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July 10, 2018

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In Re: JSB Enterprises LLC
dba The Shipping Emporium
v.
Commonwealth of Virginia
Department for Aging and Rehabilitative Services
Case No. CL18-294-00

Gentlemen:

This matter came to be heard on May 2, 2018, upon the Department for Aging and Rehabilitative Services' (hereinafter DARS) Demurrer filed on March 23, 2018.

The purpose of this letter is to provide the Court's ruling with respect to DARS' Demurrer. I have carefully considered the pleadings in this case as well as the relevant statutes and case law and I have fully considered the oral arguments of counsel and written briefs filed herein.

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PROCEDURAL HISTORY

On February 26, 2018, JSB Enterprises LLC dba The Shipping Emporium (hereinafter TSE) filed a Bill of Complaint against Defendant DARS pursuant to Virginia Code § 2.2-4360 appealing the decision of DARS to award a contract for shipping and carrier services to Riverside rather than to TSE. In its prayer for relief TSE prays that the Court (1) declare that TSE's protest was timely made under Virginia Code §§ 2.2-4360 and 2.2-4342; (2) reverse and set aside the award of the Contract to Riverside, and direct DARS to award the Contract to both TSE and Riverside in accordance with the RFP; and, (3) grant TSE such other and further relief as justice may require. In response thereto, DARS filed its Demurrer.

SUMMARY OF FACTS

On or about August 18, 2017, DARS issued a Request for Proposal (RFP) for a shipping contract for intrastate and interstate carrier services for the Department for the Blind and Vision Impaired, Virginia Industries for the Blind. The purpose of the RFP was to fulfill a need for intrastate and interstate carrier services to support the Department for the Blind and Vision, Virginia Industries for the Blind Production plants located in Richmond and Charlottesville, Virginia. The products to be shipped are non-hazmat, non-refrigerated dry goods consisting of such things as mattresses, pillows, and mops.

Paragraph V(B) AWARD TO MULTIPLE OFFERORS states that "[s]election shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals on the basis of the evaluation factors included in the Request for Proposals, including price, if so stated in the Request for Proposals. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the agency shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. The Commonwealth reserves the right to make multiple awards as a result of this solicitation. The Commonwealth may cancel this Request for Proposals or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia*, § 2.2-4359(D)). **Should the Commonwealth determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.** The award document will be a contract incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's proposal as negotiated."

TSE and Riverside Logistics, Inc. (hereinafter Riverside) submitted proposals to DARS under the RFP.

On December 15, 2017, DARS posted to its website the notice of its intent to award the Contract solely to Riverside. No notice was provided directly to TSE of this posting.

Upon learning of the posted notice, Jane Barnett, owner of TSE contacted DARS by email on December 22, 2017, in which she stated: "I see that there is a notice of intent in the eVA system but I have not heard back from you. My company is a better choice and we intend to request FOIA with the possibility of a Bid Dispute Protest, unless you have made us an offer.... The RFP calls for 1 or 2 vendors. Please

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provide us with more details & the Full FOIA to include a copy of Riverside Logistics FULL RFP within 10 business days...." By email on December 28, 2017, Robert Robinson, Buyer Specialist, responded on behalf of DARS and stated that the State had been closed since noon on December 22, 2017 until December 27, 2017. He further stated that DARS procurement unit was willing and able to make the documents available for inspection at 8004 Franklin Farms Drive, Henrico, VA 23229 as a FOIA request is not required to be delivered electronically. On February 5, 2018, TSE submitted a protest of DARS' decision to award to Riverside. On February 15, 2018, DARS issued a written decision denying TSE's protest.

On February 26, 2018, TSE filed its Complaint seeking an administrative review action against DARS who filed its Demurrer thereto on March 23, 2018.

DEFENDANT'S DEMURRER

As a threshold matter, "[a] demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of the factual allegations to determine whether the motion for judgment states a cause of action." *Fun v. Military Inst.*, 245 Va. 249, 252 (1993). In weighing the sufficiency of the Complaint to survive a demurrer the Court will separate the stated conclusion of law and merely accept the alleged material facts as true. *Ames v. American National Bank*, 163 Va. 1, 37-8 (1934); *see also Concerned Taxpayers v. Cnty. of Brunswick*, 249 Va. 320, 327 (1995) ("A demurrer does not permit the trial court to evaluate and decide the merits of the claim set forth in a . . . complaint.").

TSE seeks dismissal of this case with prejudice on the following grounds: (1) TSE's proposal was not timely filed; (2) the RFP did not require multiple contract awards; (3) TSE's Complaint fails to state a claim because TSE has not alleged that the scoring violates the law, is contrary to the RFP, or is arbitrary or capricious; and, (4) a directed award to TSE is not permitted by the Virginia Public Procurement Act and is, therefore, barred by sovereign immunity.

Virginia Code § 2.2-4300(C) provides, in part, that "all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded."

"Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the public body in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal." Virginia Code § 2.2-4360(A).

Paragraph VIII(R) of the RFP provides that "[u]pon the award or the announcement of the decision to award a contract as a result of this solicitation, the purchasing agency will publicly post such notice on the DGS/DPS eVA VBO (www.eva.virginia.gov) for a minimum of 10 days."

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Here, it is uncontested that on December 15, 2017, DARS posted publicly a notice of intent to award its contract solely to Riverside. The Court agrees with counsel for DARS as stated in his Brief in Support of Demurrer, that by both statute and regulation, that was the date at which the ten day period of TSE to protest the decision began. TSE contends that the time period began to run upon its receipt of copies of the requested procurement records. As those records were available for inspection at the time of the award or decision to award, the Court finds its argument is without merit.

Therefore, the Court finds TSE's administrative appeal was untimely filed and is barred by sovereign immunity. Thus, the Demurrer is sustained and the appeal is dismissed with prejudice.

As the Court has sustained the Demurrer on the grounds that the appeal was untimely filed, we decline to address the other grounds set forth in the Demurrer.

Counsel for the Defendant is directed to prepare an order reflecting this Court's ruling, circulate it for endorsement and submit it to the Court for entry

Thank you for your presentations in the case and your considerations of these matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Whitlock', with a long, sweeping horizontal line extending to the right.

Susan L. Whitlock, Judge
Sixteenth Judicial Circuit