

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

ACCUTYPE SERVICES, INC.

Plaintiff

v.

DEPARTMENT OF GENERAL SERVICES

Defendant.

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Case No. CL1700069400

BRIEF IN SUPPORT OF DEMURRER

The Commonwealth of Virginia's Department of General Services (DGS) states as follows in support of its previously-filed demurrer.

INTRODUCTION

Accutype challenges DGS's awards of a contract for medical transcription services. DGS's Demurrer concerns Accutype's claims with respect to the primary contract award, to the lowest-priced bidder, Diskriter. Accutype's claims as to the secondary contract award (to McClatchey and Associates) are not part of the Demurrer. The Demurrer should be sustained for two reasons. First, DGS's invitation for bids (IFB) and Diskriter's bid, which are properly before this Court, show that Diskriter's bid was responsive. Second, a claim like Accutype's that a contractor is not responsible (*i.e.*, cannot perform in compliance with the requirements), or that the contractor will not perform in compliance with requirements, is not a proper basis for protest or for this appeal of DGS's protest denial. This brief first summarizes the relevant statutory provisions, standard of review, and material facts at this stage.

THE VIRGINIA PUBLIC PROCUREMENT ACT

The Virginia Public Procurement Act, Va. Code §§ 2.2-4300 Chapter 43 of Title 2.2 of the Code of Virginia (the Act or the VPPA), requires that public contracts be awarded after a public body has used one of two statutory methods of competition – competitive sealed bidding

or competitive negotiation. Va. Code § 2.2-4303(A).

This case does not involve competitive negotiation, where vendors propose different ways to accomplish the aim of a solicitation “indicating in general terms” what the procuring public body seeks. *See* Va. Code § 2.2-4302.2(A)(1). The process here was competitive sealed bidding, in which a public body issues an “Invitation to Bid” (a.k.a. invitation for bids, or IFB) that contains or incorporates by reference “the specifications and contractual terms and conditions applicable to the procurement” and that solicits bids in which vendors agree to provide the requested goods or services under the stated terms and conditions at a particular price. Va. Code § 2.2-4302.1(1). After public notice of the solicitation, bids are submitted, opened publicly, and evaluated “based upon the requirements set forth in the [IFB].” Va. Code § 2.2-4302.1(4). The procuring public body awards a contract “to the lowest responsive and responsible bidder.” Va. Code § 2.2-4302.1(5).

A “[r]esponsive bidder” “means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.” Va. Code § 2.2-4301. A bid may be responsive even if there is a slight omission or variation, known as an “informality,” because “[a] public body may waive informalities in bids.” Va. Code § 2.2-4319(B). An informality is “a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid” that “does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.” Va. Code § 2.2-4301.

A “[r]esponsible bidder” “means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.” Va. Code § 2.2-4301. The Act sets forth specific requirements and procedures that govern determinations

regarding whether a bidder is responsible. *See* Va. Code § 2.2-4359.

After the procuring public body makes an award or a decision to award, a losing bidder may submit a protest of that award decision to the public body. Va. Code § 2.2-4360(A). If the public body denies the protest, its decision is final unless the protestor “appeals within ten days of receipt of the written decision ... by instituting legal action as provided in § 2.2-4364.” *Id.* In such an appeal, like this one, the public body’s decision “shall be reversed only if the petitioner establishes that the ... award is not (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid...”. Va. Code § 2.2-4364(C).

The Act does not permit disputing a bidder’s responsibility via protest. *See* Va. Code § 2.2-4360(A) (“No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror.”); Va. Code § 2.2-4359(C) (“A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the provisions of § 2.2-4360.”).

DEMURRER STANDARD OF REVIEW

When considering a demurrer, the Court and litigants accept the truth of “all properly pleaded material facts” in a complaint, and “[a]ll reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.” *E.g., Dodge v. Trs. of Randolph-Macon Woman's College*, 276 Va. 1, 5, 661 S.E.2d 801, 803 (2008). But the Court and litigants do not accept the truth of “the pleader’s conclusions of law.” *Id.* Also, the Court “may ignore a party’s factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings,” either by attachment to a complaint or through a motion craving oyer. *Id.*

THE DOCUMENTS BEFORE THE COURT

The documents before the Court for this Demurrer are: the Complaint, the IFB (Exhibit A to the Motion Craving Oyer, reattached here for convenience as Exhibit A), Diskriter's bid (Exhibit B to the Motion Craving Oyer, reattached here as Exhibit B), Accutype's protest (Exhibit 2 to the Complaint, reattached here as Exhibit C), and DGS's written decision denying Accutype's protest (Exhibit F to the Motion Craving Oyer, reattached here as Exhibit D).

SUMMARY OF MATERIAL FACTS

1. The procurement at issue

Through its Division of Purchases and Supply, DGS is the state agency with central responsibility for procurement (other than procurement of information technology). *See* Va. Code § 2.2-1110(A). Among other things, DGS issues regulations governing state procurement (*see* Va. Code § 2.2-1111(A)), maintains the state's central electronic procurement system (*see* Va. Code § 2.2-1110(A)), and executes state contracts (*see* Va. Code § 2.2-1115(A)), which are available for use by other governmental entities.

DGS issued the IFB, which sought bids for medical transcription services. *See* Compl. ¶¶ 2, 6, 7. DGS received a number of responsive bids. *Id.* ¶ 9. Diskriter's bid had the lowest price. *See id.* ¶¶ 9-10. DGS made the primary contract award to Diskriter. *See* Compl. ¶ 29.

2. Accutype's protest and DGS's response

Accutype timely protested the award. Compl. ¶ 18. Accutype's protest identified two purported defects in Diskriter's bid, which Accutype contended made Diskriter's bid non-responsive: that Diskriter supposedly "failed to address the mandatory requirement that all work connected with or resulting from the Contract be performed within the United States," and that Diskriter "failed to identify the annual contract dollar expenditure amount" on the form

concerning plans for utilization of certified small businesses. Accutype Protest (Ex. C) at 1-2.

DGS issued a timely, written decision denying Accutype's protest. *See* Compl. ¶ 19.

DGS deemed the absence of an annual contract dollar expenditure on the small business form an informality, noting that "the Small Business Plan was not assigned any weight in the evaluation criteria and decision." DGS Decision (Ex. D) at 1. DGS denied that Diskriter had failed to address the requirement that work be performed in the United States because, "[b]y Diskriter responding to and signing their bid, they have agreed to all of the terms and conditions in the Invitation for Bids." *Id.* at 2. DGS also noted that questions concerning a vendor's possible future performance or contractual compliance were not a proper ground for protest, because procurement protests "concern an agency's procurement process and decision," not "a vendor's possible future performance or contractual compliance." *Id.* at 1.

3. Accutype's appeal to this Court

Accutype timely appealed to this Court the denial of its protest by DGS. In its Complaint, Accutype alleges that the bids of the two vendors who finished ahead of Accutype (Diskriter and McClatchey) "did not comply with all of the requirements set forth in the IFB" (Complaint ¶ 27) such that "[i]t was therefore a violation of the [Virginia Public Procurement] Act to award the Contract to Diskriter, and to make a secondary award to McClatchey." *Id.* ¶ 28.¹ For the same reasons, Accutype alleges that the awards were also arbitrary and capricious. *Id.* ¶ 29. Accutype seeks declaratory judgment and/or mandamus finding that the contract awards were legally improper and are "therefore void." Complaint at 4-5 (Prayer for Relief ¶ (a)). Accutype also raises the possibility of "further relief" (*id.* at 5 [Prayer for Relief ¶ (b)])

¹ DGS awarded the contract to Diskriter, with secondary (or backup) contract awards to McClatchey and Accutype, in that order. The Act permits procuring agencies to make awards to more than one bidder. *See* Va. Code § 2.2-4302.1(5).

and asserts that the award should “be cancelled, and the project either re-bid or awarded to the lowest responsive bidder.” *Id.* ¶ 29.

4. The IFB and Diskriter’s bid

The IFB and Diskriter’s bid are before the Court. The IFB provides that “[a]ll work connected with the Contract resulting from this solicitation will be performed within the United States of America.” IFB (Ex. A) at 3. That sentence appears in an unnumbered paragraph at the beginning of section III, which is entitled “Mandatory Requirements (Scope of Work).” *Id.* Section III covers pages 3-8 of the IFB and has subsections designated A – Z.

The IFB provides that a complete bid must include a signed copy of page 1 of the IFB, as well as certain other materials. *See* IFB (Ex. A) at 12 (“Bidder Information and Submission Instructions”). Above the signature section, page 1 confirms that the vendor’s signature and bid submission constitutes agreement to all of the terms and conditions of the IFB:

In compliance with this IFB and to all the conditions imposed therein, the undersigned hereby offers and agrees to furnish all services at the bid prices(s) indicated. I certify that I am authorized to sign this bid.

IFB (Ex. A) at 1.

Diskriter’s bid is Exhibit B. It was signed by the Diskriter CEO, on page 1, under the above text confirming Diskriter’s agreement to the IFB’s terms and conditions. *See* Diskriter Bid (Ex. B) at 1.

ARGUMENT

I. As the IFB and Diskriter’s bid show, Diskriter’s bid was responsive because Diskriter agreed to the terms and conditions in the IFB.

Now that the IFB and Diskriter’s bid are before the Court, the record clearly shows that Diskriter agreed unconditionally to the terms and conditions in the IFB. *See* Diskriter Bid

(Ex. B) at 1. Diskriter's bid does not contradict or qualify that agreement.² Diskriter's bid does not state, or even imply, that Diskriter will not comply with the work location requirement. Diskriter's bid, in short, was responsive, and Accutype's allegation that Diskriter's bid was "facially deficient" (Compl. ¶ 28) must be discarded.

The most Accutype can possibly say about the content of Diskriter's bid is that Diskriter did not give a narrative response to the work location requirement in the same way that Diskriter did for other requirements in the IFB. *See* Diskriter Bid (Ex. B) at 7 (reprinting and discussing requirements A & B but not the unnumbered work location requirement). Diskriter's discussion of the requirements was unnecessary – bids were not required to discuss each requirement. *See* IFB (Ex. A) at 1, 12 (describing the required bid submission materials). And the absence of a narrative response to the work location requirement does not negate that requirement or undermine Diskriter's unqualified agreement to the terms and conditions of the IFB.³

II. Questioning whether Diskriter can or will actually abide by the work location requirement is not a valid basis for protesting an award or bringing this appeal.

Accutype's claim in this case is that the price in Diskriter's bid and certain other factual information alleged in the Complaint provide reason to question whether Diskriter can or will

² Even if Diskriter had attempted to change the effect of its agreement, such an attempt would have been ineffective. Bidders had no power to modify the terms and conditions in the IFB. The IFB reserves the right for the Commonwealth to decide whether modifications or additions make a bid non-responsive (*see* IFB (Ex. A) at 15, § VI(H)) and states that "Any revision to the solicitation will be made only by addendum issued by the buyer." IFB (Ex. A) at 15, § VI(I).

³ In one brief sentence, Accutype's protest raised a second issue related to Diskriter's bid: the absence of "the annual contract dollar expenditure amount" on a small business plan form. *See* Accutype Protest at 2. Accutype's Complaint does not contain any allegations pertaining to the small business amount issue, and there is no basis in the record to question DGS's determination that the absence of the amount was an informality. *See* DGS Decision at 1. As discussed above, Va. Code § 2.2-4319(B) expressly permits waiver of informalities, so that informality does not affect whether Diskriter's bid is responsive. *See* Va. Code § 2.2-4301 (defining a "responsive bidder" as one whose bid "conforms in all *material* respects to the [IFB]") (emphasis added). Accordingly, Accutype has not stated a claim with respect to that ground of protest either.

abide by the requirement that all work be performed in the United States. *See* Compl. ¶¶ 10-12 (discussing price and alleging that “the only way to perform transcription work” at the price bid by Diskriter “is to outsource the transcription work to another country”), ¶¶ 14-16 (suggesting that Diskriter may subcontract the work and that a subcontractor may outsource it, a proposition supported only by allegations that “Diskriter appears to be affiliated with” another company, ClairSol, that is headquartered in New Jersey). The Virginia Public Procurement Act does not permit such a claim.

A. The Act expressly bars a claim that Diskriter is not capable of performing in compliance with the work location requirement.

As discussed above, Va. Code § 2.2-4360(A) permits losing bidders to submit a protest of an award or a decision to award a public contract, and then to appeal an agency’s denial of that protest as provided in Va. Code § 2.2-4364. But § 2.2-4360(A) expressly limits the grounds for protest by providing that “No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror.” A responsible bidder is a bidder “who has the capability, in all respects, to perform fully the contract requirements.” Va. Code § 2.2-4301. Under the plain and unambiguous terms of the Act, a losing bidder, such as Accutype, may not protest on the grounds that the winning bidder, Diskriter, lacks the capability to perform fully the contract requirements, such as the work location requirement. The Act’s explicit bar on such claims in protests necessarily means that the protestor cannot appeal a protest denial on the basis of such a claim.

Sovereign immunity bars all claims for relief (at law and in equity) against the Commonwealth, except as specifically provided otherwise by the legislature. *See Afzall v. Commonwealth*, 273 Va. 226, 230-31, 639 S.E.2d 279, 281-82 (2007). “A waiver of immunity cannot be implied from general statutory language but must be explicitly and expressly announced in the statute.” *Id.* at 230, 639 S.E.2d at 281 (internal quotation marks omitted). The

Act “constitutes a waiver of public bodies’ sovereign immunity, is in derogation of the common law, and, therefore, must be strictly construed.” *Sabre Constr. Corp. v. County of Fairfax*, 256 Va. 68, 73, 501 S.E.2d 144, 147 (1998).

Here, the Act explicitly limits claims by barring protests based on a purported lack of capability to perform the contract requirements. Compliance with that limitation is essential to a claim under the Act. *See id.* at 72, 501 S.E.2d at 147 (“When a special limitation is part of the statute creating the substantive right, the limitation is not merely a procedural requirement, but a part of the newly created substantive cause of action. The special limitation is a condition precedent to maintaining the claim and failure to comply with it bars the claim.”) (citation omitted). Accutype’s attempt to challenge Diskriter’s ability to perform in compliance with the work location requirement is legally invalid.

B. The Act does not permit claims based on predictions about contractual noncompliance.

Accutype may attempt to portray its claim as one alleging that there is reason to believe that Diskriter will not comply with the work location requirement, as opposed to a claim that Diskriter is incapable of complying. But such an attempt would not save Accutype’s claim.

Protests under the Public Procurement Act, and appeals of agency decisions denying protests, are designed to allow vendors to demand that agencies’ procurement processes and decisions comply with the Act and the solicitation (the IFB or Request for Proposals). *See* Va. Code § 2.2-4360(A) (permitting protests of “the award or decision to award a contract”); Va. Code 2.2-4364(C) (providing that a public body’s denial of a protest may be reversed on appeal “only if the bidder establishes that *the decision of the public body* was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.”)

(emphasis added). Diskriter's future contractual performance and compliance is a separate matter for DGS to address as needed during the term of the contract. The Act does not create or permit any private right of action by a competitor to assert that a state contractor is non-compliant, so such a claim is barred by sovereign immunity.

III. Accutype has not alleged any other claim concerning the award to Diskriter.

In its Prayer for Relief, Accutype's Complaint contains a passing mention of the constitutional rights of equal protection and due process. There are no other invocations of constitutional rights, nor any allegations concerning constitutional rights, anywhere else in Accutype's Complaint. To the extent Accutype wishes to make a constitutional claim, the cursory mention of constitutional rights in a Prayer for Relief is insufficient. The Complaint fails to state an equal protection or due process claim upon which relief may be granted.

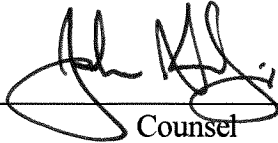
Subparagraph "b" of the Prayer for Relief is an apparently boilerplate request for "[s]uch further relief as the Court deems necessary or proper in this matter." To the extent Accutype seeks relief other than a judgment as to the propriety of the contract award to Diskriter, no such relief is available as a matter of law. The Virginia Public Procurement Act does not permit a directed award to Accutype, a declaration that the contract is "void," or an order dictating what a public body must do with respect to future procurement or re-procurement, so any such "other relief" is barred by sovereign immunity. *See Afzall*, 273 Va. at 230-31, 639 S.E.2d at 281-82.

CONCLUSION

For the foregoing reasons, the Court should sustain the Demurrer and dismiss with prejudice Accutype's claims as to the award to Diskriter.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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CERTIFICATE OF SERVICE

I certify that, on January 26, 2017, I am serving a copy of the foregoing by mail, with a courtesy copy sent by email, to:

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