

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

CASE NO. 2017-548

CONDUENT STATE & LOCAL SOLUTIONS, INC.

v.

**THE STATE OF NEW HAMPSHIRE DEPARTMENT OF
TRANSPORTATION**

and

CUBIC TRANSPORTATION SYSTEMS, INC.

Appeal from Orders of the Merrimack Superior Court

**BRIEF FOR APPELLANT
CONDUENT STATE & LOCAL SOLUTIONS, INC.**

**CLEVELAND, WATERS AND BASS, P.A.
Bryan K. Gould, Esq. (NH Bar No. 8165) (Orally)
Philip R. Braley, Esq. (NH Bar No. 9276)
Cooley A. Arroyo, Esq. (NH Bar No. 265810)
Two Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761**

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TEXT OF PRINCIPAL AUTHORITIES INVOLVED IN CASE¹

Pt. 1, Art. 37. [Separation of Powers.] In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity. *-June 2, 1784*

21-I:22-a Request for Purchases and Request for Quotes. – Notwithstanding the provisions of RSA 21-I:18, every request for purchases (RFP), request for quotes (RFQ) or other procurement which is greater than \$35,000 that is undertaken by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, shall contain within the body of the document the objective criteria by which each submission will be reviewed, if there are particular requirements that will receive more weight in the review of the submission, and the standards upon which any award will be based.

Source. 1995, 266:1, eff. Aug. 18, 1995. 2014, 327:25, eff. Aug. 2, 2014.

21-I:22-b Awards. – Notwithstanding the provisions of RSA 21-I:18, awards which are made by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, under this subdivision shall not be made on criteria that are unknown to the parties submitting bids or proposals. Nothing in this subdivision shall prevent the state or a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, from making judgments on the capabilities of vendors to complete the work requested if this option is clearly stated in the body of the document and if used as the reason for the award, is so stated.

Source. 1995, 266:1, eff. Aug. 18, 1995. 2014, 327:26, eff. Aug. 2, 2014.

228:4 State Transportation Projects. –

I. Each state transportation project shall be built under contracts awarded to the lowest responsible bidder through competitive bidding. The following are excluded from this competitive bidding requirement:

(a) Normal highway and bridge maintenance and improvements. This includes state aided town road and bridge projects.

(b) Projects executed under RSA 481 with approval of the governor and council.

(c) Statewide transportation improvement program projects with a cost not to exceed \$25,000,000 may be developed and constructed utilizing the design build concept based on a request for proposal. Such projects may be developed and constructed provided that selection is based on an objective standard and measurable criteria for evaluation of the proposals.

(d) Statewide transportation improvement program projects with a cost in excess of \$25,000,000 may be developed and constructed utilizing the design build concept based on a request for proposal provided that the department first demonstrates that using the design build concept for the project in question benefits the state more than using conventional contracting

¹ All other constitutional and statutory authorities are printed in their entirety in 491-532.

methods. The department shall hold a publicly noticed hearing to take comment on its proposal to use the design build concept for a particular project. Such notice shall be provided at least 14 days prior to the hearing date. The department shall allow for a 30-day public comment period following the publicly-noticed hearing before submitting its proposed use of the design build concept to the governor and executive council for formal approval. After the governor and council approve use of the design build concept for the project, the department may solicit bids from contractors. Any contract with the selected bidder shall be submitted to the governor and council for final approval. The commissioner shall report the results of any statewide transportation improvement program project using the design build concept to the capital budget overview committee within 90 days after the completion of the project.

II. State transportation projects shall not be awarded through cost-plus contracts.

Source. 1950, 5:1, part 9:1, par. 13. 1953, 253:1. RSA 228:4. 1957, 257:1. 1959, 58:1. 1961, 223:3. 1967, 121:1. 1971, 55:1. 1972, 60:44. 1975, 329:1. 1978, 49:18. 1979, 70:1-3; 214:1. 1981, 87:1; 558:2. 1982, 15:1, 2; 38:20. 1985, 400:3. 1986, 209:5, 6. 1988, 236:2, 3. 1989, 148:1. 1998, 171:2, 3. 2003, 70:1, 2. 2004, 257:43. 2005, 55:3, 4, eff. May 23, 2005; 291:17, eff. July 25, 2005. 2009, 135:1, 2, eff. June 29, 2009.

237:2 Authority Granted. – Subject to RSA 237:3, II, the commissioner of the department of transportation, with the approval of the governor and council, is authorized to:

I. Make improvements to that portion of the eastern New Hampshire turnpike known as the Blue Star memorial highway, including, but not limited to, the addition of 2 traffic lanes in each direction from the route N.H. 107 interchange in Seabrook to the route N.H. 101 interchange in Portsmouth and the reconstruction of the toll facilities in the town of Hampton;

II. Acquire land and make improvements to that portion of the eastern New Hampshire turnpike known as the Spaulding turnpike and extend said turnpike with 2 lanes including the completion of existing interchange number 9, the Dover-Somersworth interchange including the access roads into and away from the Weeks traffic circle in the city of Dover, and the extension of the turnpike to the 1965 Milton-Wakefield project, the expansion of the Dover toll facility, safety and widening improvements along the turnpike, purchases of access in critical sections, and study the Spaulding turnpike for expansion from 2 to 4 lanes from the intersection of Route 125 and the Spaulding turnpike north to the intersection of Route 11 and the Spaulding turnpike.

II-a. Include, as part of the study for a 4-lane east-west highway from I-393 in Concord to the Spaulding turnpike as defined in 1986, 203:8 as amended by 1988, 266:2 and 1990, 244:2, as one alternative, a corridor that would intercept the Spaulding turnpike between existing exit 9 and exit 11. This interchange would be known as exit 10. Such study shall include an evaluation of the potential social, economic and environmental impacts, and preliminary design for the siting of an interchange and exit 10.

II-b. Make improvements to the Spaulding turnpike by constructing exit 10.

II-c. Redesign and reconstruct a portion of exit 6 on the Spaulding turnpike at its intersection with N.H. Route 4 and Boston Harbor Road. This project shall not begin until the governor and council authorize a transfer of a sum not to exceed \$1,000,000 from any funds remaining in projects under RSA 237:7, I as authorized by RSA 237:7, II.

II-d. Construct a second barrel on the Spaulding turnpike from exits 12 to 16 with related interchange improvements from exits 11 to 16, as needed, and a maintenance facility at exit 16

in Rochester.

II-e. Construct improvements to the Spaulding turnpike/US 4/N.H. 16 extending from just north of the Gosling Road intersection in Newington to just south of the most southerly toll plaza in Dover, including improvements to access on and off the highway.

III. Make improvements to the central New Hampshire turnpike, including, but not limited to, the addition of a traffic lane or lanes in each direction from a point near the proposed junction of interstate route 93 near the Manchester-Hooksett town line to a point northerly of the junction of interstate route 89 in the city of Concord and the reconstruction of the toll facilities in the town of Hooksett.

IV. Make improvements to the central New Hampshire turnpike, including, but not limited to:

(a) The design, right-of-way acquisition and construction for the improvement of the central New Hampshire turnpike in Nashua between the Massachusetts line and exit 3 to include reconstruction of exit 1, also including associated widening and the construction of a new northbound on-ramp from Daniel E. Webster highway to the central turnpike, and the design and land acquisition for a new interchange at exit 2 which connects to a new interchange at the Daniel E. Webster highway and for additional lanes on the turnpike between the state line and exit 3. The commissioner of the department of transportation is hereby directed to make this project a priority and to begin construction within the biennium ending June 30, 1987.

(b) Construction of a new exit 8, formerly exit 7W, in Nashua. The commissioner of the department of transportation is hereby directed to prioritize this project and to begin construction within the 1985 biennium.

(c) Reconstruction of exit 11, formerly exit 8, in Merrimack to remove the current toll plaza providing toll collection equipment on the southbound on and northbound off ramps.

(d) Construction of the main line toll plaza in Bedford.

(e) For the construction of a northbound off ramp and a southbound on ramp to the Everett turnpike at the Bedford road in the town of Merrimack; the widening and lengthening of the overpass bridge at Bedford road; and the installation of toll booths for both ramps.

(f) Continue design and engineering of the modernization of the central turnpike.

(g) Construction of a bridge crossing the Merrimack River connecting U.S. 3 in Merrimack and N.H. 102 in Litchfield with future design consideration for a segment of highway connecting N.H. 102 in Litchfield and N.H. 111 in Hudson.

(h) Making improvements to the central New Hampshire turnpike, including, but not limited to, the addition of a traffic lane in each direction to the following 3 segments: the segment between exit 8 in the city of Nashua to exit 10 in the town of Merrimack; the segment between exit 11 in the town of Merrimack to the southern limits of the Manchester Airport Access Road project in the town of Bedford; and the segment between the northern limits of the Manchester Airport Access Road project and the interstate 293 interchange in the town of Bedford.

(i) Installation of intelligent transportation systems infrastructure on the F.E. Everett Turnpike from Nashua to Bedford.

V. Make improvements to the central New Hampshire turnpike, including, but not limited to, the addition of a Merrimack industrial interchange, including toll collection equipment, and a 1.5 mile access highway between U.S. Route 3 and Camp Sargent road.

VI. Make improvements to the eastern New Hampshire turnpike by the construction of a full interchange on the Spaulding turnpike at Gosling road, Pease Air Force Base.

VII. (a) Acquire land as required and make improvements to the central New Hampshire turnpike including, but not limited to, completing the connection to the Merrimack industrial interchange, relocation of Camp Sargent Road, improvements to interchanges 3 through 7 as required, the extension of the system to include an easterly circumferential beltway around Nashua extending from exit 2 and running easterly through the city of Nashua and the towns of Hudson, Litchfield, and Merrimack to an intersection with the existing turnpike, improvements and widening between interchanges 2 and 7, widening between the Route 101 intersection and the Amoskeag interchange in Manchester, and coordinating a study of widening between the I-89 and I-93 interchanges.

(b) Plan, engineer, and construct improvements, and acquire land as necessary for the central New Hampshire turnpike, including, but not limited to the addition of a traffic lane or lanes in each direction from the junction of interstate 89 in the city of Concord to the northerly expansion joint of the Interstate 93 bridge over Loudon Road and N.H. Route 9 (bridge no. 163/106).

(c) Plan, engineer, and construct improvements, and acquire land as necessary for the central New Hampshire turnpike, including, but not limited to the addition of a traffic lane or lanes in each direction from exit 6 to exit 7 in the city of Manchester, as well as the reconstruction of the exit 6 and exit 7 interchanges.

VII-a. Acquire land as required and relocate the high voltage transmission lines to support the redevelopment of existing rest areas located on Interstate 93 in the town of Hooksett to full service centers with food, state liquor stores, and other retail goods and services for the traveling public as may be required under 2009, 144:84 and SS 2010, 1:76.

VIII. Acquire and install new toll collection equipment.

IX. Make such other and further improvements to the New Hampshire turnpike system as may be required by RSA 240.

X. Acquire, expand, and make improvements to the eastern New Hampshire turnpike from the northerly expansion joint of the Interstate Route 95 bridge over the Spaulding turnpike, U.S. Route 4 and N.H. Route 16 (bridge No. 197/122) north to a point on the New Hampshire-Maine border in the city of Portsmouth, said improvements to include the installation of open road tolling for the toll currently on Interstate Route 95 in the town of Hampton.

Source. RSA 256-C:2. 1971, 520:1. 1973, 559:1. 1975, 286:6. 1981, 87:1. 1982, 42:58. 1983, 76:1; 427:1; 451:1. 1985, 391:3; 402:6, I(b)(8). 1986, 203:10-12. 1987, 266:2. 1989, 356:1. 1991, 255:1; 301:1-5. 1992, 217:1. 1994, 281:1. 1998, 306:2. 2000, 309:11. 2004, 262:4. 2006, 240:7, eff. July 31, 2006. 2009, 144:82, eff. July 1, 2009. 2012, 193:11, eff. June 11, 2012. 2014, 326:3-5, eff. Aug. 1, 2014. 2016, 324:3, eff. June 24, 2016.

237:5 Further Authority. –

I. Except as may be inconsistent herewith and except as hereinafter provided, the projects authorized by RSA 237:2, I and II shall be laid out, constructed and operated in accordance with, and shall be subject to, the provisions of RSA 237:17-28 inclusive until the eastern New Hampshire turnpike becomes part of the New Hampshire turnpike system, except that RSA 237:20 through 23 shall not apply and except that the bonds referred to in RSA 237:24 shall be deemed to include all bonds issued to finance the eastern New Hampshire turnpike. Subject to the same exceptions, the projects authorized by RSA 237:2, III shall be laid out, constructed

and operated in accordance with, and shall be subject to, the provisions of RSA 237:29 through 39 until the central New Hampshire turnpike becomes part of the New Hampshire turnpike system, except that RSA 237:19 through 22 shall not apply and except that the bonds referred to in RSA 237:23 shall be deemed to include all bonds issued to finance the central New Hampshire turnpike. In addition to other project costs, the cost of constructing any portion of the central New Hampshire turnpike, the eastern New Hampshire turnpike or the New Hampshire turnpike system may include any required payment to the United States on account of the incorporation of a federally-aided highway in such turnpike or system.

II. The commissioner of transportation is further authorized to operate and maintain the New Hampshire turnpike system. In doing so and in constructing any portion thereof, he may, subject to the limitations set forth in this chapter:

(a) Determine the location of each portion of the system and fix the width of its right-of-way.

(b) Acquire in the name of the state by purchase or by exercise of the right of condemnation as provided by statute such lands, property, rights, easements and interests as may be deemed necessary for carrying out the provisions of this chapter.

(c) Designate the locations and establish, limit and control such points of ingress to and egress from the system as may be necessary or desirable to ensure the proper operation of the system and to prohibit ingress to or egress from the system at any points not so designated.

(d) Permit toll free use of certain sections of the system if it is for the public good.

(e) Construct grade separations at intersections of the system with public roads and private ways, and change and adjust the lines and grades of such roads and ways so as to accommodate the same to the design of such grade separations and to the design of the system.

(f) Construct, operate and maintain portions of the system within the compact areas of cities and towns.

(g) Grant permits or licenses to any corporation or person to place and maintain along, on, under or within the system ducts, pipes, pipelines, poles, wires or other structures, to be so located as not to be unsightly and not to interfere with the safe and convenient operation and maintenance of the system, and contract with any such corporation or person for such permit or licenses on such terms and conditions as may be deemed necessary for carrying out the provisions of this chapter. The appearance, construction, maintenance and repairs of any such ducts, pipes, pipelines, poles, wires or other structures shall be subject to such directions and regulations as may be imposed.

(h) Establish a temporary turnpike engineering section for the period of design and construction of any portion of the system, assign permanent employees of the department of transportation to duties and positions in said section and employ such engineers and assistants as may be necessary on a temporary basis for said period of design and construction. The costs of said turnpike engineering section shall be a charge against the funds made available under this chapter or otherwise for the system.

(i) Enter into contractual relations on behalf of the state.

(j) Do and perform all such acts as are necessary for the public good.

(k) Cause periodic traffic and economic studies to be made of the operation of the system.

(l) Make periodic studies of possible extensions or additions to the system.

(m) Employ such assistants, engineers or consulting services as may be necessary to carry out the studies authorized by paragraphs (k) and (l) herein and, upon approval by the legislature, extend or add to the system when recommendations of independent recognized

consultants indicate that such extensions are economically feasible. The expense of the said studies shall be a charge upon the fund established under RSA 237:9.

(n) [Repealed.]

(o) Install open road tolling for existing tolls on the main lines of the turnpike system.

Source. RSA 256-C:4. 1971, 520:1. 1981, 87:1. 1985, 19:4; 402:6, I(a)(8), (b)(8). 1987, 403:3. 1996, 95:1, I, eff. July 14, 1996. 2009, 146:6, eff. June 30, 2009.

237:14 Contracts for Construction. – All contracts for the construction of the New Hampshire turnpike system shall be awarded to the lowest responsible bidder submitting a sealed bid after an advertisement calling for bids has been published at least once in each of 2 successive weeks in a newspaper of general circulation in New Hampshire. The first publication of such advertisement shall be not less than 14 days prior to the date upon which bids are received. Contracts shall be awarded in accordance with RSA 228:4.

Source. RSA 256-C:13. 1971, 520:1. 1981, 87:1, eff. April 20, 1981.

237:16-b Regional Electronic Toll Collection Authorized. – The commissioner is hereby authorized to execute all documents and perform all other acts necessary to enter into and carry out the provisions of a regional electronic toll collection system agreement with the Interagency Group in order to increase the efficiency of turnpike operation and to improve traffic management in the state and region.

Source. 2001, 247:1, eff. July 13, 2001.

QUESTION FOR REVIEW

1. Did the New Hampshire Department of Transportation exceed its statutory procurement authority and thereby violate the constitutional separation of powers by procuring a tolling back office system and using a best-value method to do so?

STATEMENT OF THE CASE

On October 16, 2015, plaintiff, Conduent State & Local Solutions, Inc. (then known as Xerox State & Local Solutions, Inc.) (“Conduent”), commenced an action in Merrimack Superior Court against the New Hampshire Department of Transportation (“NHDOT”) and Cubic Transportation Systems, Inc. (“Cubic”) challenging NHDOT’s award of a contract to Cubic. The eight-count complaint alleged that NHDOT failed to comply with statutory competitive bidding procedures when it procured a new back office system (“BOS”) and customer service center in connection with the New Hampshire E-ZPass highway tolling system. The complaint sought declaratory and injunctive relief and damages.

On June 7, 2016, Conduent moved to amend the complaint to include an allegation that NHDOT failed to comply with RSA 228:4, which requires NHDOT to award contracts for certain projects to the “lowest responsible bidder.” App. at 1 and 3. Both defendants objected to the motion, contending that RSA 228:4 did not apply to the BOS procurement. In response, on July 1, 2016, Conduent moved to amend the complaint further by adding a ninth count² alleging that if RSA 228:4 did not apply to the procurement then NHDOT did not have authority to procure as it had and the award of the back office system contract to Cubic was *ultra vires* as a consequence. App. at 11. The superior court (Nicolosi, P.J.) granted the motions to amend on August 3, 2016, over defendants’ objections. *Id.* at 14. Both sets of amendments were incorporated into the first amended complaint.

The defendants filed a joint motion to dismiss the equitable claims in the first amended complaint on August 18, 2016, arguing that those claims were barred by sovereign immunity.

² It is the superior court’s ruling on Count IX – as that count was later amended – that is before this court on appeal. All of the other counts have been nonsuited or were adjudicated on dispositive motion.

The superior court granted the defendants' motion to dismiss on January 22, 2017, but *sua sponte* gave Conduent leave to amend its claims to seek declaratory judgment on constitutional grounds. *Post* at 46. Conduent amended its complaint accordingly and filed its second amended complaint on January 26, 2017.³ *App.* at 15. NHDOT filed a motion to dismiss the equitable claims in the second amended complaint on February 6, 2017. *Id.* at 40. Cubic followed suit on February 24, 2017. *Id.* at 54.

Meanwhile, on September 19, 2016, Conduent had filed a motion for partial summary judgment on Count IX of the first amended complaint which, again, sought a declaration that NHDOT lacked statutory authority to procure the BOS as it had. *Id.* at 67. After filing the second amended complaint, which amended Count IX to include explicit allegations that *ultra vires* action by an executive branch agency violates the constitutional separation of powers, Conduent renewed its motion for partial summary judgment on Count IX. *Id.* at 203.

While these motions were still pending, NHDOT filed a motion for partial summary judgment on the claims remaining after the court issued its January 22, 2017, order. In its May 17, 2017, order, the superior court granted NHDOT's motion with respect to Conduent's claim for negligent misrepresentation. *Post* at 55-56. In its discussion of the negligent misrepresentation claim, the court stated that NHDOT had statutory authority to procure a tolling BOS. *Post* at 55. Conduent filed a motion for reconsideration of this portion of the order, arguing that the court had overlooked authorities to the contrary raised by Conduent's pending motion for partial summary judgment on Count IX. *App.* at 208-212.

³ On April 24, 2017, the court granted an assented-to motion to amend the complaint to change the plaintiff's name from "Xerox State & Local Solutions, Inc." to "Conduent State & Local Solutions, Inc." to reflect the divestiture of multiple subsidiaries of Xerox Corporation and reorganization of those subsidiaries under a new parent, Conduent Corporation. The third amended complaint incorporated this name change. *App.* at 235-261.

On June 13, 2017, the court denied Conduent's motion for partial summary judgment on Count IX and granted the defendants' motions to dismiss on all but two counts. *Post* at 79. The court dismissed Count IX as part of this order. *Id.* The defendants thereafter filed motions for summary judgment on the remaining claims and Cubic sought partial reconsideration of the court's June 13, 2017, order as to one of the remaining claims.

Conduent filed its notice of voluntary nonsuit without prejudice on its remaining claims with the court on August 22, 2017. *Post* at 88-89. Neither of the defendants objected to the nonsuit or requested that it be entered with prejudice. Two weeks later, the superior court issued an order denying Conduent's May 30, 2017, motion for reconsideration and partially granting Cubic's motion for partial reconsideration of the June 13, 2017, order, resulting in dismissal of another count. *Post* at 82. After Conduent had filed its notice of appeal with this court, the superior court held a hearing on the notice of voluntary nonsuit. *App.* at 214. After the parties filed post-hearing memoranda, the court entered an order on November 15, 2017, treating Conduent's notice of nonsuit as a motion and granted the nonsuit without prejudice. *Id.* at 217.

STATEMENT OF FACTS

This case arises out of NHDOT's procurement of a highway tolling BOS. NHDOT administers the New Hampshire E-ZPass System ("E-ZPass"), which is an electronic toll collection system that permits vehicles with transponders to pass through toll lanes without stopping to pay a cash toll. *Post* at 61. The BOS manages the collection, reconciliation, and processing of these electronic toll payments for E-ZPass. The BOS vendor also manages E-ZPass accounts, distributes transponders, responds to E-ZPass violations, and coordinates with toll collection agencies in the E-ZPass Interagency Group, which includes agencies in other states participating in electronic toll collections. *Post* at 61; RSA 237:16-a, V. In addition, the

vendor maintains a customer service center for addressing customer questions, opening new accounts, and resolving account disputes. App. at 68. Before the procurement at issue in this case, Conduent had provided the E-ZPass BOS and customer service center to NHDOT since 2004. *Post* at 61. Its most recent contract extension with NHDOT was scheduled to expire on September 30, 2016. *Id.*

In preparation for the expiration of the Conduent contract, NHDOT issued a request for proposals (“RFP”) on December 9, 2014. App. at 68. It is undisputed that this procurement was conducted using the “best-value” method. *Id.* Best-value procurements contemplate a procedure “where price and other non-price factors are considered in the evaluation and selection process to enhance the long-term performance and value of the goods or services for which bids are solicited.” *See, e.g.,* RSA 21-T:3, IV (repealed 2012) (App. at 500). App. at 71. In contrast, lowest responsible bidder procurements require that the contract “be awarded to the lowest bidder unless that bidder is found not responsible, that is, not qualified to perform the particular work.” *See, generally,* 64 Am. Jur. 2d Public Works and Contracts §60. App. at 71. Hence, under the best-value procurement method an agency may award the contract to a more expensive – or even the most expensive – bidder because cost is not determinative. One of the two principal issues raised on this appeal is whether the general court has granted best-value procurement authority to NHDOT or, for that matter, any other state agency.

The legislature has consistently rejected legislation that would adopt the best-value procurement method in state government. In 2010, the senate proposed to establish a “best value procurement commission to assess the feasibility of, and potential methods for implementing, best value contracting practices in state procurement and to propose a best value contracting pilot program.” S.B. 493, 161st Sess. (N.H. 2010). App. at 77-78 and 126-132. The bill would have

authorized an agency to “elect to award a contract on the basis of best value” notwithstanding other statutory provisions requiring an agency to use the lowest responsible or qualified bidder. *Id.* at 78 and 129. The bill proposed changing “the procurement system for the entire government.” *Id.* at 131. The bill failed as “inexpedient to legislate.” *Id.* at 78 and 134.

In 2010, the general court enacted RSA ch. 21-T to establish a “task force on state procurement policies and procedures, which shall study procurement preference systems, best value contracting, and existing state procurement procedures, intending to enhance the state’s ability to obtain optimal value for taxpayer dollars.” *Id.* at 78 and 137. The task force was also empowered to identify “up to 5 pilot projects contained in the capital budget or the operating budget adopted by the legislature in order to explore using best value procurement.” *Id.* at 78 and 138. This task force was short-lived because the legislature repealed its enabling legislation in 2012. *Id.* at 78 and 143. Before the repeal, however, the task force published reports on its proceedings. *Id.* at 145-162. A representative from the New Hampshire Department of Administrative Services (“NHDAS”) – the agency responsible for most procurements in state government – told the task force that “[NH]DOT has a prequalification system for evaluating contractors and a *Best Value* [sic] *procurement system would add expense*. The prequalification system *combined with the low-bid selection process* seems to work well.” *Id.* at 79 and at 162 (emphasis supplied). If NHDOT already had best-value procurement authority this testimony would have been superfluous.

In 2013, the senate proposed legislation to establish a “state contracting standards board” that would prepare a “uniform procurement code applicable to state contracting and procurement processes for services, including expenditures by municipalities that receive state funds.” *Id.* at 79 and 168. The proposed code included a definition of the term “best value selection,” a term

that appears nowhere in any existing statute.⁴ *Id.* at 165. The proposed board would be established to create a “process” for a variety of procurement methods, including best-value selection. *Id.* at 170. The bill failed in the senate as inexpedient to legislate. *Id.* at 175.

In 2014 the legislature created a committee to “study and develop standards and methods for a centralized system of procurement,” including an examination of conflicts within New Hampshire procurement laws and procurement procedures from other states. *Id.* at 80 and 179. The committee’s term was recently extended and its responsibilities codified in RSA 21-I:14-d. *Id.* at 80 and 178. The legislation does not mention best-value procurements, but it directs the committee to “work with the department of administrative services to update state procurement procedures.” RSA 21-I:14-d, III (*id.* at 494-495).

NHDOT’s selection of the best-value method for the BOS procurement was not based on its understanding of its statutory authority. The three NHDOT employees with principal responsibility for the procurement – including the content of the RFP – were entirely unaware of the department’s statutory procurement authority. See App. at 230, 233, and 68 (titles and responsibilities regarding BOS procurement).

For example, NHDOT’s deputy commissioner, Christopher Waszczuk, testified:

- Q: Are you aware of statutory authority permitting the use of best value procurements?
A: Specifically, no.
Q: In general terms, are you familiar with any such authority?
A: I would say that’s been a *practice that has been ongoing for several years*. So in general terms, I would say that....
Q: It’s what you do?
A: (Nodding head)
Q: Right?
A: Yes.

⁴ RSA 126-A:5, XIX(a) (App. at 506) is the only provision in New Hampshire statute using the phrase “best value,” and that provision does not relate to procurements but to the managed care model to be used by the department of health and human services for the Medicaid program.

App. at 69 and 123-124 (emphasis supplied). The administrator of the bureau of turnpikes at NHDOT and manager of the BOS procurement, John Corcoran, did not know that NHDOT's general enabling legislation is RSA ch. 228 (*id.* at 69 and 85-86), was unaware that RSA ch. 228 requires "lowest responsible bidder" procurements in specified instances (*id.*), and was unable to define or differentiate between lowest responsible bidder and best-value procurements (*id.* at 69, 85-86, and 89-90). Renee Dupuis was NHDOT's "assistant project manager" for this procurement, and she was likewise unfamiliar with NHDOT's enabling legislation or the lowest responsible bidder and best-value forms of procurement. *Id.* at 69 and 108-112. In fact, in seeking the approval of the department of information technology for the RFP, NHDOT represented that the procurement would employ yet a third standard, namely the "least cost method." *Id.* at 87-88.

Three vendors submitted proposals responsive to the RFP. *Id.* at 99. Each vendor submitted a technical proposal and a price proposal. Evaluation of the bids was based on a 100-point scale, and because this was a best-value procurement seventy points were allocated to the technical proposal and only thirty points were allocated to the price proposal. *Post* at 34. At the end of this process, NHDOT selected Cubic as the prevailing vendor. *Post* at 35. Cubic's final score was 80.76 out of 100 possible points; Conduent received a score of 80.12. *Id.* Of the three vendors participating in the procurement, Cubic's total proposed contract price was the second most expensive at \$56,249,793.⁵ App. at 100 (N.B. that the amounts of \$2,500,111 and \$1,859,958 in the bullets at the bottom of the cited page must be added to final contract price of \$51,889,724 to yield Cubic's original bid). Conduent was the lowest bidder at \$48,344,532. *Id.*

⁵ As a result of best-and-final-offer negotiations between NHDOT and Cubic, the total contract price was reduced to \$51,889,724. App. at 100. NHDOT did not conduct such negotiations with Conduent or the other bidder. *Id.* at 70 and 114.

Hence, Conduent would have prevailed had NHDOT used the lowest responsible bidder standard, but because price only accounted for thirty percent of the score and NHDOT scored Cubic's technical proposal higher than Conduent's, NHDOT awarded the contract to Cubic. The governor and council approved NHDOT's contract with Cubic on October 7, 2015. *Post* at 63.

Conduent initiated this action to challenge NHDOT's award of the contract to Cubic on October 16, 2015. *App.* at 262-281. The complaint contained eight counts, including a request for a writ of certiorari, a count for injunctive relief, a claim for promissory estoppel, two tort claims, two constitutional claims, and a request for a declaration that the bid process was unlawful and the resulting contract is void. *Id.* One of these counts alleged that NHDOT was required, yet failed, to follow competitive bidding requirements set forth in RSA 21:I-22-a and :22-b and requested a declaration that the award to Cubic was unlawful because NHDOT violated these standards. *Id.* at 275-276 (¶¶ 88-93). Conduent subsequently received leave to amend this count to include a reference to RSA 228:4, which requires NHDOT to award contracts to the lowest responsible bidder in specified circumstances. *Id.* at 11, 14, and 335 (¶ 88). Because the defendants had objected to the amendment, contending that RSA 228:4 did not apply to a procurement for a tolling BOS (*App.* at 187-188 and 194-196), Conduent sought and obtained leave to amend its complaint further to include Count IX. *Id.* at 341 (¶¶ 129-135). That count alleged that no statute other than RSA 228:4 authorized NHDOT to conduct the BOS procurement, and if that statute did not apply to this procurement then NHDOT "had no authority to conduct the procurement as it did." *Id.* at 341 (¶¶ 132-134). The court granted both motions to amend the complaint on August 3, 2016. *Id.* at 14.

Conduent filed a motion for partial summary judgment on Count IX of the first amended complaint on September 19, 2016 (*id.* at 67-82), both defendants objected to the motion (*id.* at

282-321 and 343-359), and Conduent replied to each objection (*id.* at 360-375 and 376-384). In the motion and the replies, Conduent argued that – given defendants’ position that RSA 228:4 did not give NHDOT authority to procure the BOS – NHDOT lacked authority for the BOS procurement as a matter of law. *Id.* at 75-77 and 377-382.

Conduent also argued that under RSA ch. 21-I (NHDAS’s enabling legislation) the general court has granted all executive branch procurement authority to NHDAS, subject to only limited exceptions. Taking those exceptions into account, executive branch procurement authority is broken into four discrete categories, and NHDOT’s sole procurement authority under this comprehensive scheme is found in RSA 228:4. *Id.* at 378-380. Given that the defendants maintained that RSA 228:4 did not authorize the BOS procurement⁶, Conduent argued that only NHDAS had the authority to procure the BOS under RSA ch. 21-I. *Id.* at 381-382. Conduent also contended that NHDOT’s reliance upon RSA 21-I:22-a and :22-b for use of the best-value procurement method was contrary to the statutory language and the general court’s consistent rejection of the best-value method. *Id.* at 77-81.

The defendants’ disavowal of RSA 228:4 as authority for the BOS procurement required them to identify an alternative source of authority. Both defendants relied upon RSA 21-I:22-a and :22-b for NHDOT’s authority to procure the BOS and to use the best-value method in doing so. *Id.* at 284 and 355. In its objection to Conduent’s motion, Cubic devoted a single paragraph to the observation that RSA 237:2 and :5 also authorize NHDOT “to enter into transportation related contracts, including contracts for the acquisition and installation of tolling equipment.” *Id.* at 355. In its surreply, however, Cubic took a far more expansive view of RSA ch. 237, now

⁶ If defendants had conceded that RSA 228:4 conferred authority for the BOS procurement upon NHDOT, the award to Cubic would have been invalid because RSA 228:4 requires NHDOT to award contracts to the lowest responsible bidder.

finding in its language the authority to procure the BOS. App. at 385-386. *NHDOT itself has never argued that RSA ch. 237 gave it procurement authority for the BOS. Id.* at 435-437 (arguing that there must be some *inherent* executive authority to procure the BOS or NHDOT would lack the ability to carry out its responsibilities under RSA ch. 237).⁷

Cubic's objection also asserted that sovereign immunity barred Count IX, that Conduent had waived any objection to the use of the best-value method, and that Conduent lacked standing to contest the award to Cubic. *Id.* at 348-354. NHDOT made none of these arguments. See, generally, *id.* at 282-290.

Conduent's motion for partial summary judgment remained pending for almost nine months. In the meantime, the court issued several orders on the defendants' dispositive motions. On August 18, 2016, the defendants filed a joint motion to dismiss the six equitable claims in the first amended complaint, including Count IX, on sovereign immunity grounds. *Id.* at 391-426. In its objection to this motion, Conduent argued, among other things, that Count IX stated a claim for violation of the constitutional separation of powers because an executive branch agency's actions *ultra vires* of its enabling legislation are necessarily such a violation. *Id.* at 291-321.

On January 23, 2017, the superior court granted the defendants' motion to dismiss the equitable claims. It determined that RSA 228:4 did not govern this procurement because "the statute is for *infrastructure* and the BOS contract here is for services related to E-ZPass"⁸

⁷ As Conduent demonstrates *post* at 22-24, the legislature provided NHDOT with express procurement authority to carry out its responsibilities under RSA ch. 237. See RSA 237:14. The BOS contract, however, does not fall within NHDOT's responsibilities under RSA ch. 237. *Post* at 23.

⁸ The court would disregard this distinction in its later orders holding that RSA ch. 237 – which applies exclusively to the acquisition of real property and construction of physical infrastructure – gave NHDOT authority to procure the BOS. See *post* at 81.

Post at 39. Emphasis supplied. The court concluded that “RSA 21-I applies” to the BOS procurement. *Id.* It also granted the motion to dismiss Count IX because it “does not *mention* a separation of powers violation or Part I, Article 37 of the State Constitution.” *Post* at 45 (emphasis supplied). On its own motion, however, the court gave Conduent leave to amend its declaratory judgment claims to assert them as constitutional violations.⁹ *Post* at 46. Conduent filed its second amended complaint on January 26, 2017, which added explicit references to the separation of powers doctrine and the state constitution to Count IX. *App.* at 37. In light of these revisions, Conduent also renewed its still-pending motion for partial summary judgment on Count IX as amended. *App.* at 203-204. Both defendants objected to the renewed motion. *Id.* at 427-431.

On February 6, 2017, NHDOT filed a motion for partial summary judgment on three of Conduent’s causes of action. On May 17, 2017, the court granted that motion as to Conduent’s tortious misrepresentation claim. In its order, the court again determined that NHDOT possessed statutory authority to procure the BOS, but now it adopted Cubic’s contention that RSA ch. 237 constituted an additional source of that authority:

Under RSA 237:2, VIII, NHDOT is authorized to “[a]cquire and install new toll collection equipment.” Additionally, NHDOT, as a state agency, has the ability to conduct procurements over \$35,000. *See* RSA 21-I:22-a; RSA 21-I:22-b. As recently discussed in *XTL-NH, Inc. v. N.H. State Liquor Comm’n* [Merrimack Superior Ct., No. 2013-cv-119 (Sept. 6, 2016) (Order, McNamara, J.)], procurements subject to RSA 21-I may be awarded on a best value basis, rather than on a lowest cost basis.

Post at 55. On May 30, 2017, Conduent filed a motion for partial reconsideration of this order, arguing that the court had overlooked arguments raised in Conduent’s pending motion for partial summary judgment and related papers. *Id.* at 205-213.

⁹ Six months later, the court retreated from its ruling that sovereign immunity bars declaratory relief on non-constitutional grounds. *Post* at 65-70.

On June 13, 2017, the court issued its order on the defendants' motions to dismiss the declaratory relief claims in the second amended complaint. As to Count IX, the court held that Conduent failed to state a claim for violation of the separation of powers. *Post* at 77-79. The court first suggested, but did not hold, that NHDOT's procurement of the BOS fell within the executive branch's constitutional authority to enter into contracts for the expenditure of state funds. *Post* at 78, *citing* Part II, Article 56 of the New Hampshire Constitution. It went on to hold, however, that NHDOT had statutory authority to procure the BOS. *Id.*

The court reiterated that the "competitive bidding process is governed by RSA 21-I:22-a and 22-b, which allow a best value selection." *Post* at 67. It also cited provisions of RSA ch. 237 beyond those on which it relied in the May 17, 2017, order:

. . . NHDOT, as a state agency, has the ability to conduct procurements over \$35,000, pursuant to RSA 21-I:22-a and 22-b. The authority to procure the system is explicitly found in RSA 237:2, VIII, which authorizes NHDOT to "[a]cquire . . . toll collection equipment." RSA 237:5, II authorizes NHDOT to install "open road tolling for existing tolls on the main lines of the turnpike system." RSA 237:16-b authorized NHDOT "to execute all documents and perform all other acts necessary to enter into and carry out the provisions of a regional electronic toll collection system agreement" The legislature gave NHDOT a broad grant of authority in connection with the procurement, contracting, and implementation of the E-ZPass System.

Post at 78-79. In a single sentence in this order, the court denied Conduent's motion for partial summary judgment on Count IX. *Post* at 79. The court never addressed Conduent's arguments that RSA ch. 21-I comprehensively allocates all procurement authority within the executive branch and that the general court has repeatedly rejected the use of the best-value method of procurement.

Conduent filed a notice of voluntary nonsuit for the claims remaining in the litigation on August 22, 2017. *Post* at 80-81. Neither defendant objected to this notice. The court did not act on the notice until November 15, 2017. On September 7, 2017, the court issued its order

denying Conduent's May 30, 2017, motion for reconsideration regarding the source of NHDOT's procurement authority. *Post* at 80-87. In this order, the superior court noted that Conduent's argument concerning procurement authority "has been made very clear" but found that NHDOT has procurement authority under Chapter RSA 237 [sic], read as a whole, and particularly through RSA 237:2, VIII and RSA 237:16-b." *Post* at 81.

Conduent filed its notice of appeal with the supreme court on September 20, 2017. *App.* at 214. Following a hearing on October 17, 2017, the court granted a voluntary nonsuit without prejudice in an order dated November 15, 2017. *App.* at 215-217.

SUMMARY OF ARGUMENT

RSA 21-I recognizes just four categories of procurement authority across the executive branch. All procurements must be conducted by the department of administrative services unless they are carried out by a statutorily exempt agency or they fall within NHDOT's authority to procure construction contracts for highways, bridges, and the like. NHDOT is not an exempt agency, and the parties and the superior court agree that the BOS contract is not for such forms of construction. The superior court erred when it read RSA 21-I:22-a and :22-b – which prescribe *how* otherwise authorized state procurements are to be conducted – and RSA ch. 237 to give NHDOT authority to procure the E-ZPass BOS on a best-value basis. In reaching its ruling, the court disregarded both the comprehensive statutory scheme allocating procurement authority among state agencies and the fact that the general court has repeatedly considered granting best-value procurement authority to those agencies and has rejected it on each occasion. Because RSA ch. 21-I creates and distributes the power to procure across state government and assigns to the department of administrative services the authority to procure for NHDOT except in limited specified cases not present here, NHDOT's procurement of the E-ZPass BOS and the resulting

contract with Cubic were *ultra vires*. Consequently, Conduent was entitled to a declaration that the procurement was unlawful and the court's denial of Conduent's motion for partial summary judgment was error.

ARGUMENT

I. NHDOT EXCEEDED ITS STATUTORY PROCUREMENT AUTHORITY AND THEREBY VIOLATED THE CONSTITUTIONAL SEPARATION OF POWERS BY PROCURING A TOLLING BACK OFFICE SYSTEM AND USING A BEST VALUE METHOD TO DO SO.

A. The authority of executive branch agencies is prescribed by the legislative branch and exceeding that authority intrudes on the constitutional power of the general court.

Executive branch agencies do not possess inherent authority. State agencies are created and constrained by statute. An administrative agency's authority is "dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself." *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (brackets and internal citations omitted); *see also Opinion of the Justices*, 121 N.H. 552, 557 (1981) ("Traditionally it has been the responsibility of [the supreme] court to insure that the administrative agency does not substitute its will for that of the legislature."). An agency must comply with its governing statute "in both letter and spirit." *In re Town of Nottingham*, 153 N.H. 539, 555 (2006) (citation omitted).

Actions taken without legislative authority are void. *See In re: Alexis O.*, 157 N.H. 781, 790 (2008) (administrative regulations contradicting the terms of the agency's governing statute exceed its authority and are void). Executive branch agencies, like municipalities, derive their authority from the legislature. When a municipality exceeds the authority granted by the legislature, it "intrudes into the legislative authority of the general court." *City of Manchester School Dist. v. City of Manchester*, 150 N.H. 664, 670 (2004); *see also K.L.N. Construction Co.*,

Inc. v. Town of Pelham, 167 N.H. 180, 184 (2014) (when a town enacts an ordinance “for considerations or purposes not embodied in an enabling act, it will be held invalid as an ultra vires enactment beyond the scope of the delegated authority.”) (internal quotations and citation omitted). Where the executive branch overreaches its statutory authority, however, it transgresses an even more formidable boundary, and that is the separation of powers clause of the New Hampshire constitution. Part I, article 37, of the constitution provides that the “three essential powers [of the government], to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit” N.H. Const., Pt. I, Art. 37. The separation of powers doctrine is violated when one branch of the government “usurps an essential power of another.” *Petition of Mone*, 143 N.H. 128, 134 (1998). Given that administrative agencies are “dependent entirely” on their enabling legislation for their existence and authority and that they must conduct themselves in strict accordance with that legislation (*ante* at 14), it follows that an agency’s exercise of a power not granted by the general court is a usurpation of the legislature’s power to prescribe the agency’s authority. In other words, an executive branch agency’s *ultra vires* acts are apodictically violations of the separation of powers.

B. NHDOT lacks statutory authority to procure a tolling back office system.

- 1. RSA ch. 21-I grants broad procurement authority to the department of administrative services and comprehensively describes all exceptions to that grant of authority.*

Subject to limited exceptions, the New Hampshire general court has granted all procurement authority to NHDAS. RSA ch. 21-I establishes NHDAS and prescribes its powers and duties. *See* RSA 21-I:1, I (establishing NHDAS) and RSA 21-I:1, II (enumerating its fifteen administrative and financial functions). Among NHDAS’s duties is “managing and

coordinating” many operations within state government, including “[p]rocurement.” RSA 21-I:1, II(i). The chapter divides executive branch agencies’ procurement authority into four mutually exclusive categories:

- NHDAS’s division of procurement and support services procures goods and services for the state and its agencies (*see, generally*, RSA 21-I:11);
- NHDAS’s division of public works design and construction procures contracts for the construction and maintenance of buildings, fixtures, and similar facilities (*see, generally*, RSA 21-I:78, :80, and :81);
- NHDOT procures contracts for the construction and maintenance of highways, bridges, and other things related to transportation (*see, generally*, RSA 21-I:78, IX); and
- Agencies exempt from RSA ch. 21-I procure in accordance with their enabling legislation (*see, generally*, RSA 21-I:18, I).

The first of these categories is the most expansive. The legislature has granted broad procurement authority to NHDAS’s division of procurement and support services. RSA 21-I:11, I(a). Among this division’s responsibilities is procurement of “all materials, equipment, supplies, and services for all departments and agencies of the state including contracting for the purchase or rental of data processing equipment” RSA 21-I:11, I(a)(1). “Supplies” is defined to include “all materials, equipment . . . [and] *computer hardware, software*, related licenses, media, and documentation, and support and maintenance *services*” RSA 21-I:11, II(a) (emphasis supplied). All such purchases in excess of \$10,000 must be by competitive bidding (RSA 21-I:11, I(a)(2)) unless a purchase falls within narrow statutory exceptions (RSA 21-I:11, (a)(2)(A)-(D) and (3)), and the purchase must be from the lowest cost bidder. RSA 21-I:11-b. In limited circumstances, the director of procurement and support services may delegate his or her authority to purchase supplies to the governing board of any agency.¹⁰ RSA 21-I:17-a,

¹⁰ There is nothing in the record suggesting that such a delegation occurred in this case.

I. Otherwise, NHDAS's division of procurement and support services has sole authority to procure, subject to only three exceptions.

The first exception is for procurements for projects involving "construction, reconstruction, alteration, or maintenance in any building, plant, fixture, or facility." NHDAS's division of public works design and construction has exclusive authority to conduct such procurements on behalf of the state and its agencies. RSA 21-I:78, IX; RSA 21-I:80 - 81. Subject to narrow statutory exceptions, contracts procured by this division of NHDAS must be awarded to the lowest cost bidder. RSA 21-I:81. The procurement of the E-ZPass BOS does not fall within this exception because the BOS is not a physical structure.

The second exception encompasses projects for the "construction, reconstruction, alteration, or maintenance of highways, bridges, or other items directly related to transportation." RSA 21-I:78, IX. The statute grants exclusive authority to NHDOT to procure such projects. *Id.* Not only does RSA ch. 21-I exclude such procurements from NHDAS's authority (*id.*), but RSA 228:4, which is part of NHDOT's enabling legislation, expressly grants NHDOT authority to conduct those procurements for transportation projects. RSA 228:1, VII, moreover, defines "project" for purposes of NHDOT procurement to exclude those projects within NHDAS's authority. This underscores the comprehensive nature of RSA ch. 21-I because it demonstrates how careful the legislature was to avoid overlapping grants of procurement authority. Both defendants maintained below that the BOS procurement did not fall within the authority granted by RSA 228:4, and the superior court agreed. *Post* at 39; *App.* at 410. Contracts procured by NHDOT under this statute must be awarded to the lowest responsible bidder. RSA 228:4.

The final exception to NHDAS's plenary procurement authority is found in RSA 21-I:18, I, which exempts certain agencies and purchases from the provisions of RSA ch. 21-I and

provides that these exempt procurements must be made “in accordance with the existing laws governing such purchases.” RSA 21-I:18, I. These exemptions include, for example, procurements made by the state liquor commission, the university system, and the fish and game department. *See, e.g.*, RSA 21-I:18, I (a)-(o). Each of these exempt agencies has its own corresponding grant of procurement authority. *See* RSA 176:18 (liquor commission), RSA 187-A:7 (university system), and RSA 206:22-b (fish and game). NHDOT is not an exempt agency, and the procurement of the BOS is not an exempt purchase under RSA 21-I:18, I.

Hence, the BOS procurement was not within any of the exceptions to NHDAS’s procurement authority. Because RSA 21-I describes the allocation of procurement authority throughout the executive branch agencies comprehensively, NHDOT had no authority to procure the BOS. That power lies exclusively with NHDAS. The BOS procurement was therefore *ultra vires* of NHDOT’s statutory authority and violated the separation of powers. Consequently, it was error for the superior court to deny Conduent’s motion for partial summary judgment on Count IX and to dismiss that claim.

2. *The statutes upon which the superior court relied to conclude that NHDOT had authority to procure the BOS do not provide procurement authority.*

Nowhere in the superior court’s orders regarding Count IX (or elsewhere, for that matter) did the court so much as acknowledge Conduent’s contention that RSA ch. 21-I describes all of the sources of procurement authority granted to state agencies. Instead, it held that RSA 21-I:22-a and :22-b give *all* state agencies broad procurement authority (*post* at 55) and that NHDOT’s power to “acquire and install new toll collection equipment” under RSA 237:2 authorized the agency to procure the BOS. *Post* at 55.

- a. RSA 21-I:22-a and :22-b impose requirements on all state procurements; they do not grant procurement authority.

In its order of May 17, 2017, the superior court held that “NHDOT, as a state agency, has the ability to conduct procurements over \$35,000.” *Post* at 55. The court cited RSA 21-I:22-a and :22-b for this conclusion and reiterated it in its later orders. In its June 13, 2017, order, it determined that “the competitive bidding process is governed by RSA 21-I:22-a and 22-b, which allow a best value selection.” *Post* at 67. In that same order, the court again found that these statutes give NHDOT the “ability” to conduct procurements exceeding the \$35,000 threshold. *Post* at 78.

RSA 21-I:22-a provides:

Notwithstanding the provisions of RSA 21-I:18, every request for purchases (RFP), request for quotes (RFQ) or other procurement which is greater than \$35,000 that is undertaken by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, shall contain within the body of the document the objective criteria by which each submission will be reviewed, if there are particular requirements that will receive more weight in the review of the submission, and the standards upon which any award will be based.

RSA 21-I:22-b provides:

Notwithstanding the provisions of RSA 21-I:18, awards which are made by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, under this subdivision shall not be made on criteria that are unknown to the parties submitting bids or proposals. Nothing in this subdivision shall prevent the state or a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, from making judgments on the capabilities of vendors to complete the work requested if this option is clearly stated in the body of the document and if used as the reason for the award, is so stated.

On their faces, these statutes do not grant procurement authority. Rather, they impose requirements on “every” procurement “that is undertaken” and all “awards” by “a state agency.”

Thus, if a procurement is authorized by an agency's enabling legislation and the value of the procurement exceeds \$35,000, these statutes create certain standards for the procurement.

This is borne out when these statutes are considered within the context of the entire chapter as they must be. *Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 73 (2015) (words and phrases not to be construed in isolation but "rather within the context of the statute as a whole"); *Sprague Energy Corp. v. Town of Newington*, 142 N.H. 804, 806 (1998) ("[A]ll sections of a statute must be construed together").¹¹ Once it is understood that RSA ch. 21-I places *all* state agency procurements in one of four mutually exclusive categories, the purpose of RSA 21-I:22-a and :22-b becomes clear. Both sections begin with the language, "Notwithstanding the provisions of RSA 21-I:18" and then describe certain requirements for agency procurements and contract awards. The reference to RSA 21-I:18 is significant because that is the section of the statute listing the state agencies and purchases that are exempt from the chapter's other provisions. Hence, RSA 21-I:22-a and :22-b are standards the legislature has imposed on *all* state procurements, even if the procuring agency is otherwise exempt from the provisions of RSA ch. 21-I. It defies belief that the legislature would allocate procurement authority with such care only to create standardless procurement discretion in all state agencies *in the same statute*, yet that is in effect what the superior court held. *Post* at 55 (construing RSA 21-I:22-a and 22-b to authorize procurements by state agencies, including NHDOT).

Even if RSA 21-I:22-a and :22-b were ambiguous and the court were to consult the legislative history to resolve the ambiguity, *JP Morgan Chase Bank, NA v. Grimes*, 167 N.H. 536, 537 (2015) (legislative history irrelevant if statute's intent is clear from its language),

¹¹ In none of its orders did the superior court consider RSA 21-I:22-a and :22-b as part of the statutory scheme of RSA ch. 21-I. To the contrary, it consistently interpreted those statutes in isolation. *See, e.g., post* at 78 (examining only RSA 21-I:22-a and 22-b, and no other provision of RSA ch. 21-I, in its discussion of procurement authority).

nothing in the legislative record suggests that the general court intended to create procurement authority in RSA 21-I:22-a and :22-b. Then-state senator Jeanne Shaheen was among the sponsors who introduced SB 118 in 1995 to address “controversies” arising in prior procurements. App. at 457. Senator Shaheen explained in a hearing that “people who have participated in the State’s competitive bidding process” had reported “that the process was not fair and they didn’t understand how it worked.” *Id.* She testified that it was “critical” for “people to feel like there has been a fair assessment” of bids and that they “understand how the assessment is going to be made at the outset,” particularly in the context of “highly technical contracts” executed by the state. *Id.* at 458. According to its sponsor, then, the purpose of the legislation was to enhance the fairness and openness of procurements, not to create procurement authority. SB 118 was enacted in 1995 and was codified as RSA 21-I:22-a and :22-b. *Id.* at 446.

The superior court’s ruling that RSA 21-I:22-a and :22-b granted authority to NHDOT to procure the E-ZPass BOS is contrary to the statutory language, the structure of RSA ch. 21-I as a whole, and the legislative history. Its denial of Conduent’s motion for partial summary judgment and its dismissal of Count IX was error, and Conduent respectfully requests that this court reverse those rulings.

- b. RSA ch. 237 does not authorize NHDOT to conduct procurements.

The trial court also determined that NHDOT’s procurement authority for the BOS contract is found in RSA ch. 237 which is entitled “Turnpike System.” *Post* at 81. This chapter authorizes the commissioner of NHDOT to undertake ten categories of “improvements” to and construction of the turnpike system. RSA 237:2. It is broken into seven subchapters, five of which pertain to discrete portions of the turnpike system. RSA 237:16-a-:16-g (“Regional Electronic Toll Collection”); RSA 237:17-:28 (“Eastern New Hampshire Turnpike”); RSA

237:29-:33 (“Eastern Turnpike Bridge”); RSA 237:34-:44 (“Central New Hampshire Turnpike”); and RSA 237:45-:49 (“Central New Hampshire Turnpike Connection”). The final section of the chapter, RSA 237:49-a, establishes “Turnpike Renewal and Replacement Accounts.”

The first seventeen sections of RSA ch. 237 do not comprise a titled subchapter. The superior court relied principally¹² upon RSA 237:2, VIII, for NHDOT’s authority to procure the E-ZPass BOS. *See, e.g., post* at 81 (summarizing NHDOT’s procurement authority and finding “the authority [to procure] under Chapter RSA 237 [sic], read as a whole, and particularly through RSA 237:2, VIII and RSA 237:16-b”). That paragraph authorizes NHDOT, with approval of the governor and council, to “[a]cquire and install new toll collection equipment.” RSA 237:2, VIII. The court read this provision in isolation and held that because “acquire” is synonymous with “procure” the statute authorizes NHDOT to procure “new toll collection equipment.” *Post* at 81. RSA 237:2, however, is a grant of authority for the design, construction, and improvement of the turnpike system itself. *See, e.g.,* RSA 237:2, I (new traffic lanes, interchange, and toll facilities on Blue Star highway), II – II-e (Spaulding turnpike improvements); and III-V (improvements to central New Hampshire turnpike). Paragraph VIII – on which the superior court placed such great weight – is immediately followed by a general grant of authority to “[m]ake such *other* and *further improvements to the New Hampshire turnpike system* as may be required by RSA 240.” RSA 237:2, IX (emphasis supplied).

In context, then, the authority to “[a]cquire and install new toll collection equipment” refers to the physical structures placed on the turnpike to collect tolls. Indeed, given that RSA 237:2, VIII, was enacted in 1991 – *ten years* before the legislature granted NHDOT authority to

¹² Conduent addresses the court’s reliance upon RSA 237:5, II and :16-b *post* at 24.

participate in electronic tolling (RSA 237:16-b) – it could only have applied to toll booths, collection baskets, and similar fixtures.¹³

The superior court’s interpretation of RSA 237:2, VIII, moreover, ignores the fact that contracts for construction of turnpike improvements under that statute *must be procured under RSA 228:4*:

All contracts for the construction of the New Hampshire turnpike system shall be awarded to the lowest responsible bidder submitting a sealed bid after an advertisement calling for bids has been published at least once in each of 2 successive weeks in a newspaper of general circulation in New Hampshire. The first publication of such advertisement shall be not less than 14 days prior to the date upon which bids are received. Contracts shall be awarded in accordance with RSA 228:4.

RSA 237:14. This statute establishes three important propositions. First, NHDOT’s authority under RSA 237:2 to construct, improve, acquire, and install physical turnpike infrastructure does not describe how contracts for that work are to be procured. The general court’s enactment of a separate procurement provision demonstrates that the powers granted by RSA 237:2 do not include the authority to procure. Second, RSA 237:14 further fortifies the conclusion that RSA ch. 21-I divides and allocates all procurement authority among executive branch agencies. This is because the statute requires that contracts for construction of the turnpike system be procured under RSA 228:4, which is, again, one of the three exceptions to NHDAS’s general procurement authority. See *ante* at 17. Third, even if the acquisition “and installation of new toll collection equipment” could be fairly construed to include tolling management software and a customer service center, RSA 237:14 expressly requires that procurements of contracts for such work be “awarded to the lowest responsible bidder.” The parties and the superior court agree that the

¹³ The court’s reliance on this statute is also inconsistent with its January 23, 2017, order in which the court determined that RSA 228:4 did not apply to this procurement because “the statute is for infrastructure and the BOS contract here is for services related to E-ZPass, an ETC system.” *Post* at 39. RSA ch. 237 is also “for infrastructure,” not “for services related to E-ZPass.”

BOS contract was not awarded to the lowest responsible bidder. Consequently, the RFP and the contract with Cubic did not comply with RSA ch. 237.

The superior court's reliance on RSA 237:5, II (o) and :16-b is equally misplaced. RSA 237:5, II (o), authorizes the installation of "open road tolling" on the through lanes ("main lines") of the turnpike system. "Open road tolling" refers to the high-speed lanes installed, for example, at the center of the I-93 toll booth complex in Hooksett. See <https://www.nh.gov/dot/org/operations/turnpikes/ezpass/ort.htm>. This segment of tolling is subject to a separate contract (colloquially, the "lane contract") from the BOS contract. App. at 375 (acknowledging the addition of the lane system to DOT operations). RSA 237:16-b merely authorizes the commissioner of NHDOT to undertake those acts "necessary to enter into and carry out the provisions of a regional electronic toll collection system agreement *with the Interagency Group*" Emphasis supplied. This provision enables NHDOT to enter into agreements with other participants in the E-ZPass system. It says nothing about the procurement of New Hampshire's BOS.

RSA ch. 237, then, does not grant procurement authority to NHDOT. Any contracts for the work contemplated by the chapter must be procured in accordance with RSA 228:4, the only source of NHDOT's procurement authority under RSA ch. 21-I. RSA 237:14.

NHDOT lacked authority to procure the E-ZPass BOS. The superior court's denial of Conduent's motion for partial summary judgment and its dismissal of Count IX was error. Conduent respectfully requests that this court reverse both rulings.

C. NHDOT exceeded its statutory authority by utilizing the best-value procurement method.

The superior court and NHDOT relied on RSA 21-I:22-a and :22-b not only as a source of procurement authority for NHDOT but also as authority to conduct best-value procurements.

Post at 67. Conduent has established above that the court misread these statutes for the former proposition, and the same is true with respect to the latter.

To begin with, RSA 21-I:22-a applies to *all* procurements by state agencies in excess of \$35,000 (“every request for purchases (RFP), request for quotes (RFQ), and other procurement which is greater than \$35,000 . . .”), and RSA 21-I:22-b applies to *all* awards made by a state agency at such a procurement’s conclusion (“awards which are made by the state or by a state agency . . .”). This means that if NHDOT and the superior court are correct *every* state agency has best-value procurement authority. This cannot be reconciled with the statutory language, the purpose of the two statutes in the overall context of RSA ch. 21-I, the general court’s consistent requirement that state agencies procure using the lowest responsible bidder standard, or the legislature’s repeated consideration and rejection of legislation that would confer best-value authority on any state agency.

There are two principal differences between best-value procurements and lowest responsible bidder procurements. The first is the weight assigned to the contract price. See *ante* at 4. The second is the use of *subjective* criteria by the procuring agency to determine which proposal represents the best value. For example, among the multitude of criteria in the RFP for the assessment of the technical proposals for the E-ZPass BOS are the following:

- “System Performance and Reliability: Understanding and ability to meet the overall requirements of the RFP. Specifically addressing the on-going KPI requirements, maintainability, redundancy and long term sustainability of the System.”
- “Understanding and ability to manage transponder inventory.”
- “Time commitment of key contractor personnel to this Project.”

App. at 424-425.

RSA 21-I:22-a, however, expressly authorizes only the use of “*objective* criteria” (emphasis supplied) in the procurement “document.” By no stretch of the imagination can the criteria quoted above be construed as objective, and there are more than thirty such criteria in the RFP. See App. at 423-426. The legislature’s use of the adjective “objective” alone is fatal to the superior court’s construction of RSA 21-I:22-a.

As noted above, moreover, the superior court failed to interpret these two sections of NHDAS’s enabling legislation as part of the statutory scheme. *Ante* at 19-21 (RSA 21-I:22-a and :22-b impose standards on *all* state agency procurements irrespective of which of the four categories recognized by RSA ch. 21-I they fall within). As a consequence it did not consider how its reading of those sections squares with the legislature’s explicit grants of procurement authority elsewhere in the statute. As Conduent has demonstrated above, the two divisions of NHDAS given procurement authority by RSA ch. 21-I are required to award contracts to the lowest cost bidder. *Ante* at 16-17.

The superior court’s reading of RSA 21-I:22-a and :22-b is also inconsistent with grants of procurement authority to other state agencies. Again, nowhere in any state agency’s enabling legislation does the legislature grant the authority to conduct best-value procurements. *Ante* at 5-6. Enabling legislation is replete, however, with requirements that contracts be awarded to the lowest responsible bidder (or a variation thereof). *See, e.g.*, RSA 21-I:80, I (requiring NHDAS to award major state projects to the lowest qualified bidder meeting project specifications); RSA 28:8-e, I (requiring award for purchases made by Hillsborough county to be made to the lowest responsible bidder); RSA 228:4 (requiring NHDOT to award contracts to the lowest responsible bidder for certain transportation contracts); RSA 237:44 (requiring contracts for construction of the Central New Hampshire Turnpike to be awarded to the lowest responsible bidder); RSA 486-

A:9, I(j) (authorizing the department of environmental services to issue authorization to award construction contracts to the lowest responsive and responsible bidder for certain water-related projects) and RSA 237:14 (requiring contracts for construction of the New Hampshire turnpikes system be awarded to the lowest responsible bidder). The superior court's construction of RSA 21-I:22-a and :22-b would enable those agencies to opt out of the lowest responsible bidder standard because, by the superior court's reckoning, all state agencies have best-value procurement authority. It is simply not possible to harmonize an unambiguous directive that state agencies award contracts on the most objective basis imaginable (price) with the notion that the legislature implicitly gave those same agencies procurement authority that assigns little weight to price and contemplates that subjective factors will predominate in selection of the successful bidder.

Finally, the superior court offered no explanation for why the legislature has considered and rejected best value procurement authority on multiple occasions since 1995 if RSA 21-I:22-a and :22-b already gives state agencies that authority. See *ante* at 12. Nor did the court even acknowledge that in 2011, NHDAS testified in the presence of an NHDOT representative that NHDOT did not want or need best-value procurement authority, which would "add expense" when the "low-bid selection process seems to work well" for the agency. App. at 162.

The superior court erred when it ruled that NHDOT has best-value procurement authority, and Conduent respectfully requests that this court reverse that ruling.

CONCLUSION

Conduent respectfully requests that the court reverse the superior court's dismissal of, and its denial of Conduent's motion for partial summary judgment on, Count IX and enter judgment in Conduent's favor on Count IX.

RULE 16(3)(i) CERTIFICATION

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the decisions being appealed were in writing, and that true and accurate copies of the same are appended to this brief.

Respectfully submitted,

CONDUENT STATE & LOCAL
SOLUTIONS, INC.

Date: 1-8-18

By: Bryan K. Gould
Bryan K. Gould, Esq. (NH Bar #8165)
Philip R. Braley, Esq. (NH Bar #9276)
Cooley A. Arroyo, Esq. (NH Bar #265810)
Cleveland, Waters and Bass, P.A.
Two Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761

REQUEST FOR ORAL ARGUMENT

Conduent hereby requests an opportunity for oral argument. Counsel estimates that argument will require fifteen minutes and expects that Bryan K. Gould will present the argument.

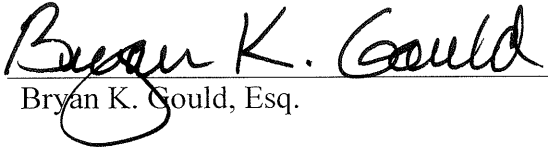
Date: 1-8-18

Bryan K. Gould
Bryan K. Gould, Esq.

RULE 26 CERTIFICATE OF SERVICE

I hereby certify that two copies of the within document were this day forwarded via U.S. Mail, postage prepaid, to all counsel of record.

Date: 1-8-18



Bryan K. Gould, Esq.

COPIES OF DECISIONS BELOW BEING APPEALED

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

File Copy

Case Name: **Xerox State & Local Solutions, Inc. v The State of NH Department of
Transportation and Cubic Transportation Systems, Inc.**
Case Number: **217-2015-CV-00574**

Enclosed please find a copy of the court's order of January 22, 2017 relative to:

ORDER

January 23, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Bryan K. Gould, ESQ; Kimberly MR Sullivan, ESQ; Rebecca L. Woodard, ESQ; Cori P Palmer,
ESQ; Stephen G. LaBonte, ESQ; Philip R. Braley, ESQ; Cooley A. Arroyo, ESQ; Daniel M.
Deschenes, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Xerox State & Local Solutions, Inc.

v.

The State of New Hampshire Department of Transportation, *et al.*

Docket No. 217-2015-CV-574

ORDER

Plaintiff, Xerox State & Local Solutions, Inc. ("Xerox"), filed a complaint against Defendants, the State of New Hampshire Department of Transportation ("NHDOT") and Cubic Transportation Systems, Inc. ("Cubic"), following NHDOT's decision to award an E-ZPass back office system ("BOS") contract to Cubic. Before the Court is Defendants' Joint Motion to Dismiss. After consideration of the parties' pleadings and the applicable law, the Court finds and rules as follows.

Factual Background

The following facts are derived from the allegations contained in Xerox's first amended complaint.¹ NHDOT administers NH E-ZPass ("E-ZPass"), an electronic toll collection ("ETC") system. (Compl. ¶ 7.) The E-ZPass system allows vehicles with a transponder to pass through toll lanes without having to stop and manually pay the toll. (Compl. ¶ 8.) NHDOT maintains accounts for all E-ZPass users and when a vehicle

¹ The Court will also consider the language in the RFP. See *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) ("The trial court may also consider documents attached to the plaintiff's pleadings or documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint.") (internal citation and quotations omitted).

with a transponder passes through a tollbooth, a toll is charged to the account that corresponds to the detected transponder. (Compl. ¶ 9.)

Operation of the E-ZPass system requires a variety of “back office” activities, such as developing and maintaining software, managing E-ZPass accounts, distributing the transponders, interacting with credit card companies, identifying and enforcing E-ZPass violations, coordinating with ETC systems in other states, staffing E-ZPass service centers, and developing and maintaining the E-ZPass website. (Compl. ¶ 16.) When NHDOT began the E-ZPass system in 2004, it contracted with Xerox to perform the back office activities. (Compl. ¶ 17.) NHDOT renewed its contract with Xerox in 2007, 2010, and 2011. (Compl. ¶ 18.) Xerox’s latest contract with NHDOT was set to expire on September 30, 2016. (Compl. ¶ 24.)

On December 9, 2014, NHDOT issued a request for proposals (“RFP”), which solicited bids for “Back Office Systems to Support Electronic Tolling, Video Tolling and Violation Processing.” (Compl. ¶ 25.) The RFP required bidders to submit a technical proposal and a price proposal. (RFP § 4.19.) After an initial screening of the bids, the RFP required NHDOT to conduct an initial scoring of each bidder’s technical proposals to create a list of the top four or five bidders. (RFP § 5.3.3.) Those bidders were then invited to oral interviews and product demonstrations with NHDOT. (RFP § 5.3.3.) NHDOT then considered the information provided at the interviews and demonstrations in refining each bidder’s technical review score. (RFP § 5.3.3.) Following the technical review, NHDOT opened the bidders’ price proposals. (RFP § 5.3.4.)

Evaluation of the bids was based on a 100-point scale, with 70 points allocated to the technical proposal and 30 points to the price proposal. (Compl. ¶ 31.) Under the

technical proposal category, points were allocated to "Back Office System Design and Technical Approach"- 20 points, "Back Office Services and Operations Approach"- 15 points, "Firm Qualifications, Project Team, Capabilities and References"- 20 points, and "Implementation, Transition and Delivery Approach"- 15 points. (RFP § 5.1.) Under the price proposal category, points were allocated to "Back Office Implementation Phase"- 15 points and "Back Office Operations"- 15 points. (RFP § 5.1.)

Following the conclusion of the scoring, the RFP permitted NHDOT to enter into contract discussions with the bidder it determined was best qualified and to solicit a best and final offer ("BAFO") from that bidder. (RFP § 5.3.5.) The RFP further provided that the State would make a final selection as a result of the BAFO process. (RFP § 5.3.6.)

After reviewing the bids, NHDOT gave Xerox a higher score than Cubic for its price proposal. (Compl. ¶ 42.) However, Cubic received a higher score than Xerox for its technical proposal. (Compl. ¶ 44.) In total, NHDOT gave Cubic a combined score of 80.76 and Xerox a combined score of 80.12. (Compl. ¶ 43.) NHDOT then entered into BAFO discussions with Cubic and ultimately executed a contract with it, which the governor and council approved on October 7, 2015. (Compl. ¶¶ 38–39.)

Xerox subsequently initiated the instant action. Defendants now move to dismiss Counts I-III and VII-IX of the amended complaint, to which Xerox objects. Counts I-III and VII-IX seek equitable relief through either a declaration voiding the contract between NHDOT and Cubic or an injunction prohibiting the implementation of the contract. The Court addresses the parties' arguments in turn.

Legal Standard

In ruling on a motion to dismiss, the Court must determine whether a plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (quotation omitted). This determination requires the Court to test the facts contained in the complaint against applicable law. Tessier v. Rockefeller, 162 N.H. 324, 330 (2011). In rendering such a determination, the Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences in the light most favorable to the plaintiff." Bohan, 141 N.H. at 213 (citation and quotations omitted). "The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted." Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985). A Court "need not accept statements in the complaint which are merely conclusions of law." Id. (citation omitted).

Analysis

Defendants argue sovereign immunity bars Xerox's six equitable claims. "In New Hampshire, the State is immune from suit in its courts without its consent. Sovereign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel. It is not a defense which must be affirmatively pled." Lorenz v. N.H. Admin. Office of the Courts, 152 N.H. 632, 634 (2006) (internal citation and quotation omitted). "The public policy considerations underlying sovereign immunity are twofold: the protection of the public against profligate encroachment on the public treasury, and the need for the orderly administration of government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen." Aranosian Oil Co. v. State, 168 N.H. 322, 330 (2015) (quotation omitted).

Xerox contends the doctrine of sovereign immunity is unconstitutional and should be abolished. The Court disagrees. Sovereign immunity is a statutory and common law construct in this State. See Tilton v. Dougherty, 126 N.H. 294, 298 (1985) (“Official immunity, like sovereign immunity itself, rested on a common law basis in this State until the enactment in 1978 of RSA 99–D:1, which adopted both doctrines ‘as the law of the state,’ except where a statute might provide an exception.”) (internal citation and quotation omitted). The crux of Xerox’s argument against sovereign immunity appears to be that the doctrine is arcane and “not among the people’s grants of power to the state government under our constitution.” (Pl.’s Obj. to Mot. to Dismiss 1, 14.) However, the Legislature codified sovereign immunity, and the Legislature is the voice of the people. See Opinion of the Justices, 143 N.H. 429, 444 (1999) (“The people of this State delegated to the legislature the power of making its laws.”); State v. Hayes, 61 N.H. 264, 327 (1881) (“The people are sovereign, but their sovereignty must be exercised in the mode which they have pointed out in the constitution. All legislative power is derived from the people; but when the people adopted the constitution, they surrendered the power of making laws to the legislature, and imposed it upon that body as a duty.”)

Moreover, the New Hampshire Supreme Court has repeatedly applied the doctrine of sovereign immunity both before and after its abrogation by the Legislature. See, e.g., Opinion of the Justices, 126 N.H. 554, 557 (1985) (“The doctrine of sovereign immunity is deeply entrenched in this jurisdiction.”) (quotation omitted). Xerox contends that sovereign immunity has been disparaged by the NH Supreme Court and its constitutionality questioned such that its demise is inevitable. However, all of the cases

cited by Xerox to support this proposition that contain criticism of sovereign immunity predated the legislature's amendment of RSA 541-B, which abrogated sovereign immunity to a great extent in tort cases. See State v. Brousseau, 124 N.H. 184, 189–91 (1983); Chasse v. Banas, 119 N.H. 93, 96 (1979). The limitation was unanimously approved by the sitting appellate justices, including Justice Douglass, who was one of the concurring justices in Brousseau who strongly indicted sovereign immunity due to its breadth. Opinion of the Justices, 126 N.H. 554, 568(1985). With the amendment of RSA 541-B in response to Brousseau, those criticisms are no longer pertinent.

One of the purposes of sovereign immunity is to ensure the orderly administration of government, an effort that would suffer if sovereign immunity were to end, particularly in cases such as this where a governmental operation would come to a grinding halt. It is up to the legislature to determine what weight should be given to the concern for efficient government and balance it against any resulting restriction on a citizen's right to a particular remedy if immunity is left intact, a principle that was reaffirmed by the Supreme Court in Slovenski v. State, Dep't of Pub. Works & Highways, 132 N.H. 18, 22 (1989) ("We refrain, however, from taking up the constitutional analysis requested by the plaintiffs [to find unconstitutional the pre-revised RSA 541-B]. In State v. Brousseau, a plurality of this court held that it was constitutionally appropriate to give the legislature a further opportunity [] before the court would reconsider the constitutionality of the doctrine of sovereign immunity. 124 N.H. at 192.") For the same reason and because a disgruntled bidder has an adequate damages remedy, this Court declines the invitation to find the doctrine of sovereign immunity unconstitutional.

Xerox alternatively argues the Legislature waived NHDOT's sovereign immunity when it enacted RSA 228:4 and RSA 228:4-a. NHDOT and Cubic argue that RSA 228 is not applicable to the bidding process at issue and that RSA 21-I applies. The Court agrees with the Defendants. RSA 228:4 states, "Each state transportation project shall be built under contracts awarded to the lowest responsible bidder through competitive bidding." "Project" is defined as "any construction, reconstruction, alteration, or maintenance of any highway, bridge, or other item directly related to transportation." RSA 228:1, VII. Under this definition, RSA 228:4 does not apply to the procurement at issue because the statute is for infrastructure and the BOS contract here is for services related to E-ZPass, an ETC system. The principle of *ejusdem generis* provides that, where specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words. In re Hennessey-Martin, 151 N.H. 207, 211 (2004) (citing State v. Meaney, 134 N.H. 741, 744 (1991)). In this case, the general phrase, "or other item directly related to transportation," relates back to the enumerated list, which are physical structures that carry vehicles. Although tolls collected may support transportation, if the legislature so deems, the E-ZPass system does not physically aid in vehicles or persons moving from one point to another.

Furthermore, even assuming that RSA 228:4 applies to the procurement at issue, it does not waive sovereign immunity for equitable relief. Neither RSA 228:4 nor RSA 228:4-a mentions liability or the ability to sue the State. Generally, "[i]n the absence of specific legislative consent," a party is barred from suing the State. Lorenz, 152 N.H. at 635. These "[s]tatutory waivers of sovereign immunity [are] strictly construed." Chasse

v. Banas, 119 N.H. at 96. Nonetheless, the New Hampshire Supreme Court has recognized implied waivers of sovereign immunity. Id. This is true, however, only when a statute “by its terms evidences a clear intent to grant a right to sue and recover damages caused by the negligent actions of certain state officials” Id. In such a case, the “statute must be construed to carry out the will and beneficent purpose of the legislature.” Id.

The Court finds no such clear intent to extend the right to equitable relief to offended bidders in Chapter RSA 228. Thus, even assuming that RSA 228:4 applies to the procurement at issue and contains an implied waiver of immunity, that waiver would only extend to suits for money damages and not equitable relief. See Lorenz v. NH Admin. of the Courts, 152 N.H. 632, 635 (2005) (citing Wiseman v. State, 98 N.H. 393, 397 (1953) (Court found no implied waiver for specific performance or equitable relief under RSA 491:8, which allow suits against the State in contract.) The Court does not find the legislature implicitly waived immunity for equitable claims when it enacted RSA 228:4 and RSA 228:4-a.²

Last, Xerox argues that, even if sovereign immunity is applicable in some context, NHDOT does not enjoy the immunity when engaging in the competitive bidding process, because it does not act as a sovereign, but rather acts as a consumer, not engaged in a discretionary function. The Court disagrees. First, the distinction between the State undertaking a discretionary executive or planning function versus implementing a policy is one found in RSA 541-B:19, which pertains to tort claims

² The Court would draw the same conclusion under Chapter RSA 21-I for the reasons set forth in NHDOT and Cubic pleadings and Judges Temple and McNamara Orders in Law Warehouses, Inc. and XTL-NH, Inc., respectively; this Court likewise finds no specific legislative consent to suit in equity for a violation of the competitive bidding statute in that chapter.

against the State. It does not apply to the claims at bar. In addition, the selection of a contractor to design and implement an electronic toll collection system requires the exercise of judgment that is beyond simply carrying out a policy or procedure. Furthermore, the State cannot serve its citizens without securing a means to deliver those services, and the collection of tolls and fees is uniquely a government function.

In determining that sovereign immunity bars equitable claims against the State, the Court also considered Marbucco Corp. v. City of Manchester, 137 N.H. 629 (1993). Marbucco Corp. sets out remedies available to a disappointed bidder on a public contract.

[D]amages ordinarily should be limited to the expenses incurred by the low bidder in its fruitless participation in the competitive bidding process, i.e., its bid preparation costs. To permit the recovery of greater damages in such cases could drain the public fisc in response to mere carelessness on the part of low level government officials. If a disappointed low bidder complies with all requirements of the bid instructions but is deprived of the contract through some conduct of the awarding authority tantamount to bad faith, however, then the recovery of lost profits should be the measure of damages.

137 N.H. at 634 (internal citation omitted). Although the Supreme Court did not address the issue of whether equitable relief could be available, Marbucco establishes some remedy for a disappointed bidder -- absent bad faith, to expenses incurred in pursuit of the contract and, in the case of bad faith, to lost profits. It also provides a strong incentive to the State to treat bidders fairly and to protect public dollars by not engaging in bad faith and favoritism. Furthermore, as discussed below, a declaratory judgment action is available if a constitutional violation has been committed during the selection process, as both parties agree. Therefore, unlike the concerns addressed by the Supreme Court prior to the abrogation of immunity for torts when an injured party had

no remedy for negligence of the State, here a wronged bidder has some remedy that at the very least would place the bidder in the same position it would have been had it not bid.

The Court also considered the analysis of the Supreme Court when it decided Lorenz v. NH Admin. of the Courts, 152 N.H. 632 (1953) and denied the State employees the opportunity for equitable relief. In construing RSA 491:8, which abrogated sovereign immunity to allow contract actions against the State, the Lorenz court relied on the fact that the statute “contain[ed] no reference to redress in equity and therefore require[d] *a fortiori* an interpretation which limit[ed] the consent given to actions for the recovery of damages.” 152 N.H. at 635 (citing Wiseman v. State, 98 N.H. at 397). The same is true of the competitive bidding statutes, RSA 228 and RSA 21-I, at issue here.

NHDOT also moves to dismiss Xerox’s pleas for declaratory judgment arguing that Xerox failed to state a valid constitutional claim. Xerox agrees that a valid constitution claim is required to survive the motion. In its amended complaint, Xerox alleges NHDOT violated its due process rights under the State Constitution, its equal protection rights under the Federal and State Constitutions, and its rights under Part I, Article 1 of the State Constitution. The Court will address each constitutional claim in turn.

To establish a due process claim, a plaintiff must demonstrate that the challenged State action affected a protected property interest. Burrage v. N.H. Police Standards & Training Council, 127 N.H. 742, 745 (1986); Duffley v. N.H. Interscholastic Athletic Ass’n, Inc., 122 N.H. 484, 490 (1982). To have a protected property interest, “a

person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules—or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Duffley, 122 N.H. at 491 (quotation omitted). The United States Supreme Court has emphasized that “[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” Id. (quotation omitted).

Xerox does not have a property interest in a contract that was not awarded to it. See Riblet Tramway Co. v. Stickney, 129 N.H. 140, 146 (1987) (“[O]ne cannot have a property interest in a privilege before it is granted.”). Xerox attempts to avoid this conclusion by alleging it has a property interest in the award of a contract “based on an objective competitive bid process.” (Compl. ¶ 123.) In support of this contention, Xerox argues “NHDOT was required to comply with the statutory requirements for competitive bidding, including the mandatory bidding procedure set forth in its enabling legislation, RSA 228:4.” (Pl.’s Obj. to Mot. to Dismiss 1, 26.) The requirement that NHDOT use certain bidding procedures, whether under RSA 228:4 or Chapter 21-I, does not give rise to a property right. See Alvarado Aguilera v. Negrón, 509 F.3d 50, 54 (1st Cir. 2007) (“‘Property’ cannot be defined by the procedures provided for its deprivation.”) (quotation omitted). Thus, Xerox’s allegations, taken as true, are insufficient to form the basis of a due process claim.

Xerox also alleges an equal protection claim under both the State and Federal Constitutions. The Court will address this claim under the State Constitution and rely upon federal law for guidance only. Cnty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 758 (2007); see also In re Sandra H., 150 N.H. 634, 637 (2004) (“Federal equal protection offers no greater protection than our State equal protection guarantee.”).

“[T]he equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike.” In re Sandra H., 150 N.H. at 637 (quotation omitted). There are two alternative means of establishing an equal protection claim: selective enforcement and classification. N. New England Tel. Operations, LLC v. City of Concord, 166 N.H. 653, 656 (2014). Xerox argues its equal protection claim is based on selective enforcement. To establish selective enforcement, a plaintiff must show “conscious, intentional discrimination.” Id. at 657 (quotation omitted). However, Xerox has failed to provide facts in its amended complaint alleging “conscience, intentional discrimination.” Rather, it alleges that NHDOT “employ[ed] undisclosed discriminatory criteria or discriminatory animus to deprive an otherwise qualified bidder of a contract award pursuant to a state competitive bid.” (Compl. ¶ 126.) Such a general allegation is insufficient to form the basis of an equal protection claim as the Court “need not accept statements in the complaint which are merely conclusions of law.” Mt. Springs Water Co., 126 N.H. at 201 (citation omitted). Thus, Xerox has failed to state a claim for equal protection.

Xerox also argues NHDOT violated its rights under Part I, Article 1 of the State Constitution. Part I, Article 1 states, “All men are born equally free and independent:

Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good." This provision is typically applied as part of the equal protection guarantees provided by the State Constitution. As discussed above, Xerox has failed to state a claim for equal protection.

However, the New Hampshire Supreme Court has also interpreted Part I, Article 1 to require municipalities "to provide assistance to all their citizens seeking approval under zoning ordinances." Richmond Co. v. City of Concord, 149 N.H. 312, 314 (2003) (quotation omitted). However, the New Hampshire Supreme Court has not applied the provision in the context of competitive bidding, and this Court does not find it appropriate to do so. Xerox is not a citizen of the public body at issue. Rather, it is a foreign corporation that has come into the State to do business. Thus, Xerox has failed to state a Part I, Article 1 claim.

Xerox also argues that it has stated a separation of powers claim in Count IX under Part I, Article 37 of the State Constitution. New Hampshire has liberal pleading standards. Berlinguette v. Stanton, 120 N.H. 760, 762 (1980); see also Pike Indus., Inc. v. Hiltz Const., Inc., 143 N.H. 1, 4 (1998) ("The writ need not do more than state the general character of the action and put both court and counsel on notice of the nature of the controversy."). However, Xerox's amended complaint does not mention a separation of powers violation or Part I, Article 37 of the State Constitution. Nor does Count IX even mention the constitution. As a result, the Court does not find that Xerox has adequately pled a separation of powers claim.

Conclusion


Based on the foregoing, the Court finds that NHDOT is immune from suit for claims in equity in connection with competitive bidding, and that, because Xerox has failed to state a valid constitutional claim, its declaratory judgment actions likewise fail.

It follows that the equitable claims against Cubic must likewise be dismissed. See Blacksmith Invs., LLC v. Cives Steel Co., 228 F.R.D. 66, 74 (D. Mass. 2005) ("As a general statement, [i]t is well established that a party to a contract which is the subject of the litigation is considered a 'necessary' party.") (quotation omitted).

Accordingly, Defendants' Joint Motion to Dismiss is GRANTED. With regard to the declaratory judgment claims, Xerox shall have thirty (30) days from the date of the Clerk's notice of this order to amend its complaint. Otherwise, the dismissal of the claims shall be final.

SO ORDERED.

Date: 1/27/2017


Diane M. Nicolosi
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

File Copy

Case Name: **Conduent State & Local Solutions, Inc. v The State of NH Department of
Transportation and Cubic Transportation Systems, Inc.**
Case Number: **217-2015-CV-00574**

Enclosed please find a copy of the court's order of May 16, 2017 relative to:

ORDER

May 17, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Bryan K. Gould, ESQ; Kimberly MR Sullivan, ESQ; Rebecca L. Woodard, ESQ; John J. Conforti,
ESQ; Cori P Palmer, ESQ; Stephen G. LaBonte, ESQ; Philip R. Braley, ESQ; Cooley A. Arroyo,
ESQ; Daniel M. Deschenes, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Xerox State & Local Solutions, Inc.
(now: *Conduent State + Local Solutions, Inc.*)
v.

The State of New Hampshire Department of Transportation, *et al.*

Docket No. 217-2015-CV-574

ORDER

Plaintiff, Xerox State & Local Solutions, Inc. ("Xerox"), filed a complaint against Defendants, the State of New Hampshire Department of Transportation ("NHDOT") and Cubic Transportation Systems, Inc. ("Cubic"), following NHDOT's decision to award an E-ZPass back office system ("BOS") contract to Cubic. Before the Court is NHDOT's Motion for Summary Judgment on Counts IV-VI of Xerox's second amended complaint. After consideration of the parties' pleadings and the applicable law, the Court finds and rules as follows.

Factual Background

In December 2014, NHDOT issued an RFP soliciting bids for a new BOS for the New Hampshire E-ZPass system. BOS activities include software development, managing E-ZPass accounts and transponders, and providing customer service, among others. At the time the RFP was issued, Xerox held a BOS contract with NHDOT.

The RFP required bidders to submit a technical proposal and a price proposal. (RFP § 5.1.) After an initial screening of the bids, the RFP required NHDOT to conduct an initial scoring of each bidder's technical proposals. (RFP § 5.3.3.) Bidders were

then invited to oral interviews and product demonstrations. (RFP § 5.3.3.) NHDOT then considered the information provided at the interviews and demonstrations in refining each bidder's technical review score. (RFP § 5.3.3.) Following the technical review, NHDOT was to open the bidders' price proposals. (RFP § 5.3.4.)

Evaluation of the bids was based on a 100-point scale, with 70 points allocated to the technical proposal and 30 points to the price proposal. (RFP § 5.1.) Following the conclusion of the scoring, the RFP permitted NHDOT to enter into contract discussions with the bidder it determined was best qualified and to solicit a best and final offer ("BAFO") from that bidder. (RFP § 5.3.5.) The RFP further provided that the State would make a final selection as a result of the BAFO process. (RFP § 5.3.6.)

After reviewing the bids, NHDOT gave Cubic a combined score of 80.8 and Xerox a combined score of 80.1. (NHDOT's Mot. Summ. J., Ex. D at ¶¶ 5.) A third bidder, Egis, received a combined score of 80.7. (*Id.*) NHDOT then entered into BAFO discussions with Cubic and ultimately executed a contract with it.

Legal Standard

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial." Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (quotation omitted). A fact is material if it affects the outcome of the case under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In

considering a party's motion for summary judgment, the Court considers the evidence, and all inferences properly drawn from it, in the light most favorable to the nonmoving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002).

Analysis

NHDOT seeks summary judgment on Counts IV-VI of Xerox's second amended complaint. Xerox objects. The Court addresses the parties' arguments in turn.

I. Count IV: Promissory Estoppel

In Count IV, Xerox seeks damages under a claim of promissory estoppel. NHDOT argues this claim is barred by RSA 541-B:19, I(b)-(c). "In enacting RSA chapter 541-B, the legislature waived the State's sovereign immunity, subject to several exceptions." Conrad v. N.H. Dep't of Safety, 167 N.H. 59, 79 (2014). Two of those exceptions are found in RSA 541-B:19, I(b)-(c), which state as follows:

Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to:

(b) Any claim based upon an act or omission of a state officer, employee, or official when such officer, employee, or official is exercising due care in the execution of any statute or any rule of a state agency.

(c) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee, or official acting within the scope of his office or employment.

However, RSA chapter 541-B and the exceptions laid out in RSA 541-B:19 relate to tort claims. See RSA 541-B:1, II-a (defining a "claim," as used in RSA chapter 541-B, as a request for monetary relief for bodily injury, personal injury, death, or property damage); see also Ford v. N.H. Dep't of Transp., 163 N.H. 284, 294 (2012) ("Discretionary function immunity is premised upon the notion that certain essential,

fundamental activities of government must remain immune from *tort liability* so that our government can govern.”) (quotation omitted) (emphasis added). RSA chapter 541-B, therefore, does not apply to Count IV, which, as a promissory estoppel allegation, is a contract claim, and, as discussed below, is not barred by sovereign immunity.

The Court has “jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state.” RSA 491:8; see also Chase Home for Children v. N.H. Div. for Children, Youth & Families, 162 N.H. 720, 731 (2011) (finding RSA 491:8 is “a specific legislative authorization for the judiciary to enter judgment against the State of New Hampshire in contract disputes”). In Marbucco Corp. v. City of Manchester, the New Hampshire Supreme Court, citing Restatement (Second) of Contracts § 90 (1979), explicitly recognized that a bidder’s reasonable reliance on a public entity’s promise to award a contract to the lowest responsible bidder may entitle a bidder to damages under a theory of promissory estoppel. 137 N.H. 629, 633 (1993).

Promissory estoppel “serves to impute contractual stature based upon an underlying promise, and to provide a remedy to the party who detrimentally relies on the promise.” Great Lakes Aircraft Co. v. Claremont, 135 N.H. 270, 290 (1992) (citing 2A Corbin on Contracts § 196A, at 55–56 (Supp. 1991)). In Jackson v. Morse, the New Hampshire Supreme Court emphasized that “a promise binding under [the promissory estoppel provision of the Restatement of Contracts] is a contract, and full-scale enforcement by normal remedies is often appropriate.” 152 N.H. 48, 53 (2005) (quoting Restatement (Second) of Contracts § 90 comment d). Thus, it follows that because RSA 491:8 permits contract actions against the State, sovereign immunity does not bar

Xerox's promissory estoppel action and the Court has subject matter jurisdiction over Xerox's promissory estoppel claim. As a result, NHDOT's Motion for Summary Judgment as it relates to Count IV is DENIED.

NHDOT argues that even if it is not entitled to immunity, Xerox's monetary claims are subject to RSA chapter 541-B's cap on damages. However, RSA chapter 541-B's cap on damages relates solely to tort claims. See RSA 541-B:14, 1 ("All claims arising out of any single incident against any agency for damages in *tort actions* shall be limited to an award not to exceed \$475,000 per claimant and \$3,750,000 per any single incident") (emphasis added). As discussed above, Xerox's promissory estoppel claim is not a tort action. As a result, NHDOT is not entitled to RSA chapter 541-B's cap on damages for Xerox's promissory estoppel claim.

NHDOT further argues Xerox is not entitled to lost profits. As discussed in the Court's Order on Defendants' Motion to Dismiss dated January 22, 2017, Marbucco sets out the remedies available to a disappointed bidder on a public contract. 137 N.H. at 634. Under Marbucco, the remedies for a disappointed bidder are limited to expenses incurred in pursuit of the contract and, in the case of bad faith, lost profits. Id. "Bad faith involves more than mere bad judgment or negligence." Porter v. Town of Sanbornton, 150 N.H. 363, 369 (2003). It "implies conscious wrongdoing." Id. To prove bad faith, a party "must demonstrate intent to injure or intent to disregard duties." Id.

NHDOT argues that it conducted the procurement at issue in good faith. It provided affidavits of John Corcoran, Renee Dupuis, Margaret Blacker, Walker Nielsen, Charles Burns, and William Oldenburg—all of whom are NHDOT employees and were

members of the evaluation committee for the RFP—that state they performed their duties as part of the evaluation committee “diligently and in good faith throughout the entire course of the evaluation and in making [their] decisions.” (NHDOT’s Mot. Summ. J., Exs. D–I.)

In response, Xerox asserts it has established that there is a genuine issue of material fact regarding whether or not NHDOT acted in bad faith. The Court agrees. First, Xerox contends that NHDOT specifically designed the RFP to reduce Xerox’s “natural advantage” as the incumbent bidder, which NHDOT does not dispute. In addition, Xerox provided deposition testimony that, during NHDOT’s contract period with Xerox, at least one member of the evaluation committee, Renee Dupuis, often used a profane adjective when referring to Xerox when the E-ZPass system encountered problems, characterized as a “mantra,” and that Cubic won the bid almost immediately after Xerox finished its product demonstration, suggesting it was a preordained choice. (Pl.’s Obj. to Summ. J., Ex. 1, Attachments D at 40:6–9; F at 129:16–13:8.)¹ Xerox has provided evidence that some members of the evaluation committee gave certain technical criteria greater weight than other criteria despite no special weighting having been assigned in the RFP. Even if the fault lay with the drafters of the RFP and the committee members did not engage in any intentional or actual wrongdoing, the lack of specificity in the RFP provided an opportunity for members to weigh the information provided by the bidders according to his or her bias. More troubling, Xerox also presented deposition testimony that some members of the evaluation committee may

¹ Xerox also provided evidence that certain NHDOT employees did not know the statutory basis for NHDOT’s procurement authority. (Pl.’s Obj. to Summ. J., Ex. 1, Attachment C at 222:14–16.) However, as discussed below, NHDOT has the authority to conduct the procurement at issue and a non-lawyer’s inability to cite to a particular statute does not lead to a reasonable inference of bias or bad faith.

have finalized their technical scores after opening the price proposals, contrary to the requirements of the RFP, such that the technical scores could be modified to result in Xerox not being the bidder with the best score. (Pl.'s Obj. to Summ. J., Ex. 1, Attachments A at 123:7–10; F at 111:4–8, 180:5–18; H at 83:6–22.) Finally, it appears that one member came to a final technical score before determining the scoring of the subcategories that would total to the final score, implying that that end result was more important than the details. Although NHDOT has an innocent explanation for its actions, for example contending that the design of the RFP was done to level the playing field of all the bidders, not to disadvantage Xerox, the Court must make all reasonable inferences in favor of the nonmoving party. Looking at the totality of the evidence in the light most favorable to Xerox, the Court concludes that a dispute of material fact exists on the issue of bad faith, which should be resolved by a neutral factfinder. As a result, the Court DENIES NHDOT's request to find that Xerox is not entitled to lost profits as a matter of law.

II. Count V: Negligent Misrepresentation

NHDOT also seeks summary judgment on Count V of Xerox's second amended complaint. In Count V, Xerox seeks damages under a claim of negligent misrepresentation. NHDOT argues this claim is barred by the exceptions to the legislature's waiver of sovereign immunity found in RSA 541-B:19, I(b)–(c).

Under RSA 541-B:19, I(c), an exception to RSA chapter 541-B's waiver of sovereign immunity applies when a discretionary executive or planning function is at issue. NHDOT argues that its evaluation and selection of a winning vendor for the BOS

contract involved the exercise of a discretionary executive function and that the NHDOT employees exercising such discretion did so in good faith.

In resolving discretionary immunity questions, [the Court] distinguish[es] between planning or discretionary functions and functions that are purely ministerial. When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

In re N.H. Dep't of Transp., 159 N.H. 72, 74 (2009) (internal quotations omitted). In applying this test, the Court distinguishes “policy decisions involving the consideration of competing economic, social, and political factors from operational or ministerial decisions required to implement the policy decisions.” Hacking v. Town of Belmont, 143 N.H. 546, 550 (1999) (quotation omitted).

Xerox argues NHDOT did not have the authority to conduct the procurement at issue and, thus, NHDOT was not performing one of its executive functions or duties as is necessary for discretionary function immunity. The Court disagrees. Under RSA 237:2, VIII, NHDOT is authorized to “[a]cquire and install new toll collection equipment.” Additionally, NHDOT, as a state agency, has the ability to conduct procurements over \$35,000. See RSA 21-I:22-a; RSA 21-I:22-b. As recently discussed in detail in XTL-NH, Inc. v. N.H. State Liquor Comm'n., procurements subject to RSA 21-I may be awarded on a best value basis, rather than on a lowest cost basis. Merrimack County Superior Ct., No. 2013-cv-119, (Sept. 6, 2016) (Order, McNamara, J.). Consistent with this authority, the RFP at issue provided for a best value procurement. (See RFP § 5.1.) Thus, NHDOT was performing one of its executive functions when it issued the RFP and chose Cubic as the winner of the BOS contract. The Court, therefore, must

next determine whether NHDOT's conduct is characterized by a high degree of discretion and judgment.

Here, the award of the BOS contract to Cubic was a decision involving a high degree of discretion. Such discretion is laid out in section 5.2 of the RFP, which states as follows:

The State reserves the right to:

- a. Consider any source of information in evaluating Proposals;
- b. Omit any planned evaluation step if, in the State's view, the step is not needed; and
- c. At its sole discretion, reject any and all Proposals at any time.

NHDOT's decisions regarding the award of the BOS contract "necessarily involve[d] the most prudent allocation of [governmental] resources, and thus the weighing of competing economic, social, and political factors." Hacking, 143 N.H. at 550 (quotations omitted); see also City of Boulder City v. Boulder Excavating, Inc., 191 P.3d 1175, 1181 (Nev. 2008) ("In reviewing the details of bids, officials . . . must judge whether particular bids ultimately will advance the public goals of the awarding agency.").² Thus, discretionary function immunity bars Xerox's negligent misrepresentation claim. The Court, therefore, need not address NHDOT's additional arguments regarding the exception to the legislature's waiver of sovereign immunity found in RSA 541-B:19, I(b). As a result, NHDOT's Motion for Summary Judgment as it relates to Count V is GRANTED.

III. Count VI: Tortious Interference with Advantageous Relations

² The West Virginia Supreme Court has noted that an RFP "is an eminently rational, cheap, and efficient method of evaluating alternate approaches to a given problem and for selecting both objectively and subjectively the best overall solution. It should be obvious to any bidder that objective and subjective evaluation processes will be used together to determine the lowest responsible bidder and proposals must be submitted bearing that risk in mind." State ex rel. E. D. S. Fed. Corp. v. Ginsberg, 259 S.E.2d 618, 626 (W. Va. 1979).

NHDOT also seeks summary judgment on Count VI of Xerox's second amended complaint. In Count VI, Xerox seeks damages under a claim of tortious interference with advantageous relations. NHDOT argues this claim is barred by RSA 541-B:19, I(d), which states as follows:

Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to:

(d) Any claim arising out of an intentional tort, including . . . interference with advantageous relations, . . . provided that the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state.

Based on the plain meaning of RSA 541-B:19, I(d), the legislature has provided that sovereign immunity bars claims of interference with advantageous relations as long as (1) the State employee whose conduct gave rise to the claim reasonably believed, at the time of the act complained of, that his or her conduct was lawful and (2) the complained of acts were within the employee's scope of official duties. Here, NHDOT has provided affidavits of the employees on the evaluation committee, which state that they believed their actions, and the actions of the evaluation committee as a whole, "were lawful throughout the RFP process." (NHDOT's Mot. Summ. J., Exs. D-I.) Although Xerox has provided evidence that certain NHDOT employees did not know the statutory basis for NHDOT's procurement authority, as discussed above, NHDOT has the authority to conduct the procurement at issue, and the members of the selection committee were not lawyers. Nor did they have to be able to cite a statute to follow the detailed criteria of the RFP, which assumedly was designed with the advice of the

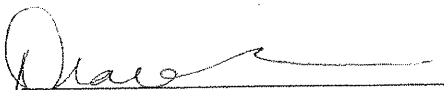
Attorney General's Office and by officials with sufficient knowledge of the law of competitive.

However, as discussed above, Xerox has provided some evidence from which a factfinder could conclude that the RFP itself was not strictly followed by some members, -- i.e., some members gave certain technical criteria greater weight despite no special weighting of criteria in the RFP, some members of the evaluation committee may have finalized their technical scores after opening the price proposals and without determining a sub-score for each section, and at least one member expressed dislike of Xerox in prior dealings. Such evidence, drawing all reasonable inference therefrom in Xerox's favor, could lead a factfinder to conclude that at least some of the members of the evaluation committee "did not reasonably believe their conduct was lawful." Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 38 (2005). A violation of the RFP, which leads to favoritism toward some bidders and a disadvantage to one, is unlawful. The Court concludes that RSA 541-B:19, I(d) does not bar Xerox's tortious interference with advantageous relations claim. As a result, NHDOT's Motion for Summary Judgment as it relates to Count VI is DENIED.

SO ORDERED.

Date:

5/16/2017


Diane M. Nicolosi
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
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NOTICE OF DECISION

File Copy

Case Name: **Conduent State & Local Solutions, Inc. v The State of NH Department of
Transportation and Cubic Transportation Systems, Inc.**
Case Number: **217-2015-CV-00574**

Enclosed please find a copy of the court's order of June 09, 2017 relative to:

ORDER

June 13, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Bryan K. Gould, ESQ; Kimberly MR Sullivan, ESQ; Rebecca L. Woodard, ESQ; John J. Conforti,
ESQ; Cori P Palmer, ESQ; Stephen G. LaBonte, ESQ; Philip R. Braley, ESQ; Cooley A. Arroyo,
ESQ; Daniel M. Deschenes, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Conduent State & Local Solutions, Inc.
(formerly known as Xerox State & Local Solutions, Inc.)

v.

The State of New Hampshire Department of Transportation, *et al.*

Docket No. 217-2015-CV-574

ORDER

Plaintiff, Xerox State & Local Solutions, Inc. ("Xerox"), now Conduent State & Local Solutions, Inc. ("Conduent"),¹ filed a complaint against Defendants, the State of New Hampshire Department of Transportation ("NHDOT") and Cubic Transportation Systems, Inc. ("Cubic"), following NHDOT's decision to award an E-ZPass back office system ("BOS") contract to Cubic. Before the Court are NHDOT's and Cubic's Motions to Dismiss Counts II, VII, VIII, and IX of Conduent's Third Amended Complaint. After consideration of the parties' pleadings and the applicable law, the Court finds and rules as follows.

Factual Background

The following facts are derived from the allegations contained in Conduent's Third Amended Complaint, and differ little from those laid out in the Court's Order dated January 22, 2017. Again, the Court will consider the language in the request for

¹ This case was originally filed by Xerox State & Local Solutions, Inc., a processing division of Xerox Corporation. After Xerox Corporation divested itself of its processing divisions, Xerox State & Local Solutions, Inc. became a subsidiary of Conduent Incorporated and underwent a formal name change to Conduent State & Local Solutions, Inc. A Motion to Amend was granted, and Conduent filed a Third Amended Complaint to indicate the change in name only.

proposals ("RFP"). See Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010).

The Court will lay out the facts again, so this Order is comprehensive.

NHDOT administers NH E-ZPass ("E-ZPass"), an electronic toll collection ("ETC") system. (Compl. ¶ 7.) The E-ZPass system allows vehicles with a transponder to pass through toll lanes without having to stop and manually pay the toll. (Compl. ¶ 8.) NHDOT maintains accounts for all E-ZPass users and when a vehicle with a transponder passes through a tollbooth, a toll is charged to the account that corresponds to the detected transponder. (Compl. ¶ 9.)

Operation of the E-ZPass system requires a variety of "back office" activities, such as developing and maintaining software, managing E-ZPass accounts, distributing the transponders, interacting with credit card companies, identifying and enforcing E-ZPass violations, coordinating with ETC systems in other states, staffing E-ZPass service centers, and developing and maintaining the E-ZPass website. (Compl. ¶ 16.) When NHDOT began the E-ZPass system in 2004, it contracted with Xerox to perform the back office activities, and it renewed its contract with Xerox in 2007, 2010, and 2011. (Compl. ¶¶ 17–18.) Xerox's latest contract with NHDOT was set to expire on September 30, 2016, but the parties extended it to March 31, 2017. (Compl. ¶ 24.)

On December 9, 2014, NHDOT issued an RFP, which solicited bids for "Back Office Systems to Support Electronic Tolling, Video Tolling and Violation Processing." (Compl. ¶ 25.) The RFP required bidders to submit a technical proposal and a price proposal. (RFP § 4.19.) After an initial screening of the bids, the RFP required NHDOT to conduct an initial scoring of each bidder's technical proposals to create a list of the top four or five bidders. (RFP § 5.3.3.) Those bidders were then invited to oral

interviews and product demonstrations with NHDOT. (RFP § 5.3.3.) NHDOT then considered the information provided at the interviews and demonstrations in refining each bidder's technical review score. (RFP § 5.3.3.) Following the technical review, NHDOT was to open the bidders' price proposals. (RFP § 5.3.4.)

Conduent alleges that in direct contravention of the RFP some committee members never fully completed the technical evaluation forms and other members did not complete the technical evaluation forms until after opening the price proposals. (Compl. ¶¶ 62.) It further alleges that the committee members did not "employ uniform standards in their assessments of the proposals, nor did the committee make any effort to ensure that each of its members gave the same weight to each criterion of the technical evaluation." (Compl. ¶¶ 62.)

Evaluation of the bids was based on a 100-point scale, with 70 points allocated to the technical proposal and 30 points to the price proposal. (Compl. ¶¶ 31.) Under the technical proposal category, points were allocated to "Back Office System Design and Technical Approach"- 20 points, "Back Office Services and Operations Approach"- 15 points, "Firm Qualifications, Project Team, Capabilities and References"- 20 points, and "Implementation, Transition and Delivery Approach"- 15 points. (RFP § 5.1.) Under the price proposal category, points were allocated to "Back Office Implementation Phase"- 15 points and "Back Office Operations"- 15 points. (RFP § 5.1.)

Following the conclusion of the scoring, the RFP permitted NHDOT to enter into contract discussions with the bidder it determined was best qualified and to solicit a best and final offer ("BAFO") from that bidder. (RFP § 5.3.5.) The RFP further provided that the State would make a final selection as a result of the BAFO process. (RFP § 5.3.6.)

Conduent alleges “NHDOT had originally intended to invite all three vendors to submit a BAFO, but upon advice of the Office of the Attorney General it solicited a BAFO only from Cubic.” (Compl. ¶ 45.)

After reviewing the bids, NHDOT gave Xerox a higher score than Cubic for its price proposal, but Cubic received a higher score for its technical proposal. (Compl. ¶¶ 46, 48.) In total, NHDOT gave Cubic a combined score of 80.76 and Xerox a combined score of 80.12. (Compl. ¶ 47.) NHDOT then entered into BAFO discussions with Cubic and ultimately executed a contract with it, which the governor and council approved on October 7, 2015. (Compl. ¶¶ 41–43.)

Conduent asserts that the RFP was designed in such a way to eliminate Xerox’s price advantage, and that “NHDOT’s turnpikes administrator characterized Xerox’s ability to deliver the BOS at a lower cost than its competitors as a ‘frustrat[ing]’ ‘upper hand.’” (Compl. ¶¶ 35–38.)

Conduent complains that Cubic did not even meet the minimum standards for proposal consideration set forth in the RFP. (Compl. ¶ 54.) It further alleges that for a variety of reasons in terms of price, history, and technical abilities, Xerox was by far the superior choice for New Hampshire, and that the technical evaluation process was “subjective and arbitrary.” (Compl. ¶¶ 49–60, 71–72.) In addition, Conduent alleges that “[m]embers of the selection committee repeatedly disparaged [Xerox].” (Compl. ¶ 137.d.)

Conduent alleges that the RFP failed to disclose a criterion considered by the committee—the number of jobs created in New Hampshire—by having an in-state

customer service center, which advantaged Cubic and disadvantaged Xerox, the latter proposing an out-of-state center as it had been operating. (Compl. ¶¶ 65–70.)

Xerox subsequently initiated the instant action. In its January 22 Order, the Court dismissed Counts I-III and VII-IX of Xerox's First Amended Complaint, with leave for Xerox to amend its declaratory judgment claims. In Count I, Conduent sought a writ of certiorari, an extraordinary remedy, and in Count III, it sought preliminary and permanent injunctive relief. Those claims remain dismissed. In Counts II and VII-IX, Conduent seeks relief through a declaration voiding the contract between NHDOT and Cubic for NHDOT's failure to comply with the terms of the RFP, competitive bidding statutes, and the New Hampshire Constitution. Xerox filed a Second Amended Complaint, adding facts to provide further factual support for those claims. Both NHDOT and Cubic again move to dismiss the four counts, to which Conduent objects. Conduent has since filed a Third Amended Complaint, with leave of the Court, which changed the name of the moving party from Xerox to Conduent.

Legal Standard

In ruling on a motion to dismiss, the Court must determine whether a plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (quotation omitted). This determination requires the Court to test the facts contained in the complaint against applicable law. Tessier v. Rockefeller, 162 N.H. 324, 330 (2011). In rendering such a determination, the Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences in the light most favorable to the plaintiff." Bohan, 141 N.H. at 213 (citation and quotations omitted). "The plaintiff must, however, plead sufficient facts

to form a basis for the cause of action asserted.” Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985). A Court “need not accept statements in the complaint which are merely conclusions of law.” Id. (citation omitted).

Analysis

In its January 22 Order, the Court concluded that sovereign immunity barred Xerox's claims for injunctive relief and that sovereign immunity barred its declaratory judgment claims because Xerox had failed to state a valid constitutional claim. In dismissing Count II, the Court mistakenly understood that Xerox had agreed that a valid constitutional claim was necessary to bring a declaratory judgment action against the State. Conduent has now corrected that misapprehension, and presses again Count II, which alleges that the State failed to adhere to statutory requirements and its RFP. As in their previous motions to dismiss, NHDOT and Cubic argue that Conduent has failed to state a valid constitutional claim and sovereign immunity bars the claims for the equitable relief sought. The Court will address each claim in turn.

Count II

Conduent argues that Count II should have survived a motion to dismiss, and that the Court overlooked its argument based upon In re Estate of Raduazo, 148 N.H. 687 (2002), which allowed a declaratory judgment action against the State in the absence of a constitutional claim. Conduent misconstrues the breadth of and reasoning for the Court's Order on Count II. The Court did not hold that a declaratory judgment action against the State can never occur without a constitutional violation; as discussed above, the issue was not addressed, because the Court assumed that the parties agreed a constitutional claim was needed. To the contrary, a declaratory judgment

action can be used when the proper application of a statute is at issue, see Linlee Enters., Inc. v. State, 122 N.H. 455 (1982), or, as in the case of Raduazo, when the propriety of the State's action as to a person's property interests is a question. See also Villars v. City of Portsmouth, 100 N.H. 453, 453–55 (1957). "The remedy of declaratory judgment is intended to grant relief from uncertainty concerning the status or legal rights existing between adverse parties." Salem Coal. for Caution, Inc. v. Town of Salem, 121 N.H. 694, 696 (1981) (citing Portsmouth Hosp. v. Indem. Ins. Co., 109 N.H. 53, 56 (1968)). "It is intended to permit the resolution of controversies 'before obligations are repudiated and rights invaded.'" Id. (quoting Portsmouth Hosp., 109 N.H. at 55). A declaratory judgment action is of statutory creation. Radkay v. Confalone, 133 N.H. 294, 298 (1990). Although RSA 491:22 makes no exception for actions against the government, it does not create a new cause of action or provide for an action that would be barred by sovereign immunity. See RSA 491:22 ("Any person claiming a present legal or equitable right or title may maintain a petition. . . .").

In Count II, Conduent alleges that NHDOT violated RSA 228:4 and RSA 21-I:22-a and 22-b by failing to award the contract to the "lowest responsible bidder." (Compl. ¶¶ 93.) Conduent further alleges that NHDOT failed to comply with a lawful competitive bidding process and "deviated from the objective criteria outlined in the RFP." (Compl. ¶¶ 95.) The facts set forth include that NHDOT: (1) "consider[ed] a proposal's potential to create in-state jobs when that was not a stated criterion in the RFP"; (2) "devise[d] an artificially low score for Conduent to achieve a predetermined outcome"; (3) "fail[ed] to use objective criteria by which each proposal would be reviewed"; and (4) "fail[ed] to assign weighting to those criteria in the RFP so that vendors submitting proposals were

on notice that some requirements would receive more weight than others in the review of the submission.” (Compl. ¶ 95.) Conduent grounds its right to challenge the RFP process and the award to Cubic on its expectation “that NHDOT would act in good faith and make its decision based on criteria set forth in the RFP and in accordance with New Hampshire law.” (Compl. ¶ 96.)

First, the Court has already held in prior orders that RSA 228:4 does not apply to the procurement of the E-ZPass system, and that the competitive bidding process is governed by RSA 21-I:22-a and 22-b, which allow a best value selection. The Court refers the parties to its prior orders. Because RSA 228:4 does not apply, as a matter of law, NHDOT was not obligated to select the lowest cost option for implementation of the E-ZPass system, even accepting as true that Xerox would have been the least costly choice.

RSA 21-I:22-a provides:

Notwithstanding the provisions of RSA 21-I:18, every request for purchases (RFP), request for quotes (RFQ) or other procurement which is greater than \$35,000 that is undertaken by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, shall contain within the body of the document the objective criteria by which each submission will be reviewed, if there are particular requirements that will receive more weight in the review of the submission, and the standards upon which any award will be based.

(Emphasis added).

RSA 21-I:22-b provides, in relevant part:

Notwithstanding the provisions of RSA 21-I:18, awards which are made by the state or by a state agency as defined in RSA 21-I:11, II(b), including those agencies referenced in RSA 21-I:18, under this subdivision shall not be made on criteria that are unknown to the parties submitting bids or proposals.

(Emphasis added).

Accepting the facts pled by Conduent as true, and drawing all reasonable inferences from those facts in its favor, the complaint is sufficient to set out a claim for a violation of RSA 21-I. Conduent specifically alleges that the objective criteria for the technical proposals were not applied, that the committee considered a criterion that was not expressed in the RFP or made known to the bidders, that the weight of certain criteria was not noticed to bidders, and that the standard upon which the award was made (based on an inferred bias against the incumbent and not on the technical proposals) was improper and not made known.

The Court must also look to whether a disgruntled bidder seeking a declaration has an adequate remedy at law rather than having to avail itself of the extraordinary remedy of declaring an awarded contract void. See Morin v. Berkshire Mut. Ins. Co., 126 N.H. 485, 486 (1985); Beaudoin v. State, 113 N.H. 559, 561 (1973).² The Court finds that Conduent does not. Although Conduent has filed a promissory estoppel claim that relies on some of the same allegations of fact, it is a different cause of action seeking different relief. There is no bar to alternative claims. It has been recognized that competitive bidding laws not only serve to “guard against favoritism, improvidence, extravagance, fraud and corruption,” but also, as “more than an incidental benefit,” safeguard the interests of bidders. Gerard Constr. Co. v. City of Manchester, 120 N.H. 391, 396 (1980). Although Conduent may be able to recover its \$125,000 investment in the bid process via its promissory estoppel claim if the requirements of the RFP or statutory law were transgressed, even without proving bad faith, the relief does not

² These cases were decided after the second sentence of RSA 491:22 was added: “The existence of an adequate remedy at law or in equity shall not preclude any person from obtaining [] declaratory relief.” They carried forward what had been established at common law. The Court is not clear how the common law and this statutory provision can be interpreted together. But, the Court need not confront that issue in this case.

redress the lost opportunity to participate in a fair governmental process and the bidder's interest that was compromised. Moreover, not only is the bidder's interest violated, "[a] public bidding procedure that places a bidder at a disadvantage violates the public interest in according prospective bidders an equal opportunity to bid and weakens the public confidence in government." Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271, 276 (1985).

NHDOT and Cubic argue that by seeking a declaration, Conduent is really seeking equitable relief that is barred by sovereign immunity. The Court does not agree that sovereign immunity bars all claims for declaratory judgment that are not based on a constitutional violation. Conduent does not request any form of injunctive relief via Count II, as it does in Counts VII, VIII and XI, through which Conduent contends NHDOT violated the New Hampshire Constitution.

The Supreme Court has recognized that a successful litigant seeking declaratory judgment against the State as a result of a constitutional challenge may obtain equitable injunctive relief. Aranosian Oil Co. v. State, 168 N.H. 322, 330 (2015) (citing Lorenz v. N.H. Admin. Office of the Courts, 152 N.H. 632, 635 (2005)). Specifically, the Supreme Court opined in Aranosian that "absent a successful constitutional challenge, [] claims for reimbursement [] based upon equitable subrogation and unjust enrichment are barred by sovereign immunity." Id. The Court does not ascribe such a broad interpretation to that language to conclude that declaratory relief seeking to void unlawful State action is prohibited as some form of equitable relief. The Supreme Court has never directly addressed whether "a violation of competitive bidding procedures

may create a right to an equitable remedy or mandamus," or for that matter declaratory relief. See Marbucco Corp. v. City of Manchester, 137 N.H. 629, 631 (1993).

Aranosian Oil Co. is distinguishable from this case in that the petitioning corporation therein was asking for a declaration and an order forcing the State to pay it money. 168 N.H. at 328–31. There is a distinction between a "declaration" of rights and enforcement of those rights. Radkay, 133 N.H. at 298. "Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him [or her] and the defendant." Id. (quotation omitted). In Count II, Conduent is asking only for a declaration due to the State's alleged statutory violations.

The Court recognizes that, should this Court declare the contract void, the practical effect will be that the terms of the Cubic contract will not be enforced, and the matter will have to be rebid in order to get a valid long term contract in place. However, a declaration of a party's rights does nothing more than that. It does not compel action nor order forbearance from action as an injunction would. Had Conduent requested injunctive relief on other equitable grounds, as did Aranosian Oil Co. when it advanced claims for equitable subrogation and unjust enrichment, the Court would agree that sovereign immunity would bar such a claim. Here, however, Conduent alleges that NHDOT either intentionally or negligently failed to comply with a statute promulgated to protect the public and bidders. To disallow such a claim would mean that the executive branch in effect could never be held to its statutory duties in the competitive bidding arena by the judicial branch.

The Court also disagrees that the prayer for declaratory relief should be dismissed because sixteen months have elapsed since the award of the contract and Cubic has performed substantially to implement the contract. Conduent filed its lawsuit in a timely fashion and made clear its claims and the relief it sought. NHDOT and Cubic made choices thereafter despite the option of delaying further implementation of the contract.

As a result, the Motions to Dismiss Count II are DENIED.

Count VII

Conduent argues NHDOT violated its rights under Part I, Article 1 of the State Constitution. Part I, Article 1 states, "All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good." This provision is typically applied as part of the equal protection guarantees provided by the State Constitution, which the Court discusses below in its analysis of Conduent's equal protection argument.

The New Hampshire Supreme Court has also interpreted Part I, Article 1 to require municipalities "to provide assistance to all their citizens seeking approval under zoning ordinances." Richmond Co. v. City of Concord, 149 N.H. 312, 314 (2003) (quotation omitted). Nevertheless, the New Hampshire Supreme Court has not applied the provision in the context of competitive bidding. Nor does this Court find it appropriate to do so here. In its January 22 Order, the Court noted that Xerox is a foreign corporation that has come to New Hampshire to do business. Xerox subsequently amended its complaint to include the Dormant Commerce Clause and the Privileges and Immunities Clause of the Federal Constitution. However, although the

Court agrees that NHDOT could not lawfully treat an out-of-state bidder and an in-state bidder differently, regardless of whether or not Xerox is an out-of-state corporation, Part I, Article 1 still does not apply. The situations in which the New Hampshire Supreme Court has required a governmental entity to provide assistance under Part I, Article 1 are distinguishable from the circumstances in this case. “In the context of aiding property owners seeking municipal approval to develop their property, [the Supreme Court’s] focus has been aimed at preventing municipalities from ignoring an application or otherwise engaging in dilatory tactics in order to delay a project.” Kelsey v. Town of Hanover, 157 N.H. 632, 638 (2008) (quoting Richmond Co., 149 N.H. at 315.). Such issues are not present in this case; NHDOT’s role as a potentially contracting party is not the same as a municipal regulator. In fact, in the context of competitive bidding, the government must treat all bidders equally, not offering help to any one in particular; rather its duty is to be transparent as to the criteria upon which its selection decision will be based. Marbucco Corp., 137 N.H. at 632–33. As a result, Conduent has failed to state a viable claim under Part I, Article 1, and, thus, the Motions to Dismiss Count VII are GRANTED.

Count VIII

Due process

To establish a due process claim, a plaintiff must demonstrate that the challenged State action affected a protected property interest. Burrage v. N.H. Police Standards & Training Council, 127 N.H. 742, 745 (1986); Duffley v. N.H. Interscholastic Athletic Ass’n, Inc., 122 N.H. 484, 490 (1982). To have a protected property interest, “a person clearly must have more than an abstract need or desire for it. He must have

more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules—or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Duffley, 122 N.H. at 491 (quotation omitted). The United States Supreme Court has emphasized that “[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” Id. (quotation omitted). As discussed in the Court’s January 22 Order, Conduent does not have a protected property interest in a contract that was not awarded to it.

The Court is not persuaded by Conduent’s attempts to reframe its claim as one demonstrating actionable executive action that is “arbitrary and conscious shocking.” Such a claim would still require that the plaintiff establish the existence of a protected interest. See Pagán v. Calderón, 448 F.3d 16, 32 (1st Cir. 2006) (“Where, as here, a plaintiff’s substantive due process claim challenges the specific acts of a state officer, the plaintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property.”) (emphasis added); Rivera v. Rhode Island, 402 F.3d 27, 34 (1st Cir. 2005) (stating “[i]t is not enough to claim the governmental action shocked the conscience,” a plaintiff must also show a deprivation of a protected interest). Because Conduent’s Third Amended Complaint remains deficient as to the existence of a property interest, Conduent’s allegations, taken as true, are insufficient to form the basis of a due process claim. Thus, the Motions to Dismiss Conduent’s due process claim are GRANTED.

Equal Protection

Conduent also alleges an equal protection claim under both the State and Federal Constitutions. The Court will address this claim under the State Constitution and rely upon federal law for guidance only. Cnty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 758 (2007).

"[T]he equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike." In re Sandra H., 150 N.H. 634, 637 (2004) (quotation omitted). There are two alternative means of establishing an equal protection claim: selective enforcement and classification. N. New England Tel. Operations, LLC v. City of Concord, 166 N.H. 653, 656 (2014). Conduent argues its equal protection claim is based on selective enforcement. To establish selective enforcement, a plaintiff must show "conscious, intentional discrimination," demonstrating "something more than mere errors of judgment by officials." Id. at 657 (quotations omitted); see also Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 499 (2007) ("[A plaintiff] must show more than that the enforcement was merely historically lax."). The Court applies the rational basis test in selective enforcement cases. N. New England Tel. Operations, LLC, 166 N.H. at 657. Under this test, the Court determines whether Xerox was subject to selective enforcement and, if so, whether such selection "is rationally related to a legitimate state interest." Id.

In its January 22 Order, the Court found that Xerox had failed to provide facts in its First Amended Complaint alleging "conscious, intentional discrimination." In its Third Amended Complaint, Conduent lists ten factors, which it contends are "specific factual indicia of [NH DOT's] conscious and intentional discrimination against Xerox throughout

the procurement process.” (Pl.’s Obj. to NHDOT’s Second Mot. to Dismiss 1, 14.) In particular, Conduent alleges:

- a. NHDOT designed the scoring criteria of the RFP with the specific intent of negating Xerox’s price advantage for the purpose of ensuring that Xerox would not win the procurement.
- b. None of the questions NHDOT prepared for use in conducting reference checks concerned the vendors’ experience in providing a tolling back office system, a subject that could be expected to highlight Xerox’s strengths and the weaknesses of other bidders.
- c. The RFP originally required the vendor’s proposed software manager to have “Previous E-ZPass Group Experience” and its back office operations manager to have “3 years E-ZPass Group Experience,” but NHDOT amended the RFP to make these qualifications “preferred,” rather than required, to make it easier for less experienced vendors to compete against Xerox.
- d. Members of the selection committee repeatedly disparaged Xerox.
- e. NHDOT interviewed only one of the three references provided by Cubic before deciding to award it the contract, and that reference had never worked with Cubic in the context of electronic tolling.
- f. NHDOT finalized the technical scoring and selected Cubic for the contract immediately after Xerox completed its oral interview and product demonstration, taking virtually no time to consider Xerox’s presentation.
- g. NHDOT originally planned to invite all three vendors to lower their bids with a BAFO, but ultimately decided to give only Cubic that opportunity, foregoing the opportunity to obtain a still lower bid from Xerox.
- h. NHDOT withheld information concerning Cubic’s lack of qualifications and tolling experience from the governor and executive council when it sought approval of the proposed contract with Cubic.
- i. Two members of the selection committee decided Xerox’s total technical score before recording their scores for each of the four technical categories, which the RFP required them to first determine and add together to produce the total technical score.
- j. Even though the RFP specifically required the selection committee to make a final determination of all technical scores for all vendors before opening the Price Proposals, some members of the evaluation committee

did not finalize and sign their technical evaluation forms until after the Price Proposals were opened, and Xerox's position as lowest bidder was known.

(Compl. ¶ 137.)

Assuming the truth of these allegations and construing all reasonable inferences in the light most favorable to Conduent, the Court finds that they are sufficient to form the basis of an equal protection claim. Allegation "d" alleges that members of the selection committee "repeatedly disparaged Xerox," and there was frustration with Xerox having an advantage in the bidding due to its incumbency that drove the structure of the RFP to Xerox's disadvantage. These facts suggest some ill motive to steer the contract away from Xerox. The criterion relative to the creation of in-state jobs through a local service center would predictably cut against Xerox given its existing New Jersey location, and the failure to disclose it compromised Xerox's ability to address it. Furthermore, allegation "e," which alleges NHDOT only interviewed one of the three references Cubic provided and allegation "f," which alleges that scoring was completed immediately after Xerox finished its interview and product demonstration, suggests that NHDOT predetermined that a bidder other than Xerox would be the winning bidder.

Most significant are the facts set out in allegations "i" and "j," that members of the selection committee did not complete their scoring sheets correctly when determining Xerox's technical score and opened the price envelopes before finalizing the scores. While potentially only showing errors of judgment by those selection committee members, the facts must be construed in favor of Conduent. The ability of the members to change their technical scores after becoming aware of Xerox's better price provides the opportunity for bias to drive the outcome of the selection rather than merit. Such

allegations could give rise to the level of showing “conscious, intentional discrimination.”

Thus, the Motions to Dismiss Conduent’s equal protection claim are DENIED.

Count IX

Conduent also argues that it has stated a separation of powers claim in Count IX under Part I, Article 37 of the State Constitution. Part I, Article 37 states as follows:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Conduent alleges that if Defendants “are correct that RSA 228:4 is inapplicable, then NHDOT had no authority to conduct the procurement as it did, and by its conduct of the procurement, the executive branch, acting through NHDOT, exceeded its authority to execute the laws as enacted by the general court, thereby usurping the power of the legislature” (Compl. ¶ 148.)³

Cubic argues Conduent lacks standing to claim a separation of powers violation. Assuming *arguendo* that Conduent has standing, it has failed to state a separation of powers claim. “Unlike most state constitutions the language of the New Hampshire Constitution recognizes that separation of powers in a workable government cannot be absolute.” N.H. Health Care Ass’n v. Governor, 161 N.H. 378, 386 (2011) (quotation omitted). The New Hampshire Constitution “expressly recognizes that, as a practical matter, there must be some overlapping among the three branches of government and that the erection of impenetrable barriers among them is not required.” Id. (quotations

³ In its January 22 Order, the Court determined that RSA 228:4 was not applicable to the bidding process at issue and that RSA 21-I applies. Order at 7.

omitted). “Thus, the New Hampshire Separation of Powers Clause is violated only when one branch usurps an essential power of another.” *Id.* (quotation omitted).

Part II, Article 56 of the State Constitution gives the executive branch responsibility for government expenditures, stating:

No moneys shall be issued out of the treasury of this state, and disposed of, . . . but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

See also In re Opinion of the Justices, 129 N.H. 714, 717 (1987) (“[T]he power to make contracts for the expenditure of the State’s funds is characteristically an executive function under the plain language of the constitution.”).

Conduent does not challenge NHDOT’s authority to enter into a valid contract for the E-ZPass system. Rather, it puts forth the argument that, if RSA 228:4 does not apply, NHDOT is without authority to procure a contractor through the competitive bidding process, and that such authority rests with the Department of Administrative Services. The Court has already found that NHDOT, as a state agency, has the ability to conduct procurements over \$35,000, pursuant to RSA 21-I:22-a and 22-b. The authority to procure the system is explicitly found in RSA 237:2, VIII, which authorizes NHDOT to “[a]cquire . . . toll collection equipment.” RSA 237:5, II authorizes NHDOT to install “open road tolling for existing tolls on the main lines of the turnpike system.” RSA 237:16-b authorized NHDOT “to execute all documents and perform all other acts necessary to enter into and carry out the provisions of a regional electronic toll collection system agreement. . . .” The legislature gave NHDOT a comprehensive and

broad grant of authority in connection with the procurement, contracting, and implementation of the E-ZPass system.

Accordingly, the Motions to Dismiss Count IX are GRANTED.

Xerox's Renewed Motion for Summary Judgment

For these same reasons, Xerox's Renewed Motion for Summary Judgment, which seeks summary judgment on Count IX, is DENIED.

The State may file a motion for summary judgment on the surviving claims within thirty (30) days from the clerk's date of the issuance of this Order. In addition, because claims other than ones seeking monetary damages have survived, Cubic shall remain a party and is also entitled to file a dispositive motion.

SO ORDERED.

Date: 6/9/2017



Diane M. Nicolosi
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

File Copy

Case Name: **Conduent State & Local Solutions, Inc. v The State of NH Department of
Transportation and Cubic Transportation Systems, Inc.**
Case Number: **217-2015-CV-00574**

Enclosed please find a copy of the court's order of September 06, 2017 relative to:

Order on Docket Nos. 116, 119

September 07, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Bryan K. Gould, ESQ; Kimberly MR Sullivan, ESQ; John J. Conforti, ESQ; Cori P Palmer, ESQ;
Stephen G. LaBonte, ESQ; Philip R. Braley, ESQ; Cooley A. Arroyo, ESQ; Daniel M. Deschenes,
ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Conduent State & Local Solutions, Inc.

v.

The State of New Hampshire Department of Transportation, *et al.*

Docket No. 217-2015-CV-574

ORDER ON DOCKET NOS. 116, 119

Conduent's Motion for Partial Reconsideration of the Order on NHDOT's Motion for Partial Summary Judgment is DENIED. The court understood that Conduent contends NHDOT lacked authority to conduct the procurement at issue. The argument has been made very clear. As previously noted, the court disagrees and finds the authority under Chapter RSA 237, read as a whole, and particularly through RSA 237:2, VIII and RSA 237:16-b. RSA 237:2, VIII authorizes NHDOT to "[a]cquire and install new toll collection equipment." The word "acquire" is synonymous with "procure." Webster's Collegiate Thesaurus 579 (1988). The term "equipment" is somewhat broader in definition than Conduent allows. "Equipment" means "the equipping of a person or a thing" or "the state of being equipped." Webster's Third International Dictionary 768 (unabridged 2002). To "equip" mean "to furnish for service or action by appropriate provisioning" or "to make ready." Merriam-Webster Collegiate Dictionary, 10th Edition, 392. Although this contract requires that the successful bidder provide staffing, it also provides for all the technical components necessary to develop the back office system, including computer equipment and software, and the outfitting for

accounting and customer service facilities. It is not a contract that provides simply personnel.

Furthermore, the NHDOT Commissioner is authorized to [i]n stall open road tolling for existing tolls on the main lines of the turnpike system.” RSA 237:5, II (o). He is authorized “to execute all documents and perform all other acts necessary to enter into and carry out the provisions of a regional electronic toll collection system agreement.” RSA 237:16-b. (Emphasis added). In sum, Chapter RSA 237 sets out a comprehensive system in which authority is vested in NHDOT to acquire what is necessary to set up and manage the electronic open toll system.

Cubic’s Motion for Clarification and Partial Reconsideration is DENIED in part and GRANTED in part. As to Count II, the arguments presented have already been considered and rejected, and, therefore, the motion is denied.

As to the state and federal equal protection claims set forth in Count VIII, neither party previously argued directly that this Court should extend the analysis set forth in Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591 (2008) to the case at bar. Conduent does not allege it is a member of a protected class, and thus raises a class-of-one claim. For a class-of-one claim to succeed, a plaintiff must allege and prove that it has been treated differently from others similarly situated, that the disparate treatment was intentional, and that there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The plaintiff must prove that the selective treatment was “conscious, intentional discrimination beyond mere errors, and the selection was “arbitrary or without reasonable justification ... to negative every

conceivable basis which might support the selection[.]” Northern New England Telephone Operations, LLC v. City of Concord, 166 N.H. 653, 657 (2014) (quotations omitted).

In Engquist, the U.S. Supreme Court narrowed the availability of “class-of-one” claims it had recognized in Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (*per curiam*). Id. at 607. Olech involved the inequitable application of a municipal regulatory requirement to a property owner seeking to hook up to the municipal water supply. Id. at 601. Engquist involved inequitable treatment of a government employee where the employee alleged and a jury found her termination from employment was not rational, but was “for arbitrary, vindictive and malicious reasons.” Id. at 595 (citation omitted). The U.S. Supreme Court held that “a ‘class-of-one’ theory of equal protection has no place in the public employment context[.]” id. at 594, and resulting in dismissal of the claim. The distinction between the contexts in Olech and Engquist was that in the former, involving government regulatory action, there was “a clear standard against which departures, even for a single plaintiff, could be readily assessed[.]” as opposed to the employment context, where the government must necessarily “exercise discretionary authority based on subjective, individualized determinations.” Id. at 602. With regard to the latter context, the Supreme Court noted that different treatment of similarly situated individuals is “an accepted consequence of the discretion granted.” Id. at 603.

Since Engquist, lower courts have drawn analogies to the employment arena and dismissed equal protection claims involving discretionary decision-making, including in the area of government contracting. Seymour’s Boatyard,

Inc. v. Town of Huntington, 2009 WL 1514610, E.D. N.Y. *7. (collecting cases),
See Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1274 (11th Cir. 2008);
Northern Golf, Inc. v. City of Colorado Springs, 2017 WL 1734491 * 6 (D.Colo.);
Mountain Cascade Inc. v. City & Cty. of San Francisco, 2013 WL 6069010, at *5
(N.D. Cal.). Dismissing an equal protection claim of a disappointed bidder
alleging government favoritism toward the winning bidder, the 11th Circuit noted:

This notion [expressed in Engquist] is especially true in the context of discretionary government activity. Every government-run bid process involves winners and losers: selection of a winner inherently involves a kind of discrimination in itself. If the law allowed groups defined basically as the “bid-losers” to be the basis for an Equal Protection Clause claim, every government bid process—with winners and losers—would theoretically support such an equal protection claim.”

Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc., 682 F.3d 1293, 1298 (11th Cir. 2012). In short, the rule carried forward from Engquist is that “a class-of-one claim does not extend to cases where the rules are uniformly applicable and a state official exercises his ‘discretionary authority based on subjective, individualized determinations.’” Higgins Electric, Inc. v. O’Fallon Fire Protection Dist., 813 F.3d 1124, 1129 (8th Cir. 2016) (quoting Novotny v. Tripp County, 664 F.3d 1173, 1178 (8th Cir. 2011) (quoting Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 602 (2008)); Integrity Collision Center v. City of Fulshear, 837 F.3d 581 (2016).

In Hanes v. Zurick, the 7th Circuit specified the three reasons underlying the Engquist Court’s holding:

First, the Court emphasized that the judgments unsuited to a class-of-one claim are typically “subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” *Id.* at 2154–55. That describes employment decisions because treating like individuals differently in the employment context is “par for the course.” *Id.* at 2155. Second, the Court noted that the constitutional constraints on government

are much less onerous when it acts as employer as compared to acting as sovereign. *Id.* at 2151. Finally, the Court recognized that, in the employment context, an uncabined class-of-one theory risks making a constitutional case out of every decision by a government employer. *Id.* at 2156 (citing *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)).

578 F.3d 491, 495 (2009).

Cubic urges this court to follow suit, arguing that selecting a bidder in the competitive bidding process requires the same exercise of discretion on the part of NHDOT as do employment decisions. The court agrees that all three operative factors set out by the NH Supreme Court in Engquist are present here, and most particularly that a competitive bidding process requires a multitude of evaluative and discretionary judgments individually and collectively by the selection committee members. The selection of a contractor in a best value bidding process starts with the design of the RFP, leads to the evaluation of as a bidder's qualification and technical proposal compared to others, and ends with the final selection of the successful bidder. Each stage requires a State actor to craft a plan of action to achieve the goal of contracting with the candidate that would be best for the State. This is not an unusual governmental process. To the contrary, the State through its various agencies must retain contractors to provide for services, construction, supplies and facilities to serve and meet the needs of its citizens. In this role, the State acts more like an employer than a regulator or taxing authority. Moreover, for an equal protection claim, the first criterion is that the plaintiff must demonstrate that it is similarly situated to those it compares itself to. Here, the Court questions whether the bidders are even sufficiently similar to allow the comparative process the equal protection clause requires.

Conduent in its Third Amended Complaint alleges that the State offended equal protection because:

a. NHDOT designed the scoring criteria of the RFP with the specific intent of negating Xerox's price advantage for the purpose of ensuring that Xerox would not win the procurement.

b. None of the questions NHDOT prepared for use in conducting reference checks concerned the vendors' experience in providing a tolling back office system, a subject that could be expected to highlight Xerox's strengths and the weaknesses of other bidders.

c. The RFP originally required the vendor's proposed software manager to have "Previous E-ZPass Group Experience" and its back office operations manager to have "3 years E-ZPass Group Experience," but NHDOT amended the RFP to make these qualifications "preferred," rather than required, to make it easier for less experienced vendors to compete against Xerox.

d. Members of the selection committee repeatedly disparaged Xerox.

e. NHDOT interviewed only one of the three references provided by Cubic before deciding to award it the contract, and that reference had never worked with Cubic in the context of electronic tolling.

f. NHDOT finalized the technical scoring and selected Cubic for the contract immediately after Xerox completed its oral interview and product demonstration, taking virtually no time to consider Xerox's presentation.

g. NHDOT originally planned to invite all three vendors to lower their bids with a BAFO, but ultimately decided to give only Cubic that opportunity, foregoing the opportunity to obtain a still lower bid from Xerox.

h. NHDOT withheld information concerning Cubic's lack of qualifications and tolling experience from the governor and executive council when it sought approval of the proposed contract with Cubic.

i. Two members of the selection committee decided Xerox's total technical score before recording their scores for each of the four technical categories, which the RFP required them to first determine and add together to produce the total technical score.

j. Even though the RFP specifically required the selection committee to make a final determination of all technical scores for all vendors before opening the Price Proposals, some members of the evaluation committee

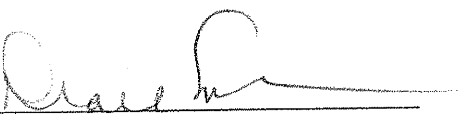
did not finalize and sign their technical evaluation forms until after the Price Proposals were opened, and Xerox's position as lowest bidder was known.

(Compl. ¶ 137.)

The majority of Conduent's complaints involve discretionary decisions as to the design of the RFP or the conduct of the interviewing, screening and selection process. The only exceptions are set out above paragraphs i and j, which allege specific violations of the RFP. However, the failures to comply were not particular to Conduent's proposal; it appears that same process was used for all the proposals. Although the outcome of the allegedly flawed selection process may have effected Conduent as the losing bidder, the process itself was the same and more properly should be remedied through the promissory estoppel and/or declaratory judgment action based on the failure to comply with statutory requirements. See Caesars Massachusetts Management Co., LLC v. Crosby, 778 F.3d 327, 330 (1st Cir. 2015) (Held that "class-of-one Fourteenth Amendment equal protection does not extend to redress action taken under state law authorizing the exercise of highly discretionary judgement in response to an application to license (casino) activity[.]") The court concludes that an equal protection challenge to a best value competitive bidding process is not cognizable as a constitutional transgression. Accordingly, the motion to reconsider GRANTED and the federal and state equal protection claims set out in Count VIII are DISMISSED.

SO ORDERED.

Date: 9/6/2017


Diane M. Nicolosi
Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Conduent State & Local Solutions, Inc.

v.

Docket #217-2015-CV-574

The State of New Hampshire Department of Transportation
and
Cubic Transportation Systems, Inc.

NOTICE OF VOLUNTARY NONSUIT

Conduent State & Local Solutions, Inc. (“Conduent”) hereby exercises its right to voluntarily nonsuit without prejudice those claims in the Third Amended Complaint (“TAC”) that remain for trial. This nonsuit does not apply to those claims that the court has dismissed or on which it has granted summary judgment to NHDOT or denied summary judgment to Conduent. The nonsuited claims are as follows:

- **Count II:** To the extent that Count II of the TAC alleges that NHDOT did not comply with the competitive bidding standards set forth in RSA 21-I:22-a and 21-I:22-b it is nonsuited.
- **Count IV:** Count IV is nonsuited.
- **Count V:** Conduent voluntarily nonsuits the intentional misrepresentation claim alleged in Count V.
- **Count VI:** Count VI is nonsuited.
- **Count VIII:** Conduent voluntarily nonsuits Count VIII to the extent it alleges a violation of Conduent’s right to equal protection under the law.

The following claims are not included in this nonsuit: Count I, Count II to the extent it alleges NHDOT failed to comply with RSA 228:4, Count III, Count V to the extent it alleges a

negligent misrepresentation by NHDOT, Count VII, Count VIII to the extent it alleges a violation of due process, and Count IX (collectively, the "Excluded Claims"). The purpose of this nonsuit is to make the court's orders dismissing, granting summary judgment on, or denying summary judgment to Conduent on the Excluded Claims¹ immediately appealable as a matter of right.

Respectfully submitted,

CONDUENT STATE & LOCAL
SOLUTIONS, INC.,
By Its Attorneys,

Date: 8-22-17

By: Bryan K. Gould

Bryan K. Gould, Esq. (NH Bar #8165)

Philip R. Braley, Esq. (NH Bar #9276)

Cooley A. Arroyo, Esq. (NH Bar #265810)

Cleveland, Waters and Bass, P.A.

Two Capital Plaza, P.O. Box 1137

Concord, NH 03302-1137

(603) 224-7761

CERTIFICATE OF SERVICE

I hereby certify that the within document was this day mailed, postage prepaid, to Stephen G. LaBonte, Esq. and John J. Conforti, Esq., NH Department of Justice, Office of the Attorney General, 33 Capitol Street, Concord, NH 03301; to Daniel M. Deschenes, Esq., Hinckley, Allen & Snyder LLP, 650 Elm Street, Ste. 500, Manchester, NH 03101, and to Cori P. Palmer, Esq., Hinckley, Allen & Snyder LLP, 28 State Street, Boston, MA 02109-1775.

Date: 8-22-17

Bryan K. Gould
Bryan K. Gould, Esq.

4820-5377-8765, v. 1

¹ In its order of January 23, 2017, the court dismissed Counts I and III. In its order of May 17, 2017, the court granted summary judgment to NHDOT on the negligent misrepresentation claim in Count V. In its order of June 13, 2017, the court affirmed its earlier dismissal of Counts I and III, dismissed Count II (RSA 228:4 violation), Count VII, Count VIII (due process violation), and Count IX, and denied Conduent's motion for summary judgment on Count IX.