VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

CRH CATERING COMPANY, INC.	**)**	
Plaintiff	**)**	
v.	**)**	**Case No. CL15004246**
	)	
VA. DEPT. FOR THE BLIND AND VISION IMPAIRED	**)**	
Defendant.	**)**	

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

The Virginia Department for the Blind and Vision Impaired (DBVI) states as follows in opposition to CRH Catering Company, Inc.'s Motion for Preliminary Injunction (the Motion) and Memorandum in Support thereof (CRH's Mem.).

SUMMARY

Temporary injunctive relief should be denied for the following reasons:

1) Temporary injunctive relief is barred by sovereign immunity. The Virginia Public Procurement Act, Va. Code § 2.2-4300 *et seq.* (the Act) is a waiver of sovereign immunity that must be strictly construed. The Act is clear about what agency decisions may be appealed and the relief available. The Act does not give any right to challenge an agency's written determination that proceeding without delay is necessary to protect the public interest, and the Court should not accept CRH's invitation to rewrite the Act by substituting the Court's judgment for that of the agency. Moreover, the Act does not authorize temporary injunctive relief.

2) CRH emphasizes that temporary injunctions are used to protect the status quo, but the status quo cannot be preserved in this case. This is not a case of an agency moving to terminate a contract early. The current contract will expire naturally at the end of February 2016, regardless of the disposition of this Motion. There is no basis in Virginia law to require the

Commonwealth to extend the current contract or to allow CRH to continue performing services after the current contract expires. Indeed, the agency that holds the current contract – the Virginia Department of Transportation (VDOT) – is not even a party to this case.

3) CRH is not likely to succeed on the merits. DBVI's procurement was consistent with law and the Request for Proposals (RFP) and was far from arbitrary and capricious. DBVI's methodology for scoring the Small Business Utilization Plan criterion was approved by the central procurement authority, the Virginia Department of General Services (DGS); is reasonable; and was not required to be detailed in the RFP. DBVI took care to exclude Chant Connock from the evaluation and decision-making process, and there was no improper influence or input in the award decision. The winning vendor, Canteen Mid South Division (Canteen), made a fully compliant offer that the agency had good reason to conclude was best.

4) There is no irreparable harm to CRH, and a balancing of the hardships does not favor relief because CRH's supposed harms are speculative, if they exist at all. Regardless of the outcome of this case, CRH is not guaranteed a future state contract, and transition costs are not "damages" to CRH under either the Public Procurement Act or the current contract. By contrast, the risk to an important program and to the livelihood of citizens who are blind is real if DBVI cannot proceed with transition and thereby ensure continued services throughout the litigation.

5) Equity does not favor granting relief. CRH has been dishonest with both DBVI and this Court about its record under the current contract. CRH's dishonesty was a significant factor in the scoring, and CRH's unclean hands bar temporary injunctive relief.

6) The public interest does not favor undermining a critical public program and its supporting services by an injunction that would bar the Commonwealth from proceeding based on DBVI's procurement and award, especially given the fatal defects in CRH's case.

STANDARDS OF REVIEW

Standard of Review for Temporary Injunctive Relief

CRH proposes the four-factor test for preliminary injunctions in federal court, under which a plaintiff must make "a clear showing" "[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." *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-46 (4th Cir. 2009) (quoting *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20, 22 (2008)).[1] Indeed, CRH even advances outdated federal law that was rejected in a case that CRH cites. *Compare* CRH's Mem. at 11 (arguing CRH need show only "a 'grave or serious question' … instead of a likelihood of success") & 12 n.7 (same) *with The Real Truth About Obama*, 575 F.3d at 346-47 (a plaintiff must "make a clear showing that it will likely succeed on the merits at trial," a "far stricter" standard than "showing that 'grave or serious *questions* are presented'").

Virginia law allows "temporary injunctions," and neither the General Assembly nor the Supreme Court of Virginia has adopted the federal test. Va. Code § 8.01-628 provides that "No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." The Supreme Court has stated that "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008). When asked to adopt the federal test, the Supreme Court chose to express no view. *Id.* at 60 n.6., 662 S.E.2d 53 n.6.

[1] The Fourth Circuit's opinion in *The Real Truth About Obama* was vacated on other grounds by 559 U.S. 1089 (2010) and reissued in pertinent part by 607 F.3d 355 (4th Cir. 2010).

The 2015 unpublished order that CRH cites does not change the Virginia standard. To the contrary, citing Va. Code § 8.01-628 and quoting prior "extraordinary remedy" language, the Supreme Court wrote: "No single test is to be mechanically applied, and no single factor can be considered alone as dispositive. Instead a court must consider the totality of the circumstances and decide whether equity counsels for the temporary preservation of the status quo."[2]

As argued *infra*, the Commonwealth does not agree that the Court has the power to grant a temporary injunction in this case. And any decision on temporary injunctive relief must apply the Virginia standard. The Commonwealth does agree, however, that the federal factors may help illuminate "the nature and circumstances of [the] particular case," so as to determine whether the "extraordinary remedy" of a temporary injunction should be granted.

Standard of Review in a Procurement Appeal

An agency's denial of a protest "shall be final unless the bidder or offeror appeals within ten days … by instituting legal action as provided in § 2.2-4364." Va. Code § 2.2-4360(A).

The agency's decision "shall be reversed only if the petitioner [CRH] establishes that the proposed award or 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 and conditions of the … [RFP]." Va. Code § 2.2-4364(C).

An action is arbitrary or 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." *Prof'l Bldg. Maint. Corp. v. Spotsylvania Sch. Bd.*, 283 Va. 747, 754, 725 S.E.2d 543, 548 (2012). Showing

[2] *Commonwealth ex rel. Bowyer v. Sweet Briar Institute*, no. 150619 (June 9, 2015) at 5, *available at* http://www.courts.state.va.us/courts/scv/orders_unpublished/150619.pdf.

a basis for reasonable disagreement with an agency decision, or that an agency had other valid options, is insufficient to establish that the decision was arbitrary or capricious. *See City Council v. Wendy's of W.Va.*, 252 Va. 12, 18, 471 S.E.2d 469, 473 (1996) (if it was possible for "objective and reasonable persons to reach different conclusions," then the challenged action "was reasonable, not arbitrary and capricious").

FACTS

CRH provides highway rest stop vending services under a state contract with VDOT. The current contract expires February 29, 2016. Ex. D-1 (Declaration of Martin Krebs) ¶¶ 3, 5.

VDOT is dissatisfied with CRH's performance under the current contract, due to many payment-related problems with CRH and due to CRH's failure to deploy technology to monitor and provide access to sales data. *Id.* ¶ 8. After CRH failed to pay the Commonwealth almost half a million dollars over two years, VDOT issued a formal notice in July 2014 that found CRH had "violated the subject contract due to non-payment." After that breach and cure notice, CRH paid the withheld amounts. *Id.* ¶ 8(a) & Ex. C at 1. Notwithstanding its desire to end the current contract, VDOT has waited for DBVI to complete the procurement process. *Id.* ¶ 9.

As the federal Randolph-Sheppard Act and Virginia law require, DBVI helps persons who are blind or vision impaired achieve their maximum level of employment, education, and personal independence. The Randolph-Sheppard Act and Va. Code § 51.5-89 give qualified persons an opportunity to operate businesses on federal and state property by granting DBVI a priority on such property, on behalf of such persons. The rest stop vending services contract revenue supports DBVI's Business Enterprise Program by financing health insurance and operations supporting vendors who are blind. *See* Ex. D-2 (Declaration of Matthew Koch) ¶¶ 3, 31(b) & Ex. R at 2; *see* Va. Code § 51.5-97. DBVI provides services in part through Business

Opportunities for the Blind, Inc. (BOB), DBVI's "nominee", a nonprofit entity designated by "written agreement to act as [DBVI's] agent in the provision of services to blind licensees under the State's vending facility program." Ex. D-2 (Koch Decl.) ¶ 3 (quoting 34 C.F.R. § 395.1(l)).

DBVI's initial procurement attempt, which is not at issue in this case, ended in January 2015. After Canteen prevailed, CRH protested, alleging *inter alia* that there was bias and impropriety because two members of the initial procurement attempt evaluation committee were employed by Canteen in the past, prior to becoming BOB employees. DBVI did not agree with CRH's allegations but wanted to procure without any appearance of impropriety and so decided to cancel the initial procurement attempt and re-procure. Ex. D-2 (Koch Decl.) ¶ 5.[3]

On February 27, 2015, DBVI published RFP no. 002-15PJT, beginning the procurement at issue. DBVI chose a new evaluation committee and screened the former Canteen employees from the process. *See id.* ¶¶ 6-8, 30(b); Ex. D-3 (Declaration of Chant Connock) ¶¶ 8-9.

DBVI received five proposals by the April 2 closing date. Initially, the evaluation committee members individually scored the proposals based on only the proposals themselves. *See* Ex. D-2 (Koch Decl.) ¶¶ 10-11; RFP (Ex. 5 to CRH's Mem.) at 13 (listing the criteria and their weights). DBVI then corresponded with the top three offerors to obtain more information and checked their references and experience from other customers that had experience with each company. For CRH, the reference check included VDOT. Ex. D-2 (Koch Decl.) ¶¶ 12-13. In June, the evaluation committee met and developed a consensus scoring, in which the evaluation committee reduced CRH's score on the "Experience and Qualifications" criterion by 5 points, from 19.5 to 14.5, due to VDOT's unfavorable evaluation and dishonesty by CRH. *Id.* ¶¶ 14-15.

[3] No Virginia law forever bars public employees from procurement involving former employers, and it is far from clear there was any actual impropriety in DBVI's initial procurement attempt. It is often easier, however, to cancel and re-procure than to litigate with a contentious vendor.

In CRH's May 28, 2015 response to DBVI's May 27 letter, CRH claimed that it "never received an 'official delinquency' notification from VDOT," minimizing the payment problems under the current contract. Ex. F to Koch Decl. at 3. In fact, CRH's June 1 letter was the second time CRH had claimed the payment issues did not rise to breach of contract.[4] But by June DBVI had obtained VDOT's July 29, 2014 "Notice of Contract Deficiency," which expressly found CRH "to have violated the subject contract due to non-payment" (Ex. C to Krebs Decl. at 1), so DBVI knew CRH was being less than honest *See* Ex. D-2 (Koch Decl.) ¶ 15.

The evaluation committee then invited the top two offerors, Canteen and CRH, to make presentations, and both did so in person on July 13, 2015. Two VDOT representatives were also present at both presentations. CRH had a full and fair opportunity to present information, and the evaluation committee considered all information provided. The procurement file notes the presentations. *See* Ex. D-2 (Koch Decl.) ¶¶ 17-18, 22, 30(c); Ex. D-1 (Krebs Decl.) ¶ 10(c).

DBVI then wrote to Canteen and CRH, the two highest scoring offerors thus far, noting the procurement had reached the "competitive negotiation" process's second phase, which occurs after an agency selects two or more offerors with whom to negotiate. *See* Va. Code § 2.2-4302.2(A)(3). DBVI sought improvements in their offers and noted that "the committee will rescore each of the finalists" upon completion of the negotiations phase. Both Canteen and CRH improved their offers. *See* Ex. D-2 (Koch Decl.) ¶¶ 20-21 & Ex. M at 1.

In late August, the evaluation committee met and completed final consensus scoring for Canteen and CRH. CRH's final "Experience and Qualifications" score was lowered to 10.5, based on CRH's failure (in its presentation and the written negotiations) to address the

[4] CRH's proposal admitted "a delinquency in the timeline of payment" but claimed that "neither CRH nor subcontractors have ever received notice of default in its contractual obligations" and that CRH "never failed to make a payment." Ex. 10 to CRH's Mem. at 51.

committee's concerns about the performance problems under the current contract, about CRH's commitment to customer service, and about the vendor-agency relationship. *See* Ex. D-2 (Koch Decl.) ¶¶ 23-24. Canteen had the highest final score. *Id.* ¶ 25 & Exs. P & Q. Canteen would still have had the highest score (albeit by a smaller margin) even if CRH's Experience and Qualifications score had remained at 14.5.

Regarding the Small Business Utilization Plan criterion, the RFP included the weight that criterion was given (20 out of 100 points). *See* RFP (Ex. 5 to CRH's Mem.) at 13. Per DGS regulations, the evaluation committee awarded CRH, a certified small business, the full 20 points, and non-certified offerors were eligible for only 15 (75%) of the points assigned to the criterion. Ex. D-2 (Koch Decl.) ¶ 16.[5] After discussion of how to score the small business criterion for a revenue-generating contract, the evaluation committee consulted with DGS[6] and received confirmation that the planned scoring approach was appropriate. Ex. D-2 (Koch Decl.) ¶ 16(b); Ex. D-5 (Declaration of Ronald L. King) ¶¶ 3-6. The evaluation committee awarded 15 points to the non-certified offeror who proposed the highest small business subcontracting dollar amount – Aramark – and divided that amount by 15 to create a clear, mathematical scale for how many points to assign to lower amounts of proposed small business subcontracting. The amount of small business subcontracting offered initially by Canteen qualified for 12 points, but Canteen also qualified for 15 points after raising its small business subcontracting commitment. Ex. D-2 (Koch Decl.) ¶ 16(c) & Ex.P (a final summary including the amounts point scale).

Canteen's small business subcontracting numbers are based on Canteen's direct

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5 *See* DGS, Agency Procurement and Surplus Property Manual (last updated July 1, 2015) (APSPM) at § 7.2(j), *available at* https://eva.virginia.gov/pages/eva-aspm-manual.htm (portions attached as Exhibit D-4). The APSPM is a set of regulations. *See* 1 VAC 30-130-10.

6 DGS is the central procurement authority for non-technology goods and services. *See* Va. Code §§ 2.2-1110 & 2.2-1111.

subcontracts. Ex. D-6 (Declaration of Brenda Gobble) ¶ 5. The evaluation committee verified that those direct Canteen subcontractors were certified small businesses. Ex. D-2 (Koch Decl.) ¶ 30(f).[7] Subcontracting scoring and amounts were based on direct Canteen subcontractors, not on further levels of contractual delegation in which Canteen's subcontractors may engage. *Id.*; *see* Ex. D-6 (Gobble Decl.) ¶ 5. It is a regular practice in state procurements to base small business subcontracting scoring on direct subcontractors only. Ex. D-5 (King Decl.) ¶ 7.

Canteen's proposal included "real-time monitoring" technology to provide direct access to timely sales data. Ex. D-6 (Gobble Decl.) ¶ 6; *see* Ex. D-2 (Koch Decl.) ¶ 30(d).

DBVI posted its notice of intent to award to Canteen on September 9, 2015. CRH filed a protest, DBVI denied that protest, and this appeal by CRH followed. *Id.* ¶ 27.

On December 7, 2015, after considering the likely lawsuit duration, VDOT's decision not to extend the contract, revenue implications, the risk of not having rest stop vending services, and the risk of not beginning transition, DBVI made a written determination that proceeding without delay to award and transition was necessary to protect the public interest. Ex. D-2 (Koch Decl.) ¶ 28 & Ex. R. DBVI's counsel notified CRH's counsel that day. On December 8, DBVI posted a notice awarding the new contract to Canteen. *See* Ex. D-2 (Koch Decl.) ¶ 29 & Ex. S.

ARGUMENT

I. Sovereign immunity bars temporary injunctive relief to overturn a state agency's written determination that proceeding without delay is necessary.

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.*

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[7] The term "SWaM-certified" is an amalgamation of distinct certifications offered by the Virginia Department of Small Business and Supplier Diversity (DSBSD): Small (S), Women-owned (W), and Minority-owed (M). *See generally* DSBSD, SWAM Certification, *at* http://www.dmbe.virginia.gov/swamcert.html (last visited Jan. 5, 2016).

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 Public Procurement 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). CRH cites *Sabre* but immediately ignores it, arguing that the Act waives sovereign immunity broadly based on general language and "the legislative goal." *See* CRH's Mem. at 10. That argument cannot be reconciled with the Act itself or clear Virginia case law on sovereign immunity. The Court lacks jurisdiction to overturn DBVI's written determination that proceeding without delay is necessary.

A. The Public Procurement Act authorizes an agency to proceed without delay upon a written determination that doing so is necessary, and the Act does not authorize any appeal of such a determination.

The Act expressly permits proceeding with award and performance upon a written determination that doing so is necessary to protect the public interest. Such a determination is for the procuring agency to make, and the Act does not authorize an unhappy vendor to appeal.

Va. Code § 2.2-4362 is the most important section of the Act with respect to CRH's Motion. Section 2.2-4362 provides first that "[a]n award need not be delayed for the period allowed a bidder or offeror to protest." If there is a timely protest or legal action, § 2.2-4362 then creates a general rule with two express statutory exceptions: "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." As both its text and title ("Stay of award during protest") reflect, § 2.2-4362 concerns awarding the contract, which is an action taken by the procuring agency, not the Court. Section 2.2-4362 authorizes a procuring agency to determine that proceeding without delay is necessary. This Court overturning DBVI's determination would rewrite § 2.2-4362 and disregard its plain meaning.

CRH's blatant call for the Court to substitute its own determination for that of the agency cannot be reconciled with the Act as a whole, either. The Act carefully specifies who may appeal agency procurement decisions to circuit court and what decisions they may appeal. *See* Va. Code §§ 2.2-4364(A), (B), & (C). Section 2.2-4364 does not even hint at authorizing an appeal of a determination like the one DBVI made here. Nor does § 2.2-4360. Section 2.2-4360(A), which sets forth administrative and timing prerequisites to bringing suit in circuit court, establishes a specific and limited role for the Court. *See Sabre Constr. Corp.*, 256 Va. at 71, 501 S.E.2d at 147 ("By describing the alternatives available to the protesting bidder as 'appeals,' the General Assembly made it clear that the purpose of the action is to review the public body's written decision regarding the bidder's protest."). Section 2.2-4360 does not authorize appealing agency decisions other than protest denials or authorize temporary injunctive relief.

In sum, the Act has not waived sovereign immunity to allow CRH to appeal DBVI's written determination that proceeding with award of a contract and transition without delay is necessary to protect the public interest. Given that exhausting litigation routinely takes many months or even years, there is nothing exceptional about the legislature's express recognition that there may be a need to proceed with the public business in the interim.

B. There is no statutory authorization for temporary injunctive relief in procurement matters.

CRH's reading of § 2.2-4364(D) – as a broad authorization of temporary injunctive relief without restrictions – turns the basic approach required under Virginia law on its head. A waiver of sovereign immunity exists only if "explicitly and expressly announced in the statute." *Afzall*, 273 Va. at 230, 639 S.E.2d at 281. And statutory waivers "must be strictly construed." *Sabre Constr. Corp.*, 256 Va. at 73, 501 S.E.2d at 147.

Va. Code § 2.2-4364(D) does not conflict with or override § 2.2-4362, the more specific statute regarding the present circumstances. And § 2.2-4364(D) does not "explicitly and expressly" authorize temporary injunctive relief; instead, it provides only that **if** injunctive relief is granted, the court must require the posting of reasonable security if requested. The plain language of § 2.2-4364(D) is a conditional requirement for a bond where relief is otherwise authorized and granted, not a broad authorization of relief.[8]

In accordance with the rule of sovereign immunity, when the Act means to authorize relief, the Act is clear. For example, as noted, Va. Code § 2.2-4364(A) expressly authorizes a court to revisit an agency determination that the apparent low bidder is not a responsible bidder and, if the court finds otherwise, direct the agency to award the contract to that bidder. By contrast, no part of the Act explicitly and expressly authorizes temporary injunctive relief.

The legislature's decision not to waive sovereign immunity as to temporary injunctive relief in procurement cases is even clearer upon consideration of past procurement statutes. Prior to enactment of the Act (*see* 1982 Va. Acts ch. 647), former Va. Code § 2.1-437.3 did explicitly and expressly permit temporary injunctive relief. *See* Ex. D-7 at 3. The lack of any such statutory authorization now reflects a legislative decision not to authorize such relief.[9]

It is true that *MFS Network Tech., Inc. v. VDOT*, 33 Va. Cir. 406 (Richmond 1994), permitted temporary injunctive relief in a procurement case. But that case did not involve a

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[8] Va. Code § 2.2-4364(D) operates where the Act allows injunctive relief. For example, under § 2.2-4364(A), a court may order an agency to award to an apparent low bidder. Or, if a court makes a final determination that an agency's protest denial was contrary to law or arbitrary and capricious, the court may enjoin award or performance. *See* Va. Code § 2.2-4360(B).

[9] Were Plaintiff to argue that Va. Code § 8.01-628 authorizes temporary injunctive relief in this case, that would be incorrect. *See Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 427-28, 722 S.E.2d 626, 630-31 (2012) (noting and applying the position of the Attorney General that agencies are exempt from statutes of general applicability unless the statutes expressly extend to the state, which § 8.01-628 does not do).

determination under § 2.2-4362. Also, the opinion does not discuss sovereign immunity and predates the Supreme Court of Virginia's holding in *Sabre Construction Corp*. that sovereign immunity principles apply to the Public Procurement Act. The language from the *MFS Network* decision on which CRH relies – that § 2.2-4364(D) "refers to injunctive relief with absolutely no restriction" – fundamentally contradicts the approach to sovereign immunity that is required. Finally, unlike *MFS Network*, denying temporary injunctive relief does not prevent a meaningful final adjudication in this case. In *MFS Network*, the parties were implementing an automatic toll system for the Dulles Toll Road, a largely one-time task that could not be repeated after a final ruling; here, the contract is a time-based services contract that could be ended and re-procured.

Finally, there are good reasons the General Assembly granted agencies the written determination exception in § 2.2-4362. Without it, an unsatisfactory incumbent contractor – like CRH – has every incentive to use litigation to try to shackle the Commonwealth to its services. And it is the procuring agency, not the Court, that is the best judge of what is necessary to ensure the agency's continued ability to serve the public by operating its programs – in this case, providing critical support to persons who are blind. *See LaCava v. Commonwealth*, 283 Va. 465, 470, 722 S.E.2d 838, 840 (2012) ("decisions by administrative agencies are given deference when they fall within an area of the agency's specialized competence.").

II. Expiration of the current contract will alter the status quo, regardless of the disposition of the Motion.

It is true that preservation of the status quo is a normal function of temporary injunctions. But CRH's emphasis of that point ignores that the status quo is fleeting: the natural expiration of the current contract at the end of February 2016, only 47 days after the hearing. *See* Ex. D-1 (Krebs Decl.) ¶ 5. The expiration of the current contract is not within DBVI's control, and temporary injunctive relief will not and cannot avoid expiration.

CRH notes that "VDOT may once more extend CRH's current contract according to negotiated terms," and CRH has offered a six-month extension that it says would avoid loss of revenue. *See* CRH Mem. at 8 & Ex. 1.[10] But CRH has identified no legal basis to order VDOT – which is not even a party to this case – to extend the current contract or to allow CRH to continue performing services after expiration. Even if the current contract were extended for six months, litigation likely would not be complete by August 2016. The normal preservation of the status quo rationale for temporary injunctive relief simply does not apply here.

III. CRH is not likely to succeed on the merits because DBVI's procurement was in accordance with the law and the RFP and not arbitrary and capricious.

CRH has offered an incomplete and badly distorted view of DBVI's procurement and the governing law. Each of CRH's criticisms is refuted below. Because DBVI's award was not contrary to law or the RFP or arbitrary or capricious, CRH is not likely to succeed on the merits.

A. DBVI's small business scoring methodology was permissible and reasonable, and did not need to be fully detailed in the RFP.

CRH's claims that DBVI's scoring of the Small Business criterion contradicts the APSPM and that DBVI's adoption of the specific scoring methodology for that criterion after the procurement had begun contradicts the Public Procurement Act. Neither criticism has merit.

APSPM § 7.2(j) (Ex. D-4 at 3) addresses scoring of the Small Business criterion. DBVI followed that section. As a certified small business, CRH received the full 20 points. Non-certified offerors were eligible for only 15 (75%) of the points. To score the non-certified offerors, DBVI used a straightforward mathematical approach, based on relating the maximum points (15) to the highest proposed dollar amount of small business subcontracting. *See* p.8, *supra*. CRH claims that DBVI used the wrong relationship – that the APSPM required basing

[10] VDOT and CRH already have used three of the four extensions allowed in the current contract's "Period of Performance" section. *See* Ex. D-1 (Krebs Decl.) ¶ 5 & Ex. A at 1.

the scoring scale on CRH's proposal. CRH is wrong. Other than specifying the 75% maximum, APSPM § 7.2(j) does not dictate how to allocate points to non-certified offerors. APSPM Annex 7-B sets forth "Competitive Negotiation Step-by-Step Procedures" as "a guide." Ex. D-4 at 8. Even assuming, contrary to their "guide" terminology, that those procedures are mandatory, they do not address how to score the Small Business criterion for a revenue-generating contract.

The APSPM is written for "normal" contracts that involve cost to the procuring agency. Ex. D-5 (King Decl.) ¶ 4. Accordingly, the procedures in Annex 7-B, at Step 9 § III(E), describe relating the proposed small business subcontracting amount to the offeror's "total proposed price." Ex. D-4 at 16-17. In a revenue-generating contract, the Commonwealth has a net income, not a "total price." And unlike in a normal contract, there is not any direct or clear relationship between the proposed amount of small business contracting and the total value of the contract to the Commonwealth. Indeed, even CRH admits that the revenue-generating aspect "makes [rest area] contracts unlike other state contracts." (CRH's Mem. at 4 n.4.)

DBVI did not choose the only possible scoring method. CRH apparently would prefer that the amount of small business subcontracting be judged in relation to the contractor's total revenue. *See* CRH's Mem. at 2, 6 (asserting, without support, that only 10-15% of Canteen's revenue would go to small businesses). But the contractor's total revenue is variable based on sales, and the Commonwealth could reliably determine the total revenue only through the "real-time monitoring" technology that CRH refused to install on all machines under the current contract. Ex. D-1 (Krebs Decl.) ¶ 8(d). CRH's preference for another scoring methodology does not make DBVI's method contrary to law or arbitrary and capricious. *See Wendy's of W.Va.*, 252 Va. at 18, 471 S.E.2d at 473 (if it was possible for "objective and reasonable persons to reach different conclusions," then the challenged action "was reasonable, not arbitrary and capricious"). Critically, DBVI sought and received approval of its methodology from the central procurement authority, DGS. Ex. D-2 (Koch Decl.) ¶ 16(b); Ex. D-5 (King Decl.) ¶¶ 3, 6.

CRH's claim that Canteen and DBVI improperly counted Pepsi as a small business also fails. Canteen's proposed small business subcontracting was based on its direct subcontracts with certified small businesses. Ex. D-6 (Gobble Decl.) ¶ 5. DBVI verified that Canteen's direct subcontractors were in fact certified. Ex. D-2 (Koch Decl.) ¶ 30(f). Nothing in the Public Procurement Act or the APSPM requires examining the status of entities with whom the certified small business subcontractors might contract further, and it is normal practice to examine only one level of subcontracting. *See* Ex. D-5 (King Decl.) ¶ 7. It may be reasonable to argue that work ultimately done by a large business should be excluded, but the legislature and DGS have made the equally reasonable choice not to micromanage certified small businesses by penalizing them if they partner or contract with large businesses rather than performing work themselves.

Finally, DBVI was not required to determine and publicize a full scoring methodology at the time of the RFP. The Act specifically provides that a RFP must include only each criterion's point value: "In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the [RFP]…" Va. Code § 2.2-4302.2(A)(1). Indeed, prior to 2015 revisions, the Act did not even require a RFP to include each criterion's point value. *See* 2015 Va. Acts ch. 350. That the Act does not require an agency to determine and provide exhaustive detail about scoring methodology fits the nature of a RFP. RFPs are inherently general documents – if an agency knew all of the details of what it wanted, it would be able to procure via an invitation to bid.

The Act's general requirement that "the rules governing contract awards be made clear in advance" (§ 2.2-4300(C)) does not override the more specific requirements of § 2.2-4302.2, and

DBVI satisfied the Act's requirements by publishing all content required in the RFP. DBVI then adopted a straightforward and reasonable method of scoring the Small Business criterion, with the approval of DGS, and there is nothing to support CRH's claim that DBVI's method was adopted for the purpose of favoring Canteen. Although CRH asserts that the Small Business criterion scoring was outcome-determinative, CRH had a significant lead in the scoring based on that criterion. The outcome was actually determined by the Experience and Qualifications criterion, where CRH lagged in scoring based on its poor performance and dishonesty regarding the current contract. *See supra* at pp.5, 6-7, 7-8; Ex. D-2 (Koch Decl.) ¶¶ 15, 22-23, 30(c).

B. There was no improper influence or impropriety related to Chant Connock.

CRH asserts that DBVI's procurement was "infected by the appearance of impropriety," a claim supported by one instance of dirty or broken vending machines at a rest stop that Mr. Connock reported. *See* CRH's Mem. at 7. CRH subsequently provided its explanation of the situation, that information was circulated to the evaluation committee, and that maintenance issue was not part of the scoring. Ex. D-2 (Koch Decl.) ¶ 31(a) & Ex. T. Assuming for the sake of argument that CRH's meager evidence is adequate to show an appearance of impropriety, the evidence from DBVI and Mr. Connock shows that he had no actual involvement or influence in the evaluation, decision-making, and award. *See id.* ¶ 31(a); Ex. D-3 (Connock Decl.) ¶¶ 8-9. Such evidence is more than sufficient "to demonstrate that the apparent impropriety was illusory only, and that it did not have any actual impact on the selection process." *First Health Svcs. Corp. v. Va. Dept. of Info. Tech.*, 35 Va. Cir. 184, 194 (Richmond 1994).

C. Canteen's offer does include the requested "real-time monitoring."

CRH also claims – based on only a promise of future evidentiary support from a third-party (Pepsi) – that Canteen did not propose and cannot deliver real-time monitoring – *i.e.*, direct access to timely vending machine sales data. (CRH's Mem. at 14-15 & n.8.) CRH is wrong. Canteen's proposal included the requested monitoring, and Canteen will deliver such services. Ex. D-6 (Gobble Decl.) ¶ 6. If Canteen fails to deliver, Canteen will be contractually deficient and can be held accountable. There is no reason to credit CRH's remarkable claim that CRH has a better understanding of Canteen's services than the evaluation committee and Canteen itself.

D. DBVI did not disregard the facts.

Finally, CRH claims that DBVI engaged in "disregard of facts" by failing to explain why CRH's offer of an ACH automatic funds transfer would be inadequate to guard against a repeat of the payment problems that occurred under the current contract. (CRH's Mem. at 15.) CRH identifies nothing at all that required the evaluation committee to disregard CRH's deficient past performance in scoring the "Experience and Qualifications" criterion. *See* Ex. D-2 (Koch Decl.) ¶ 23. Moreover, the evaluation committee's scoring also reflected CRH's misleading accounts of the most significant payment dispute under the current contract (*see* p.7, *supra*, and § V, *infra*), VDOT's unfavorable assessment of CRH (*see* Ex. D-1 (Krebs Decl.) ¶¶ 8 & 10(a)), and the evaluation committee's conclusion that CRH's approach to the issues under the current contract did not demonstrate the relationship and customer-focused commitment that DBVI reasonably wants and expects from a key contractor. *See* Ex. D-2 (Koch Decl.) ¶ 30(c). Even if payment via ACH would fix payment timing issues, ACH does not solve other problems under the current contract or CRH's combativeness and dishonesty. In short, CRH's claim that the evaluation committee engaged in an arbitrary or capricious disregard of facts ignores reality.

IV. There is no irreparable harm to CRH, and a balancing of the hardships does not favor granting temporary injunctive relief.

The harms CRH claims are: (i) loss of the new contract; (ii) the costs of transition upon expiration of the current contract; and (iii) the costs of transition back to CRH assuming that

CRH wins this case and wins the new procurement that would result thereafter. None of those are valid, non-speculative harms attributable to DBVI, much less the "irreparable harm" and "lack of an adequate remedy at law" required for an injunction. *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 401, 732 S.E.2d 676, 686 (2012).

First, CRH is not entitled to the new contract. A final ruling for CRH in this case would result in a new procurement, which CRH is not guaranteed to win. Second, the transition costs upon expiration of the current contract are a normal part of that contract, not damages to CRH. Third, the costs of transition back to CRH – which necessarily assumes that CRH wins this case and also wins the new procurement thereafter – are speculative. Perhaps most importantly in the temporary injunction context, all of CRH's claimed harms boil down to monetary damages that, as a matter of law, do not justify injunctive relief and likely are not permissible at all.[11]

V. CRH has unclean hands, and equity does not favor granting relief.

Under long-standing principles of Virginia law, a litigant may not obtain equitable relief, much less the "extraordinary remedy" of a temporary injunction, unless the litigant has clean hands. *E.g., Cline v. Berg*, 273 Va. 142, 147-48, 639 S.E.2d 234, 233-34 (2007). Dishonesty is a classic example of unclean hands. *See id.* (quoting *Richards v. Musselman*, 221 Va. 181, 185, 267 S.E.2d 164, 166 (1980)). CRH has misrepresented a material fact, so the doctrine of unclean hands bars the requested injunctive relief.

As described *supra* (at p.7), CRH made statements to DBVI about problems under the current contract that were less than fully truthful, if not outright misrepresentations. Remarkably, CRH's Complaint contains an even clearer misrepresentation that illustrates CRH's dishonesty on a material issue and belies CRH's claim that it "has done nothing wrong in this

[11] The lack of authorization for expectations and transition damages in the Public Procurement Act means such claims are barred by sovereign immunity.

case." (CRH's Mem. at 17.) Paragraph 25 of CRH's Complaint states:

> Only by one email dated February 2014, has anyone ever contacted CRH about any allegedly untimely payments under its current contract. VDOT has never formally noticed CRH that it was in violation of the terms of its contract.

The second sentence is plainly false, and the first sentence is misleading at best. VDOT issued a formal "Notice of Contract Deficiency" on July 29, 2014, which expressly found CRH "to have violated the subject contract due to non-payment." Ex. D-1 (Krebs Decl.) ¶ 8(a) & Ex. C at 1. CRH's inaccurate and misleading attempts to minimize the problems under the current contract were material to DBVI's scoring. Ex. D-2 (Koch Decl.) ¶¶ 15, 22-23, 30(c). CRH's dishonesty, in the procurement and in this case, bars the extraordinary remedy of a temporary injunction.

VI. Particularly given the fatal defects in CRH's case, the public interest does not favor temporary injunctive relief.

To some extent, the public interest factor is intertwined with the merits of CRH's claims. Because CRH's claims are meritless, the public interest does not favor a temporary injunction.

But there is an independent public interest that must be considered and weighs strongly against an injunction. Vending services revenue provides essential support to a program on which several dozen persons who are blind depend for their livelihood and careers. *See* Ex. D-2 (Koch Decl.) ¶ 31(b). The current contract is ending, and VDOT is unwilling to extend it further. Even if VDOT were willing to accept CRH's offered extension, that extension would last only until August 2016, which is likely inadequate to ensure continuity of service. The public interest weighs strongly against subjecting the Business Enterprise Program, and the persons who depend on it, to the uncertainty that would result if DBVI cannot proceed without delay.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 6, 2015, I am serving a copy of the foregoing on the following by mail, with a courtesy copy sent by email:

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