

COMMENTARY

# COURT OK'S LAWSUIT TO PROCEED AGAINST VMI FOR ALLEGEDLY ILLEGAL DEI PROCUREMENT ACTIVITIES

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A Rockbridge County (Virginia) Court has rejected an attempt by the Virginia Military Institute (VMI) to dismiss a lawsuit alleging serious violations of the Virginia Public Procurement Act, Virginia policies, and the Governor's Executive order to subject VMI cadets, faculty and staff to divisive training.

The Twenty-Fifth Judicial Circuit Court of Virginia for the County of Rockbridge has denied from the Virginia Military Institute (VMI) a Plea in Bar and Demurrer requesting the dismissal of the lawsuit filed against VMI by Center for Applied Innovation, LLC (CAI), a Virginia Service-Disabled, Veteran-Owned Business. VMI unsuccessfully claimed it was not bound by the Virginia Public Procurement Act (VPPA), then attempted to claim sovereign immunity against being sued by CAI. The Court's denial of VMI's motions clear the way for unsuccessful bidder CAI to vigorously pursue its claims in the litigation, including that VMI's decision to issue a Notice of Intention ("NOI") to award the RFP for the Diversity, Equity and Inclusion (DEI) contract for mandatory cadet, faculty, staff and Board of Visitors training to bidder NewPoint Strategies, LLC was arbitrary and capricious under Virginia law.

Represented by a member of Virginia Attorney General Jason Miyares' staff, VMI's first argued that it is exempt from the VPPA, the foundational Virginia law established to ensure the competition and award of contracts by Virginia State Agencies adhere to the highest ethical standards and avoid even the perception of impropriety. The Court found that VMI does not have the requisite "management agreement" in place, as required after Title 23 of the Virginia Code was repealed in 2016; moreover, a Memorandum of Understanding (MOU) that VMI submitted to the Court was insufficient, so the strict standards of the VPPA did indeed apply to the RFP as Plaintiff CAI had contended in its lawsuit.

VMI's second argument was to claim CAI's lawsuit against it could not proceed under the doctrine of sovereign immunity. The Court rejected this as well, finding VMI is a "Public Body" within the meaning of the VPPA and that in its own Brief VMI stated the VPPA and rules allow bid protest lawsuits that constitute a waiver of sovereign immunity. The court further ruled that the Rules Governing Procurement that VMI had provided to the Court in an attempt to stop CAI's lawsuit were promulgated pursuant to the now-repealed Title 23 of the Code of Virginia.

VMI's only success was in the Court declining CAI's request for a Court Order declaring the contract between VMI and its intended contractor void. While this does not give CAI the immediate ruling to void the intended contract award CAI sought, the Court found CAI's complaint sufficient to move forward on the serious allegations that VMI violated Virginia Procurement law in its arbitrary and capricious NOI to award the RFP for the DEI training, as alleged in CAI's complaint.

More importantly, VMI acknowledged that it is prohibited from awarding the DEI contract for mandatory cadet, faculty, staff and Board of Visitors training until after CAI's lawsuit has been adjudicated by the Court.

The impact of the Court's decision is significant for VMI and Virginia taxpayers.

The Court's finding that VMI is NOT exempt from the VPPA opens the door for other procurement contractors and companies dealing with VMI to seek relief under the VPPA for procurement law violations. For companies that attempted to contract or had difficulties with VMI in the past the ruling brings up potential areas of concern of how VMI may have improperly invoked this argument with treatment of other contractors and acquisitions after Title 23 was revoked in 2016

It also raises the question of whether Virginia's Chief Procurement Officer (CPO) will investigate VMI's past and present procurement awards to include its significant use of "sole source" contracting to avoid competition and potentially steer contracts to preferred vendors.

CAI's 54-page Protest that includes 245 footnotes and an additional 657 pages of evidentiary exhibits supporting its claims on contracting and other improprieties will be evaluated in court. A small sample of CAI's documented allegations against VMI and its failed procurement process in the lawsuit is:

- VMI deliberately denied access to, or concealed, or destroyed documents required by FOIA, VPPA and other applicable policies and rules to be created, maintained and available by VMI for review in the procurement file with the aim of preventing the challenges of any bidder from being successful. VMI does not even attempt to deny its spoliation, concealment, and destruction of procurement records and other relevant evidence. In fact, public records filed with CAI's lawsuit show VMI admitted records of proposal evaluation were destroyed, missing, or not maintained at all, in contravention of the VPPA.
- The VMI DEI RFP price scoring structure, method, evaluation, as well as the scoring implemented, were arbitrary and capricious in violation of the VPPA.
- The cost proposals from the top three Offerors, as ranked by the VMI evaluation panel and selected for the final evaluation round, indicates the winning (NOI) bidder NewPoint Strategies, LLC received preferential treatment.
- Pressure by the VMI leadership was placed on VMI procurement staff to include unnecessarily shortening the acquisition cycle without sufficient urgency justification and with the intent to steer the contract to a specific Offeror or to one within a selected group of Offerors.
- VMI acted willfully and unlawfully (under the VPPA) to impede or block an Offeror from submitting a proper, complete and timely protest.
- Systematic arbitrary and unequal treatment of Offerors.

CAI now has the ability to obtain depositions from all relevant VMI staff including its procurement officials, RFP evaluators, and most senior leadership. This extends to the VMI Board of Visitors (BOV) who are also named Defendants in the Lawsuit. According to the BOV's Statement of Governance, "The Board shall also oversee the actual application of resources and ensure the cost-effective operation of the Institute" and "The Board is ultimately responsible for the academic quality and integrity of the Institute."<sup>i</sup> To date, the VMI BOV minutes posted on VMI's website for the public do not indicate if the BOV is aware of the lawsuit or ever executed its oversight responsibilities by reviewing it or the various aspects of the procurement.

In addition to the VPPA procurement violations, the Court's ruling also opens the path to explore allegations that VMI willfully disregarded Governor Youngkin's Executive Order and Policy against divisive training and instruction in state-supported educational institutions. Documents obtained by CAI and filed with the Court provide evidence of VMI's disregard not only for Virginia Procurement law but for Governor Youngkin and his policies and VMI's role as the leading state-supported senior military college. Just a few examples available from VMI's own records show:

- One member of the committee that evaluated proposals (who is also a VMI Professor instructing Cadets) deducted points from CAI's proposal because of **"too much military"** and **"includes VMI alumni"**<sup>ii</sup> See CAI complaint Exhibit 50.
- Another VMI Professor on the selection committee made her position against VMI's rich military tradition and the VMI system itself clear when she stated, **"We [VMI] really aren't military. I have a bird on my shoulder [indicating Colonel rank] – doesn't mean anything – just I am a field professor, So – compare us more to University of Maryland than a military academy."**<sup>iii</sup> See CAI complaint Exhibit 51.
- A VMI priority, as evident from the selection committee's evaluation notes, appears to be developing and implementing a risk management plan in order to protect VMI's Chief Diversity Officer (CDO) from scrutiny based on the selection committee's repeated questions to bidders of **"How will you protect VMI from Risk?"** This question was so beyond the scope of the RFP that a VMI procurement official annotated in the meeting notes **"why ask?"**<sup>iv</sup> See CAI complaint Exhibit 49.

- Records also show VMI developing a deliberate campaign to lobby or otherwise influence the Youngkin administration in Richmond and a plan to deal with persons who criticize the Chief Diversity Officer ; according to one VMI Professor and evaluation Panel member's question to a bidder: "***How to assist VMI with new government [i.e., then-new Youngkin administration] ? Critical Race Theory. Collective Regard – Governor tends to respond to criticism and complaints” and “how will you support the CDO – people who do not support her?”***<sup>v</sup> See CAI complaint Exhibit 49. ***This selection committee member also commented, “ Youngkin CRT/Va Policies. Cannot ignore collective regard. Constituency complaints – won't do anything. CHAOS – is where they intervene. They only go where there is a FIRE. They don't believe there is a fire here.”***<sup>vi</sup> See CAI complaint Exhibit 49. [Emphasis added]
- VMI is developing a media engagement plan to include repression of free speech, "***Control who talks to the press . Shared understanding of what information is shared with the press”***<sup>vii</sup> See CAI complaint Exhibit 49. [Emphasis added]
- Before evaluations and award, VMI Attorney-General appointed Legal Counsel opined "***We are getting a great deal of consternation on the subject procurement. I expect that the probability is high that this procurement will be protested. Accordingly, please get with Kathy Tomlin and let's begin to assemble a review of our documents and process, understand our vulnerabilities and complete a review of the procurement protest process.***<sup>viii</sup> See CAI complaint Exhibit 59. [emphasis added]

The Court's ruling comes at a time when VMI, the BOV and the mandatory DEI training at the Institute are becoming more and more controversial.

During the July 26, 2022 VMI BOV DEI committee public meeting held on August 26, a presentation was given by CDO LTC Love. This presentation of VMI's planned Cadet and Employee DEI training consisted largely of graphic/offensive videos and what many regard as ideologically divisive content.

One video entitled "**Miss Representation**"<sup>ix</sup> included a video animation depicting a man hitting a woman with what appears to be a hammer. After she falls to the ground, he continues to beat her until there are pools of blood.

Another video is "**White Like Me – Race, Racism & White Privilege in America.**" The video is described in part as: "**Tim Wise, explores race and racism in the US through the lens of whiteness and white privilege. Wise offers a fascinating look back at the race-based white entitlement programs that built the American middle class, and argues that our failure as a society to come to terms with this legacy of white**

**privilege continues to perpetuate racial inequality and race-driven political resentments today.** [emphasis added]

A third video in the presentation, "**Disarm Hate**" advanced by Dr. Love for "Inclusive Excellence" on "LGBTQIA+ & the Military" conveys a strong anti-military and anti gun rights ideology. The video's official summary is: "Nine LGBTQs come together after the Pulse Massacre to join one man, a hairdresser and activist from New Jersey without political experience, as he builds a national rally to demand LGBTQIA equal rights, **fight the NRA and challenge America's obsession with gun violence.**" [emphasis added]

The **references** cited as the foundation for the DEI training in Dr. Love's presentation to the BOV include, but were not limited to, ***Microaggressions and Female Athletes; Masculinity and US Military Climate; The Military Hypermasculinity Mystique; How symbolic embodiment threatens women's inclusion in the US military; Femininity as Perceived Threat to Military Effectiveness: How Military Service Members Reinforce Hegemonic Masculinity in Talk.*** [emphasis added]

To date there is no record of the VMI BOV objecting to any of these topics or ideology imposed on cadets and faculty in the training. VMI's Superintendent, Maj. Gen. Cedric Wins fiercely defends the VMI DEI program to the extent of previously taking to Facebook and participating in interviews with the Washington Post condemning critics, especially alumni. The leadership of the VMI Alumni Association has supported the VMI administration in attacking critics, leading recently to a growing number of alumni attempting to replace the Alumni Association Board with new members who are more transparent and moderate.

The situation at VMI has grown so ominous, and the atmosphere there so negative, anti-male, and anti-military, that, in a separate action, a petition was initiated that received the support of over 1,100 individuals, consisting of VMI alumni, parents, and others, asking the Virginia Attorney General to investigate. In other separate appeals to the Governor and Attorney General, VMI alumni, cadets and parents, together with attorneys representing cadets and national student rights organizations, have raised serious allegations of the VMI administration repressing **the First Amendment Rights** of cadets, including Free Speech, additionally, the VMI Alumni Association has been alleged to have engaged in censoring alumni. The allegations include documented instances of interfering with attempts to bring these issues to the attention of the VMI BOV and alumni.

The Court's decision now allows CAI's lawsuit to go forward, thus providing the opportunity for a full and open review of the significant allegations that have been made. It should also be noted that VMI agreed it would not award the DEI contract until such time as the case has been fully adjudicated, and a final judgment rendered by the court.

In a statement to the *Washington Post* on behalf of VMI soon after the election when former-Governor Ralph Northam gave a speech at the school that raised criticism because cadets were forced to attend and no alumni allowed to attend, VMI's official spokesperson, Bill Wyatt, VMI's Communications Director, doubled down on pushing forward with Northam's policies stating to the *Post*, "General Wins is definitely very ambitious. He's very

invested in VMI. He is not afraid to come in and shake things up and make decisions and move the ball forward,' Wyatt said. ` **I think that it would be silly for the past 18 months, going through a leadership change and a new plan, I think it would be silly to roll all that back just because of the results of an election.**”<sup>1</sup> [Emphasis added]

As reported in a July 2, 2022 Washington Post article, Col. Bill Wyatt, VMI spokesperson, stated the language of the new Virginia General Assembly budget appropriation for VMI appears to come with a caveat that the money may not be used to fund the expansion of VMI's Chief Diversity Office and DEI program. but VMI, again, plans to push forward, regardless of the General Assembly's findings: "It was an expense we were hoping the state would fund," Wyatt said. **"But in the absence of state funding, we'll find a way to fund it."**<sup>2</sup> [emphasis added] It remains open if VMI intends to by-pass the Court's ruling by finding a way to move forward with the DEI training RFP despite the decision. Will unknowing VMI alumni donors' unrestricted donations to the VMI Foundation be diverted to the fund the expansion of VMI's Chief Diversity Office and DEI program as part of Mr. Wyatt's declaration just a month ago that "...in the absence of state funding, we'll find a way to fund it."

According to VMI BOV records, during her July 26, 2022 presentation to the BOV, CDO LTC Love stated that VMI plans to conduct the DEI training in 17 cadet sessions plus 2 makeup sessions in the upcoming academic session. No change was announced as a result of the Court decision.

VMI has also repeatedly misrepresented CAI's lawsuit and the intent of CAI's President, a VMI alumnus, as intending to stop needed changes to racial and gender issues at VMI and for some personal benefit. VMI's argument fails to disclose that neither CAI nor its President can ever recover the substantial funds spent to litigate the case. The only possible outcome under Virginia law is for the contract award to be cancelled and, so that any future VMI procurements, to include DEI training, would be fair, open, transparent, and free of arbitrary and capricious awards, thereby complying with the VPPA as the General Assembly intended.

Sources:

<sup>i</sup> <https://www.vmi.edu/media/content-assets/documents/bov/Statement-of-Governance.pdf>

<sup>ii</sup> See CAI complaint Exhibit 50.

<sup>iii</sup> See CAI complaint Exhibit 51.

<sup>iv</sup> See CAI complaint Exhibit 49.

<sup>v</sup> See CAI complaint Exhibit 49.

<sup>vi</sup> See CAI complaint Exhibit 49.

vii See CAI complaint Exhibit 49.

viii See CAI complaint Exhibit 59.

ix <https://www.kanopy.com/en/benbrooklibrary/video/128008>

<sup>1</sup> [https://www.washingtonpost.com/local/youngkin-vmi-northam-racism/2021/11/12/718cdb8a-419e-11ec-a88e-2aa4632af69b\\_story.html](https://www.washingtonpost.com/local/youngkin-vmi-northam-racism/2021/11/12/718cdb8a-419e-11ec-a88e-2aa4632af69b_story.html)

<sup>2</sup> <https://www.washingtonpost.com/dc-md-va/2022/07/02/vmi-board-youngkin-racism-sexism/>