



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>

Telephone (609) 292-4886 / Facsimile (609) 984-2575

CHRIS CHRISTIE
Governor

FORD M. SCUDDER
State Treasurer

KIM GUADAGNO
Lt. Governor

MAURICE A. GRIFFIN
Acting Director

September 8, 2017

Via Email [sgalacio@windelsmarx.com] and USPS Regular Mail

Sandy L. Galacio, Esq.
Windels Marx Lane & Mittendorf, LLP
120 Albany Street Plaza
New Brunswick, NJ 08901

Re: Request for a Stay of the Contract Award – SGS Testcom, Inc.
RFP #16-X-24049: Enhanced Motor Vehicle Inspection/Maintenance System

Dear Mr. Galacio:

This letter is in response to your correspondence of August 24, 2017, on behalf of SGS Testcom, Inc. (SGS Testcom) to the Division of Purchase and Property's (Division) Hearing Unit requesting a stay of the contract award for the above referenced solicitation to Opus Inspection, Inc. (Opus). In that letter, SGS Testcom states that it has filed a Notice of Appeal with the Superior Court Appellate Division (Appellate Division) challenging the Division's July 31, 2017, final agency decision which found that SGS Testcom's submitted proposal contained a material deviation rendering its proposal non-responsive and making SGS Testcom ineligible for a contract award.

By way of background, Request for Proposal #16-X-24049: Enhanced Motor Vehicle Inspection/Maintenance System (RFP) was advertised on December 21, 2015, by the Division's Procurement Bureau (Bureau) on behalf of the New Jersey Motor Vehicle Commission (MVC) and the New Jersey Department of Environmental Protection (DEP). The purpose of the RFP was to solicit proposals to engage a contractor to implement a next generation motor vehicle inspection and maintenance system. RFP § 1.1 *Purpose and Intent*. It is the intent of the State to award one contract to that responsible bidder whose proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. *Ibid*. On February 22, 2016, four proposals received by the submission deadline were opened by the Division's Proposal Review Unit. All four proposals were forwarded to the Bureau and the Evaluation Committee (Committee) for review and evaluation consistent with the criteria set forth in the RFP § 6.7 *Evaluation Criteria*. Based upon that evaluation, on May 13, 2016, the Bureau issued the Notice of Intent to Award (NOI) advising all bidders that it was the State's intent to award a contract to SGS Testcom.¹

¹ Subsequent to the issuance of the NOI, the Bureau received a request from Parsons Environment and Infrastructure Technology, Inc. (Parsons) for copies of the un-redacted proposals submitted by the other bidders. Parsons challenged the Division's documents release and filed actions in both the Superior Court Law Division and the Appellate Division. The Appellate Division stayed the protest period until the 10

On October 24, 2016, Opus submitted a protest to the Division alleging that SGS Testcom's proposal materially deviated from the requirements of the RFP and therefore SGS Testcom's proposal should have been rejected.² See, Opus Protest, p. 9. In part, Opus alleged that SGS Testcom submitted an inaccurate *Ownership Disclosure Form* which was a material deviation and which rendered SGS Testcom's proposal nonresponsive. Specifically, Opus alleged that SGS Testcom did not list all of its corporate parents on its *Ownership Disclosure Form* as required. Rather, Opus claimed that SGS Testcom's listing of only its ultimate corporate parent company did not comply with the statutory requirement for disclosure or the RFP. See, Opus Protest, p. 9.

On July 31, 2017, the Division issued its final agency decision finding that SGS Testcom's submitted *Ownership Disclosure Form* did not accurately reflect its full ownership structure, which resulted in a material deviation rendering its proposal nonresponsive. Accordingly, the Bureau was directed to rescind the May 13, 2016, NOI and issue an Amended NOI as appropriate.

On August 18, 2017, the Bureau issued an Amended NOI advising all bidders that it was the State's intent to award a contract to Opus. On August 24, 2017, the Division received SGS Testcom's request for a stay of the contract award along with a copy of its Notice of Appeal.

A stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden to demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations and quotations omitted, emphasis added); 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:

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

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

In consideration of this request for stay, I have reviewed the record of this procurement, including SGS Testcom's request for a stay, the RFP, the proposal submitted by SGS Testcom, the Division's final

days following the Division's release the names of the SGS employees who would be working on the contract. The protest period accordingly expired on October 24, 2016.

² Parsons also filed a protest on October 24, 2016. Parsons alleged that the proposals submitted by SGS Testcom and Opus contained material deviations from the requirements of the RFP. Based upon the Division's final agency decision on the Opus protest, which rescinded the May 13, 2016 NOI, Parson's protest was rendered moot.

agency decision, along with the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the request for a stay of the contract award pending the outcome of SGS Testcom's appeal. I set forth herein the Division's final agency decision related to the stay request.

1. **SGS Testcom will not suffer an irreparable harm.**

In support of its request for a stay, SGS Testcom states that it will suffer irreparable harm if the stay is denied because absent a stay, its appeal might be rendered moot. See, SGS Testcom's letter p. 2. While it may be true that absent a stay, the Division will proceed with its contract award, the purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the "public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good." Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997); see also, In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 222-223 (App. Div. 2009), citing, Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 409 (1975).

As will be discussed in point four below, even if a finding of irreparable harm could be made, 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. "Contractual matters in which the State and its public entities engage must proceed with alacrity....The State's business and the public interest in the State's contractual endeavors should not be unreasonably delayed while an unsuccessful bidder seeks another level of review." Barrick v. State, 218 N.J. 247, 264 (2014). "In some cases, such as 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). As noted above, this solicitation was advertised in December 2015 and the NOI issued in May of the following year. Because of litigation related to the Division's document response to Parsons, the protest period was extended to October 2016. Two protests were received and the Division's final agency decisions were issued in July 2017. If the Division is unable to proceed with the contract award, the public interest will continue to be harmed in securing a timely and economically efficient procurement.

Moreover, where the likelihood of success on the merits of an appeal is slim, the Courts have found that it is appropriate to deny a stay. See, Terminal Constr. Corp. v. Gloucester Cnty. Improvement Auth., 2015 N.J. Super. Unpub. LEXIS 2357 (App. Div. Sept. 30, 2015); citing, Garden State Equality v. Dow, 216 N.J. 314, 320, Crowe v. De Gioia, 90 N.J. 126, 133 (1982) (stating "[f]ollowing their consideration of the parties' briefs, they entered an order on August 18, 2015 expediting the appeal but denying the request for stay based on lack of probability of success on the merits.") The New Jersey Courts have long recognized the broad grant of authority that the Legislature has vested with the Director, and have acknowledged that the State's public bidding laws serve to limit the scope of judicial review when a decision is challenged on appeal. Jasper, supra, 406 N.J. Super. at 222; citing, Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 548 (1966). Further, under the governing law, the Division's Director has the authority to reject any or all bids received when s/he determines that it is in the public interest to do so. Jasper, supra, 406 N.J. Super. at 222; citing, N.J.S.A. 52:34-12. "Generally, courts will not interfere with a final agency determination which pertains to contract awards or rejecting a bid or bidders unless there is a finding of bad faith, corruption, fraud or gross abuse of discretion." Ibid. As will be discussed more fully in points three and four below, SGS Testcom's proposal contained a material deviation from a statutory requirement that rendered its proposal non-responsive.

2. SGS Testcom has the legal right to request a stay.

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

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

SGS Testcom has not established a reasonable probability of success on the merits. As noted above, SGS Testcom's proposal contained a material deviation that rendered its proposal non-responsive. Specifically, SGS Testcom did not provide the Division with its full ownership structure as mandated by N.J.S.A. 52:25-24.2. At the time of proposal opening in February 2016, N.J.S.A. 52:25-24.2 stated:³

No corporation, partnership, or limited liability company shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation, said partnership, or said limited liability company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be. If one or more such stockholder or partner or member is itself a corporation or partnership or limited liability company, the stockholders holding 10 percent or more of that corporation's stock, or the individual partners owning 10 percent or greater interest in that partnership, or the members owning 10 percent or greater interest in that limited liability company, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been listed.

To comply with the statutory requirement that a bidder provide its full ownership structure, the RFP mandated that:

Pursuant to N.J.S.A. 52:25-24.2, in the event the bidder is a corporation, partnership or sole proprietorship, the bidder must complete and sign the attached Ownership Disclosure Form. A current completed Ownership Disclosure Form must be received prior to or accompany the submitted proposal. A bidder's failure to submit the completed and signed form with

³ In August 2016 N.J.S.A. 52:25-24.2 was amended to permit alternative sources of disclosure to comply with the statute; however, the statute was not retroactive. However, even had the statute been retroactive, it does not appear that the forms of disclosure then available to SGS Testcom would have satisfied the ownership disclosure statutory requirements.

its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six months prior to the proposal submission deadline for this procurement. If any ownership change has occurred within the last six months, a new Ownership Disclosure Form must be completed, signed and submitted with the proposal.

[RFP § 4.4.1.2.1, *emphasis added*; see also, In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing, 2013 N.J. Super Unpub. LEXIS 1698, at *28 (App. Div. July 10, 2013).]

To assist bidders with providing the required information, the Division provided bidders with the *Ownership Disclosure Form*, which further advises bidders that they:

must disclose identifying information related to the individuals, partnerships and/or corporations owning a 10% or greater interest in the bidder/offeror. Further, if one or more of these entities is itself a corporation or partnership, you must also disclose all parties that own a 10% or greater interest in that corporation or partnership. This information is required by statute.

[*Emphasis in the original.*]

With its proposal, SGS Testcom submitted an *Ownership Disclosure Form* on which it identified an entity “SGS Group” as holding a 100% ownership interest in the bidder SGS Testcom. No other entities or individuals were identified. However, in its November 11, 2016, response to the protest filed by Opus, SGS Testcom revealed the following regarding its ownership structure:

SGS S.A. is the ultimate parent company of SGS Testcom. Opus is alleging [SGS Testcom] failed to disclose SGS North America Inc. SGS Testcom is a subsidiary of SGS North America Inc. While we believe the information provided fully complies with the disclosure requirements, to clarify SGS Testcom’s corporate structure – SGS Testcom is wholly owned by SGS North America, Inc., which is wholly owned by SGS U.S. Holding Inc., which is wholly owned by the ultimate parent company, SGS S.A.

[SGS Testcom’s November 11, 2016, response to the Opus’ protest.]

Further, in response to a request from the Division’s Hearing Unit for further clarification regarding its ownership structure, on January 13, 2017 and January 18, 2017, SGS Testcom advised: “SGS Testcom is wholly owned by SGS North America Inc., which is wholly owned by SGS U.S. Holding Inc., which is wholly owned by the ultimate parent company, SGS SA, which is publically traded on the Six Swiss Exchange.” SGS Testcom’s January 13, 2016 letter. Moreover, SGS Testcom further advised that at the time of proposal opening SGS SA was in part held by Groupe Bruxelles Lambert which has a 16.38% interest and the Von Finck Family which has a 15.03% interest in SGS SA. In its response, SGS Testcom also referred to the 2015 Annual Report for SGS SA, which is available on SGS SA’s website, and lists the following significant shareholders:

SIGNIFICANT SHAREHOLDERS

As at 31 December 2015, Mr. August von Finck and members of his family acting in concert held 15.03%, Groupe Bruxelles Lambert acting through Serena SARL held 15.00%, the Bank of New York Mellon Corporation held 3.35%, BlackRock Inc. held 3.03% and MFS Investment Management held 3.01% of the share capital and voting rights of the Company. At the same date, SGS Group held 2.77% of the share capital of the Company.

[SGS SA's 2015 Annual Report, p. 3.]

Based upon the information submitted to the Division's Hearing Unit in response to the protest, it was apparent that SGS Group did not hold a 100% ownership interest in the bidder, SGS Testcom, as indicated on the *Ownership Disclosure Form*. Rather, SGS Group, appears to hold only 2.77% interest in SGS SA.

A review of SGS Testcom's proposal revealed that SGS Testcom did not describe its subsidiary relationships with SGS North America Inc. and SGS Group/SGS SA such that its ownership structure could be gleaned from within the four corners of proposal. Moreover, nowhere within its proposal or *Ownership Disclosure Form* did SGS Testcom reference SGS U.S. Holding Inc., SGS SA, Groupe Bruxelles Lambert or the Von Finck Family. As such, SGS Testcom's submitted ownership disclosure information did not conform the statutory or RFP requirements.

The New Jersey Courts have consistently held that strict compliance with the ownership disclosure requirements of N.J.S.A. 52:25-24.2 is necessary. As such, a proposal is properly rejected where it contains inaccurate ownership information. See, Impac, Inc. v. City of Paterson, 178 N.J. Super. 195, 200-01 (App. Div. 1981); Muirfield Const. Co., Inc. v. Essex County Imp. Authority, 336 N.J. Super. 126 (App. Div. 2000).

In its request for stay, SGS Testcom states that it had previously provided its ownership information to the Division and had therefore complied with the statutory and RFP disclosure requirement. In support of its position, SGS Testcom relies upon the Appellate Division's decision in Schlumberger Industries, Inc. v. Borough of Avalon, 252 N.J. Super. 202 (App. Div. 1991). SGS Testcom claims that it provided the Division with its ownership structure in prior contacts and meetings with the State, and notes that it is a subcontractor on the current State contract for the Enhanced Motor Vehicle Inspection/Maintenance System held by Parsons.

In the Division's July 31, 2017, final agency decision it distinguished the matter before it from that before the court in Schlumberger, where the Appellate Division, in 1991, recognized that post-bid clarification could be permitted in limited circumstances. In Schlumberger, the Appellate Division held that post bid clarification could be permitted where the bidder is wholly-owned by a public company with the same name in its title, a fact known to the government entity that solicited the bids because it had engaged in extensive contract negotiations, both on an earlier contract and the subject contract with the bidder prior to the proposal opening, and was aware of the bidder's ownership structure. Id. at 207-13. The Appellate Division went on to say:

In the case before us what had not been disclosed was that the bidder was a wholly-owned subsidiary of a public corporation having no individual stockholders requiring disclosure under the statute. . . . Since the bidder here was a corporation with the name "Schlumberger" in its title and apparently was known to the municipality as wholly-owned by the public

company...Of course, if there had been undisclosed shareholders holding 10% or more of the stock or if the identity of even a public company has been purposely withheld, the bid might properly have been rejected...the bid might be properly rejected.”

[Id. at 211-212, *emphasis added.*]

In, Equine, the Appellate Division revisited this distinction, noting:

We revisited this distinction between facially valid and facially defective bids finding that the bidder's failure to disclose an individual's 10% ownership interest was a material and incurable defect. The bidder had originally represented that 100% of its stock was owned by one company, but after bids were opened, clarified that the company actually owned 89% of the bidder's stock while another individual owned the remaining 11%.

...

The present matter is unlike Schlumberger, where the bidder had recently provided complete and accurate ownership information during extensive contract negotiations with the municipality; and the ultimate parent company that was initially omitted was publicly traded on the New York Stock Exchange and shared the same name with the bidder.... Here, HFL's bid information was both incorrect and incomplete, having failed to disclose several companies that wholly own other companies within its direct lineage. Moreover, this deficiency was not completely cured by HFL's post-bid documentation, which did not provide the addresses of all of HFL's parent companies in compliance with N.J.S.A. 52:25-24.2. We therefore conclude that HFL's bid was facially invalid and the defect in the ownership information provided was material and incurable through post-bid clarification.

[2013 N.J. Super Unpub. LEXIS 1698, *internal citations and quotations omitted, emphasis added.*]

In conducting its initial review of Opus' protest and SGS Testcom's response, neither the Hearing Unit, the Bureau, or the Division's Contract Compliance and Audit Unit - Chapter 51 Group, discovered any information maintained by the Division which gave the Division pre-bid knowledge or a record of SGS Testcom's ownership structure. Despite being provided with three opportunities to provide information to the Division regarding its ownership structure, SGS Testcom never asserted that the Division should have on file a record of its ownership structure or provided any evidence that the information existed. Further, unlike the situation in Schlumberger, the Division did not have a prior contractual relationship with SGS Testcom and did not engage in prior contract negotiations with SGS Testcom; therefore, the Division did not have any corporate structure information on file for the company. Rather, the Division's prior and existing contract is with Parsons Environment and Infrastructure Technology, Inc. (Parsons). SGS Testcom is a subcontractor under Parsons' current contract, a fact recognized and acknowledged by the Division.⁴

⁴ See, RFP 08-X-39078 § 2.2 *General Definitions* stating in part “The subcontractor has no legal relationship with the State, only with the contractor.” See also, the State of New Jersey Standard Terms

Moreover, as noted by the court in Schlumberger and Equine, and as is the case here, there were undisclosed individuals who have a 10% ownership interest in SGS Testcom, a material and incurable defect. See, Schlumberger, supra, 252 N.J. Super. at 212; Equine, supra, 2013 N.J. Super Unpub. LEXIS 1698, at *24-25.

Only now in connection with the instant request for a stay and its Notice of Appeal does SGS Testcom even assert that the Division should have a record of its ownership structure on file. SGS claims that it “can show that it disclosed its ownership structure to the Division during prior contacts and meetings with the Division [and that it] is a subcontractor on an existing contract with the State and the Division is already familiar with SGS [and that it] is likely to prevail on the merits.” See, SGS Testcom’s Request for Stay, p. 2, emphasis added. However, SGS Testcom has not provided any information or documents to support this claim.⁵

In connection with this request for stay, the Division undertook a second review of its files to determine whether SGS Testcom’s assertion that that the Division had on file a record of its ownership structure was correct. That review did not reveal any information or documents to support SGS Testcom’s claim. Specifically, the Division’s records reveal that SGS Testcom does not have any contracts with the State. SGS Testcom is a subcontractor on the current Enhanced Motor Vehicle Inspection/Maintenance System contract held by Parsons, who, in its October 2007 proposal, identified SGS Testcom as a subcontractor. No other documents or information, specifically ownership information, was provided to the Division regarding SGS Testcom. Parsons was not under any obligation to provide corporate ownership information to the State for any of its subcontractors; and did not do so.

Even if SGS Testcom’s ownership information had been provided to the Division in 2007 (with Parson’s proposal) or in 2008 (prior to the contract award to Parsons), that information would not have accurately represented SGS Testcom’s ownership structure at the time that proposals were submitted to the Division, in February 2016, for the subject solicitation. A review of SGS SA’s Annual Reports which are available on company’s website reveals the following:

- **2006 Annual Report**, available at: <http://www.sgs.com/-/media/global/documents/financial-documents/financial-reports/2006/sgs-2006-ar-en.pdf?dc=http&lb=>), p. 66

SIGNIFICANT SHAREHOLDERS

At 31 December 2006, August von Finck and members of his family, acting in concert, held 23.7% of the share capital and voting rights of the Company. IFIL Investissements S.A. held 13.2% of the shares.

- **2007 Annual Report**, available at <http://www.sgs.com/-/media/global/documents/financial-documents/financial-reports/2007/sgs-2007-ar-en.pdf?dc=http&lb=>, pp. 62 - 63

and Conditions § 3.11 *Subcontractor or Assignment* stating “Nothing contained in the specifications shall be construed as creating any contractual relationship between any subcontractor and the State.”

⁵ On August 21, 2017, the Division received an OPRA request from Phillip Hom, Esq., attorney for SGS Testcom, seeking “Any records submitted by Parsons Environmental and Infrastructure Technology, Inc. (“Parsons”) or SGS Testcom, Inc. (“SGS”), or Department of the Treasury records disclosing SGS as a subcontractor under Parson’s contract with the NJ Motor Vehicles Commission to provide vehicle inspection services.” As indicated above, the Division finds that no such records exist.

SIGNIFICANT SHAREHOLDERS

At 31 December 2007, Mr. August von Finck and members of his family acting in concert held 23.7% of the capital and voting rights of the company; IFIL Investissements SA held 15%, Allianz SE held 7.4% and FMR Corp held 5.57%.

- **2014 Annual Report**, available at: <http://www.sgs.com/-/media/global/documents/financial-documents/financial-reports/2014/annual-report-ar-2014-en.pdf?dc=http&lb=>, p. 24

SIGNIFICANT SHAREHOLDERS

As at 31 December 2014, Groupe Bruxelles Lambert acting through Serena Sàrl held 15.00% (2013: 15.00%), Mr. August von Finck and members of his family acting in concert held 14.97% (2013: 14.97%), the Bank of New York Mellon Corporation held 3.43% (2013: 3.18%) and BlackRock Inc. held 3.00% (2013: nil), of the share capital and voting rights of the Company. SGS SA, together with certain of its subsidiaries, held 1.88% (2013: 2.19%) of the share capital of the Company.

- **2015 Annual Report**, available at: <http://www.sgs.com/-/media/global/documents/financial-documents/financial-reports/2015/sgs-2015-annual-report-en.pdf?dc=http&lb=>, p. 3

SIGNIFICANT SHAREHOLDERS

As at 31 December 2015, Mr. August von Finck and members of his family acting in concert held 15.03%, Groupe Bruxelles Lambert acting through Serena SARL held 15.00%, the Bank of New York Mellon Corporation held 3.35%, BlackRock Inc. held 3.03% and MFS Investment Management held 3.01% of the share capital and voting rights of the Company. At the same date, SGS Group held 2.77% of the share capital of the Company.

In the years between SGS Testcom being named as a subcontractor by Parsons in 2007, and its proposal submission to the Division in 2016, there were changes in its corporate ownership that would have rendered any prior ownership disclosure inaccurate at the time that SGS Testcom submitted its proposal, resulting in its proposal being deemed non-responsive. Further, even if the Division did have ownership information on file for SGS from Parsons' prior contract, the Division could not have relied upon that information to sustain SGS Testcom's statutory ownership disclosure obligation so many years later. While the statute permits the Division to rely upon ownership disclosure information submitted prior to the proposal opening; that information can be submitted to the Division no more than six months prior to the proposal opening date. See, Equine, supra, 2013 N.J. Super Unpub. LEXIS 1698, at *28.

Accordingly, based upon the relevant case law, I find that SGS Testcom's proposal contained a material deviation from the requirements of the solicitation making SGS Testcom's proposal nonresponsive. Given the statutory requirement that a bidder submit its complete and accurate ownership structure with its proposal, SGS Testcom has not demonstrated a likelihood of success on the merits of its appeal.

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

Lastly, the balance of hardships weighs in favor of denying of a stay.

While the current contract was intended to be in place for five-years, it has now been in place for almost ten years. MVC advises that the current contract utilizes outdated and sub-standard hardware and software which requires continuous maintenance and upkeep. When the new contract is in place, the current Vehicle Information Database (VID) will be phased out and replaced by the Next Generation VID.⁶ A stay would result in the postponement of the State's modernization of the State's inspection equipment. The installation of new modernized equipment is necessary and will allow for more efficient record keeping and reporting of the required data to the U.S. Environmental Protection Agency consistent with the regulations implementing the Clean Air Act. Moreover, the new equipment will allow for emissions data to be more accurately analyzed, provide software enhancements to detect fraud, and capture audit data electronically on site; all features that are not available on the existing equipment that is used under the current contract. Further, any delay in awarding the contract increases costs to MVC and reduces the security and efficiency of the inspection hardware and software systems.

Additionally, the current inspection requirements result in a payment by the State of approximately \$100,000 per day. The award of a new contract will result in significant cost saving to MVC and ultimately the State's taxpayers due in part to the reduced inspection requirements and costs. Further, it is anticipated that the new contract will result in shorter wait times at the inspection facilities based in part on increased inspection efficiencies and the approximately 300,000 commercial inspections that will be redirected to Private Inspection Facilities.

Based upon the foregoing, SGS Testcom has not established that the balance of the hardship weighs in its favor. The Appellate Division has 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." Waste Management, supra, 399 N.J. Super. at 520, citing, Union County, supra, 399 N.J. Super. at 520-21. 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 any of SGS Testcom's legally cognizable interests. SGS Testcom will not lose anything to which it is entitled if the stay request is denied. Conversely, the public will suffer hardship if the contract award does not proceed as scheduled.

Based upon the foregoing, I find that SGS Testcom has not demonstrated by clear and convincing evidence that it is entitled to a stay. Accordingly, I deny SGS Testcom's request for stay. This is my final agency decision.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: M. Tagliaferri
K. Scott-Leonard

⁶ MVC advises that it recently spent \$60,000 to patch the VID, and that another patch may be necessary in the near future.