



State of New Jersey

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June 2, 2016

Via Email [MAponte@caunj.org] and USPS Regular Mail

Sidney Blanchard, Executive Director
Community Access Unlimited
80 West Grand Street
Elizabeth, NJ 07202-1447

Re: Request for a Stay of Award of Contract
RFP# 16-X-23964: Fiscal Intermediary and Financial Cash and Counseling Services: DHS

Dear Mr. Blanchard:

This letter is in response to your correspondence dated May 17, 2016, submitted on behalf of Community Access Unlimited (CAU) to the Division of Purchase and Property (Division). In that letter, you indicate that CAU intends to file an appeal of the Division's May 13, 2016 final agency decision (FAD) in the Superior Court of New Jersey - Appellate Division and accordingly requests a stay of the award of a contract for Solicitation # 16-X-23964: Fiscal Intermediary and Financial Cash and Counseling Services: DHS to PCG Public Partnerships, LLC (PPL).¹ In the alternative, if the contract has already been awarded, CAU requests a stay of the performance of the contract by PPL until CAU's appeal has been resolved by the Appellate Division.

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 its discretion to grant a request for stay, an agency must be guided by certain fundamental principles which must be considered:

- (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...

¹ On May 24, 2016, prior to the issuance of this decision on CAU's request for a stay, CAU filed an Emergent Application in the Superior Court of New Jersey – Appellate Division seeking a stay of the contract award.

- (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).]

At the outset, I note that CAU did not explicitly address any of the Crowe factors in its request for a stay. To the extent that CAU included information which may be used to evaluate its request for a stay under Crowe, I find as follows:

1. CAU will not suffer an irreparable harm.

CAU is the incumbent contractor, who will lose business from the State when the contract resulting from this RFP is awarded. CAU alleges that “failure to stay will result in the loss of employment for hundreds of CAU employees.” CAU has not provided any support for its claim that it will be forced to lay off any employees as a result of not being awarded this contract. I note that it is an unusual position to argue that a vendor is entitled to taxpayer funds beyond the term of the contract it won. While CAU will not reap the economic benefits of having its current contract with the State extended indefinitely pending the outcome of its appeal, and even assuming arguendo that CAU may lay off some employees, the New Jersey Courts have held that harm is generally not considered irreparable if it can be redressed with monetary damages. Crowe, supra, 90 N.J. at 132-33. In addition, I note that 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). Here, the public has a great interest in ensuring that the fiscal management and financial counseling services sought under this contract are provided to those persons enrolled in the various DHS programs. These DHS programs promote and provide participant-directed care to the elderly, individuals with disabilities, the medically needy, and veterans. However, even if the court were to find that CAU 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.

2. CAU has the legal right to challenge the award of the contract.

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

CAU has not established a reasonable probability of success on the merits. 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). Firstly, in this case, CAU alleges that the Division had “numerous significant material misunderstandings regarding CAU’s response to the RFP, CAU’s protest and the very programs that are the subject of the RFP itself.” Specifically, CAU alleges that the Division misunderstands the requirements of the current contract and the subject solicitation. CAU has offered no factual support for this allegation and clearly misunderstands the State procurement process. The Division relied heavily upon the Department of Human Services, the very agency that utilizes the current contract and that will utilize this new contract, in determining the RFP requirements and the evaluation of all proposals to meet the needs of its evolving programs. Secondly, CAU claims that the Division’s acceptance of the PPL’s proposal, and specifically those proposal responses where PPL expressed its intent to comply with the RFP § 3.0 *Scope of Work* (SOW), is contrary to the law. As noted in the Division’s FAD, RFP § 3.0 contained requirements for the

Contractor – defined in the RFP as “[t]he bidder awarded a contract resulting from this RFP.” (RFP 2.1 *General Definitions*.) Therefore, the requirements set forth in RFP § 3.0 are not mandatory requirements of a bidder, but instead are requirements for the contractor after the contract has been awarded. Further, the RFP requires that there be a contract implementation period during which the awardee will have time satisfy all of the RFP §3.0 contractor requirements. See, RFP §3.1.1 *Contract Implementation Period*.²

I note that while CAU’s proposal did respond to the proposal requirements, as indicated in the Recommendation Report:

There were a number of reasons the firm was in second place technically: (1) how the proposal presented the organizational structure for the contract specific roles was unclear; (2) while its contract experience was New Jersey-related, the proposal did not demonstrate the firm has the ability to simultaneously manage multiple programs (i.e., DDD, DDS, and DOAS)-currently CAU manages portions of only one DHS program at a time; and, finally, (3) its overall approach lacked IT functionality to be associated with specific VF/ EA tasks.

In evaluating a reasonable probability of success on the merits, the Appellate Division 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 v State, 218 N.J. 247, 259 (2014) (citing In re Stallworth, 208 N.J. 182, 194 (2011).) That standard is applicable on appellate review of an administrative agency’s actions regardless of whether that action followed a quasi-adjudicative hearing or, as in this case, an assessment of the relevant submissions and standards by an administrative head. Id.

In applying this standard of review, “an appellate court does not substitute its judgment . . . for that of [the] administrative agency.” Id. at 260, citing, In re Young, 202 N.J. 50, 70 (2010) (internal quotation marks omitted). Instead, a court’s 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). CAU has not set forth any facts to demonstrate that the Division’s evaluation of its proposal was arbitrary, unreasonable or capricious.

Next I note that CAU has not set forth any facts demonstrating that the Division was arbitrary, unreasonable or capricious when it determined that PPL had satisfied all requirements necessary at the time of bid and would be required to satisfy RFP §3.0 only at such a time as PPL became the contractor, rather than at the time the bid was evaluated. Nor has CCAU presented any evidence that the Procurement Bureau conducted the procurement or evaluation process in an arbitrary, unreasonable or capricious way.

In support of its request for a stay, CAU cites to an unpublished Appellate Division decision, In re: Request for Letters of Interest for the Transfer of Operation for Eleven (11) Existing Community

² The Procurement Bureau’s inclusion of a contract implementation period is a standard practice of providing a level playing field between the incumbent contractor, that is almost certain to be able to perform immediately after contract award in light of performing under the prior contract, and potential bidders that may need to hire staff and make other preparations in order to be ready to undertake a large scope of work, such as in this contract.

Residential (GH) and Two (2) Day Programs, A-4705-13T1, decided May 6, 2016. That decision does not support CAU's request for a stay. There, the Appellate Division remanded the matter to the Division of Developmental Disabilities (DDD) for a re-bid for the services sought in a DDD procurement, which was conducted outside of the Treasury process, because it found that DDD, in conducting its evaluation of the proposals received, grossly abused its discretion in evaluating applicants for the contracts using different evaluation methods. In contrast, here, as noted in the Division's FAD, all proposals received by the Division in response to the subject procurement were evaluated using the same evaluation criteria and scoring methodology and in accordance with Treasury's regulations. (See Division's May 13, 2016 FAD, p. 43.)

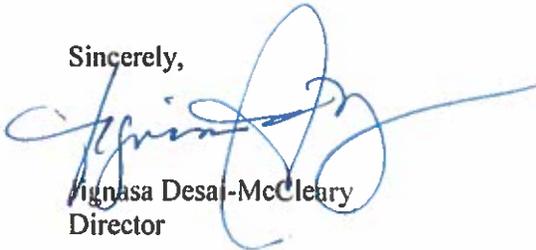
Therefore, I find that CAU will not be successful with respect to the arguments raised on appeal.

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

As to the balance of the relative hardships, CAU has not established that the balance of equities weighs in its favor warranting the granting of a stay. Here, this new contract combines three current contracts, which will allow the entire Department of Human Services to proceed with a new fiscal model, which will better implement self-directed services for individuals with disabilities. The Agency's and individuals' need for the services to be provided under the new model from the combined three contracts outweighs CAU's limited interest in maintaining its current contract to provide services to the one program covered by its current contract. CAU will not lose anything to which it is entitled if the contract is awarded in accordance with the NOI. Conversely, the public will benefit from the award of the new contract supporting a newly designed and combined program to PPL. As such, the State's and the public's interest in moving forward with the contract award in order to satisfy the public purposes of the procurement outweighs all of CAU's legally cognizable interests.

Accordingly, because CAU has not satisfied the Crowe factors, the request for a stay of the award of a contract for the subject solicitation, pending the outcome of the appeal of the Division's FAD, is denied.

Sincerely,



Ignasa Desai-McCleary
Director

JD-M: RUD

c: Lisa D. Taylor, Esq.
P. Michaels
L. Spildener
S. Fletcher