yaros Company (“Yaros”). Finally, Need A Can requests a stay if the Division awards to any bidder besides Need A Can.

By way of background, on August 26, 2025, the Bureau issued Bid Solicitation 25DPP01189 - T2634 – Scrap Metal Collection and Recycling/Disposal – Statewide (“Bid Solicitation”) on behalf of the State of New Jersey and its Cooperative Purchasing Program Participants. The purpose of the Bid Solicitation was to solicit Quotes for the recycling and disposal of light iron, steel, aluminum, copper, stainless steel, brass, lead, lead acid batteries, crushed steel drums, and other surplus scrap metal through a rebate program. Bid Solicitation Section 1.1, *Purpose and Intent*. It is the intent of the State to award Contracts to those responsible Bidders whose Quotes, conforming to the Bid Solicitation are most advantageous to the State of New Jersey, price and other factors considered. Id.

In accordance with Bid Solicitation Section 2.1, *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions electronically was available to all potential Bidders until 2:00 P.M. Eastern Time on September 15, 2025. One (1) Bid Amendment was issued for this Bid Solicitation, which provided revisions to Attachment two (2) of the Bid Solicitation, responses to questions received from potential Bidders, and extended the Quote Submission Due Date to October 21, 2025.

On October 21, 2025, the Division's Proposal Review Unit ("PRU") opened three (3) Quotes which were received by the submission deadline of 2:00pm Eastern Time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirement, the Division's PRU forwarded the three (3) Quotes to the Bureau for further review and evaluation consistent with the requirements of the Bid Solicitation.

As set forth in the Recommendation Report, the Bureau rejected John Blewett's Quote because John Blewett provided conflicting information regarding their ownership. As set forth in the Recommendation Report, the Bureau recommended that a contract be awarded to Need A Can.

On April 22, 2026, John Blewett Inc. ("John Blewett") submitted a Protest of the rejection of their Quote and protested the Bureau's contract award to Need A Can. On April 29, 2027, the Division's Hearing Unit issued a Final Agency Decision ("Blewett FAD") which upheld the Division's non-responsive determination for John Blewett, and after conducting a *de novo* review of Need A Can's Quote based upon arguments contained in John Blewett's protest, the Hearing Unit found that Need A Can's Quote was also non-responsive for failing to properly disclose their ownership prior to Quote opening.

On July 24, 2026, Need A Can submitted a Protest protesting the determination in the Blewett FAD that Need A Can was non-responsive and protesting the rescission of Need A Can's intended award as set forth in the Recission. Need A Can's arguments in the Protest are broken up into different sections, which are outlined briefly here:

- Section I titled **"NEED A CAN'S BID SUBMISSION CONTAINED ALL THE INFORMATION ABOUT ITS OWNERSHIP THAT THE DIVISION WOULD NEED AND THEREFORE, THE RESCISSION OF THE NOI WAS NOT APPROPRIATE"** (emphasis in the original) states that Need A Can is a limited liability company which is "owned by a singular, sole person" (Protest, page 7), and that Ms. Rafferty (the sole owner of Need A Can) does not have the requisite knowledge "which would allow her to understand the nuances between a sole proprietor, in an ownership sense, and a sole proprietorship in the legal sense." Protest, page 7-8. The Protest states that all necessary ownership disclosure information was contained within Need A Can's Quote. Finally, in this section of their Protest, Need A Can states that The Yaros Company, Inc. ("Yaros") also incorrectly completed their Ownership Disclosure Form.
- In Section II titled **"NEED A CAN'S PROPOSAL IS THE MOST ADVANTAGEOUS TO DIVISION AND TAXPAYERS, PRICE AND OTHER FACTORS CONSIDERED"** (emphasis in the original), Need A Can argues that the rebate that Need A Can is providing to the State in their Quote is much higher than the rebate that Yaros is providing, therefore, the State should choose Need A Can because the Bid Solicitation allows for the State to choose a bidder whose Quote is "most advantageous to the State, price and other factors considered" (Protest, page 10). Need A Can suggests that if the Division does not reverse the Recission, a rebid is most appropriate as it would benefit the Division and the taxpayers. Need A Can further states that "[u]nder the circumstances, an award to any other bidder, or failing to rebid the contract, would be plainly arbitrary, capricious, unreasonable and against public interest." Protest, page 11.
- Section III titled **"TO THE EXTENT THE TECHNICAL SCORES, AS CALCULATED BY THE DIVISION, ARE RELIED UPON TO JUSTIFY AWARD OF A CONTRACT TO YAROS, THE EVALUATION AND SCORING OF THE TECHNICAL PROPOSALS WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE IN FACT AND AS APPLIED"** (emphasis in the original). In this Section, Need A Can states again that Need A Can submitted the superior Quote, and that Yaros is an inexperienced bidder and their Quote is far less favorable to

the Division and taxpayers. In this Section, Need A Can states that “the Division clearly intended to consider a bidder’s prior experience in determining the award of the contract under the RFP.” Protest, page 13 .

- Section IV titled “**A STAY OF AWARD AND IMPLEMENTATION OF THE CONTRACT IS WARRANTED**” (emphasis in the original) and its subsections outline Need A Can’s request for a stay (and attendant arguments) of the contract award and implementation pending appeal should the Hearing Unit deny Need A Can’s protest.

Although an in-person presentation is permitted by N.J.A.C. 17:12-3.3(e), it should be noted that “[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director.” 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). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the relevant statutes, regulations, case law, and the protest submitted by Need A Can. The issues raised in the protest were sufficiently clear such that a review of the record of this procurement 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 submitted by Need A Can on the written record, as such an in-person hearing is not warranted. 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 of New Jersey, 218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)).

The Division’s administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

(a) In order to be eligible for consideration for award of contract, the bidder’s proposal **shall** conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder’s proposal but that **must** be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), emphasis added.]

If the requirements of N.J.A.C. 17:12-2.2 are not met, a Quote must be rejected. This regulation mandates stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State's bidding process.

The term "must" denotes a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Must – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*.]

The term "shall" also denotes that which is a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Shall – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*.]

Pursuant to Bid Solicitation Section 3.13.2, *Ownership Disclosure Form*, it is clear that submitting accurate ownership information prior to Quote Opening was a requirement to be found responsive for this Bid Solicitation. To that end, the Division offers Bidders the ability to complete the Ownership Disclosure Form ("ODF") to satisfy the statutory requirement contained in N.J.S.A. 52:25-24.2 which requires that if the "Bidder is a corporation, partnership or limited liability company, the Bidder must disclose all 10% or greater owners". In this case, Need A Can submitted an ODF prior to Quote Opening. However, they checked "Yes" to both being a Sole Proprietor (Question 2) and a corporation, partnership or limited liability company (Question 3). as shown below.

OWNERSHIP DISCLOSURE FORM	
STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY - DIVISION OF PURCHASE AND PROPERTY 33 WEST STATE STREET, P.O. BOX 230 TRENTON, NEW JERSEY 08625-0230	
VENDOR NAME: <u>Need A Can, LLC.</u>	
PURSUANT TO N.J.S.A. 52:25-24.2, ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO PROVIDE A STATEMENT OF OWNERSHIP. Please answer all questions and complete the information requested.	
1. The vendor is a Non-Profit Entity; and therefore, no disclosure is necessary.	YES ☐ NO ☒
2. The vendor is a Sole Proprietor; and therefore, no other disclosure is necessary. A Sole Proprietor is a natural person who owns an unincorporated business by himself or herself. A limited liability company with a single member is not a Sole Proprietor.	☒ ☐
3. The vendor is a corporation, partnership, or limited liability company.	☒ ☐
4. If you answered YES to Question 3, do any individuals (including a single 100% owner), partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest; and therefore, disclosure is necessary.	☐ ☒
If you answered YES to Question 4, you must disclose the information requested in the space below:*	
(a) the names and addresses of all stockholders in the corporation who own 10% or more of its stock, of any class;	
(b) all individual partners in the partnership who own a 10% or greater interest therein; or,	
(c) all members in the limited liability company who own a 10% or greater interest therein.	
NAME _____ ADDRESS _____ ADDRESS _____ CITY _____ STATE _____ ZIP _____	NAME _____ ADDRESS _____ ADDRESS _____ CITY _____ STATE _____ ZIP _____
NAME _____ ADDRESS _____ ADDRESS _____ CITY _____ STATE _____ ZIP _____	NAME _____ ADDRESS _____ ADDRESS _____ CITY _____ STATE _____ ZIP _____

Section I of Protest Argument

In Section I of the Argument section of their protest, Need A Can states that “Need A Can is a woman-owned business organized in the form of a limited liability company that is solely owned by Michelle Rafferty.” Protest, page 7. Need A Can argues that “[w]hile it is clear that an entity cannot be both a limited liability company and a sole proprietorship, a limited liability company can be owned by a singular, sole person, as is the case here. This is, in fact, what Need A Can is and what Ms. Rafferty disclosed”. Protest, page 7. Need A Can also argues that “Ms. Rafferty filled out the ODF to the best of her ability as a layperson with no formal training or legal background which would allow her to understand the nuances between a sole proprietor, in an ownership sense, and a sole proprietorship in the legal sense.” Protest, page 7.

The Hearing Unit agrees with Need A Can’s statement that “it is clear that an entity cannot be both a limited liability company and a sole proprietorship”, Protest, page 7, and by claiming to be both which all parties agree is not possible, Need A Can created confusion and uncertainty as to Need A Can’s legal structure. A conflicting, erroneous disclosure which creates uncertainty as to the true and accurate business structure of a bidder cannot be accepted because it is not actually a disclosure. Need A Can mentions several times in this Section of their Protest in various iterations, that Need A Can is a limited liability company entirely owned by Michelle Rafferty. However, Need A Can does not disclose her ownership interest in Question 4 of the ODF, nor anywhere else in Need A Can’s Quote. As shown in the excerpt of the ODF above, by checking “No” to Question 4, Need A Can expressly states that there is no “individuals (including a single 100% owner) . . . owning a 10% or greater interest” which would require disclosure. This failure to disclose Ms. Rafferty’s 100% ownership interest in Need A Can, which interest is stated numerous times in their Protest, renders their Quote non-responsive.

Need A Can also claims that the Division could have requested clarification from Need A Can regarding their submitted ODF. Allowing Need A Can the opportunity to correct their ODF would result in an impermissible modification to their submitted Quote which would also have rendered their Quote non-responsive. In I/M/O Protest of Award of On-Line Games Prod. & Operation Svs. Contract, Bid No. 95-X-20175, the court held that a post-opening commitment to supply an essential missing element for a bid is not a clarification but rather is an “impermissible supplementation ... and flies in the face of our public bidding scheme.” 279 N.J. Super. 566, 598 (App. Div. 1995). In contrast, clarification is permissible. “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 already there.” Id. at 597. Based on the facts outlined in the Recommendation Report, it’s clear that the Hearing Unit was correct to not seek an impermissible clarifications because the information provided would have changed the information provided with the Quote, as well as requiring additional information not provided with the Quote that was required to be supplied at the time of Quote opening under the statutory law and the Division’s regulations.

Need A Can states that “all of the required information as to Need A Can’s ownership was contained within its bid submission.” Protest, page 8. This is not at all the case. As discussed above, the Division did not know Need A Can’s legal structure. Perhaps it was an error that Need A Can checked off “Yes” for being a Sole Proprietorship and in reality is a Limited Liability Company (“LLC”). This LLC could have 4 members each with a 10% or greater ownership interest, or perhaps there are 7 members each with a 10% or greater ownership interest. The Division must take the information that is provided by the bidder and not guess or hypothesize about a a bidder’s ownership.

Additionally, it does not follow that because Need A Can checked off “Yes” for Sole Proprietorship ownership structure that there could be only one member of the LLC. The argument that Michelle Rafferty is listed as “President” on one form (her title is missing from the other submitted forms) does not automatically mean that she has any ownership interest in Need A Can, let alone that she is the sole member

if Need A Can is a LLC. It is not unusual for a President of a company to be an employee, without any ownership interest. Nowhere on the ODF, nor in Need A Can's Quote, does it state that Ms. Rafferty is the sole member and holds 100% of the ownership interest of Need A Can LLC.

Turning to Need A Can's argument that Ms. Rafferty is a lay person and does not have formal legal training so she "filled out the ODF to the best of her ability", Protest page 7, the State solicits bids for all manner of products and services and countless bidders are in the same position as Ms. Rafferty in that they are "layperson[s] with no formal training or legal background" Protest, page 7. Need A Can's statement suggests that they receive special treatment because Ms. Rafferty made a mistake in completing the ODF, and that different bidders be held to different standards in disclosing their ownership structure and interest depending on potential legal training.

A fair public bidding process requires that the State treat all bidders the same. In an effort to assist bidders, the Division has included very clear language within Question 2 on the ODF that "A limited liability company with a single member is not a Sole Proprietor". Additionally, in Question 4 of the ODF, Bidders are instructed that "If you answered **YES** to Question 3, do any individuals (including a single 100% owner) . . . own[] 10% or greater interest; and therefore, disclosure is necessary." (Emphasis in the original). Here, Need A Can answered "No" despite the disclosure in their protest that Michelle Rafferty is indeed the 100% owner of Need A Can LLC. Need A Can's request for specialized treatment, or that there was not sufficient information to accurately complete the form, have no place in the public bidding process.

Need A Can states that Yaros' ODF was also completed incorrectly. Need A Can points out that for Question 3, Yaros answered "YES" then answered "NO" to Question 4, and states that "Question 4 was incorrectly answered despite the question containing the clarifying language "any individuals (**including a single 100% owner**). (emphasis added). Id. The Division cannot fault Need A Can for an alleged issue with its ODF without similarly faulting Yaros for incorrectly checking "no" in response to Question 4." Protest, pages 9-10. However, Need A Can fails to mention that Yaros checked off "YES" on only one box (Question 3) regarding their business structure in contrast to Need A Can's "YES" answers to being both a sole proprietorship and a corporation, partnership or limited liability company. Additionally, although Yaros checked "NO" that no person owned a 10% or greater interest in their company, Yaros disclosed the 100% ownership interest in the ODF as shown on the Yaros ODF below). This disclosure is what is required pursuant to N.J.S.A. 52:25-24.2, and unlike the disclosure provided by Need A Can, there is no question or confusion about Yaros' ownership.

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STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY - DIVISION OF PURCHASE AND PROPERTY 33 WEST STATE STREET, P.O. BOX 230 TRENTON, NEW JERSEY 08625-0230	
VENDOR NAME: _____	
PURSUANT TO N.J.S.A. 52:25-24.2, ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO PROVIDE A STATEMENT OF OWNERSHIP. Please answer all questions and complete the information requested.	
1. The vendor is a Non-Profit Entity , and therefore, no disclosure is necessary.	YES ☐ NO ☒
2. The vendor is a Sole Proprietor , and therefore, no other disclosure is necessary. A Sole Proprietor is a natural person who owns an unincorporated business by himself or herself, A limited liability company with a single member is not a Sole Proprietor.	YES ☐ NO ☒
3. The vendor is a corporation, partnership, or limited liability company .	YES ☒ NO ☐
4. If you answered YES to Question 3, do any individuals (including a single 100% owner), partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest; and therefore, disclosure is necessary.	YES ☐ NO ☒
If you answered YES to Question 4, you must disclose the information requested in the space below: (a) the names and addresses of all stockholders in the corporation who own 10% or more of its stock, of any class; (b) all individual partners in the partnership who own a 10% or greater interest therein; or, (c) all members in the limited liability company who own a 10% or greater interest therein.	
NAME: Anthony Yaros 100% ADDRESS: 350 Basin Road CITY: Trenton NJ 08619 STATE: _____ ZIP: _____	NAME: _____ ADDRESS: _____ CITY: _____ STATE: _____ ZIP: _____
NAME: _____ ADDRESS: _____ CITY: _____ STATE: _____ ZIP: _____	NAME: _____ ADDRESS: _____ CITY: _____ STATE: _____ ZIP: _____

Although the State has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, In re Request for Proposals #17DPP00144, 454 N.J. Super. 527, 559 (App Div. 2018). “In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the [RFQ’s] requirements.” Ibid., quoting, Barrick v. State, 218 N.J. 247, 258-59 (2014)). For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [RFQ] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c). As Need A Can’s Quote was not responsive to the material requirements of the Bid Solicitation, it is ineligible for evaluation and award.

Section II of Protest Argument

In Section II of Need A Can’s Protest, Need A Can argues that its Quote is the most advantageous to the State as Need A Can’s submitted rebate percentages were higher than Yaros’ submitted rebate percentages. Need A Can argues that:

Sections 1.1, 8.15, and 8.16 of the RFP make clear that the contract will be awarded to the bidder whose proposal is “most advantageous to the State, price and other factors considered.” Exhibit B. See also N.J.S.A. 52:34-12 (award of a public contract should be to those responsible bidders whose submission is the most “advantageous to the State, price and other factors considered.”).

While the language cited by Need A Can is accurate, it presupposes that choices are made among bidders who were **responsive** to the mandatory requirements of the Bid Solicitation. As outlined above, Need A Can was not responsive to the requirement of Bid Solicitation Section 3.13.2, *Ownership Disclosure Form*, so even if their pricing was better than another bidder’s they could not be considered for award. Need A Can states:

Under the circumstances, an award to any other bidder, or failing to rebid the contract, would be plainly arbitrary, capricious, unreasonable and against public interest. Even if the Division ultimately declines to reverse its NOI rescission and does not award a contract to Need A Can, the Division should readvertise the RFP rather than awarding the contract to Yaros or any other bidder in order to secure the greatest benefit for the Division and taxpayers.

Here, Need A Can is assuming that rebidding the contract will result in a rebate more favorable to the State than that which Yaros would provide under the contract. This is an assumption that the Court in In the Matter of Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Servs., 2010 N.J. Super. Unpub. LEXIS 1641 (App. Div. 2010) was unwilling to make. The Court reiterated the standard that “once the bids have . . . been opened and each bidder’s competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons.” Id. quoting Bodies by Lembo v. Middlesex County, 286 N.J. Super. 298, 309 (App. Div. 1996) (quoting Marvec Constr. Corp. v. Twp. of Belleville, 254 N.J. Super. 282, 288 (Law Div. 1992) (quoting Cushman & Doyle, Construction Bidding Law § 1.7 at 9 (1990)) (internal quotation marks omitted). See also, PENPAC, Inc. v. Morris County Mun. Utils. Auth., 299 N.J. Super. 288, 296 (App. Div.), certif. denied, 150 N.J. 28 (1997). The Court in In re Failure to Award, supra, found that financial

reasons alone, where there was no material flaw in the bid solicitation does not reach the cogent and compelling reasons required for cancellation and rebid of a contract where there is a responsive bidder whose bid does not exceed the estimate.

In the Bid Solicitation at hand, this is not an expenditure of funds by the State but rather a rebate, and by its very nature, the amounts of rebates in both Need A Can and Yaros' Quoted, as set forth on page 7 of the Recommendation Report are all estimates, so there is no guarantee that the difference in the rebate between Need A Can and Yaros will be as large as Need A Can claims in their Protest. In addition to being ineligible based on the non-responsive ODF discussed above, Need A Can has not presented a compelling or cogent reason to overturn the Bureau's award to a responsive bidder for this Contract.

Section III of Protest Argument

In Section III of their Protest Argument, Need A Can asserts that "Yaros' proposal, as an inexperienced bidder, was significantly less favorable to the Division and taxpayers." Protest, page 13. Need A Can cites language from Bid Solicitation Section 3.26, *Experience with Contracts of Similar Size and Scope*, and argues that "The entirety of Section 3.26 makes clear that the Division clearly intended to consider a bidder's prior experience in determining the award of the contract under the RFP." Protest, page 13. Bid Solicitation Section 3.26, *Experience with Contracts of Similar Size and Scope*, states in pertinent part, "The Bidder should provide a comprehensive listing of contracts of similar size and scope that it has successfully completed, as evidence of the Bidder's ability to successfully complete services similar to those required by this Bid Solicitation." The definition of "should" can be found in Bid Solicitation Section 9.2, *Definitions*, which states: "**Should** – denotes that which is permissible or recommended, not mandatory." (emphasis in the original). Having experience with contracts of similar size was not a requirement of Bidders for this Bid Solicitation. If the Division "clearly intended to consider a bidder's prior experience in determining the award", Protest page 13, as Need A Can states, then the Division would have made prior experience with contracts of a similar size and scope a mandatory Bid Solicitation requirement as it has done with countless other bid solicitations.

Bid Solicitation Section 8.9, *Evaluation Criteria*, states in pertinent part that "The following evaluation criteria categories, not necessarily listed in order of significance, will be used to evaluate Quotes received in response to this Bid Solicitation." Bid Solicitation Section 8.9.1, *Technical Evaluation Criteria*, states "The following criteria will be used to evaluate and score Quotes received in response to this Bid Solicitation: A. The Bidder's demonstration in the Quote that the Bidder understands and is able to complete the requirements of the Scope of Work as sought." Bid Solicitation Section 8.9.2, *Price Evaluation*, informs Bidders that a weighted consumption model will be used to evaluate pricing. Nowhere in the Bid Solicitation does it state that a Bidder must have prior experience to be considered for award. A bidder can demonstrate that they understand and can accomplish the work required without having experience with contracts of a similar size and scope.

Need A Can continues to argue this point turning to the language in the Recommendation Report which does briefly discuss that Need A Can provided two (2) contracts of similar size and scope in their Quote, while Yaros indicated that they do not have experience with contracts of similar size and scope. However, that was not all that was included in the evaluation, and the Bureau's determination based on information contained in the technical Quotes that it was "satisfied with Yaros Company's ability to successfully complete the Scope of Work based upon its Technical Quote." Recommendation Report, page 6. Need A Can states that "In the Recommendation Report, the Division notes that Need A Can submitted proof of its prior experience with contracts of a similar size and scope while simultaneously noting that Yaros 'does not have any experience with Contracts of Similar Size and Scope'". Protest, page 13. Need A Can does not include the remainder of the sentence which follows their quoted language from the Recommendation Report which is vitally important to understand the evaluation process:

Yaros Company indicated that the firm does not have experience with Contracts of Similar Size and Scope within the firm's Technical Quote; however, it is noted that experience is not a definitive requirement within the Bid Solicitation.

Need A Can places a great deal of weight on the prior experience of Need A Can versus Yaros – supplanting their judgment for that of the Bureau who developed and advertised the Bid Solicitation and had decided that it was not a mandatory requirement nor determinative factor in who could complete the scope of work.

New Jersey procurement law requires that “specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of supplies and services necessary to meet the requirements of the using agency. . . .” N.J.S.A. 52:34-12. This principle is based on the long-recognized “policy behind the competitive bidding statutes, i.e., assurance against favoritism, improvidence, extravagance and corruption in the bidding process.” Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241, 251 (App. Div. 1983) (citing Terminal Construction Co. v. Atlantic City Sewerage Auth., 67 N.J. 403, 410 (1975)). “These policies, in turn, are meant to ensure that all bidders are equally situated in their competition for the public contract.” Palamar, *supra*, 196 N.J. Super. at 251 (citing Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957)). “The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition.” *Id.* Allowing Need A Can’s Quote to proceed in light of its failure to adhere to the requirements of the Bid Solicitation would place both Bidders in a superior position among bidders under this Bid Solicitation.

Section IV of Protest Argument

In consideration of this Stay Request, I have reviewed the record of this procurement, including Need A Can’s Protest (which includes a Stay Request), the Bid Solicitation, the Quotes received, the protests, 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 decision on the merits of the Stay Request.

I. Analysis

Because a request for a stay is an extraordinary remedy, the party who seeks a stay “must satisfy a ‘particularly heavy’ burden.” Gauman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006)). In exercising discretion to grant a request for stay, an agency must be guided by the four fundamental principles set forth in Crowe v. De Gioia, 90 N.J. 126 (1982). First, a stay should be granted only “when necessary to prevent irreparable harm.” *Id.* at 132 (citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)). Second, “temporary relief should be withheld when the legal right underlying plaintiff’s claim is unsettled.” *Id.* at 133 (citing Citizens Coach, 29 N.J. Eq. at 304-05). Third, the “plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” *Ibid.* (quoting Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)). The fourth and final consideration “is the relative hardship to the parties in granting or denying the relief.” *Id.* at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), *mod. on other grounds*, 132 N.J. Eq. 613 (E. & A. 1942)).

New Jersey courts have consistently held that a movant must clearly and convincingly demonstrate the right to a stay. Waste Mgmt. of N.J., Inc. v. Union County Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). As discussed in detail below, in reviewing each of the Crowe factors with respect to this request, Need A Can has not demonstrated that it is entitled to a stay.

With respect to each of the Crowe factors, I find as follows:

1. Need A Can will not suffer an irreparable harm if the stay is denied.

Need A Can will not suffer irreparable harm if the stay of the Contract award is denied. In support of its stay request, Need A Can states that:

Notably, a bidder aggrieved by a public agency's failure to award it a contract to which it is legally entitled may not assert a claim for damages under New Jersey law. Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 546 (1966) (holding that damages are not available for a wrongfully awarded public contract). Accordingly, the absence of a monetary remedy in a bidding matter such as this renders the harm to be suffered as a result of the wrongful award of the Contract irreparable. M.A. Stephen Construction Co, v. Borough of Rumson, 125 N.J. Super. 67, 75-76 (App. Div. 1973) (holding that unrecoverable economic loss constitutes irreparable harm). Indeed, even if Need A Can ultimately prevails on the merits of its protest, absent a stay, it cannot recover damages for the improperly awarded contract.

When considering a stay request, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public contract, not every request for stay that concerns a public contract award is granted. See, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs., 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of contract). Even if Need A Can could arguably suffer monetary harm from not being awarded a Contract pursuant to this Bid Solicitation, this is a risk that a company routinely accepts when it participates in a public bidding process. Need A Can is like any other bidder for the contract and subject to a pillar underlying public procurement - no bidder is entitled to award of a public contract. Comm'l Cleaning Corp. v. Sullivan, 47 N.J. 539, 546 (1966). Thus, Need A Can has not demonstrated by clear and convincing evidence that it will suffer irreparable harm if the Contract award is not stayed.

2. Need A Can has not demonstrated a reasonable likelihood of success on the merits.

In this section, Need A Can reiterates its reasons set forth in Sections I, II and III of the protest and states that based upon its protest, "Need A Can is confident that it will prevail on the merits of its protest." Protest, page 16. As set forth above, Need A Can's Quote was non-responsive to Bid Solicitation Section 3.13.2 *Ownership Disclosure Form*, ineligible for contract award. Thus, Need A Can is not likely to succeed on the merits.

3. The balance of the relative hardship weighs in favor of denying the Stay Request.

Need A Can has not (and cannot) established that the balance of relative hardships weighs in favor of granting a stay. Conversely, the public will benefit from the award of the contract now and without any further delay. Currently there is no State contract available to using agencies for these services. It is a safety hazard for these items to remain onsite at various State facilities. Should any of these items shift they could injure someone, and their presence over time creates an attractive environment for vermin. The State's and the public's interest in moving forward with the awarded Contract to satisfy the public purposes of procurement outweighs all of Need A Can's alleged legally cognizable interests.

Further, as to Need A Can's argument of relaxing the Crowe factors for its Stay Request (Protest, pages 14-15), 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). Need A Can provided no factual or legal support for the relaxing of the Crowe factors.

Need A Can has not established that the balance of the hardship weighs in its favor, or 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, 399 N.J. Super. at 520-21). The State's and the public's interest in moving forward with the awarded Contract, to satisfy the public purposes of procurement, outweighs any of Need A Can's alleged legally cognizable interests.

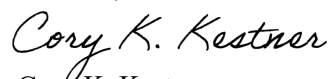
CONCLUSION

In light of the findings set forth above, I sustain the Bureau's finding that Need A Can's Quote was non-responsive and agree that they are not eligible for consideration for contract award. Additionally, Need A Can failed to establish the necessary Crowe factors to grant a stay of the contract award.

Thank you for your company's interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

This is the Division's final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Cory K. Kestner
Chief Hearing Officer

CKK:CMD

c: C. Clarke
K. Aponte