

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

American Traffic Solutions, Inc., :  
Petitioner :  
v. : No. 139 C.D. 2014  
: Argued: May 13, 2014  
Philadelphia Parking Authority, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI FILED: May 30, 2014

American Traffic Solutions, Inc. (ATS) petitions for review of the final determination of the Philadelphia Parking Authority (PPA) denying ATS's protest of the PPA's award of a contract to Xerox State and Local Solutions (Xerox) for a new Red Light Camera (RLC) system in the City of Philadelphia. For the reasons that follow, we affirm the PPA's determination.

By Act 123 of 2002, the General Assembly created the RLC program, a pilot program through which red light traffic violations are issued by way of an automated system employing photographic technology. Pursuant to Section 3116 of the Vehicle Code, 75 Pa. C.S. §3116, the PPA administers the RLC program in Philadelphia in conjunction with the City of Philadelphia and the Commonwealth

of Pennsylvania, Department of Transportation (PennDOT).<sup>1</sup> To operate the RLC program, the PPA contracts with a “Support Services” vendor which provides the necessary equipment, software and processing and database services. The Support Services vendor forwards photographs of vehicles suspected of committing red light violations to the PPA. The PPA then reviews the images and, if it believes they clearly depict a red light violation, forwards the images to the Philadelphia Police Department which conducts a final review. If the Philadelphia Police Department issues a notice of violation to the owner of a vehicle, the Support Services vendor processes the notice (which includes the relevant photographs) and collects the related fines.

In 2004, after issuing a request for proposals (RFP), the PPA awarded the first RLC Support Services contract to Mulvihill Intelligent Control Systems, Inc. (Mulvihill). ATS ultimately acquired Mulvihill and in 2006, the PPA approved the assignment of the Support Services contract to ATS (ATS Contract). Because the ATS Contract was scheduled to expire on February 14, 2014,<sup>2</sup> the PPA issued another RFP in September 2013 for a new RLC system and all related support services. In response to the RFP, ATS and three other offerors, including

---

<sup>1</sup> Section 3116(h)(2) of the Vehicle Code, 75 Pa. C.S. §3116(h)(2), provides that “[t]he city shall designate or appoint the [PPA] as the system administrator to supervise and coordinate the administration of notices of violation issued under this section.”

<sup>2</sup> The ATS Contract also provided for a “Winding Down Period” of up to six months beyond the termination date of February 14, 2014, to ensure the continued operation of the RLC program during the transition between Support Services vendors.

Xerox, submitted proposals to the PPA. After reviewing the proposals, the PPA's Board authorized the award of the contract to Xerox on December 23, 2013.

On December 30, 2013, ATS filed a protest with the PPA under Section 1711.1 of the Commonwealth Procurement Code (Procurement Code), 62 Pa. C.S. §1711.1, which governs how a protest is to be processed. The protest set forth the following grounds: (1) the PPA violated the terms of the RFP by selecting a proposed RLC system that had not been approved by PennDOT at the time the proposal was submitted; (2) the PPA failed to account for transitional costs that would eliminate or exceed any savings the PPA anticipated from awarding the contract to Xerox; and (3) Xerox's proposed RLC system violates Pennsylvania law because it utilizes radar. ATS also requested a stay of procurement pursuant to Section 1711.1(k) of the Procurement Code, 62 Pa. C.S. §1711.1(k).<sup>3</sup>

---

<sup>3</sup> Section 1711.1(k) of the Procurement Code provides:

In the event a protest is filed timely under this section and until the time has elapsed for the protestant to file an appeal with Commonwealth Court, the purchasing agency shall not proceed further with the solicitation or with the award of the contract unless and until the head of the purchasing agency, after consultation with the head of the using agency, makes a written determination that the protest is clearly without merit or that award of the contract without delay is necessary to protect substantial interests of the Commonwealth.

62 Pa. C.S. §1711.1(k).

On January 14, 2014, the PPA’s Executive Director, Vincent J. Fenerty, Jr. (Director Fenerty), denied ATS’s protest. In his final determination, Director Fenerty explained that: (1) there is no requirement under the law or in the RFP mandating PennDOT approval of a proposed RLC system before the submission of the proposal; (2) the “transitional costs” referenced in the protest are included in the overall pricing of each offer and were considered when evaluating each proposal; and (3) the restrictions upon the use of radar in Section 3368 of the Vehicle Code, 75 Pa. C.S. §3368, apply only to speeding calculations and, therefore, are not relevant to the RLC system. Moreover, Director Fenerty determined that the second and third protest grounds were untimely because ATS was indisputably aware of the underlying facts relating to those protest grounds more than seven days before it filed its protest.<sup>4</sup> Finally, Director Fenerty denied ATS’s request for a stay of procurement, explaining that the continued implementation of the contract must continue without delay in order to protect substantial interests of the Commonwealth, including public safety and the Commonwealth’s fiscal well-being. This appeal by ATS followed.<sup>5,6</sup>

---

<sup>4</sup> Section 1711.1(b) of the Procurement Code provides, in relevant part:

If the protestant is a bidder or offeror or a prospective contractor, the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest ...

62 Pa. C.S. §1711.1(b).

<sup>5</sup> The Procurement Code sets forth the scope and standard of review in an appeal from a determination denying a bid protest. Section 1711.1(i) provides, “The court shall hear the appeal, without a jury, on the record of determination certified by the purchasing agency. The court shall affirm the determination of the purchasing agency unless it finds from the record that **(Footnote continued on next page...)**”

On appeal, the only substantive issue raised by ATS is that the PPA violated the RFP by selecting a proposed RLC system that had not been approved by PennDOT at the time of the bids.<sup>7</sup> In making this argument, ATS relies upon Section A of the RFP, entitled “Evaluation Criteria,” which provides, in relevant part, that “[a]ll proposals which meet the specifications of this RFP will be evaluated in accordance with the evaluation criteria listed below.” (Reproduced Record (R.R.) at 13a). Section A.1.4 of the RFP requires “[c]ompliance with at least the minimum operational specification requirements defined in the RFP.” (R.R. at 14a). The minimum operational and system requirements are found in Section B of the RFP, which provides that “[a]ll equipment, systems, processes and procedures provided under this [RFP] must comply with 75 Pa. C.S. §3116 ...” (R.R. at 19a). That section, in turn, requires PennDOT approval of any “automated red light enforcement system.” 75 Pa. C.S. §3116(g). According to ATS, that means that PennDOT approval under Section 3116 of the Vehicle Code was a minimum operational and system requirement that any **proposed** RLC system first had to meet in order to be evaluated.

---

**(continued...)**

the determination is arbitrary and capricious, an abuse of discretion or is contrary to law.” 62 Pa. C.S. §1711.1(i); *Stanton-Negley Drug Company v. Department of Public Welfare*, 943 A.2d 377, 383 n.12 (Pa. Cmwlth. 2008).

<sup>6</sup> ATS also filed an emergency application for stay with this Court. This Court denied the application for stay, finding that ATS failed to demonstrate that it is likely to prevail on the merits or that it will suffer irreparable harm, and that a stay would adversely affect the public interest.

<sup>7</sup> ATS does not raise the other substantive arguments from its protest relating to transitional costs and the use of radar.

However, neither the RFP nor Section 3116 of the Vehicle Code requires that PennDOT have approved the red light system at the time of the bid. Section B.10.1 of the RFP's operational and system requirements, entitled "PERMITTING," states that "[p]rior to installation, [PPA] in coordination with the City and PennDOT shall approve the design and installation of all system equipment." (R.R. at 27a) (emphasis added). Moreover, Section 3116(g) of the Vehicle Code plainly states that "[n]o automated red light enforcement system may be **used** without the approval of [PennDOT]." 75 Pa. C.S. §3116(g) (emphasis added). Accordingly, Director Fenerty did not err or abuse his discretion in finding that "[t]here is no requirement under the law (or the RFP) mandating a participant in the RFP process to have its enforcement system approved by PennDOT before even participating in the RFP to be a Support Services vendor." (January 14, 2014 Final Determination at 5) (emphasis in original).

Even if we rule against ATS on the substantive issue of whether a proposed RLC system requires PennDOT approval at the time of the bid, ATS argues that the award of the contract should be enjoined because PPA and Director Fenerty violated several procedural provisions of Section 1711.1 of the Procurement Code in considering its protest. Specifically, ATS alleges a violation of Section 1711.1(d)<sup>8</sup> because a contracting officer was first required to file a

---

<sup>8</sup> Section 1711.1(d) of the Procurement Code provides:

Within 15 days of receipt of a protest, the contracting officer may submit to the head of the purchasing agency and the protestant a response to the protest, including any documents or information he deems relevant to the response within ten days of the date of the response.

**(Footnote continued on next page...)**

response to ATS's protest before Director Fenerty's final determination. Moreover, ATS argues that Director Fenerty's denial was in violation of Section 1711.1(e)<sup>9</sup> because he was not acting as a neutral arbitrator and did not properly evaluate ATS's protest because he failed to conduct a hearing and considered additional documentation and information without providing ATS an opportunity to review it. Finally, ATS alleges that Director Fenerty violated Section 1711.1(k) because he failed to articulate any appropriate rationale for lifting the mandatory stay provided for in that section.

With respect to Section 1711.1(d), ATS ignores the plain language of that section stating that a "contracting officer **may** submit to the head of the purchasing agency and the protestant a response to the protest..." (emphasis

---

**(continued...)**

62 Pa. C.S. §1711.1(d). The Procurement Code defines "contracting officer" as "[a] person authorized to enter into and administer contracts and make written determinations with respect to contracts." 62 Pa. C.S. §103.

<sup>9</sup> Section 1711.1(e) of the Procurement Code provides:

The head of the purchasing agency or his designee shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may, at his sole discretion, conduct a hearing. The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.

62 Pa. C.S. §1711.1(e).

added). Given that language and that the matter involved a legal interpretation of the RFP, we agree that a contracting officer's response before Director Fenerty denied the protest was not necessary.

Moreover, a hearing was not necessary in order to evaluate the protest. Whether to conduct a hearing under Section 1711.1(e) is within the sole discretion of the head of the purchasing agency. Director Fenerty did not abuse his discretion in deciding not to conduct a hearing because, despite ATS's argument to the contrary, there were no disputed material facts warranting a hearing.<sup>10</sup> With respect to the additional documents and information allegedly considered by Director Fenerty in rendering his decision,<sup>11</sup> ATS fails to demonstrate how any of this documentation or information was critical to the conclusion that the protest was clearly without merit.<sup>12</sup> Accordingly, we find no violation of Section 1711.1(e) of the Procurement Code.

---

<sup>10</sup> The "disputed material facts" cited by ATS that allegedly warranted a hearing mostly relate to the purported procedural violations of Director Fenerty in evaluating the protest, not to the merits of ATS's protest. (See ATS's Brief at 34-35). The only disputed material fact raised by ATS related to the merits of its protest ("When did Xerox obtain PennDOT approval of its proposed RLC System?") is not material because, as discussed above, PennDOT approval is only required prior to installation and use of an RLC system, not prior to the award of a contract for such a system.

<sup>11</sup> Director Fenerty attached three exhibits to his determination: (1) a December 23, 2013 letter to ATS informing it that the PPA awarded the contract to Xerox; (2) the contract between the PPA and Mulvihill; and (3) an August 24, 2012 letter from ATS's counsel to Director Fenerty in which ATS's counsel took the position that the use of radar is permissible in connection with automated red light enforcement.

<sup>12</sup> The lack of merit in ATS's first protest ground is evident in the plain language of the RFP and Vehicle Code cited by ATS in its protest. Assuming that we even need to address Director Fenerty's evaluation of ATS's second and third protest grounds, Director Fenerty did **(Footnote continued on next page...)**



Finally, we find no violation of Section 1711.1(k) of the Procurement Code. That section only mandates a stay “unless and until the head of the purchasing agency ... makes a written determination that the protest is clearly without merit or that the award of the contract without delay is necessary to protect substantial interests of the Commonwealth.” Here, Director Fenerty determined that the protest is clearly without merit and articulated the substantial interests of the Commonwealth that would be harmed if the stay was granted. The fact that ATS disagrees with those conclusions does not mean that Director Fenerty violated Section 1711.1(k).<sup>13</sup>

Accordingly, the PPA’s determination is affirmed.

---

DAN PELLEGRINI, President Judge

Judge Brobson did not participate in the decision of this case.

---

**(continued...)**

not need to review **any** documents or information in rejecting those grounds because he determined that they were untimely.

<sup>13</sup> Because we find no merit in ATS’s contention that Director Fenerty violated the Procurement Code procedures in issuing his final determination, we need not address ATS’s argument that those alleged violations deprived ATS of due process.

