STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 5, 2021)

BARLETTA/AETNA I-195 WASHINGTON BRIDGE NORTH PHASE 2 JV; AETNA BRIDGE COMPANY; and BARLETTA HEAVY DIVISION, INC.	:	
Petitioners,	:	
v.	:	**C.A. No. PC-2020-06551**
STATE OF RHODE ISLAND, DEPARTMENT OF ADMINISTRATION, by and through BRETT SMILEY, in his official capacity as Chief Purchasing Officer; and STATE OF RHODE ISLAND, DEPARTMENT OF TRANSPORTATION, by and through PETER ALVITI, JR., P.E., in his official capacity as Director,	:	
Respondents,	:	
v.	:	
CARDI CORPORATION,	:	
Intervenor	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is a Motion to Amend the Complaint filed by Barletta/Aetna I-195 Washington Bridge North Phase 2 JV, Aetna Bridge Company, and Barletta Heavy Division, Inc. (collectively, Petitioners). The Rhode Island Department of Administration (DOA), by and through Brett Smiley acting in his official capacity of Chief Purchasing Officer for the State of Rhode Island, and Rhode Island Department of Transportation (RIDOT), by and through Peter Alviti, Jr., P.E. acti]ng in his official capacity as Director (collectively,

Respondents), have filed an objection to the motion. Intervenor in this action, Cardi Corporation (Cardi), has also objected. The Court heard this motion, as well as several other motions to be addressed in a separate decision, via WebEx on February 9, 2021. Jurisdiction is pursuant to Rule 15(a) of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

This controversy arises out of a public bidding contract sought by the Respondents for a construction project relating to the I-195 Washington Bridge. In December 2016, the Respondents issued a request for proposal (RFP) as to Phase 1 of the I-195 Washington North project, which was awarded to Cardi. (Petition for Declaratory Judgment, Injunctive Relief and Writ of Mandamus (Petition) ¶¶ 11-12.) Cardi completed work under Phase 1 of the project until RIDOT cancelled or terminated the contract for the Phase 1 RFP. *Id.* ¶ 13.

On April 10, 2020, the Rhode Island Division of Purchases, on behalf of RIDOT, issued RFP # 76033776 for Phase 2 of the Washington Bridge North project (Phase 2 RFP). *Id.* ¶ 14. The Phase 2 RFP stated that the project "will principally consist of the rehabilitation of the I-195 Washington Bridge North Phase 2 and the associated new on and off ramps in Providence and East Providence." *Id.* ¶ 16. Section 3.1 of Part 1 of the Phase 2 RFP set forth a list of improvements to be completed as part of the Phase 2 project, including, *inter alia*, the "installation of link slabs." *Id.* ¶ 17. Additionally, the Phase 2 RFP noted that "Phase 1 of the project was the recently completed partial rehabilitation of the substructure of the bridge," but that "only a portion of the work depicted in the 2016 contract documents was completed during the Washington North Phase 1 project." *Id.* ¶¶ 16, 18.

In response to the Phase 2 RFP, three bidders submitted questions, including Petitioners, who requested clarification regarding the scope of work completed under Phase 1. *Id.* ¶ 19. According to Petitioners, the Respondents' answers to these questions contained incorrect information. *Id.* ¶ 21. Bidders also attended a site inspection for the project, where it "became evident" that "certain link slabs may have been replaced during the Phase 1 RFP," but it was not clear how many slabs were impacted. *Id.* ¶¶ 22-23. Petitioners submitted a timely bid with the required technical proposal and sealed price proposal. *Id.* ¶¶ 28-29. This bid relied upon the "State's representations that the majority of the work associated with the replacement of the link slabs had to be performed under the Phase 2 RFP." *Id.* ¶ 25.

On August 17, 2020, RIDOT issued an Apparent Best Value determination for the Phase 2 RFP, which report deemed Cardi to have the highest final score of the three bidders; consequently, Respondents tentatively selected Cardi for the project. *Id.* ¶¶ 50-54. Ten days later, Petitioners submitted a bid protest after learning that Cardi's price proposal was significantly less than Petitioners' proposal. *Id.* ¶ 56. Petitioners asserted in the bid protest that Cardi had a "substantial and unfair competitive advantage" based on its knowledge of the scope of the work performed under the Phase 1 RFP. *Id.* Respondents' Determination in response to the bid protest revealed that Cardi had not included construction of any link slabs in its proposal. *Id.* ¶ 60. This action followed.

On September 17, 2020, Petitioners filed a three-count Petition against the Respondents requesting declaratory and injunctive relief. *Id.* at 14-19. By agreement of the parties, Cardi entered the action as an Intervenor/Respondent. *See* Consent Order, Dec. 24, 2020. Respondents and Cardi filed Motions to Dismiss the action, which were subsequently denied by this Court on December 21 and December 22, 2020, respectively.

Immediately following those decisions, the course of this litigation changed significantly. On December 23, 2020, the Federal Highway Administration (FHWA) denied concurrence with the State's tentative award of the Phase 2 RFP to Cardi.[1] *See* Ex. B to Pet'rs' Mot. to Amend Compl. (Mot. to Am.). By letter, the FHWA noted that the basis for its decision was that Cardi was "non-responsive according to the terms of the RFP." *Id.* On December 31, 2020, RIDOT rescinded its tentative selection of the project to Cardi and cancelled the solicitation in its entirety. *See* Ex. C to Pet'rs' Mot. to Am. Cardi filed a bid protest challenging the Respondents' decision to cancel the solicitation, which protest was denied on February 17, 2021. *See* Cross-Claim and Counterclaim of Intervenor/Def. Cardi Corporation (Cardi Counterclaim) ¶ 85; Ex. B to Resp'ts' Suppl. Mem. Obj. to Pet'rs' Mot. to Am. Compl. at 7.

Following FHWA's decision of nonconcurrence, the parties filed several discovery and dispositive motions. Notably, on January 13, 2021, Respondents filed a Motion to Dismiss Based on Mootness. The same day, Cardi filed a seven-count Crossclaim and Counterclaim seeking damages in addition to declaratory and injunctive relief. *See generally* Cardi Counterclaim. Both Respondents and Petitioners have moved to dismiss those claims.

On January 15, 2021, Petitioners filed a Motion to Amend the Complaint in light of the FHWA's issuance of nonconcurrence and events following therein. More specifically, Petitioners seek leave to amend the Petition to request declarations that: (1) cancellation of the solicitation was void and in violation of 23 C.F.R. § 635.114(h) and G.L. 1956 § 37-2-53; (2) the State's "failure to engage in Competitive Negotiations" with Petitioners violates the Purchasing Act, Procurement Regulations, and the RFP; (3) Cardi is a non-responsive bidder, has a conflict of

[1] The Phase 2 RFP is defined as a "Federal-Aid" contract, which requires concurrence from the FHWA prior to issuance of federal funds. *See* Ex. A to Pet'rs' Mot. to Am. (Proposed Am. Pet.) ¶ 19; 23 C.F.R. § 635.114(b).

interest, and an unfair competitive advantage, and is therefore precluded from engaging in Competitive Negotiations with the State; and (4) that the State is required to engage in Competitive Negotiations with Petitioners regarding the Phase 2 RFP. *See* Ex. A to Pet'rs' Mot. to Am. (Proposed Am. Pet.) at 24. Additionally, Petitioners' proposed First Amended Petition for Declaratory Judgment, Injunctive Relief and Writ of Mandamus requests that the Court issue injunctive relief voiding the cancellation of the solicitation and requiring the State to "proceed with a formal award of the Phase 2 RFP. . . by engaging in Competitive Negotiations with [Petitioners] and exclude Cardi from such negotiations[.]" *Id.* at 26. Last, Petitioners seek to amend their request for a writ of mandamus which would similarly compel the State to void cancellation of the solicitation and require it to engage in Competitive Negotiations with Petitioners. *Id.* at 28. Both the Respondents and Cardi object to Petitioners' Motion to Amend.

In addition to the Motions to Dismiss and the Motion to Amend, several other motions remain pending before the Court, primarily concerning discovery. These motions include: (1) Cardi's December 3, 2020 Motion for Protective Order; (2) Cardi's December 31, 2020 Motion to Compel, Motion to Enjoin Further Procurement Proceedings, and Motion to Extend the Time to Answer or Otherwise Respond to the Petition; (3) Cardi's January 19, 2021 Motion to Compel; (4) Petitioners' December 14, 2020 Motion to Compel Intervenor/Defendant Cardi Corporation's Responses to Petitioners' Request for Production of Documents and Interrogatories and Motion to Strike Cardi's Objections Thereto; and (5) Petitioners' January 4, 2021 Motion to Vacate the Court's Scheduling Order.

Thereafter, Respondents submitted additional materials to the Court in an email dated February 18, 2021. Cardi objected to the email submissions and requested the right to supplement the record. The Court granted Cardi's request. Respondents filed Supplemental Memoranda

relating to two of its Objections—Respondents' Objection to Petitioners' Motion to Amend and Respondents' Objection to Cardi's Motion to Compel, Enjoin, and Extend Time—and one of its dispositive motions—Respondents' Motion to Dismiss Cardi's Cross-Claim and Counterclaim for Failing to Join an Indispensable Party and/or a Motion for Judgment on the Pleadings. Respondents also filed as exhibits the State's February 17, 2021 Bid Protest Determination relating to Cardi's bid protest challenging cancellation of the solicitation, as well as the Appendices attached to that Determination, which include several communications between the parties and between the State and FHWA. *See generally* Exs. A (Cardi's Bid Protest) and B (Determination in Response to Cardi's Bid Challenge) to Resp'ts' Suppl. Memoranda. Cardi filed a memorandum supplementing its Objection to Respondents' Motion to Dismiss Based on Mootness and Objection to Respondents' and Petitioners' Motions to Dismiss Cardi's Cross-Claim and Counterclaim. Petitioners also filed a Supplemental Memorandum and Response to Cardi's and the Respondents' Post-Hearing Submissions, as well as attached exhibits.

The Court now renders its decision on the Motion to Amend.[2] Determinations on the remaining pending motions will follow.

II

Standard of Review

Rule 15(a) of the Superior Court Rules of Civil Procedure states that "leave [to amend] shall be freely given when justice so requires." Super. R. Civ. P. 15(a). Notwithstanding this

[2] As noted, Petitioners' Motion to Amend is one of nine motions pending before the Court. Although it was filed after several other motions that remain pending, including Respondents' Motion to Dismiss based on mootness, the Court must first take up the merits of the motion to amend. *See Medeiros v. Cornwall*, 911 A.2d 251, 254 (R.I. 2006) (finding an abuse of discretion when a trial justice granted a motion for summary judgment while a motion to amend the complaint remained pending).

liberal standard, '"a number of reasons—such as undue delay, bad faith, undue prejudice to the opposing party, or, most relevant to this case, futility of the amendment—may nonetheless warrant the denial of a motion to amend."' *Gannon v. City of Pawtucket*, 200 A.3d 1074, 1080 (R.I. 2019) (quoting *IDC Properties, Inc. v. Goat Island South Condominium Association, Inc.*, 128 A.3d 383, 393 (R.I. 2015)). "[I]f a complaint as amended could not withstand a motion to dismiss . . . then the amendment should be denied as futile." *Williams v. Stoddard*, No. PC 2012-3664, 2013 WL 4777453, at *4 (R.I. Super. Aug. 30, 2013) (internal citation omitted). A motion to dismiss is granted '"when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim."' *Crenshaw v. State*, 227 A.3d 67, 71 (R.I. 2020) (quoting *Goodrow v. Bank of America, N.A.*, 184 A.3d 1121, 1125 (R.I. 2018)).

III

Analysis

Respondents object to the Motion to Amend on two grounds. First, Respondents argue that judicial estoppel precludes Petitioners from amending the Petition. (Resp'ts' Obj. to Pet'rs' Mot. to Am. Compl. (Respondents' Obj.) at 4-6.) Additionally, Respondents contend that as a matter of law, Petitioners' claim cannot survive because the State had the right to cancel the bid under § 37-2-23. *Id.* at 6. Respondents assert that Petitioners have not alleged that the State engaged in any bad faith, fraud, or palpable abuse of discretion. *Id.* at 7.

In its Objection, Cardi argues that Petitioners' Proposed Amended Petition is futile. (Intervenor/Defendant, Cardi Corporation's Obj. to Pet'rs' Mot. for Leave to File Am. Compl. (Cardi's Obj.) at 2-5.) Second, Cardi argues that Petitioners have waived the right to request

Competitive Negotiation. *Id.* at 5-7. The Court first addresses the judicial estoppel argument, then considers futility.

A

Judicial Estoppel

Respondents argue that Petitioners' proposed requested relief is "antithetical to the positions marshalled in the original complaint" as it seeks to have the State recognize a bid which Petitioners alleged in the initial Petition resulted from an unfair process. (Respondents' Obj. at 5.) They contend that "[i]f the Petitioner simply sought to have the Cardi's bid thrown out and be awarded the contract, it should have sought that relief originally" and that leave to amend in this matter "would allow the Petitioner to have multiple bites at the apple by intentional self-contradiction[.]" *Id.* at 6. Petitioners respond that judicial estoppel is inapplicable in this context, as pleading in the alternative is permitted and the relief requested in the Proposed Amended Petition is not inconsistent with or contradictory to the original Petition. (Pet'rs' Reply to State of Rhode Island's Obj. to Pet'rs' Mot. for Leave to File an Am. Petition (Pet'rs' Reply to State) at 2-6.)

The doctrine of judicial estoppel '"prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."' *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). "'[J]udicial estoppel focuses on the relationship between the litigant and the judicial system as a whole,' rather than solely on the 'relationship between the parties.'" *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 519 (R.I. 2006) (quoting *D & H Therapy Associates v. Murray*, 821 A.2d 691, 693-94 (R.I. 2003)). This doctrine is "driven by the important motive of

promoting truthfulness and fair dealing in court proceedings." *D & H Therapy Associates*, 821 A.2d at 693.

In *New Hampshire v. Maine*, the United States Supreme Court enumerated three important considerations in determining the appropriateness of judicial estoppel: (1) whether "a party's later position [is] . . . clearly inconsistent with its earlier position"; (2) whether the party "has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 750-51 (internal quotation marks and citations omitted). Our Supreme Court has held that the final factor is most important to the analysis. *See Gaumond*, 909 A.2d at 519.

Invocation of the doctrine of judicial estoppel is discretionary and is an "extraordinary form of relief, that 'will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief.'" *Gaumond*, 909 A.2d at 519 (quoting *Southex Exhibitions, Inc. v. Rhode Island Builders Association, Inc.*, 279 F.3d 94, 104 (1st Cir. 2002)). The Court declines to apply this extraordinary relief under the facts presented herein. First, the instant Motion to Amend was prompted by events that occurred after the initial Petition—FHWA's nonconcurrence and the State's subsequent cancellation of the solicitation—and the proposed changes to the pleading largely stem from these actions. *See InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003) (declining to apply judicial estoppel and holding that the court "would not want to institute a rule that unduly inhibits a plaintiff from appropriately adjusting its complaint either to correct errors or to accommodate facts learned during pretrial discovery"). Second, Petitioners have not succeeded

in "persuading [this] [C]ourt to accept" an earlier position. *See New Hampshire*, 532 U.S. at 750. The Court has not yet decided any issue on its merits, which have changed in light of FHWA's refusal to concur in the award of the Phase 2 RFP. *See InterGen N.V.*, 344 F.3d at 145 (finding judicial estoppel inapplicable to preclude allegations in an amended complaint where the party amended its complaint prior to issuance of a substantive ruling). Rather, the Court has issued rulings on jurisdictional issues and the sufficiency of the initial Petition, all prior to the cancellation of the solicitation. *See* Dec. 21, 2020 and Dec. 22, 2020 Decisions. Last, assuming for purposes of this argument that Petitioners' claims proceed, the Court sees no unfair advantage to Petitioners or major disadvantage to Respondents. Accordingly, the circumstances at bar do not warrant issuance of such "extraordinary" relief.

B

Futility

Respondents argue that allowing amendment would only "serve to delay the matter" and that Petitioners have not alleged any bad faith, fraud, or a palpable abuse of discretion. (Respondents' Obj. at 6-7.) Respondents contend that pursuant to § 37-2-23, the State has the authority to cancel a procurement, as long as it is acting in its best interests. *Id.* at 6. Moreover, they argue that "[w]hile the State *may* be authorized to conduct other methods of procurement," the State has made its choice, and now seeks to rebid. *Id.* In their Supplemental Memorandum to the Objection to the Motion to Amend, Respondents further cite § 37-2-19(a) for support that the State may choose to negotiate but is not required to do so. (Resp'ts' Suppl. Mem. Obj. to the Pet'rs' Mot. to Am. the Compl. at 4.) Cardi argues that the Petitioners' Proposed Amended Petition is futile because competitive negotiation cannot take place after a competitive proposal is disclosed,

and this form of procurement must be stated in the RFP before it is to take place. (Cardi's Obj. at 2-4.) Cardi further argues that Petitioners have waived this argument. *Id.* at 6.

Petitioners contend that § 37-2-23 does not provide Respondents an unfettered right to cancel the solicitation, and additionally, that the Purchasing Act and Procurement Regulations "mandate that the state engage in Competitive Negotiations" with Petitioners. (Pet'rs' Suppl. Mem. and Resp. to Cardi's and the State's Post-Hearing Submissions (Pet'rs' Suppl. Mem.) at 11.) Furthermore, in their Supplemental Memorandum, Petitioners argue that recently produced documents disclosing the State's request for FHWA's concurrence in the State's cancellation of the solicitation demonstrates that the Court should view Respondents' broad interpretation of its rights under § 37-2-23 "circumspectly." *Id.* at 8. Furthermore, Petitioners point to 23 C.F.R. Part 636, Subpart E, for support that federal regulations "make[] it clear that competitive negotiation up and through best and final offers is consistent with this type of solicitation." *Id.* at 10-11.

As to Cardi, Petitioners challenge its standing to object to the Motion to Amend because there "is no set of circumstances wherein Cardi could become the recipient of th[e] Phase 2 RFP." (Pet'rs' Reply to Intervenor Cardi Corporation's Obj. to Mot. for Leave to File an Am. Pet. (Pet'rs' Reply to Cardi's Obj.) at 3.) Petitioners also similarly argue in response to Cardi that the claims asserted in the Proposed Amended Petition are not futile because the State was required to engage in competitive negotiations with Petitioners following nonconcurrence. *Id.* at 9.

In the Proposed Amended Petition, Petitioners allege that Respondents' cancellation of the solicitation in its entirety without first obtaining federal concurrence pursuant to 23 C.F.R. § 635.114(h) or engaging in competitive negotiations with Petitioners amounts to a palpable abuse of discretion.[3] (Proposed Am. Pet. ¶ 126.) Petitioners seek relief from this Court declaring the

[3] Petitioners do not allege bad faith or fraud in the Proposed Amended Petition.

cancellation void and in violation of federal and state regulations and statutes, as well as declaratory and injunctive relief requiring Respondents to engage in competitive negotiations with Petitioners, and specifically precluding Cardi from any such competitive negotiations. *Id.* at 24-26.

Preliminarily, the Court is mindful that the "hurdle to be overcome in overturning a decision made by the awarding authority in the public bid process is very high indeed." *Blue Cross & Blue Shield of Rhode Island v. Najarian*, 865 A.2d 1074, 1081 (R.I. 2005). '"It is well settled that, in reviewing the bidding process, the Judiciary will interfere with the award of a state or municipal contract *only* in the event that the awarding authority has acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion."' *Id.* (quoting *H.V. Collins Co. v. Tarro*, 696 A.2d 298, 302 (R.I. 1997)) (emphasis added). Furthermore, "[t]he decision of any official, board, agent, or other person appointed by the state concerning any controversy arising under or in connection with the solicitation or award of a contract, shall be entitled to a presumption of correctness." Section 37-2-51.

"To rise to a showing of palpable abuse of discretion . . . one must establish that not only were there violations of the law but also that those violations were *significant*." *Najarian*, 865 A.2d at 1084 (emphasis added). As the Court noted above, futility is measured against the standard for a motion to dismiss. *See Williams*, 2013 WL 4777453, at *4. Accordingly, in order to determine that the claims in the Proposed Amended Petition are futile, it must be "clear beyond a reasonable doubt" that, "under any set of facts that could be proven in support of the plaintiff's claim," cancellation of the solicitation does not amount to a palpable abuse of discretion based on significant violations of law. *See Crenshaw*, 227 A.3d at 71.

This Court first notes that recent action, subsequent to the filing of the Motion to Amend, has rendered moot Petitioners' claim relating to violation of 23 C.F.R. § 635.114(h).[4] In the Proposed Amended Petition, Petitioners assert that pursuant to this regulation, Respondents were required to obtain federal concurrence in cancellation of the solicitation and rejection of all bids. (Proposed Am. Pet. ¶ 126.) On February 4, 2021, RIDOT requested concurrence from the FHWA in the cancellation and resolicitation of the project.[5] (Appendix M to Determination in Response to Cardi Bid Challenge at 2.) FHWA concurred in RIDOT's request the following day. (Appendix N to Determination in Response to Cardi Bid Challenge.)

Next, the Court turns to Petitioners' other ground for relief in the Proposed Amended Petition—that Respondents' failure to engage in competitive negotiations violates the Purchasing Act and Procurement Regulations. *See* Proposed Am. Pet. at 24-26. Petitioners argue that state statutes and regulations "mandate" that Respondents engage in competitive negotiations with Petitioners. (Petr's' Reply to State Obj. at 11.) More specifically, Petitioners contend that § 37-2-19(e) suggests that competitive negotiations "not only can be employed by the State, but *should* be employed unless certain conditions are satisfied." *Id.* at 9. For further support of this position, Petitioners point to § 37-2-20(b), as well as Section 6.3(B) of the Procurement Regulations. *Id.* at 9-10.

[4] Under 23 C.F.R. § 635.114(h), "[a]ny proposal by the State DOT to reject all bids received for a Federal-aid contract shall be submitted to the Division Administrator for concurrence, accompanied by adequate justification."

[5] Although RIDOT requested FHWA concurrence in the decision to cancel the solicitation, Respondents have taken the position that 23 C.F.R. § 635.114(h) does not apply in this situation—where the State is not seeking to reject all proposals at the outset—and further, that the State looks to its own laws for the authority to cancel solicitations and reject bids. *See* Determination in Response to Cardi Bid Challenge at 6; Section 37-2-23.

‘“When the language of the statute is clear and unambiguous,”’ the Court must ‘“give the words of the enactment their plain and ordinary meaning.”’ *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012) (quoting *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 258 (R.I. 2011)). Further, the Court ‘“must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.”’ *Id.* (quoting *Generation Realty, LLC*, 21 A.3d at 259).

Section 37-2-19 governs the use of competitive negotiations in public bidding contracts. *See* § 37-2-19. Section 37-2-19(e) provides that “[a]n award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals.” This provision further states that competitive negotiation “[d]iscussions need not be conducted” under certain enumerated circumstances.[6] *See id*. Petitioners also rely on § 37-2-20(b), which provides that “[w]here there is more than one bidder, competitive negotiations, pursuant to § 37-2-19, shall be conducted with the three (3) (or two (2) if there are only two (2)) bidders determined in writing

[6] These circumstances include where “the purchasing agent makes a written determination concerning one or more of the following:

> “(1) With respect to prices, where the prices are fixed by law or regulation, except that consideration shall be given to competitive terms and conditions;
>
> “(2) Where time of delivery or performance will not permit discussions; or
>
> “(3) Where it can be clearly demonstrated and documented from the existence of adequate competition or accurate prior cost experience with the particular supply, service, or construction item that acceptance of an initial offer without discussion would result in fair and reasonable prices, and the request for proposals notifies all offerors of the possibility that an award may be made on the basis of the initial offers.” Section 37-2-19(e).

to be the lowest responsive and responsible bidders to the competitive sealed bid invitation." Section 6.3(B) of the Procurement Regulations states that under "§ 37-2-19(d), written or oral discussion *shall* be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award." 220-RICR-30-00-6.3 (emphasis added).

However, other subsections of §§ 37-2-19 and 37-2-20 clearly and unambiguously demonstrate that engagement in competitive negotiation is permissive, not mandatory. *See Downey v. Carcieri*, 996 A.2d 1144, 1151 (R.I. 2010) ("It is an axiomatic principle of statutory construction that the use of the term 'may' denotes a permissive, rather than an imperative, condition."). For instance, § 37-2-19(a) provides, in relevant part, that "[w]hen . . . the purchasing agent determines in writing that the use of competitive sealed bidding is not practicable . . . a contract *may* be awarded by competitive negotiation." (Emphasis added.) Additionally, § 37-2-20(a) states that where all bids submitted by way of a competitive sealed bidding process "result in bid prices in excess of the funds available" and the chief purchasing officer has determined in writing that (1) there are no additional funds available, and (2) "[t]he best interest of the state will not permit the delay attendant to a resolicitation . . . then a negotiated award *may* be made[.]" (Emphasis added.) The Procurement Regulations relating to competitive negotiations largely mirror these statutory provisions.[7] *See* 220-RICR-30-00-6.2 (citing § 37-2-19 and using the term "may" regarding competitive negotiation). Reading the plain language of these statutes and regulations in their entirety, it is clear that the subsections highlighted by Petitioners provide

[7] Furthermore, although Petitioners additionally point to federal regulations, which Petitioners argue "make[] it clear" that competitive negotiations are "consistent" with such a solicitation, *see* Petitioners' Suppl. Mem. at 11, like the state statutes at issue, nothing in 23 C.F.R. Part 636, Subpart E, appears to require the State to engage in these discussions. *See* 23 C.F.R. § 636.501 ("In a competitive acquisition, discussions *may* include bargaining.") (emphasis added).

for the method by which the State shall conduct discussions with the parties should it choose to use competitive negotiations as a procurement method. *See* § 37-2-20(a)(2) (stating that when the chief purchasing officer makes certain determinations in writing, "then a negotiated award may be made *as set forth in subsection (b) or (d) of this section*") (emphasis added).

Moreover, § 37-2-23 affords the State broad power to cancel solicitations. Section 37-2-23 provides that

> "[a]n invitation for bids, a request for proposals, or other solicitation may be cancelled, or all bids or proposals may be rejected, if it is determined, in writing, that the cancellation or rejection is taken in the best interest of the state and approved by the chief purchasing officer."

Consequently, as Respondents contend, the State "*may* be authorized to conduct other methods of procurement," but in this situation, officials have determined that cancellation of the solicitation in its entirety is in the State's best interest. (Respondents' Obj. at 6.) Indeed, as noted above, this decision carries with it a presumption of correctness. *See* § 37-2-51.

Furthermore, the relief requested in the Proposed Amended Petition—that the Court compel Respondents to competitively negotiate with Petitioners and to exclude Cardi from that process—would require this Court to direct the course of the procurement process. Our Supreme Court has been clear that in the context of public bidding cases, the Court generally should not interfere with the decisions made by the State officials in charge of that process. *See H.V. Collins Co.*, 696 A.2d at 302 (quoting *Truk Away of Rhode Island, Inc. v. Macera Brothers of Cranston, Inc.*, 643 A.2d 811, 815 (R.I. 1994)) ("'[T]hose whose duty it is to contract for the construction of a public improvement should [not] be placed in a legalistic straitjacket,' and in particular 'when officials in charge of awarding a public work's contract have acted fairly and honestly with reasonable exercise of a sound discretion, their actions shall not be interfered with by the courts.'");

see also Najarian, 865 A.2d at 1082-83 (citing *H.V. Collins Co.*, 696 A.2d at 305) ("[E]ven if a public official violates the letter of the procurement act, his or her decision is still to be *given great deference* as long as the authority did not act in bad faith, was not 'corrupt' and was not so arbitrary or capricious as to amount to a 'palpable abuse of discretion.'") (emphasis added). Importantly, in *Truk Away*, the Supreme Court cautioned that "government by injunction save in the most compelling and unusual circumstances is to be strictly avoided." *Truk Away*, 643 A.2d at 816.

Lastly, the Court turns briefly to Cardi's alternative argument that the claims in the Proposed Amended Petition are futile because (1) competitive negotiations cannot take place after information about proposals has been disclosed pursuant to § 37-2-19(d) and federal "Design Build" regulations and (2) Petitioners have waived any claim to this process and should not be permitted to pursue a remedy that cannot be granted at this time. (Cardi's Obj. at 2-6.) Preliminarily, the Court rejects Petitioners' contention that Cardi lacks standing to object to this motion and may not assert these arguments. Importantly, Cardi entered this case by consent of Petitioners and Respondents. *See* Consent Order, Dec. 24, 2020. Furthermore, in the Proposed Amended Petition, Petitioners request that the Court declare that the State exclude Cardi from competitive negotiations because it is a non-responsive bidder *and* because it has a conflict of interest and unfair competitive advantage.[8] *See* Proposed Am. Pet. at 24. It is difficult to see how issuance of this relief would not impact Cardi.

As to the merits of the argument, Cardi asserts that under § 37-2-19(d), competitive negotiations must "take place in a manner and at a time prior to disclosures of any information," and, that here, pricing and other substantive information from proposals have been disclosed.

[8] Petitioners request an injunction and writ of mandamus on the same basis. *See* Proposed Am. Pet. at 26, 28.

(Cardi's Obj. at 3.) Cardi also points to 23 C.F.R. § 636.507, which outlines rules for communications with offerors, including that certain information shall not be revealed during discussions.[9] *See id.* at 4; 23 C.F.R. 636.507. Section 37-2-19(d) provides, in full:

> "Written or oral discussions may be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award. All oral discussions conducted with responsible offerors who submit proposals shall be memorialized in writing and all such writings shall be deemed public record at the time the contract is awarded and shall be made available for public inspection. Discussions shall not disclose any information derived from proposals submitted by competing offerors."

While the language of the statute clearly prohibits disclosure of information *during* discussions, it does not expressly set out whether this method of procurement is foreclosed altogether where, as here, there has been disclosure of some information outside of the competitive negotiation process. This Court will not '"read into the statute what the legislature has not expressed."' *Woods v. Safeway System, Inc.*, 102 R.I. 493, 495, 232 A.2d 121, 122 (1967) (quoting *Adelson v. McKenna*, 55 R.I. 363, 365, 181 A. 799, 800 (1935)). Consequently, it declines to adopt Cardi's argument

[9] This section of the Design-Build Regulations prohibits conduct that:

> "(a) Favors one offeror over another;
>
> "(b) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
>
> "(c) Reveals an offerors price without that offeror's permission;
>
> "(d) Reveals the names of individuals providing reference information about an offeror's past performance; or
>
> "(e) Knowingly furnish source selection information which could be in violation of State procurement integrity standards." 23 C.F.R. § 636.507.

that competitive negotiation is unavailable as a remedy for purposes of this Motion to Amend the Complaint.

Cardi further asserts that the federal "Design-Build Regulations" governing this procurement process and all federal-aid design-build projects, 23 C.F.R. Part 636, require the RFP to inform offerors of an intent to enter into competitive negotiations, which it argues did not occur here. (Cardi's Obj. at 3-5.) Petitioners, on the other hand, contend that the RFP "explicitly references the State's ability to utilize Competitive Negotiation as the method of source selection," pointing to language in the RFP that refers to § 8.11 of the Procurement Regulations, which section lists competitive negotiations as one of several procurement methods. (Pet'rs' Reply to Cardi's Mot. to Am. at 9-10.) These competing arguments raise a potential question of an ambiguity in the RFP. However, the Court has already determined that the relevant statutes authorize, but do not require, the State to enter into competitive negotiations, and the State has not chosen to proceed with this method of selection in this case. The Court need not delve into a question of contract interpretation to resolve this motion.

Given the permissive provisions set forth in §§ 37-2-19 and 37-2-20, as well as the broad power provided to the State under § 37-2-23 to cancel solicitations and the deference afforded the State's decisions, the Court cannot see how failing to conduct competitive negotiations with Petitioners following FHWA's nonconcurrence would be a "significant" violation of the law amounting to a palpable abuse of discretion under any set of facts. *See Najarian*, 865 A.2d at 1084. Accordingly, it would be futile to allow the Petitioners to amend the Petition.

IV

Conclusion

Therefore, for the reasons stated above, this Court denies Petitioners' Motion to Amend the Complaint. Counsel shall submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Barletta/Aetna I-195 Washington Bridge North Phase 2 JV, et al. v. State of Rhode Island, Department of Administration, et al.**
CASE NO:	**PC-2020-06551**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 5, 2021**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Jackson C. Parmenter, Esq.; Erin A. Hockensmith, Esq.; Michael A. Kelly, Esq.**
For Defendant:	**Daniel W. Majcher, Esq.**
For Intervenor:	**Jeremy Ritzenberg, Esq.; William M. Russo, Esq.**