

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

POYLDYNE, INC.	:	FEBRUARY TERM, 2001
Plaintiff	:	No. 3678
v.	:	COMMERCE PROGRAM
CITY OF PHILADELPHIA,	:	
PHILADELPHIA WATER DEPARTMENT,	:	
and WAYNE LARAWAY,	:	
Defendants	:	Control No. 022026

OPINION

**ADJUDICATION DENYING THE REQUEST FOR PERMANENT INJUNCTION
PURSUANT TO Pa.R.C.P. 1517:**

This matter arises from a Motion for Preliminary and Permanent Injunction filed by plaintiff, Polydyne, Inc. (“Polydyne”) against defendants, the City of Philadelphia (“City”), the Philadelphia Water Department, Biosolids Recycling Center (“Water Department”)¹ and Wayne Laraway (“Laraway”). Polydyne, a disappointed bidder and taxpayer, seeks to void the award of the publicly-bid contract, Bid No. S1-XV853-0, on the grounds that the City and the Water Department, in awarding the contract to Cytec Industries, Inc. (“Cytec”), gave Cytec an unfair advantage in violation of competitive bidding laws, pursuant to 53 P.S. § 36901 and the Philadelphia Home Rule Charter § 8-200. Polydyne also requests that the City be ordered to statistically review the data collected during the official plant scale trials according to a purportedly proper method of analysis in order to determine the lowest responsible bidder,

¹Throughout this Opinion, references to the City shall sometimes also include the Water Department as a department or agent of the City. See Compl. & Am. Answer, ¶ 5.

and that the City be enjoined from consulting with Laraway in any further review of the technical data collected in those trials.

The primary issues which this court must resolve are whether the City abused its discretion in awarding the bid to Cytec, whether the award was tainted by fraud or favoritism, and/or whether the bid specifications were changed after the bids were submitted. These issues depend upon this court's finding one or all of the following: (1) that Laraway was biased and had a material interest in awarding the contract to Cytec; (2) that the City abused its discretion and violated the Philadelphia Home Rule Charter or City regulations in hiring and paying Laraway under a split contract arrangement, (3) that all of the bids were not analyzed on a common standard; and/or (4) that the bid specifications were changed to give an unfair advantage to Cytec over all other bidders.

A permanent injunction hearing was held over the course of five (5) days ending May 31, 2000. The court bases the following findings of fact, discussion, conclusions of law and decree nisi on the evidence adduced at the hearing and the briefs and arguments of counsel.

For the reasons set forth below, this court holds that the plaintiff has failed to demonstrate that the City abused its discretion in awarding the bid to Cytec, that any fraud or favoritism tainted the bid award, or that the bid specifications were changed to give Cytec an unfair advantage in violation of unfair competitive bidding laws.

FINDINGS OF FACT

PROCEDURAL BACKGROUND

1. On March 1, 2001, Polydyne, filed a Motion for Preliminary and Permanent Injunction ("Motion"), requesting *inter alia* that defendants, the City and Water Department, void the award to Cytec, statistically

review the data collected during the official plant scale trials to determine the lowest responsible bidder, enjoin any consultation with Laraway in their review of the technical data and award the bid to the lowest responsible bidder according to their purportedly correct statistical analysis. See Proposed Order to Polydyne's Motion.

2. On that same date, plaintiff filed a Complaint in Equity, seeking both a preliminary and a permanent injunction against all the defendants, as well as seeking monetary damages against defendant, Laraway, under a count for tortious interference with a prospective contractual relationship.

3. On March 15, 2001, the court held an initial hearing on the preliminary injunction.

4. At that hearing, the parties agreed to an expedited discovery process and to conduct a permanent injunction hearing following that process. 3/15/01 N.T. 12.

5. The court conducted a permanent injunction hearing on May 23, 24, 25, 30 and 31, 2001.²

6. On May 22, 2001, defendants, the City and Water Department, served plaintiff with an Answer with New Matter to the Complaint.³

7. On May 23, 2001, plaintiff filed a Motion to Strike the Answer with New Matter on the grounds that no verification was attached.

8. On June 1, 2001, defendants, the City and Water Department, filed an Amended Answer with

²See Burrell Educ. Ass'n v. Burrell School Dist., 674 A.2d 348, 350 n.3 (Pa.Comm. Ct. 1996)(determining that a court may not treat a hearing for a preliminary injunction as a final hearing and basis for a permanent injunction, unless the parties stipulate to the contrary).

³Defendants' Answer was officially docketed by the Prothonotary on May 24, 2001.

New Matter to the Complaint, which did contain a verification.⁴

9. On July 12, 2001, this court denied the Motion to Strike the Answer with New Matter of these defendants.

FACTUAL BACKGROUND

A. Parties

10. At all times relevant hereto, Polydyne is a corporation organized and existing under the laws of Delaware, with its principal place of business at One Chemical Plant Road, Riceboro, Georgia, which engages in the business of manufacturing polymers for use in solid waste water treatment plants. Polydyne has been authorized to do business in the Commonwealth of Pennsylvania, and, in particular, Philadelphia, and has paid Philadelphia business privilege tax. Compl. & Am.Answer, ¶¶ 1-3.

11. Polydyne brings this action as a taxpayer of the City of Philadelphia. Compl. & Am.Answer, ¶¶ 3; 11.

12. The City is a city of the first class. Compl. & Am.Answer, ¶ 4.

13. Laraway, principal of MPL Services, Inc. and EKR Resources, LLC., was hired by the City to assist the Water Department in conducting the 2000 polymer plant scale trials at issue in this case, and to

⁴Defendants did not file an Answer to the Motion for Preliminary and Permanent Injunction. Plaintiff raised this point at the beginning of the final injunction hearing. 5/23/01 N.T. 3. Defendants responded that their Answer “is essentially incorporated in our answer which contests the material allegations of the complaint and material allegations of the motion for preliminary injunction. *Id.* Though the proper procedure would have been to file an actual answer to the Motion, *see* Pa.R.C.P. 1029(b); 1531, the fact that the hearing was final in nature, that the parties proceeded with this hearing, and that the allegations in Count I of the Complaint mirror those in the Motion for Preliminary and Permanent Injunction allow this court to proceed without deeming the plaintiff’s allegations in the Motion as if admitted.

interpret the data collected in those trials which was used as a basis for the bid award. Compl. & Am. Answer, ¶¶ 28-29. See also 5/24/01 N.T. 294-97.

B. Treatment of Waste Water At The Biosolids Recycling Center

14. The Water Department, a department of the City, operates the Biosolids Recycling Center (“BRC”) at which waste water or sludge is treated through a process which separates solid waste material from the sludge. See Compl. & Am. Answer, ¶¶ 12-13.

15. The separation process occurs at two distinct locations involving two differently composed sludges: the Northeast (NE) sludge and the Southeast/Southwest (SE/SW) sludge. See Pl. Proposed Findings of Fact, #2; Defs. Proposed Findings of Fact, # 6.

16. In processing the NE sludge and SE/SW sludge, the BRC operates centrifuges to separate the solids from the waste water in a “dewatering process.” See Pl. Proposed Finding, # 3; Defs. Proposed Finding, # 7.

17. The solids are referred to in the industry as “cake” and are further processed or land filled. Compl. & Am. Answer, ¶ 14.

18. The BRC uses polymers in the dewatering process to facilitate the separation of solids from water in the centrifuges. Compl. & Am. Answer, ¶ 16.

19. Specifically, the polymer interacts with the solids causing a concentration of the solid material (cake) to form at the outer walls of the centrifuge and the centrate (water with suspended solids) to concentrate in another area. The cake is pushed through the centrifuge through a scroll, and is ultimately discharged and gathered at a separate floor of the BRC. The cake for the NE sludge is then primarily composted, while the cake for the SE/SW sludge is hauled from the BRC for purposes of land filling and

mine reclamation. See Pl. Proposed Findings, ## 5-7. See also, 5/23/01 N.T. 52-53.

20. James Golembeski (“Golembeski”) is the plant manager of the BRC who is responsible for overseeing the engineering aspects of the facility. 5/23/01 N.T. 36.

21. Golembeski has twenty-one (21) years of experience with the Water Department, thirteen (13) of which have been with the BRC. Id.

22. Golembeski has been responsible for overseeing six polymer plant scale trials during his tenure at the BRC. Id. at 37-38.

23. Golembeski was involved with the 2000 polymer plant scale trials, the bid and bid award. Id. at 38-45. Specifically, Golembeski testified that he was actively involved with hiring Laraway and MPL Services, in working with the City’s Procurement Department and the BRC’s engineering staff to come up with the bid protocol and method for conducting the plant scale trials, in establishing standards and goals, as well as the “prep work,” but that the BRC’s engineering staff and Laraway actually conducted most of the trials. Id. at 41.

24. Douglas Cowley (“Cowley”) is an engineering specialist at the BRC and has worked for the Water Department for fourteen (14) years. Id. at 94.

25. Prior to the 2000 polymer plant scale trials, Cowley had been involved with four (4) polymer bids. Id. 94-95.

C. Previous Polymer Plant Scale Trials - 1996 Bid Contract In Particular

26. The previous six polymer bids Golembeski participated in for the City experienced protests filed by the various losers of the contracts. Id. at 38.

27. Prior to the 2000 polymer bid, the most recent previous public bid for polymer was in 1996.

Compl. & Am. Answer, ¶ 17. Polydyne won the 1996 bid, which granted a four-year contract to supply the City and Water Department with polymer product. Id.

28. The 1996 bid generated several protests before Polydyne received the award. 5/23/01 N.T. 38-39.

29. The 1996 bid award was expected to cost the City approximately \$ 1.5 million per year, but, by the end of the contract, the City was spending about \$2.6 million dollars per year for polymer, because a different polymer than the one utilized in the trial had to be employed. The tested polymer never really performed up to expectations. Id. at 38.

30. According to Golembeski “. . . . after all these protests, we end up with a polymer that doesn't really work, that we're spending a whole lot more money on, and what's going on; how come these polymer trials are not effective at producing reproducible results . . .”. Id.

31. Specifically, the dosage of Polydyne's polymer in the first year of the 1996 contract was over 50 percent (50%) of what the trial dosage was. Id. at 40.

32. The City could have terminated Polydyne's rights under the 1996 contract for performance deficiencies, but it did not. Id. at 39.

33. Polydyne's 1996 contract was set to expire in April, 2000, but the City extended its use of the Polydyne product since a new bid had neither been posted nor awarded. Compl. & Am. Answer, ¶ 19.

34. Golembeski and Louis Applebaum, of the Procurement Department, were determined to achieve reproducible results in the 2000 polymer bid. 5/23/01 N.T. 38; 52.

35. Cowley also testified that the goal of the 2000 polymer trials was a fair trial that would achieve reproducible results. In order to do that, the decision was made that vendors or polymer manufacturers

would not conduct the official testing of their individual polymer products to eliminate the possibility or impression of “cheating” by the manufacturers. Id. at 97-100; 5/24/01 N.T. 252-53.

36. The problems with the previous polymer bids prompted the City to hire Laraway as an independent technical consultant.

C. Hiring of Wayne Laraway - MPL Services And EKR Resources

37. Wayne Laraway is the owner and principal of both EKR Resources, LLC. (“EKR”) and MPL Services, Inc. (“MPL”). 5/24/01 N.T. 294-97.

38. EKR and MPL are two separate companies. 5/23/01 N.T. 129.

39. From 1992 to 1996, Laraway had worked for Cytec, a manufacturer of polymer who was awarded the bid in the 2000 plant scale trials. 5/24/01 N.T. 279-80.⁵

40. At Cytec, Laraway was the business manager of the municipal water and wastewater treatment business, which involved technical sales and commercial or marketing functions, as well as pricing of polymers for particular bids in the wastewater municipal field. Id. at 281.

41. Prior to starting his consulting business, Laraway had been involved in approximately twenty (20) plant scale trials. Id. at 282-83. His involvement included determining when to increase or decrease dosage. Id. at 283.

42. Laraway was involved with pricing the Cytec product for the 1996 bid in Philadelphia. Id. at 283.

43. Laraway was “downsized” (i.e. laid off) from Cytec at some point in 1996. 5/23/01 N.T. 122.

44. Laraway personally owned 5,335 shares of Cytec stock, during the 2000 polymer trials. 5/24/01

⁵Laraway had been employed by American Cyanamide , Cytec’s predecessor, from 1975 to 1979 and 1988 through 1992. 5/24/01 N.T. 280.

N.T. 291.

45. Laraway sold his stock in Cytec in December, 2000. Id.

46. At the time of selling his stock, Laraway was aware that Polydyne had protested the bid result. Id. at 292-93.

47. Laraway will receive a pension from Cytec when he reaches the age of sixty-five (65) in the amount of approximately \$1200 to \$1500 per month. Id. at 294.

48. Laraway did not derive any direct financial gain from the results reached in the polymer plant scale trials or the ultimate award to Cytec, other than the contractual compensation paid to him or his companies by the City. Id. at 312.⁶

49. In 1998 or 1999, Golembeski received a brochure in the mail from MPL which highlighted the services and benefits that Laraway could provide to the City. Given the City's previous problems with performance during testing not reproducible in the field, Golembeski was interested. 5/23/01 N.T. 57. See Exhibit P-4.

50. The MPL brochure advertised that it would provide "an independent and unbiased evaluation and a thorough and impartial investigation of alternative chemical programs [polymers] in order to optimize operations involving liquid-solid separation." Exhibit P-4.

51. The brochure prompted discussions between Laraway, Golembeski, and his boss, Mr. Guru Bose, the chief of the biosolid section for the Water Department. 5/23/01 N.T. 58; 64-65..

52. Golembeski also knew Laraway from previous trials and from attending conferences such as the

⁶Cytec's annual revenues exceed \$1 billion, while the contract at issue is worth \$ 1 to 2 million per year spread out over a period of four (4) years. 5/23/01 N.T. 64.

American Waterworks Association conference, the Water Environment Federation conference, and the American Metropolitan Sewerage Agencies conference. 5/23/01 N.T. 58-59.

53. Golembeski attested to Laraway's reputation for professionalism and integrity. Id. at 59. Golembeski was not concerned that Laraway might have had a "conflict of interest" as a result of his previous employment by Cytec, nor had he known of it, would Laraway's stock ownership have affected Golembeski's decision to hire Laraway or his companies. Id. at 63.

54. Golembeski hired Laraway despite his prior connection to Cytec without reservation:

“[t]he traditional trial that is run for polymer bids is where the vendor comes in and takes control of the trial and comes up with a dosage that the city then gets. That's the traditional way of doing it. A lot of municipalities are having trouble getting reproducible results So what was lacking in our industry was anybody willing to step out and do this independent consulting, knowing that this type of thing could occur. And I knew of no one else to offer this type of service.”

Id. at 60-61.

55. Cowley also had discussions with Laraway regarding his providing services for the City. Id. at 103-04.

56. Sometime prior to July 1, 1999, Golembeski, along with the City's Procurement Department, hired Laraway and MPL Services to accomplish the following: (1) to prepare the bid specifications and work with the City to finalize how the trials were going to be conducted; (2) to actually conduct the polymer trials and (3) to provide an annual re-occurring personal services contract so that MPL could evaluate the product after the plant trials and award. Id. 69-70.

57. The City cannot extend an offer for a contract of more than \$11,000 without the contract having first been approved by the City Solicitor's office. However, contracts for less than \$11,000 may be

arranged through “miscellaneous purchase orders” which don’t require prior approval. *Id.* at 70-71; 120-21; Exhibit P-5. See also Philadelphia Home Rule Charter § 8-200 (1991).⁷

58. Laraway estimated his services to cost \$20,000. Because of the time constraints for conducting the trials and the lengthy time frame for obtaining administrative approval, the work was split between MPL and EKR. 5/24/01 N.T. 327.

59. The City Rules prohibit “splitting” miscellaneous purchase orders when done “to avoid the need for a formal contract.” An intentional violation of the Home Rule Charter may subject a violating department to the suspension of the use of [miscellaneous purchase orders] at the discretion of the Director of Finance.” Section 8-200. Exhibit P-5.

Despite the above, and with full knowledge of the Procurement Department, the contract was split.

⁷Section 8-200 provides, in pertinent part, that:

“(1) Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, competitive bids shall be secured before any purchase, by contract or otherwise is made or before any contract is awarded for construction, alteration, repairs or maintenance or for rendering any services to the City other than professional services and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder.

(2) If any purchase or contract for which competitive bidding is required involves an expenditure of more than ten thousand (\$10,000) dollars, which amount shall be adjusted every five (5) fiscal years as rounded to the nearest one thousand (\$1,000) dollars to reflect the percentage change in the most recently published Consumer Price Index for All Urban Consumers (CPI-U) All Items Index, Philadelphia, Pennsylvania, United States Department of Labor, Bureau of Labor Statistics”

Philadelphia Home Rule Charter, § 8-200 (1991).

Laraway’s services to be performed by MPL and EKR constituted a professional services contract which no other entity in the industry was providing. 5/23/01 N.T. 60-61. Therefore, competitive bidding was not required under Section 8-200.

60. On July 1, 1999, Laraway sent a letter to Cowley regarding the scope of work that EKR proposed for preparing the bid documents along with coordinating informal vendor evaluations and reviewing vendors' product evaluations and qualifications. 5/23/01 N.T. 124-25. Exhibit P-14. The fee for these services was \$8,400. Id. An invoice for the amount of \$8,400 to be paid to EKR was attached to that letter. Id.⁸

61. On July 15, 1999, a miscellaneous purchase order in the amount of \$8,400 was issued to EKR and signed by Carlos Doyle ("Doyle"). Exhibit P-15.

62. On February 9, 2000, Laraway sent a letter to Cowley regarding the scope of work to be performed by MPL. The work would include the formal or official product evaluations, the preparation and presentation of a report comparing performance results, the preparation of an economic tabulation based on the responses to the sealed bid and a recommendation as to the optimum product. Exhibit P-20. The fee for those services was \$10,840. Id. See also 5/23/01 N.T. 139-41; 5/24/01 N.T. 295-96.

63. On February 24, 2000, a miscellaneous purchase order in the amount of \$10,840 was issued to MPL and signed by Laraway. Exhibit P-21.

64. At this time, Cowley was under the impression that Laraway was simply an employee of EKR, not its president, and believed that MPL and EKR were separate entities. 5/23/01 N.T. 129-30. Golembeski also was not certain, nor particularly concerned about Laraway's affiliation with MPL and EKR. Id. at 76.

65. Doyle is a person with whom Laraway has worked for a long time and who participates with

⁸The letterhead on this proposal designated the company as EKR, even though the internal provisions indicated that it was MPL. Exhibit P-14.

Laraway in his polymer plant trials. 5/24/01 N.T. 328.

66. Doyle is not associated with EKR or MPL, but works with Laraway as an independent contractor in order to provide Laraway with additional expertise. Id.

67. Laraway used Doyle's name with his permission and for convenience. Id.

68. EKR was hired for the purpose of doing a preliminary bid specification and developing the initial protocol. 5/23/01 N.T. 105.

69. MPL was responsible for the development of the trial protocol, product evaluation and filing a report. Id. at 104.

70. The water department was under time pressure to hire MPL and EKR for the respective services these companies could provide and the City did not have enough time to go through an extensive contract approval process with the Solicitor's Office. Id. at 71; 129.

71. According to Golembeski, Procurement was well aware of the dual purchase order:

“Technically speaking you can give a contract to different companies in the course of a year.⁹ Technically I guess we found a loophole and we used it. We could have [] done it differently. Procurement could have hired Laraway for the first half and we could have hired him for the second half. In hindsight maybe that would have been a safer bet. But we were running up against a time frame. Procurement knew that. Procurement was anxious to get on with it. They wanted to do it this way. They were totally on board with it. . . .”

Id. at 74.

72. MPL provided technical consulting on three municipal polymer plant scale trials other than Philadelphia. Compl. & Am. Answer, ¶ 94; 5/24/01 N.T. 297; 300.

⁹By “year” Golembeski meant calendar year, not fiscal year. 5/23/01 N.T. 74.

73. Those three (3) other municipalities were Baton Rouge, Louisiana; Bethlehem, Pennsylvania; and Wyoming Valley Sanitary Authority, Pennsylvania. *Id.* at 300.¹⁰

D. 2000 Polymer Bid Process

74. Beginning in May or June 1999, the BRC began planning its official polymer plant scale trial. The trials were to be conducted at the BRC by the BRC and Laraway, rather than by the polymer vendors or manufacturers. By removing the vendors BRC hoped to achieve its goal of reaching a fairer and more realistic result. 5/23/01 N.T. 98-99; 5/24/01 N.T. 252-53.

75. On January 7, 2000, pursuant to public bidding laws, including but not limited to 53 P.S. § 36901(b),¹¹ the Water Department distributed the Application Package for the polymer trials, including specific criteria of the City and Water Department, to all prospective bidders. *Compl. & Am. Answer*, ¶ 24; Exhibit P-2.

¹⁰Cytec won the bid in Baton Rouge. The product itself was not the best performer but Cytec's bid cost won as the lowest priced bid. 5/24/01 N.T. 304-05. Cytec also was awarded the bid in Wyoming Valley and half of the bid in Bethlehem with Polydyne winning the other half. *Id.* These facts are not materially relevant to what occurred in Philadelphia. At best, this evidence is merely circumstantial and appears to reflect that the bid awards in those instances turned on Cytec's price for its polymer product. Further, all of the testimonial evidence of Mr. Hugh Taylor, the plant manager in Baton Rouge, regarding the use of lab (i.e., jar) tests for assessing bid dosages is irrelevant since Baton Rouge uses belt presses rather than centrifuges. *See id.* at 334-356. Counsel for the City moved to strike Mr. Taylor's testimony at the trial as irrelevant. *Id.* at 355. The court held that objection under advisement and is now sustaining it.

¹¹Section 36901(b) states in relevant part:

All services and personal properties required by any city, or any department thereof, where the amount exceeds the sum of ten thousand dollars, shall be furnished and performed under written contract, and the contract shall be awarded and given to the lowest responsible bidder”

53 P.S. § 36901(b).

76. As a preliminary matter, the Water Department and BRC excluded “mannich” polymers from consideration during the official polymer plant scale trials because mannich polymers (which Polydyne had used in the 1996 contract) had not performed satisfactorily and caused problems in the BRC’s operations. 5/23/01 N.T. 83-84; 90; 101-02; 5/31/01 N.T. 640-41.

77. The decision to exclude mannich polymers was made by Cowley, Golembeski and Cowley’s supervisor, Mary Ellen Woodrow, without input from Laraway. 5/23/01 N.T. 106.

1. The Application Package And Vendor-Conducted Trials

78. The Application Package contemplated two components to the polymer trials: a manufacturer-controlled (or vendor-conducted) polymer product evaluation at the BRC plant during which the manufacturer could test and evaluate its polymer products on the particular sludge processed at the BRC, and a City-controlled official polymer product evaluation, based on information provided in the Application Package during which the BRC alone would test the polymer products selected by the manufacturers. Exhibit P-2.

79. The Application Package required that bidders had to be manufacturers of the specific polymer offered. *Id.* at ¶ 2.3.1.

80. Because of this requirement only Polydyne, Cytec, CIBA Specialty Chemicals (“CIBA”) and Stockhausen, Inc. (“Stockhausen”), who constitute the largest polymer manufacturers and vendors in the Northeast region, participated in the unofficial plant scale trials. Compl. & Am. Answer, ¶ 26; Exhibit P-39.

81. The Application Package also contained general product specifications in considering cationic polyacrylamide flocculants, emulsion or dispersion (EPAM) and dry (DPAM) polymers for conditioning sludge prior to centrifuge dewatering at the BRC. Exhibit P-2, ¶ 2.5.

82. The manufacturers would have to provide product which could achieve specific levels of total solids percentage (less than 10% for EPAM or DPAM), active polymer content¹² (25% minimum for EPAM and 87% minimum for DPAM), moisture content (% max), insolubles (% max), charge density, specific gravity, maximum bulk viscosity¹³ (2,500 cps for EPAM), standard viscosity and solution strength. Id. at ¶ 2.6.

83. The Application Package also requested the bidder to include recommendations for the polymer concentration the bidder's product should be run at in order for the City to achieve the best product utilization and optimum overall economic performance. Id. at ¶ 2.8.

84. As to performance specifications, the package required the bidder to meet minimum performance criteria for the NE sludge and SE/SW sludge of 25% cake solids with a capture rate of 92 % (based on suspended solids). Id. at ¶ 2.9. The estimated sludge volume in dry tons per year was 20,000 for the NE sludge and 40,000 for the SE/SW sludge. Id.

85. According to the package, the bid would be awarded to the lowest responsive and responsible bidder, and the City reserved the right to reject any and all bids. Id. at ¶ 2.10.

86. The application package's formula for economic criteria represented the following:

A. Polymer Cost

$$\text{NE sludge: Unit price (\$/lb.)} \times \text{Dose (lbs./DT)} \times 20,000 \text{ DT/yr} = \text{\$/yr NE}$$

¹²“Active polymer content” is defined as the percentage of neat product that is actually active polymer. Surfactants, salts, inerts and other ingredients which may contribute to total solids, but which are not active polymer, are not to be included as part of the active polymer content.” Exhibit P-2, n.1.

¹³“Viscosity” is defined as “the property of resistance to flow in a fluid or semifluid” or “the ratio of the tangential frictional force per unit area to the velocity gradient perpendicular to the direction of flow of a liquid.” Webster's Collegiate Dictionary, 1320 (10th ed. 1996).

SE/SW sludge: Unit price (\$/lb.) x Dose (lbs./DT) x 40,000 DT/yr = \$/yr SE/SW

Total Polymer Cost: NE + SE/SW = \$/yr total

B. Cake Utilization (25% min. cake solids; Note that the utilization cost for NE sludge is \$0.00)

NE: $\frac{\$ 0.00/\text{WT}}{\% \text{ Cake Solids}} \times 20,000 \text{ DT/yr} = \$/\text{yr NE}$

SE/SW: $\frac{\$35.00/\text{WT}}{\% \text{ Cake Solids}} \times 40,000 \text{ DT/yr} = \$/\text{yr SE/SW}$

Total Cake Utilization Cost: NE + SE/SW = \$/yr total

C. Total Annual Bid Cost = Total Polymer Cost + Total Cake Utilization Cost

Id. 2.10.1.

87. The Application Package was merely an invitation to participate in the pre-qualification evaluation process, but it was not a formal bid document or bid specification. See Exhibit P-2; Compare Exhibit P-1.

88. The Application Package did not state that the City would “maximize” cake solids with respect to the SE/SW sludge. Exhibit P-2.

89. During its own vendor-conducted polymer trial at the BRC, Polydyne tested its polymer products with the aim of “maximizing the cake.” 5/30/01 N.T. 503-04, 517.

90. During its unofficial trial, Polydyne tested the polymer product it ultimately selected for the official polymer plant scale trial - Clarifloc SE-217 - which achieved a maximum cake solid of 32.9% on the SE/SW sludge. 5/24/01 N.T. 324-25; 5/30/01; 515; 517; Exhibit P-39.

91. Polydyne did not identify a product other than Clarifloc SE-217 that it would have selected for evaluation in the official polymer plant scale trials to achieve a cake solids level approximating 35%. 5/30/01 N.T. 517-18, 522.

92. The polymer product recommended by Cytec was not a mannich polymer, but was an emulsion mannich, specifically an XL product identified as WP-2004. 5/23/01 N.T. 84-85; Exhibit P-39.
93. An emulsion mannich is a low viscosity product and flows more easily than a mannich which is thicker and requires more energy to mix. 5/23/01 N.T. 84-85.
94. Cytec's application did supply a viscosity rate and all requisite areas were completed in full. 5/24/01 N.T. 251. The handwritten notations on Cytec's application were placed there by Cowley following a telephone conversation with Cytec to clarify what the viscosity rate and the terms meant. Id. at 251-52; Exhibit P-40
95. The recommended polymer solution (on an "as is" basis) of each manufacturer in their respective applications was as follows: Polydyne at 1.0%; Stockhausen at 0.5%; Cytec at 2.0%.¹⁴ Exhibit P-39.
96. Prior to the unofficial vendor-conducted trials, Polydyne had contested the use of Laraway's services on a perceived potential conflict of interest, but the City's Procurement Commissioner, Louis Applebaum, rejected Polydyne's concerns as speculative. Compl. & Am. Answer, ¶¶ 36-38.
97. All four of the manufacturers, Polydyne, Cytec, Stockhausen and CIBA, submitted applications and bids. None of the four were disqualified prior to the official polymer plant scale trials at the BRC.

2. The Official Polymer Plant Scale Trial - May 1 to May 5, 2000

98. On May 1 to May 5, the BRC conducted the official polymer plant scale trials. Exhibit P-22.
99. Laraway was present at the trials to assist the BRC personnel with the actual "fieldwork" in conducting the trials. 5/24/01 N.T. 263.

¹⁴CIBA did not provide a recommended polymer solution, but this omission was not fatal to CIBA's pre-qualification.

100. Laraway shared the responsibility with Cowley for conducting the official trials. 5/23/01 N.T. 96-97.
101. Ultimately, the decision on how the official trials were conducted rested with Cowley. 5/24/01 N.T. 315.
102. Prior to conducting the official polymer plant scale trials, BRC personnel and Laraway performed “jar tests” (or laboratory evaluations) on the each of the polymer products. 5/23/01 N.T. 153.
103. The jar tests were not used as part of the official polymer plant scale trials and were not used to determine a starting dosage for the products to be evaluated during the official polymer plant scale trial. Id. at 152-54.
104. The jar tests were performed as a diagnostic tool only to troubleshoot future problems experienced at the BRC. Id. See also 5/24/01 N.T. 212-13.
105. It may be coincidental that the starting point of dosage for the full scale evaluation falls within the range of the jar tests, but the tests were not intended nor used for this purpose. 5/23/01 N.T. 154.
106. During the official trials, only one centrifuge machine, a Bird Model No. 6150 was used to test all the polymer products. Id. 109-110; 5/25/01 N.T. 401.
107. The centrifuge machines at the BRC have been extensively modified over the years on an on-going basis since 1992. 5/24/01 N.T. 255-56.
108. Cowley had experience with centrifuge machine no. 10 since 1992, through all of its modifications and upgrades. Id. at 269-70.
109. It takes the centrifuge approximately 10 minutes to stabilize after increasing polymer dosage, before

a representative sampling of the sludge can be taken and analyzed for cake solids and centrate.¹⁵ 5/23/01 N.T. 205-06; 5/24/01 N.T. 211; 5/31/01 N.T. 628-30.

110. Polydyne offered the expert testimony of Richard T. Moll (“Moll”) on the issue of the stabilization of the centrifuge used during the official polymer plant scale trials. 5/24/01 N.T. 368-388; 5/24/01 N.T. 404-05. 5/25/01 N.T. 405.

111. Moll was not qualified to give any expert opinion on the subjects of polymer chemistry or the manner of testing polymers in a municipal waste water treatment plant, and, consequently, he gave no testimony on these subjects. 5/25/01 N.T. 395-96.

112. Moll was qualified as an expert in the area of how centrifuges work. Id. at 396.¹⁶

113. However, Moll has no critical evaluation experience with the Bird Model No. 6150 centrifuge used during the official polymer plant scale trial, nor did he ever examine or seek to examine this model centrifuge though he admitted that such an examination would have been helpful to him in rendering his opinions. Id. at 405, 420.

114. Moll’s opinion regarding the stabilization and operation of centrifuges was general in nature. Id. at 405-08.

115. Moll’s opinion did not persuade this court that the centrifuge used during the official trials was not allowed to properly stabilize before changing product.

¹⁵As testified by Cowley, fifteen or twenty minutes to stabilize the centrifuges would be a conservative estimate of the time required. 5/23/01 N.T. 205.

¹⁶The standard for qualifying an expert witness is a liberal one. Commonwealth v. Arroyo, 555 Pa. 125, 143, 723 A.2d 162, 170 (1999)(quoting Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 480, 664 A.2d 525, 528 (1995)). A witness may be qualified as an expert if the witness has “any reasonable pretension to specialized knowledge on the subject under investigation.” Id.

116. The feed rate for each polymer product evaluated during the official trials, i.e., the rate at which polymer dosage would be increased or decreased, was determined jointly by Cowley and Laraway, on the basis of the performance of the centrifuge in demonstrating cake solids and capture, without regard to the identity of the manufacturer. 5/23/01 N.T. 207-08.

117. The BRC evaluated each manufacturer's polymer product in a solution concentration that was recommended by the manufacturer itself. Id. at 147; 194; 199; 201; 5/31/01 N.T. 590; Exhibit P-39.

118. The starting dosage was in fact based upon the active dosage of the polymer product that was then running on the centrifuge prior to the start of a new testing period, without regard to the identity of the manufacturer. 5/23/01 N.T. 156; 5/24/01 N.T. 231-33.

119. During the official trials, each manufacturer's polymer product was evaluated and tested by the City at various doses on the NE sludge and SE/SW sludge, with the objective of evaluating the performance of the polymer products in terms of how dry the cake solids were and how clear the centrate was. 5/24/01 N.T. 236; Exhibits P-31-35; 44 and 46.

120. The typewritten log for the evaluation of Polydyne's polymer product on the SE/SW sludge indicates that at 8:30 p.m., a sample of sludge (with a corresponding cake solids percentage) was recovered for the Cytec polymer product. Exhibit P-32.

121. This 8:30 p.m. data point was not used to determine Cytec's SE/SW bid dosage because the evaluation of the Cytec polymer product had already been completed and this data point was derived an hour after the trial of Cytec's polymer product was over. 5/23/01 N.T. 188-90; 5/31/01 N.T. 585-87.

122. On May 2, 2000, the evaluation of CIBA's polymer product on the SE/SW sludge, resulted in four data points. Exhibit P-34.

123. During the official trials, the evaluation of the CIBA polymer product on the SE/SW sludge was ended because the sludge feed was switched to the NE sludge, a factor over which Laraway and Cowley had no control. 5/24/01 N.T. 325-27; Exhibit P-34.

124. Despite the fact that the evaluation of the CIBA polymer product was cut short on the SE/SW sludge, Laraway believed that the BRC had obtained a "very good evaluation" of the product. 5/24/01 N.T. 326.

125. Cowley testified that the number of data points from the trial of the CIBA polymer product on the SE/SW sludge was sufficient to determine CIBA's SE/SW bid dosage. Id. 271-73.

126. On May 4, 2000, during the evaluation of Polydyne's polymer product on the SE/SW sludge, after the 9:30 p.m. sample was taken and measured at 34.7% cake solids, the polymer feed rate was decreased, rather than increased. Exhibit P-32.

127. Cowley explained that this was done because there was "foam" in the centrate which indicated that there was an overdosing of the polymer product, which would have a negative impact on the rest of the testing process. 5/23/01 N.T. 191-92; 5/24/01 N.T. 270-71.

128. During the official polymer plant scale trials, the highest level of cake solids achieved for the Polydyne polymer product on the SE/SW sludge was 34.7%, a higher percentage than that achieved by Polydyne itself during its own vendor-conducted trial. 5/24/01 N.T. 325.

129. On the typewritten log for the evaluation of Stockhausen's polymer product on the SE/SW sludge, there are two entries in the "cake solids" column for the samples taken at 9:20 a.m. (35.8% and 36.3%), 9:40 a.m. (35.7% and 36.0%), and 10:00 a.m. (40.4% and 35.9%). Exhibit P-33.

130. These entries do not mean that two separate samples were taken at these times. 5/24/01 N.T. 300, 313.

131. Laraway explained that the sludge samples taken at 9:20 a.m., 9:40 a.m., and 10:00 a.m. had been analyzed initially by another inexperienced engineer at the BRC, resulting in the first data points for the cake solids (i.e., 35.8% at 9:20 a.m., 35.7% at 9:40 a.m., and 40.4% at 10:00 a.m.). Id. 313-14. See also, 5/25/01 N.T. 582-85; Exhibit P-33.

132. Cowley and Laraway determined that, after obtaining the analysis of the third sample, the numbers did not look right and that "something was wrong." 5/24/01 N.T. 313-14; 5/31/01 N.T. 582-85. They then themselves re-analyzed the sludge samples taken at 9:20 a.m., 9:40 a.m., and 10:00 a.m., and recorded different percentages for cake solids that were then used to determine the SE/SW bid dosage for Stockhausen. Id.

133. On the typewritten log for the evaluation of Stockhausen's polymer product on the SE/SW sludge, there were three samples taken after 11:40 p.m. – at 12:05 p.m., at 12:15 p.m., and at 12:40 p.m. Exhibit P-33.

134. Laraway explained that these three samples and data points were not used in the analysis for Stockhausen's SE/SW bid dosage because the "test had been run down" to the "point where we were now getting dirty centrate" and "we were satisfied that the trial [of the Stockhausen polymer product] was basically over." 5/24/01 N.T. 316.

135. Golembeski testified that he was satisfied that the official trials had been conducted fairly and that there was no bias in favor of Cytec. 5/23/01 N.T. 80.

136. Cytec's bid dosage, in terms of active ingredients, was the highest for the NE sludge and the next to highest for the SE/SW sludge, rather than the lowest, which negates an inference that there was a bias in favor of Cytec. Id.

137. The BRC, along with Laraway, conducted the official trials in a fair and impartial manner.

138. The BRC tested and evaluated each manufacturer's polymer product under similar conditions.

139. The record does not contain any competent evidence that the manner in which the polymer plant scale trials were conducted and the manner in which the samples were collected and analyzed were incorrect or inappropriate to determine polymer dosages for the 2000 polymer bid.

140. Any deviations in the conditions under which each manufacturer's polymer product was evaluated during the official trials was minor and immaterial and not sufficient to invalidate the trials or dosages found by the BRC and Laraway.

3. Evaluation of the Data From the Trials and Bid Dosage Determinations

141. At the conclusion of the official trials, the BRC and Laraway evaluated the data in order to determine appropriate bid dosages for each manufacturer's polymer product, as part of the function for determining the overall bid.

142. Cowley was confident that the number of data points from the trial of each manufacturer's polymer product on the NE sludge and SE/SW sludge was sufficient to determine these dosages, even if the same number of data points was not obtained. 5/24/01 N.T. 273-74.

143. Laraway also believed that the number of samples or data points obtained for each manufacturer's

polymer product was sufficient in order to determine bid dosages for the NE sludge and SE/SW sludge. Id. at 309-10; 314-15.

144. With respect to the SE/SW sludge, the data recorded from the trials indicated that each manufacturer's product could yield cake solids of at least 35%. 5/23/01 N.T. 177-78.

145. The dosage for the SE/SW sludge was at the point where the product would yield 35% cake solids. Id. at 51; 5/24/01 N.T. 258-59.

146. The BRC cannot handle cake solids greater than 35% since the downstream processes are not designed to handle solids greater than this amount. 5/23/01 N.T. 44; 5/31/01 N.T. 599.

147. Since each manufacturer's product could yield a 35% cake solid, the SE/SW bid dosage was determined according to a common performance standard. 5/24/01 N.T. 322; 5/25/01 N.T. 472.

148. As to the SE/SW bid dosages, Laraway used a computer model to determine a performance curve based on a logarithmic analysis. 5/31/01 N.T. 579-80.

149. As to the SE/SW bid dosages, capture or recovery was not used as a basis for determining bid dosages, as each manufacturer's polymer product had achieved excellent recovery on the SE/SW sludge. Id. at 617.

150. As computed by Laraway, and approved by the Water Department, the SE/SW bid dosages for each manufacturer was as follows: CIBA's SE/SW bid dosage was 40.1 pounds per dry ton; Polydyne's was 44.5 pounds per dry ton; Cytec's was 66.8 pounds per dry ton; and Stockhausen's was 22.0 pounds per dry ton. Exhibit P-6.

151. As to the NE sludge, all of the dosages of each manufacturer's polymer product yielded cake solids of greater than 25%, but some of the dosages did not achieve at least 92% capture. Exhibit P-35, P-44

to 46.

152. An “interpolation” methodology was used to determine the NE bid dosages for each manufacturer, rather than a functional form model as was used in calculating the SE/SW dosages, because a curve based upon all of the capture data would be too complicated and confusing and would be skewed by the data set such that it would not reasonably fit. 5/25/01 N.T. 427; 5/31/01 N.T. 591-92.

153. Specifically, Cowley interpolated between the data point showing the highest capture that was less than 92% and the data point showing the lowest capture rate that exceeded 92% to calculate the NE bid dosages. 5/24/01 N.T. 258-59.

154. Cowley used the same mathematical formula and the same performance standard in calculating the NE bid dosages. 5/31/01 N.T. 591-92.

155. As calculated by Cowley, the NE bid dosages are as follows: CIBA’s was 48.8 pounds per dry ton; Polydyne’s was 48.3 pounds per dry ton; Cytec’s was 78.9 pounds per dry ton and Stockhausen’s was 23.7 pounds per dry ton. Exhibit P-6.

156. A meeting between representatives of the Water Department and Laraway was held on May 25, 2000 to discuss the curves that Laraway had produced from the trials, but the names of the manufacturers were kept anonymous from the City’s personnel. 5/23/01 N.T. 79; 150.

158. Golembeski testified that there was nothing unusual in the curves produced by Laraway or the bid dosages calculated. Id. at 78-79.

159. Polydyne offered the expert testimony of Bernard R. Siskin, Ph.D. (“Dr. Siskin”), an expert in the field of applied statistics to demonstrate that the interpolation method of the NE sludge was inappropriate, opining that a functional form model or a response surface model should have been used. 5/25/01 N.T.

425-470.

160. Dr. Siskin also testified that the data did not question the fairness of the process, but did criticize the removal of “outliers” in the analysis of the data. Id. at 451-54.

161. Dr. Siskin also testified that he had no subject matter expertise and therefore no expertise for determining whether any one point was a valid data point or not. Id. at 455.

162. Dr. Siskin could not and did not give expert testimony as to the chemical properties of polymers, nor did he provide persuasive testimony as to why the method used by Laraway and/or Cowley was incorrect in calculating the bid dosages.

163. At most, Dr. Siskin’s opinion was that the NE bid dosages were calculated under a methodology that was not the best methodology, absent considerations of time, cost, and subject matter.

164. Based upon the data collected in the official trials, the dosages in the NE sludge resulted in the following rankings in terms of performance: CIBA had the best performing product; Polydyne was second; Stockhausen was the third best performing product; and Cytec was the worst performing product. 5/24/01 N.T. 305; 322-23.

165. As to the dosages on the SE/SW sludge: CIBA was again the best performing product; Polydyne was second; Cytec was third and Stockhausen was the worst performing product. Id. at 322-24.

4. Cake Utilization Cost Calculation - Not Necessary For The Bid

166. The cake utilization cost calculation, which was included in the Application Package, would provide the calculation to determine hauling costs incurred by the use of the polymer product on the SE/SW sludge. 5/24/01 N.T. 245; Exhibit P-2.

167. The Water Department determined that the data collected from the official trials no longer needed

to consider the cake utilization cost calculation because each manufacturer's polymer product was capable of achieving 35% cake solids on the SE/SW sludge, which was the maximum that the BRC could utilize, and since the cake utilization cost for each manufacturer's polymer was identical, i.e., \$4,000,000. It was not necessary to include it in the bid process. 5/24/01 N.T. 240; 5/30/01 N.T. 504.

168. In light of these circumstances, the Procurement Department eliminated the cake utilization costs calculation from the final and official bid specifications. 5/23/01 N.T. 44-45; 51; 141-42; 5/24/01 N.T. 237; 5/31/01 N.T. 615; Exhibit P-28.

169. Polydyne, as all of the bidders, was made aware of the "change" from the application package whereby the cake utilization cost was no longer part of the total cost calculation in the bid formula. 5/30/01 N.T. 513.

170. However, prior to the opening of the bid, Polydyne did not protest, complain or otherwise voice its concerns, either in writing or orally, regarding any change in the basis of the bid award. Rather, Polydyne first voiced its complaint about the supposed elimination of the cake utilization cost calculation on September 22, 2000, after the bid had been opened and Cytec had been awarded the contract. Exhibit P-29.

171. The Water Department would have considered any concern raised by a bidder regarding the cake utilization "credit" if the concern had been expressed prior to the opening of the bid. 5/23/01 N.T. 173-75.

172. The inclusion or exclusion of the cake utilization cost calculation would not have made any difference, in terms of pricing, or in determining the lowest responsible bidder.

173. Polydyne offered no persuasive evidence that it would have used a different polymer product in the official trials if it had known that the cake utilization cost calculation was not being counted in the final

bid award. Rather, Polydyne submitted its sealed bid despite this change.

5. The Official Invitation & Bid Award

174. By letter dated August 17, 2000, the City's Procurement Department mailed to Stockhausen, CIBA, Cytec, and Polydyne, a formal Invitation & Bid for the Purchase of Polymer ("Bid Invitation" or "Bid No. S1-XV853-0"). Exhibits P-6.

175. The same Bid Invitation was sent to each manufacturer. Exhibits P-7 to P-10.

176. The August 17, 2000, letter informed Stockhausen, CIBA, Cytec, and Polydyne that each had been "pre-qualified" to participate in Bid No. S1-XV853-0 for the purchase of polymer.

Exhibit P-6.

177. In this letter, the Procurement Department provided each manufacturer with its NE bid dosage and SE/SW bid dosage, as a result of the data derived from the official polymer plant scale trials and instructed the manufacturers to use the respective bid dosages in their calculation of the total annual cost for their products. Id.

178. The letter also stated that:

You will note that the Basis of Award in Section 3.2 has been simplified and differs from the version that appeared in the Application Package. Bidders are to use the formulas contained in the attached bid document. . . All questions concerning this I&B **prior** to the bid opening should be in writing and directed to me at the above address and fax number.

Id. (emphasis in original).

179. The cover sheet of the Invitation & Bid stated that:

All questions concerning this Invitation to Bid [sic], including specifications and conditions, must be presented prior to the bid opening date and time. [**Exhibit P-28, cover sheet**]

180. Section 1.6.1 of the bid specifications for Bid No. S1-XV853-0 provides that:

All information concerning this bid will be contained in this bid document as issued or amended.

Exhibit P-28, at 4.

181. The bid specifications for Bid No. S1-XV853-0 do not incorporate the Application Package. Id.

182. At section 3.2 of the Bid Invitation, the basis of award was specified as the total annual cost for NE sludge dewatering (20,000 DT/YR x NE dose lbs./DT x unit price \$/lb.) and SE/SW sludge dewatering (40,000 DT/YR x NE dose lbs./DT x unit price \$/lb.). Id.

183. The only variable in the basis of award calculation was the unit price for each manufacturer's polymer product on a pounds per dry ton basis. Each manufacturer had total control and discretion over the unit price of its polymer product.

184. Bid No. S1-XV853-0 was advertised to open on Thursday, August 31, 2000, at 10:30 a.m.

Exhibit P-6.

185. Polydyne, CIBA, Stockhausen and Cytec all submitted sealed bids to the Procurement Department in response to Bid No. S1-XV853-0. Exhibits P-7 to P-10.

186. The Bids were opened on August 31, 2000.

187. Cytec bid a unit price of \$0.38 per pound for its polymer product, based upon a NE bid dosage of 78.9 lbs./DT and a SE/SW bid dosage of 66.8 lbs./DT. Exhibit P-9.
188. The total annual cost under Cytec's bid was \$1,615,000. Id.
189. Stockhausen bid a unit price of \$1.25 per pound for its polymer product, based upon a NE bid dosage of 23.7 lbs./DT and a SE/SW bid dosage of 22.0 lbs./DT. Exhibit P-7.
190. The total annual cost under Stockhausen's bid was \$1,692,500. Id.
191. Polydyne bid a unit price of \$0.64 per pound for its polymer product, based upon a NE bid dosage of 48.3 lbs./DT and a SE/SW bid dosage of 44.5 lbs./DT. Exhibit P-10.
192. The total annual cost under Polydyne's bid was \$1,757,440. Id.
193. CIBA bid a unit price of \$0.78 per pound for its polymer product, based upon a NE bid dosage of 48.8 lbs./DT and a SE/SW bid dosage of 40.1 lbs./DT. Exhibit P-8.
194. The total annual cost under CIBA's bid was \$2,012,400. Id.
195. Cytec was the lowest responsible bidder in terms of price, based upon a comparison of each bidder's total annual cost, as determined by the pricing formula contained in section 3.2 of the Bid Invitation.
196. On September 6, 2000, the Procurement Department awarded the Polymer Purchase Contract to Cytec, as the lowest bidder. Compl. & Am. Answer, ¶ 62.
197. The Polymer Purchase Contract is for an initial term of approximately nine months with an option to renew for an additional three years on a yearly basis. Id. at ¶ 63.
198. The initial contract term commenced on October 1, 2000, and ended on June 30, 2001. Id. See also, Exhibit P-28.

199. Polydyne's protest of the award came after Polydyne had lost the contract. See Exhibit P-29.

200. The City rejected and continues to reject Polydyne's protest of the award to Cytec.

DISCUSSION

I. CYTEC IS NOT NECESSARILY AN INDISPENSABLE PARTY, WITHOUT WHOM THIS COURT LACKS JURISDICTION TO RENDER ITS RULING

As a threshold matter, the City argues that Cytec is an indispensable party to this action since it is the present vendor under the Polymer Purchase Contract, which is subject to the City's option to renew for up to three additional one-year periods following the initial term which ended on June 30, 2001. See City's Proposed Conclusions of Law, ## 1-4. See also, New Matter, ¶ 2 The City initially raised this matter at the first hearing on March 15, 2001. 3/15/01 N.T. 10. This court, however, disagrees.

“An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests.” Hubert v. Greenwald, 743 A.2d 977, 979 (Pa.Super.Ct. 1999)(citing CRY, Inc. v. Mill Service, Inc., 536 Pa. 462, 468, 640 A.2d 372, 375 (1994)). Absent an indispensable party, any decree or order rendered in a matter is void for lack of jurisdiction. Id. at 980. A party may raise this objection at any time during the proceedings and it is not waivable. Pa.R.C.P. 1032;¹⁷ Church of the Lord Jesus Christ of the Apostolic

¹⁷Pa.R.C.P. 1032 provides, in pertinent part, that:

(a) A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except . . . the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim and any other nonwaivable defense or objection . . .

(continued...)

Faith, Inc. v. Shelton, 740 A.2d 751, 755 (Pa.Comm. Ct. 1999). The following factors are used in determining whether a party is indispensable:

- (1) Do absent parties have a right or interest related to the claim?
- (2) If so, what is the nature of that right or interest?
- (3) Is that right or interest essential to the merits of the issue?
- (4) Can justice be afforded without violating the due process rights of absent parties?

Hubert, 743 A.2d at 980 (citation omitted). In deciding this issue, this court's inquiry focuses on "whether justice can be done in the absence of [Cytec]." Id. Therefore, this court must refer to the nature of the claim and the relief sought. Id. In addition, a party may be deemed "necessary", if not indispensable, if its presence is essential if the court is to resolve completely a controversy and to render complete relief.

Pennsylvania Human Relations Comm'n v. School District of Philadelphia, 167 Pa. Commw. 1, 14, 651 A.2d 177, 184 (1994).

The gravamen of this action lies in what the City and Laraway did or did not do in connection with the 2000 plant scale trials and in awarding the contract. Admittedly, Cytec has a contractual interest in performing the Polymer Purchase Contract and in having that contract renewed over the three additional one-year periods. However, Cytec's interest is not so essential to the merits of the case so as to make it indispensable. Rather, this court previously queried whether the City would be advocating in support of the contract awarded to Cytec and would therefore protect Cytec's interests. 3/15/01 N.T. 10-11. This court finds that justice may be done without Cytec since, as discussed below, this court finds that Polydyne

¹⁷(...continued)

(b) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter or that there has been a failure to join an indispensable party, the court shall order . . . that the indispensable party be joined, but if that is not possible, then it shall dismiss the action.

is not entitled to injunctive relief.

II. POLYDYNE IS NOT ENTITLED TO A PERMANENT INJUNCTION AS IT HAS FAILED TO ESTABLISH THAT THE CITY'S AWARD OF THE PUBLICLY-BID CONTRACT VIOLATED COMPETITIVE BIDDING LAWS

In its Motion, Polydyne requests preliminary and permanent injunctive relief to void the award of the contract to Cytec, to order the City to statistically review the data collected during the official plant scale trials according to the purportedly proper method to determine the lowest responsible bidder, to enjoin any consultation with Laraway in the City's review of the data, and to then award the contract to the lowest responsible bidder. Since the parties stipulated to conducting a final injunction hearing, this court will treat this motion as one for a permanent injunction.

A final injunction is warranted if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law. Berger by and Through Berger v. West Jefferson Hill School Dist., 669 A.2d 1084, 1086 (Pa.Comm. Ct. 1995); Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 478, 522 A.2d 1129, 1131 (1987). Unlike a preliminary injunction, a final injunction does not turn on the presence of imminent or irreparable harm. Soja, 361 Pa.Super. at 481, 522 A.2d at 1133. Further, while a preliminary injunction requires a party to establish a reasonable likelihood of success on the merits, Lewis v. City of Harrisburg, 158 Pa.Comm. Ct. 318, 324, 631 A.2d 807, 810 (1993), a party seeking a permanent injunction must establish his or her claim absolutely. Boyle by Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc., 676 A.2d 695, 699 (Pa.Comm. Ct. 1996).¹⁸

¹⁸A preliminary injunction, on the other hand, requires the plaintiff to prove all of the following elements:

(continued...)

A court may enjoin the award of a public contract when irregularities are shown in the bidding process. American Totalisator Co., Inc. v. Seligman, 489 Pa. 568, 576-77, 414 A.2d 1037, 1041 (1980); Stapleton v. Berks County, 140 Pa. Commw. 523, 542, 593 A.2d 1323, 1332 (1991). However, this court's scope of review is limited to determining whether the City's award of the bid to Cytec constituted a manifest abuse of discretion or purely an arbitrary execution of the City's duties or functions. American Totalisator Co., 489 Pa. at 574, 414 A.2d at 1041 (1980); Kimmel v. Lower Paxton Twp., 159 Pa. Commw. 475, 481, 633 A.2d 1271, 1274 (1993). It is a fundamental principle that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power. American Totalisator, 489 Pa. at 575, 414 A.2d at 1040-41. Nor will this court inquire into the wisdom of the City's decision nor the manner in which it executed this decision. Id.

“Drawing up the terms of, and the award of a contract to the ‘lowest responsible bidder’ involves the exercise of discretion by the contracting authority.” A. Pickett Constr., Inc. v. Luzerne Cty Convention Center Authority, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999). See also, Hibbs v. Arensberg, 276 Pa. 24,

¹⁸(...continued)

- (1) that relief is necessary to prevent immediate and irreparable harm which could not be remedied by damages;
- (2) that greater injury would result by refusing such relief than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct;
- (4) that the injunction is reasonably suited to abate such activity; and
- (5) that the plaintiff's right to relief is clear and the alleged wrong is manifest.

Gaeta v. Ridley School Dist., 757 A.2d 1011, 1013 (Pa. Commw. Ct. 2000)(citing Singzon v. Department of Public Welfare, 496 Pa. 8, 10, 436 A.2d 125, 126 (1981)).

29, 119 A. 727, 729 (1923)(“The term ‘lowest responsible bidder’ does not mean the lowest bidder in dollars; nor does it mean that the board may capriciously select the highest bidder regardless of responsibility or cost. What the law requires is the exercise of sound discretion.”). The statutory requirements for competitive bidding on public contracts do not exist solely to secure work at the lowest possible price, but also to invite “competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts.” Conduit and Foundation Corp. v. City of Philadelphia, 41 Pa.Comm. 641, 646-47, 401 A.2d 376, 379 (1979). The plaintiff bears the heavy burden of showing that the contracting authority [the City] abused its discretion and did not act in good faith or in its best interests. J.J.D. Urethane Co. v. Montgomery County, 694 A.2d 368, 370 (Pa.Comm. Ct. 1997)(upholding alternative higher bid where commissioners chose it for genuine safety reasons over lower bid).

Pennsylvania courts have repeatedly held that the specifications set forth in bidding documents are mandatory and must be strictly followed for the bid to be valid. R. & B. Builders, Inc. v. School District of Philadelphia, 415 Pa. 50, 52, 202 A.2d 82, 83 (1964); Harris v. City of Philadelphia, 283 Pa. 496, 503, 129 A. 460, 462 (1925); Kimmel, 159 Pa.Comm. at 482, 633 A.2d at 1274-75. The administrative body has no discretion in deciding whether the bidder’s effort at meeting the bid requirements was sufficient. Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa.Comm. 619, 624, 566 A.2d 649, 651 (1989). An award of a contract in a competitive bidding process must be overturned if the mandatory requirements in the bid instructions are not strictly followed. Smith v. Borough of East Stroudsburg, 694 A.2d 19, 23 (Pa.Comm. Ct. 1997). As stated recently by the Pennsylvania Commonwealth Court, “the appearance of propriety is so important that genuine deviations may not be tolerated even if all available evidence suggests that the parties acted in good faith.” Gaeta v. Ridley School

Dist., 757 A.2d 1011, 1014 (Pa.Comm.w.Ct. 2000).

Moreover, it is well-settled that a defective bid cannot be remedied once the bids have been opened. Kimmel, 159 Pa.Comm.w. at 484, 633 A.2d at 1275; City of Philadelphia v. Canteen Co., Div. of TW Services, Inc., 135 Pa.Comm.w. 575, 583, 581 A.2d 1009, 1013 (1990); Nielson v. Womer, 46 Pa.Comm.w. 283, 286, 406 A.2d 1169, 1171 (1979). Nonetheless, certain defects in a bid proposal may be waived provided that the defect is a mere irregularity and that no competitive advantage is gained. Rainey v. Borough of Derry, 163 Pa.Comm.w. 606, 614, 641 A.2d 698, 702 (1994). In Rainey, the low bidder's proposal contained two defects: a calculation error and the failure to designate which equipment manufacturers from a restricted list of manufacturers would supply the equipment for the project. Id. at 614-18, 641 A.2d at 702-04. The court concluded that no competitive advantage inured to the low bidder when the borough correctly added together the itemized prices on the bidder's proposal to generate an accurate base bid and to submit the equipment list for manufacturers within twenty-four (24) hours. Id. at 615-17, 641 A.2d at 703. However, courts have disallowed municipalities to waive "material discrepancies" as opposed to mere "technical" irregularities. See, Smith, 694 A.2d at 23 (bid predicated on out-of-state waste disposal was not a technical aspect of the bid but substantially and materially deviated from requirement that waste disposal be done within the state); Kimmel, 159 Pa.Comm.w. at 483-485, 633 A.2d at 1275-1276 (townships lacked discretion to waive bidder's alleged "technical" bid deficiencies, consisting of missing asset page and absence of letter certifying access to a recycling center, in contravention of the mandatory bid instructions); and Conduit, 41 Pa.Comm.w. at 645-47, 401 A.2d at 379-80 (holding that low bidder's multiple listings of subcontractors in its bid was not "mere informality waivable or correctable in the city's exercise of discretion" where bid specifications allowed for only one

listing).

Applying these principles to the present case, Polydyne has failed to show that the City abused its discretion in awarding the bid to Cytec, that the award was tainted by fraud or favoritism or that various actions of the City, the Department and/or Laraway afforded Cytec a competitive advantage over the other bidders. First, the evidence adduced at the hearing did not demonstrate that the bid specifications, in the actual bid, were not strictly followed or that changes were made to give Cytec or any bidder a competitive advantage over the other. While the cake utilization cost calculation (or “cake credit”) for the SE/SW dosages was originally included in the Application Package, it was not included in the bid formula in the official bid. The evidence presented unequivocally demonstrated that all of the bidders achieved a 35% cake solid and that the cake credit was not necessary to uphold the dosages reached in the official trials. While Polydyne asserted that it would have used a different polymer had the cake credit not been eliminated, Polydyne presented no evidence in support of their claim. All of the bidders complied with the bid specifications, as written, and were correctly deemed responsive.

Further, it was not shown that Laraway was biased or had a material interest in awarding the contract to Cytec. Cytec’s polymer product had the worst performance rating as to the NE dosage and the second to worst performance rating as to the SE/SW sludge. If Laraway had a bias in favor of Cytec, it seems logical that the performance results would have been different. The fact that Laraway formerly worked for Cytec, had stock options at the time of the official trials and would receive a small pension, at best, shows an “appearance” of impropriety. The mere “appearance” of impropriety is not sufficient to grant Polydyne permanent injunctive relief.

Additionally, the fact that there were miscellaneous purchase orders for both MPL and EKR,

which are both owned by Laraway, amounting to more than \$20,000 does not mean that the City violated Section 8-200 of the Philadelphia Home Rule Charter or the City's regulations. See Exhibit P-5. Rather, testimonial evidence sufficiently demonstrated that the City and the Water Department were under time constraints to hire Laraway and begin the planning for the 2000 polymer trials. Further, different phases of work were to be completed by both companies throughout the process. If this is an issue at all, it is an issue for the City to take up with its own Procurement Department who was well aware and approved the split contract. However, as to the bid, it is collateral to the bid process itself and insufficient to void the bid.

Finally, there is no evidence that the bids were not analyzed on a common standard or by an inappropriate method. The fact that certain polymer products were tested for less time than others does not demonstrate an abuse of discretion or fraud or favoritism toward one manufacturer. The fact that the BRC and Laraway used the solution concentrations, as recommended by the manufacturers, does not show a failure to test the products on a uniform basis. Different polymers have different chemical properties, and, thus, react differently when processed through the centrifuges and applied to sludge.

Taking all the evidence together, it appears that Cytec won the Polymer Purchase Contract because it had the lowest price, and not because of any perceived unfair advantage. The City through the Water Department, correctly concluded that Cytec was a responsive and responsible bidder and awarded it the contract. Therefore, Polydyne is not entitled to the permanent injunctive relief which it seeks.

CONCLUSIONS OF LAW

For the foregoing reasons, plaintiff has failed to establish its claim for permanent injunctive relief:

1. Cytec is not an indispensable party, without whom, this court lacks jurisdiction to resolve this matter.
2. The City's witnesses presented credible evidence that they acted with discretion and good faith in the conduct of the official polymer trials, in drawing up the bid specifications, and in adhering to those specifications when awarding the bid to Cytec.
3. Moll's opinion is not probative as to whether the centrifuges were stabilized and his testimony did not negate the credible testimony of Cowley or Golembeski that the centrifuges were in fact stabilized.
4. Dr. Siskin's testimony did not demonstrate that the City abused its discretion or violated public bidding laws in using the interpolation method over a different form of analysis and Dr. Siskin's recommended method would not change the results.
5. Cytec's bid application did include the viscosity requirement, as well as all the other requirements of the bid specifications. Therefore, Cytec was correctly determined to be the lowest responsible bidder.
6. The evidence failed to show that any of the defendants conducted the 2000 polymer bid in bad faith.
7. The mere suggestion of fraud or favoritism or a possible conflict of interest is insufficient to void an otherwise valid bid award.
8. The City had legitimate reasons for paying MPL and EKR in separate miscellaneous purchase orders and the City did not abuse its discretion or violate the Philadelphia Home Rule Charter or regulations in acting as it did.
9. The evidence showed that all of the bids were analyzed on a common standard.
10. The evidence also showed that the bid specifications were not changed or altered after the bids were opened to give a competitive advantage to Cytec over all other bidders.

On the basis of the record, the court is entering a Decree Nisi Denying the Petition for Permanent Injunction.

BY THE COURT:

PATRICIA A. MCINERNEY, J.

Dated: August 6, 2001

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

POYLDYNE, INC.	:	FEBRUARY TERM, 2001
Plaintiff	:	No. 3678
v.	:	COMMERCE PROGRAM
CITY OF PHILADELPHIA,	:	
PHILADELPHIA WATER DEPARTMENT,	:	
and WAYNE LARAWAY,	:	
Defendants	:	Control No. 022026

ORDER - DECREE NISI

AND NOW, this 6th day of August, 2001, pursuant to Pa.R.C.P. 1517, upon consideration of Plaintiff's Motion for Preliminary and Permanent Injunction, the Complaint in Equity, Defendants' Amended Answer with New Matter to the Complaint, having conducted a permanent injunction hearing on May 23, 24, 25, 30 and 31, 2001, all other matters of record, in accordance with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that the Plaintiff's Motion for Preliminary and Permanent Injunction is **DENIED**.

BY THE COURT:

MCINERNEY, J.