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June 28, 2022

Via Electronic Mail Only maeve.cannon@stevenslee.com

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Re: I/M/O Bid Solicitation #20DPP00471 Parsons Environment and Infrastructure Group, Inc.
Request for a Stay Pending Appeal
T1628 Enhanced Motor Vehicle Inspection Maintenance System

Dear Ms. Cannon:

This letter is in response to the Request for a Stay Pending Appeal dated June 16, 2022, submitted to the Division of Purchase and Property (Division) on behalf of Parsons Environment and Infrastructure Group, Inc. (Parsons) with respect to Bid Solicitation #20DPP00471 – T1628 Enhanced Motor Vehicle Inspection Maintenance System (Bid Solicitation).

I. Background

On August 28, 2019, the Division's Procurement Bureau (Bureau) issued the Bid Solicitation on behalf of the Motor Vehicle Commission (MVC) and the Department of Environmental Protection (DEP). The purpose of the Bid Solicitation was to solicit Quotes for implementing the next generation Motor Vehicle Inspection and Maintenance program (NGSystem) to provide for the mandatory periodic inspection of vehicles to assure compliance with standards established by the State and the federal government. Bid Solicitation § 1.1 *Purpose and Intent*.

On May 25, 2021, Parsons submitted a challenge to certain specifications of the Bid Solicitation. Specifically, Parsons raised the following concerns: (1) Parsons is at a disadvantaged with respect to Quote pricing because it has specific information regarding maintenance, repairs and renovations that are needed at the various inspection facilities; (2) that inaccurate/incomplete information has been provided to potential Bidders with respect to the requirement to hire the current inspection workforce; (3) there was no information included in the Bid Solicitation regarding required COVID protocols; and, (4) the Bid Solicitation failed to include or reference new and emerging technologies. On June 4, 2021, the Division issued its final agency decision finding that no amendments to the Bid Solicitation were necessary.[1] However, amended responses to questions #1 and 2 on Bid Amendment #15 were posted to clarify that the

[1] The June 4, 2021 final agency decision is available at: https://www.state.nj.us/treasury/purchase/pdf/decisions/2021/IMOBidSolicitation20DPP00471Parsons.pdf.

State will not reimburse the Contractor for any costs incurred for maintenance and repairs performed by the Contractor as required by Bid Solicitation Section 3.21.2 and Bid Solicitation Section 3.21.3.

Thereafter, on June 23, 2021, the Service Employees International Union, Local 32B-J, (SEIU) submitted a challenge to the workforce specifications of Bid Solicitation. On June 29, 2021, the Division issued its final agency decision finding that no amendments to the Bid Solicitation were necessary.[2]

On July 21, 2021, the Division's Proposal Review Unit opened three (3) Quotes received by the submission deadline. Quotes were submitted by Parsons, Opus Inspections Inc. (Opus), and Applus Technologies, Inc. (Applus). The Division's Proposal Review Unit forwarded the three (3) Quotes to the Bureau for further review. The Bid Solicitation required, among many things, the Bidders to complete a *Source Disclosure Form*. The *Source Disclosure Form* requires that if a contract was primarily for services, then the services had to be performed in the United States. All three bidders submitted a disclosure form, as required. Two bidders, Opus and Applus, certified that all services would be performed in the U.S. Parsons certified that all services except software development would be done in the U.S. The Bureau determined that the Quote submitted by Parsons was non-responsive to the requirements of the Bid Solicitation. The remaining two (2) Quotes were forwarded to the Evaluation Committee for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

On November 22, 2021, the Evaluation Committee prepared a report detailing the review of the Quotes submitted by Applus and Opus and the Bureau prepared a Recommendation Report summarizing the procurement, and recommending that the contract be awarded to Opus.[3] 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.

On January 10, 2021, Parsons submitted a protest letter to the Division. In that protest Parsons' (1) challenged the Bureau's determination that its Quote was non-responsive; (2) claimed that the certain specifications contained in the Bid Solicitation created an unlevel playing field; and, (3) alleged that the Quote submitted by Opus is non-responsive. By way of remedy Parsons' requested that the Bid Solicitation be canceled and a new procurement issued. On May 20, 2022, the Division issued its final agency decision sustaining the Bureau's December 21, 2021, NOI. On that same date, the Bureau awarded Contract No. (Master Blanket Purchase Order Number) 20-TELE-15299 to Opus with an effective date of August 6, 2022.

On June 6, 2022, two weeks after the award of the Contract, Parsons seeks "a stay of award and any further administrative agency processes with respect to the award of the contract pending an appeal." In support if its request for a stay, Parsons states that it:

1. "dispute[s] the terms of the Statute requiring work on certain contracts be performed in the United States, even applies to software development in this instance. Here the "service" to be performed in the inspection of motor vehicles;"
2. disputes the determination that issues raised by Parsons as to the workforce specifications should have been appealed to the appellate division within 45 days June 4, 2021 final agency decision; and

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[2] The June 29, 2021 final agency decision is available at: https://www.state.nj.us/treasury/purchase/pdf/decisions/2021/IMO-Bid-Solicitation-20DPP00471-Service-Employees-International-Union.pdf.

[3] The Bureau determined Parsons' Quote was non-responsive because Parsons' submitted *Source Disclosure Form* stated that services would be provided in Canada.

3. Disputes the determination that the awarded contract is not required to offer employment to Parsons current employees and maintain the same level of pay and benefits.

In consideration of this request for stay, I have reviewed the record of this procurement, including Parsons' stay request, the Bid Solicitation, the Quotes received, the protests and final agency decisions, 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 request for a stay.

II. 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). The movant must clearly and convincingly demonstrate the right to a stay. Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

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

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

With respect to the first Crowe factor, Parsons does not allege that it will suffer irreparable harm. Rather, Parsons asserts that a "less rigid" review of the Crowe factors should be applied in order to maintain the status quo to avoid an irreparable harm that might result in a case such as this involving public bidding where a vendor is not entitled to monetary damages. In support of its request for a "less rigid" review, Parsons cites to Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority, 433 N.J. Super. 445, 453 (App. Div. 2013), citing, Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

Admittedly, Parsons is not entitled to monetary damages as under the applicable law, permitting monetary damages would twice penalize the taxpayers. Undoubtedly, Parsons who is the incumbent contractor, and has been the Contractor since 1998, will lose business from the State when the contract resulting from this Bid Solicitation is transitioned on August 5, 2022 as planned. However, no vendor, regardless of the time and resources expended to provide services to the State, is entitled to a contract in perpetuity. This is one of the pillars underlying the public bidding law. The fact that Parsons expended time and resources to fulfill its contractual obligations to the State under the current contract, for which it was compensated by the State, or the fact that Parsons will be required to reallocate resources and allow its employees to accept positions elsewhere, is insufficient to justify staying the contract award for the instant solicitation.

Further, 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). The Division does not find that Parsons will suffer irreparable injury. The public interest however is greatly affected as the award of this contract will bring about substantial savings for these services, which inure to the benefit of the public.[4] However, even if the court were to find that Parsons would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to grant a stay relief as the movant has the burden to establish all of the Crowe factors.

Because Parsons has not demonstrated that it will suffer irreparable harm, and because its current contract does not expire until November 2022, Parsons has ample time to seek an appeal on an expedited schedule without the need for stay.

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

The Division acknowledges that it is well settled that a bidder claiming to be entitled to an award of a contract has standing to challenge the award of the contract to another. M.A. Stephen Construction Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

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

In support of the request for a stay, Parsons asserts that the Division's May 20, 2022, final agency decision as a whole, was fraught with error and a misunderstanding of the law. As such, Parsons opines that it will prevail on appeal.

The purpose of the public bidding process is to "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)). 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). Importantly, in general, "courts will not interfere with a Final Agency Determination which pertains to contract awards or rejecting a bid or bidders unless there is a finding of 'bad faith, corruption, fraud[,] or gross abuse of discretion.'" *In re Jasper Seating Co*., 406 N.J. Super. 213, 222, (App. Div. 2009). The Appellate Division had repeatedly noted:

> Our jurisprudence recognizes that the Legislature purposefully conferred broad discretion on the Director of the [DPP] to determine 'which bid will be most advantageous to the State. *In re Jasper Seating Co*., 406 N.J. Super. 213, 222, 967 A.2d 350 (App. Div. 2009) (quoting *Sullivan, supra*, 47 N.J. at 548). "[T]he Director's determinations 'as to . . . bid conformity are to be tested by the ordinary standards governing administrative action.'" *Ibid*. (quoting *In re On-Line Games Contract*, 279 N.J. Super. 566, 593, 653 A.2d 1145 (App. Div. 1995) (stating that "[c]ourts can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy")). Despite this "elevated scrutiny, 'judicial capacity to review administrative actions is severely limited.'" *Id*. at 223 (quoting *George Harms Constr. Co. v. Tpk. Auth*., 137 N.J. 8, 27, 644 A.2d 76 (1994)).

[4] At a minimum, the State will realize a significant monetary savings with respect to the cost per CIF inspections. Parsons' current contract pricing for performing each CIF inspection is $20.35/CIF inspection. Once active, Opus' contract price for performing each CIF inspection will be 9.95/CIF inspection.

> [In re Bid Solicitation #11-X-21175, Snow Removal & Salting Servs. Statewide, 2012 N.J. Super. Unpub. LEXIS 2760, *7-8.]

In evaluating a reasonable probability of success on the merits, the review is restricted to a determination of whether the Director's decision to award the contract is founded on "bad faith, corruption, fraud or gross abuse of discretion." Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 549 (1966); In re Jasper Seating Co., 406 N.J. Super. 213, 222 (App. Div. 2009). "[A]n appellate court will not upset an agency's ultimate determination unless the agency's decision is shown to have been "arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole." Barrick, supra 218 N.J. at 259 (citing In re Stallworth, 208 N.J. 182, 194 (2011).) In reviewing the probability of success on the merits, the inquiry is limited to: (1) whether the agency's action violated the legislative policies expressed or implied in the act governing the agency; (2) whether the evidence in the record substantially supports the findings on which the agency's actions were premised; and (3) "whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Barrick, supra, 218 N.J. at 260, citing, In re Carter, 191 N.J. 474, 482 (2007).

In support of its request for a stay, Parsons reiterates the points raised in its prior protests and notes its disagreement with the Division's decision to the extent that the determination did not inure to its benefit. Specifically, Parsons claims (1) that the Division's determination that its Quote was non-responsive based upon Parsons submitted *Source Disclosure Form* was in error; (2) the specifications created an unlevel playing field; and, (3) the Division's determination that Opus Quote was responsive was in error.

The Division's determinations with respect to each of Parsons protest points was fully supported by the governing statues, regulations and case law, Parsons has not demonstrated, because it cannot, that the Division acted in bad faith or exercised a gross abuse of discretion, such that the Division's decision is likely to be overturned on appeal. As such, Parsons is unlikely to succeed on appeal.

a. The Bureau correctly determined that Parsons' Quote was non-responsive based upon its submitted *Source Disclosure Form*.

Parsons states that Division's rejection of its Quote based upon the submitted *Source Disclosure Form* was in error because (1) the *Source Disclosure Form* is not a bidding requirement; and (2) there is no record to support the Division's position that the Parsons' Quote would not comply with the law.

Parsons' protest and its statements on this request for a stay demonstrate its misunderstanding of New Jersey's procurement law.

In support of the request for a stay, Parsons asserts that the *Source Disclosure Form* was not a requirement of bidding; and therefore, it was inappropriate for the Bureau to review the contents of the form. In support of its position, Parsons refers to the Division's May 20, 2022 final agency decision which stated in part:

> Turning now to Parsons' submitted *Source Disclosure Form*, I agree with Parsons' statement that *Source Disclosure Form* was not required to be submitted with the Quote. N.J.S.A. 52:34-13.2 and Bid Solicitation Section 4.4.2.4 *Source Disclosure* both indicate that the *Source Disclosure Form* is required prior to Contract award, not with the submitted Quote. This is consistent with the Court's holding in In re Snow Removal and Salting Services Statewide, A-2583-10T1, 2012 WL 6599794 (N.J. Super.

> App Div. Dec. 18, 2012). The failure of a Bidder to submit the *Source Disclosure Form* with a Quote does not render the Quote non-responsive and Parsons' Quote was not deemed non-response for failing to submit the *Source Disclosure Form*.
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> [May 20, 2022 final agency decision, p. 13.]

Parsons however mistakenly expands the Division statements in the final agency decision and the Appellate Division's decision in In re Snow Removal and Salting Services Statewide, A-2583-10T1, 2012 WL 6599794 (N.J. Super. App Div. Dec. 18, 2012), and conflates submission requirements and timing of the submission.

As noted in the Division's final agency decision,

> the State of New Jersey Standard Terms and Conditions (SSTCs) applicable to this Contract stated in part, "[u]nder N.J.S.A. 52:34-13.2, all contracts primarily for services awarded by the Director shall be performed within the United States, except when the Director certifies in writing a finding that a required service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the State Treasurer." See, SSTCs Section 3.6 *Service Performance Within U.S.* Further, Bid Solicitation Section 4.4.2.4 *Source Disclosure* stated in part "[p]ursuant to N.J.S.A. 52:34-13.2, prior to an award of Blanket P.O., the Vendor {Bidder} is required to submit a completed *Source Disclosure Form*. The Vendor's {Bidder's} inclusion of the completed *Source Disclosure Form* with the Quote is requested and advised. See Bid Solicitation Section 7.1.2 for additional information concerning this requirement."
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> [May 20, 2022, final agency decision, p. 7.]

There is no dispute that the *Source Disclosure Form* is a bidding requirement. In order to be eligible for a contract award, the Bidder <u>must</u> submit a *Source Disclosure Form* demonstrating its compliance with the legislative requirement that all services to be performed under the Contract will be performed in the United States. Unlike the *Ownership Disclosure Form* which is required at the time of Quote submission in accordance with N.J.S.A. 52:25-24.2, the *Source Disclosure Form*, like many other bidding requirements, for example the *Disclosure of Investment Activities in Iran Form* required in accordance with N.J.S.A. 52:32-58 and the *New Jersey Business Registration Certificate,* are not required with the submission of the Quote, but rather are required prior to Contract award. Nonetheless, each of these is a bidding requirement, and a Bidder's failure to comply with the requirements renders its Quote non-responsive and therefore ineligible for an award.

In *In re Snow Removal and Salting Services Statewide*, A-2583-10T1, 2012 WL 6599794 (N.J. Super. App Div. Dec. 18, 2012) the Appellate Division held that the failure of a Bidder to submit the *Source Disclosure Form* with a Quote does not render the Quote non-responsive as the statute permits the form to be obtained after Quote opening but prior to contract award. Importantly, the Appellate Division did not opine that when a *Source Disclosure Form* was submitted, that the Division should not review the contents of the form for compliance with the statutory requirements. Such a proposal as suggested by Parsons is in clear contradiction with the requirements of N.J.S.A. 52:34-13.2 which dictates that the Division ensure that all for all contracts "primarily for the performance of services", that "all services performed under the

contract or performed under any subcontract awarded under the contract shall be performed within the United States."

As noted in the final agency decision, Parsons' Quote was not deemed non-responsive for failing to submit the *Source Disclosure Form*. Rather, Parsons Quote was properly deemed non-responsive because Parsons stated that software development, a service to be performed under the contract, would be performed outside of the United States.

Because the *Source Disclosure Form* is a requirement of bidding, Parsons' claim that it should have been afforded an opportunity modify its form would be contrary to the Court's holding in *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". While Parsons claims that it simply wanted the opportunity to explain or clarify its *Source Disclosure Form*, there is no explanation or clarification that would have permitted Parsons to perform the services outside of the United States. The only mechanism though which Parsons could have "saved" its Quote, would have been through an impermissible change to the contents of the submitted *Source Disclosure Form*.

Finally, despite Parsons' efforts to couch software development as nothing more than an ancillary service to be performed under the Contract, the Bid Solicitation was replete with requirements that identified software development as a service to be performed under the Contract and how import software development was to the inspection services to be performed. Even if software development was an ancillary service, N.J.S.A. 52:34-13.2 dictates that all services performed under the contract be performed within the United States; there is no exception for ancillary service.

Accordingly, Parsons is not likely to succeed on this claim if an appeal is filed.

b. The Division addressed Parsons workforce arguments in full.

Parsons alleges that the Division has refused to address its arguments regarding the unionized workforce which lead to a Bid Solicitation which was "impermissibly vague and ambiguous regarding the standard for retention of current staff." Parsons' allegation is a clear misstatement of the facts. Despite Parsons' disagreement with the Division as it relates to the interpretation of the Federal Clean Air Mandate Compliance Act[5] (the "Act"), the Division has fully addressed Parsons claim regarding the workforce requirements, both as it relates to this procurement and the identical arguments raised by Parsons in its challenges to the 2016 procurement.

With respect to the contract workforce, potential Bidders were permitted to submit questions and/or proposed modifications to the Bid Solicitation and State of New Jersey Standard Terms and Conditions no later than September 18, 2019. On December 27, 2019, the Bureau issued Bid Amendment #4 responding to 48 questions received; on March 18, 2020, the Bureau posted Bid Amendment #6, responding to an additional 103 questions. Thereafter, the Bureau permitted potential Bidders to submit a second and third round of questions no later than June 1, 2020 and March 12, 2021 respectively. On August 19, 2020, the Bureau posted Bid Amendment #9, responding to eight questions received regarding Bid Solicitation Section 3.14 *Workforce*.

[5] Federal Clean Air Mandate Compliance Act - enacted by the New Jersey Legislature in 1995 as N.J.S.A. 39:8-42 et seq.

On May 25, 2021, Parsons submitted a challenge to the terms of the Bid Solicitation. In part, Parsons alleged that the Bid Solicitation provided inaccurate/incomplete information to potential Bidders with respect to the requirement to hire the current inspection workforce. Specifically, Parsons alleged the Bid Solicitation had the potential to mislead Bidders by indicating that the awarded Contractor "should" offer positions to the current employees. Parsons claimed that the applicable law required that the current employees be offered positions and that the unionized workforce be retained at the same salary and level of benefits currently in place. June 4, 2021, final agency decision, p. 6.

In response to Parsons' challenge to the specifications, the Division stated:

> As written, the Act required that the original contractor awarded a contract for privatization of the State's inspection and maintenance program, and offer employment to all then full time employees of the Division of Motor Vehicles. The Act did not require that any future contractor be obligated to hire the employees any prior contractor providing the services for the State's inspection and maintenance program.

New Jersey's courts, when reviewing questions of statutory interpretation, have stated that

> When the Legislature's language is clear and unambiguous, and subject to only one interpretation, we apply the statute's plain meaning. Bosland, supra, 197 N.J. at 553-54, 964 A.2d 741; DiProspero, supra, 183 N.J. at 492-93, 874 A.2d 1039; O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002). But when the statutory language is ambiguous and subject to more than one reasonable interpretation, we must look to extrinsic evidence, such as legislative history, judicial interpretation, and rules of statutory construction. Bosland, supra, 197 N.J. at 553-54, 964 A.2d 741; DiProspero, supra, 183 N.J. at 493-94, 874 A.2d 1039; State v. Fortin, 178 N.J. 540, 607, 843 A.2d 974 (2004).
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> [In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Management Services, 436 N.J. Super. 350, 368 (App. Div. 2014).]

Here, the statute is clear, and the Division's interpretation is consistent with the plain language of the law. N.J.S.A. 39:8-44(c)(7) states:

> All qualified full-time employees whose employment with the division is terminated as a result of P.L.1995, c.112 (C.39:8-41 et al.) shall be offered full-time employment. If more than one contract for the operation of official inspection facilities is awarded, each contractor shall offer full-time employment to a percentage of the number of such employees that is equal to the percentage of the total number of inspection lanes that will be operated by that contractor.
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> [Emphasis added.]

Importantly, the Act defined "division" as "the Division of Motor Vehicles in the Department of Law and Public Safety", not contractor or vendor. N.J.S.A. 39:8-43[6]. There is no dispute that as it relates

[6] The Division of Motor Vehicles is now known as the Motor Vehicle Commission.

to the current contract held by Parsons, neither the Division of Motor Vehicles/ Motor Vehicle Commission, the Department of Environmental Protection, the Department of the Treasury or any other instrumentality of the State was involved in the negotiations or is a party to the collective bargaining agreement between Parsons and Service Employees International Union, Local 32B-J, (SEIU), and therefore the requirement that "All qualified full-time employees whose employment with the division is terminated as a result of P.L.1995, c.112 (C.39:8-41 et al.) shall be offered full-time employment, is inapplicable here. Consistent with the governing laws, in response to the questions posed and in response to Parsons' challenge to the specifications, the Division stated that there was no requirement that a new contractor, hire or offer employment to the current workforce as the current "contractor's employees shall not be deemed employees of the State for any purpose" and the State is not a party to any employment agreement or collective bargaining agreement between the current contractor and its employees. N.J.S.A. 39:8-44(b)(4).

However, recognizing that it may be beneficial for a newly awarded contractor to have employees on staff who are familiar with the inspection and maintenance program, the Bid Solicitation stated in relevant part:

> A. To ensure an uninterrupted transition from the current inspection program to the new program, the Vendor {Contractor} should offer employment under the NGSystem to any qualified personnel currently employed with the current vendor prior to the Blanket P.O. effective date.
>
> B. In the event the Vendor {Contractor} determines it is not practicable or possible to retain any individual(s), the Vendor {Contractor} should provide a written report to the SCM documenting its best efforts along with recommendation to fulfill staffing requirements.
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> [Bid Solicitation Section 3.14 *Workforce*.]

Again, in its protest of the NOI, Parsons raised an identical argument stating Parsons' unionized workforce is guaranteed protection under the Act and argues that the Bid Solicitation "established an impermissibly vague and ambiguous standard as to the retention of current staff." Parsons January 10, 2022 Protest, p. 23. Unfortunately, Parsons has misinterpreted the plain language of the law and the terms of the Bid Solicitation. As noted above, the language of the Act does not require that every subsequent contractor offer employment to the employees of the prior contract.

Accordingly, Parsons is not likely to succeed on this claim if an appeal is filed.

c. The Division addressed Parsons' concerns regarding capital maintenance, repair and renovation costs.

In the challenge to the specifications, its protest of the NOI, and now in the request for a stay, Parsons claims that the State has given itself a "blank check" under the terms of the Bid Solicitation to require that the awarded Contractor perform maintenance and repairs and claims that the State refused to provide Bidders with Parsons' list of necessary capital repairs.

With respect to the potential costs of performing maintenance and repairs, the Bid Solicitation provided potential Bidders with the historical data on the costs of maintenance and repairs required by Bid Solicitation Section 3.21.2 *Routine Maintenance and Operations of Buildings and Grounds* and the historical capital expenditure costs for the maintenance and repairs required by Bid Solicitation Section 3.21.3 *CIF Capital Maintenance, Repairs and Renovations at Existing CIFs*. To ensure that all potential

Bidders had to opportunity to inspect the CIF's and make a preliminary assessment of the routine and/or capital repairs, maintenance or renovations which may be required, the State afforded potential Bidders the opportunity to visit each of the 25 CIFs and gather information that they could then use in preparing their respective Quote pricing.

After the site visits, potential Bidders were afforded the opportunity to ask questions through the Questions and Answer process. There were numerous questions posed and answered regarding Bid Solicitation Section 3.21.2 *Routine Maintenance and Operations of Buildings and Grounds* and Bid Solicitation Section 3.21.3 *CIF Capital Maintenance, Repairs and Renovations at Existing CIFs* related to historical costs, responsibility for the cost of performing any necessary maintenance and repairs and outstanding costs. While Parsons claims that the site inspection did not allow Bidders to thoroughly inspect the buildings, importantly, there were no questions raised about the ability to perform more in-depth inspections of the buildings or any equipment; and therefore, no additional inspections were scheduled.

In response to the questions raised regarding capital repairs and routine maintenance and repairs, Question #19 on Bid Amendment #14 reminded Bidders that "The actual capital repair expenses for the last 12 years are located in Appendix 3.2 H. All Vendors {Bidders} should use these costs in estimating capital repair costs. Updated facility costs chart has been uploaded as T1628 Revised Appendix 3.2H 03/01/2021." Taken together potential Bidders were provided with the information necessary to account for the annual costs of maintenance and repairs required by Bid Solicitation Section 3.21.2 and Bid Solicitation Section 3.21.3 when developing their respective Quote pricing.

Parsons asserted that there are numerous requests for maintenance and repairs which had not been approved by MVC totaling approximately 3.1 million dollars. With respect to those items, MVC has indicated that the list of maintenance and repairs created by Parsons will not be carried forward. Rather, the awarded Contractor will be performing its own assessment of necessary maintenance and repairs; independent of Parsons' prior list of maintenance items. The Contractor's list of maintenance and repairs will then be reviewed and discussed between MVC and the Contractor.

Accordingly, Parsons is not likely to succeed on this claim if an appeal is filed.

d. Parsons could have filed an interlocutory appeal of the issue presented in its specification challenge.

Parsons argues that the neither the governing regulations, statues, case law or any other provision, directs that the bidder dissatisfied with the outcome of a challenge to the specifications, terms and/or conditions of Bid Solicitation is required to file an appeal with the Appellate Division. However, while there is no "automatic and mandatory appeal," N.J.S.A. 52:34-10.10 states that final agency determinations addressing vendor challenges to the division's procurement process "shall be appealable to the Appellate Division of New Jersey Superior Court." Moreover, governing regulations clearly advise Bidders that there is a right to appeal any final agency decision following a challenge to the specification. Specifically, N.J.A.C. 17:12-3.1 *Protests* states in relevant part:

> (a) The purpose of this subchapter is to provide the procedures that govern written challenges to an action of the Director related to advertised procurements. A protest is defined as follows:
>
> 1. A timely filed written challenge to a term, condition, or requirement of a specification contained within an advertised RFP;
>
> . . .

> (b) Protests of the type described in this subchapter, for the purpose of this chapter, are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. Final agency determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey.

N.J.A.C. 17:12-3.2(f) makes clear that "[i]n the case of a review [of the written record] by a designee from within the Division, the determination shall be issued by the Director, or the Director's designee, and such determination shall be a final agency decision pursuant to N.J.A.C. 17:12-3.1(b)" (emphasis added). If the challenger chooses not to file an appeal, it can acquiesce to the final agency decision and submit a bid or not.

While the Division does not have specific rules concerning reconsideration of Final Agency Determinations on specification challenges, many state agency rules prescribe a period of 45 days or fewer to file a motion or request for reconsideration of agency action. (See e.g. N.J.A.C. § 4A:2-1.6 (Civil Service Commission – 45 days); § 6A:9B-4.15 (State Board of Examiners – 15 days); § 19:19-5.2 (Public Employment Relations Commission – 15 days); § 13:61-2.8 (Boat Safety Instructor Approval – 15 days); § 17:12-5.5 (Business Entity Political Contribution Compliance Review – 10 business days); § 16:65-6.1 (NJDOT Transportation Utilities Matters – 10 days). Where Division of Purchase and Property rules do allow for reconsideration of its decisions, such reconsideration is discretionary. See N.J.A.C. 17:27-4.6. Of note, Parsons made no request to the Division to reconsider its denial of its specification challenge. In fact, rather than attempting to preserve those issues or bring them to the attention of the Appellate Division, Parsons remained silent, and then submitted its Quote notwithstanding its belief that there were shortcomings in the Bid Solicitation. Cf. Sajo, 2013 N.J. Super Unpub. LEXIS at *13.

Parsons asserts that the Quote opening functions as a statute of limitations for challenging specifications. Stay Request at p. 18, citing Sajo Transp., Inc. v. Village of Ridgewood, 2013 N.J. Super. Unpub. LEXIS 1210. This decision however, takes place in the context of whether an unsuccessful bidder has standing to bring a specification challenge after the opening of bids. Importantly, however, the court in Sajo does not state that a timely challenge submitted prior to the bid opening functions as a tolling agreement, nor that it "preserves" the issue for future proceedings as Parsons argues. Stay Request at p. 18. Indeed, the Sajo court makes clear that by submitting a bid, "all interested parties have accepted the specification as drawn." Sajo Transp., Inc. v. Village of Ridgewood, 2013 N.J. Super. Unpub. LEXIS 1210, at *11-12. To allow a challenge to the specification at this time would hand Parsons a trump card that could be played against a successful bidder, when the unsuccessful bid fails, as is the case here.

Parsons argues that the final agency decision turning away its specification challenge was not final. Protest at p. 19. I disagree. As stated in In re CAFRA permit No. 87-0959-5, "[t]o satisfy *Rule* 2:4-1(b), [and trigger the 45-day window for filing an appeal from final agency decision], an agency decision should contain adequate factual and legal conclusions [and] should give unmistakable notice of its finality." 152 N.J. 287, 299 (1997). The June 4, 2021 final agency decision did so.

Asserting, as it does now, that the issues raised in its specification challenge were not final, Parsons misses the bigger picture: If there was an unlevel playing field, it was because Parsons attempted to submit a bid while it laid in wait with an 'ace up its sleeve' – i.e. the supposed 'interlocutory' nature of the specification challenge, and its planned post-opening re-challenge. Parsons' interpretation would mean that filing a pre-opening specification challenge functions to toll the time period in which a potential bidder can then appeal a denial of its specification challenge, allowing the bidder to wait and see if it prevails in the bid with knowledge that it can revive the challenge if it does not. Such a reading would undermine one of the foundations of public bidding.

Parsons is correct that context is critical. Curiously, to bolster its point, Parsons makes an unnecessary analogy to a civil court litigant losing a *motion in limine*, completely ignoring that there is a Rule directly on point. That is, even if the June 4, 2021 final agency decision was interlocutory, Rule 2:2-4 specifically allows the Appellate Division to "grant leave to appeal, in the interest of justice, from an interlocutory . . . decision or action of a state administrative agency or officer, if the final . . . decision or action thereof is appealable as of right pursuant to R.2:2-3(a). . . ." Accordingly, Parsons could have sought leave to appeal the June 4, 2021 final agency decision on an interlocutory basis, it could have appealed to the Appellate Division by right (because the specification challenge was a final agency decision), or, it could have sought reconsideration by this office, any of which would have put the Division "on notice of the issue and preserve[d] if for future proceedings." See, Stay Request, p. 18. It chose not to pursue any of these options.

Finally, the Division has not engaged in rulemaking by rightly determining that Parsons' specification challenge is time-barred. As made clear in Woodland Private Study Group v. State, 109 N.J. 62, the criteria derived from Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), "although originally formulated in a context that distinguished rulemaking from adjudication, essentially provides a test of when rulemaking procedures are necessary in order to validate agency actions or determinations." Woodland, 109 N.J. at 68. The factors for determining that an agency action constitutes an administrative rule are as follows:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
> Woodland, 109 N.J. at 66 (quoting Metromedia, 97 N.J. at 331-332.)

The determination that Parsons's specification is time-barred does not constitute rulemaking under these criteria. The Division is not taking a "new position" as asserted by Parsons; rather, it is applying the statutes and regulations cited herein. Moreover, this determination does not impact "a large segment of the regulated or general public" – at most, it impacts bidders who unsuccessfully challenge specifications prior to a bid opening, who then attempt to revive those complaints after the bids are opened.

Parsons asserts that the Division's position has troubling policy implications. On the contrary, it is Parsons' preferred outcome that would have "troubling policy implications" that would undermine the public policy of placing all bidders to a given Bid Solicitation on equal footing. Allowing Parsons to lie in wait, submit a bid, and, if unsuccessful, revive its specification challenge not only runs contrary to the stated law, but would incentivize future bidders to bring forward specification challenges if only to allow them another bite at the apple after their unsuccessful bids. Despite Parsons' protestations that the Division's so-called "new position . . . runs afoul of basic judicial economy", their desired outcome would upend the Division's ability to efficiently conduct procurements for the public benefit. And, notwithstanding Parsons' claim that their concerns were "unreviewable", a bidder is allowed not only to challenge specifications, but

to raise those issues on appeal, should it so desire. What it cannot do is revive such claims after award when it has waived its right to appeal.

Accordingly, Parsons is not likely to succeed on this claim if an appeal is filed.

e. Opus' submitted Quote was responsive to the requirements of the Bid Solicitation.

Parsons summarily claims that the Division acceptance of Opus's Quote as responsive to the terms and conditions of the Bid Solicitation was error. While Parsons expresses its disagreement with the determination, it does not set forth any facts demonstrating that the Division was arbitrary, unreasonable or capricious when it determined that Opus's Quote was responsive to the requirements of the Bid Solicitation.

As discussed above, the Division's decision to award cannot be upset absent a showing that its decision was "arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole." Barrick, supra 218 N.J. at 259. Parsons has not set forth any facts, let alone credible facts, to sustain such a finding.

Accordingly, Parsons is not likely to succeed on this claim if an appeal is filed.

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 relative hardships weighs in favor of granting of a stay. The current contract for which Parsons is the incumbent vendor continues until November 5, 2022. The new Contract, which was awarded on May 20, 2022 has an effective date of August 6, 2022, which will provide the new Contractor, Opus, 90 days to assume responsibility for operating the Centralized Inspection Facilities as required by Bid Solicitation Section 3.1.2 *Existing CIFs*.

Importantly, Parsons will not lose anything to which it is entitled if the already awarded Contract is allowed to commence as expected. Parsons has at all times been aware that the end date for its current contract was November 5, 2022. That has not changed. The transition period was always to be used at the State's discretion. Therefore, Parsons had no expectation that its current contract would be extended.

Conversely, the public will benefit from the award of the contract to Opus as the NGSystem will provide for more efficient services for the State and for drivers and will be performed at a significant cost savings to the State and ultimately to taxpayers. As such, the State's and the public's interest in moving forward with the awarded Contract in order to satisfy the public purposes of procurement outweighs all of Parsons' legally cognizable interests.

Once the new contract is awarded, the State will realize cost savings due in part to the reduced inspection requirements. 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 awarded Contract, in order to satisfy the public purposes of procurement, outweighs any of Parsons' legally cognizable interests. Conversely, the public will suffer hardship if the State and Opus are unable to move forward.

III. Conclusion

Accordingly, because Parsons has not established each of the Crowe factors, the request for a stay is denied.

Sincerely,

Maurice A. Griffin
Acting Director

MAG: RUD: EEL

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