



## State of New Jersey

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March 28, 2017

Via Electronic Mail [PPJosephson@duanemorris.com] and USPS Regular Mail

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Re: Request for a Reconsideration and for a Stay of Award of Contract  
RFP#: 16-X-23676: Accounting and Billing Services: MVC Surcharge System

Dear Mr. Josephson:

This letter is in response to your correspondence dated February 23, 2017, submitted on behalf of Xerox State & Local Solutions, Inc. (Xerox) to the Division of Purchase and Property (Division). In that letter Xerox requests that the Division reconsider its February 17, 2017 final agency decision sustaining the March 15, 2016 NOI. Xerox requests that the Division either award the contract to Xerox or remand the matter for a hearing. In the alternative, Xerox requests a stay of the contract award to Gila, LLC d/b/a Municipal Services Bureau (MSB) pending appeal.

I have reviewed the record of this procurement, including Xerox's current request for reconsideration and in the alternative for a stay, Xerox's original protest letters, the Request for Proposal and related documents, relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of Xerox's requests.

By way of background, the Request for Proposal (RFP) was issued by the Division's Procurement Bureau (Bureau) on June 12, 2015 on behalf of the Division of Revenue and Enterprise Services (DORES) and the Motor Vehicle Commission (MVC). The RFP sought proposals to engage a Contractor to develop a new Surcharge Billing and Collection System and to provide surcharge billing services including but not limited to the following elements: surcharge billings, collections, reconciliation and disbursement of payments, handling telephone inquiries and correspondence, and conducting collection activities. RFP § 1.1 *Purpose and Intent*. The intent of the RFP was to award a contract to the bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. Ibid.

On October 15, 2015, two proposals received by the submission deadline were opened by the Proposal Review Unit and subsequently forwarded to the Bureau. Both proposals were then sent to the Evaluation Committee (Committee) for review and consideration. The Committee was comprised of six voting members including representatives from the New Jersey Office of Information Technology (OIT), MVC, DORES, and the Division. The Committee also included subject matter experts from MVC, DORES, the Division and OIT who served as technical advisors to the Committee.

The Committee was responsible for performing a technical review of the proposals received using the criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria*. The technical scores were based upon an independent reading of the proposals by each Committee member and the results of discussions and deliberations conducted by the full Committee.

During the evaluation, it became necessary to clarify certain statements contained within the proposals received from MSB and Xerox as permitted by RFP § 6.6 *Oral Presentation and/or Clarification of Proposal*. Specifically, in reviewing MSB's proposal, the Bureau found that there was an ambiguity between MSB's price sheet and its narrative proposal. Therefore, the Bureau sought to clarify MSB's intent with respect to its proposal pricing.<sup>1</sup>

After the proposal evaluation was complete, on March 15, 2016, the Division issued the NOI advising the bidders that it was the State's intent to award the contract to MSB. Xerox's March 30 protest letter and May 16 supplemental protest letter followed. On July 18, 2016, MSB submitted its response to the protest. On February 17, 2017, the Division issued its final agency decision regarding the merits of Xerox's protest. This request for reconsideration and in the alternative for a stay of the contract award followed.<sup>2</sup>

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 shall be guided by certain fundamental principles, all of 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...
- (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).]

With respect to each of the Crowe factors related to Xerox's stay request and its request for reconsideration, I find as follows:

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<sup>1</sup> The Bureau also sought to clarify MSB's proposal with respect to its maintenance of the STARS program; credit card payments; non-recurring costs; and, new system development costs. Bureau's November 16, 2015 clarification letter to MSB. In addition, the Bureau sought clarification of Xerox's proposal with respect to its interface requirements; document imaging and management; data confidentiality; contract schedule; and maintenance of the STARS system. Bureau's December 3, 2015 clarification letter to Xerox and Bureau's February 25, 2016 clarification letter to Xerox.

<sup>2</sup> Xerox's request for reconsideration is addressed in Point III below.

**I. Xerox will not suffer an irreparable harm.**

With respect to the first Crowe factor, Xerox alleges that it will suffer irreparable harm because under the applicable law it cannot recover monetary damages as permitting monetary damages would twice penalize the taxpayers; therefore, the stay should be granted. Admittedly, Xerox is not entitled to monetary damages under the law; therefore, Xerox must demonstrate irreparable harm by other means.

In further support of its belief that it will suffer irreparable harm, Xerox asserts that as the incumbent contractor it “has expended considerable time and resources to ensure that it satisfactorily provided the services to the State...by depriving [it] of this opportunity and awarding the contract to MSB, Xerox would not merely be deprived of the monetary benefit of this contract award for this RFP, but would also lose the time, experience, resources, and personnel it has invested, allocated, and contributed to this project over the previous contract period.” Xerox’s February 23, 2017 Reconsideration letter, p. 11. Undoubtedly, Xerox who is the incumbent contractor, will lose business from the State when the contract resulting from this RFP is awarded. 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 Xerox expended time and resources to fulfill its contractual obligations to the State under the current contract, for which it was compensated by the State, is insufficient to justify staying the contract award for the instant solicitation.

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). The Division does not find that Xerox has suffered irreparable injury. The public interest however is greatly effected as the award of this contract will bring about substantial savings for these services, which inure to the benefit of the public. However, even if the court were to find that Xerox 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.

**II. Xerox 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).

**III. Xerox has not demonstrated a reasonable probability of success on the merits.**

Xerox 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).

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 was 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). With this standard of review in mind, it is unlikely that Xerox will succeed on the merits on appeal. Xerox has not set forth any facts demonstrating that the Division’s final agency decision was arbitrary, unreasonable or capricious, nor has it presented any evidence that the Bureau conducted the procurement or evaluation process in an arbitrary, unreasonable or capricious way.

Xerox has additionally requested that the Division reconsider the allegations of its protest and the Division’s final agency decision. Reconsideration however,

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

Alternatively, if a litigant wishes to bring new or additional information to the [tribunal’s] attention which it could not have provided on the first application, the [tribunal] should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [tribunal] must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), citing, D’Atria v. D’Atria, N.J. Super. 392, 402-402 (Ch. Div. 1990)(stating “[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.)]

In requesting reconsideration, Xerox has not brought to light any new or additional information which was not included in its original protest. Rather, Xerox simply disagrees with the Division’s decision, and asks that the Division reconsider the decision based upon the same information and arguments presented in the original protest. While Xerox may not be entitled to reconsideration under the law, for the sake of completeness I will address each of Xerox’s arguments.<sup>3</sup>

**A. MSB was not permitted to change its proposal pricing.**

Xerox alleges that MSB’s proposal price deviated from the requirements of the RFP in that “MSB failed to include their full pricing detail, and instead was permitted to change its pricing by shifting costs to be paid by the State to [drivers].” (Xerox February 23, 2017 letter p. 4.) Xerox’s allegation is in error.

As noted in the Division’s final agency decision, MSB’s proposal stated “[u]nlike Texas’ Surcharge Program, mailing costs are entirely pass-through for the NJMVC Surcharge Program, for which the State

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<sup>3</sup> Additionally, the Division’s governing regulations do not contemplate requests for reconsideration. Rather, upon issuance of the final agency decision, the appropriate course of action would be to file an appeal with the Superior Court Appellate Division. N.J.A.C. 17:12-3.1 (b).

compensates MSB for printing and postage expenses.” (MSB’s Proposal dated September 8, 2015, p. 8-9.) MSB’s price sheet however did not list any per unit or percentage costs associated with the printing and mailing of notices and correspondence indicating that these fees were incorporated into the proposal price set forth on the price sheet. As such, a discrepancy between the narrative proposal and proposal pricing existed. Accordingly, as permitted by the RFP and the applicable case law, the Bureau properly requested that MSB clarify the terms of the submitted pricing in its bid. In response to the Bureau’s clarification requests MSB confirmed that its proposal price sheet was accurate, and that its proposal price “is inclusive of all costs and addresses all requirements of the RFP.” MSB’s November 27, 2015 Response to Supplemental Clarification. Contrary to Xerox’s assertion, MSB did not change its proposal price. Compare to, In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995).

Additionally, the situation here can be analogized to that of an ‘unbalanced bid’ where a bidder submits a nominal price for some work and enhanced prices for other work. Turner Construction Company v. New Jersey Transit Corporation, 296 N.J. Super. 530, 537 (App. Div. 1997). The Courts have concluded that “reasonable unbalancing is perfectly proper.” Id. at 538, citing, Riverland Construction Co. v. Lombardo Contracting Co., 154 N.J. Super. 42 (App. Div. 1977). “[T]he submission of an unbalanced bid standing alone does not invalidate the bid.” Turner, supra, 296 N.J. Super. at 538; citing, Frank Stomato v. City of New Brunswick, 20 N.J. Super. 340, 344 (App. Div. 1952). In Turner, the court held

The submission of a zero bid is similar to that of a nominal penny bid. A nominal bid is not inherently evil or destructive of fair and competitive bidding. Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors

As we stated in Riverland

[i]n the absence of a factual showing that such a decision subverts the principles of fair and competitive bidding there is no reason to invalidate the resulting bid. The pejorative connotation of the phrase ‘unbalanced bid’ comes into play only when the nominal bid on one item is unbalanced because of an excessive bid on other items, or because of other elements pointing to fraud, collusion, unfair restriction of competition or other substantial irregularity. Reasonable unbalancing is perfectly proper.

[Turner, supra, 296 N.J. Super. at 538, *internal quotes and citations omitted.*]

Here, in reviewing the proposal and pricing submitted, I conclude that there is no evidence of collusion or fraudulent conduct by MSB or the Bureau. Further, there is no evidence of any substantial irregularity affecting fair and competitive bidding.<sup>4</sup>

Moreover, as noted in the Division’s final agency decision, the RFP did not request that a bidder supply the underlying fee structure used to calculate the price proposed. The RFP requested that bidder’s propose a price to the State that encompassed all of the services sought by the RFP. In making the clarification request, what the Bureau sought, and what MSB confirmed, was that the proposal price as originally submitted on the price sheet was inclusive of all costs and addressed all requirements of the RFP.

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<sup>4</sup> I note that Xerox also submitted a zero bid for certain items on its price sheet - Returned Mail Processing and Document & Image Management; and presumably incorporated those costs into the flat rate to be charged to the State.

Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

**B. The Bureau properly removed members of the Evaluation Committee named by Xerox as references.**

On reconsideration Xerox alleges that Bureau's basis for disqualification of two members of the Committee was wrong as a matter of law. Xerox states there "is no categorical rule, policy, or case law suggesting that a contract manager cannot participate and vote on an evaluation committee simply because s/he has worked with an incumbent vendor who is one of the bidders." Xerox's February 23, 2017 Reconsideration letter, p. 7.

As noted in the Division's final agency decision, upon receipt of the proposals, the Bureau noted that Xerox had named as references the DORES Chief of Staff and two (2) other Committee voting members, Frank Patrone (Patrone) from MVC and Dario DaCosta (DaCosta), the State Contract Manager (SCM) from DORES. So as to prevent any appearance of impropriety, to protect the integrity of the procurement process, and guard against any potential conflict of interest or potential allegation of favoritism or bias, the Bureau determined that both MVC and DORES' Committee voting members, who had been specifically named as references in Xerox's proposal, should be removed from the Committee and replaced with qualified representatives from both of those agencies. Accordingly, an alternate member from DORES was selected in DaCosta's place and an alternate member from MVC was selected in Patrone's place.<sup>5</sup>

While there may not be a "categorical rule, policy, or case law" which precludes a bidder's reference from participating on an evaluation committee, the Division must always be aware of the public's interest in State procurements and possible conflicts of interest, and should take the appropriate actions to insulate the procurement process from those potential conflicts. See generally, Keyes Martin & Co. v. Director, Div. of Purch. & Prop., 99 N.J. 244, 260-64 (1985). Moreover, the Division's governing regulations require that "members of evaluation committees shall conduct evaluations of proposals objectively, impartially, and with propriety. The Director retains the discretion to reject proposed members, remove sitting members and add additional members to an evaluation committee." N.J.A.C. 17:12-2.7(a)(1).

As noted above, upon receipt of the proposals the Bureau became aware that Xerox had listed two Committee voting members as references. No other bidder had done so. Therefore, in an effort to ensure that the public's perception that the evaluation was conducted objectively, impartially, and with propriety and to protect the integrity of the procurement process by guarding against any potential conflict of interest or any potential allegation of favoritism or bias, the Bureau determined that both the MVC and DORES' Committee voting members, who had been specifically named as references in Xerox's proposal, should be removed from the Committee. Accordingly, as permitted by the regulations, the Director removed and replaced the two Committee members. N.J.A.C. 17:12-2.7(a)(1). Here, the Bureau perceived a potential conflict of interest, where evaluators were listed as a references for one of the bidders, and took steps to rectify the issue.

Xerox additionally argues that the Committee commenced its work without the "State Contract Manager who has, and will have, primary responsibility for the contract performance, if not the project." Therefore, Xerox alleges that the Committee was deprived of having the "State employee with both the past experience and future responsibility for the contracting relationship [which] is a clear abuse of the "sound business judgment." Xerox's February 23, 2017 Reconsideration letter, p. 7-8.

There is no requirement in the law, the RFP, or other procurement process, that the State Contract Manager (SCM) be a member of the Committee. Nevertheless, DaCosta was replaced by the former SCM

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<sup>5</sup> Additionally, three non-voting technical advisors from MVC were added to the Committee along with one voting and three non-voting members from OIT.

who had served as the SCM for several years and had more experience and knowledge regarding the MVC Surcharge program and STARS than DaCosta, who had only recently been appointed to the position. Therefore, to the extent Xerox claims that the absence of the current SCM deprived the Committee of some necessary expertise, any such argument is without merit.

Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

**C. The Evaluation Committee considered all of the information provided by Xerox's references.**

As it did on its initial protest, Xerox alleges that the Committee disregarded the highly positive statements from its State references, specifically by DORES staff, and that the Committee failed to contact its out-of-state references asserting that its listed references "did not receive clear and proper inquiries concerning Xerox's performance." Xerox's February 23, 2017 Reconsideration letter, p. 8; Xerox's May 16, 2016 Supplemental Protest letter, p. 6-7.

As noted in the Division's final agency decision, the Committee received both positive and negative feedback from Xerox's state references. A review of the Committee's reference questionnaire reveals that both Patrone and DaCosta gave positive and negative feedback to the Committee. Xerox's May 16, 2016 protest, Exhibit D. In response to the Committee's reference questionnaire, Patrone and DaCosta stated "up until recently there have not been issues," "[they] have been responsive up until the last few months," "fixes (band aid) put in place for the time being," "[n]ot being fixed the way it should be fixed" and "weaknesses are dealing with 3<sup>rd</sup> party vendors, especially in last few months with card issues."<sup>6</sup> Responses to Vendor Reference Questions, November 16, 2015. The Committee Report reflects this information stating, "the reference reported that Xerox was responsive with issues or requests; [but] there have been issues with credit card processing that continue to go unanswered; and, that Xerox's knowledge of the State's Surcharge Program make them easy to work with since they know the system so well." Committee Report, p. 7.

With respect to Xerox's out-of-state references, the Arizona Supreme Court and the Philadelphia Municipal Court, the Committee made diligent efforts to contact each of them; however, neither was responsive to the Committee's request for information. As noted in the final agency decision, on November 12, 2015, the Committee emailed questions to Ms. Weigand of the Arizona Supreme Court requesting information regarding Xerox's contract with the State of Arizona. Ibid. On November 23, 2014, the Committee called Ms. Weigand and followed-up with a second email containing the Committee's questions which sought information related to Xerox's contract with Arizona. Ms. Weigand responded to the Committee's email stating that she would reply to the email with responses to the questionnaire ASAP. Ibid. On November 24, 2015, a reminder email was sent to Ms. Weigand; however, no response was received. Ibid.

In addition, on November 13, 2015, the Committee contacted Mr. Hassett, the Deputy Court Administrator for the Philadelphia Municipal Court, who had been listed as a reference in Xerox's proposal. Mr. Hassett stated that he was surprised to learn that he was listed as a reference by Xerox. Mr. Hassett requested that the questions be emailed to him as he needed to obtain approval from the Municipal Court before he acted as reference. On November 13, 2015, the Committee emailed the questions to Mr. Hassett. Ibid. A follow-up email was sent on November 17, 2015; however, no response was received. Ibid.

In its request for reconsideration as it did in its protest, Xerox alleges that the Division's final agency decision disregards its proffer that its references either were not contacted by the Committee or that

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<sup>6</sup> The feedback from Xerox's State references was limited to Xerox's recent contract performance as neither Patrone nor DaCosta worked on the contract when the Vision System or the STARS program was first implemented by MVC. Therefore, the references could only provide information which was limited to Xerox's current contract.



the Committee did not send out the reference questionnaire. Xerox states that its references are prepared to confirm this fact. However, despite having raised this argument in its original protest and on reconsideration, Xerox has failed to provide any certification or documentation to support its proffer. On the other hand, the record of this procurement reveals that the Bureau made phone calls and sent emails to Xerox's listed references that went unanswered. It is the bidder's responsibility, not the Bureau's to ensure that references are willing and able to respond.

Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

**D. The Committee did not make an initial finding that Xerox's proposal was superior to MSB's.**

Allegedly relying upon statements contained in the Requirements Outline, Xerox claims that the Committee initially found that its proposal was 'far superior' to that of MSB. However, with respect to this argument, in its request for reconsideration Xerox concedes that the Requirements Outline should not be viewed as a final evaluation. Xerox's February 23, 2017 Reconsideration letter, p. 9. Xerox seems to agree the Requirements Outline

is a deliberative tool that contains only preliminary cursory notes of the consultant and reflects only some comments made by Committee members. The Requirements Outline does not reflect the comprehensive and complete technical analysis, discussions and conclusions of the Committee as a result of the Committee's full discussions and deliberations.

[February 17, 2017 Final Agency Decision, p. 14.]

Despite its agreement that the Requirements Outline should not be viewed as the final evaluation, Xerox claims that "any review of the evaluators' comments in the Requirements Outline reveal a fundamentally different picture from that reflected in the Evaluation Report or scoring sheets." Xerox's February 23, 2017 Reconsideration letter, p. 9. However, as noted in the Division's final agency decision, a review of the Committee Report with the Requirements Outline reveals that the cursory comments contained in the Requirements Outline are consistent with and reflected in the Committee Report. To the extent that any comments contained in the Requirements Outline may be consistent or inconsistent with the comments contained in the Committee Report, I note that the Requirements Outline is a deliberative tool that contains only preliminary cursory notes of the consultant and reflects only some comments made by Committee members. The Requirements Outline does not reflect the comprehensive and complete technical analysis, discussions and conclusions of the Committee as a result of the Committee's full discussions and deliberations. Rather, the final result and recommendation of the Committee, based upon its full discussions and deliberations, are incorporated into Committee's scoring and the Committee's Report.

Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

**E. The Division's financial analysis was conducted fairly and in accordance with the applicable laws.**

Xerox alleges that MSB's financial capacity to perform the work required under this contract is inadequate compared to the size of the contract sought by the State. Xerox also alleges that the Bureau did not properly evaluate MSB's finances in reviewing the proposal. Xerox's May 16, 2016, Supplemental Protest Letter, p. 12.

As raised in its initial protest, Xerox claims that the Division's financial review did not consider MSB's relative size and financial capacity with its ability to absorb the costs of the mailings associated with



the contract work. As it did before, Xerox contends that if the State proceeds with awarding a contract to MSB, there is a “substantial risk that MSB will not be able to bear these costs, that MSB will dramatically change its level of effort to match the reduction in contract revenues, or that MSB will quickly seek change orders to make up for this significant revenue gap.” Xerox’s February 23, 2017 Reconsideration letter, p. 9; Xerox’s May 16, 2016, Supplemental Protest Letter, p. 13.

Xerox has provided no support for its belief that MSB does not have the financial capacity and capability to perform the contractual work, other than its speculation that MSB cannot absorb “the \$20 million cost of notices, mail and card processing charges.” As previously noted with respect to the mailing and printing costs MSB can choose to utilize other less costly methods for mailing notices rather than the first class mail currently utilized by Xerox. Additionally, the soft costs associated with creating the POINT system proposed by MSB have already been incurred by MSB as the POINT systems was developed and is in use by the State of Texas.

RFP § 4.4.4.6 *Financial Capability of the Bidder* states in part:

[i]n order to provide the State with the ability to judge the Bidder’s financial capacity and capabilities to undertake and successfully complete the contract, the Bidder should submit certified financial statements which include a balance sheet, income statement and statement of cash flow, and all applicable notes for the most recent calendar year or the Bidder’s most recent fiscal year.

Therefore, in order to determine whether MSB has the financial capacity and capability to successfully complete all of the contract work, the Bureau’s financial analyst reviewed the financial statements provided by MSB detailing the earnings, liabilities, return on equity and other newly awarded contracts and concluded that MSB is financially sound so as to meet the requirements of this solicitation. There is no need to address Xerox’s speculation about the financial impact to MSB of “absorbing” the mailing costs because, again, it is nothing more than speculation.

Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

**F. The extension of the proposal submission deadline was in accordance with the applicable laws.**

In its request for reconsideration, Xerox admits that the extension of the proposal submission deadline “demonstrates nothing nefarious.” However, it alleges that “given the [Bureau’s] willingness to excuse a material deficiency of MSB’s proposal and other curious departures...is worthy of further inquiry.” Xerox’s February 23, 2017 Reconsideration letter, p. 10.

As noted in the Division’s final agency decision, this procurement was advertised and available for download on June 12, 2015, with bidder questions originally due to be submitted to the Bureau by July 2, 2015. On July 2, 2015, prior to the close of the question and answer (Q&A) period, an error with the eBid system’s electronic Q&A occurred. The error was discovered when Xerox wrote to DPP eSupport (esupport@treas.nj.gov), which is maintained by DORES, advising that it was unable to upload questions to the website. DORES then contacted the Division regarding the issues. The Bureau determined that the appropriate course of action was to extend the electronic Q&A period for all potential bidders – an addendum was posted to that effect. On August 7, 2015, the Bureau posted Addendum #2 to respond to bidder questions, modify the price sheet and the RFP, and to extend the proposal opening deadline from August 13, 2015 to September 8, 2015. The extension of the proposal submission deadline allowed potential bidders to incorporate the revised information into their proposals.

On August 24, 2015, Addendum #3 was issued to modify the RFP to conform its language to the requirements of Title 15 of the New Jersey Administrative Code. Again, in order to allow all potential

bidders sufficient time to address changes to the RFP in their respective proposals, the proposal submission deadline was extended to September 10, 2015. Subsequently, on September 8, 2015, DPP eSupport received an email from a potential bidder seeking a clarification regarding the revised price sheet. In response to the question, a Special Notice was posted along with Addendum #4. With the posting of Addendum #4 which modified the price sheet, the Bureau permitted a second Q&A period through September 16, 2015 and extended the proposal submission deadline to October 7, 2015. On September 15, 2015, DORES notified the Bureau that there were again issues with the eBid system's electronic Q&A. Accordingly, Addendum #5 was issued to extend the Q&A period to September 25, 2015, and to extend the proposal submission deadline to October 15, 2015.

Based upon my re-review of the history of this procurement, there was nothing "nefarious" in the Bureau's extension of the proposal submission deadline. Accordingly, Xerox is unlikely to succeed on appeal with respect to this argument.

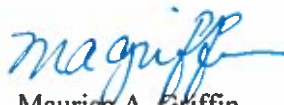
**IV. The balance of the relative hardship weighs in favor of denying the request for a stay.**

As to the balance of the relative hardships, Xerox has not established that the balance of equities weighs in favor of granting the stay. The current contract for which Xerox is the incumbent vendor continues until April 2017. Upon contract award, the new vendor, MSB will begin its mobilization process and commence the transfer of the maintenance of the current STARS system, and also commence work on the new surcharge system.

Moreover, Xerox 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 contract to MSB as the new surcharge billing and collection system will provide for more efficient services for the State and for drivers and will be performed at a significant cost savings to the State. 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 procurement outweighs all of Xerox's legally cognizable interests.

Based upon the foregoing, I find no reason to disturb the February 17, 2017 final agency decision which sustained the March 15, 2016 NOI. This is my final agency decision with respect to Xerox's request for reconsideration. In addition, I conclude that Xerox has not satisfied the Crowe factors necessary for a stay of the award of a contract for the subject solicitation and therefore deny Xerox's request for a stay.

Sincerely,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: P. MacMeekin  
C. Brennan  
B. Cummings