DOCKET NO. CV-10-6016708-S	:	SUPERIOR COURT
THE METROPOLITAN DISTRICT	:	JUDICIAL DISTRICT OF HARTFORD
V.	:	AT HARTFORD
CONNECTICUT RESOURCES RECOVERY AUTHORITY	:	AUGUST 18, 2011

MEMORANDUM OF DECISION

After trial, the court finds the following facts. Connecticut Resources Recovery Authority ("CRRA") is a quasi-public entity, created by the Connecticut Legislature in 1973 as a public instrumentality.[1] CRRA's primary role is to implement Connecticut's Solid Waste Management Plan, as adopted by the Department of Environmental Protection ("DEP"). CRRA operates through a board of directors. It implements the Solid Waste Management Plan using "solid waste disposal, volume reduction, recycling, intermediate processing and resources recovery facilities."[2] CRRA has designed, constructed, and operated or managed four waste-to-energy facilities in Connecticut. These facilities are located in Hartford, Preston, Bridgeport and Wallingford.

The MDC is a specially chartered municipal corporation, created by the Connecticut Legislature in 1929. The primary purpose of the MDC is to serve 8 district towns with a variety of public works services. It's largest service is delivering public water to over 100,000 customers. The annual budget of the MDC is $250,000,000. Only about 7% of the MDC's annual budget goes to its operations at the WPF. The MDC has 680 employees, 80 of whom work at the Mid-Conn Facility.

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1 See Connecticut General Statutes § 22a-261.

2 See Connecticut General Statutes § 22a-262.

cc: Robinson + Cole, LLP (P)
Chadwick + Shore, LLP (P)
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Rptr. Jud. Decisions on 8/18/11 (ctb)

The waste-to-energy facility located in Hartford, which is the subject of this suit, is known as the Mid-Connecticut Resources Recovery Facility (the "Mid-Conn Facility"). The Mid-Conn Facility, which is owned by CRRA, is a waste-to-energy facility that accepts municipal solid waste from municipalities and private-sector waste hauling companies and converts that waste into energy. At the Mid-Conn Facility CRRA receives municipal solid waste that is generated within seventy (70) towns in Connecticut. The waste is delivered pursuant to CRRA contracts with private haulers and contracts with the 70 towns known as municipal service agreements ("MSAs"). Through these MSAs, the municipalities agree to dispose of a certain amount of waste per year at the Mid-Conn Facility, CRRA agrees to accept all waste generated within the boundaries of those towns and CRRA charges the towns and the private haulers its "net cost of operation." At the beginning of each fiscal year, CRRA establishes a fixed price per ton of waste that it charges to each municipality based upon its estimated net cost of operation for that year, known as a "tip fee. For the past six years the tip fee has been $69 per ton.

The Mid-Conn Facility itself consists of three separate parts - the Waste Processing Facility ("WPF"), the Power Block Facility ("PBF"), and the Electric Generating Facility ("EGF"). The waste is accepted at the WPF, where it is screened and shredded into a homogenous fuel called refuse derived fuel or "RDF." The RDF is stored at the WPF and then transported via a conveyer belt from the WPF to the PBF. In the PBF, the fuel is heated in boilers to create steam. The steam is then piped into turbine generators located in the EGF. The turbine generators create electricity, which CRRA sells to the third-parties.

For the past twenty-six and a half years, since October 4, 1984, the MDC has operated the WPF pursuant to a long-term contract between CRRA and the MDC. (hereinafter, the "Agreement")

The twenty-seven year term of the Agreement ends on December 31, 2011. Covanta Environmental Systems ("Covanta") is the current operator of the PBF and EGF under contracts with CRRA that are set to expire on May 31, 2012.

The Agreement and the Covanta contracts, which were not competitively bid, locked CRRA into long term business arrangements. Under the Covanta contracts, CRRA pays Covanta a fixed fee and Covanta decides how to use that money to operate, repair and maintain the PBF and EGF. Therefore, Covanta maximizes its profits best by spending as little as possible on its operations. Moreover, Covanta is not required to provide CRRA with any information about its operations at the PBF and EGF, such as information contained in its computerized maintenance management system.

The Agreement with the MDC includes no performance incentives to promote the efficiency of operations or control costs. It provides that CRRA is to pay the MDC only the "actual cost of the goods and services provided" in operating the WPF. Under the Agreement, "[a]ctual costs" include direct costs and "indirect costs/support services." In order to account for its "indirect costs," the MDC assigns a markup on all of its direct costs, such as labor, materials and other services provided at the WPF. For many years, the MDC charged CRRA a markup of thirty percent (30%) on all of its direct costs incurred in operating the WPF.

In 2000, an arbitration panel determined that the MDC's method for allocating indirect costs resulted in substantial overcharges and was "unfair to CRRA." The 2000 panel further instructed CRRA and the MDC to implement a new method for determining indirect costs. The parties failed to reach an agreement on a new method and the issue was arbitrated for a second time in 2004-2005.

The 2005 arbitration panel reaffirmed the findings of the 2000 panel and found that for the period from 1996 through 2004, the MDC had overcharged CRRA for indirect costs in the amount of $7,091,841. As a result of the 2005 arbitration, the MDC's markup on direct costs was cut in half, from 30% to 14.65%, where it currently stands.

In addition to the terms of the Agreement and the Covanta contracts, the fact that there are currently two operators of the Mid-Conn Facility results in increased costs to operate and maintain the Mid-Conn Facility. A single operator for the entire Mid-Conn Facility would save costs in maintenance and labor.

As a result of CRRA's dissatisfaction with the Agreement, and its contracts with Covanta, it decided to attempt to arrive at a less costly arrangement with any operator of Mid-Conn Facility which took over after the Agreement and the Covanta contracts expired by seeking bids from prospective operators in a competitive procurement process.

In 2002, in the wake of the financial crisis caused by the collapse of Enron, the Connecticut legislature reconstituted CRRA's board of directors and the new board replaced many members of CRRA's senior management, including its President. In December of 2002, CRRA hired Tom Kirk as its President. Under Mr. Kirk, CRRA sought to set goals for controlling the increased costs to CRRA due to the "Enron debacle" and to ensure that CRRA continued to provide its waste services to municipalities at costs they could afford. As part of these goals, in 2003 CRRA management began discussing what would happen to the Mid-Conn Facility when the contracts with MDC and Covanta expired on December 31, 2011 and May 31, 2012, respectively. Mr. Kirk assigned Ron Gingerich and Virginia Raymond as the lead members of a group of CRRA staff who were in charge

of setting up a competitive procurement process to secure a new contract for the operation and maintenance of the Mid-Conn Facility

Mr. Gingerich has worked for CRRA for ten years and has been involved in over 100 procurements for CRRA. He was involved in drafting CRRA's Procurement Policies and Procedures. Ms. Raymond has been employed with CRRA for almost 19 years and has also worked on many large procurements.

The procurement team developed two potential business models for the operation and maintenance of the Mid-Conn Facility, both of which envisioned a single operator for the entire Mid-Conn Facility. Under Business Model 1, CRRA would assume direct management of the Mid-Conn Facility, retaining control over the operational functions assigned to the contractor. CRRA favored Business Model 1 because Business Model 2 would have given more discretion to the contractor. However, it included Model 2 as a backup in the event that Business Model 1 did not attract sufficient interest.

CRRA decided to use a two-phase procurement process, beginning with a Request for Qualifications ("RFQ") followed by a Request for Bids and Proposals ("RFBP"). The RFQ phase would aim to identify and attract participants to the process who were capable of operating Mid-Conn Facility. Those who met that standard would be eligible and invited to participate in the RFBP phase, which would provide the process by which CRRA would actually select a contractor.

CRRA also permitted participants to submit their own proposals for the Mid-Conn Facility, provided they also submitted bids on Business Model 1, Business Model 2, or both. To do so, CRRA combined a "Request for Bids" on its own business models, with a "Request for Proposals" to accommodate other ideas.

CRRA's RFQ requested a statement of qualifications from potential participants, which CRRA would evaluate in relation to the two business models it had formulated. The RFQ made it clear that under both Business Model 1 and Business Model 2, CRRA sought a single operator for the entire Mid-Conn Facility. The RFQ also provided the potential participants with a complete overview of the procurement process, including a description of the upcoming RFBP, which explained that CRRA would allow bidders to present alternative proposals provided they submit a bid on either Business Model 1, Business Model 2 or both. CRRA advertised the RFQ, which was issued on September 14, 2009, in two national trade publications, Waste Age and Recycling and Waste News.

On September 30, 2009, CRRA held a "pre-SOQ" meeting and provided a tour of the Mid-Conn Facility, as scheduled in the RFQ. Twenty-three people from eight companies attended, including four representatives of the MDC. At the meeting, Mr. Gingerich gave a speech in which he expressed to the attendees the ideas and concepts contained in the RFQ, including that CRRA was seeking to institute an entirely new management structure for the Mid-Conn Facility that would consist of a *single operator* under one of two possible business models.

Prior to the pre-SOQ meeting, CRRA decided to excuse the current operators of the Mid-Conn Facility, the MDC and Covanta, from having to participate in the RFQ process. CRRA communicated its offer to exempt of the current operators in letters sent to each of them by Ms. Raymond in September, 2009.

About a week after the pre-SOQ meeting, on October 8, 2009, J. Scott Jellison, Chief Operating Officer of the MDC, who was in charge of responding to the CRRA procurement, sent a letter to Ms. Raymond in which he requested answers to 27 questions under headings of "Financing

Risks," "Costs and Operational Risks" and "Facilities and Legal Risks." Included in that letter were the following questions:

> Is CRRA engaged in any contract dispute and/or litigation? If the answer is in the affirmative, please state the parties to the litigation, and the nature of the dispute.
>
> Will CRRA indemnify contractor against any claims or causes of action against contractor resulting from the displacement of current operators or contractors or from transition undertakings?

Ms. Raymond responded to Mr. Jellison and said the "questions and issues posed in your letter which are appropriate to this solicitation, are precisely the kinds of questions and issues CRRA will address in the RFBP package and its attendant agreements." The MDC wrote back to state that it "expects and insists that CRRA respond to each of the questions and issue the written responses in the requisite Addendum ...." As to CRRA's position that the questions were beyond the scope of the RFQ phase, the MDC took the extraordinary position that: "It is not for CRRA to make that determination."

Mr. Jellison and Mr. Sheehan offered differing, incredible reasons for MDC's posing the 27 questions to CRRA . While Mr. Sheehan claimed confusion regarding CRRA's rules and regulations pertaining to the procurement process, the MDC did not pose a single question having anything to do with CRRA's procurement rules and regulations. Mr. Jellison testified that the MDC needed an answer to Question 6, which raised the idea that the MDC would pursue a claim against a potential incoming contractor due to the MDC's displacement, in order to understand the "impact to the MDC" of awarding a new contract.

The court finds that the MDC's submission of the question seeking information about its ability to sue bidders for the new Mid-Conn Facility contract and its insistence on the answer to that question and other questions was done for the purpose of raising doubts in the minds of potential

bidders and discouraging them from participating. MDC expectated that answers to its questions would be posted in writing to all the participants.

During the RFQ phase, CRRA interviewed all of the companies who were participating. CRRA did not interview Covanta or the MDC because they had accepted the exemption offered by CRRA and had chosen not to participate. CRRA did invite the MDC to the boiler inspections on the Covanta side of the plant and the MDC attended those meetings.

CRRA issued the RFBP on May 6, 2010. The RFBP included a complete contract addressing the details of Business Model 1. It also included a detailed term sheet specifying the essential terms of a contract under Business Model 2.

The RFBP set forth CRRA's evaluation criteria. Included among the evaluation criteria were: price; the "proven knowledge, capabilities and experience of the Bidder to provide the Services required;" the financial condition of the Bidder; and "any other factor or criterion that CRRA may deem relevant or pertinent for its evaluation of the proposals."

Many of the MDC's claims are based on the allegation that CRRA unfairly deprived the MDC of an opportunity to present its qualifications by exempting the MDC from the RFQ phase and then considering the bidders' qualifications in the RFBP phase. The MDC has also complained at trial that CRRA's consideration of "other" criteria deemed relevant by CRRA was unfair

The court finds that CRRA made it clear in the RFBP that a bidders' qualifications were an evaluation criterion. Both Mr. Jellison and Mr. Sheehan testified that they knew that qualifications were a factor in the selection process once the RFBP was issued. Contrary to Mr. Sheehan's testimony that MDC was unfairly prevented by CRRA from submitting its qualifications during the RFQ process, MDC ultimately did submit a statement of its qualifications at CRRA's request.

Mr. Sheehan testified that, if given the chance, the MDC would have told CRRA about the MDC's engineers and skilled craft workers, its engineering experience, its operation of a hydro-electric power plant, its relationships with consultants and subcontractors, and its construction of a steam generating power plant at its wastewater treatment plant in Hartford. However, the statement of qualifications submitted by the MDC addressed virtually everything Mr. Sheehan testified the MDC would have told CRRA, if given the chance. Moreover, Mr. Jellison testified that the MDC submitted everything it wanted to submit during the procurement process with respect to the MDC's qualifications.

MDC devoted significant time at trial to criticizing the language in the RFBP that CRRA would consider "any other factor or criterion that CRRA may deem relevant or pertinent for its evaluation of the proposals." This language followed a list of selection criteria consistent with the CRRA's Procurement Policies and Procedures and was reasonably intended to give CRRA broad discretion in evaluating the ability of bidders to operate Mid-Conn Facility.

The MDC also devoted a lot of time at trial to Section 5.2 of the RFBP, which provides, in pertinent part:

> All inquiries regarding this RFBP, request for information related to the O&M of the Facility and requests to schedule appointments to review documents and perform a Facility inspection shall be in writing and submitted using one of the following methods:
>
> (a) U.S. Postal Service to CRRA, . . . Attention Virginia Raymond with a copy to Ron Gingerich;
>
> (b) FAX to . . . , Attention Virginia Raymond with a copy to Ron Gingerich;and/or
>
> (c) Email to vraymond @ crra.org, . . . with a copy to Ron Gingerich. . . .
>
> Subject to CRRA's sole and absolute discretion, CRRA will determine if it chooses to respond in writing to all or some of the foregoing submitted written questions for

> information. CRRA also reserves the right to determine in its sole discretion the methodology to be used to disseminate information. . . . .
>
> Any Bidder who attempts to use or uses any means or method other than those set forth above to communicate with CRRA or any director officer employee or agent thereof regarding this RFBP shall be subject to disqualification from the procurement process.

The purpose of this language was not to prohibit CRRA personnel from having telephone conversations with the bidders. Rather, it was to provide CRRA with an option to disqualify any bidder who attempted to gain advantage by communicating with board members, officers or employees of the CRRA, other than those in charge of the bidding process.

In fact, CRRA took considerable pains to make sure that its written communications with one bidder were shared with other bidders via use of an electronic document site, or room. Although MDC devoted much time to this subject at trial, it did not identify any significant advantage afforded to any of the bidders in the course any of these communications.

In July of 2010, two months after the RFBP was issued, the MDC filed a lawsuit against CRRA seeking to enjoin the bidding process. The First Count of the MDC's July 2010 Verified Complaint alleged that certain waiver language contained in the RFBP prevented the MDC from bidding because to do so would result in the MDC waiving claims it might have against CRRA under the existing Agreement. In the Second Count of the Verified Complaint, the MDC alleged that the RFBP was non-competitive because it excluded the MDC's participation by seeking to contract with a single entity for the operation and maintenance of the Mid-Conn Facility.

A hearing was held before Judge Prescott on August 3, 2010 on the MDC's application for temporary injunction

The MDC's claims in the July 2010 lawsuit that CRRA had concealed or concocted the single operator requirement in order to disable the MDC from participating and that MDC could not partner with the private sector were known by MDC at the time to be untrue. The MDC's sole purpose in filing the July, 2010 lawsuit was to disrupt the procurement process.

The bidders submitted their responses to the RFBP on September 9, 2010. Four entities submitted bids on Business Model 1: Covanta, the MDC, Engen LLC and NAES Corporation, the contractor eventually selected. One entity, Wheelabrator Technologies, Inc., submitted a bid on Business Model 2. Each of the bidders also submitted alternative proposals. Most of the bids submitted were serious bids. The MDC's bid was not one of a serious bidder.

The MDC's bid addressed at some length legal arguments to the effect that Business Model 2 was prohibited under CRRA's enabling legislation. MDC did not submit a bid on Business Model 2. It devoted barely ½ page to Business Model 1, upon which it did bid.

The MDC represented in its bid that CRRA would not incur transition costs by selecting the MDC, without explaining how, and reminded CRRA of the MDC's pending arbitration claim seeking millions of dollars from CRRA if the MDC was not retained by CRRA at the Mid-Conn Facility. Beyond that, the MDC filled in the price form for Business Model 1and signed the bid form. The MDC neglected to complete the Business Exception Form that was supposed to identify any issues related to the model contract for Business Model 1. However, it did attach three pages of exceptions it took to the RFBP itself, including reserving its "right and ability to modify or amend" its bid. The MDC also refused to complete the required background questionnaire because, as a current contractor, it believed it should be entitled to an exemption from that requirement.

The MDC's bid documents also offered, as an alternative to CRRA's business models, an extension of its existing contract to operate the WPF only for another 20 years. The only rationale put forward in support of this proposal was the prospect of avoiding the disputed "termination cost" claim currently in arbitration and also saving on transition costs at the WPF. The MDC's proposed Alternate 1 to extend the existing contract proposed to pass through all of its direct costs with a 14.65% markup, consistent with the existing arrangement, and proposed that CRRA pay an additional $2.7 million on top of that.

The MDC devoted the most explanation in its bid to its proposal to completely take over the Mid-Conn Facility from CRRA and eliminate CRRA's role at that Mid-Conn Facility. Mr. Jellison, the principal author of this proposal, testified that this proposal was not really intended to be considered by CRRA, but was ultimately intended for the legislature. Several months after MDC submitted its bid, a bill was introduced in the Connecticut legislature that would have transferred responsibility for the Mid-Conn Facility to an unnamed "public entity. Mr. Jellison testified that the proposal to the legislature was the only detailed proposal it made. MDC's goal was clearly to obviate its need to present a bona fide bid to the CRRA by effecting legislation which would give control of the Mid-Conn Facility to the MDC and remove CRRA completely from any involvement in the facility.

The MDC's alternative 2 in the bid contained many inaccuracies, some of which were intentionally made. In support of alternative 2, which was also its legislative proposal, the MDC misrepresented enormous cost savings amounting to nearly $40 million.

The MDC first showed a $7,890,799 budget line item purporting to represent CRRA's "General Administration" costs and claimed that its own administrative costs to operate the entire

Mid-Conn Facility would be only $1.5 million. Mr. Jellison testified that he could not explain those figures and that Rob Constable would have to explain the figures. Mr. Constable, however, admitted that the $7 million figure did not appear in the CRRA's budget, and testified that Mr. Jellison told him to put that figure in the cost savings spreadsheet. Mr. Jellison and Mr. Constable both testified that they did not know how the MDC would reduce the administration costs to $1.5 million. Constable further testified that Mr. Jellison had direct him to insert the $1.5 million figure. By inflating CRRA's costs and underestimating its own, the MDC alternative 2 represented a nonexistent $6.4 million in savings.

In alternative 2, the MDC also represented unrealistic legal expense savings, projecting 0 legal expenses if it operated the Mid-Conn Facility(a $2 million savings off actual legal expenses) and inserted an unexplained $32 million amount in CRRA expenses. In addition to, essentially, making up numbers to support its claims for cost savings, the MDC also took credit for a number of cost saving initiatives which had originated with CRRA and that CRRA was already in the process of implementing

After the bids for operation of the Mid-Conn Facility were submitted, the CRRA sought clarification of certain items. The bid price form for Business Model 1 contained an ambiguity. It included charts upon which the bidders were asked to estimate labor costs for the operation of the Mid-Conn Facility. The labor costs were to include: base wages, overtime and the "burden" or "benefit rate" on those two categories. The bid price form did not, however, include a column where bidders could calculate the burden on overtime costs. This caused a great deal of confusion because different bidders dealt with it differently. CRRA identified the issue with respect to the NAES bid

and then communicated with the other bidders to understand what their burden on overtime was and how to calculate their total labor cost estimates for purposes of comparison.

There were a number of other issues and questions associated with the bidders' submissions and CRRA set up meetings to discuss these issues with each of them. The purpose of the meetings was to clarify and obtain additional information about the bidders' submissions. There were no negotiations at these meetings. After the bid submissions had been clarified and the meetings completed, the evaluation team, Mr. Gingerich, Ms. Raymond and Peter Egan, CRRA's Director of Operations and Environmental Affairs, evaluated the submissions and arrived at the conclusion that the NAES bid on Business Model 1 should be recommended for acceptance by the CRRA board. They prepared a memorandum for the CRRA Board of Directrs which detailed their evaluation(the "Board Memo").

CRRA concluded that NAES ranked highest in experience, knowledge and capabilities, and it also submitted the lowest priced bid. Mr. Gingerich testified at trial, that based upon the two most important evaluation criteria - knowledge, capability and experience, and price - NAES was the "clear choice."

The MDC did not contest NAES's status as the low bidder at trial and it did not challenge its qualifications to operate the Mid-Conn Facility. The MDC's focus, with respect to CRRA's evaluation of the submissions, was on its claim that CRRA employed an "organizational" bias in its evaluation of the MDC's submission.

At trial, Mr. Sheehan testified on the issue of CRRA's bias against the MDC. As explained more fully above, he testified incorrectly that CRRA had somehow prevented the MDC from presenting its qualifications to operate the entire Mid-Conn Facility.

With respect to CRRA's evaluation of price, none of Mr. Sheehan's points challenged CRRA's conclusion that NAES was the low bidder. His only complaint regarding price pertained to CRRA's expression of its misgivings about the reliability of MDC's expense numbers in the Board Memo. He also testified that CRRA failed to account for the cost of repairs at the WPF in its analysis.

Mr. Sheehan testified that "extensive repairs are always needed at [the WPF] ... [because] customers very creatively conceal 20 pound propane cylinders, and they make it through the process, the initial screening stages of the process, into the primary crusher. And when you crush a propane tank, it sounds like a 2,000 pound bomb going off and sends the same shock wave through the Mid-Conn Facility ... And that occurs hundreds of times during the course of the year ... they explode, they do massive damage to the Mid-Conn Facility, requiring immediate, massive repairs ..." He went on to say that the MDC's superior ability to make these needed repairs was left out of the bid process and CRRA's evaluation of costs. This suggested that the analysis was slanted against the MDC. The court does not find this testimony to be credible. There was credible evidence offered by CRRA that there are not "hundreds" of propane tank explosions causing "massive damage" and requiring "massive repairs" every year at the WPF. Mr. Quelle, CRRA's Senior Engineer working full time at the WPF, testified that such explosions occur, "on average, about 2 or 3 times a year." His testimony is consistent with the MDC's *own annual budgets* for the WPF, which include a line item for repairs necessitated by propane tank explosions. For example, the MDC's fiscal year 2010-2011 budget included a line item for propane tank explosions. It budgeted for repairs necessitated by up to six explosion events during that fiscal year. Prior budgets reflect the same estimate. Actual explosion incidents are less than the MDC budgeted amount - in fiscal year

2009/2010, only half the MDC budgeted amount (approximately $42,000) was expended. A $42,000 repair item is approximately .2% of CRRA's budget for the WPF and .1% of its budget for the entire Mid-Conn Facility.

Mr. Sheehan also faulted CRRA for not giving the MDC "credit" for its transition costs estimate of zero. In this regard, the RFBP asked bidders responding to Business Model 1 to provide an estimate of the costs involved in transitioning from the current two operators to a single operator. The MDC's estimate for this item was zero, and CRRA observed that it appeared to be "unrealistic," since the MDC would have to prepare to operate the PBF and the EGF if awarded its Business Model 1 bid. The estimate was unrealistic.

Mr. Sheehan testified that CRRA never inquired of the MDC concerning its zero transition cost estimate. However, the CRRA did ask that question. It was in the CRRA agenda for the post-bid meeting with the MDC.

Mr. Sheehan also criticized the doubts expressed by CRRA about the MDC's overall labor cost estimate, as well as footnote 10 in the Board Memo, where CRRA questioned the MDC's burden rate on overtime. He testified that no one at CRRA asked anyone at the MDC about its 40% burden rate. As with other subjects of his testimony, Mr. Sheehan was uninformed. The burden rate issue was on the agenda for the MDC post-submission meeting. Since CRRA's historical experience with the MDC was that the burden rate was much higher than 40%, CRRA's doubts about that particular bid figure were certainly justified. Neverthless, CRRA used the MDC's professed burden rates of 40% on base wages and 7.65 % on overtime in its price analysis.

Mr. Sheehan also testified that CRRA was biased in its evaluation of the MDC's qualifications to operate a waste-to-energy Mid-Conn Facility. The MDC, however, has never

operated a waste-to-energy Mid-Conn Facility before; it has only operated CRRA's waste processing Mid-Conn Facility. CRRA's evaluation did give the MDC credit for its experience operating a waste processing Mid-Conn Facility - the MDC ranked second only to Covanta, which has even more experience with waste processing facilities than the MDC does.

Mr. Sheehan also testified that CRRA's evaluation of the MDC's past performance for CRRA exhibited bias. The Board Memo pointed out some of the MDC's past failures at the plant. The court finds that the CRRA, indeed, had abundant cause to be unhappy with the MDC's operation of the WPF. The MDC was not willing or able to help find solutions to make the facility operate more efficiently. It had been urged to, but had never implemented a comprehensive preventative maintenance program. CRRA was sufficiently concerned at the operation of the WPF to assign a full time engineer, Mr. Quelle, to the WPF. Given the CRRA's well founded concerns about the MDC's operation of the WPF, it showed a remarkable amount of professionalism towards MDC during the whole process.

Mr. Sheehan also complained that CRRA was unduly harsh in its treatment of Alternate 2 - the MDC's proposal to take over the Mid-Conn Facility. Much of Mr. Sheehan's complaint had to do with CRRA's alleged failure to raise directly with the MDC the questions identified on this subject in the Board Memo. However, CRRA actually posed a host of questions to the MDC concerning the operational details and purported cost savings associated with Alternate 2. At the meeting scheduled to discuss these questions, the MDC representatives flatly refused to address them on the basis that Alternate 2 was a proposal to the legislature, not to CRRA.

CRRA personnel believed that the MDC's proposal to reduce the volume of waste flowing into the Mid-Conn Facility - a featured aspect of Alternate 2 - was impractical, and against public

policy. It was impractical because CRRA has contractual commitments to accept all waste generated within its 70 member towns, not only from the towns themselves, but also from private haulers delivering commercial waste generated within those towns. Reducing the amount of waste accepted at the Mid-Conn Facility would necessarily involve placing limits on the delivery of waste generated in the 70 towns, forcing the towns and/or the haulers to take it elsewhere.

Mr. Kirk credibly testified that the proposed reduction in the volume of waste was contrary to the purpose of the plant - to recover value from waste in the form of energy. Less waste would mean less energy generated and less revenue earned. The objective is to maximize energy production and minimize waste disposal costs.

The MDC's rationale for its proposal to reduce the volume of waste at the Mid-Conn Facility was to eliminate the substantial expense involved in diverting waste away from the Mid-Conn Facility when the volume delivered exceeds the plant's capacity, typically in the warmer months. The MDC did not address the reciprocal problem that arises when not enough waste is being delivered to the Mid-Conn Facility, typically in the colder months. The CRRA proposed to solve both problems by means of a process it referred to as "baling," which is currently being tested. Under the baling process, excess waste will be baled and stored, to be burned during the periods of insufficient waste deliveries.

The CRRA criticised the MDC's alternative 2 proposal to reduce the volume of waste deliveries to the Mid-Conn Facility because such reduction would be inconsistent with the State's Solid Waste Management Plan which CRRA is charged with implementing. The Plan states that "there is not enough disposal capacity in-state to handle all the Connecticut solid waste requiring disposal. This is true for the major components of the solid waste stream: MSW and C&D waste."

It goes on to state that disposing of all of Connecticut's waste in-state "represents good public policy for Connecticut for many reasons, including the ability to better control costs and other risks related to solid waste disposal." Mr. Kirk testified that because there is no excess disposal capacity in Connecticut, the MDC's proposal to reduce the volume of waste flowing into the Mid-Connecticut Mid-Conn Facility is against this state policy, as it would cause additional waste to flow out of Connecticut.

The MDC claims that CRRA engaged in impermissible negotation with NAES, the successful bidder. The court does not find that there was any evidence that negotiation took place. As Mr. Gingerich testified, after NAES was selected there was a lot of discussion among lawyers about where things should go in the agreement. The four principal areas of discussion were: insurance; indemnity; a performance bond requirement; and the subcontracting process.

On December 16, 2010, the CRRA Board approved the NAES contract without a dissenting vote. Prior to the approval at a meeting held on December 2, 2010, the Board thoroughly reviewed the contract and the process CRRA management had followed. On November 30, 2010, the MDC filed this lawsuit. The CRRA Board, comprised of public officials and experts on energy, the environment and business and finance, appointed by the governor and legislative leaders, approved the contract notwithstanding the MDC's claims in this suit. The Minutes of the Board of Directors meeting contains the following rationale for the approval:

> NAES presented the "most qualified, cost efficient, and most effective bid."
>
> It "will serve the best interest of the towns, citizens, business and the environment of Connecticut for many years to come."
>
> It "will save the towns and residents of Connecticut millions in waste disposal."

> The "purchasing procurement process [was] one of the most comprehensive and thorough [Vice Chairman Jurjura] has seen in government service during his 25 years of service."
>
> The process "was a comprehensive, organized and well executed process."
>
> The "analysis of bids was extremely well done and the conclusion reached is clearly the right decision."

Generally, "an unsuccessful bidder has no standing to challenge the award of a public contract." *Ardmare Constr. Co. v. Freedman*, 191 Conn. 497, 501, 467 A.2d 674 (1983). *See Spiniello Constr. Co. v. Manchester*, 189 Conn. 539, 544, 456 A.2d 1199(1983); *Connecticut Associated Builders & Contrs. v. City of Hartford*, 251 Conn. 169, 178, 740 A.2d 813 (1999)"[C]ompetitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders . . . [and] . . . in no sense create any rights in those who submit bids," . *John J. Brennan Constr. Corp. v. Shelton*, 187 Conn. 695, 702, 448 A.2d 180 (1982); *Austin v. Housing Authority*, 143 Conn. 338, 345, 122 A.2d 399 (1956).

The Connecticut Supreme Court has recognized a very limited exception to the general rule that an unsuccessful bidder lacks standing. *Lawrence Brunoli, Inc. v. Town of Branford*, 247 Conn. 407, 411, 722 A.2d 271 (1999). "Only where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of municipal officials, does an unsuccessful bidder has standing to challenge the award." *Ardmare Constr. Co. v. Freedman*, 191 Conn. 497, 501, 467 A.2d 674 (1983).

In order to challenge a public contract, the conduct on the part of the contracting authority must be more than arbitrary and capricious. It must be undertaken in bad faith, demonstrating fraud, favoritism or corruption. *Joseph Rugo, Inc. v. Henson*, 148 Conn. 430, 434, 171 A.2d 409 (1961). "[A]n honest exercise of discretion by a municipality which has reserved [the right to reject any and all bids] will not be disturbed by the court so long as its officials observe good faith and accord all bidders just consideration in accordance with the purpose of competitive bidding." *Spiniello Construction Co. v. Manchester*, 189 Conn. 539, 544,456 A.2d 1199 (1983). In this case CRRA did reserve the right to "reject any and all submittals." Ex. 4, p.4.

Courts in Connecticut have recognized that an important element of proving fraud, favoritism or corruption, or actions that compromise the integrity of a bidding process is evidence that a chosen bidder has received an advantage not afforded to other bidders. In *Spiniello Constr. Co.* v. *Manchester*, *supra* at 544-45, the court found that the bidding process was compromised where one bidder was allowed to submit a discounted, combined bid, precluding all bidders from bidding on equal terms. In *Unisys Corp.* v. *Dept. of Labor*, 220 Conn. 689, 600 A.2d 1019 (1991), the court found standing to challenge the bid process where the disappointed bidder was prevented from bidding because of illegal anti-trust bid requirements.

In *Ardmare Construction, supra*, the Department of Administrative Services rejected a bid because the bidder's signature on the form was a rubber stamp and not an original handwritten signature. The disappointed bidder alleged this action was "so arbitrary as to undermine the bidding statutes." *Ardmare*, *supra*, at 505. The Department had previously interpreted the bidding statutes as requiring handwritten signatures, but had not promulgated any regulation concerning its interpretation, nor notified any of the bidders about this requirement. *Id.* at 500. The Connecticut

Supreme Court determined that the plaintiff lacked standing because the "company which received the contract award was not given any special advantage over the plaintiff in submitting its bid, nor was it privy to any secret information." *Id.* at 506. The Court noted that there was no evidence of bad faith or that the Department applied its requirement in a discriminatory fashion. Rather, "the commissioner made a good faith interpretation of the competitive bidding statute requirements and applied it in a consistent fashion." *Id. See also AAIS Corp.* v. *Dep't of Admin. Servs.*, 93 Conn. App. 327, 332-33, 888 A.2d 1127 (2006) (affirming trial court's decision dismissing plaintiff's bid challenge where the plaintiff failed to demonstrate favoritism or bias in the defendant's consideration of the criminal history of plaintiff's employee); *Capasso Restoration, Inc.* v. *New Haven*, 88 Conn. App. 754, 870 A.2d 1184 (2005) (affirming the trial court's decision that the contract was awarded to the lowest bidder and that the bidding officials made a good faith interpretation of the submissions, despite winning bidder's unauthorized alteration the bid form, because such facts were immaterial to a determination of whether there was favoritism in the awarding of the contract to the winning contractor). In the absence of evidence establishing fraud, favoritism, or corruption, or actions defeating the object and integrity of the process, unsuccessful bidders cannot legally disrupt the outcome of a bid process. *See, e.g., Ardmare, supra*, at 506.

The MDC's Verified Complaint sets forth six causes of action. Counts One through Five allege promissory estoppel, negligent misrepresentation, fraudulent misrepresentation, violations of Article I, Sections 8 and 10, of the Connecticut Constitution, and violation of the Connecticut Unfair

Trade Practices Act ("CUTPA"), respectively.[3] Count Six seeks a declaratory judgment that the contract entered into between CRRA and NAES is null and void.

In Count Six, the MDC seeks a declaration that the NAES contract is null and void. In order to succeed on its claim, the MDC must prove that the CRRA's actions were undertaken with fraud, favoritism or corruption, or that they undermined the object and integrity of the procurement process.

The MDC has claimed that CRRA undermined the object and integrity of the competitive procurement process by failing to follow its statutes and its policies and procedures. First, the MDC claims that CRRA failed to follow the notice and comment requirements of Connecticut General Statutes § 22a-266(c) in the procurement of the contract awarded to NAES

Section 22a-266(c) provides, in pertinent part:

> Whenever the authority determines that a contract for facility management shall be awarded on other than a competitive bidding basis, in accordance with applicable provisions of subdivision (16) of subsection (a) of this section, subsection (b) of this section, section 22a-268 and the contract procedures adopted under section 22a-268a, the directors shall, at least sixty days prior to the award date, pass a resolution expressing their intent to award and shall within ten days cause a copy of such resolution to be printed in one daily and one weekly newspaper published within the state. Thereupon, interested parties who so desire may, within thirty days, petition the directors with respect to such contract and offer evidence in extenuation before a referee appointed by the chairperson. Such referee shall not be an employee of the authority and shall report the referee's findings with respect to such petition and evidence to the directors at least ten days prior to the projected award date. The directors shall give due consideration to such findings in determining the final award of the contract.

Pursuant to § 22a-266(c), the notice and comment requirement applies only when a "facility management" contract is awarded on other than a competitive bidding basis.

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3 Counts Four and Five are the subject of a pending motion to strike filed by CRRA. (See Doc. No. 112.00 and 113.00.)

CRRA disputes that the contract for the operation of the Mid-Conn Facility is a "facility management" contract. However, it is not necessary to determine that issue, because even if the NAES contract is a "Facility Management" contract, the contract was clearly awarded through a competitive bidding process.

Connecticut General Statutes § 22a-266(c) requires CRRA to carry out a notice and hearing procedure if it "determines that a contract for facility management shall be awarded on other than a competitive bidding basis. . . ." § 22a-266(c). CRRA's statutes do not define "competitive bidding." However, other sections of the Connecticut General Statutes that govern the procurement of state and municipal contracts do define this term. These statutes provide that the two hallmarks of competitively bid public contracts are the non-negotiation of price and the selection of the lowest responsible qualified bidder.

Connecticut General Statutes Sections 2-71p(a) and 4a-50(4) define "competitive bidding" to mean "the submission of prices by persons, firms or corporations competing for a contract to provide supplies, materials, equipment or contractual services, under a procedure in which the contracting authority does not negotiate price. Connecticut General Statutes § 4e-1(5) defines "competitive bidding" to mean "the submission of prices by a business competing for a contract to provide supplies, material, equipment or contractual services to a state contracting agency, under a procedure in which the contracting authority does not negotiate prices . . . ."). Conversely, "competitive negotiation" is defined in §§ 2-71p(a) and 4a-50(5) to mean "a procedure for contracting for supplies, materials, equipment or contractual services, in which (1) proposals are solicited from qualified suppliers by a request for proposals and (2) changes may be negotiated in proposals and prices after being submitted." The regulations for state contract procurement further

describe "competitive negotiation" as a process where a contract is negotiated with the "best qualified proposer for the required . . . contractual services . . . at a compensation that is fair and reasonable", Regs., Conn. State Agencies § 4a-52-16(h), and that such contract negotiations shall be directed toward "the scope of work," the availability of "necessary personnel . . . to perform the contractual services," and "agreeing upon compensation which is fair and reasonable." Regs., Conn. State Agencies § 4a-52-16(i).

"Competitive bidding" is distinguished primarily by whether price is the subject of negotiation. Where the statute vests wide discretion in the contracting authority, a bidder's "conduct under other contracts and the quality of previous work as well as financial ability are among the many facts that a public agency is entitled to review" in a competitive bidding process. *Prete Enterprises, Inc.* v. *Bartlett, Brainard, Eacott, Inc.*, 1995 Conn. Super. LEXIS 1996 (Conn. Super. Ct. July 7, 1995) (Barnett, J.).

Connecticut General Statutes § 4a-59 defines "lowest responsible qualified bidder" to mean "the bidder whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and financial responsibility." The regulations on state procurement provide that "[p]ast performance and financial responsibility shall always be a factor in making [the] determination [of lowest responsible qualified bidder]." Regs., Conn. State Agencies § 42a-52-18.

In this case, the RFBP contemplated competitive bidding under Business Model 1 or 2, and potentially competitive negotiation to the extent that CRRA selected an alternative proposal. Because CRRA awarded the contract under Business Model 1, which entailed a competitive bidding process, the notice and comment procedure of § 22a-266(c) does not apply.

There was a considerable amount of evidence at trial that NAES ranked "far higher" amongst the bidders in knowledge, capabilities and experience relevant to a Business Model 1 contract and that NAES had the best price on Business Model 1. As Mr. Gingerich testified, based upon the two most important evaluation criteria – experience and price – NAES was the "clear choice." The MDC did not contest NAES's status as the low bidder at trial and it did not challenge NAES's significant qualifications to operate the Facility.

The NAES contract was awarded through competitive bidding because price was not negotiated and the lowest qualified bidder was selected

There was no evidence that price was ever the subject of discussion or negotiation between CRRA and NAES. CRRA's procurement of the contract was a competitive bid, not a competitive negotiation. For these reasons, CRRA did not fail to follow § 22a-266(c) because that statute did not apply.

The MDC claims that the NAES contract should be declared null and void because CRRA's communication policy was not followed in that there were some telephone contacts with bidders discussing the procurement. The MDC points out that the RFQ and the RFBP required bidders to communicate in writing with Ms Raymond or Mr. Gingerich. Contrary to the MDC's argument, the purpose of this language was not to prohibit all oral conversations or to limit CRRA's ability to communicate with bidders. The purpose of section 5.2 of the RFBP was to permit CRRA to disqualify any bidder who attempted to gain advantage by communicating with board members, officers or employees of the CRRA, other than those in charge of the bidding process.

MDC's interpretation of § 5.2 of the RFBP is undermined by language from the same section, which provides: "[s]ubject to CRRA's sole and absolute discretion, CRRA will determine

if it chooses to respond in writing to all or some of the foregoing submitted written questions for information" and that "CRRA also reserves the right to determine in its sole discretion the methodology to be used to disseminate information."

The MDC has claimed that CRRA's rules required it to send responses to all questions from bidders to every other bidder, regardless of the substance of the question. The rules had no such requirement. They gave CRRA discretion as to how to respond to questions.

MDC also claims that CRRA's oral communications with EMCOR and Wheelabrator were improper. EMCOR withdrew from the procurement process because of its concerns about the relationship between MDC and CRRA. Therefore, no communications with EMCOR could have had any impact on MDC.

There was evidence that Mr. Schwartz from Wheelabrator met with Mr. Kirk on September 9, 2010 after dropping off Wheelabrator's submission. They discussed a reunion of employees from the Broward Wheelabrator plant, where Mr. Kirk once worked. As stated above, nothing in the RFBP prohibited oral conversations between the CRRA and bidders. Wheelabrator was not awarded the contract. MDC has not presented any evidence that the foregoing conversation undermined the integrity of the bidding process.

The MDC has also addressed numerous communications between Ms. Raymond and NAES. These communications consisted primarily of questions originating from NAES during the RFBP. Ms. Raymond testified that the answers and information that she provided in response to NAES's questions were also available to all the other participants during the procurement either through Addenda or CRRA's electronic data room.

The MDC also highlights communications between NAES and CRRA that occurred after the bids were received. CRRA had the right to meet with and have discussions with bidders to clarify information provided in the bids. See RFBP, Ex 4, p.4. These communications with NAES do not prove favoritism or show that the integrity of the process was undermined.

In what seems to be an exercise in grasping at straws, MDC argues that CRRA showed improper favoritism towards NAES because Ms. Raymond thanked NAES for its participation after confirming receipt of its submission. Both Engen and NAES requested a confirmation of receipt from Ms. Raymond and she thanked them both when she confirmed that she had received their bids.

The MDC argues that CRRA had improper communications with NAES concerning the clarification of NAES's labor cost estimate and its mark-up burden on overtime. These types of communications are clearly permitted in a competitive bid. *Fred Brunoli & Sons, Inc.* v. *Woodbury*, 4 Conn. App. 185, 186 n.3, 493 A.2d 264 (1985); *Fabrizio & Martin* v. *Board of Ed.*, 523 F.2d 528 (2d Cir. 1975). *See McQuillin*, 10 Municipal Corporations § 29:75 ("While bids cannot be changed in substance after presentation . . . mere irregularities in the form may after opening be corrected or disregarded. While a substantive amendment to a bid will not be permitted, late submittal of information necessary to a fair analysis of the bid will be allowed. The test of whether a variance in a bid for a public contract is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by the other bidders.")

CRRA had separate communications with all the bidders. There is no evidence that any bidder was provided with secret information, or gained any material advantage from these communications. CRRA applied its communications policy in good faith and in a consistent fashion

amongst all bidders and that all the bidders had the same information made available to them for preparing their bids. *See Ardmare, supra,* at 506.

Contrary to the arguments of MDC, the CRRA's communications with the bidders here did not create a situation similar to that in *Spiniello Constr. Co. , supra.* As stated above, in *Spiniello*, the Court determined that allowing a bidder to submit a conditional bid when other bidders were not afforded the same opportunity "precluded the other bidders from competing on equal terms." *Id.* at 545. Here, there is no evidence that CRRA imparted material information to any bidder that was that was not available to other bidders. Similarly, there is no evidence that the information provided to NAES gave NAES any advantage in formulating its bid over the other bidders. CRRA's communications with bidders simply does not reach the level of undermining the object and integrity of the procurement process.

MDC claims that CRRA arbitrarily and capriciously utilized what it labels a "hybrid RFP/RFB" process not authorized by the CRRA Policies and Procedures. CRRA's Policies and Procedures require a "Competitive Process", which includes RFQs(Request for Qualifications), RFPs(Request for Proposals) and/or RFBs(Request for Bids). That CRRA combined an RFB and a RFP into one document as opposed to two does not violate the authority given to CRRA.

As Mr. Gingerich testified, it was mere "common sense" to merge the two processes into one document, thereby making the procurement process less confusing and avoiding duplicative work. Combining the two procedures enabled CRRA to condition a participant's submission of an alternative proposal on that participant's submission of a bid on one or both of CRRA's business models. All participants were notified in the RFQ that the second phase of the procurement would

allow a bidder to submit an alternative proposal provided the bidder bid on either Business Model 1 or Business Model 2 or both

CRRA's interpretation of its rules should be afforded deference, especially where they were applied consistently to all participants and there is no evidence that CRRA's issuance of an RFBP was to due fraud, favoritism or corruption. *See Ardmare*, *supra*, at 506. The reasonableness of CRRA's use of a RFBP is highlighted by the fact that such a process is explicitly authorized in the State's regulations for contract procurement under "Submission of bids." See Regs., Conn. State Agencies § 4a-52-5(g) ("Alternate bids or proposals will not be considered unless specifically for in the invitation to bid. An 'alternate bid or proposal' is defined as one which is submitted in addition to the bidder's primary response to the invitation to bid.")

CRRA's use of an RFBP did not defeat the object and integrity of the competitive procurement process and, therefore, does not serve as grounds for overturning the NAES contract.

The MDC has also claimed that CRRA was biased against the MDC throughout the entire procurement process. MDC claims that this bias was evidenced by CRRA's decision to seek a single operator for the Facility, CRRA's exemption of the MDC and Covanta from the RFQ process, and CRRA's evaluation and characterization of the MDC's bid and past performance in management's memorandum to the CRRA board.

The MDC claims that CRRA's decision to require a bid to operate the entire Facility was allegedly calculated to preclude the MDC from bidding. There was no credible evidence to support this claim.

The goal of a single operator for the Facility was motivated by CRRA's desire to save operation and maintenance costs. A single operator would save costs through coordination of

maintenance activities between the plants, establishing labor force efficiencies, and eliminating redundant expenses.

Mr. Jellison testified that CRRA designed the RFBP's requirement that a bidder submit a bid on Business Model 1 or Business Model 2 in order to preclude the MDC from bidding. Specifically, Mr. Jellison claimed that CRRA developed this requirement in response to the MDC's October, 2009 question whether a bidder could submit a bid on only one of the two plants. This claim was erroneous. The RFQ, issued in September, 2009, made it quite clear that the MDC would have to submit a bid to operate the *entire* Facility. MDC knew or should have known this beginning in September, 2009. Therefore, its various claims that it was surprised by this requirement, or did not have enough time to formulate a bid for the entire facility were simply unconvincing.

The MDC claims that offering to exempt the MDC and Covanta from the RFQ phase was prejudicial to the MDC and demonstrates a bias against the MDC. The court finds no credible evidence to support this claim.

CRRA was familiar with the capabilities of the MDC and Covanta and felt that they were capable of formulating a responsive bid to the RFBP. Therefore, Mr. Kirk excused the MDC and Covanta from the RFQ phase and deemed them eligible to submit bids. Had CRRA required MDC to participate in the RFQ, MDC would certainly have claimed that CRRA was forcing it to participate in unnecessary administrative busy work.

The harm that MDC ascribed to its exemption from the RFQ process was its inability to fully explicate its qualifications. As set forth above, the harm was nonexistent and derived chiefly from Mr. Sheehan's misinformation. Mr. Jellison, whose office was responsible for responding to the RFQ and the RFBP, acknowledged that the MDC's failure to submit its qualifications with its

response to the RFBP was "not because CRRA deprived the MDC of the right to do so." Transcript, Jellison, 5/20/11, 64:22-65:5.

Mr. Jellison admitted that the MDC submitted everything it wanted to submit during the procurement process with respect to the MDC's qualifications. The statement of qualifications submitted by the MDC addressed virtually everything Mr. Sheehan testified that the MDC would have told CRRA, if given the chance.

The MDC claims that CRRA's management made false and disparaging comments about the MDC in the memorandum it submitted to the CRRA Board and that these comments demonstrate a bias against the MDC that undermined the procurement process. The court finds that CRRA had an obligation to report its past experience with MDC accurately to its Board and it did so.

There was testimony from CRRA's senior engineer, Richard Quelle, which supported the accuracy of the performance deficiencies referenced in the Board Memo: the MDC's failure to implement a CMMS program; failure to maintain the emergency lighting system and safety trip system; and failure to perform proper maintenance on the fire suppression system.

The MDC has argued that CRRA unfairly evaluated its bid on Business Model 1 because it questioned the MDC's zero dollar estimate for transition costs, deeming it "unrealistic", and further questioned the accuracy of the MDC's projected labor costs and the burden on overtime wages. However, there was certainly evidence, some of which came from MDC itself, that the 0 transition costs was inaccurate and the MDC's past record of its labor costs were clearly at odds with its projections. The MDC's own determination of its benefit rate for purposes of calculating its administrative overhead for Business Model 1 was that it was approximately 55%, not 40%, as stated in the Model 1 bid. Nevertheless, CRRA evaluated the pricing of the bid based upon the numbers

contained in the MDC's bid. After using MDC's clearly unrealistic numbers, the NAES bid was still the lowest and the MDC's bid ranked third out of four in CRRA's price component evaluation.

The MDC claims that CRRA unfairly evaluated its Alternate 2 proposal, which Mr. Jellison admitted was really a proposal to the legislature. Mr. Sheehan claimed that CRRA had failed to raise with the MDC its criticisms of Alternate 2 that appeared in the Board Memo. However, CRRA did pose a host of questions to the MDC concerning the operational details and purported costs savings associated with Alternate 2. At the meeting to discuss these questions, the MDC representatives refused to address them, telling CRRA that Alternate 2 was a proposal for the legislature, not for CRRA. As set forth above, CRRA had good reason to be skeptical of the projections and plans outlined by MDC in its Alternate 2, which proposed limiting the amount of waste the facility would accept, thereby leaving member towns and trash haulers with nowhere in the state to dispose of waste.

The MDC has not proven that CRRA's evaluation of its bid and alternative proposals, as set forth in the Board Memo, was based on bias or that it rises anywhere near the required standard of fraud, favoritism or corruption, or damage to the object and integrity of the procurement process. The word "bias" connotes a negative impression that is unfounded. The CRRA's evaluation of MDC was based on its experience with MDC. The fact that CRRA's evaluation of the MDC contract, the MDC's performance under that contract and the content of its submission was sometimes unflattering to the MDC is not evidence of bias.

Based on the foregoing, there was absolutely no basis upon which the court can find that the contract entered into between CRRA and NAES is null and void. Judgment enters on Count Six in favor or the defendant, CRRA.

In Counts One, Two and Three, the MDC asserts claims for promissory estoppel, negligent misrepresentation and fraudulent misrepresentation. The court finds no bases in law or in fact to support these claims.

CRRA argues that the MDC's claims for promissory estoppel, negligent misrepresentation and fraudulent misrepresentation are not legally viable because the MDC cannot pursue personalized claims for damages as a disappointed bidder. The MDC, as a disappointed bidder, only has standing to challenge an award of a public contract where there is fraud, favoritism or corruption, or the object and integrity of the process was compromised. *See, e.g., Ardmare Construction Co.* v. *Freedman,* 191 Conn. 497, 467 A.2d 674(1980). Standing is conveyed upon the disappointed bidder as a private attorney general to challenge a contract award in the public's interest. *Id.* Standing is not conferred under such circumstances to pursue individual claims for damages. *See Lawrence Brunoli, Inc.* v. *Town of Branford,* 247 Conn. 407, 408, 722 A.2d 271 (1999). Therefore, a disappointed bidder can only pursue injunctive relief in court, not claims for damages.

In *Lawrence Brunoli, Inc.*, the plaintiff, an unsuccessful bidder in a municipal bidding contest, alleged impropriety in the contract awarding process and brought a breach of contract action for money damages against the town of Branford. *Id.* at 410. The trial court dismissed the action for lack of subject matter jurisdiction on the ground that the plaintiff lacked standing to assert a claim for money damages and was, therefore, limited to an action for injunctive relief. *Id.* On appeal, the Connecticut Supreme Court held that "as a matter of law, an unsuccessful bidder to a municipal contract has no standing to assert a cause of action for money damages for failure of the municipality to follow its competitive bidding laws, regardless of whether the plaintiff alleges fraud, corruption or favoritism" in the bidding process. *Id.* at 411. The Court further held "if an unsuccessful bidder

has standing to bring a claim against a municipality . . . such standing must be derived from a source other than its bid submitted in response to an invitation to bid. That source is the municipal bidding statutes themselves." *Id.* at 412. The statutes did not confer standing for money damages. *Id.*

The Court in *Lawrence Brunoli, Inc.* further noted that "our prior cases illustrate . . . that the only remedy afforded to unsuccessful bidders under the municipal bidding statutes has been injunctive relief against the awarding of the contract to the illegally favored bidder." *Id.* (citations omitted). "Providing unsuccessful bidders with an equitable remedy alone is consistent with the policies that we previously have identified as underlying the municipal bidding statutes. This court has long maintained that 'municipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders; they should be construed to accomplish these purposes fairly and reasonably with sole reference to the public interest.'" *Id.* at 412-413. The Court held that it would "be inconsistent with these policies to permit an unsuccessful bidder to assert a private claim for damages." *Id.* at 413. The Court additionally noted that "[t]o grant standing to unsuccessful bidders who seek to bring actions for money damages would undermine the purpose underlying the municipal bidding statutes . . . [because] [i]f . . . an unsuccessful bidder is permitted to assert a claim for money damages, rather than injunctive relief against awarding the contract to the successful bidder, the taxpayers of the municipality would be subject to paying once to have the work performed by the successful bidder and, if the unsuccessful bidder were successful, again for damages above and beyond the cost of the project. Such extra costs clearly are not in the public interest." *Id.* at 413-14.

For the reasons stated in *Lawrence Brunoli, Inc.*, this court lacks subject matter jurisdiction over the MDC's claims for money damages based upon promissory estoppel, negligent misrepresentation, and fraudulent misrepresentation. CRRA's statutes do not confer standing for money damages claims to a disappointed bidder and,"an unsuccessful bidder does not have standing to seek money damages" because such a damages award would directly conflict with the statutes' purpose of protecting the public interest in securing the best possible services at the lowest possible price. *Lawrence Brunoli, Inc.*, *supra*, at 412-13.

Based on the foregoing, the MDC's claims for promissory estoppel, negligent misrepresentation, and fraudulent misrepresentation are hereby dismissed.

Even if the court did have jurisdiction over the claims for for promissory estoppel, negligent misrepresentation, and fraudulent misrepresentation, the MDC has failed to prove these claims.

In Count One, the MDC asserts a claim of promissory estoppel. The MDC failed to prove this claim because it did not establish a clear and definite promise on the part of CRRA that the MDC reasonably relied upon to its detriment. Further, the MDC put on no evidence of damages.

The Connecticut Supreme Court has recognized that "under the doctrine of promissory estoppel, '[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 213, 520 A.2d 217 (1987). "A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance

at all." *Id.* *See also Stewart* v. *Cendant Mobility Servs. Corp.*, 267 Conn. 96, 104-106, 837 A.2d 736 (2003). "[T]o succeed on a claim of promissory estoppel, the party seeking to invoke the doctrine must have relied upon the other party's promise." *Stewart*, 267 Conn. at 112 (2003). "That reliance . . . may take the form of action or forbearance. . . . Nevertheless, the asserted reliance, regardless of its form, must result in a detrimental change in the plaintiff's position" such that there is a cost to the plaintiff of relying upon the promise. *Id.* at 112-13. The Connecticut Supreme Court has recognized that "estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency." *Chotkowski* v. *State*, 240 Conn. 246, 268, 690 A.2d 368 (1997).

The MDC argues that CRRA's letter advising the MDC that CRRA considered it "eligible to submit a bid" and offering to excuse the MDC from the RFQ process was somehow a "promise" that the MDC would be absolved from any consideration of its qualifications to operate the Mid-Connecticut Facility during the RFBP phase. CRRA never promised the MDC that its knowledge, capabilities and experience in providing the services sought by CRRA would be immaterial to the second phase of the procurement process and the ultimate selection of a contractor.

The MDC argues that it "can reasonably be inferred" from the September, 2009 letter from Ms. Raymond that CRRA deemed the MDC qualified to render the services outlined in the RFQ. The court does not agree that the letter conveyed any such implication. Moreover, the MDC knew that CRRA would weigh the bidders' qualifications during the RFBP phase. Mr. Jellison testified that the September 14, 2009 letter did not mean that the MDC would be considered the "most qualified" bidder; and that he knew the MDC's qualifications to operate the entire Mid-Conn Facility

would be a factor throughout the procurement process. At best, CRRA promised the MDC that it would be eligible to submit a bid, if it so chose. The MDC did submit a bid and CRRA accepted it and evaluated it, just as it did with all of the other bids it received.

Most of the MDC's argument on promissory estoppel is addressed to the disadvantages it allegedly incurred because it chose not submit an SOQ in response to the RFQ. Because it accepted the opportunity not to participate in the RFQ process, the MDC claims that it was unable to adequately present its qualifications, to meet individually with CRRA during the RFQ phase and was denied the award of the contract. As set forth above, this claim was baseless and, apparently arose out of Mr.Sheehan's lack of familiarity with the bid process. Mr. Jellison, who was familiar with the process, confirmed that MDC had ample opportunity to present and did present its qualifications.

In Count Two, the MDC alleges a claim for negligent misrepresentation.

"[A]n action for negligent misrepresentation requires the plaintiff . . . to prove that [the speaker] made a misrepresentation of fact, that [the speaker] knew or should have known that it was false, that the plaintiff reasonably relied upon the misrepresentation, and that the plaintiff suffered pecuniary harm as a result thereof." *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73,___ A.2d __ (2005). *See also D'Ulisse-Cupo, supra*, at 218. "Although the general rule is that a misrepresentation must relate to an existing or past fact, there are exceptions to this rule, one of which is that a promise to do an act in the future, when coupled with a present intent not to fulfill the promise, is a false representation." *Paiva* v. *Vanech Heights Constr. Co.*, 159 Conn. 512, 515, 271 A.2d 69 (1970).

Like its promissory estoppel claim, the MDC's claim for negligent misrepresentation arises from CRRA's offer to exempt the MDC from the RFQ process. And like promissory estoppel, the MDC's negligent misrepresentation claim simply does not fit the facts.

The MDC claims CRRA falsely represented that it deemed the MDC qualified, but that it never truly considered the MDC qualified. As set forth above, there is no evidence to support that claim and abundant evidence that MDC 1) knew that its qualifications to operate the Mid-Conn Facility were being considered by CRRA and 2) submitted those qualifications.

On the subject of qualifications, there was evidence that the MDC had never operated an entire waste-to-energy facility. It has only operated the WPF at the Mid-Connecticut Facility. The MDC has no experience in operating a power block or electric generating facility similar to that at Mid-Conn. That did not disqualify the MDC, particularly in a Business Model 1 context where CRRA would manage the Mid-Conn Facility and the MDC would provide the labor force. CRRA was, however, concerned about bidders' experience operating facilities like the PBF/EGF. CRRA's evaluation gave the MDC credit for its experience operating the WPF - the MDC ranked second only to Covanta, which has even more experience with waste processing facilities than the MDC.

As stated above, CRRA merely told the MDC that it did not have to participate in the RFQ process and that it considered the MDC eligible to submit a bid in the upcoming RFBP. At best, these statements potentially may be construed as a promise to do something in the future, i.e., permit the MDC to submit a bid. However, a promise to do something in the future is only a false representation "when coupled with a present intent not to fulfill the promise." *Paiva, supra,* at 515. Here, there is no evidence that CRRA intended not to allow the MDC to submit a bid. The MDC has failed to prove its negligent misrepresentation claim.

In Count Three, the MDC asserts a claim for fraudulent misrepresentation. The MDC's fraud claim is predicated upon the same allegedly false statements set forth in its negligent misrepresentation claim. The only difference between the counts is that in Count Three, the MDC alleges that CRRA made these statements "knowing that they were false or with reckless disregard for the truth . . . ." The MDC's fraudulent misrepresentation claim fails for the same reasons that the MDC's negligent misrepresentation claim fails.

The Connecticut Supreme Court has held that the elements of an action in fraud are: "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." *Miller* v. *Appleby*, 183 Conn. 51, 54-55, 438 A.2d 811 (1981). *See also Centimark Corp.* v. *Village Manor Associates, Ltd. Partnership*, 113 Conn. App. 509, 522, 967 A.2d 550 (2009). Fraudulent misrepresentation must be proven by the heightened standard of clear and convincing evidence. *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 326-27, 593 A.2d 478 (1991).

As stated above, the MDC has not proved any misrepresentation by CRRA even by a preponderance of the evidence and certainly has not satisfied the heightened burden of proof required to prove a claim for fraudulent misrepresentation. Accordingly, the MDC's fraudulent misrepresentation claim must fail substantively as well as procedurally.

In Counts Four and Five, the MDC alleges violations of Article I, Sections 8 and 10, of the Connecticut Constitution and violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), respectively. Counts Four and Five are the subject of a pending motion to strike dated January 18, 2011.

In support of the Motion to Strike, CRRA argued that Count Four of the Complaint must be stricken because MDC has failed to allege a constitutionally protected property or liberty interest.

In order to succeed on a due process claim, a plaintiff must show that it was deprived of a constitutionally protected liberty or property interest and that such deprivation occurred without the requisite due process. *Giamo* v. *City of New Haven*, 257 Conn. 481, 499, 778 A.2d 33 (2001).

Due process provisions of the state and federal constitutions are essentially the same. *Blue Sky Bar, Inc.* v. *Stratford*, 203 Conn. 14, 26, 523 A.2d 467(1987). In *S & D Maintenance Co., Inc.* v. *Goldin*, 844 F.2d 962 (2nd Cir. 1988), the Second Circuit Court of Appeals considered whether the plaintiff's contracts with the City of New York under which it was owed approximately $1.6 million created a property interest protected by procedural due process. The Court held that the plaintiff had no property interest and stated:

> The Supreme Court over the past two decades has enlarged the scope of interests protected by the procedural guarantees of the Due Process Clause. *See Board of Regents* v. *Roth*, 408 U.S. 564, 571 & n. 9, 92 S.Ct. 2701, 2706 & n. 9, 33 L.Ed.2d 548 (1972). This result has been accomplished in part through a broadened understanding of the word "property," as used in the Due Process Clause, to include rights to some governmental benefits conferred by statute, *see, e.g., Goldberg* v. *Kelley*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (welfare payments), or by contract, *see, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) (tenured teaching position). The Court has suggested that a rationale for constitutionalizing some of these socalled "new property" rights is the functional importance of governmental benefits like welfare to citizens in contemporary society, *see Goldberg* v. *Kelley, supra*, 397 U.S. at 262 n. 8, 90 S.Ct. at 1017 n. 8 (citations omitted).[fn3] The Court has emphasized, however, that all interests warranting procedural protection as property rights require something in addition to their importance to the claimant: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709.

S & D Maintenance Co., Inc. v. *Goldin, supra, at* 965-66.

"The 'clear entitlement' test asks whether there is a certainty or a very strong likelihood that the application in questions would have been granted, but for the wrongful conduct of the local officials. . . A very strong likelihood means not simply a high probability of approval, but rather a virtual assurance of approval because any discretion is narrowly circumscribed. . . ." *Kelley Property Development* v. *Lebanon*, 226 Conn. 314, 325-30, 627 A.2d 909 (1993). "Application of the ['clear entitlement'] test must focus primarily on the degree of discretion enjoyed by the issuing authority, not on the estimated probability that the authority will act favorably in a particular case. *Id.* at 323.

The MDC has no constitutionally protected liberty or property interest in the contract to be awarded for the operation and maintenance of the Mid-Conn Facility because it cannot show that it has a "clear entitlement" to the contract. Connecticut General Statutes § 22a-265 provides CRRA with broad contracting authority and does not limit its discretion in making and entering contracts or agreements.

The "majority of jurisdictions have held that a disappointed bidder on a state or municipal contract has no right to sue. . .on the ground of a deprivation of a property or liberty interest in violation of [the due process clause]." *Connecticut Legal Services, Inc.* v. *Heintz*, 689 F. Supp. 82, 85, n.1(D.Conn. 1988). In *Connecticut Legal Services* the court stated that any attempt by the disappointed bidder to assert a due process claim under Connecticut law "would run afoul of *Ardmare Construction Co.* v. *Freedman*, 191 Conn. 497, 502, 467 A.2d 674(1983), which held that a disappointed bidder has no legal or equitable right to the contract."

In its Memorandum in Opposition to Motion to Strike the MDC argues that it "is not claiming that it is entitled to the operation and maintenance contract that was ultimately awarded to NAES." Despite this apparent concession that it does not have clear entitlement to the contract at

issue, the MDC argues that it has a property interest sufficient to support a due process claim because it has "an identifiable property interest in a fair, unbiased process." It cites *Unisys Corporation* v. *Department of Labor*, 220 Conn. 689, 600 A.2d 1019 (1991); *Electrical Contractors, Inc.* v. *State*, 2009 Conn Super LEXIS 3543(August 7, 2009, Sheldon, J.); and *Spiniello Cosntruction Co.* v. *Manchester*, 189 Conn. 539, 456 A.2d 199(1983). None of those cases involved a due process claim.

In conceding the absence of "clear entitlement" while arguing for a property interest in the process, the MDC confuses substance and procedure in contravention of the holdings of *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Furlong* v. *Shalala*, 156 F.3d 384(2d Cir. 1998). In *Loudermill* the United States Supreme Court held:

> [T]he Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

Cleveland Board of Education v. *Loudermill*, *supra*, at 541.

MDC argues, essentially, that it has a property interest in the process itself. However, the property interest which is entitled to due process must exist independently of the process. The MDC cannot meet the "clear entitlement" test under *Kelley Property Development, Inc.* v. *Lebanon*, 226 Conn. 314, 325-30, 627 A.2d 909 (1993) and *S&D Maintenance Co.* v. *Goldin*, 844 F.2d 962, 965-66(2d Cir. 1988).

Even if MDC's version of the law is correct, that is, that it was entitled to a fair, unbiased process, it received one. As set forth more fully above, MDC's claims of biased and unfair conduct by the CRRA was not proved. Therefore, as a matter of law and fact, the plaintiff has no claim for

violation of due process and judgment may enter in favor of the defendant on Count Four of the complaint.

The plaintiff's CUTPA claims alleged in Count Five fails because it did not establish facts which meet the "cigarette rule," which is used to determine whether conduct constitutes a violation of CUTPA. See *Willow Springs Condo Ass'n, Inc.* v. *Seventh BRT Dev. Corp.*, 245 Conn. 1, 43, 717 A.2d 77 (1998) (adopting the "cigarette rule," used by the Federal Trade Commission, in evaluating whether a trade practice is unfair). *See also Boulevard Associates* v. *Sovereign Hotels, Inc.*, 72 F.3d 1029, 1038 (2d Cir. 1995). Under that rule, a trade practice is unfair when it: (1) offends public policy as it has been established by statutes, common law, or other established concepts of fairness; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers, competitors or other business persons. *Willow Springs Condo Ass'n., supra,* at 43.

Therefore, in order to prove a violation of CUTPA, the MDC must establish facts demonstrating that the actions of CRRA offended public policy, were immoral, oppressive, unscrupulous and deceptive, or caused substantial injury to consumers, competitors or other business persons. Here, the facts, as described in detail above, establish nothing close to unethical, immoral, or unscrupulous behavior, at least not by CRRA. The record is devoid of any evidence demonstrating how or in what manner the conduct of CRRA rose to the level of corrupt, immoral or unscrupulous behavior.

Additionally, the MDC has no grounds to pursue a CUTPA claim for damages as a disappointed bidder. The MDC's only recourse in Court is for injunctive relief. *See Lawrence Brunoli, Inc., supra,* at 408. In any case, the MDC simply did not put on any proof of damages at trial. Therefore, judgment enters in favor of the defendant, CRRA, on Count Five of the complaint

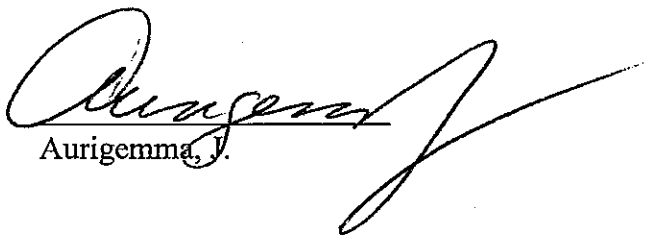
Conclusion

In this suit the MDC has sought an order from this court that the entire procurement process be restarted. Such an order would undermine the very purpose of the procurement process. A public agency conducting a procurement acts in the interest of the public it serves, not in the interest of the contractors involved in the process. There is no evidence in this case that the public's interest in low cost, high quality waste disposal services was harmed in any way by the CRRA's procurement process. The CRRA acted fairly and in a non-discriminatory manner with respect to all bidders in the process, including the MDC. The MDC, on the other hand, went through the motions of participating in the procurement process while at the same time attempting to legislate the CRRA out of existence, at least insofar is the Mid-Conn Facility was concerned.

The member towns and general public will be well served by the operation of the entire Mid-Conn Facility by NAES, the most qualified bidder, who also submitted the lowest price. The interest of those towns and the general public would be massively disserved were this court to restart the entire procurement process.

As set forth above, Counts One, Two, and Three are dismissed for lack of standing, or, in the alternative, judgment enters in favor of the defendant, CRRA, on those counts for substantive reasons. Judgment also enters in favor of the defendant, CRRA, on Counts Four, Five and Six.

By the Court,



Aurigemma, J.