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The Hon. Robert L. Steinberg, Judge
The Hon. J. Brian Johnson, Judge
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The Hon. James T. Anthony, Judge
The Hon. Maria L. Dantos, Judge
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The Hon. Alan M. Black, Senior Judge

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SOLID WASTE SERVICES, INC. d/b/a
J.P. MASCARO & SONS, M.B. INVESTMENTS AND
JOSE MENDOZA, PLAINTIFFS vs.
CITY OF ALLENTOWN AND WASTE MANAGEMENT OF
PENNSYLVANIA, INC., DEFENDANTS

*Preliminary Injunction—Municipalities—Home Rule Charter
and Optional Plans Law—Competitive Bidding Process—
Request for Proposal—Standing—Disappointed Proposer—
Taxpayer Standing—Home Rule Charter—Administrative
Code—Rules of Statutory Construction—Services Contract—
Waste Management Contract—“Competitive Processes.”*

Court denied preliminary injunction sought by waste disposal company to stop the City of Allentown from contracting with a competing waste disposal contractor, based on assertion that contract awarded should have been solicited via a competitive bidding process, rather than a request for proposal. The court held that: (1) waste disposal company Solid Waste Services, Inc., as a disappointed proposer, did not have standing to bring an action for injunction, but additional Plaintiffs had “taxpayer standing;” (2) neither the City of Allentown’s Home Rule Charter nor its Administrative Code required it to acquire contracts for services through a competitive bidding process; and (3) the City complied with its Home Rule Charter, which required that it purchase services through “competitive processes.”

In the Court of Common Pleas of Lehigh County, Pennsylvania—Civil Division. No. 2016-C-157. Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons, M.B. Investments and Jose Mendoza, Plaintiffs vs. City of Allentown and Waste Management of Pennsylvania, Inc., Defendants.

ALBERT A. DEGENNARO, ESQUIRE, on behalf of Plaintiffs.

DOUGLAS SMILLIE, ESQUIRE, on behalf of Defendant City of Allentown.

SHANNA L. PETERSON, ESQUIRE, on behalf of Defendant Waste Management of Pennsylvania, Inc.

ADJUDICATION

MCGINLEY, J., May 10, 2016. On January 12, 2016, Plaintiffs Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons (Mascaro) and M.B. Investments (MB) filed a Complaint and a Petition for Preliminary Injunction. Defendant Waste Management of Pennsylvania, Inc. (WMI) filed Preliminary Objections, and both WMI

and Defendant City of Allentown (the City) filed responses to the Petition for Preliminary Injunction.

On February 17, 2016, Plaintiffs filed an Amended Complaint and added Jose Mendoza as a Plaintiff. Also on that day, Plaintiffs filed an Amended Petition for Preliminary Injunction. Defendants WMI and the City both filed Preliminary Objections to the Amended Complaint.

A hearing on the original preliminary injunction was set for February 23, 2016. A hearing was held on that date at which time the parties agreed to forego a preliminary injunction hearing, and, instead, hold a final hearing on this matter. Evidence was also presented in order for Defendants to raise their argument that the Plaintiffs did not have standing, which was asserted in their Preliminary Objections to the Amended Complaint.

After the conclusion of the hearing, briefs were filed by all parties and argument was heard on March 24, 2016.

This case involves Plaintiffs' assertion that the City used an illegal and unlawful request for proposal process to select and award the City's Municipal Solid Waste & Recyclables Collection, Disposal and Related Services Contract (MSW&R Contract) for waste management services. Plaintiffs request that the court void the MSW&R Contract between WMI and the City, prevent WMI from performing pursuant to the MSW&R Contract, prohibit the City from awarding an MSW&R Contract to any of the proposers under City RFP No. 2015-24, and remand the matter back to the City so that a contract can be awarded after a competitive bidding process with common specifications.

The City contends that pursuant to the City's Home Rule Charter and Administrative Code, the waste management and recycling services was not required to be put out for an invitation to bid; the only requirement was that the purchase be made through "competitive processes," which the City argues was achieved by the request for proposal issued for this contract.

In deciding the final injunction, two issues need to be resolved: 1. Do Plaintiffs have proper standing to bring the instant action; and 2. Does the applicable law require the City to award a

contract for waste management and recycling services through a competitive bidding process.¹

A separate record was established to address the issue of whether Plaintiffs have proper standing to raise the instant action.

Findings of Fact—Standing

1. Mascaro is a Pennsylvania corporation and a taxpayer (business privilege tax) of the City of Allentown, with a business address of 315 Basin Street, Allentown, Pennsylvania 18101. (Stipulated Findings of Fact, 1.)

2. Mascaro is a waste service company that engages in the collection, recycling, transportation, transferring, composting and disposal of nonhazardous solid waste. (*Id.* at 2.)

3. MB is a Pennsylvania general real estate partnership that is the owner of property in the City of Allentown, Pennsylvania at 315 Basin Street, and is a taxpayer (real estate taxes) of the City of Allentown. (*Id.* at 3.)

4. Jose Mendoza (Mendoza) is a resident of the City and resides at 1932 South Delaware Street, Allentown, Pennsylvania 18103. (Notes of Testimony, February 23, 2016, p. 17.)

5. Mendoza pays real estate taxes to the City. (N.T. p. 19.)

6. Mendoza is serviced by the waste management contract entered into by the City. (*Id.*)

7. Mendoza is employed by Mascaro and has worked for them for 28 years. (N.T. p. 20.)

8. The City awarded the MSW&R Contract to WMI, contingent upon approval by City Council. (Stipulated Findings of Fact, 27.)

¹ At the conclusion of the hearing on the permanent injunction, a third issue was raised by the City and WMI: if a competitive bid was required for the purchase of waste management and recycling services, was the process that was used similar enough to a bid to satisfy the legal requirements. At the post-hearing argument, the City and WMI withdrew this position and relied solely on the argument that the applicable law did not require a bid for this contract.

9. On October 30, 2015, the City sent a letter to Mascaro regarding the award of the MSW&R Contract. (*Id.* at 28.)

10. On December 9, 2015, City Council again considered Resolution No. 73 [request for City Council's approval of the MSW&R Contract]. (*Id.* at 35.)

11. At the December 9, 2015 meeting, City Council, as recommended by the City Administration, voted to approve the award of the MSW&R Contract to WMI. (*Id.* at 37.)

Conclusions of Law

1. Mascaro is a disappointed competitor of the awarded MSW&R Contract.

2. Mascaro pays a business privilege tax, but is not an aggrieved taxpayer of the City as it relates to solid waste and recycling management.

3. Mascaro lacks standing to bring this action before the court.

4. MB pays real estate taxes to the City and is an aggrieved taxpayer of the City.

5. Mendoza pays real estate taxes to the City and is an aggrieved taxpayer of the City.

6. The only type of challenger to this action would include disappointed competitors who lack standing or individuals with taxpayer standing; the winner of the awarded contract would benefit from the award and would be disinclined to challenge it; judicial relief is appropriate in this circumstance with no other alternative remedies; no one else is better suited than MB and Mendoza to challenge this action.

7. MB has "taxpayer standing" to bring the current action before the court.

8. Mendoza has "taxpayer standing" to bring the current action before the court.

Discussion

The City and WMI assert that Mascaro and MB are dissatisfied proposers of the awarded contract and lack standing to set

aside a public contract. Further, they argue that Mr. Mendoza was added as a “straw man” for Mascaro and MB in order to circumvent the standing requirements.² Plaintiffs contend that they have proper standing pursuant to the “taxpayer standing” exception to the general requirements of standing.

Generally, to have standing one must be an “aggrieved party;” someone adversely affected by the matter sought to be challenged. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 193, 346 A.2d 269, 281 (1975). In order for a plaintiff to meet that requirement, he must allege and prove an interest in the outcome of the suit which surpasses “the common interest of all citizens in procuring obedience to the law.” *Id.* To surpass the common interest, the interest is required to be, at least, substantial, direct and immediate. *Id.*

Our Supreme Court established a narrow exception from the above standard for “taxpayer standing” in the case of *Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979). The court explained the reason for the exception:

Certain cases exist which grant standing to taxpayers where their interest arguably does not meet the requirements of *Wm. Penn*, *supra*. The relaxing of those requirements in those cases or, more appropriately, the granting of standing where the degree of causal connection between the action complained of and the injury alleged is small, can be explained by the policy behind granting taxpayers standing. ...

As Mr. Justice Roberts pointed out over ten years ago in *Faden v. Phila. Housing Auth.*, 424 Pa. 273, 278, 227 A.2d 619, 621-622 (1967):

‘(A)lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts.’

² Defendant Waste Management of Pennsylvania, Inc.’s Post-Hearing Memorandum of Law in Opposition to Plaintiffs’ Petition for Injunction, filed with the Clerk of Judicial Records—Civil Division on March 18, 2016, p. 10; Defendant City of Allentown’s Post-Trial Memorandum of Law, filed with the Clerk of Judicial Records—Civil Division on March 18, 2016, p. 22 (joining and adopting the arguments of WMI concerning Plaintiffs’ lack of standing).

See Note, Taxpayers' Suits: A Survey and Summary, *supra*, n.5. Hence, the policy for granting standing [w]here the degree of causal connection is small is to ensure judicial review which would otherwise not occur. This will most often occur when those directly and immediately affected by the complained of expenditures are beneficially affected as opposed to adversely affected. *Cf.* Faden v. Phila. Housing Auth., *supra*.

Id. at 444-45, 409 A.2d at 852. Further, footnote 5 of Biester provides:

The ultimate basis for granting standing to taxpayers must ... be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Id. at 443 n.5, 409 A.2d at 851 n.5, *quoting* Note, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 904 (1960).

Pursuant to the holding in Biester, a taxpayer seeking standing to sue must allege a substantial, direct and immediate interest in the outcome of the suit unless the taxpayer can show: 1. the governmental action would otherwise go unchallenged but for taxpayer standing; 2. those most directly affected by the expenditure would benefit and thus, be disinclined to challenge it; 3. judicial relief is appropriate; 4. alternative remedies are unavailable; and 5. no one else is better suited to challenge the action. *Gleim v. Bear*, 151 Pa. Commonwealth Ct. 274, 281, 616 A.2d 1064, 1068 (1992).

Mascaro is unable to establish a substantial, direct and immediate interest in the outcome of the suit as a disappointed competitor. "A mere disappointed bidder to a public contract does not have standing to challenge its award because he has no prop-

erty interest and has suffered no injury that would entitle him to redress.” *Black Ash Services, Inc. v. DuBois Area School District*, 764 A.2d 672, 674 (Pa. Commw. 2000). “To have standing, the bidder must be an aggrieved taxpayer of the municipality awarding the contract.” *Id.* Here, Mascaro pays a business privilege tax, but the business privilege tax has not been the type of tax historically considered to establish an entity as an aggrieved taxpayer. We find that persons or companies paying real estate tax to the City are better suited to challenge the action than a company only paying tax on its profits earned. Accordingly, we find that Mascaro is a disappointed competitor of the awarded contract and does not have taxpayer standing to bring the current action.³

However, MB pays real estate taxes to the City of Allentown, which makes it an aggrieved taxpayer of the municipality awarding the contract. Additionally, in an abundance of caution, Mendoza was added as a plaintiff after Defendants filed preliminary objections based on standing to Plaintiffs’ original complaint. Mendoza owns residential property in the City of Allentown, pays City taxes, and is serviced by the waste management contract entered into by the City. N.T. pp. 17-19.

Applying the requirements of taxpayer standing to MB and Mendoza, we find the challenger to this type of governmental action would only include disappointed competitors who lack standing to file suit or individuals with taxpayer standing, and the winner of the awarded contract would benefit from such award and would be disinclined to challenge it. Further, judicial relief is appropriate, there are no other alternative remedies, and no one else is better suited to challenge this action. Therefore, MB and Mendoza meet the taxpayer standing requirements.

Defendants have disputed Mendoza’s standing contending that procedurally and technically, Mendoza is just a “straw man” for Mascaro and MB especially given the fact that Mendoza only learned of the lawsuit one week prior to the hearing. See N.T. p. 22. This issue was addressed in *Marx v. Lake Lehman School District*, 817 A.2d 1242 (Pa. Commw. 2003), when appellees argued that Marx

³ Because we find Mascaro does not have standing to bring this action, we do not address the City and WMI’s allegation of unclean hands.

was a straw man for an unsuccessful bidder. The court in holding that knowledge of the details of the case is not necessary, stated:

The courts have recognized that, because competitors are not granted standing in bidding award cases, the process relies upon taxpayers to bring actions such as this one. *Rainey v. Borough of Derry*, 163 Pa.Cmwlth. 606, 641 A.2d 698, 701 (1994). For this reason, the standing requirement is not an onerous one. And, in fact, the notion argued by [appellees] that, to possess standing, Marx must have a substantial, direct, and immediate interest in the matter, has been rejected in public bidding cases. *Id.* We, therefore, conclude that Marx, although he is unfamiliar with many of the details of this case, as a taxpayer, nonetheless, has demonstrated a sufficient interest in the matter to convey standing upon himself. Review of the record shows that Marx was in the construction business, had an interest in the integrity of the bidding process in general, although he had submitted no bid on this project, had read the newspaper regarding what occurred with the bidding and had spoken to the unsuccessful bidder [], a long-time friend whose word he trusted.

Id. at 1245. Similarly, Mendoza, in addition to living and owning property in the City for over ten years, works in the waste management business, and has worked for Mascaro for 28 years. N.T. pp. 17-20. Mendoza is familiar with Mascaro being awarded waste management contracts via public bid. N.T. pp. 21-22. He is also familiar with the fact the City awarded waste management contracts via public bid for 20 years and is now changing the procedure. *Id.* We find that Mendoza is sufficiently familiar with the facts of this case to assert his own standing to challenge the award of the MSW&R Contract.

Finding that MB and Mendoza (Plaintiffs) have proper standing, we address the substance of the permanent injunction.

Findings of Fact—Injunction

1. Mascaro is a waste service company that engages in the collection, recycling, transportation, transferring, composting and disposal of nonhazardous solid waste. (Stipulated Finding of Fact, 2.)

2. MB is a Pennsylvania general real estate partnership that is the owner of property in the City of Allentown, Pennsylvania at 315 Basin Street, and is a taxpayer (real estate taxes) of the City of Allentown. (*Id.* at 3.)

3. Jose Mendoza (Mendoza) is a resident of the City and resides at 1932 South Delaware Street, Allentown, Pennsylvania 18103. (Notes of Testimony, February 23, 2016, p. 17.)

4. Mendoza pays real estate taxes to the City. (N.T. p. 19.)

5. Mendoza is serviced by the waste management contract entered into by the City. (*Id.*)

6. Mendoza is employed by Mascaro and has worked for them for 28 years. (N.T. p. 20.)

7. Defendant City of Allentown is a third-class city operating under the Home Rule Charter form of governance under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S.A. § 2901 *et seq.*, with offices at 435 Hamilton Street, Allentown, Pennsylvania 18101. (Stipulated Finding of Fact, 4.)

8. Defendant WMI is a corporation in the solid waste business with a local office at 2710 Golden Key Road, Kutztown, Pennsylvania 19530. (Stipulated Finding of Fact, 5.)

9. In the past, pursuant to a fixed competitive bid process, both Mascaro and WMI were awarded waste collection, disposal and related services contracts by the City. (Stipulated Finding of Fact, 6.)

10. In the past, the City's bid invitations upon which the waste collection, disposal and related services contracts awards were made to both Mascaro and WMI were pursuant to fixed competitive bid invitations with common specifications applicable to all parties. (Stipulated Finding of Fact, 7.)

11. Each of these prior awards of waste collection, disposal and related services contracts by the City to Mascaro and WMI were made in accordance with these fixed competitive bid invitations and were made to the lowest responsive and responsible bidder. (Stipulated Finding of Fact, 8.)

12. None of the last three bid invitations (*i.e.*, in years 1995, 2001 and 2006) were Requests for Proposals on the basis of a professional services/professional consulting contract or included provisions for ‘value added services,’ nor did they provide for negotiations after the bids were submitted. (Stipulated Finding of Fact, 9.)

13. The current contractor for the City providing the trash collection, disposal and related services is WMI. (Stipulated Finding of Fact, 10.)

14. This current contract (the ‘2006 Contract’) was awarded to WMI pursuant to a City fixed competitive bid process. (Stipulated Finding of Fact, 11.)

15. The current waste management contract includes the collection of municipal solid waste twice a week, dual stream recycling collection once a week, and provisions for yard waste, bulk collection and litter basket collection. (N.T. p. 42.)

16. The 2006 Contract awarded to WMI expires in June 2016. (Stipulated Finding of Fact, 12.)

17. Mascaro currently serves approximately 100 municipalities; all of those contracts have been obtained through a public bid solicitation. (N.T. p. 34.)

18. The City retained Gershman, Brickner & Bratton, Inc. (‘GBB’), Solid Waste Management Consultants, of Fairfax, Virginia, as a consultant in the 2006 City Bid Invitation. (Stipulated Finding of Fact, 13.)

19. In or around 2015, the City again retained GBB as consultant for Request for Proposal No. 2015-24 (‘RFP’) with regard to the City’s MSW&R Contract. (Stipulated Finding of Fact, 14.)

20. GBB recommended that the waste management contract solicitation should be done via a request for proposal. (N.T. p. 61, 114.)

21. GBB recommended a request for proposal for the waste management solicitation because of the variety of services and options involved in the waste management contract,

including: the frequency of collection for solid waste per week; the frequency of collection for recyclables per week; whether collections were automated, semi-automated or manual; whether recyclables were picked up by a dual stream or a single stream process; household hazardous waste options; options for staffing at the drop-off location; a no haul/no landfill option; the number of years of the contract; and, whether the total cost of the services was over the life of the contract, a fixed price, a fuel cost adjustment or a consumer price index adjustment. (N.T., pp. 110-14.)

22. The City considers the collection and disposal of municipal solid waste and recyclables and related services a services contract. (N.T. pp. 176-77.)

23. The City's Purchasing Department together with the Bureau of Recycling and Solid Waste decided to solicit for the waste management contract via a request for proposal. (N.T. pp. 60-61.)

24. No one in the City Solicitor's Office, the City's Law Department, or the Solicitor herself, ever saw or reviewed the RFP before the RFP was advertised and issued to prospective proposers. (Stipulated Finding of Fact, 15; N.T. p. 62.)

25. Request for Proposal, RFP No. 2015-24, was issued by the City for the Municipal Solid Waste and Recyclables Collection, Disposal and Related Services. (Stipulated Finding of Fact, Exhibit B.)

26. The RFP was sent to companies and individuals identified as potentially interested in the RFP. The RFP was advertised on the City's website and various trade journals. People or companies interested in the RFP emailed the City and the solicitation was emailed to them. (N.T. pp. 130, 134.)

27. The RFP included a standard request for proposal provision at Section 3.3 that provided in part:

The City may elect, at its sole and absolute discretion, to award a Contract based on the initial Proposals, or, to open negotiations, either written or oral, with one or more Propos-

ers to address performance, technical questions, pricing delivery, or other provisions. If negotiations are opened, the City may elect, at its sole and absolute discretion to conclude negotiations at any time if it is determined to be in its best interest, or they will be closed upon settlement of all questions and clarifications.

RFP Section 3.3.

28. The RFP also included the following language at Section 3.4:

The award will be made to that responsive, responsible and qualified Proposer who's [sic] Proposal, conforming to the specifications, will be most advantageous to the City; price and other factors considered. The award may or may not be made to the Proposer with the lowest cost.

RFP Section 3.4.

29. The RFP included the following provision at Section 5.1.31:

The Proposer may include in their proposal any additional 'value added services' that the Proposer wishes the City to consider and evaluate. These services are separate from the Options outlined in the RFP and should include detailed information and any additional incremental costs to those proposed.

RFP Section 5.1.31.

30. A mandatory Pre-Proposal Conference was held on September 9, 2015 at 10:00 a.m., which all parties interested in submitting a proposal in response to the RFP were required to attend. (Stipulated Finding of Fact, 16.)

31. Questions were accepted at the Pre-Proposal Conference, and addenda were issued in response to those questions. (N.T. pp. 130-31.)

32. Both Mascaro and WMI, among others, attended the Pre-Proposal Conference on September 9, 2015. (Stipulated Finding of Fact, 17.)

33. On September 29, 2015, two weeks before responses to the RFP were due, Mascaro's General Counsel, William F. Fox, Jr. ('Attorney Fox'), sent a letter to the City's Mayor, Finance Director, Purchasing Agent and Solicitor. (Stipulated Finding of Fact, 19.)

34. Pursuant to the September 29, 2015 correspondence, Attorney Fox requested RFP No. 2015-24 be cancelled and withdrawn because the process and procedure being used is unlawful and contrary to the City Code and City Administrative Code. (Stipulated Exhibit C.)

35. On October 2, 2015, the City issued Addendum No. 3. (Stipulated Finding of Fact, 20.)

36. Addendum No. 3 replaced Section 3.3 of RFP #2015-24, to read as follows:

The City of Allentown reserves the right to request additional information from any Proposer and the right to waive minor irregularities in the procedures or proposals if it is deemed in the best interests of the City of Allentown. The City further reserves the right to reject all Proposals and seek new Proposals when such procedure is considered to be in the best interest of the City. (Stipulated Finding of Fact, Exhibit D.)

37. Addendum No. 3 replaced Section 3.4 of RFP #2015-24, to read as follows:

The award will be made to that responsive and responsible Proposer whose Proposal, conforming to the specifications, will be most advantageous to the City; price and other factors considered. The prices submitted by the Proposer on the Forms in Appendix VI are firm and final and the award shall be made to the lowest responsible and qualified Proposer based on the Options selected by the City. (Stipulated Finding of Fact, Exhibit D.)

38. Addendum No. 3 also provided: '[f]urthermore, any and all references in the RFP to "Bid" or "Bidder" shall be replaced with "Proposal" or "Proposer," respectively.' (Stipulated Finding of Fact, Exhibit D.)

39. Addendum No. 3 was not advertised, nor published in a newspaper of general circulation, but rather was sent to prospective proposers that had attended the Pre-Proposal Conference on September 9, 2015. (N.T. pp. 71-72.)

40. The original due date for proposals to be submitted to the City was September 30, 2015 at 3:00 p.m. However, the City extended the deadline to October 15, 2015 at 3:00 p.m. (Stipulated Finding of Fact, 18.)

41. On October 15, 2015, the technical proposals were opened. (N.T. p. 72.)

42. On October 15, 2015, at 3:00 p.m., the City announced that seven (7) proposers responded to the RFP. They were Mascaro; WMI; Republic Waste Services, Inc.; County Waste of PA; Advanced Disposal Services, FCC; and Progressive Waste Solutions. Five of the proposers submitted technical and pricing proposals, while two, Republic Waste Services, Inc. and Progressive Waste Solutions, submitted in writing that they were declining to propose. (Stipulated Finding of Fact, 22.)

43. At the time of the announcement on October 15, 2015, at 3:00 p.m., the price proposals of the proposers were not opened, but rather were taken into custody by the City's Purchasing Department. No mention of when these price proposals would be opened or disclosed was made. (Stipulated Finding of Fact, 23.)

44. On October 16, 2015, Attorney Fox sent a letter to the City's Purchasing Agent. (Stipulated Finding of Fact, 24.)

45. Pursuant to the October 16, 2015 correspondence, Attorney Fox demanded 'that the City immediately provide [Mascaro] with copies of the Cost Proposals submitted by each of the bidders' '[s]ince the City did not open, read or disclose the bid numbers as required, and since it has not made those bid numbers available for public inspection.' (Stipulated Exhibit E.)

46. After the technical proposals were opened, an evaluation committee was formed to review the technical proposals;

a meeting was held on October 19, 2015. (N.T., pp. 79-80; Defendant's Exhibit 5.)

47. GBB created a complex and technical spreadsheet and a table for economic analysis in order to fairly evaluate all of the information that came in from the Proposals. The information was provided in a five-year and seven-year summation of what the proposal options were from each proposer. The compilation of data was provided to the City's staff and an evaluation committee. (N.T. pp.116-18.)

48. The committee met and three proposers were selected to be shortlisted as companies still being considered for the RFP: FCC, J.P. Mascaro & Sons, and WMI. (N.T. pp. 79-90, 136; Defendant's Exhibit 5.)

49. The cost/pricing proposals of the proposers were opened by the City on or about Monday October 19, 2015, but the [] prices of the proposers were not read publicly, nor were they ever made available for public inspection. (Stipulated Finding of Fact, 25.)

50. The cost proposals were opened in the presence of the City Controller's Office. The names of the companies were read and identified on the tabulation memo for this RFP. (N.T. pp.132-33.)

51. Clarification letters were sent to the shortlisted companies in order for those companies to clarify their cost proposals to ensure that the correct numbers were being compared during the evaluation. (N.T. p. 137.)

52. The cost proposals were forwarded to the Evaluation Committee and the Evaluation Committee recommended that WMI be awarded the contract. (N.T. p. 81.)

53. The City awarded the MSW&R Contract without ever disclosing the pricing numbers in the proposals to the proposers or to the public at large. (Stipulated Finding of Fact, 26.)

54. The City awarded the MSW&R Contract to WMI, contingent upon approval by City Council. (Stipulated Finding of Fact, 27.)

55. The City awarded the contract to WMI by letter dated October 30, 2015. The letter stated: ‘The award of this contract is contingent upon approval by City Council. Do not order any materials or equipment, begin work or make any other financial commitments concerning this matter until you are in possession of a signed contract by both parties.’ (Plaintiffs’ Exhibit 10.)

56. On October 30, 2015, the City sent a [rejection] letter to Mascaro regarding the award of the MSW&R Contract. (Stipulated Finding of Fact, 28.)

57. On November 4, 2015, Attorney Fox spoke at the regular public meeting of City Council. (Stipulated Finding of Fact, 29.)

58. On November 6, 2015, Attorney Fox sent a letter to the President of City Council and all City Council members. (Stipulated Finding of Fact, 30.)

59. On November 30, 2015, City Council held a special meeting. (Stipulated Finding of Fact, 31.)

60. At the November 30, 2015 City Council special meeting, the City Administration placed before City Council Resolution No. 73, a Request for Approval by City Council of Contract Award, Service or Contract Price Increase Pursuant to City Ordinance, Article 130.16. (Stipulated Finding of Fact, 32.)

61. At the November 30, 2015 special meeting, Attorney Fox spoke to City Council. (Stipulated Finding of Fact, 33.)^[4]

62. At the November 30, 2015 special meeting, City Council, by a six-to-one vote, tabled consideration of Resolution No. 73. (Stipulated Finding of Fact, 34.)

63. On December 9, 2015, City Council again considered Resolution No. 73. (Stipulated Finding of Fact, 35.)

⁴ Plaintiffs’ counsel was given the opportunity to have the substance of the November 30, 2015 City Council meeting reduced to a transcript and admitted as part of the record of this matter. No transcript was ever received by this court.

64. At the December 9, 2015 meeting, Attorney Fox spoke to City Council. (Stipulated Finding of Fact, 36.)

65. The City's 'Request for Approval' attached to Resolution No. 73 required the contract to be identified as one of three categories. The WMI award was categorized as follows: 'The contract is for the engagement of professional services. We have received and reviewed a proposal or proposals for professional services in connection with above referenced project or requirement for professional services. We recommend award of the contract.' (Stipulated Finding of Fact, Exhibit H.)

66. At the December 9, 2015 meeting, City Council, as recommended by the City Administration, voted to approve the award of the MSW&R Contract to WMI. (Stipulated Finding of Fact, 37.)

67. On January 8, 2016, the City Solicitor's Office sent WMI the Agreement pursuant to RFP 2015-24 for signature. (Plaintiffs' Exhibit 14.)

68. The Agreement was entered between the City and WMI for the municipal solid waste and recyclables collection, disposal and related services on February 15, 2016. (Plaintiffs' Exhibit 15.)

69. The Agreement provided the following provision: 'The CONTRACTOR's Proposal stipulates and details the Value Added Services that will be provided to the CITY. These Value Added Services and all costs and pricing submitted by the CONTRACTOR in Appendix VI of RFP 2015-24, and as part of the Proposal, shall be included under the terms of the Contract.' (Plaintiffs' Exhibit 15.)

Conclusions of Law

1. The MSW&R Contract is a contract for services.

2. Defendant City of Allentown is a third-class city operating under the Home Rule Charter form of governance under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S.A. §2901 *et seq.*

3. The City is governed by its Home Rule Charter and Administrative Code.

4. The Home Rule Charter liberally construes the powers of the City in favor of the City, and specific mention of particular powers in the Home Rule Charter does not limit the general powers granted by the Home Rule Charter. Home Rule Charter §105(A).

5. The Home Rule Charter provides that ‘[a]ll purchases of materials, supplies, equipment and services by the City government shall be made through competitive processes, with evidence available to demonstrate broad solicitation of suppliers and opportunities for participation in the acquisition process; and the value received for the money paid.’ Home Rule Charter §815A.

6. The Home Rule Charter provides for the adoption of a Code for the governing of policies necessary to effectively administer a system of competitive purchasing for the City. Home Rule Charter §815B.

7. The Administrative Code delineates types of contracts that are required to be awarded to the lowest responsible bidder. Administrative Code §130.16B(1) and (2).

8. The language of the Administrative Code §130.16B is clear and free from ambiguity and should be given its plain meaning.

9. The Administrative Code §130.16B does not require service contracts to be awarded to the lowest responsible bidder.

10. The lack of policies regarding the solicitation of service contracts in the Administrative Code does not limit the power of the City to govern the solicitation of service contracts according to its Home Rule Charter.

11. Service contracts must be solicited via a competitive process, ‘with evidence available to demonstrate broad solicitation of suppliers and opportunities for participation in the acquisition process; and the value received for the money paid.’ Home Rule Charter §815A.

12. The RFP used to solicit the MSW&R Contract demonstrated broad solicitation of suppliers and opportunities for participation in the acquisition process.

13. The compilation of the technical and cost proposals as summarized by spreadsheets prepared by professional consultants and evaluated by an evaluation committee establishes a competitive process with evidence of the value received for the money paid.

14. Plaintiffs did not establish a clear right to relief as required for permanent injunctive relief.

Discussion

Plaintiffs assert that the City illegally used a request for proposal process instead of an invitation to bid to solicit the MSW&R Contract. The City asserts that it is permitted to use the request for proposal process for such solicitation pursuant to its Home Rule Charter and Administrative Code. Plaintiffs request a permanent injunction to invalidate the MSW&R Contract, prevent performance pursuant to said Contract, and prevent the City from awarding any contract in response to the RFP.

In order to establish a claim for a permanent injunction, “the plaintiff must establish a clear right to relief, that there is an urgent necessity to avoid an injury which cannot be compensated for by monetary damages, and that greater injury will result from refusing rather than granting the relief requested.” *Richard Allen Preparatory Charter School v. School District of Philadelphia*, 123 A.3d 1101, 1107 (Pa. Commw. 2015). We first address whether Plaintiffs have established a clear right to relief.

The contract at issue describes the work to be performed as:

The ‘Work’ shall include the furnishings of all labor, materials, vehicles, containers, equipment, bonds, insurance, licenses, permits, supplies, tools, tipping fees and all other items incidental to performing the prompt and efficient collection, removal, transportation and disposal of all MSW, Yard Waste and Recyclables for all residences, special events and

commercial entities and all other work as necessary to properly perform the work, as set forth in the Contract.

The City's RFP §10.4. The work described above is related to the collection and disposal of municipal solid waste and recyclables and includes typical language of a service contract, which is what the City considers it. N.T. pp. 176-77. Therefore, it is necessary to determine how the City is required to solicit service contracts.

The City is a third-class city operating under the Home Rule Charter form of governance under the Home Rule Charter and Optional Plans Law, 53 Pa. C.S.A. §2901 *et seq.* The City has adopted both a Home Rule Charter and an Administrative Code.

Looking first to the general language of the Home Rule Charter, it provides: "[t]he City shall have the power to exercise any power or to perform any function not denied by the Constitution of the United States, by the Constitution of Pennsylvania, by act of the General Assembly of Pennsylvania, or by this Charter." Home Rule Charter §102. Further, it states, "[a]ll powers of the City shall be exercised as provided by this Charter, or if the Charter makes no provision, as provided by ordinances or resolutions of the City Council." Home Rule Charter §103. Finally, "[t]he powers of the City under this Charter shall be construed liberally in favor of the City, and the specific mention of particular powers in the Charter shall not be construed as limiting in any way the general power granted in this Article." Home Rule Charter §105(A).

More specifically, the Home Rule Charter provides the following language regarding bidding:

Section 815 BIDDING PROCESS

A. Competition Principle

All purchases of materials, supplies, equipment and services by the City government shall be made through competitive processes, with evidence available to demonstrate broad solicitation of suppliers and opportunities for participation in the acquisition process; and the value received for the money paid.

B. Competitive Policies Code

Consistent with applicable Federal and State laws, the Council shall adopt and may amend, by Ordinance, a Code

for the establishment, regulation, and maintenance of a competition system; governing the policies necessary to effectively administer a system of competitive purchasing for the City government. This Code may include but is not limited to: 1) establishing varied procedures for types of services or materials to be acquired; 2) setting the dollar limits which would require: a) verbal solicitation of price quotes with a written record; b) written price quotes after informal solicitation; and c) formal public solicitation of written price quotes after public advertising; 3) establishing procedures for determining sole source contract awards; 4) policies regarding minority or local resident preference; and 5) policies and procedures to encourage the use of contemporary purchasing techniques such as reverse auctioning and electronic commerce.

Home Rule Charter §815.

Pursuant to the language of the Home Rule Charter, services purchased by the City shall be made through “competitive processes” and City Council shall adopt a Code for the “establishment, regulation, and maintenance of a competition system; governing the policies necessary to effectively administer a system of competitive purchasing for the City government.” Home Rule Charter §815.

An Administrative Code has been adopted pursuant to the City’s Home Rule Charter, and provides, in part, as follows:

130.16 CONTRACTS

A. Administration

1. Contract administration for the City including but not limited to authority as to preparation of specifications, letting of bids, award of contracts and payment of bills, shall be vested in the Mayor and the Department of Finance to be exercised in accordance with procedures adopted by the Mayor, on file with City Council, and consistent with the requirements set forth herein.

(a) For the award of contracts or the engagement of professional services, coordination with and approval by

Resolution of City council prior to contract or engagement execution is required. ...

(b) For the award of all contracts over \$40,000 that are required to be bid, recommendation of the lowest responsible bidder by the Department of Administration and approval by Resolution of City Council prior to contract execution are required.

(c) For all contracts over \$40,000 that are required to be bid whenever an increase by 10% or more is recommended by the Administration, resubmission to City Council and approval by Resolution prior to execution of any increase are required.

(d)—(g) ...

(h) All bid, contract and engagement contracts with the exception of legal counsel exempt under the provisions of the Home Rule Charter shall contain language noting such engagement is subject to Council approval by resolution at a public meeting.

Section 130.16A.

Section 130.16A of the Administrative Code governs the competitive procedures under which the City awards contracts. The waste management contract is not a contract for the engagement of professional services; therefore, subsection (a) does not apply. Additionally, there was no evidence submitted to support that the service contract falls under subsection (c). Accordingly, it is necessary to determine whether the waste management service contract is one that is required to be bid pursuant to subsection (b). We turn to Administrative Code §130.16B for the procedures specific to bids:

B. Bidding Process

1. Whenever the estimated cost of any construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to the control of the City shall exceed Forty Thousand (\$40,000) Dollars; it shall be the duty of the City to have such work performed pursuant to a contract

awarded to the lowest responsible bidder, after advertisement for bids. Every such contract shall contain a provision obligating the contractor to the prompt payment of all material furnished, labor supplied or performed, rental for equipment employed, and services rendered by public utilities in or in connection with the prosecution of the work, whether or not the said material, labor, equipment or service enter into and become component parts of the work or improvement contemplated. Such provision shall be deemed to be included for the benefit of every person, partnership, association or corporation who, as subcontractor or otherwise, has furnished material, supplied or performed labor, rented equipment or services in or in connection with the prosecution of the work as aforesaid, and the inclusion thereof in any contract shall preclude the filing of any such person, partnership, association or corporation of any mechanics' lien claim for such material, labor or rental of equipment.

2. Whenever the estimated costs of any purchase of supplies, materials or equipment or the rental of any equipment, whether or not the same is to be used in connection with the construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to the control of the City, shall exceed Forty Thousand (\$40,000) Dollars, it shall be the duty of the City to have such purchase or rental made pursuant to a contract awarded to the lowest responsible bidder, after advertisement for bids ...

a. The City shall not evade the provisions of subsection (a) or (b) as to advertising for bids by purchasing materials or contracting for services piecemeal for the purpose of obtaining prices under Forty Thousand (\$40,000) Dollars upon transactions which should, in the exercise of reasonable discretion and prudence, be conducted as one transaction amounting to more than Forty Thousand (\$40,000) Dollars. ...

b. Written or telephonic price quotations from at least three (3) qualified and responsible contractors or vendors shall be requested for all contracts that exceed Ten Thousand (\$10,000) Dollars but are less than the amount requiring

advertisement and competitive bidding or, in lieu of price quotations, a memorandum shall be kept on file showing that fewer than three (3) qualified contractors exist in the market area within which is its practicable to obtain quotations.

Administrative Code §130.16B.

In reading the Administrative Code, we must keep in mind the rules of statutory construction, which provide in part:

(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1 Pa. C.S.A. §1921.

Plaintiffs assert that the waste management service contract is a contract that is “required to be bid” pursuant to Administrative Code §130.16(A)(1)(b), because it falls within the language of §130.16(B)(1). Plaintiffs argue, “[t]hus, 130.16(B) Bidding Process makes it clear that contracts for performing work, including “contracting for services,” in the City (“any project subject to control of the City”), in excess of \$40,000 must be awarded to the “lowest responsible bidder” pursuant to a fixed competitive bid solicitation. See Plaintiffs’ Post-Hearing Memorandum filed with the Clerk of Judicial Records—Civil Division on March 11, 2016, p. 16.

However, Plaintiffs’ reading of §130.16(B)(1) is disingenuous as it is clear that the language “any project subject to the control of the City” applies only to the specific words it follows. Accordingly, it is only when the estimated cost of *any construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to the control of the City* that the contract be awarded to the lowest responsible bidder. The waste management contract is not a construction project, erection or installation project, and is not involved in the completion of, repair of or addition to any project. It is a service contract, a type of contract not listed in the categories of contracts required to be bid.

The language set forth in the “Bidding Process” is clear and unambiguous. Sections “1” and “2” provide specific examples of contracts that require competitive bidding. The definitive list of contracts set forth in the two provisions does not include service contracts.

Plaintiffs contend that although the word “service” is not in the list of contracts specified in the first provision, we should add the category of contracts to the list because the remaining language of that provision puts service contracts within the purview of the mandatory bidding requirement. Plaintiffs assert that the second sentence of Section 130.16(B)(1) establishes that “service” contracts are included.⁵ The second sentence states:

Every such contract shall contain a provision obligating the contractor to the prompt payment of all material furnished, labor supplied or performed, rental for equipment employed, and services rendered by public utilities in or in connection with the prosecution of the work, whether or not the said material, labor, equipment or service enter into and become component parts of the work or improvement contemplated.

Again, Plaintiffs’ interpretation of the Administrative Code is not consistent with the actual language provided therein. “Every such contract” refers to the definitive list of contracts provided in the first sentence, which did not include service contracts. Therefore, the second sentence does not apply to service contracts. In addition, the remainder of the sentence as it relates to “services,” requires the contracts for the specified projects to include a provision for the contractor’s prompt payment of all services rendered by public utilities in connection with the work. Such language does not in any way impute service contracts into the realm of competitive bidding; it simply provides a mechanism for contractor

⁵ See Plaintiffs’ Post-Hearing Memorandum filed with the Clerk of Judicial Records—Civil Division on March 11, 2016, pp. 17-18, in which Plaintiffs state: “For instance, the second sentence of (B)(1): ‘Every such contract shall contain a provision obligating the contractor to the prompt payment of material furnished, labor supplied or performed ... and services rendered ... with the prosecution of the work, whether or not said material, labor equipment or services enter into and become component parts of the work or improvement contemplated’ establishes that ‘service’ contracts are included.”

payment of services rendered by public utilities for other types of projects. This sentence does not provide any basis for this court to add language to the provision to include service contracts.

Plaintiffs similarly argue that the last sentence in Section 130.16(B)(1) is a clear indication that the waste management contract falls within the category of competitive bidding. Plaintiffs fail to elaborate on how such a sentence supports their interpretation. The final sentence of Section 130.16(B)(1) establishes that the provision required in the enumerated list of contracts obligating the contractor to the prompt payment of all material furnished, labor supplied or performed, rental for equipment employed and services rendered by public utilities precludes the filing of any mechanics' lien claim for such material, labor or rental of equipment. There is nothing in the language of the last sentence that remotely expands the list of contracts that require competitive bidding.

The plain language of the Administrative Code makes it clear that service contracts are not in the category of contracts that require bid solicitation. We are not in a position to add "service contracts" to the list of enumerated contracts required to be bid. We find the omission of such contracts deliberate. See *Veterans of Foreign Wars Post 1989 v. Indiana County Board of Assessment Appeals*, 954 A.2d 100, 106 (Pa. Commw. 2008) (citing *Commonwealth v. Ostrosky*, 589 Pa. 437, 446 n.7, 909 A.2d 1224, 1229 n.7 (2006)); *Black's Law Dictionary* 620 (8th ed. 2004).

Because the Administrative Code does not require a service contract to be bid, we must determine what is required for the solicitation of service contracts. Plaintiffs argue that if the Home Rule Charter and Administrative Code are silent as to how service contracts are to be awarded, "then, under 5[3] Pa.C.S.A. § 2971 of the Home Rule Charter and Optional Plans Law, the general law applicable to Third Class Cities would apply, and under that general law (*i.e.*, Third Class City Code, 53 P.S. § 36901.1), all contracts, including service contracts, greater than \$18,500 are to be awarded to the lowest responsible bidder after advertising and competitive bidding." Plaintiffs' Post-Hearing Memorandum, filed

with the Clerk of Judicial Records—Civil Division on March 11, 2016, p. 19, f.n. 11. The City responds that its Home Rule Charter governs service contracts and the Third Class City Code does not govern this issue.

Pennsylvania law provides:

A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality.

53 Pa. C.S.A. §2961.

Such broad grant of power is enumerated in both the Home Rule Charter and the Administrative Code. The Home Rule Charter and Administrative Code provide, “[t]he powers of the City under this Charter shall be construed liberally in favor of the City, and the specific mention of particular powers in the Charter shall not be construed as limiting in any way the general power granted in this Article.” City of Allentown, Home Rule Charter, §105; Administrative Code §100.05A.

Pennsylvania statutory authority together with the Home Rule Charter and Administrative Code provide the authority for the City to determine how service contracts should be solicited, and those regulations supersede the Third Class City Code. The Administrative Code provides the policies necessary to effectively administer a system of competitive purchasing for the City. The Administrative Code does not delineate how the City is to solicit service contracts. Therefore, it is necessary to go back to the broader language of the Home Rule Charter which provides: “all purchases of ... services by the City government shall be made through competitive processes, with evidence available to demonstrate broad solicitation of suppliers and opportunities for participation in the acquisition process; and the value received for the money paid.” Home Rule Charter §815A.

The RFP⁶ for the MSW&R Contract was sent to companies and individuals identified as potentially interested in the RFP. N.T. pp. 130, 134. The RFP was also advertised on the City's website and in various trade journals. *Id.* A pre-proposal meeting was held to address any questions of potential proposers. N.T. pp. 130-31. Such efforts constitute evidence of broad solicitation of suppliers and opportunities for participation in the acquisition process.

The purchase of the waste management services was required to be made via a competitive process. The City and proposers did not negotiate price. N.T. p. 144. An evaluation committee reviewed the technical proposals and a complex spreadsheet was created to compare the different technical components of the proposals. N.T. pp. 79-80, 116-18; Defendant's Exhibit 5. The cost proposals were opened and were compared by a cost review evaluation committee during meetings held on October 19, 20, 21, 22, 23, 24, 26, and 27 of 2015. N.T. p. 174. The technical evaluations were scored and compared with the cost proposal scoring. N.T. p. 175. The contract was awarded based on the scores of both the technical and cost proposals. We find such process to evidence both competition among proposers and to establish the value of the services received for the money paid.

Accordingly, the RFP solicitation for the MSW&R Contract constitutes a competitive process as required by Home Rule Charter §815A and included the necessary evidence of broad solicitation, opportunities for participation and evidence of the value received for the money paid. Therefore, the RFP was a proper mechanism for waste management solicitation.

Because this request for proposal was consistent with the requirements of the "competitive process" set forth in the Home Rule Charter and because the Administrative Code did not specify any additional or contrary solicitation procedures for a services contract, we find that Plaintiffs cannot establish a clear right to relief as required for a permanent injunction. Plaintiffs' request for relief is denied.

⁶ We note that Plaintiffs do not contend that there was an error with the RFP process; Plaintiffs argue that the error was that the RFP process was employed. See Notes of Testimony, pp. 166-71.

DECREE NISI

And now, this 10th day of May, 2016, after a non-jury trial conducted before the undersigned on February 23, 2016, and upon consideration of the record, the briefs filed by the parties, and after oral argument on March 24, 2016, and for the reasons expressed in the accompanying Adjudication,

IT IS DECREED that this Decree is entered in favor of Defendants, City of Allentown and Waste Management of Pennsylvania, Inc. and against Plaintiffs, Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons, M.B. Investments, and Jose Mendoza.

IT IS FURTHER DECREED that Plaintiffs' request for permanent injunctive relief to invalidate the City of Allentown's award of the solid waste collection and recycling contract to Waste Management of Pennsylvania, Inc. is DENIED.

IT IS FURTHER DECREED that this Decree shall become final unless post trial motions are filed pursuant to Pennsylvania Rule of Civil Procedure 227.1(c)(2) within ten days of the filing of the Adjudication in the within matter.



PERIODICAL PUBLICATION

*** Dated Material. Do Not Delay. Please Deliver Before Monday, June 27, 2016**