



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

CHRIS CHRISTIE
Governor

FORD M. SCUDDER
State Treasurer

KIM GUADAGNO
Lt. Governor

MAURICE A. GRIFFIN
Acting Director

November 6, 2017

Via Email [jbratspies@shermanwells.com] and USPS Regular Mail

Joshua S. Bratspies, Esq.
Sherman Wells Sylvester & Stamelman, LLP
210 Park Avenue, 2nd Floor
Florham Park, NJ 07932

Re: IMO RFP #16-X-23961 Diamond Chemical Company, Inc.
Request for a Stay

Dear Mr. Bratspies:

This letter is in response to your correspondence dated August 16, 2017, on behalf of Diamond Chemical Company, Inc. (hereinafter "Diamond"), which was received by the Division of Purchase and Property's (hereinafter "Division") Hearing Unit on August 21, 2017. In that letter, Diamond requests a stay of the Division's intended reprourement of a statewide contract for laundry chemicals pending the outcome of its appeal which was filed on or about August 16, 2017, with the Superior Court of New Jersey Appellate Division.

By way of background, the Bid Solicitation/Request for Proposal #16-X-23961 Laundry Chemicals - Statewide (hereinafter "RFP") was issued by the Division's Procurement Bureau (hereinafter "Bureau") on behalf of various State Using Agencies to solicit proposals for environmentally preferable biodegradable laundry chemicals in accordance with the requirements of Executive Order #76. RFP § 1.1 *Purpose and Intent*. Specifically, this RFP sought 12 different laundry chemicals, which were divided into three groups. Group 1 is for the Dry Chemical System (price line 1); Group 2 is for the Liquid Chemical System (price lines 2 -11); and Group 3 is for the Solid Encapsulated Detergent (price line 12). It was the intent of the Bureau to award contract(s) to the responsible bidder(s), whose proposal(s), conforming to the RFP are most advantageous to the State, price and other factors considered. RFP § 1.1 *Purpose and Intent*. The State intended to extend the contract(s) awarded to Cooperative Purchasing Program Partners. Ibid.

On July 1, 2015, five proposals received by the submission deadline were opened by the Division's Proposal Review Unit. On September 23, 2015, the Bureau issued a Notice of Intent to Award (hereinafter "NOI-1") indicating that a contract would be award to Diamond for all groups/price lines.

On October 1, 2015, the Hearing Unit received a protest from Interline Brands, Inc./SupplyWorks (hereinafter "SupplyWorks"). In that protest SupplyWorks alleged that Diamond's proposal for three of the line items was deficient for the following reasons:

- RFP Section 3.3 *Liquid Heavy Duty Alkaline Building (Price Line 3)*
SupplyWorks alleged that Diamond's proposal did not comply with the specifications because the NaOH levels set forth on the Safety Data Sheet (SDS) exceeded the levels specified in the RFP.
- RFP Section 3.4 *Detergent/Bleach Combination Liquid Laundry Detergent (Price Line 4)*
SupplyWorks alleged that Diamond's proposal did not comply with the specifications because Diamond's proposal did not conform to U.S. Department of Transportation's (DOT) regulations that require chemicals exceeding 8.0% hydrogen peroxide be classified as a rapid oxidizer and labeled as such.
- RFP Section 3.7 *Liquid Antibacterial Softener/Sanitizer (Price Line 7)*
SupplyWorks alleged that Diamond's proposal did not comply with the specifications because the product proposed by Diamond for this line item did not have a valid U.S. Environmental Protection Agency (EPA) Registration Number.

On November 25, 2015, the Division issued a final agency decision finding that Diamond's proposal for price lines 3 and 7 conformed to the requirements of the RFP. However, with respect to price line 4, from the proposal documents submitted it was unclear whether Diamond's proposed product conformed to the specifications of the RFP. Therefore, NOI-1 was rescinded and the Bureau was directed to conduct a further review and evaluation of the proposals submitted for price line 4 and request clarification from bidders as necessary.

On November 30, 2015, the Bureau wrote to Diamond requesting clarification regarding the product proposed for price line 4. Based upon the information provided in response to the request for clarification, the Bureau, in consultation with Distribution and Support Services (hereinafter "DSS"), found that Diamond's proposal for price line 4 did not conform to the RFP requirements. Because price lines 2 – 11 were to be awarded as group, even though Diamond's remaining proposed products for Group 2 conformed to the RFP requirements, Diamond was not eligible for a contract award for Group 2.

Accordingly, on December 2, 2015, the Bureau issued an amended Notice of Intent to Award (hereinafter "NOI-2") indicating that a contract would be awarded to Diamond for Group 1 (price line 1) and Group 3 (price line 12). With respect to Group 2 (price line 2 – 11) a contract would be awarded to Accses NJ/CNA (hereinafter "Accses")¹.

On December 23, 2015, Diamond submitted a protest of the NOI-2 to the Division's Hearing Unit. Specifically, Diamond claimed that its proposed product for price line 4 – Detergent/Bleach Combination Liquid Laundry Detergent, DBC 2010, conformed to the RFP requirements, and that the Bureau's determination that its proposal for price line 4 was non-responsive was in error. In addition, Diamond stated that DBC 2010 was properly labeled according to the applicable Department of Transportation regulations. With its protest, Diamond submitted a laboratory report from Stresau Laboratory, Inc. (Stresau), an independent lab that performed an analysis on Diamond's DBC 2010. In its report, Stresau concluded that based upon the testing performed, DBC 2010 was not a Division 5.1 Liquid Oxidizer as defined by Code of Federal Regulations, Title 49 or the United Nations Transport of Dangerous Goods criteria. Accordingly, DBC 2010, as proposed by Diamond, was properly classified and labeled. DSS did not dispute the results of the Stresau laboratory report or Diamond's conclusion regarding the classification or labeling of DBC 2010.

¹ In its proposal, Accses advised the Bureau that it would be partnering with SupplyWorks to provide the laundry chemicals sought in the RFP.

On August 25, 2016 the Division issued a final agency decision which concluded that based upon this independent testing and DSS' acceptance of the same, that Diamond's proposal of DBC 2010 for price line 4 was responsive to the specifications. Therefore, Diamond was eligible for a contract award for Group 2 (price lines 2 – 11). The Bureau was directed to rescind the amended NOI-2.²

Following issuance of the August 25, 2016, final agency decision, on September 1, 2016, the Bureau issued a third Notice of Intent to Award (hereinafter "NOI-3"), indicating an intent to award a contract to Diamond for all Groups. On September 30, 2016 and October 3, 2016 Accses and SupplyWorks respectively filed protests with the Division's Hearing Unit. Both protests challenged the intended contract award to Diamond. On October 11, 2016, Diamond responded to the protest submitted by SupplyWorks and on November 1, 2016, it submitted its response to the protest filed by Accses.

In connection with its review of the protests submitted by Accses and SupplyWorks, the Hearing Unit requested that the Bureau undertake a thorough review of the RFP specifications, the approved products³, and the proposals submitted. Based upon this review, the Bureau concluded that several of the approved products listed in the RFP did not correspond to the written RFP specifications. By way of example:

- Price Line 4 – Detergent/Bleach Combination Liquid Landry Detergent, the written specifications required that the product have a minimum specific gravity of 1.05. The approved brand listed in the RFP was Spartan Clothesline Fresh Oxygen Detergent #7021. Two bidders submitted proposals with the approved brand. The MSDS provided by both bidders revealed that the specific gravity of the approved brand was lower than the minimum indicated in the written specifications. Therefore, the approved brand did not conform to the written specifications.
- Price Line 6 – Liquid System Combination Fabric Softener/Sour, the written specifications required that the product have a pH between 1.5 - 2.5. The approved brand listed in the RFP was Spartan Clothesline Fresh Sour/Softener #7009. Two bidders submitted proposals with the approved brand. The MSDS provided by the bidders revealed that the pH of the approved brand was higher than the maximum pH permitted by the written specifications. I further note that when this product was tested in 2011, the pH level was found to be higher than that indicated on the MSDS submitted to the Bureau in response to the Solicitation #16-X-23961. Therefore, the approved brand did not conform to the written specifications.
- Price Line 11 – Liquid Hydrogen Peroxide (H₂O₂) Bleach, the written specifications required a Hydrogen Peroxide content of 240.0% - 29.0%. The approved brand listed in the RFP was Spartan Clothesline Fresh Xtreme Oxygen Bleach #7015. Two bidders submitted proposals with the approved brand. The MSDS provided by the bidders revealed that the Hydrogen Peroxide content of the approved brand had a range significantly larger than that permitted by the written specifications. Therefore, the approved brand did not conform to the written specifications.

² In the protest, Diamond also alleged that the Safety Data Sheets (SDS) submitted by Accses with its proposal did not conform to the applicable federal laws. Diamond requested that the intended award to the Accses for Group 2 (line items 2 – 11) be rescinded. Because Diamond's proposed product for price line 4 was found to be responsive to the specifications making it eligible for a contract award for Group 2 (price lines 2-11) the remainder of Diamond's protest allegations were not addressed.

³ Approved Product or Approved Brands listed in a RFP represent those products that have been researched and/or tested in advance of procurement to determine which suppliers, model numbers, and/or brand names conform to the specifications.

Given that at least two (2) bidders relied upon the approved brands listed in the RFP in submitting their proposal, and that the approved brands listed did not accurately reflect the written RFP specifications, the bidder playing field was unlevelled through no fault of these bidders.

Accordingly, on July 10, 2017, the Bureau issued a letter to all bidders advising it had cancelled the subject procurement and rescinded the intended contract award. The letter further advised that it was the Bureau's intent to reprocure the products sought in the RFP. In light of the Bureau's cancellation of this procurement, the Division issued two final agency decisions, dated July 11, 2017, responding to the protests received, concluding that both protests were moot.⁴

On August 21, 2017, the Division received Diamond's request for a stay of the Division's intended reprocurement of a statewide contract for laundry chemicals pending the outcome of its appeal.

A stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled...
- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).]

In consideration of Diamond's request for a stay, I have reviewed the record of this procurement, including the RFP, the proposals submitted, 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 Diamond's request for Stay. Diamond has not established that it is entitled to stay under the law; however, for the sake of completeness, I will address each of the factors here. I set forth herein the Division's final agency decision.

⁴ While not specifically referenced in the Bureau's recommendation report dated June 28, 2017, or in the July 10, 2017 cancellation letter, I note that because the proposals for the subject solicitation were received in July 2015, almost two (2) years prior to cancellation, the Bureau determined to cancel and resolicit all twelve price lines comprising the procurement rather than only those 10 price lines effected by the unlevel playing field noted above.

1. Diamond will not suffer an irreparable harm.

Diamond will not suffer irreparable harm if the stay of the Division's decision to repro cure the contract is denied. In support of its request for a stay, Diamond states that it will suffer irreparable harm if the stay is denied because absent a stay, "appellate review of the Division's action might be shut off." See, Diamond's letter p. 4. Further, Diamond asserts the Division may well re-solicit, review and consider proposal submissions and award a contract prior to its appeal being heard and resolved, if the stay is not granted. Ibid.

While it may be true that absent a stay, the Division may proceed with its repro curement, 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); see also, In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 222-223 (App. Div. 2009), citing, Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 409 (1975). The purpose of the public bidding process is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Terminal Constr. Corp. at 410.

Accordingly, the Division's Director has the authority to reject any or all bids received when s/he determines that it is in the public interest to do so. Jasper, supra, 406 N.J. Super. at 222; citing, N.J.S.A. 52:34-12. Importantly, the New Jersey Courts have recognized the broad grant of authority that the Legislature has vested with the Director, and have acknowledged that the State's public bidding laws serve to limit the scope of judicial review when a decision is challenged on appeal. Jasper, supra, 406 N.J. Super. at 222; citing, Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 548 (1966). "Generally, 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." Ibid. Here, there is a cogent and compelling reason to reject all bids and rebid this solicitation. See, In re 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 *8 (App. Div. July 2, 2010), citing, Bodies by Lembo v. Middlesex County, 286 N.J. Super. 298, 309 (App. Div. 1996) (stating "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.")

As noted in the Division's final agency decisions dated July 11, 2017, in connection with the review of the protests submitted by Accses and SupplyWorks the Hearing Unit requested that the Bureau undertake a thorough review of the RFP specifications and the submitted proposals. That review revealed that testing for five (5) of the approved brands listed in the RFP last occurred in 2011.⁵ Of those five (5) approved brands with lab reports, a review of the Safety Data Sheets submitted by SupplyWorks with its proposal reveals that four (4) of the approved brands listed did not conform with the written specifications.

Contrary to the requirements of the public bidding laws which aim to guard against favoritism and seek unfettered competition, an unlevel playing field was created as those Bidders who submitted products which had been identified as an approved brand could not be responsive to the RFP's written specifications. To cure this deficiency, the Bureau chose to cancel the subject solicitation.

I note that even if Diamond would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to permit the court to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

⁵ No lab reports could be located for the remaining five (5) approved brands listed in the RFP.

2. Diamond has the legal right to request a stay.

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 cancellation of an intended contract award. See, M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

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

Diamond has not established a reasonable probability of success on the merits. In support of its request for a stay on this point, Diamond cites to the Division's governing regulations which state in part "[f]inal 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. 17:12-3.1(b). Diamond states that because the Division's August 25, 2016, decision was a final agency decision, Accses' and SupplyWorks' only recourse was to file an appeal with the Appellate Division; and therefore, the Division should not have accepted Accses' nor SupplyWorks' protests filed in response to NOI-3.

The Division's governing regulations state in part that:

- (a) The purpose of this subchapter is to provide the procedures that govern the challenge of an action of the Director in the issuance of an advertised RFP or the award of a contract or contracts resulting from an advertised RFP as described at N.J.A.C. 17:12-2. A protest is defined as follows:
1. A timely filed challenge to a term, condition or requirement of a specification contained within an advertised RFP; or
 2. A timely filed challenge to a contract award decision made by the Director.

[N.J.A.C. 17:12-3.3(b), *emphasis added.*]

Further, the regulations advise that a protest shall be filed following the bidder's receipt of a notice of intent to award a contract. N.J.A.C. 17:12-3.3(b).

On September 1, 2016, following issuance of the August 25, 2016, final agency decision, the Bureau issued NOI-3 indicating that a contract would be awarded to Diamond. Because NOI-3 represented a "new" contract award decision by the Division, bidders were afforded the opportunity to challenge the Division's decision. Accordingly, in response to NOI-3, Accses and SupplyWorks filed protests with the Division's Hearing Unit as they were permitted to do under the governing regulations.⁶

Because the Division's governing regulations permit the filing of a protest after the issuance of a notice of intent to award, the filing and acceptance of protests subsequent to the Bureau's issuance of NOI-3 was in compliance with the Division's governing regulations. Further, as outlined above, because the approved brand list did not meet the specifications and some bidders relied upon the Bureau's representation that the products on the list met the specifications, the bidder playing field was not level. Accordingly,

⁶ I note that the filing of the protests by Diamond's competitors subsequent to the issuance of NOI-3, is similar to the tactic taken by Diamond in response to the Bureau's issuance of NOI-2. Rather than file an appeal of the November 25, 2015, final agency decision which rescinded NOI-1, Diamond instead chose to file a protest with the Division's Hearing Unit in response to NOI-2 as permitted by the Division's governing regulations.

Diamond has not established a reasonable probability of success on the merits of its appeal of the Division's decision to cancel and reprocure the Laundry Chemicals – Statewide contract.

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

Lastly, Diamond has not established that the balance of hardships weighs in favor of granting of a stay. Currently, the Laundry Chemicals – Statewide contract is expired. While Using Agencies are able to purchase laundry chemicals, they are only able to do so up to the thresholds set by the delegated purchasing authority, currently \$40,000 for State Using Agencies. This amount is significantly below the amount using agencies will need to spend on laundry chemicals; as these products are used for the populations in the State's prisons and the developmental and psychiatric institutions. The State's and the public's interest in moving forward with the reprocurement of the Laundry Chemicals – Statewide contract is significant, as both the State Using Agencies and Cooperative Purchasing Program Partners have a continuing need to purchase laundry chemicals.

Diamond has not established that the relative hardships weigh in its favor as it has not identified anything that it will lose, to which it is entitled, if the stay request is denied. Conversely, the State Using Agencies and Cooperative Purchasing Program Partners will suffer hardship if the reprocurement process does not continue as the State Using Agencies and Cooperative Purchasing Program Partners will be unable to purchase the necessary laundry chemicals once the delegated purchasing authority threshold is reached.

Based upon the foregoing, I find that Diamond has not demonstrated by clear and convincing evidence that it is entitled to a stay. Accordingly, I deny Diamond's request for stay. This is my final agency decision. Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with **NJSTART** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
C. Murphy