

**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

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

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ARGUMENT

I. A CONTRACT BETWEEN A STATE AGENCY AND ANOTHER PARTY IS VOID IF THE GENERAL COURT HAS NOT GRANTED THE AGENCY THE AUTHORITY TO PROCURE SUCH A CONTRACT.

NHDOT and Cubic have abandoned the argument that they made – and that the superior court adopted – below, namely that RSA 21-I:22-a and :22-b granted NHDOT the authority to procure the back office system (“BOS”) contract. *See, e.g.*, Appendix to Reply Brief for Appellant (“App.”) at 284-85, 355; Conduent Br. at 55. Both of them have fallen back on RSA ch. 237 as the source of NHDOT’s procurement authority for the BOS. Cubic Br. at 14-15; State Br. at 8. Cubic offers the additional theory that NHDOT has constitutional authority to make contracts and therefore could procure the BOS contract unless it conflicted “with any existing statutes.” Cubic Br. at 12-14. Under New Hampshire law, however, there are two basic phases to a procurement: competitive bidding to select a vendor, followed by negotiation and execution of a contract with that vendor. There is no dispute that NHDOT has the authority to *enter into* a contract for a BOS, but it does not have the authority to *procure* such a contract because that authority has been granted to the department of administrative services (“DAS”).

A. *RSA ch. 21-I Comprehensively Describes Executive Branch Agencies’ Procurement Authority, and RSA ch. 237 is Consistent with this Construction.*

1. The definitional exceptions found in RSA 21-I:11, II are not grants of authority and fortify the conclusion that RSA ch. 21-I is a comprehensive expression of executive branch procurement authority.

NHDOT and Cubic attempt to persuade the court that RSA ch. 21-I does not describe the allocation of all procurement authority to state agencies by pointing to two exceptions to the *definitions* of “supplies” and “services” under RSA 21-I:11, II. Cubic Br. at 16; State’s Br. at 13. Both of them contend that DAS’s authority to procure “supplies” does not apply to the BOS contract because “any systems that collect or store data off-site” are excluded from the definition

of “supplies.”¹ *Id.* They also argue that the BOS contract does not fall within DAS’s authority to procure “services” because the definition of that term excludes “services provided to solely one agency.” *Id.*

Even read in isolation, however, these definitional exceptions would, at best, establish that DAS’s broad procurement authority does not extend to contracts for off-site data storage or services to a single agency. They would not grant authority to NHDOT to procure such supplies and services. Because the defendants do not even try to consider the exceptions in context, moreover, they fail to ask the obvious question: If DAS does not have procurement authority for these types of supplies and services, which agency does?

For example, contracts for off-site data collection and storage fall within the purview of the commissioner of the department of information technology. RSA 21-R:4, X. The commissioner is also charged with developing specifications for the procurement of all computer-related goods and services “in concert with the [DAS] division of procurement and support services.” RSA 21-R:4, XII. Thus, the carveout from “supplies” for off-site data storage is further evidence that RSA ch. 21-I comprehensively describes the allocation of procurement authority among state agencies, and nowhere does it authorize NHDOT to procure the BOS contract.

2. RSA ch. 237 reinforces the conclusion that a grant of authority to enter into contracts is not equivalent to a grant of procurement authority.

New Hampshire statutes expressly contemplate that procurements will consist of two phases. For example, RSA 21-I:11, I (a)(1) authorizes DAS’s division of procurement and support services to purchase “all materials, equipment, supplies, and services for all departments

¹ The defendants ignore the fact that the definition of “supplies” includes “computer hardware and software” (RSA 21-I:11, II(a)) and that such hardware and software are principal elements of the BOS. *See* Appellees’ Joint Appendix at 47-48 for a description of BOS functions.

and agencies of the state.”² In the following subparagraph, however, the legislature has required “competitive bidding before making any” such purchases. RSA 21-I:11, I (a)(2) (also listing exceptions to competitive bidding requirement). Similarly, RSA ch. 237 authorizes NHDOT to “enter into contractual relations on behalf of the state” (RSA 237:17, IX), but in the same subchapter the legislature required that contracts be awarded to the lowest responsible bidder in accordance with RSA 228:4. RSA 237:28. Hence, the statutory power to enter into contracts did not give NHDOT authority to procure the BOS contract.

II. RSA 21-I:22-a AND –b DO NOT GRANT BEST-VALUE PROCUREMENT AUTHORITY TO STATE AGENCIES.

NHDOT and Cubic maintain, as they did before the superior court, that RSA 21-I:22-a and :22-b grant best-value procurement authority to all state agencies. Cubic Br. at 20; State Br. at 10. They both assert that RSA 21-I:22-b should be read to enable state agencies to exercise subjective judgment on all aspects of vendors’ proposals in a competitive procurement. Cubic Br. at 21; State Br. at 10. Construing RSA 21-I:22-b in this fashion, however, is contrary to its language, subversive of its purpose, and heedless of the legislature’s consistent rejection of the best value procurement method.

RSA 21-I:22-a requires that any state solicitation of proposals set out the “objective criteria by which each submission will be reviewed” RSA 21-I:22-b creates a narrow exception to this requirement, allowing state agencies to make “judgments on the capabilities of vendors to complete the work requested” Defendants’ interpretation of these statutes disregards both the requirement that the solicitation use *objective* criteria and the fact that an

² As noted in Conduent’s opening brief, this authority is subject to certain enumerated exceptions. Conduent Br. at 15-18.

agency's exercise of subjective judgment is limited to whether a vendor has the capability to perform the work.

Transforming these statutes into a grant of authority to use subjective judgment in evaluating any aspect of a proposal, moreover, would violate the express purpose of the legislation creating them. RSA 21-I:22-a and :22-b were enacted to make state procurements more standardized and understandable. Conduent Br. at 21; App. at 458-59. To the extent that a contract award is based on subjective criteria, it is impossible for vendors or the public to determine what will satisfy the criteria or whether the agency made the award arbitrarily or in bad faith. The defendants' interpretation of these statutes would have exactly the opposite effect on state procurements as that which their sponsor intended.

Finally, the defendants offer no plausible explanation for the legislature's repeated consideration of legislation that would adopt or experiment with best value procurements only to reject such legislation or terminate any such experiments before they could begin. Conduent Br. at 4-6. If RSA 21-I:22-a and :22-b granted best value authority to all state agencies, this cycle of proposal and rejection would be unnecessary and irrational. Whether the legislature has "disavowed" best-value procurements (State Br. at 15) is immaterial. The legislature has *not* authorized the best-value procurement method, and neither defendant has cited any law to the contrary.

For all of the foregoing reasons, NHDOT does not have best-value procurement authority.

III. THE DEFENDANTS MISAPPREHEND THE NATURE OF CONDUENT'S SEPARATION OF POWERS CLAIM AND THE RESULT OF A REVERSAL OF THE SUPERIOR COURT'S RULINGS ON COUNT IX.

A. Conduent's Separation of Powers Claim Rests on the Principle that a State Agency's Ultra Vires Acts Violate the Constitution Because They Exercise Authority Withheld by the Legislature.

NHDOT and Cubic overlook how Conduent's separation of powers claim arose below. As a result, they misunderstand that claim and their arguments contest assertions Conduent has never made.

From the outset, Conduent has alleged that NHDOT failed to comply with statutory procurement requirements. In its original complaint it sought a declaration that NHDOT failed to apply objective criteria as required by RSA 21-I:22-a. App. at 276. It then amended its complaint to seek a declaration that NHDOT exceeded its statutory authority by conducting a best-value procurement instead of a lowest responsible bidder procurement as required by RSA 228:4. *Id.* at 3-4, 29. When the defendants argued that RSA 228:4 did not apply to the BOS procurement, Conduent sought a declaration that NHDOT has no procurement authority beyond RSA 228:4. *Id.* at 10-11, 37-38.

The superior court dismissed Conduent's Count IX by order of January 23, 2017, in the mistaken belief that Conduent had conceded that declaratory relief is barred by sovereign immunity unless plaintiff alleges a violation of the constitution.³ Conduent Br. at 42. The court gave Conduent leave to amend Count IX to allege a constitutional violation, which it promptly did. *Id.* at 46; App. at 15-39. Six months later, the court acknowledged its error and held that Count IX was not barred by sovereign immunity irrespective of whether it alleged a constitutional violation. Conduent Br. at 65.

While this court has never expressly characterized *ultra vires* executive branch acts as violations of the separation of powers, that is the implicit rationale of the court's rulings on the limits of executive authority. *See, e.g., In re Chase Home for Children*, 155 N.H. 528, 533

³ In fact, Conduent had argued that sovereign immunity does not bar actions seeking a declaration that a state agency has exceeded its authority. App. at 302. It had also argued that *ultra vires* acts by executive branch agencies necessarily violate the separation of powers. *Id.* at 318-20.

(2007) (agencies hold only the authority “expressly granted or fairly implied” by statute) (citation omitted). It is the judicial branch’s responsibility to ensure that an administrative agency like NHDOT “does not substitute its will for that of the legislature.” *Opinion of the Justices*, 121 N.H. 552, 557 (1981). Where the executive branch attempts to exercise authority that the general court has not seen fit to grant, then, it usurps the legislature’s power to prescribe agency authority. *See N.H. Health Care Assn. v. Governor*, 161 N.H. 378, 386 (2011) (separation of powers violated where one branch usurps essential power of another, citing authority).

Both defendants forecast calamity if this court reverses the superior court’s dismissal of Count IX and rules that Conduent is entitled to summary judgment. Cubic Br. at 23; State Br. at

9. The superior court aptly dispensed with this argument, however:

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. . . . 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.

Conduent Br. at 70. Neither defendant has challenged this ruling on appeal.

The consequence of a declaration that the BOS procurement was unlawful would be that the state would have to reprocore the BOS. Because Conduent’s motion for partial summary judgment on Count IX did not seek coercive relief, however, the state would have latitude regarding the timing and manner of the reprocorement and how to ensure the continued operation of the E-ZPass system until the reprocorement takes place. The defendants’ dire warnings of disruptions and disorder, then, are forensic hyperbole.

B. Part II, Art. 56 of the New Hampshire Constitution Does Not Grant Procurement Authority to the Executive Branch.

Cubic argues – but NHDOT notably does not – that the power to make contracts is “characteristically an executive function under the plain language of the constitution” and that this somehow gives the executive branch plenary authority to procure goods and services. Cubic Br. at 13 (*citing Opinion of the Justices*, 129 N.H. 714, 717 (1987)). This misstates the law. While the executive has the power to enter into contracts, it must do so in accordance with a grant of authority from the legislature. Thus, the executive branch has the power to “insure that no payments be made from the public treasury except for public purposes and *in accordance with the law.*” (Emphasis supplied.) *Opinion of the Justices*, 116 N.H. 406, 412 (1976) (construing N.H. Const. pt. II, art. 56). It has no authority, however, to “draw [a] warrant upon the treasury” and enter contracts for the expenditure of funds “unless there is some existing act or resolve of the legislature authorizing such payment.” *In re Opinion of Justices*, 75 N.H. 624, 626 (1910); *see also N.H. Health Care Assn.*, 161 N.H. at 386-89 (executive branch’s authority under pt. II, art. 56, must be exercised so as to carry out legislative mandates faithfully).

Accordingly, nothing in pt. II, art. 56, modifies the requirement that executive branch agencies must select vendors and enter into contracts only as prescribed by the legislature.

IV. CUBIC’S STANDING, WAIVER, AND MOOTNESS ARGUMENTS ARE MISPLACED.

Cubic devotes over half of its argument to contentions that Conduent lacks standing, has waived its rights, and is asserting claims that are moot. Cubic Br. at 9-11, 17-20, 22-23. NHDOT makes no such arguments. Cubic made similar arguments in the superior court, but the court did not address them.

Cubic's assertion that Conduent does not have standing to challenge the lawfulness of the BOS procurement is premised on its reading of Count IX in isolation. It claims that Conduent "did not argue it should have been awarded the Contract" or that it was "deprived of the award due to a separation of powers violation" in Count IX. Cubic Br. at 9. Count IX, however, includes *all* allegations contained in the complaint by restating and re-alleging them. App. at 37 (¶139). It alleges, for example, that Conduent was the lowest bidder (*id.* at 22 (¶44)) and that RSA 228:4 requires NHDOT to award contracts to the lowest responsible bidder (*id.* at 29 (¶93)). As Conduent has demonstrated, moreover, DAS had the authority to procure the BOS, not NHDOT. DAS is likewise required to select the lowest responsible bidder. RSA 21-I:11, I (a)(2) (competitive bidding); *see also* RSA 21-I:11-b (tie breaker for identical lowest qualified bids). Given that it is undisputed that Conduent was the lowest qualified bidder, if DAS had conducted the procurement of the BOS it stands to reason that Conduent would have been the selected vendor. Cubic's characterization of Conduent's allegations is simply inaccurate.

This court has also recognized that a "more than incidental benefit of mandatory competitive bidding" is safeguarding the interests of those who bid on public works contracts. *Gerard Constr. Co. v. City of Manchester*, 120 N.H. 391, 396 (1993).

Cubic's waiver argument is equally unpersuasive. Waiver is the "voluntary or intentional abandonment or relinquishment of a known right." *Maroun v. Deutsche Bank Nat'l Tr. Co.*, 167 N.H. 220, 227 (2014). Cubic has shown that Conduent was aware that the BOS procurement used the best-value method, but it has not so much as suggested that Conduent knew that NHDOT lacked statutory authority to use the best-value method. Without such knowledge, there could be no waiver. A party has no obligation, moreover, to object to the government's *ultra vires* acts until those acts cause it harm. *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 734-

35 (1996). Even if Conduent knew that NHDOT lacked authority to conduct a best-value procurement when it submitted its proposal, then, it was not harmed by the exercise of that authority until NHDOT awarded the contract to Cubic. If Cubic were correct, any vendor doing business with the state would have to become an expert in New Hampshire procurement law before submitting a bid or risk losing the right to challenge an award on the ground it was *ultra vires*. Such a standard could be justified only on the ground that state agencies should not answer for arrogating authority they do not have.⁴

Finally, Cubic has abandoned its argument to the superior court that Conduent's claim is moot because Cubic has substantially completed its performance of the contract. Reply App.⁵ at 46-48. This is no doubt because Conduent responded to this argument by providing the superior court with an October 6, 2017, letter from NHDOT to the governor and executive council in which NHDOT noted that the "BOS functionality has now reached approximately 60%" and that Cubic plans to bring the system to full functionality by the end of 2018. Reply App. at 2. Instead, Cubic now argues that a claim that a procurement was unlawful becomes moot when there has been a transition from the incumbent vendor to the selected vendor. Cubic Br. at 8.

To begin with, mootness is not jurisdictional in New Hampshire; it is a question of convenience and discretion. *Appeal of Hinsdale Federation of Teachers, NEA-New Hampshire, NEA*, 133 N.H. 272, 276 (1990). The courts, moreover, do not dismiss a case on mootness grounds where it presents an issue that is capable of repeating so future litigation may be avoided. *Sullivan v. Town of Hampton Bd. of Selectmen*, 153 N.H. 690, 692 (2006). In this case, the record demonstrates that NHDOT regularly procures goods and services using the best-value

⁴ For a more extensive refutation of Cubic's waiver argument, see App. at 364-68.

⁵ "Reply App." refers to the Appendix to Reply Brief for Appellant Conduent State & Local Solutions, Inc.

method. *See, e.g.*, App. at 123-24. The question of mootness is “not subject to rigid rules,” and a decision on the merits is proper where there is a “pressing public interest” in the issue presented. *Batchelder v. Town of Plymouth*, 160 N.H. 253, 256 (2010) (citation omitted). Here a state agency selected a vendor with no tolling or E-ZPass experience at a cost of \$3.5 million more than Conduent had proposed. App. at 100. The agency has used and continues to use a procurement method that the legislature has not authorized. Appellees’ Joint Appendix at 288 (listing seven NHDOT procurements conducted with this method since 2004). Other state agencies are also using this method. *See, e.g., XTL-NH, Inc. v. N.H. State Liquor Comm’n*, Docket No. 2013-cv-119, slip op. at 11-12 (N.H. Super. Ct. (Merrimack) Jan. 4, 2016) (approving the New Hampshire State Liquor Commission’s use of best-value procurements under RSA 21-I:22-a and -b). The use of subjective criteria to award contracts worth tens of millions of dollars creates precisely the opportunities for “favoritism, imprudence, extravagance, and corruption” that public bidding procedures are designed to prevent. *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 273, 274 (1985) (citation omitted). In short, this case presents an issue of first impression that has significant public policy implications. It is plainly not academic or dead because in any reprocurement Conduent would have the opportunity to bid and to prevail. The mootness doctrine is therefore inapplicable.

CONCLUSION

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

Respectfully submitted,

CONDUENT STATE & LOCAL
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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.

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