

Commonwealth of Virginia

JUDGES
TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

W. CHAPMAN GOODWIN, CHIEF JUDGE
JOEL R. BRANSCOM
PAUL A. DRYER
ANNE M. REED
CHRISTOPHER B. RUSSELL
EDWARD K. STEIN



ROCKBRIDGE/BUENA VISTA JUDGE'S CHAMBERS
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CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF STAUNTON
CITY OF WAYNESBORO

August 3, 2022

Via Electronic Mail

Patrick C. Henry, II, Esquire
Mary & Henry
7202 Glen Forest Drive, Suite 307
Richmond, Virginia 23226

Christopher B. Bernhardt
Patrick O. O'Leary
Office of the Attorney General
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Re: *Center for Applied Innovation, LLC v. Virginia Military Institute, et al.*
Case No.: CL22-215

Dear Counsel:

On July 14, 2022, the parties appeared for argument on the defendants' Plea in Bar and Demurrer. Having considered the oral and written argument of counsel and the authority presented, the Court responds as follows.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Center for Applied Innovation, LLC ("Plaintiff" or "CAI") is a limited liability company. Defendant Virginia Military Institute ("Defendant" or "VMI") is a public institution of higher education located within the jurisdiction of this Court. In November of 2021, VMI published a Request for Proposal ("RFP") seeking proposals for the provision of Diversity, Equity and Inclusion ("DEI") Consultation and Training. CAI and other entities submitted proposals in response to the RFP. Plaintiff was eliminated from consideration during the first round of the

procurement process. In February of 2022, VMI published a Notice of Intent (“NOI”) to Award a contract to Newpoint Strategies, LLC.¹

Prior to the posting of the NOI, Plaintiff attempted unsuccessfully to obtain access to records from the procurement process. On March 18, 2022, Plaintiff filed a Protest of Award, alleging that VMI’s actions during the process had resulted in an unjust awarding of the contract. VMI responded with a denial letter on March 28, 2022. On April 1, 2022, Plaintiff filed this action seeking relief, which includes (1) a Motion for Declaratory Judgment, and; (2) a Petition for Temporary & Permanent Injunction. CAI alleges that VMI’s conduct during the procurement process was arbitrary and capricious. In response, VMI filed a Plea in Bar and Demurrer.

II. QUESTIONS PRESENTED

VMI asserts several bases for dismissal of Plaintiff’s actions. First, VMI claims a statutory exemption from the provision of the Virginia Public Procurement Act (VPPA) under which Plaintiff filed. Second, VMI states that the doctrine of sovereign immunity bars the remedies Plaintiff seeks. Further, VMI claims that Plaintiff has failed to state a cause of action for declaratory judgment or injunctive relief and has failed to state facts upon which relief can be granted.

III. ANALYSIS

A. Plea in Bar

1) Exemption from VPPA

Generally, public bodies in the Commonwealth are required to comply with the VPPA when procuring services from non-governmental vendors. In this case, Plaintiff has filed suit under Va. Code § 2.2-4364 which, under usual circumstances, provides a cause of action for bidders on government contracts to challenge the legitimacy of the bidding process. However, Va. Code § 23.1-1017—part of the Restructured Higher Education Financial and Administrative Operations Act (RHEFAO)—states that, “each covered institution may be exempt from the provisions of the Virginia Public Procurement Act, except for §§ 2.2-4340, 2.2-4340.1, 2.2-4340.2, 2.2-4342, and 2.2-4376.2.” Further, the definitions portion of the same act defines “covered institution” as “a public institution of higher education that has entered into a management agreement with the Commonwealth to be governed by the provisions of Article 4.” Va. Code § 23.1-1000. Thus, if VMI is a “covered institution” pursuant to the Act, it is exempt from the relevant provisions of VPPA.

VMI does not assert that it is a party to a management agreement. Instead, it asserts that it is exempt from the VPPA by having entered a “memorandum of understanding” with the Commonwealth. Memoranda of understanding are governed by § 23.1-1003. An MOU can provide an institution of Higher Education “restructured operational authority in any operational area adopted by the General Assembly in accordance with law.” However, an MOU under this statute

¹ At the hearing on July 14, 2022, VMI presented as Defendant’s Exhibit #2 an Affidavit of Kathleen Tomlin, the Procurement Services Director at VMI, indicating that VMI has not awarded a contract to NewPoint or any other bidder under the RFP and does not intend to do so while this lawsuit is pending.

does not appear to bestow the status of “covered institution” which would exempt the institution from the requirements of the VPPA.

In support of its position, VMI cites a 2008 amendment to Va. Code § 23-38.90.

To effect its implementation under the Memorandum of Understanding, and if the Institution remains in continued substantial compliance with the terms and conditions of the Memorandum of Understanding, the Institution's procurement of goods, services, insurance, and construction and the disposition of surplus materials shall be exempt from the Virginia Public Procurement Act.

VMI argues that this amendment “showed an intent for institutions of higher education that have entered into a MOU to not be subject to civil actions beyond what is provided for in the rules.” *Memo in Support of Plea in Bar* at 6.² However, Title 23 of the Virginia Code was repealed in 2016. The current version of the RHEFAO in Title 23.1 exempts “covered institutions” from the VPPA while omitting similar protection for institutions who have entered Memoranda of understanding. Furthermore, the language of the MOU itself certifies that VMI is in full compliance with the requirements of the VPPA. The MOU itself does not appear to contemplate the exemption VMI asserts.

2) Sovereign Immunity

VMI argues that the doctrine of sovereign immunity protects it from this suit. Plaintiff filed under Virginia Code § 2.2-4364 which empowers bidders to challenge the decision of the “public body” to deny their bid. “Public body” in the relevant sense is defined as:

any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

Va. Code § 2.2-4301. VMI is a public body under this definition. Further, as VMI notes in its Brief, the VPPA and the Rules allowing bid protest lawsuits (which VMI says are applicable here) constitute a waiver of sovereign immunity.

Defendants’ Plea in Bar is overruled.

B. Demurrer

1) Plaintiff’s Request for Declaratory Judgment

A declaratory judgment provides a procedural remedy for a legally viable cause of action that is yet to ripen. *See Cherrie v. Va. Health Servs.*, 292 Va. 309, 318 (2016). Such judgments “provide relief from the uncertainty arising out of controversies over legal rights.” *Treacy v.*

² The recodification of the RHEFAO is not mentioned in the Commonwealth Finance Secretary’s letter to VMI’s Superintendent dated May 23, 2017, contained in Defendant’s Exhibit #1. In any event, the statute referenced in the opening sentence of that letter was not in effect on that date.

Smithfield Foods, 256 Va. 97, 103 (1998). Rather than guiding the parties in their future conduct, CAI seeks to remedy injuries it has allegedly already sustained. *See Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970). The elimination of Plaintiff from the procurement process and denial of its protest of the notice of intent to award are concluded events, and therefore constitute claims which have fully matured.

It is true that the general rule is that in an action for a declaratory judgment, if the plaintiff's pleading alleges the existence of an actual or justiciable controversy it states a cause of action and is not demurrable. But this does not mean that a demurrer will never lie to a plaintiff's pleading in a declaratory judgment proceeding. As is said in 26 C.J.S., Declaratory Judgments, § 141, p. 335, "[Where] the allegations of the complaint not only fail to show a right to executory relief, but also fail to show a right to declaratory relief, there is no reason why a demurrer should not be interposed; and where it is plain on the record that there is no basis for declaratory relief, a demurrer is properly sustained."

First Nat'l Tr. & Sav. Bank v. Raphael, 201 Va. 718, 721 (1960) (internal citations omitted).

Plaintiff's assertions that Defendant violated the VPPA and that its award of the contract was arbitrary and capricious are disputed issues and facts. When the "actual objective in the declaratory judgment proceeding [i]s a determination of [a] disputed issue rather than an adjudication of the parties' rights,' the case is not one for declaratory judgment." *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 55 (2018) (citing *Green v. Goodman-Gable-Gould Co.*, 268 Va. 102, 108 (2004)).

Plaintiff's Count I requests a Judgment Order declaring the contract between VMI and NewPoint void and granting full access to the procurement file pursuant to the VPPA. The Court is satisfied that no such contract exists. Further, the Court agrees with VMI that declaratory judgment is not an appropriate vehicle for Defendants' request for records, especially given the disputed facts in this case.

Defendants' demurrer to Count I is sustained.

2) Injunction Merits

a. VMI is Prohibited from Awarding the Contract

Section 52 of the Rules Governing Procurement of Goods, Services, Insurance and Construction by a Public Institution of Higher Education and Their Vendors ("the Rules") states:

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 50 of these Rules, or the filing of a timely legal action as provided in § 54, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

VMI has acknowledged that it is prohibited from awarding the contract until the present action has been resolved.

b. The Four-Part Test Used by Federal Courts

VMI correctly states that “[n]o Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a[n] injunction.” *See Sch. Bd. Of Richmond v. Wilder*, 73 Va. Cir. 251, 253 (2007). However, Virginia Circuit Courts have relied on the four-part test used by the federal courts.

Since the Fourth Circuit decided *Real Truth About Obama*, most Virginia circuit courts have evaluated temporary injunctions using that court's sequential analysis. Consistent with this approach, the *Virginia Civil Benchbook* refers to the *Winter* four-factor test—and the Fourth Circuit's interpretation of the *Winter* factors as applied in *Real Truth About Obama*—in the section regarding motions for temporary injunctions.

Dillon v. Northam, 105 Va. Cir. 402, 409 (Cir. Ct. 2020) (internal citations omitted).

VMI's argument that Plaintiff has failed to state a cause of action for an injunction rests heavily on the assertion that Plaintiff has filed its action pursuant to the VPPA rather than the Rules. Setting aside (for the moment) this procedural distinction, an analysis based on the federal standard requires that Plaintiff “must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20, 24 (2008).

Plaintiff's allegations fail to establish that CAI is likely to suffer irreparable harm in the absence of preliminary relief. An injunction is not appropriate in this case at this time.

3) Substantive Claims

The Supreme Court of Virginia has defined an act as “arbitrary and capricious when it is willful and unreasonable and taken without consideration or in disregard of facts or law or without determining principle, or when the deciding body departed from the appropriate standard in making its decision.” *James v. City of Falls Church*, 280 Va. 31, 41 (2010) (internal quotations and citations omitted). Plaintiff alleges that VMI has departed from numerous relevant authorities, including the APSPM, VPPA, the Rules, Purchasing Manual, and Vendor's manual. *See generally* Pl.'s Ex. A.

In *Professional Building Maintenance Corporation v. School Board of the County of Spotsylvania*, the Supreme Court of Virginia addressed a similar complaint of arbitrary and capricious actions during the process of entertaining bids for a contract. *See generally Prof'l Bldg. Maint. Corp. v. Sch. Bd.*, 283 Va. 747 (2012). The allegations evaluated by the court included (1) utilizing factors that were not included in the criteria set forth in the invitation; (2) inability to articulate the factors considered in how points were allocated or awarded; (3) allocating points for certain criteria with no basis in fact; and (4) giving point scores that bore no rational relationship with the information provided in the bid. *See id.* at 754-55. The court found that the allegations were not merely conclusory and sufficiently stated a cause of action regarding whether the school board's actions were arbitrary and capricious. The court therefore held that the circuit court had erred in sustaining the school board's demurrer, reversed the judgment, and remanded the matter for further proceedings.

CAI has alleged that VMI (1) utilized factors not included in the criteria of the RFP by scoring prices in proposals that included products and services that were not requested by the RFP; (2) failed to include justification or explanations that articulated the factors considered in scoring; (3) allocated points for criteria with no basis in fact due to the wide variance of the costs/services in each company's proposals caused by VMI's vague articulation of its requirements; and (4) gave points with no rational relationship to the information provided as Plaintiff was the only bidder to receive a score of "0" for price, despite the existence of several more expensive proposals. *See generally* Pl.'s Ex. A. Viewed in the light most favorable to Plaintiff, these allegations are sufficient to withstand VMI's demurrer as to the substance of Plaintiff's claims.

4) Procedural Issues

VMI argues that CAI's remedies, if any, emanate from the Rules Governing Procurement rather than the VPPA. It appears to the Court that the Rules presented to the Court were promulgated pursuant to the now-repealed Title 23 of the Code of Virginia. Similar expressions of policy, purpose, and scope of procurement authority are now codified in Article 4 of the RHEFAO. However, as noted above, these provisions apply to "covered institutions" that have "management agreements" with the Commonwealth. The correspondence between VMI and the Commonwealth in 2017³ appears designed to extend the original Memorandum of Understanding, subject to the Rules, notwithstanding the General Assembly's recodification of Title 23 one year earlier. As VMI correctly notes, the statutes in effect in 2017 retained Memoranda of understanding in § 23.1-1003. But the General Assembly appears to have transferred the compliance scheme contemplated by the Rules to Article 4, which does not by any express terms apply to institutions that entered Memoranda of understanding. Nothing in the correspondence mentions Article 4 or any intent to convert the Memorandum of Understanding to a management agreement. The Code currently recognizes both types of agreements. VMI has an MOU, but the "Rules" VMI says are to govern this dispute now apply to management agreements.

IV. CONCLUSION

The defendants' Plea in Bar is overruled. The demurrer is sustained as to Count I. The demurrer is overruled as to Count II. The plaintiff's counsel is requested to prepare an appropriate Order reflecting the ruling of the Court.

Thank you for your attention to the above. With kind regards, I am

Sincerely yours,


Christopher B. Russell

c: Michelle M. Trout, Clerk of Court

³ Letters of May 23, 2017 and June 9, 2017 contained in Defendant's Exhibit #1.

VIRGINIA:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

CENTER FOR APPLIED)
INNOVATION, LLC,)
)
Plaintiff,)
)
v.)
)
VIRGINIA MILITARY INSTITUTE, et al.,)
)
Defendants.)

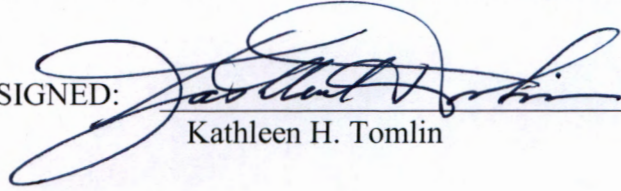
Case No. CL22-215-00

AFFIDAVIT OF KATHLEEN H. TOMLIN

I, Kathleen H. Tomlin, being duly sworn according to law, state the following:

1. My name is Kathleen H. Tomlin and I am an adult citizen residing in the Commonwealth of Virginia.
2. I am the Procurement Services Director at Virginia Military Institute (“VMI”).
3. I have reviewed the Motion for Declaratory Judgment and Petition for Temporary & Permanent Injunction filed by Center for Applied Innovation, LLC, Case No. CL22-215-00 (“the Lawsuit”).
4. In my role as Procurement Services Director at Virginia Military Institute, I am familiar with the request for proposal issued by VMI titled Project #V211-22-054 (“RFP”) and that is described in the Lawsuit.
5. VMI has not awarded a contract to NewPoint Strategies LLC (“NewPoint”) or any other bidder under the RFP.
6. No work has been performed under the RFP.

7. VMI does not intend to award a contract under the RFP while the Lawsuit is pending.

SIGNED: 
Kathleen H. Tomlin

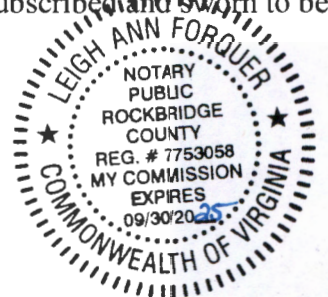
CITY/COUNTY OF Rockbridge

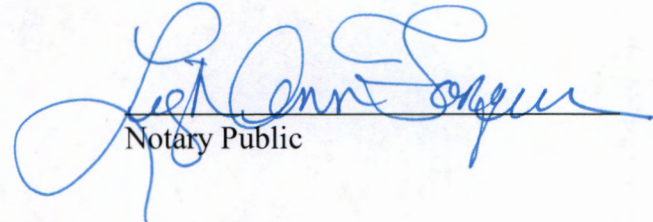
COMMONWEALTH OF VIRGINIA

I, Leigh Ann Forquer, a Notary Public in the Commonwealth of Virginia, do hereby certify that this day personally appeared before me Kathleen H. Tomlin, who being first duly sworn, made oath that the foregoing Affidavit is true and correct to the best of her knowledge, information, and belief.

Subscribed and sworn to before me this 15th day of June, 2022.

[SEAL]




Notary Public

My Commission expires: 9/30/2025

My Commission No.: 7753058