IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DANVIR CORPORATION, a Delaware corporation, NECASTRO, INC., a Delaware corporation, and DONALD L. HAIRSTON,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3404-VCP
CITY OF WILMINGTON and FIRST STATE TOWING, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 17, 2008
Decided: October 6, 2008

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PARSONS, Vice Chancellor.

This action stems from the City of Wilmington's ("the City") bidding process for a yearlong towing and impounding contract. The City opened bidding for a towing and impounding contract in June 2007, informing any interested bidders that in order to be considered, their bids needed to include three separate items: (1) the charge for towing a vehicle to an official storage lot ("Tow Charge"), (2) the daily storage fee for a towed vehicle ("Storage Charge"), and (3) the hourly rate for having a tow truck standby for special operations ("Standby Charge"). The City informed bidders that it would determine the contract winner based solely on the aggregate of the Tow and Storage Charges. Based on these two variables, First State Towing, LLC ("First State") provided the lowest total bid and was awarded the contract.

Plaintiffs are two disappointed bidders and one taxpayer, who is unrelated to the merits of the case. Plaintiffs argue that this bidding process was illegal because the City did not bid the contract pursuant to the City Charter provision requiring that contracts be awarded to the "lowest responsible bidder." Plaintiffs therefore urge this Court to void the contract and require the City to re-bid it.

Plaintiffs moved for summary judgment to void the contract between the City and First State. Defendants cross moved for summary judgment on numerous theories discussed below. Based on the evidence presented, I find the City's actions to be lawful and not arbitrary or capricious. Thus, I deny Plaintiffs' motion for summary judgment and grant Defendants' cross motion for summary judgment.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs are Danvir Corporation ("Danvir"), Necastro, Inc. ("Necastro"),[1] and Donald L. Hairston. Danvir and Necastro are Delaware corporations that provide towing services in the state of Delaware. Both corporations bid unsuccessfully on the towing and impounding contract at issue. Hairston is a taxpayer residing in the City, but is otherwise unrelated to the merits of this case.

Defendants are the City and First State. First State is a Delaware limited liability company that provides towing and impounding services in the state of Delaware. First State won the contract to provide the City with towing and impounding services. The contract was awarded through a bidding process that began in June 2007; it covers the period from November 19, 2007 to November 18, 2008.

B. The Bidding Process

In June 2007, the City invited bids on a one-year contract, City Contract PD08002, for the towing and impounding of vehicles. To facilitate the bidding, the City supplied proposal forms to be completed by interested bidders. On these forms, bidders were required to quote three different prices: (a) the Tow Charge, (b) the Storage Charge, and (c) the Standby Charge.

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[1] The parties' correspondence spells this party's name Necastro. On its bid proposal sheet, however, the company's President listed the corporate name as NiCastro. For purposes of uniformity, this opinion will use Necastro.

In addition to the proposal forms, the City provided instructions to all interested bidders. The instructions contained numerous provisos including that the price of services alone would not be determinative of the successful bidder,[2] and that "the City reserves the right to award this contract to more than one (1) bidder."[3] In addition, the City's proposal forms advised bidders that "low bid(s) will be based upon the sum of the 'Cost Per Tow' plus the 'Cost of One Day's Storage.'"[4] The proposal forms stated that Standby Charges would not be used to calculate the winning bid.

On July 11, 2007, Captain Michael Maggitti conducted a pre-bid meeting to answer any questions regarding the bidding process and the contract.[5] According to Captain Maggitti, nobody raised concerns regarding the City's decision to exclude the Standby Charge in determining the lowest bidder, either at or before the meeting.[6] The City's Purchasing Agent, J. Timothy McMahon, confirmed that no one inquired about the exclusion of the Standby Charges before or during the pre-bid meeting. Both men aver that these standby services are rarely used and the City determined not to use them in the bidding process because of their infrequent use. In the two years before the challenged

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2 Defs.' Ex. A ¶ 6. The references to "Defs.' Exs. A-I" are to the Exhibits filed with Def. City's Answering Br. in Opp'n to Pls.' Mot. For S.J. and Opening Br. in Support of the City's Mot. for S.J.

3 Defs.' Ex. A ¶ 11.

4 Defs.' Exs. B, C.

5 Defs.' Ex. B ¶¶ 6-7.

6 Defs.' Ex. B ¶ 6, Ex. C ¶ 6.

bidding process, standby services were rendered only once.[7] Plaintiffs allege that for a number of years before then, standby services were rendered approximately two to five times per year.[8]

On July 24, 2007, First State submitted its bid to the City as follows: $0.00 for the Tow Charge, $20.00 for the Storage Charge, and $75.00 for the Standby Charge.[9] On the same day, Danvir bid $1.00 for the Tow Charge, $26.00 for the Storage Charge, and $5.00 for the Standby Charge.[10] In addition, Necastro bid $1.00 for the Tow Charge and $20.00 for the Storage Charge. Necastro did not provide a Standby Charge.[11]

As First State had the lowest aggregate bid in terms of the Tow and Storage Charges, it was awarded the contract. By letter dated October 31, 2007, the City advised Plaintiffs Danvir and Necastro that the contract had been awarded to First State.[12]

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7 This occurred during a trip by President Bush through Wilmington, which per Secret Service protocol required clearing all vehicles from the streets.

8 Pls.' Reply Br. Ex. A ¶ 3. Plaintiff Danvir avers that it won this contract approximately thirty-five of the last fifty years. Danvir's affiant, Charles E. Wahl, III, states that during the years he worked for Danvir, "and during which Danvir had a towing contract with the City, a stand-by Charge has been invoked an average of two-to-file [sic: five] times per year." *Id.* Wahl does not indicate, however, when he began working at Danvir.

9 Defs.' Ex. B.

10 Defs.' Ex. C.

11 Defs.' Ex. G.

12 Defs.' Exs. H, I.

C. Procedural History

Plaintiffs filed their Complaint on December 11, 2007, and the City and First State filed separate Answers in early January. Plaintiffs moved for summary judgment on May 8, 2008. In conjunction with their answering brief in opposition to Plaintiffs' motion, Defendants cross moved for summary judgment on June 13, 2008. Plaintiffs then filed their reply brief, and the parties waived argument on the cross motions for summary judgment. This is the Court's opinion on those motions.

D. The Parties' Contentions

Plaintiffs argue that the bidding process was *per se* illegal and should be voided, because the City failed to place any weight on the Standby Charge and, thus, violated the City Charter's requirement that bids be granted to the "lowest responsible bidder." The City responds by asserting a number of defenses. In particular, the City contends that: (1) Plaintiffs' claim is barred by laches and waiver because Plaintiffs failed to complain of the bidding process until after they lost the contract; (2) Plaintiffs' claim is moot because a new bidding process is about to begin and the contract is almost complete; (3) the City acted properly when it determined not to consider the Standby Charge in deciding the lowest bidder; (4) Plaintiffs failed to demonstrate that not considering the Standby Charge was an abuse of discretion; and (5) Plaintiffs lack standing. I now turn to the analysis of those issues.

II. ANALYSIS

A. The Applicable Standard

Summary judgment may be granted if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[13] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[14] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[15] The court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[16]

Here, the parties have filed cross motions for summary judgment, and have not argued that there is any issue of fact material to the disposition of either motion. Accordingly, under Court of Chancery Rule 56(h), the court may render a decision on the merits based on the record submitted with the motions.[17] Therefore, the normal practice

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13 Ct. Ch. R. 56(c).

14 *Estate of Carpenter v. Dinneen*, 2007 WL 1114082, at *4 (Del. Ch. Apr. 11, 2007) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

15 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

16 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

17 *See Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007). Rule 56(h) states:

of drawing inferences in favor of the nonmoving party does not apply to the pending cross motions.[18]

B. Standing

I begin with the threshold issue of whether Plaintiffs have standing. "Taxpayers who have not suffered any special injury nonetheless have standing to challenge the allegedly unlawful expenditure of public money or misuse of public property."[19] In *Wahl*, a taxpayer who had no relation to the merits of the case was deemed to have standing based on the overriding public policy of protecting taxpayers from financing improper city contracts.[20] Like the taxpayer in *Wahl*, therefore, Plaintiff Hairston, a City taxpayer who has no relation to this case's merits, has standing to challenge the legality of the expenditure of taxpayer money in this matter.

As to Plaintiffs Danvir and Necastro, Defendants argue that they lack standing because they are not City taxpayers and because disappointed low bidders have no

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> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

18 *See Twin Bridges Ltd. P'ship*, 2007 WL 2744609, at *8.

19 *Wahl v. City of Wilmington*, 1994 WL 13638, at *2 (Del. Ch. Jan. 10, 1994) (citing *City of Wilmington v. Lord*, 378 A.2d 635 (Del. 1977)). *See also O'Neill v. Town of Middletown*, 2006 WL 4804652, at *14 n.116 (Del. Ch. Jan. 18, 2006) (stating that there is a "long line of case law permitting challenges [by taxpayers] to conduct relating to low-bid contracts – effectively a subset of taxpayer standing suits").

20 *Wahl*, 1994 WL 13638, at *2.

standing to challenge the award of a public works contract by a public agency. In support of their position, Defendants cite *Statewide Hi-Way Safety, Inc. v. Department of Transportation*.[21] In that case, the court held a New Jersey corporation did not have standing to challenge a Delaware state contract for guardrail installation because it was an out-of-state corporation and had not provided any evidence that it paid Delaware taxes. Thus, the corporation did not have standing as a taxpayer. In addition, the court in *Statewide* stated that "one who is not a resident and not a taxpayer, but sues only in the capacity of a disappointed low bidder, has no standing to challenge the decision of a public agency in the award of a public works contract."[22]

In this case, Plaintiffs have neither presented evidence nor argued that Danvir and Necastro have standing as taxpayers.[23] Because Plaintiffs bear the burden of establishing standing[24] and have failed to present sufficient evidence to show that either corporate Plaintiff is a City taxpayer, I cannot conclude that Danvir or Necastro has standing on that basis.

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21 1983 WL 18024, at *3 (Del. Ch. June 28, 1983).

22 *Statewide*, 1983 WL 18024, at *3 (citing *Bader v. Sharp*, 125 A.2d 499 (Del. 1955); *Fetters v. Mayor & Council of Wilmington*, 73 A.2d 644 (Del. Ch. 1950).

23 The only relevant evidence in the record appears in the corporate Plaintiffs' proposal forms and it is ambiguous. On these forms, Necastro lists its business address as being in Wilmington and Danvir lists its business address as being in Centreville. Defs.' Exs. F, G. This information alone is not sufficient to support a reasonable inference that the corporate Plaintiffs are City taxpayers.

24 *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Plaintiffs Necastro and Danvir do have standing, however, in their capacities as disappointed low bidders. Although the *Statewide* opinion relied upon by Defendants holds to the contrary, Plaintiffs cite the more recent decision, in *Wahl*, in which the then Vice Chancellor, now Justice, Berger held that "a disappointed low bidder [does] ha[ve] standing to sue."[25] There, Vice Chancellor Berger granted standing to a disappointed low bidder, concluding that this result represented "the better rule of law," citing numerous cases from other jurisdictions reaching the same conclusion.[26] In this case, the corporate Plaintiffs are both disappointed low bidders on the disputed contract. Because I find the reasoning in *Wahl* affording standing to disappointed low bidders persuasive, I hold that Plaintiffs Danvir and Necastro have standing in this case.

C. The Legality of the Contract

Turning to the merits, the next question is whether the City properly excluded the Standby Charge when it awarded the towing contract. Plaintiffs contend that the City's failure to accord any weight to the Standby Charge in determining the "lowest responsible bidder" renders the contract illegal and therefore void. On their cross motion for summary judgment, Defendants claim the City acted properly and also raise the defenses of mootness, laches, and waiver.

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[25] *Wahl*, 1994 WL 13638, at *2.

[26] *Id.*

The City's decision to award the disputed contract to First State is an administrative decision. The responsibility of a reviewing court in considering a challenge to an administrative decision is as follows:

> [T]he ultimate standard that it must apply is a normal appellate one. Reversal is warranted if the administrative agency exercised its power arbitrarily, or committed an error of law, or made findings of fact unsupportable by substantial evidence. . . . [I]f the record clearly indicates that the administrative agency made its decision on improper or inadequate grounds, discretion has been abused and reversal upon judicial review is required.[27]

Plaintiffs argue that "the contract violates the requirement that a contract for towing services must be submitted to competitive bidding."[28] They contend the City violated the law by failing to give at least some weight to the Standby Charge involved in the bidding and that the City may not "pick and choose" what components of a contract it considers when granting contracts. Thus, according to Plaintiffs, the bid procedure the City used is illegal, or in the alternative, is an abuse of discretion, and therefore, the contract is void. I disagree.

The Wilmington City Charter prescribes in general terms the bidding procedure for the City. Specifically, the Charter provides that:

> Except in the purchase of unique articles . . ., competitive bids shall be secured before any purchase, by contract or

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[27] *A-Del Const. Co. v. Del. Dep't of Transp.*, 1992 WL 127531, at *4 (Del. Ch. June 5, 1992) (quoting *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 652 (Del. 1973)).

[28] Pls.' Reply Br. at 3.

> otherwise, is made or before any contract is awarded for construction, alterations, repairs or maintenance or for rendering any services to the city other than professional services and . . . the contract shall be awarded to the lowest responsible bidder.[29]

The term "lowest responsible bidder" has been construed to mean the "lowest bidder unless that bidder is found not responsible, i.e., not qualified to perform the particular work."[30]

A state-contracting agency is vested with broad discretion.[31] This Court will not overturn an agency decision to award a contract that complies with the law unless that decision was made arbitrarily, capriciously, or in bad faith.[32] Where, as in this case, the agency has actually signed the contract--rather than merely selecting the successful bidder--the challenger's burden is heightened and he must show that the agency clearly acted illegally in making the award.[33]

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29 *Wilm. C.* (Charter) § 8-200.

30 64 Am. Jur. 2d *Public Works and Contracts* § 69 (2008) (citing *Boydston v. Napa Sanitation Dist.*, 272 Cal. Rptr. 458 (1st Dist. 1990)).

31 *Gannett Co. v. State*, 1993 WL 19714, at *3 (Del. Ch. Jan. 11, 1993) (citing *Fetters v. Mayor & Council of Wilm.*, 72 A.2d 626, 629 (Del. Ch. 1950)). *See also Prison Health Serv., Inc. v. State*, 1993 WL 257409, at *2 (Del. Ch. June 2, 1993)); *Statewide Hi-Way Safety, Inc. v. Dep't of Transp.*, 1983 WL 18024, at *3 (Del. Ch. June 28, 2008) ("An administrative agency is given broad discretion with regard to the qualifications for the award of a public works contract.").

32 *Gannett*, 1993 WL 19714, at *3 (citing *Tower Const. v. Christina Sch. Dist.*, 1983 WL 21018 (Del. Ch. Nov. 16, 1983)). *See also Statewide*, 1983 WL 18024, at *2-3.

33 *Gannett*, 1993 WL 19714, at *3.

A department acts illegally when it departs from statutory mandates.[34] In *Wahl*, the City used a four-factor test in its bidding process, instead of using the "lowest responsible bidder" standard set forth in the City Charter.[35] The court held the City acted illegally because it determined the contract winner using such factors as equipment, facilities, and past job performance that fell outside the purview of the "lowest responsible bidder" standard.[36]

Agencies have discretion, however, in formulating their bidding procedures, and those procedures are lawful unless they deviate materially from the relevant statute.[37] In *A-Del Construction Co.*, the court held the Delaware Department of Transportation acted within its discretion when it implicitly allowed "cost shifting" within its bidding process, provided "the economic effect of the cost shifting [was not] material."[38] There, the

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34 *Id.* at *7.

35 *Wahl*, 1994 WL 13638, at *1-2. The four factors, which were to receive equal weight, were: (1) past job performance and business experience, (2) facilities, (3) equipment, and (4) price of towing and storage. *Id.* at *2.

36 *Id.* at *2. *See also Gannett*, 1993 WL 19714, at *7 (holding illegal an administrative agency's departure from statutory language to use a lower standard for the award of a contract and requiring a re-bid of the contract). *But see A-Del Constr. Co.*, 1992 WL 127531, at *5-6 (holding that an immaterial failure to comply with an implicit requirement of a statute did not render a bidding process unlawful).

37 *See A-Del Constr. Co.*, 1992 WL 12753, at *5-6.

38 *Id.* at *6.

plaintiff conceded the propriety of a materiality requirement in connection with its argument to strictly limit the agency's discretion in determining its bidding process.[39]

In this case, the City used a "lowest responsible bidder" standard pursuant to the City's Charter. Unlike *Wahl*, the City used two relevant factors, the Tow and Storage Charges, to determine the "lowest responsible bidder." There is no evidence the City considered extraneous factors, such as the nature of the towing equipment or facilities, in the competitive bid process. Rather, the City focused solely on factors determinative of total price. Consistent with the procedure it described in its pre-bid meeting and proposal forms, the City added the expected costs on the Tow and Storage Charges, and awarded the bid to the company with the lowest sum. As to the "responsibility" requirement of the "lowest responsible bidder" standard, Plaintiffs have not presented any evidence even suggesting that First State was not responsible or qualified to do the work specified in the bid proposal form. Thus, I find that the procedure the City used complied with the definition of a "lowest responsible bidder."

In arguing to the contrary, Plaintiffs point to the City's Charter and claim that the bidding process used violated the "lowest responsible bidder" requirement. They contend that it is illegal for the City to request the bidder to provide three specific types of charges and simultaneously announce that it will evaluate only two of those three items when determining the bid. Similar to *A-Del Construction Co.*, the City used its discretion to determine the factors upon which it would base its determination. The City chose to

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39 *Id.*

include the Tow and Storage Charges because they were material to the contract, but to exclude the Standby Charge because it was not material.

The question, therefore, is whether the City acted arbitrarily, committed an error of law, or made its decision to exclude the Standby Charge on improper or inadequate grounds.[40] The Standby Charge was used only once in the last two years. Before then, according to Plaintiff Danvir, it was used two to five times per year. Moreover, the contract was nonexclusive; the City explicitly reserved the right to award the contract to more than one towing service.[41] Consequently, the City could have apportioned the contract to two different services or allowed a second service to handle the standby services. The lack of exclusivity further reduces the importance of the Standby Charge in terms of determining the lowest bidder. Because the Standby Charge is rarely used and is nonexclusive, it was reasonable and within the City's discretion to exclude it from consideration as immaterial. I therefore find that Plaintiffs have not clearly shown that the bidding process used was illegal or contrary to existing statute or law.

D. Was the City's Selection of First State Arbitrary or Capricious?

Having found that the bidding process was legal, I turn to whether the decision to award the disputed contract to First State was arbitrary or capricious. Government officials "are vested with broad discretion in determining which applicant is the lowest responsible bidder in a particular case and such a decision will not be disturbed unless it

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40 *A-Del. Const. Co.*, 1992 WL 127531, at *4.

41 Defs.' Ex. A ¶ 11.

can be shown to have been illegally or arbitrarily exercised."[42] "This Court will not overturn the decision of an agency to award a contract that complies with the law unless that decision was made arbitrarily, capriciously, or in bad faith."[43]

Plaintiffs contend that the City's consideration of the Standby Charge in their bid approval process two years before the bid at issue here supports their position that it should have been considered on the challenged bid approval. As previously noted, standby services were used only once in the two years preceding the bid in dispute and only two to five times a year before that. There is no evidence that the Standby Charges materially affected the overall cost of a towing contract in any of the previous years. On this record, I cannot say the City acted unreasonably in deciding not to use the price bid for that rarely used, nonexclusive service in determining the lowest responsible bidder on this particular contract.

Moreover, the City clearly enumerated in its bid proposal form, which Plaintiffs Danvir and Necastro received and later submitted, that "[t]he low bid(s) will be based upon the sum of the "Cost Per Tow" plus the "Cost of One's Day's Storage."[44] These forms contained blanks in which each bidder could list their Tow Charges, Storage

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42 *See Furnival Mach. Co. v. New Castle County*, 1977 WL 9565, at *3 (Del. Ch. Jan. 21, 1977) (citing *Bader v. Sharp*, 125 A.2d 499, 501-02 (Del. 1955)).

43 *Gannett*, 1993 WL 19714, at *3.

44 Defs.' Exs. G, H.

Charges, and Standby Charges. Notably, Plaintiff Necastro did not provide a Standby Charge, from which I infer that it understood that charge was not important.

In addition, at the pre-bid meeting, Plaintiffs and all other interested bidders were advised that the contract was to be awarded based solely on the Tow and Storage Charges. Neither at the pre-bid meeting nor at any time before the bid was awarded did the City receive any complaints regarding this aspect of the bid process. Although Plaintiffs could have objected to the City's excluding the Standby Charge, they never raised any concerns about it, until after they lost their bid.

I therefore conclude that Plaintiffs have failed to meet their burden of showing that the City's actions were arbitrary or capricious. The City acted within its discretion in awarding contracts when it determined not to consider the rarely used Standby Charge. Additionally, the City clearly identified the two requirements it would use in awarding the contract in question, no one timely objected to that procedure, and the City awarded the contract consistently with it. Thus, Plaintiffs have not shown that the bidding process was illegal or that the City acted arbitrarily or capriciously in awarding the contract to First State.

E. Defendants Equitable Defenses of Laches and Waiver

Defendants also seek summary judgment on their defenses of laches and waiver.[45] "Laches requires a defendant to prove both unreasonable delay on the part of a plaintiff in

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[45] Defendants also half-heartedly assert that Plaintiffs' claims should be dismissed as moot. "According to the mootness doctrine, although there may have been a justiciable controversy at the time the litigation was commenced, the action will be

bringing suit and prejudice to the defendant as a result."[46] In determining what constitutes an unreasonable delay, "the temporal aspect of the delay is less critical than the reasons for it, because in some circumstances even a long delay might be excused."[47] In this case, Plaintiffs knew of the bidding process requirements as early as June 2007. Plaintiffs, therefore, had an opportunity to voice any concern about the bid process beginning in June 2007 and also could have objected in person at the July 11, 2007 pre-bid meeting; yet, they chose to remain silent. Plaintiffs were advised that their bids were unsuccessful in letters dated October 31, 2007, but did not file their complaint in this action until nearly six weeks later on December 11, 2007. Nothing prevented Plaintiffs from objecting to the bidding process in the six months before that date. In the circumstances of this case pertaining to bidding on a public contract, I find that delay unreasonable.

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dismissed if that controversy ceases to exist." *GMC v. New Castle County*, 701 A.2d 819, 823 (Del. 1997). Defendants argue that by the time this Court makes its decision and the disputed contract is rebid, Plaintiffs already will have had the opportunity to bid on a new contract, because the disputed contract expires on November 18, 2008. In their answering brief, Plaintiffs counter that the mootness defense is not ripe because the bidding on the new contract has not yet occurred, the new contract has not been awarded, and the City is still operating under the challenged contract. Neither side, however, has supplemented the record with any evidence to prove what the current state of affairs is. Accordingly, I reject the defense of mootness on the ground that Defendants have failed to demonstrate its applicability on the facts of record.

[46] *Medek v. Medek*, 2008 WL 4261017, at *10 (Del. Ch. Sept. 10, 2008) (citing *Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999)).

[47] *State v. Sterner*, 2008 WL 2721182, at *4 (Del. Ch. July 11, 2008) (citing *Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del. Ch. May 9, 2006)).

Regarding the prejudice prong of the laches defense, Defendants may be prejudiced because they relied on Plaintiffs' silence in declaring First State the winning bidder and entering into the contract with First State. If forced to re-bid the contract, the City may incur additional expenses and have difficulty continuing its towing operations. In addition, First State has relied on the contract for business throughout the year. Hence, Defendants have made at least a colorable showing of prejudice, and therefore, conceivably could succeed on their defenses of laches. I need not decide that issue, however, because Defendants have demonstrated their entitlement to summary judgment in their favor on the merits of Plaintiffs' challenge to the bid process and contract award.

Similarly, I do not need to resolve the issue of waiver. To prevail on that defense, Defendants would have to prove Plaintiffs voluntarily and intentionally relinquished a known right.[48] Defendants plausibly argue that Plaintiffs intentionally relinquished a known right when they bid on the disputed contract without objection despite having known that the City did not intend to consider the Standby Charge in determining the lowest responsible bidder. Based on my rejection of Plaintiffs' claim on the merits, however, the issue of waiver is now moot.[49]

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[48] *Medek*, 2008 WL 4261017, at *10 (citing *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982)).

[49] Ordinarily, this Court will decline to decide moot issues. *McDermott Inc. v. Lewis*, 531 A.2d 206, 211 (Del. 1987) (citing *Sannini v. Casscells*, 401 A.2d 927, 930 (Del. 1979)).

III. CONCLUSION

For the reasons stated, Plaintiffs' Motion for Summary Judgment and its request to re-bid the contract is DENIED. In addition, Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.