



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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April 21, 2023

Via Electronic Mail maeve.cannon@stevenslee.com

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Re: Protest of Contract Cancellation
Master Blanket P.O. #22-GNSV2-28430
Appraisal Services for New Jersey Department of Environmental Protection

Dear Ms. Cannon:

This final agency decision is in response to your letter dated March 24, 2023, regarding Master Blanket P.O. #22-GNSV2-28430 - Appraisal Services for New Jersey Department of Environmental Protection (the "Curran Contract") which was received by the Division of Purchase and Property's (the "Division") Hearing Unit. In that letter, Curran Realty Advisors, LLC, ("Curran Realty") protests the Department of Environmental Protection's ("DEP") decision to terminate the Curran Contract, communicated by a letter from the Division on March 7, 2023. Curran Realty further requests an in-person hearing, as well as discovery, regarding the same.

BACKGROUND

The New Jersey Department of Environmental Protection is the State agency in New Jersey charged with the mission of protecting the air, waters, land, and natural and historic resources of the State to ensure continued public benefit. The Green Acres Program operates within the DEP to achieve, in partnership with others, a system of interconnected open spaces, whose protection will preserve and enhance New Jersey's natural environment and its historic, scenic, and recreational resources for public use and enjoyment. The Blue Acres Program is administered by the Green Acres Program to acquire flood-prone properties for open space preservation or floodplain protection including moving residents out of harm's way.

The DEP utilizes real estate appraisal services on an as-needed basis for a variety of purposes. All appraisals must be performed in conformance with the current Uniform Standards of Professional Appraisal Practice ("USPAP") standards at the time of task engagement. DEP Green Acres Program and Blue Acres Program tasks, including Appraisal Updates, must be performed in conformance with the version of the Green Acres or Blue Acres Appraisal Requirements on the DEP website at the time of task engagement and specific appraisal task. These appraisal services are an integral part of New Jersey's program, and DEP

utilizes real estate appraisal services on an as needed basis for a variety of purposes, including, but not limited to:

- A. Acquisition of properties for open space preservation or floodplain protection;
- B. Determination of fair market rent;
- C. Settlement negotiations; and
- D. Determination of before and after value of easements/purchase of development easements.

The DEP's appraisers are selected as part of a public procurement process. Part of this process, as announced in Bid Solicitation Section 4.4.1.1.3, *New Jersey Business Ethics Guide Certification*, requires a bidder submitting a Quote to sign the Bid Solicitation Offer and Acceptance Page, which certifies that the bidder has complied with all applicable laws and regulations governing the provision of State goods and services, including the Conflicts of Interest Law, N.J.S.A. 52:13D-12 to 28.

PROCEDURAL HISTORY OF THE CURRAN CONTRACT

By way of background, on July 30, 2021, the Bureau issued the Bid Solicitation for T2957 on behalf of the DEP for Real Estate Appraisal services. The purpose of the Bid Solicitation was to solicit Quotes from qualified New Jersey State Certified General Real Estate Appraisers (SCGREAs) capable of performing real estate appraisals for DEP in connection with the acquisition of properties as open space preservation or flood plain protection by the State of New Jersey (State). Bid Solicitation Section 1.1 *Purpose and Intent*. It was the State's intent to award multiple Master Blanket Purchase Orders (Blanket P.O.s) in each region to those responsible Bidders whose Quotes, conforming to the Bid Solicitation, are most advantageous to the State, price and other factors considered. *Id.*

Critically, the bidding community was cautioned that this "new Bid Solicitation addresses current requirements", so Bidders "should not rely upon or use data from the prior Blanket P.O." Bid Solicitation Section 1.2 *Background*.

Potential Bidders were permitted to submit questions to the Bureau using the NJSTART eProcurement system, by 2:00 pm Eastern Time on August 18, 2021. See Bid Solicitation Section 1.3.1, Electronic Question and Answer Period. Answers to the questions submitted during the Electronic Q&A period were posted on the NJSTART eProcurement website by way of Bid Amendment #1 on September 1, 2021, which also alerted prospective Bidders that a Revised State-Supplied Price Sheet was posted. On September 23, 2021, the Bureau issued Bid Amendment #3, which reiterated to Bidders the availability of the Revised State-Supplied Price Sheet, and clarified that all Bidders "must submit the Revised State-Supplied Price Sheet with its Quote." See Bid Amendment #3.

On October 7, 2021, the Division's Proposal Review Unit opened twenty-four (24) Quotes which were received by the submission deadline of 2:00 pm Eastern Time. After conducting a review of the Quotes received, and as indicated in the August 31, 2022, Recommendation Report, the Bureau determined that three bidders' Quotes were non-responsive for three different reasons: one bidder failed to provide the required Revised State Supplied Price Sheet for the current Bid Solicitation, and instead submitted the State Supplied Price Sheet from Bid Solicitation #19DPP00335; one bidder failed to provide requested financial information as required by the Bid Solicitation; and one bidder provided incorrect pricing on its State Supplied Price Sheet. A fourth bidder provided a partially responsive Quote by failing to include pricing for all price lines in the Northern Region. *August 31, 2022, Recommendation Report, p. 3-4*. The remaining proposals were forwarded to the Bureau for evaluation. On August 31, 2022, the Bureau recommended that a Contract be awarded to Curran Realty and other responsive bidders for the three regions established in the Bid Solicitation.

On September 2, 2022, the Bureau issued the Notice of Intent to award ("NOI") advising all bidders of the State's intent to award a Contract to Curran Realty and the other advertised bidders. On September 6, 2022, a non-responsive bidder submitted a protest of the issuance of the NOI. The protest challenged the determination that the bidder's proposal was non-responsive for failing to provide pricing for "Appraisal Services" in three (3) Regions, and also did not submit pricing for "Other Appraisal Services", as required by Bid Solicitation Section 3.6, nor for "Testimony and Litigation Support", as required by Bid Solicitation Section 3.7, in any Region. On October 7, 2022, the Division issued a final agency decision which upheld the Bureau's issuance of the September 2, 2022 NOI.

On September 2, 2022, the Bureau awarded the contract to Curran Realty with an effective date of December 1, 2022. On or about December 8, 2022, DEP asked the Bureau if a conflict of interest exists when an awarded vendor is a former employee of DEP. The Bureau advised that DEP should contact its Ethics Liaison Officer with the details regarding the contract and the former employee's involvement with the awarded contract.

Then, by email to the Bureau dated January 31, 2023, the Bureau Chief for Green Acres Flood Buyout Implementation & State Land Acquisition Program, NJDEP Green Acres Program, advised the Bureau that the State Ethics Commission provided a staff opinion that Ms. Curran would violate N.J.S.A. 52:13D-17 if Ms. Curran or Curran Realty provided services on the T2957 contract based on her substantial and direct involvement with the development of the Bid Solicitation. Thus, DEP determined that Curran Realty could not be utilized for work on the contract.

In accordance with the guidance provided by DEP, on March 7, 2023, the Division issued a letter advising Curran Realty that the Director of the Division was canceling the contract for convenience pursuant to SSTC Section 5.7(A), and set forth a brief summation of DEP and SEC's reasons for doing so (the "Notice of Contract Termination for Convenience"). Curran Realty requested a short extension to respond to the Division's letter, and an extension was granted until March 24, 2023. Curran Realty protested the Termination for Convenience by letter submitted to the Division on March 24, 2023 (the "Curran Protest"). Curran Realty asserts that a: (1) Stay of Termination is warranted pending receipt of the SEC's Advisory Opinion and a hearing before the Division; and (2) Ms. Curran Has Not, and Will Not, Violate N.J.S.A. 52:13D-1. Additionally, Curran Realty requested that the entire record underlying this decision, including but not limited to the SEC's advisory opinion and any communications by and between NJDEP, SEC and the Division regarding this matter, be produced immediately.

Per N.J.A.C. 17:12-3.3(d), any "protest accepted by the Director shall be resolved by written decision on the basis of the Director's review of the written record including, but not limited to, the written protest, the terms, conditions and requirements of the RFP, the proposals submitted in response to the RFP, the evaluation committee report and/or the award recommendation document, pertinent administrative rules, statutes, and case law, and any associated documentation the Director deems appropriate." In-person presentations are fact-finding for the benefit of the Director and she has the sole discretion to determine if an in-person presentation is necessary to reach an informed decision on the matter(s) of the protest. N.J.A.C. 17:12-3.3(e). Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). In consideration of Curran Realty's Protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, Evaluation materials, Curran Realty's Protest, prior final agency decisions, the relevant statutes, regulations, and case law. In addition, as the preparation of the Bid Solicitation underlies the issues between the parties, I have reviewed the draft Bid Solicitations to determine if any evidence exists supporting either party's position. 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 the Protest on the written record. As such, an in-person hearing is not warranted

and Curran Realty's request for an in-person presentation is hereby denied. I set forth herein the Division's final agency decision.

DISCUSSION

The New Jersey Courts have long recognized that the purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the "public bidding statutes exist for the benefit of the taxpayers, *not bidders*, and should be construed with sole reference to the public good." Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997) (Emphasis added). The objective of New Jersey's statutory procurement scheme is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick v. State, 218 N.J. 247, 258 (2014) (citing, Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)).

A. Curran Realty argues that Ms. Curran Has Not, and Will Not, Violate N.J.S.A. 52:13D-1.

The State's March 7, 2023, Notice of Cancellation indicated that DEP requested the cancellation for the following reasons:

On December 8, 2022, NJDEP notified the Division of a potential ethics issue with the award to Curran Realty Advisors LLC. The owner of Curran Realty Advisors LLC was working for the Department of Environmental Protection until September 14, 2021 and had actively assisted in the reprocurement of this above referenced Bid Solicitation. The Division advised NJDEP to discuss the possible ethics issue with the State Ethics Commission. On January 31, 2023, the State Ethics Commission stated that "it is the opinion of SEC Staff that if Ms. Curran or Curran Realty worked on this contract, it would violate N.J.S.A. 52:13D-17." The Division has further reviewed the potential ethics violation and has determined that before work begins on this Blanket P.O. it is in the best interest of the state to terminate Blanket P.O. #22-GNSV2-28430 for convenience in accordance with Section 5.7(A).

[Notice of Cancellation, Page 1.]

DEP has the statutory and regulatory duty to design and implement the State's Green Acres program to establish a system of interconnected open spaces, whose protection will preserve and enhance New Jersey's natural environment and its historic, scenic, and recreational resources for public use and enjoyment, and Blue Acres Program to acquire flood-prone properties for open space preservation or flood plain protection including moving residents out of harm's way. In order to fulfill these missions, these agencies have delegated authority and extensive experience in appraising and acquiring real property. See George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 51 (1994) (Handler, J., concurring) (citing Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, (1984) (recognizing that agency's expertise is entitled to great respect by courts, particularly when exercised in specialized areas covered by statutory provisions relevant to agency's purpose)). DEP utilizes the public bidding process to secure appraisal services to further its mission.

Similarly, the SEC was created in 1973 to administer and enforce the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq. The Commission also administers and enforces several sections of the Casino Control Act, N.J.S.A. 5:12-1 et seq., and has administrative authority granted by the Governor

by Executive Orders 189 (Kean, 1989), 41 (Codey, 2005), 68 (Codey, 2005), 14 (Corzine, 2005), and 64 (Christie, 2011), and 2 (Murphy, 2018). Additionally, SEC has the power to undertake investigations and hold hearings regarding alleged violations of the Conflicts Law, as well as issue advisory opinions concerning whether a given set of facts and circumstances would, in the Commission's opinion, constitute possible violations of the Conflicts Law or any code, rules or regulations promulgated pursuant thereto.

Accordingly, to address the DEP's concern that permitting Curran Realty to perform services as an awarded vendor for a contract that Ms. Curran helped the DEP to publicly bid would violate New Jersey's ethics laws, the DEP contacted the SEC for an opinion on the matter. In a December 15, 2022, email from DEP's Ethics Liaison Officer (ELO) to a Legal Specialist at SEC, the ELO provided the following summary regarding Ms. Curran's involvement:

She was employed with the NJDEP and worked on the RFP document for the new State Term Appraisal contract, and she left State employment on September 14, 2021. The Term Contract advertising date was July 30, 2021 and the Quote opening date was October 7, 2021. However, her firm Curran Realty signed off on her Treasury Cooperative Purchasing form on September 14, 2021, when she was still a NJDEP Green Acres employee.

The fact that she was still employed with NJDEP when her firm applied for the State contract is itself a potential conflict of interest.

However, I will focus on her substantial and direct involvement with the development of the new State Term Appraisal contract. Whereas she worked and developed the draft and final version submitted to Treasury, and whereas she was privy to communications and discussions between other outside appraisers, NJDEP Green Acres/Blues Acres management and staff, and was aware of the specifics concerns and ultimate terms and conditions of the new State Term Appraisal contract, it would appear that she was "substantially and directly involved" with the development of the new State Term Appraisal contract. The NJ State Ethics Code does have language in Appendix H, "Post Employment Restrictions - New Jersey Conflicts of Interest Law", which describes in part such factors as whether the individual had provided input in a matter and access to confidential information when considering whether an individual had "substantially and directly involvement in a matter".

As part of the ongoing discussions and review process, the DEP provided the SEC with the details related to Ms. Curran's involvement with the Bid Solicitation preparation, the dates of her employment, the dates of the Bid Solicitation preparation and advertisement, Curran Realty's bid submission date, and the date of award. Additionally, the DEP provided the SEC with the history of Ms. Curran's most recently approved Outside Activity Questionnaire (OAQ), and most recent ethics training receipts.

In reviewing the facts presented in anticipation of work being assigned for the newly awarded contract, SEC determined that, based upon the facts presented, it was the opinion of the SEC Staff that if Ms. Curran or Curran Realty worked on the contract, it would violate N.J.S.A. 52:13D-17.

Curran Realty argues that the conclusion reached by the SEC "is neither borne out by the facts, nor the plain language of the statutes and regulations governing post-employment restrictions on former State officers and officials." However, Curran Realty's arguments that no violation exists because Curran Realty and Ms. Curran would be working on behalf of the State misses the point that Ms. Curran was awarded a

contract for a State contract with which Ms. Curran played a substantial and direct role in preparing for public bidding. In this matter, DEP and SEC were not concerned about the quality of Ms. Curran's work, or that she would represent the State's interest, but that Curran Realty performing work for this specific contact would violate ethics laws due to Ms. Curran's substantial and direct role in the Bid Solicitation's development.

Ms. Curran disputes that she had direct and substantial involvement in the review and preparation of the new Bid Solicitation. Specifically, on Page 3 of her submitted protest, Curran Realty claims "Ms. Curran's only contribution to this RFP—if any contribution at all—was indirectly by the updating of the Appraisal Requirements for Green and Blue Acres Program appraisals, which were ultimately annexed to the RFP as Attachments 2, 3, 7 and 8. She was not otherwise involved in the creation or preparation of the RFP, which was assembled entirely by NJDEP's contracting unit." However, as a sampling from the draft Bid Solicitation, a review of the following pages from the draft Bid Solicitation reviewed and prepared by DEP displays that Ms. Curran had direct and substantial involvement in not only revising portions of the Scope of Work, but raised questions to be addressed as part of the process.

<p>The Vendor {Contractor} may be required to include a completed "Appraisal Report Review Checklist" as part of the deliverable for each appraisal assignment. A sample of the Appraisal Report Review Checklist for Green Acres projects is depicted in Attachment #2 and a sample of the Appraisal Report Review Checklist for Blue Acres projects is depicted in Attachment #3. An Appraisal Report Review Checklist will be provided to the Vendor {Contractor} that is performing the specific appraisal assignment by the Using Agency.</p>	S Curran	Deleted: project
<p>If required by the Using Agency, a digital/electronic report copy will be submitted by the due date and prior to the appraisal review. A specified number of hard copies of the final report list be provided after the Using Agency's review of the electronic report is finished. The initial report and final reports must be signed by the SCGREA who performed the work.</p>	S Curran	Deleted: engagement
<p>All Appraisals must be prepared in accordance with the current Uniform Standards of Professional Appraisal Practice (USPAP), current GA or BA Appraisal Requirements as applicable, and specific appraisal assignment instructions. Any omission of the required documentation, including a completed appraisal requirements checklist, will result in the rejection and return of the report to the Appraiser for the revision or correction at no additional cost to the Using Agency.</p>	S Curran	Deleted: project
<p>The format for the Appraisal report shall be in accordance with the current GA or BA Appraisal Requirements mandated by the Using Agency, current USPAP standards, and the specific appraisal assignment instructions of the engagement.</p>	S Curran	Deleted: engagement
<p>3.3 BLANKET P.O. KICKOFF MEETING</p>	S Curran	Deleted: extra
<p>The Vendor {Contractor} shall attend a mandatory "kick-off" meeting upon Blanket P.O. award, at no additional cost to the State. DEP will schedule the meeting approximately thirty (30) calendar days after Blanket P.O. award. The meeting location will be DEP's office in Trenton, NJ. The estimated length of the meeting is one (1) hour.</p>	S Curran	Deleted: paper copies and the
<p>3.4 APPRAISAL UPDATES</p>	S Curran	Deleted: deliverables
<p>The Using Agency may request an Appraisal Update for a property. If a Vendor {Contractor} under this Bid Solicitation performed the original Appraisal, the Using Agency will contact the Vendor {Contractor} and provide details of the necessary update. The Vendor {Contractor} shall provide a price Quote within five (5) business days. If the original Appraisal was conducted by an Appraiser that is not a Vendor {Contractor} under this Bid Solicitation, the Using Agency will solicit competitive price Quotes as per Section 3.0 of this Bid Solicitation. All GA or BA Appraisal Requirements and any specific appraisal assignment instructions will be applicable to an Appraisal Update.</p>	S Curran	Deleted: deliverable
<p>3.5 OTHER APPRAISAL SERVICES</p>	S Curran	Deleted: applicable
<p>The Vendor {Contractor} awarded an Appraisal by the Using Agency for that task may be requested to perform other valuation and/or Appraisal services on an hourly basis. xxx Such as additional research or work required by the addition of assignment instructions after the contract is executed?</p>	S Curran	Deleted: guidelines and project
<p>3.6 LEGAL SERVICES: TESTIMONY AND LITIGATION SUPPORT</p>	S Curran	Deleted: requirements
<p>The Vendor {Contractor} shall ensure that its appraiser staff for DEP assignments are available to answer questions from the Using Agency and to testify at depositions and/or administrative hearings regarding other Appraisal services work. The Using Agency shall notify the Vendor {Contractor} via email of all requests to schedule consultation, preparation, testimony and litigation support and the Vendor {Contractor} must confirm via e-mail, within 48 hours, that its personnel are available to appear. In such instance, the Vendor {Contractor} awarded the all-inclusive hourly rate shall be paid with no more than three (3) hours billed by the Vendor {Contractor} for preparation relating to scheduled testimony before a deposition or administrative hearing unless otherwise approved by the Using Agency.</p>	S Curran	This should be modified to reflect
<p>23</p>	S Curran	Only under this contract and not
	S Curran	Deleted: r
	S Curran	Deleted: requirements
	Wolf, Ann	Such as? I don't remember the
	Wolf, Ann	Deleted:
	S Curran	?
	S Curran	Deleted: personnel
	Wolf, Ann	What "other" appraisal work? ▾
	S Curran	I agree with Ann- take out word

The Vendor's {Contractor's} personnel shall be required to cooperate with the Attorney General's office in responding to discovery requests and preparing for testimony. In preparation for the depositions, the Vendor {Contractor} may charge up to three (3) hours. If preparation is beyond three (3) hours, this time must be justified by Vendor {Contractor}, and approved in advance by the respective Using Agency.

If the Vendor {Contractor} is not advised prior to the day of the deposition or administrative hearing at which Vendor {Contractor} personnel has been scheduled to appear that the event has been cancelled, and the Vendor {Contractor} personnel travels to such event, or the Vendor {Contractor} personnel travels to a deposition or administrative hearing at which the Vendor {Contractor} personnel has been scheduled to appear but where testimony is not required, the Vendor {Contractor} may bill the Using Agency the awarded all-inclusive hourly rate for only the first hour of the Vendor {Contractor} personnel's testimony. There are no pre-payments for testimony or depositions.

3.7 A. Non-Performance

Failure to perform may lead to formal complaints to the Contract Compliance Audit Unit within the Division and possibly engagement termination or Blanket P.O. termination in accordance with the terms of this Bid Solicitation. For purposes of this Bid Solicitation, examples of non-performance include, but are not limited to:

- B. Failure to respond to a competitive price Quote with either a bid or a response indicating "no-bid";
- C. Failure to respond to a competitive price Quote by the due date;
- D. Failure to accept the engagement after the Using Agency has offered the intent to award;
- E. Unsatisfactory performance on an engagement by a Vendor {Contractor};
- F. Failure to submit the specified deliverable(s) by the due date;
- G. Submittal of deliverable(s) that require numerous corrections; Failure of the Appraiser to maintain status as a SCGREA;
- H. Failure to obtain permission to inspect the property being Appraised;
- I. Inappropriate discussions with property owners and/or their agents, or with other appraisers, without authorization from the Using Agency, including but not limited to, discussing values or any other confidential information that should be handled by the Using Agency;
- J. Failure to meet with the property owner/conduct the inspection unless authorized by the Using Agency;
- K. Bidding on an assignment where USPAP's Competency Rule is not met; and
- L. Failure to respond to Using Agency or other reviewer questions in a timely manner.


3.8 PAYMENT


The Vendor {Contractor} shall submit its invoice with the deliverables. The report/deliverable is subject to Using Agency approval before payment is issued. For all NJDEP Blue Acres and Green Acres projects, the Vendor {Contractor} must submit a separate invoice on company letterhead, the SCGREA's timesheet, and the State payment voucher.

3.9 FEDERAL GRANT PROCUREMENT REQUIREMENTS


Vendors {Contractors} must comply with all applicable Federal CDBG-DR and cross-cutting statutes and regulations. Refer to Attachment #1.


3.9.1 ACCESS TO RECORDS


 **Wolf, Ann**
What constitutes numerous? More than 5 corrections?


 **S Curran**
Numerous corrections that undermine overall reliability

S Curran Deleted: f

 **S Curran**


 **S Curran**


 **S Curran**

 **S Curran**

S Curran Deleted: c

S Curran Deleted: provision

 **Wolf, Ann**
What does timely mean? Two days, one week?

 **S Curran**
Five business days?

24

Contrary to Ms. Curran's assertion in her protest letter that her "only contribution to this RFP—if any contribution at all—was indirectly by the updating of the Appraisal Requirements for Green and Blue Acres Program appraisals, which were ultimately annexed to the RFP as Attachments 2, 3, 7 and 8", and that she "was not otherwise involved in the creation or preparation of the RFP, which was assembled entirely by NJDEP's contracting unit", Ms. Curran was intimately familiar with the submission requirements for the Bid Solicitation because she reviewed and revised them during the drafting process, and additionally raised questions and provided input while working for DEP. And as noted earlier, the bidding community was cautioned in the Bid Solicitation that this "new Bid Solicitation addresses current requirements", so Bidders "should not rely upon or use data from the prior Blanket P.O." Bid Solicitation Section 1.2 *Background*. Ms. Curran's substantial and direct involvement in revising the Bid Solicitation would have provided her with an intimate knowledge of where these changes occurred. The draft Bid Solicitation document supports the concerns raised by DEP and SEC, and the eventual request to have Curran Realty removed from contract.

Given the expertise of DEP and SEC in the specialized and complex areas covered by the various statutes and regulations noted above, DEP's determination to cancel Curran Realty's contract based on Ms. Curran's direct and substantial involvement in the review and preparation of the new Bid Solicitation is entitled to stand. See Metromedia, supra, 97 N.J. 313 at 327.

B. A Stay of Termination is not warranted based on the established facts.

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. Curran Realty will not suffer irreparable harm if the stay is denied.

With respect to the first Crowe factor, Curran Realty vaguely alleges that it will suffer irreparable harm as "Ms. Curran's livelihood, and personal and professional reputation have been impacted by the Division's action." Harm, as explained in Crowe, supra, 90 N.J. at 132-22, is "generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Here, as explained in Section 1.2 of the Bid Solicitation, the current contract, for which Curran Realty is only one of twenty-one vendors, the funding for projects needing an appraisal comes from a variety of sources, and the State made no guarantee of work volume or funding under this Bid Solicitation. Importantly then, Curran Realty will not lose anything to which it is entitled if the already awarded Contract is allowed to commence as expected. Curran Realty has at all times been aware that there may be no work awarded to it as a vendor, and that has not changed. Therefore, Curran Realty had no expectation that its contract would guarantee any level of work or income. Regardless, the harms claimed by Curran Realty and Ms. Curran could be redressed by monetary damages so no irreparable harm exists.

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 Curran Realty will suffer irreparable injury. The public interest however is greatly affected as the award of public contracts in New Jersey must be done with the highest level of scrutiny, and seeking "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick, supra, 218 N.J. at 258 (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)). The proper award of public contracts is a benefit which inures to the benefit of the public. However, even if the court were to find that Curran Realty 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 Curran Realty has not demonstrated that it will suffer irreparable harm, the Curran Contract may be canceled without the need for stay.

2. Curran Realty has not demonstrated a reasonable probability of success on the merits.

In support of the request for a stay, Curran Realty asserts that it is confident that it will prevail on the merits.

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, supra, 218 N.J. at 258 (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, supra, 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)).

[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, supra, 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, Curran Realty has simply claimed that Ms. Curran did not have direct and substantial involvement with the preparation of the Bid Solicitation underlying the contract award, and thus could not have violated New Jersey's ethics laws. Specifically, Curran Realty claims (1) that Ms. Curran had only incidental contact when preparing the Appraisal Requirements for the Bid Solicitation, which are otherwise publicly available; (2) Ms. Curran was not hired to, nor did she develop, the Bid Solicitation in her capacity as an appraisal reviewer; and, (3) Ms. Curran's input into any appraisal requirements did not give her any advantage or access to information that any other contractor on the contract does not already have.

Curran Realty's arguments though fail to address the direct and substantial involvement Ms. Curran actually had in the development of the Bid Solicitation beyond any public appraisal requirements. The concerns raised by DEP to SEC regarding potential ethics violations by Ms. Curran show that Ms. Curran's contact with the entire Bid Solicitation, and not merely the attachments, were more than incidental, and that she did have access to information and a potentially deeper understanding of the requirements through the development of the Bid Solicitation. Ms. Curran was not hired to review the Bid Solicitation as an appraisal review because the Bid Solicitation is not an appraisal, but she was employed by DEP, and in the course of her duties worked to develop the Bid Solicitation for T2957.

The Division's decision to cancel Curran Realty's contract, as well as the underlying basis provided by DEP and SEC for DEP's request to cancel, are fully supported by the facts, governing statutes, regulations and case law, and Curran Realty 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, Curran Realty is unlikely to succeed on the merits.

a. Curran Realty will not succeed on this claim because the Bureau correctly canceled Curran Realty's Contract based upon the request from DEP.

Curran Realty states that the Division's cancelation of its contract based upon the guidance provided to DEP by SEC was in error because (1) Ms. Curran has not, and will not, violate N.J.S.A. 52:13D-17 because facially, the "contract does not implicate the post-employment restrictions" under New Jersey law; (2) Ms. Curran will not be appearing on behalf of negotiating for or providing information not generally available to members of the public or services to any party in connection with her response to the Bid Solicitation; and (3) Ms. Curran does not possess any information not otherwise available to members of the appraisal profession since the Bid Solicitation's standards and requirements are publicly available on the DEP website or as a part of state and national standards for performance of appraisals. Curran Realty Letter Pgs. 8-9.

Curran Realty's 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, Curran Realty asserts that Ms. Curran would not be performing work for the State with information not available to the public or other appraisers. However, Curran Realty's contract was canceled based on a request from DEP, following an inquiry to the SEC, regarding Ms. Curran's substantial and direct involvement in the preparation of the Bid Solicitation, which would provide her with an advantage over the other potential bidders for the contract. As previously indicated, Ms. Curran was intimately familiar with the submission requirements for the Bid Solicitation because she reviewed and revised them during the drafting process, and additionally raised questions and provided input while working for DEP. The draft Bid Solicitation document pages included above support the concerns raised by DEP and SEC, and the eventual request to have Curran Realty removed from the contract.

Accordingly, given the expertise of DEP and SEC in the specialized and complex areas covered by the various statutes and regulations noted above, the determination to cancel Curran Realty's contract based on Ms. Curran's direct and substantial involvement in the review and preparation of the new Bid Solicitation is entitled to stand. *See Metromedia*, 97 N.J. 313 at 327. Thus, Curran Realty is not likely to succeed on this claim if an appeal is filed.

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

Lastly, Curran Realty has not established that the balance of relative hardships weighs in favor of granting a stay. As outlined above, and explained in Section 1.2 of the Bid Solicitation, Curran Realty is only one of twenty-one vendors on the current contract, for which, the funding for projects needing an appraisal comes from a variety of sources, and the State made no guarantee of work volume or funding under this Bid Solicitation. Importantly then, Curran Realty will not lose anything to which it is entitled if the already awarded Contract is allowed to commence as expected. Curran Realty has at all times been aware that there may be no work awarded to it as a vendor, and that has not changed. Therefore, Curran Realty had no expectation that its contract would guarantee any level of work or income.

Conversely, the public will benefit from the cancelation of the contract with Curran Realty to avoid ethics violations, as well as wrongfully awarded contracts, which satisfies the primary objective of New Jersey's statutory procurement scheme "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." *Barrick, supra*, 218 N.J. at 258 (citing, *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). As such, the State's and the public's interest in moving forward with the awarded contract with the remaining vendors satisfies the public purposes of procurement and outweighs all of Curran Realty's legally cognizable interests.

Further, as to any argument of relaxing the Crowe factors for a 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 based on the facts and law of this matter.

Curran Realty 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 with the awarded Contract and remaining vendors, in order to satisfy the public purposes of procurement, outweighs any of Curran Realty's legally cognizable interests.

C. Curran Realty's Request for Discovery.

Curran Realty requests "that the entire record underlying this decision, including but not limited to the SEC's advisory opinion and any communications by and between NJDEP, SEC and the Division regarding this matter, be produced immediately." Curran Protest Pg. 6. Pursuant to N.J.A.C. 17:12-3.4 *Discovery procedures*, "Notwithstanding the provisions set forth in N.J.A.C. 17:12-3.2(b)1 and 3.3(b)1, the

Director is entitled to request, receive, and review copies of any and all records and documents deemed appropriate and relevant to the issues and arguments set forth in the protest. Upon receipt of the Director's request, the bidder shall promptly provide the requested records and documents free of charge in the time, place, and manner specified by the Director. If the protesting bidder fails to comply with the provisions of this section, such failure may constitute a reasonable basis for the Director to resolve the protest against the bidder submitting the protest. The Director may also consider relevant information requested and received from other parties deemed appropriate by the Director."

No provision is made under the Division's protest regulations for discovery to be provided to any protesting or responding party. However, while Curran Realty may not be entitled to the discovery sought as part of its protest, Curran Realty will be provided a copy of the draft Bid Solicitation discussed above as that document, when combined with the reasons underlying the request to cancel the Curran Contract, provides the foundation for affirming the Bureau's actions in this matter.

CONCLUSION

Based upon the foregoing, I find no reason to reverse the termination for convenience of the Curran Realty Contract. Accordingly, I sustain the March 7, 2023, Notice of Contract Termination for Convenience. This is my final agency decision.

Sincerely,

Amy F. Davis

Amy F. Davis
Acting Director
Division of Purchase and Property

Enc.

c: C. Clarke
J. Loughran
C. Fullam, Esq. (State Ethics Commission)