

STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0548

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 County Superior Court

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BRIEF FOR APPELLEE

Cubic Transportation Systems, Inc.

HINCKLEY, ALLEN & SNYDER LLP
Daniel M. Deschenes, Esq. (Bar #14889)
Cori P. Palmer, Esq. (Bar #20668)
Hinckley, Allen & Snyder LLP
650 Elm Street, Suite 500
Manchester, NH 03101-2551
Ph.: 603-225-4334
Fax: 603-224-8350

Oral Argument by:

Daniel M. Deschenes, Esq. (#14889)

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QUESTION PRESENTED

1. Whether the superior court (Nicolosi, J.) correctly held that NHDOT had the authority to procure “back office system” services for the New Hampshire E-ZPass system, such that NHDOT did not violate the separation of powers doctrine under Part 1, Article 37 of the New Hampshire Constitution.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The NH E-ZPass System

NHDOT is responsible for administering the electronic toll collection system commonly referred to as “NH E-ZPass.” App. at 238. The E-ZPass system allows vehicles with a transponder to pass through toll lanes without having to stop to manually pay the toll. Id. When a vehicle with a transponder passes through a toll station, a toll is charged to an account corresponding with the transponder. Id. NHDOT maintains accounts for all NH E-ZPass system users. Id.

NHDOT began the NH E-ZPass system in 2004. The system requires a variety of so-called “back office system” (“BOS”) services, including developing and maintaining software, managing E-ZPass accounts, distributing transponders, interacting with credit card companies, enforcing E-ZPass violations, coordinating with ETC systems in other states, staffing E-ZPass service centers, and developing and maintaining the E-ZPass website. Joint Supplemental Appendix (“JSA”) at 38.

In 2004, NHDOT issued an RFP to solicit bids to provide BOS services for the soon-to-be implemented NH E-ZPass system. App. at 239. Appellant Conduent State and Local Solutions, Inc. (“Conduent”) submitted a bid and was awarded the contract. App. at 239. NHDOT conducted this procurement using the “best-value” procurement method. JSA at 288-9. Best-value procurement is a term used to describe the award of a contract based on the best technical value for the price rather than solely on the basis of a low bid. See, e.g., Philip L. Bruner & Patrick J. O’Connor, Jr., *Bruner and O’Connor on Construction Law* §2.160. Any solicitation that awards the contract on the basis of a combination of technical factors and cost may be described as a best-value procurement. See id. BOS contracts, which involve the design

and management of a data system, as well as propriety software unique to the bidder, are procured in a best-value manner. This is in contrast to a standard construction contract that simply requires bidding against issued specifications (thus allowing for an “apples to apples” comparison on price).

B. The 2015 RFP For BOS Services

On December 9, 2014, in anticipation of the expiration of the initial BOS contract, NHDOT issued RFP 2015-068 (the “RFP”), which solicited bids for “Back Office Systems to Support Electronic Tolling, Video Tolling and Violation Processing.” JSA at 14. The RFP called for NHDOT to conduct a best-value procurement, just as it had done when awarding the initial BOS contract in 2004. JSA at 28.

Under the RFP, bids were evaluated based on a 100 point scale, with a maximum of 70 points allocated to each bid’s technical proposal, and a maximum of 30 points allocated to the cost proposal. Id. 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). Id. Under the price proposal category, points were allocated to “Back Office Implementation Phase” (15 points) and “Back Office Operations” (15 points). Id.

On February 13, 2015, Conduent, along with Cubic and one other bidder, Egis Projects, Inc. (“Egis”), submitted bids in response to the RFP. App. at 99. It is undisputed that Conduent understood when it prepared and submitted its bid that NHDOT would conduct a best-value procurement. JSA at 348-51; 357. It further is undisputed that Conduent did not object to this procedure, and did not raise any challenge to NHDOT’s general authority to conduct the BOS

procurement until nearly a year after NHDOT awarded the BOS contract and Conduent filed its Amended Complaint in this case. App. at 1; JSA at 357.

The proposals submitted by Conduent, Cubic and Egis were evaluated and scored under the criteria set forth in the RFP. App. at 99. Cubic received the highest overall score (80.76), following by Egis (80.69) and, lastly, Conduent (80.12). App. at 100. Although Conduent's proposal included the lowest price, it also received the lowest technical score by almost ten points. Id.

Based on these scores, NHDOT recommended that the contract be awarded to Cubic. App. at 96-101. On October 7, 2015, the Governor and Council approved the award of the contract (the "Contract") to Cubic, and NHDOT issued a Notice to Proceed to Cubic that same day. App. at 244; JSA at 504-5. In the 28 months since the issuance of the Notice to Proceed, Cubic has performed the contract work.

In March 2017, Conduent completed its transition of all BOS operations to Cubic, making Cubic the sole operator of the BOS for the NH EZ-Pass system. JSA at 358-59.

C. Procedural History

On October 16, 2015, Conduent filed an eight-count Complaint against NHDOT and Cubic, seeking declaratory and injunctive relief and damages.¹ App. at 262. Count II sought a declaratory judgment that "the bid process was unlawful" because NHDOT allegedly failed to "follow competitive bidding procedures under New Hampshire law, including RSA 21-I:22-a and 22-b." App. at 275-76. The Complaint did not allege that NHDOT lacked the authority to conduct a best-value procurement, or challenge the Contract award on that basis. Id.

¹ The superior court scheduled an injunction hearing for November 9, 2015. That hearing was cancelled at Conduent's request. JSA at 340; 359. Conduent did not seek to reschedule the hearing, and made no attempt to preliminarily enjoin the performance of the Contract.

Eight months later, on August 4, 2016, Conduent filed a First Amended Complaint (“FAC”). App. at 322. In the FAC, Conduent revised Count II to allege, for the first time, that RSA 228:4 applied to this procurement and required NHDOT to award the BOS contract to the lowest responsible bidder. App. at 322. The FAC also asserted a new count, Count IX, which sought a declaratory judgment that if RSA 228:4 did not apply to this procurement, NHDOT lacked the statutory authority to award the BOS contract. App. at 341.

On August 18, 2016, Cubic and NHDOT moved to dismiss Conduent’s claims for equitable relief, including Count IX, on sovereign immunity grounds. App. at 391. In response, Conduent argued that sovereign immunity did not bar Count IX because the claim was based on the doctrine of separation of powers (even though Count IX did not reference this or any other constitutional principle). App. at 318-20. With respect to Count II, Conduent argued the legislature waived sovereign immunity when it enacted RSA 228:4. Id.

Separately, on September 16, 2016, Conduent moved for summary judgment on Count IX, again arguing that if RSA 228:4 did not apply to the BOS contract, NHDOT lacked authority to conduct the procurement. App. at 67.

On January 23, 2017, the superior court issued an order (the “January 23 Order”) that granted NHDOT and Cubic’s motion to dismiss. Appellant’s Brief at 32. The superior court held that sovereign immunity barred Conduent’s claims for equitable relief, including Count IX. Id. at 40-41. In addition, with respect to Count II, the court rejected Conduent’s argument that RSA 228:4 applied to the procurement and effected a waiver of sovereign immunity. Id. at 39-40. The court held that RSA 228:4 applies to projects for the construction of “infrastructure” relating “directly” to transportation and “physical structures that carry vehicles,” not to BOS

services required for an electronic toll collection system. Id. at 39. Conduent has not appealed the superior court's ruling that RSA 228:4 did not apply to the BOS contract.

The January 23 Order granted Conduent leave to amend the FAC to attempt to allege a valid constitutional basis for the declaratory judgment claims. Id. at 46. On January 26, 2017, Conduent filed a Second Amended Complaint ("SAC"). In Count II, Conduent included new allegations that RSA 228:4 is the only statute granting NHDOT procurement authority, and that if this statute did not apply, the procurement violated the separation of powers doctrine under part I, article 37 of the State Constitution. App. at 37-38. Also on January 26, 2017, Conduent renewed its pending motion for summary judgment on Count IX. App. at 203.

In February 2017, NHDOT and Cubic each moved to dismiss Conduent's claims for declaratory judgment, including Count IX. App. at 54, 203. Cubic argued that Conduent lacked standing to assert that the procurement violated the separation of powers doctrine and that Conduent waived any objection to the form of the procurement. App. at 61-62. In addition, Cubic and NHDOT argued that statutes other than RSA 228:4 grant NHDOT procurement authority, including RSA Chapter 237 and RSA 21-I:22-a and RSA 21-I:22-b. App. at 64-64, 435-36.

Separately, NHDOT moved for summary judgment on Conduent's remaining claims, including its claim for negligent misrepresentation (Count V). App. at 219. On May 17, 2017, the superior court issued an order (the "May 17 Order") granting NHDOT's motion for summary judgment on Count V on sovereign immunity grounds. Appellant's Brief at 48. In the May 19 Order, the superior court addressed, and rejected, Conduent's argument that because NHDOT purportedly did not have the authority to conduct the procurement, NHDOT could not invoke exceptions to the statute waiving sovereign immunity (RSA 541-B:19). Id. at 55. The court

observed that RSA 237:2, VIII, authorizes NHDOT “acquire and install new toll collection equipment,” and that RSA 21-I:22-a and 22-b authorize NHDOT to conduct procurements over \$35,000 on a best-value basis. Id.

The superior court reiterated the substance of this ruling a month later, on June 13, 2017, when it issued an order (“June 13 Order”) granting Defendants’ motion to dismiss Count IX and, concomitantly, denying Conduent’s motion for summary judgment on that claim. Appellant’s Brief at 59. In the June 13 Order, the superior court did not address whether Conduent had standing to assert a separation of powers claim, or whether it had waived its rights to challenge the procurement. Id. at 77. The court instead held that Count IX failed because NHDOT had the authority to conduct this procurement under RSA 21-I:22-a and 22-b, and RSA Chapter 237. Id. at 77-78.

Finally, on September 7, 2017, the superior court denied Conduent’s motion for reconsideration of the May 17 Order granting summary judgment to NHDOT on Count V, negligent misrepresentation. Id. at 8-81. Expanding on its earlier decision, the superior court identified specific provisions of RSA Chapter 237 which granted NHDOT the authority to conduct the procurement, including RSA 237:2 VIII (authorizing NHDOT to acquire and install toll collection equipment); RSA 237:5, II(o) (authorizing NHDOT to install open road tolling for existing tolls on the main lines of the turnpike system); and RSA 237:16-b (authorizing NHDOT to “execute all documents and perform all other acts necessary to enter into an carryout the provisions of a regional electronic toll collection system agreement”).

SUMMARY OF ARGUMENT

This appeal poses the narrow question of whether NHDOT had the authority to procure BOS services for the NH E-ZPass system.

Conduent has not appealed the superior court's ruling that RSA 228:4 did not apply to this procurement. In addition, Conduent does not argue in this appeal that NHDOT should have awarded the Contract to Conduent, not Cubic. Instead, Conduent argues the Contract should not have been procured by NHDOT at all. Conduent contends that RSA 228:4 is the only statute authorizing NHDOT to conduct procurements. According to Conduent, since RSA 228:4 did not apply, NHDOT lacked authority to conduct the procurement, and any resulting contract would violate the separation of powers doctrine.

Conduent, however, lacks standing to challenge the procurement on separation of powers grounds. Conduent does not contend that the alleged separation of powers violation prevented a contract award to Conduent, and it cannot demonstrate that it sustained any injury against which this doctrine is designed to protect. Moreover, NHDOT did not usurp the legislature's authority when it conducted this procurement, which was well within the statutory authorization granted to NHDOT under RSA Chapter 237 and RSA 21-I:22-a and 22-b. Further, regarding Conduent's argument that NHDOT was not permitted to conduct a best-value procurement, Conduent waived this argument by participating knowingly, and without objection, in this procurement. Even absent a waiver, RSA 21-I:22-a and 22-b authorized NHDOT to use the best-value method to procure BOS services for the NH E-ZPass system. Lastly, since the Contract was awarded over two years ago, and the transition to Conduent is long completed, Conduent's request relief should be declared moot as a matter of law.

ARGUMENT

I. Conduent Lacks Standing to Assert a Separation of Powers Violation

Conduent lacks standing to argue that NHDOT's procurement of BOS services violated the separation of powers doctrine.

By Count IX, 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. Instead, Conduent asserted that because NHDOT purportedly lacked the authority to conduct the procurement, the Contract should not have been awarded at all. Because Conduent cannot allege any personalized harm flowing from this conduct, it cannot establish standing to assert a separation of powers violation.

To have standing under the New Hampshire Constitution, parties must "to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical dispute which is capable of judicial redress." State v. Actavis Pharma, Inc., 167 A.3d 1277, 1281 (NH 2017) (citing Duncan v. State, 166 N.H. 630, 642-43 (2014)). In evaluating whether a party has standing to sue, this Court focuses on "whether the party suffered a legal injury against which the law was designed to protect." Actavis, 167 A.3d at 1281 (citing O'Brien v. NH Democratic Party, 166 N.H. 138, 142 (2014)).

Of particular relevance here, a plaintiff cannot establish standing by asserting an "abstract interest in ensuring the State Constitution is observed." Duncan, 166 N.H. at 642. "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of the legislative and executive branches." Id. at 644 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Thus, to demonstrate standing, the plaintiff must show that "its own rights have been or will be directly affected." Actavis, 167 A.3d at 1281.

Applying these principles, this Court recently held in Actavis that pharmaceutical companies lacked standing to challenge the validity of a contingency-fee agreement between the Attorney General's Office and an outside law firm. The companies argued that because the State engaged the firm without first obtaining the approval of the joint legislative fiscal committee and the governor and counsel, as required by statute, the fee agreement was *ultra vires* and void. Id. at 1281-84. On the issue of whether they had standing to raise a *ultra vires* challenge to the contract, the companies argued they personally suffered actual harm, since they were the target of an investigation being conducted by the firm, and the contingency-fee agreement prevented the firm from conducting the investigation in an unbiased manner. Id. at 1282. This Court disagreed. It held that the companies' alleged injury (being the target of a biased investigation) was unrelated with the alleged violation of the statutory requirements for ratifying the fee agreement. Id. The Court reasoned that even if the ratification requirements had been met, the companies' "injury would not be alleviated" – the investigation by the firm would continue. Id.

Conduent likewise cannot demonstrate that it sustained an injury traceable to the alleged separation of powers violation. Conduent alleged the violation occurred when NHDOT conducted a procurement that was beyond the scope of NHDOT's statutory authority. This alleged violation is unrelated to any injury sustained by Conduent. The separation of powers doctrine serves to prevent one branch of government from usurping the authority of another branch. If NHDOT overstepped its authority, this at best would result in a "generalized harm" to the public at large, id. at 1281, not a personal harm to Conduent.

Additionally, if NHDOT lacked the authority to conduct the procurement, this would not result in a contract award to Conduent. Indeed, Conduent did not seek this relief through Count IX. Under similar facts, federal courts have held that to establish standing to bring a bid protest, a

plaintiff “must show that there was a substantial chance it would have received the contract award but for the alleged error in the procurement process.” Precision Asset Management Corp. v. United States, 125 Fed. Cl. 228, 232 (2016) (granting government’s motion to dismiss for lack of standing where unsuccessful bidder could not demonstrate that its chances of receiving the contract would have increased absent alleged errors in the procurement process); see also Look v. United States, 113 F.3d 1129, 1132 (9th Cir. 1997) (plaintiff lacked standing because it could not establish a substantial chance of receiving contract award); Chang Eng’g Co. v. United States, 75 Fed. Cl. 62, 68 (2007) (unsuccessful bidder lacked standing where it could not demonstrate a substantial chance of receiving the award).

Here, Count IX did not allege that Conduent likely would have won the Contract if NHDOT had acted within its statutory authority. Furthermore, Count IX did not seek an order requiring NHDOT to award the Contract to Conduent. Instead, Count IX sought a “declaration that the procurement was unlawful and that the resulting contract between NHDOT and Cubic is void, as well as an order enjoining NHDOT and Cubic from performing under the Contract.” App. at 38. This relief would not help Conduent, and would only have interfered with the Contract between NHDOT and Cubic and disrupted the operations of the NH E-ZPass system. As Conduent’s injury would not be alleviated even if its requested remedy were granted, this Court should hold that Conduent has not established “an actual, not hypothetical, dispute which is capable of judicial redress.” Actavis, 167 A.2d at 1282. Accordingly, this Court should affirm the dismissal of Count IX on the grounds that Conduent lacked standing to challenge the Contract award on separation of powers grounds.

II. NHDOT Had the Authority to Conduct the Procurement

Should this Court proceed to the merits of Conduent's claim, it should still affirm the superior court's dismissal of Count IX.

A. NHDOT Did Not Usurp Powers of the Legislative Branch

Conduent's argument relies on the incorrect assumption that NHDOT could not conduct the procurement without an express delegation of authority from the legislature. In fact, NHDOT's award of the Contract was within NHDOT's authority, and it did not interfere with, or usurp, the power of the legislature.

"Unlike most state constitutions the language of the New Hampshire Constitution recognizes that separation of powers in a workable government cannot be absolute." New Hampshire Health Care Ass'n v. Governor, 161 N.H. 378, 387 (2011). "Instead, it 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. (internal citations and quotations omitted). Thus, "the New Hampshire Separation of Powers Clause is violated only when one branch usurps an essential power of another." Id. at 386.

The legislature is primarily responsible for lawmaking. See, e.g., Opinion of the Justices, 121 N.H. 552, 559 (1981) (finding that lawmaking is an essential function of the legislature). By comparison, Part II, Article 56 of the New Hampshire Constitution places the responsibility for government expenditures in the hands of the executive branch. See N.H. Const. Part. II, Art. 56 ("No moneys shall be issued out of the treasury of this state, and disposed of ... but by warrant under the hand of the governor"). The purpose of this article is to "grant the Governor the power to ensure that no payments be made from the public treasury except for public purposes and in accordance with the law." New Hampshire Health Care Ass'n v.

Governor, 161 N.H. at 387 (citations omitted). New Hampshire courts have consequently found that the power to make contracts for the expenditure of the State's funds is "characteristically an executive function under the plain language of the constitution." In re Opinion of the Justices, 129 N.H. 714, 717 (1987) (citations omitted).

Selecting a vendor through a competitive bidding process is a form of contracting, not lawmaking. Because a procurement falls under the umbrella of powers given to the executive branch by the Constitution, NHDOT could not have "usurped" an "essential power" of the legislature by awarding the Contract. Id. at 717 (finding contracting to be an executive function).

Conduent cites to a number of cases which it claims hold that when an executive agency acts outside of its express legislative authority, it violates Part I, Article 37 of the New Hampshire Constitution. See Appellant's Brief at 14. None of these cases, however, concern a procurement or a constitutional separation of powers challenge. The cases instead support the proposition that an administrative agency must act in compliance with the applicable statute when promulgating administrative rules or conducting adjudicatory proceedings. See, e.g., In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011) (holding that administrative agency tribunals are granted only special and limited subject matter jurisdiction); In re Alexis O., 157 N.H. 781, 790 (2008) (holding that administrative regulations cannot contradict the terms of a governing statute); In re Town of Nottingham, 153 N.H. 539, 555 (2006) (same).

This case does not concern a transfer of the legislature's essential lawmaking powers, through the delegation of rulemaking or adjudicatory authority to an administrative agency. See Hynes v. Hale, 146 N.H. 533, 538 (2001) (legislature may delegate limited capacity to hear factual disputes without usurping essential judicial functions); Opinion of the Justices, 121 N.H. 552, 557 (1981) (discussing ability of legislature to delegate the power to promulgate rules). It

follows that such delegation must be limited, thus requiring strict compliance with the applicable statutory authority. See Opinion of the Justices, 121 N.H. at 557 (noting that legislature may only delegate limited authority).

In contrast, an administrative agency does not act pursuant to delegated lawmaking authority in the context of a procurement. Again, the power to contract is an essential function of the executive, not the legislature. See In re Opinion of the Justices, 129 N.H. at 717. Conduent does not claim that NHDOT violated a statute, but alleges that it acted in the absence of statutory authority. Appellant's Brief at 15. As discussed below, NHDOT has express statutory authority to conduct the procurement of the BOS Contract. But in any case, NHDOT did not violate the separation of powers doctrine by engaging in an essential executive function in a manner that did not conflict with any existing statutes. Accordingly, this Court should find that the superior court did not err in dismissing Count IX for failure to state a claim.

B. NHDOT Had the Authority to Procure the BOS Contract

In addition, the superior court correctly ruled that NHDOT acted within its statutory authority in conducting a procurement for the BOS contract.²

RSA Chapter 237 affords NHDOT broad authority to enter into contracts and perform other actions necessary to the operation and maintenance of the New Hampshire turnpike systems, including its tolling systems. NHDOT is authorized to acquire and install tolling equipment. See RSA 237:2, VIII. In addition, NHDOT 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, and to participate in "the selection of equipment and contractors used to provide consistent toll collections throughout the region,"

² Conduent's challenge to NHDOT's use of the best-value method is addressed below.

RSA 237:16-c. Moreover, NHDOT is authorized to “[e]nter into contractual relations on behalf of the state,” and to “do and perform all such acts as are necessary for the public good,” to maintain and operate the turnpike system. RSA 237:5, II(i) & II(j).

In the face of this broad and explicit language, Conduent’s argument that NHDOT lacks procurement authority is not persuasive. By its terms, RSA Chapter 237 does not, as Conduent contends, limit NHDOT’s authority to the acquisition of “physical structures placed on the turnpike.” Conduent Brief at 22. The fact that certain provisions of the statute were enacted before the implementation of the NH E-ZPass system is immaterial. The broad statutory language anticipates further developments and improvements to tolling and the turnpike system generally. There is no requirement that statutes like this must be repeatedly amended over time to account for conditions that did not exist at the time of enactment, but fall within the scope of statute.

Conduent also argues that because one provision of the statute, RSA 237:14, explicitly requires compliance with RSA 228:4, all provisions of RSA Chapter 237 are subject to this same requirement. This is incorrect. RSA 237:14 addresses the “construction” of the turnpike system; its reference to RSA 228:4 – which Conduent concedes does not apply to BOS services for electric tolling – shows that RSA 237:14, like RSA Chapter 228:4, likewise concerns the construction of roads and similar infrastructure related to the movement of vehicles. This interpretation is underscored by the fact that none of the provisions of RSA Chapter 237, cited above refers to RSA 228:4.

Conduent also argues that NHDOT does not have “procurement authority” with respect to BOS services because all such authority is placed in the New Hampshire of Department of

Administrative Services (“NHDAS”) by RSA 21-I:11. Appellant Brief at 15-18. RSA 21-I:11 did not apply to this procurement.

RSA 21-I:11 grants NHDAS responsibility for the purchase of “all materials, equipment, supplies and services for all departments and agencies of the state.” RSA 21-I:11, I(a)(2). The statute, however, goes on to define “supplies” as “all materials, equipment, printing, furniture, furnishings, and books, of every name or nature including computer hardware, software, related licenses, media and documentation, and support and maintenance services, *excluding any systems that collect or store data off-site.*” RSA 21-I:11, II(a) (emphasis added). The statute further defines “services” as excluding “services provided to solely one agency.” 21-I:11, II(f).

The BOS Contract does not qualify as either “supplies” or “services” under RSA 21-I:11. The Contract only serves NHDOT and consequently falls outside of the scope of the term “services.” The Contract also cannot be considered “supplies,” since the RFP expressly contemplates a “hosted” BOS system that collects and stores data off-site. JSA at 14 (specifying that a “hosted” BOS was one of the goals of the RFP); JSA at 38 (noting that existing Conduent back office system was hosted at a shared facility out-of-state); JSA at 46 (specifying that BOS location may be In-State or Out-of-State and may be in a shared environment). The instant procurement therefore falls outside of the scope of the NHDAS authority under RSA 21-11, II (a).

In sum, RSA Chapter 237 grants NHDOT broad authority to procure contracts such as the BOS Contract, provided the procurements comply with RSA 21-I:22-a and 22-b. NHDOT did not violate the separation of powers doctrine in awarding the Contract.

III. Conduent Waived Any Objection to a Best-Value Procurement

Conduent contends that even if NHDOT had statutory authority to procure BOS services, NHDOT was not authorized to employ a best-value procurement to award a contract for those services. Conduent, however, waived this argument by participating in the procurement without objecting to NHDOT's use of the best-value method.

Courts from other jurisdictions, particularly the Federal Circuit, have repeatedly held that if a bidder fails to object to an alleged error in the terms of a solicitation prior to bid, it waives the ability to raise the objection after the contract has been awarded. See, e.g., COMINT Systems Corp. v. United States, 700 F.3d 1377, 1382-83 (Fed. Cir. 2012) (bidder waived challenge regarding defect in amendment where it was aware of the alleged defect prior to bid and only "now that the contracts have been awarded to the other bidders does [the protesting party] seek to 'restart the bidding process' by objecting"); Moore's Cafeteria Serv. v. United States, 314 Fed. Appx. 227, 2008 WL 732032, 279 (Fed. Cir. Mar. 20, 2008) (contractor waived argument that agency was required to apply different priority standards in the procurement); Visual Connections, LLC v. United States, 120 Fed. Cl. 684 (2015) (rejecting post-bid challenge on the grounds that "if protestor believed that there may have been a statutory violation with the RFQ, the time for raising that challenge would have been before the proposals were due."); Commun. Constr. Serv. v. United States, 116 Fed. Cl. 233, 262 (2014) (noting "it was unfair and inefficient to allow protestors to game the system by waiting to raise problems with a solicitation until after they failed to receive the award."); Linc Gov't Servs. v. United States, 96 Fed. Cl. 672, 713 (2010) (plaintiff waived its right to challenge a solicitation term, even though the term in question was concededly unlawful); Ceres Env'tl. Serv. v. United States, 97 Fed. Cl. 277, 309, 310 (2011) (protestor waived objection to "obvious procurement procedure which [protestor]

knew was being applied and chose not to challenge prior to submitting its proposal” and that “[i]f Plaintiff believed that the procedure for the recompetition had to be amended . . . it had an obligation to raise this argument prior to the closing date for receipt of proposals”); Rochester City Lines, Co. v. City of Rochester, 868 N.W.2d 655, 662 (Minn. 2015) (losing bidder forfeited its challenge to the terms of the RFP by submitting a responsive bid and failing to object in accordance with the procedures outlined in the RFP); Seattle-Tacoma Intern. Taxi Ass’n v. Port of Seattle, 156 Wash App. 1025, 2010 WL 2283621 (Jun. 7, 2010) (rejecting bidder’s argument that “even though it participated in the proposal process, it could not have waived its right to protest the validity of the RFP” on the ground that the Port of Seattle lacked authority to issue the RFP).

The federal District Court’s decision in Kohl Partners, LLC v. City of Manchester, 2003 WL 22474626 (D.N.H. Oct. 30, 2003), is instructive. In that case, the District Court concluded that a disappointed bidder waived its right to challenge the city’s award of a contract because the bidder had declined to object to a specific RFP term during the procurement process pursuant to the procedure set forth in the RFP. Id. at *6-7. In concluding that the bidder waived any argument concerning the RFP’s terms, the Kohl Court noted that “[w]hile there is no New Hampshire case directly on point, several courts have ruled that once a person submits a proposal in response to an RFP, he or she gives up the right to protest any of the terms of the RFP.” Id. at *7 (collecting cases).

The purpose of the waiver rule is to prevent bidders from using objections previously known to the bidders to attempt to invalidate contracts only after a contract award. As articulated by the Federal Circuit in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007):

In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.

Id. at 1314. The Blue & Gold Court thus noted that “[v]endors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award [sic] and then, if unsuccessful, claim the solicitation was infirm.” Id. (quoting Argencord Mach. & Equip. v. United States, 68 Fed. Cl. 167, 175 n.14 (Fed. Cl. 2005)).

Here, Conduent engaged in precisely the type of conduct warned against by the Blue & Gold Court. Conduent admitted that prior to submitting its bid, it was aware that the Contract would be awarded on a best-value basis and not to the lowest price bidder. JSA at 348-351; 357. Indeed, at the time of the bid, Conduent had *ongoing* contracts with NHDOT that it had secured through best-value procurements. JSA at 288-9.

Despite having full knowledge that the BOS Contract would be awarded on a best-value basis, Conduent made a business decision not to object to the form of the procurement. JSA at 357 (testifying “we knew that, we saw that, we did not object to that.”). Conduent did submit 28 questions to NHDOT on a variety of topics concerning the RFP, but it chose not to raise any question or objection relating to the scoring mechanism of the RFP or NHDOT’s authority to conduct the procurement. Id. at 254-261.

The record shows that Conduent chose to sit on its rights, roll the dice, and wait and see if it received the Contract before challenging NHDOT’s authority to engage in the procurement. The relief sought by Conduent on Count IX is specifically formulated to “restart the bidding process.” App. at 38; 370. Allowing Conduent to proceed with its claim in these circumstances

would encourage bidders to conceal objections to a solicitation in the hopes that they later might use the objections to derail an award to a competitor.

Accordingly, this Court should affirm the superior court's dismissal of Count IX.

IV. NHDOT is Authorized to Conduct Best-Value Procurements

Apart from that fact that Conduent waived its objection to NHDOT conducting a best-value procurement, this objection fails on the merits, as NHDOT has authority to employ this procurement method.

RSA 21-I:22-a and 22-b allow state agencies to conduct best-value procurements, and NHDOT has employed this procurement method for many years without objection or challenge, including multiple "best-value" awards to Conduent. JSA at 288-9. RSA 21-I:22-a provides that every RFP for a procurement greater than \$35,000 which is undertaken "by a state agency as defined in RSA 21-I:11 (II)(b) ... shall contain in the body of the document objective criteria by which each submission will be reviewed, if there are particular requirements that receive more weight in the review of the submission, and the standards upon which any award will be based." Id.

RSA 21-I:22-b, in turn, provides that contract awards "shall not be made on criteria that are unknown to the parties submitting bids or proposals." The statute further states that "[n]othing in this subdivision shall prevent the state or a state agency ... 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." Id.

NHDOT is a state agency within the meaning of these statutes. See RSA 21-I:11, II(b) (defining agency as any "board, department, commission ... or other institution conducted or operated by the state of New Hampshire").

Conduent argues that because RSA 21-I:22-a requires an RFP to list the “objective criteria” to be applied, the statute prohibits the use of subjective criteria. Conduent Brief at 26. The language of the statute does not support this argument. First, if the legislature intended for RSA 21-I:22-a to bar the use of subjective considerations, it could easily have included language in the statute to accomplish this intent. It did not do so. Second, a requirement that an RFP identify objective criteria does not logically lead to a conclusion that subjective criteria cannot be used as well.

Third, the plain language of the statute makes clear that a contract award may be made based on the “judgments on the capabilities of vendors to complete the work” so long as it is clearly stated in the body of the document. RSA 21-I:22-b. The statute thus allows based on criteria other than cost, including subjective determinations of the capabilities of the vendors.

Construing RSA 21-I:22-a and 22-b to allow awards on a best value basis permits state agencies to tailor goods and services solicitations to the specific needs of the contract. As noted by the Merrimack Superior Court in XTL-NH, Inc. v. N.H. State Liquor Comm’n, Docket No. 2013-CV-119, 2016 N.H. Super. LEXIS 1, at *17 (N.H. Super. Ct. Jan. 4, 2016) (McNamara, J.) in an action involving a request for proposals for a liquor warehousing contract, “exercising some subjective judgment would most likely be requisite to selecting the best value proposal in cases similar to the present case because of the nature of the RFP, the complex services sought, and the innovative solutions requested.”

Likewise, here, the RFP solicited proposals for innovative solutions for complex proprietary computer software and customer services. The nature of the services sought do not allow for the type of apples-to-apples comparison required by a low-bid procurement. In the type of complex procurement at issue, the exercise of some subjective judgment on the

capabilities of the vendors to complete the work is consistent with the “public’s interest in securing the best work at the lowest cost practicable.” XTL-NH, Inc., 2016 N.H. Super. LEXIS 1, at *17. Consequently, the superior court did not err in determining that these statutes permit NHDOT to conduct a best-value procurement.

V. The Relief Requested By Conduent Is Moot

As a remedy for its separation of powers claim, Conduent seeks a declaration that the Contract between NHDOT and Cubic is “void.” In the first instance, in the event that the Conduent prevails in this appeal, any determination of remedy should be remanded to the superior court. Moreover, this Court can determine that the request to void the Contract is now moot.

Under New Hampshire law, “a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead.” Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734, 736 (2008) (quotation omitted). Where a contract has been awarded and performance has begun, the mootness doctrine bars claims for a declaratory judgment that the contract is void or to enjoin work on the contract. See, e.g., Kohl Partners, LLC v. City of Manchester, 2003 U.S. Dist. LEXIS 19699 at *1, n.1 (D.N.H. 2003) (noting that plaintiff’s claim for injunctive relief to block contract was moot because the contract had already been awarded); Bleccs, Inc. v. Augusta, Georgia 2009 U.S. Dist. LEXIS 126458 *24 (S.D. Ga. 2009) (plaintiff filed its complaint within two weeks of the contract award and moved for a temporary restraining order, but then asked to postpone the hearing; court later denied injunctive relief where plaintiff’s failure to act immediately to enjoin the contract meant that by the time of the hearing on the injunction, construction of the building “was underway,” noting that granting

the injunction would cause greater harm to defendant and taxpayers than not granting the injunction).

Here, there is no dispute that Cubic was awarded the contract, received the Notice to Procure, and began work in October 2015. Nor is it disputed that Cubic assumed sole operation of the BOS for the NH E-ZPass system in March 2017. JSA at 358-59. Id. Conduent no longer has any involvement with the operation of the BOS. Id.

Nonetheless, Conduent seeks to turn back the clock and require NHDOT – to the detriment to Cubic and the public at large – to rescind the Contract, discard all work performed by Cubic to fulfill the Contract, and rebid the project. The requested relief is unreasonable and flies in the face of well-established New Hampshire law.

Moreover, granting Conduent's requested relief would allow disappointed bidders to place the viability of performed public contracts in doubt for years by simply filing a lawsuit. This result would deter qualified vendors from bidding on public contracts, which in turn would deprive the public of the opportunity to obtain the best goods and services. It would also place awarding authorities in the untenable position of having to choose between voiding a contract with its selected vendor, or proceeding with the contract under threat that it could at any time be declared void. Accordingly, this Court should affirm the dismissal of Count IX on the grounds that it is moot.

CONCLUSION

For the reasons stated herein, Cubic respectfully requests that this Court affirm the superior court's dismissal of Count IX of the Conduent's Third Amended Complaint, and its denial of Conduent's motion for partial summary judgment on this claim.

REQUEST FOR ORAL ARGUMENT

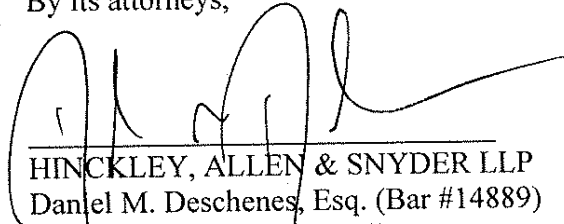
Cubic hereby requests an opportunity for oral argument. Counsel estimates that the argument will require fifteen minutes and expects that Daniel M. Deschenes will present the argument.

Respectfully submitted,

CUBIC TRANSPORTATION SYSTEMS, INC.

By its attorneys,

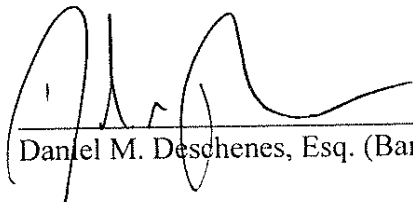
February 7, 2018



HINCKLEY, ALLEN & SNYDER LLP
Daniel M. Deschenes, Esq. (Bar #14889)
Cori P. Palmer (Bar #20668)
Hinckley, Allen & Snyder LLP
650 Elm Street, Suite 500
Manchester, NH 03101
Ph.: 603-225-4334
ddeschenes@hinckleyallen.com
cpalmer@hinckleyallen.com

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true and accurate copy of the foregoing document by electronic mail and first-class mail, postage prepaid, to Bryan K. Gould, Esq., Philip R. Braley, Esq. and Cooley A. Arroyo, Esq., Cleveland, Waters & Bass, P.A., Two Capital Plaza, P.O. Box 1137, Concord, NH 03302-1137; and Jessica A. King, Esq. and Karen A. Schlitzer, Esq., State of New Hampshire, 33 Capitol Street, Concord, NH 03301.



Daniel M. Deschenes, Esq. (Bar #14889)