

FCC CONSULTING SERVICES,  
LLC,

Plaintiff,

v.

CITY OF TRENTON,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MERCER COUNTY

DOCKET NO.: MER-L- \_\_\_\_\_ -20

CIVIL ACTION

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**BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR AN ORDER TO  
SHOW CAUSE WITH TEMPORARY RESTRAINTS**

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**LANCIANO & ASSOCIATES, L.L.C.**

Larry E. Hardcastle, II, Esq.

Id No.: 025742010

2 Route 31 North

Pennington, NJ 08534

(609) 452-7100

lhardcastle@lancianolaw.com

*Counsel for the Plaintiff*

On the Brief:

Larry E. Hardcastle, II

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## INTRODUCTION

The principal concern of New Jersey's Local Public Contracts Law is to mandate a fair and open process for the selection of public contractors. Thus, the law requires that municipalities neutrally evaluate public contract proposals and award contracts to the contractor providing the most advantageous proposal. If a municipality wants to disqualify a potential contractor from being awarded a contract, it must follow a process that affords the targeted contractor significant due process protections. Those rules ensure that public funds will be well spent. The Trenton City Council has made a mockery of those protections by twice rejecting the Plaintiff's most advantageous bid and *de facto* disqualifying it from being awarded the contract at the heart of this dispute. The Court, therefore, should temporarily restrain Trenton from proceeding any further with the award of the disputed contract until this challenge is resolved.

Trenton is a Faulkner Act city that has elected the mayor-council form of government. The mayor-council form of government divides city governance between two branches. On the one hand, the legislative power is allocated to a council. On the other hand, the executive power is allocated to the mayor's office. Thus, as relevant to this Action, it is incumbent on the mayor's office to evaluate the city's needs, prepare requests for proposals to provide the city with necessary goods and services, and evaluate responsive proposals in accordance with the mandates of the Local Public Contracts Law. The council then has the ability to approve or disapprove a proposed contract.

In accordance with that division of authority, Trenton's mayor's office prepared a request for proposals in late 2019 to provide information technology services. As the Plaintiff was the incumbent provider of those services, it submitted a responsive proposal. The mayor's office selected the Plaintiff's proposal as the most advantageous bid in December 2019. The Council rejected the bid solely because it was the Plaintiff who had won. The mayor's office then republished the request for proposal in February 2020. Once again, the Plaintiff submitted a proposal and was selected by the mayor's office as the most advantageous proposal. Once again, the Council rejected the contract solely because it was the Plaintiff who had won. Over two meetings in early September 2020, the Council made clear that it would *never* approve an IT contract if the Plaintiff won the bid. That conduct was illegal.

The Council's reason for *de facto* disqualifying the Plaintiff was its purportedly poor prior performance. Councilmembers accused the Plaintiff of being responsible for 1) a highly publicized failure of the police department's communications system during a bank robbery and 2) the school district's difficulties in implementing remote learning in the early days of the pandemic. Both of those specious allegations would be easily disproved if the Council had *listened to the mayor's office representative who was at the meetings*. That representative stated, unequivocally, that the Plaintiff had *no* responsibility for either of those situations. Indeed, the representative confirmed that the school board is responsible for procuring its own IT support services. Those easily demonstrable misapprehensions held by the Council are exactly why the Local Public Contracts Law provides

prospective contractors with robust pre-disqualification due process protections.

The process a municipality must follow to disqualify a prospective contractor from winning a specific public contract is set forth at N.J.S.A. § 40A:11-4. That section permits a municipality to “disqualify a bidder . . . if the governing body finds that it has had prior negative experience with the bidder.” In order to avail itself of that provision, however, the Council needed to first satisfy the circumscribed definition of what constitutes a “prior negative experience.” If the municipality actually had a “prior negative experience” with a contractor, it must then send the prospective bidder a notice “(a) stating that a disqualification is being considered; (b) setting forth the reason for the disqualification; and (c) indicating that the bidder shall be accorded an opportunity for a hearing before the governing body if the bidder so requests within a stated period of time.” Finally, if the bidder requests a hearing, the contractors shall be entitled to present “documents and testimony” showing why it should not be disqualified. The Council did *none* of that before directing the mayor’s office to effectively disqualify the Plaintiff from receiving the IT contract.

Trenton’s fisc is not the Council’s to do with what they will. The Plaintiff has twice been identified as the most advantageous provider for the IT contract at issue in this litigation. The Council has illegally *de facto* disqualified the Plaintiff from consideration without following the Local Public Contract Law. The Court, therefore, should enjoin Trenton from further evaluation, consideration, or award of the contract until this challenge is resolved.

## **FACTUAL BACKGROUND**<sup>1</sup>

### **I. TRENTON'S FORM OF GOVERNMENT**

Trenton City is a mayor-council plan of government authorized by the Faulkner Act, N.J.S.A §§ 40:69A-31 to 67.2. That form of government divides the legislative and executive powers between the council and mayor, respectively. N.J.S.A. §§ 40:69A-36, 39. The council's legislative power, on the one hand, includes the power of "[a]pproval of contracts presented by the mayor." N.J.S.A. § 40:69A-36(l). The executive power, on the other hand, includes the power to "[n]egotiate contracts for the municipality, subject to council approval." N.J.S.A. § 40:69A-40(j). Trenton also has a department of administration, which is headed by Trenton's business administrator. N.J.S.A. § 40:69A-44.

### **II. THE PLAINTIFF'S HISTORY OF PROVIDING IT SERVICES TO TRENTON**

The Plaintiff, FCC Consulting Services, LLC ("FCC"), has provided information technology consulting services to Trenton since 2015, when it won a competitively bid contract. FCC's 2015 contract expired in 2019, so it submitted a proposal to continue providing IT services in response to Trenton's request for proposals pursuant to New Jersey's competitive contracting process.

### **III. THE PLAINTIFF IS SELECTED TO CONTINUE PROVIDING IT SERVICES**

In December 2019, the evaluation committee charged with selecting the winning proposal identified FCC's proposal as the most advantageous proposal. In

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<sup>1</sup> The factual background set forth herein comes from the Verified Complaint in Lieu of Prerogative Writs.

accordance with the Faulkner Act, the mayor's office presented the contract to the Council for approval. The Council withheld its approval not because of any technical defect, but because it was FCC that was selected. Thus, the mayor's office readvertised the request for proposals. The readvertisement changed the terms of the contract to a two-year term with a one-year extension from a three-year term with two one-year extensions.

In March 2020, the evaluation committee once again selected FCC as the most advantageous proposal for the IT contract. Once again, the Council withheld its approval simply because FCC had been selected.

Following the second rejection in March 2020 by the Council, the statewide lockdown prompted by the spread of the novel coronavirus SARS-CoV-2 caused a delay in reissuing the request for proposals. Thus, the mayor's office did not readvertise the request for proposal until August 17, 2020. Once again, FCC submitted a proposal. The Council discussed the contract at meetings on September 1 and 3. During those meetings, several members of the Council made their illegal bias against apparent.

#### **IV. THE COUNCIL MAKES CLEAR ITS BIAS AGAINST THE PLAINTIFF**

During its September 3, 2020 meeting, many members of the Council demonstrated a misapprehension of what services FCC was actually providing to Trenton. As support for their reason to oppose FCC, two points were brought up. First, Council President Kathy McBride blamed FCC for the failure of the police communication system during a bank robbery. Second Councilwoman Robin

Vaughn faulted FCC for difficulties the school system had in accommodating remote learning during the early days of the pandemic.

Council President McBride faulted FCC for the failure of the police communication system during a bank robbery. While it is true that the police communication system failed during an October 2019 bank robbery, it is equally true *that FCC had no responsibility over that system*. That fact was confirmed by Trenton Business Administrator Adam E. Cruz, who even offered to provide the Council with invoices showing that FCC, who is an information technology provider, had no responsibility for the event, which was a failure of the communications system. The Council ignored Mr. Cruz's attempt to educate them as to the scope of FCC's services and instead persisted under its misapprehension.

Councilwoman Vaughn asserted during a prolonged monologue that FCC was at fault for the school district's difficulties with remote learning during the early days of the pandemic. Again, however, FCC had no responsibility for the administering the school district's network, a fact first made clear to her by Councilman Jerell Blakeley. Mr. Cruz further substantiated that point by pointing out that the school board "has their own set of IT support." Again, the Council elected to ignore the facts and proceed under their misapprehension. In a stunning bit of hypocrisy, Councilwoman Vaughn admonished that FCC should "compete for the projects in the open market and allow the fair and open process to take place." But the fair and open process had *twice selected FCC*. It was only by the Council's bias that stopped the FCC from being awarded the contract.

Councilman George Muschal took the outrageous position that irrespective of FCC's suitability for the position, that it was not going to be awarded the Contract. He even went so far as to state that he would withdraw a procedural motion that was holding up the meeting only if "Mr. Cruz says that the FCC is not going to be back on that list to be put on there for us, for council, on the record, on the record." Mr. Cruz rightfully rejected Councilman Muschal's demand because to do so would constitute illegal bid rigging. In a further attempt to illegally exclude FCC, the Council asked the city attorney whether FCC could bid on the new RFP, to which the attorney replied that if the Council was seeking to disqualify FCC from participating in the process, it would have to abide by certain procedural steps, which the Council did not do. Finally, he suggested that requiring the mayor's office to confirm that FCC would not be selected constituted illegal bid rigging.

**V. THE MAYOR'S OFFICE, CONSTRAINED BY THE COUNCIL'S ILLEGAL CONDUCT, TAKES ACTION THAT DISADVANTAGES THE PLAINTIFF**

Faced with the Council's vendetta against FCC, Mr. Cruz confirmed that the mayor's office had made two key changes to the way in which it was evaluating the proposals. First, it completely changed the typical evaluation committee. In the first and second rounds of evaluation, the evaluation committee included Mr. Cruz, Assistant Business Administrator Colin Cherry, and Budget Administrator Alphonso Jones. Instead of the regular members, Mr. Cruz indicated that an alternative evaluation committee had been constituted. Second, the mayor's office advised the new evaluation committee of the Council's overt bias against FCC. The mayor's office's understandable attempt to accommodate the Council's overt bias

has irretrievably damaged the fair and open process guaranteed to FCC by the Local Public Contracts Law. Based on Mr. Cruz's statements, the mayor's office will present the Council with the proposal selected by flawed process on September 14, 2020, and the Council will vote on its approval on September 17, 2020. This Action follows.

### **LEGAL ARGUMENT**

In determining whether to grant preliminary injunctive relief, a court must consider: (1) whether the injunction is necessary to prevent immediate, irreparable harm; (2) whether the legal rights underlying the plaintiff's claims are well-settled; (3) whether the plaintiff can "make a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) whether the balance of the hardships favors the grant of the requested relief. Crowe v. De Gioia, 90 N.J. 126, 132-33 (1982). FCC easily satisfied each requirement, so the Court should enter the requested temporary restraints.

#### **I. FCC WILL FACE IRREPARABLE HARM IF TRENTON IS NOT ENJOINED FROM PROCEEDING WITH THE FLAWED EVALUATION PROCESS THAT ILLEGALLY EXCLUDES IT FROM BEING CONSIDERED FOR THE IT CONTRACT**

To satisfy the irreparable harm inquiry, FCC must demonstrate that the injunction is necessary to prevent harm that "cannot be redressed adequately by money damages." Crowe, 90 N.J. at 133. Both the nature of the injury from which the Plaintiff is seeking protection and the right affected by such injury are considered when evaluating whether pecuniary damages are an adequate remedy. Id. That standard is easily satisfied in the context of public contracts law because

parties cannot recover money damages if a contract is awarded to another party. See Commercial Clean Corp. v. Sullivan, 47 N.J. 539, 546 (1966) (stating so in the context of bid contracts); M.A. Stephen Construction Co. v. Borough of Rumson, 125 N.J. Super 67, 75-76 (App. Div. 1973). Furthermore, the Appellate Division has recognized the “need to grant stays, pending appeal, in cases like this which reflect a statutory deviation from the required bidding process. Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp., 283 N.J. Super. 223, 233 (App. Div. 1995) (citing Crowe, 90 N.J. at 132-134; R. 2:9–8). Because the mayor’s office will furnish the Council with its recommendation following the flawed process on September 15 and the Council will vote on contract on September 18, FCC will face irreparable harm if Trenton is not enjoined from taking further action on the award of the contract until this challenge is resolved.

## **II. FCC’S RIGHT TO CHALLENGE THE FLAWED BIDDING PROCESS IS WELL SETTLED**

There can be little dispute that courts possess the authority to vindicate the purpose of the Local Public Contracts Law by setting aside the awards of contracts not awarded in accordance therewith. For example, in Suburban Disposal, Inc. v. Twp. of Fairfield, the Appellate Division concluded that the award to a contractor violated the Local Public Contracts Law, so it set aside the award. 383 N.J. Super. 484, 494 (App. Div. 2006). Here, the process was so tainted by the Council’s conduct that no award stemming therefrom can be consistent with the Local Public Contracts Law. Thus, the FCC, which has submitted a bid, has the unquestionable right to challenge the process.

### III. FCC IS LIKELY TO SUCCEED ON THE MERITS

The Council has effectively disqualified FCC from being awarded the IT contract. Two provisions of the New Jersey Local Public Contracts Law show that conduct to be illegal. First, the only provision that permits a governing body to disqualify a bidder is N.J.S.A. § 40A:11-4(a). That provision permits the Council to disqualify a contractor if it “finds that it has had prior negative experience with the bidder.” N.J.S.A. § 40A:11-4. A “prior negative experience” can only mean one of four things:

- (1) the bidder has been found, through either court adjudication, arbitration, mediation, or other contractually stipulated alternate dispute resolution mechanism, to have: failed to provide or perform goods or services; or failed to complete the contract in a timely manner; or otherwise performed unsatisfactorily under a prior contract with the contracting unit;
- (2) the bidder defaulted on a contract, thereby requiring the local unit to utilize the services of another contractor to provide the goods or perform the services or to correct or complete the contract;
- (3) the bidder defaulted on a contract, thereby requiring the local unit to look to the bidder's surety for completion of the contract or tender of the costs of completion; or
- (4) the bidder is debarred or suspended from contracting with any of the agencies or departments of the executive branch of the State of New Jersey at the time of the contract award, whether or not the action was based on experience with the contracting unit.

[N.J.S.A. 40A:11-4].

None of those situations is applicable to FCC. Additionally, even if the Council were convinced that one was applicable, it was required to furnish FCC with a notice:

- (a) stating that a disqualification is being considered;
- (b) setting forth the reason for the disqualification; and
- (c) indicating that the bidder shall be accorded an opportunity for a hearing before the governing body if the bidder

so requests within a stated period of time. At the hearing, the bidder shall show good cause why the bidder should not be disqualified by presenting documents and testimony

[Id.].

The Council failed to do so. Thus, Trenton was required to evaluate its proposal in accordance with the standard provisions of the Local Public Contracts Law.

Generally, public contracts are awarded by a public bid process, but competitive contracting is authorized in certain circumstances. N.J.S.A. § 40a:11-4. The regulations governing the competitive contracting process are found at N.J.A.C. § 5:34-4.1. Those regulations set forth a list of permissible criteria for evaluating a competitive contracting proposal. N.J.A.C. § 5:34-4.2. While the list is not all-inclusive, the regulation makes clear that “[n]o criteria shall unfairly or illegally discriminate or exclude otherwise capable vendors.” Id. The personal animus and specious allegations of prior poor performance leveled by the Council are not permissible considerations. Thus, FCC is likely to succeed on the merits of its claim.

#### **IV. THE BALANCE OF THE EQUITIES FAVORS ENTERING TEMPORARY RESTRAINTS**

As set forth above, FCC will suffer irreparable harm if the Court does not enter temporary restraints. The flawed and illegal process demanded by the Council will proceed and, almost certainly, result in the selection of a contractor other than FCC. That selection will be marred by the Council’s illegal conduct and undermine faith in Trenton’s public contracting. Against that considerable public and private harm, Trenton will suffer essentially no harm. It will merely put off for a short period of time the selection of the IT vendor. But even if Trenton were to suffer some harm, it

would be entirely the fault of the Council's irrational and illegal animus against FCC. Thus, weighing the relative harms supports entering temporary restraints.

**CONCLUSION**

For all the foregoing reasons, the Plaintiff respectfully requests that the Court enter the requested relief.

LANCIANO & ASSOCIATES, L.L.C.  
*Counsel for the Plaintiff*

By:   
\_\_\_\_\_  
Larry E. Hardcastle, II

Dated: September 14, 2020