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Case No. 4767-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOCTORS PATHOLOGY SERVICES P.A., a Delaware corporation,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4767-VCN**
THE STATE OF DELAWARE DIVISION OF PUBLIC HEALTH, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, an agency of the State of Delaware,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: November 3, 2009
Date Decided: November 20, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

This action for injunctive and declaratory relief stems from a state public health agency's solicitation for certain laboratory services. Plaintiff, a frustrated provider of laboratory services, asserts that the agency failed to comply with the statutes governing its procurement of professional services. Plaintiff further claims that it is a victim of agency bias resulting from its past efforts to convince the agency to modify its procurement procedures.

II. BACKGROUND

A. *The Parties*

Plaintiff Doctors Pathology Services, P.A. ("DPS") is a Delaware-based anatomical pathology laboratory. Dr. V. Raman Sukumar is DPS's President, Medical Director, and sole shareholder. Defendant State of Delaware Department of Health and Social Services ("DHSS") is a State agency with the mission of promoting the health and well-being of vulnerable populations within the State. Defendant Division of Public Health ("DPH") is a unit of DHSS.[1] Dr. Terrance Zimmerman is DHSS's Chief of Administration.

B. *The Solicitation Process*

DHSS contracts out anatomical pathology ("AP") and clinical pathology ("CP") laboratory services for patients of its various State clinics and long-term

[1] For convenience, DHSS and DPH will be referred to, collectively, as "DHSS."

care facilities.[2] In the past, it has obtained both AP and CP services through one contract. The last contract was awarded for a three-year term, with the right to extend for an additional two years.

Although DPS provides AP services, it does not perform CP work. DPS alleges that only three laboratories doing business in Delaware are capable of providing both AP and CP services. These are Bioreference Laboratories, Inc., Quest Diagnostic, Inc. ("Quest"), and Laboratory Corporation of America ("Labcorp"), all large national firms headquartered outside the State. In contrast, DPS claims that there are several AP service providers, both inside and outside of Delaware, that could submit proposals for AP services if the AP services and CP services were not bundled together in the same solicitation and contract.[3]

C. *The Release of RFP 826*

On September 8, 2008, DHSS Request for Proposal No. PSCO-826 for Clinic and Long Term Care Facility Laboratory Services ("RFP 826") was released. It sought providers, through one contract, for both AP and CP laboratory services. DPS was interested in acquiring the contract; however, as a small laboratory, it was only able to perform AP laboratory services. For years DPS has advocated separating AP and CP services and, in the months before issuance of

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[2] "The medical field of CP is typically associated with the analysis of human bodily fluids, such as blood, urine, and cerebrospinal fluid." Compl. Ex. C ("Manion Aff.") ¶ 10. "The medical field of AP generally involves the analysis of tissue and organs . . . ." *Id.* ¶ 16.
[3] Compl. ¶¶ 21-23.

RFP 826, DPS communicated with various high-level DHSS employees about the advantages of such a separation.[4] DPS asserts that these employees discussed the logistics and feasibility of such a separation with DPS on several occasions, indicated their support for the idea, and made inquiries into DPS's rates and pricing structure.[5]

All potential proposers were required to attend a pre-bid meeting on October 8, 2008, in order to be eligible to submit a proposal in response to RFP 826. Questions submitted in advance would be answered by DHSS employees at the pre-bid meeting. DPS submitted several questions probing DHSS's rationale for continuing to combine AP and CP laboratory services under a single contract. At the pre-bid meeting, DHSS responded to DPS's inquiries by stating that the two services were combined in the same contract because "[t]his procedure works for the Division and we have not had a problem with it in the past," "[i]t is a better option for us," and "DPH has a track record of success and we are going to continue with the combination of CP and AP."[6] DPS asserts that, during the pre-bid meeting, its "comments and suggestions were publicly met with hostility and false accusations by DHSS that DPS had engaged in inappropriate

[4] Compl. ¶ 12. DPS asserts that the "ultimate decision maker regarding the RFP process," Dr. Zimmerman, has "refused to meet" with DPS principal Dr. Sukumar. Compl. ¶¶ 18-19.
[5] Compl. ¶¶ 14-17.
[6] Compl. ¶ 28. The questions and answers were later provided to bidders as an addendum to the RFP. Compl. Ex. D ("RFP 826 Addendum").

conduct," which were allegedly reiterated in an email from Dr. Zimmerman to Dr. Sukumar.[7] DPS also claims that this reaction "'chilled' any potential partnership, venture or subcontractor relationship that DPS could have potentially developed or enjoyed with any persons or entities present at the pre-bid meeting."[8]

In order to be eligible for the contract, DPS arranged to obtain CP services through a subcontract with Labcorp. Labcorp was ineligible to seek the contract because it had failed to send a representative to the pre-bid meeting.[9] However, Labcorp would only agree to supply the CP services if DPS agreed to use Labcorp's pricing structure (including its pricing structure for AP services) in

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[7] Compl. Ex. B ("Sukumar Aff.") ¶ 15. Although the Complaint does not expressly describe these events, the exhibits to the Complaint suggest that they arose out of a dispute between DPS and DHSS over the scope and pretext of DPS communications with State clinics, as well as certain public remarks allegedly made by DPS regarding DHSS. It appears that, in a tense exchange between DPS and DHSS staff at the RFP 826 pre-bid meeting, DHSS asserted that DPS had contacted various State clinics and requested detailed information about the services the clinics utilized, claiming that Dr. Zimmerman had authorized DPS to contact them for such information. DHSS may have also claimed that DPS had publicly accused DHSS of providing poor services. Dr. Zimmerman subsequently contacted Dr. Sukumar and reiterated the former allegations and requested that he stop any such activity. Dr. Sukumar asserted in a reply email that DPS had not "behaved unethically or violated any provisions of this RFP" and that DHSS staff had "got[ten] angry and jumped to conclusions." Dr. Sukumar asserted that all inquires made by DPS into the scope of clinical services were done during normal professional communications with those clinics and that DPS had not had any communications with State officials since the RFP was released. Dr. Sukumar denied accusing DHSS of providing poor services and offered his apologizes "[i]f we offended any one in the State by any comments I made. . . ." Compl. Ex. B-3 ("Sukumar-Zimmerman Emails").

[8] Compl. ¶ 34.

[9] Sukumar Aff. ¶ 21. DPS had also negotiated with Quest about subcontracting CP services, but they were unable to reach an agreement. *Id.* ¶¶ 19-20.

submitting its bid, which led to higher rates for AP services than DPS had initially planned to submit.[10]

DHSS selected another proposer for contract negotiations. Those negotiations, however, were terminated when the parties were unable to reach a mutual agreement.

D. *A New Request for Proposal*

Instead of attempting to negotiate RFP 826 with any of the remaining bidders after negotiations with the first-selected proposer failed, DHSS reissued the solicitation as Request for Proposal No. PSCO-868 for Clinic and Long Term Care Facility Laboratory Services ("RFP 868") on May 25, 2009. Through RFP 868, DHSS again sought one contract for both AP and CP services. Before the pre-bid meeting, DPS submitted substantially the same questions concerning the combination of AP and CP laboratory services that it submitted for the previous RFP.[11] However, DHSS did not have a representative at the pre-bid meeting in a position to address any such questions. DPS asserts that this was intentional and "for the sole purpose of avoiding inquiries from DPS."[12] DHSS later provided a

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[10] Compl. ¶¶ 43-44. DPS asserts that Labcorp's pricing "represented a 168 to 307% increase in the cost of AP services." Compl. ¶ 44; Sukumar Aff. ¶ 11.

[11] Presumably, DPS was also the proposer which submitted a series of questions inquiring as to why the agency chose not to negotiate with the next responsible bidder under RFP 826. To those questions, DHSS responded that "none of the other bidders were deemed acceptable," and that "there was not a next most responsible bidder." Compl. ¶ 62; Ex. G ("RFP 868 Addendum") at 3.

[12] Compl. ¶ 59.

written response to DPS's questions; in short, it dismissed them as not relevant to the proposal process.[13] Though DPS was present at the pre-bid meeting, it did not submit a proposal in response to RFP 868.

Thereafter, DPS commenced this action, seeking primarily to preclude any contract award under RFP 868. DHSS has moved to dismiss the Complaint. As a consequence of this action, DHSS has yet to award the contract for RFP 868, despite the fact that the provision of services under RFP 868 was scheduled to begin in November 2009.[14]

E. *The Parties' Contentions*

DPS asserts that DHSS violated Delaware law by failing to treat all proposers and potential proposers fairly, equitably, and without bias; by failing to maximize the purchasing power of public monies; and by failing to give due consideration through "individual attention" to each solicitation. In so doing, DHSS has "exceeded the limits of its discretion concerning the structure of the RFPs by, *inter alia*, arbitrarily and capriciously failing to give due consideration (if any) to separating the CP and AP services,"[15] and "has unduly restricted

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[13] Compl. ¶ 61; RFP 868 Addendum at 2.

[14] DHSS and DPH agreed to refrain from awarding the contract without first insisting that DPS seek both expedited handling of the matter and interim injunctive relief. In so doing, they accepted the "plaintiff-friendly" burdens of a motion to dismiss, *see, e.g.*, *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009), instead of requiring DPS to show a probability of success on the merits, an imminent threat of irreparable harm, and a favorable balance of the equities.

[15] Compl. ¶ 5.

competition for professional services"[16] and "manipulated the process in favor of those three potential bidders [capable of providing both services] and has demonstrated its bias against contracting with DPS . . . ."[17] DPS alleges that DHSS has acted arbitrarily and capriciously in its "refusal to even consider separate bidding for AP and CP services,"[18] and has "created an appearance of bias and impropriety by publicly leveling false accusations and otherwise exhibiting a hostile attitude towards and against DPS at the October 8, 2008 pre-bid meeting for RFP 826,"[19] despite an obligation "to be unbiased in connection with all procurement actions and avoid any appearance of bias."[20] Finally, DPS claims that subsequent actions by DHSS demonstrated that "no due consideration was ever given" to DPS's proposal submitted in response to RFP 826 and that DHSS "acted with a pre-disposed bias against DPS" in refusing to negotiate with it for RFP 826 after negotiations with the preferred bidder were scuttled.[21]

DHSS, in its defense, asserts that, as a state agency engaged in procurement activities, it is entitled to broad deference to delineate the services it wants and to structure its contracts as it sees fit, and that reliance on historical practice is a sufficient justification. In short, DHSS claims that it has the discretion either to

[16] Compl. ¶ 6.
[17] Compl. ¶ 7.
[18] Compl. ¶ 67.
[19] Compl. ¶ 76.
[20] Compl. ¶ 77.
[21] Compl. ¶ 79.

bundle or to shop separately for AP and CP services. As to DPS's claims of bias, DHSS denies any bias and attributes DPS's allegations to the perceptions of a disgruntled competitor. DHSS also argues that all claims relating to RFP 826 are barred by the doctrines of mootness and laches.

F. *DPS's Claim for Relief*

DPS seeks permanent injunctive relief barring the award and execution of any contract under RFP 868, and requiring DHSS to re-issue RFP 868 after due consideration is given to the cost efficiencies relating to the separation of CP and AP services. DPS also seeks a declaration that DHSS's issuance of RFPs 826 and 868 were not in compliance with 29 *Del. C.* § 6901, *et seq.*, because DHSS failed to give due consideration to cost savings that could be achieved by separating CP and AP services.

III. DISCUSSION

A. *Standard for a Motion to Dismiss*

A motion to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim will not be granted unless it appears with reasonable certainty that "under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[22] In considering a motion to dismiss, courts are required to accept the truthfulness of all well-pleaded allegations of fact in the

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[22] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

complaint, as well as all inferences that can reasonably be drawn in the plaintiff's favor from such facts.[23] Conclusory allegations, however, need not be accepted as true without specific supporting factual allegations.[24]

B. *DPS's Claims Involving RFP 826 Are Moot*

DHSS asserts that DPS is barred from bringing any claims regarding RFP 826 because the claims are moot and because they are barred by the doctrine of laches.

DPS argues that the circumstances surrounding RFP 826 are directly connected to an injury it has suffered: that it has been effectively deprived of any opportunity to acquire the contract for Clinic and Long Term Care Facility Laboratory Services as a result of the re-bid of RFP 826 as RFP 868.[25] This is because, unlike with RFP 826, all of the laboratory firms with which DPS could subcontract CP services were present at the pre-bid meeting for RFP 868 and, thus, are able to seek the contract, themselves. Thus, because it could not satisfy the CP work component, DPS was incapable of submitting an eligible bid for RFP 868. Consequently, DPS asserts that its claims are neither moot nor unduly delayed.

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[23] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009). DPS incorporated several affidavits and other exhibits into the Complaint. Accordingly, they will be considered in evaluating the motion to dismiss.
[24] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. Ch. 1995).
[25] RFP 826 allowed DHSS to "reject any and all proposals received in response to this RFP." Compl., Ex. A ("RFP 826") at 25. Also, by 29 *Del. C.* § 6982(b)(2), "[a]t any point in the negotiation process, the agency may, at its discretion, terminate negotiations with any or all firms."

Since RFP 826 has been terminated and a new solicitation issued, DPS is not subject to any threatened injury that the Court can remedy. Absent an actual controversy between the parties with respect to RFP 826, the claim must be dismissed as moot.[26] While the facts surrounding RFP 826—including DPS's allegations of bias—remain relevant to DPS's claims with respect to RFP 868, when RFP 826 was cancelled by DHSS it became a nullity. As such, there is nothing for the Court to remedy or enjoin. Accordingly, DPS's claim for relief involving RFP 826, specifically, a declaration that it was not in compliance with Delaware law, must be dismissed as moot.[27]

C. *Statutory Requirements for Professional Services Contracts*

Agencies of the State of Delaware seeking professional services, including medical services, must comply with the state procurement laws, specifically those dealing expressly with professional services.[28] The General Assembly has not imposed upon the professional service solicitation process the more familiar requirement that contracts be "awarded to the lowest responsible and responsive bidder," as with public contracts for matériel and nonprofessional services.[29]

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[26] *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997) (citing *Glazer v. Pasternak*, 693 A.2d 319, 320 (Del. 1997)).

[27] With this conclusion, there is no need to address DHSS's laches argument.

[28] 29 *Del. C.* ch. 69, subch. V. No party disputes that the procurement contract at issue is for professional services.

[29] 29 *Del. C.* § 6923(k)(1). While this is the general rule for matériel and nonprofessional services, the statute allows for a contract to be awarded to a firm other than the lowest responsible bidder "if, in the opinion of the agency, the interests of the State shall be better

Instead, the professional services negotiation subchapter establishes only general guidelines for the procurement process: agencies are granted great discretion to shape the process to meet their needs.[30] When those general guidelines are met and in the absence of agency conduct that facially appears irrational, illegal, or tainted by undue influence or favoritism, a court's review of the solicitation process is extremely limited.

Section 6981 establishes two principal criteria for the award of large professional service contracts: (1) a public announcement of the project, including, *inter alia*, a general description of the project, the deadline for submission of letters of interest, criteria for the selection of professionals, and a description of the selection process to be used;[31] and (2) the establishment of "written administrative procedures for the evaluation of applicants," that are adopted and made available to

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served by awarding the contract to some other bidder. . . ." 29 *Del. C.* § 6923(k)(2). Courts have accorded considerable deference to agencies in determining both what is in the best interests of the State, as well as what constitutes the "lowest responsible bidder." *See, e.g.*, *Holley Enters., Inc. v. City of Wilmington*, 2009 WL 1743726 (June 5, 2009) (holding that a city's refusal to award contracts to lowest bidder because pending criminal charges against that bidder cast doubt as to whether the bidder was a "responsible bidder" was not arbitrary and capricious); *A-Del Constr. Co., Inc. v. Del. Dep't of Transp.*, 1992 WL 127531 (Del. Ch. June 5, 1992) (holding that an agency's decision not to consider the impact of fee shifting in calculating the lowest responsible bidder was not arbitrary and capricious); *Danvir Corp. v. City of Wilmington*, 2008 WL 4560903 (Del. Ch. Oct. 6, 2008) (holding that a city's decision to exclude certain charges in determining the lowest responsible bidder was not arbitrary and capricious); *Fetters v. Mayor and Council of Wilmington*, 72 A.2d 626 (Del. Ch. 1950) (holding that a council's decision not to award a contract to a bidder held to have provided the lowest bid and that had fully complied with the bid requirements did not violate statute that required the contract go to the "lowest and best bidder").

[30] 29 *Del. C.* §§ 6981-82.

[31] 29 *Del. C.* § 6981(b)-(c).

the public prior to the public announcement of the project. Section 6981 does not require the use of any particular criteria for the evaluation of applicants, but it does provide a list of criteria that "may be utilized in ranking the applicants under consideration."[32] Price considerations are not included among the criteria suggested by the statute for ranking the applicants under consideration,[33] although Section 6981(h) notes that "price may be a criteria used to rank applicants under consideration."[34] Section 6981(g) establishes an additional requirement that "[e]ach project shall be given individual attention. . . ."

Medical service contracts are not included on the list of professional services that are subject to Section 6982(a), which delineates the selection process to be carried out by the agency. Instead, DHSS is subject to Section 6982(b), which merely states that "[b]ased upon the criteria established pursuant to § 6981(e) of this title, the agency shall determine all applicants that meet the minimum qualifications,"[35] and that the agency should interview at least one of the qualifying

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[32] 29 *Del. C.* § 6981(e).

[33] The listed criteria are: (1) expertise and reputation; (2) expertise for the particular project under consideration; (3) capacity to meet requirements; (4) geographical location; (5) demonstrated ability; (6) familiarity with public work and its requirements; and (7) distribution of work to individuals and firms or economic considerations. 29 *Del. C.* § 6981(e).

[34] 29 *Del. C.* § 6981(h). Nevertheless, Delaware Courts have recognized that "price is not a major factor in Professional Service contracts. . . ." *Prison Health Servs., Inc. v. State*, 1993 WL 257409, at *4 (Del. Ch. June 29, 1993).

[35] 29 *Del. C.* § 6982(b)(1).

firms.[36] The agency then has the discretion to negotiate with one or more firms but, "[a]t any point in the negotiation process, the agency may, at its discretion, terminate negotiations with any or all firms."[37]

Even after construing the facts as alleged in the Complaint in the light most favorable to DPS, it is clear that DHSS has met the statutory burdens that the General Assembly has imposed with respect to the procurement process under RFP 826 and RFP 868. As agency procurement procedures are deemed "lawful unless they deviate materially from the relevant statute,"[38] to the extent that DPS may have argued that the RFPs violated the express requirements of the procurement statute, those contentions are untenable, even under the motion to dismiss standard.[39] Instead, DPS focuses its arguments on DHSS's exercise of its discretion and the bias that may have motivated its action.

D. *DHSS's Process Was Not Arbitrary or Capricious*

First, DPS argues that DHSS has "exceeded the limits of its discretion concerning the structure of the RFP's by¸ *inter alia*, failing to give due consideration (if any) to separating the CP and AP services therein,"[40] and that RFP 868 should, accordingly, be enjoined by this Court. Courts will only overturn

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[36] 29 *Del. C.* § 6982(b)(2).
[37] *Id.*
[38] *Danvir*, 2008 WL 4560903, at *5 (citing to *A-Del Constr.*, 1992 WL 12753, at *5-6).
[39] DPS has not squarely alleged any particular violation of any specific statutory requirement, such as matters of public notice or the development of evaluation criteria.
[40] Compl. ¶ 5.

the determinations of State agencies where those decisions are arbitrary, capricious, or in bad faith.[41] DPS relies heavily on the notion in *Harmony Construction* that the scope of judicial inquiry in addressing the "arbitrary and capricious" standard includes an evaluation of the adequacy of the agency's decision-making process,[42] and argues that, because the Complaint alleges that DHSS's decision not to separate AP and CP contracts was "based upon ignorance through lack of inquiry"[43] and was an "ad hoc" determination,[44] DHSS is, therefore, not entitled to any deference by this Court.

The Court in *Harmony Construction* observed that:

> Implicit in the deferential 'arbitrary and capricious' standard of review is the premise that the agency has employed a decision-making process rationally designed to uncover and address the available facts and evidence that bear materially upon the issue being decided. Indeed, it would seem that any decision made without such a process would be arbitrary by definition.[45]

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[41] *See, e.g.*, *Danvir*, 2008 WL 4560903, at *5 ("A state-contracting agency is vested with broad discretion. This court will not overturn an agency decision to award a contract that complies with the law unless that decision was made arbitrarily, capriciously, or in bad faith." (citing *Gannett Co. v. State*, 1993 WL 19714, at *3 (Del. Ch. Jan. 11, 1993))); *Prison Health Servs.*, 1993 WL 257409, at *2 ("Public contracting agencies are vested with broad discretion in carrying out their functions. A Court will not overturn the decision of an agency to award a contract that is not illegal unless that decision is made arbitrarily, capriciously, or in bad faith. (citation omitted)); *Statewide Hi-Way Safety, Inc. v. Dep't of Transp.*, 1983 WL 18024, at *3 (Del. Ch. June 28, 1983) ("An administrative agency is given broad discretion with regard to the qualifications for the award of a public works contract.").

[42] *Harmony Constr., Inc. v. State Dep't of Transp.*, 668 A.2d 746, 750 (Del. Ch. 1995).

[43] Pl.'s Ans. Br. to Defs.' Mot. to Dismiss at 12 (quoting *Harmony Constr.*, 668 A.2d at 750).

[44] Pl.'s Ans. Br. to Defs.' Mot. to Dismiss at 12 (quoting *James Julian, Inc. v. Del. Dep't of Transp.*, 1991 WL 224575, at *7 (Del. Ch. Oct. 29, 1991)).

[45] *Harmony Constr.*, 668 A.2d at 751.

DPS takes this language to have the effect of conferring upon disgruntled potential proposers a due process right, somewhat akin to case decisions under the Administrative Procedures Act,[46] that allows for redress of any disagreement with the scope or nature of the agency's solicitation for professional services and its criteria for the evaluation of proposals. DPS reads too much into the Court's explanation. The statute does not countenance the imposition of a duty upon an agency to justify the policy assumptions it makes in the face of a dissenting bidder.

As the Court in *Harmony Construction* noted, its decision to set aside the Delaware Department of Transportation's ("DelDOT") contract award based upon the inadequacy of the agency's decision-making process was an exceptional one:

> This Court will not normally or lightly decline to defer to a . . . decision made by [an agency]. Given the broad discretion conferred upon the agency . . . and the highly deferential nature of the applicable judicial review standard, only in extraordinary cases would this Court be justified in setting aside such a decision.[47]

This is not such a case. In *Harmony Construction*, DelDOT was bound by statute to award construction contracts to the "lowest responsible bidder." Concerned that a contractor who was awarded five simultaneous contracts would be unable to perform all of the contracts satisfactorily, DelDOT met with and sought additional information from the contractor to gauge its ability. Acting without an "established fact-finding process or procedure for determining not to award a

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[46] *See* 29 *Del. C.* § 10142.
[47] *Harmony Constr.*, 668 A.2d at 752.

contract to the lowest responsible bidder,"[48] DelDOT rescinded one of the previously awarded contracts, basing its decision on a number of factual findings that were found to be either patently incorrect or completely unfounded.[49] The Court concluded that such a process was not entitled to judicial deference in considering the agency's departure from the statute's "lowest responsible bidder" requirement.[50]

In contrast, the procurement decisions by DHSS at issue did not represent an ad hoc exception to the agency's statutory obligations, nor did they involve the withdrawal of an expectation that might raise procedural due process considerations.[51] Further, the allegations in the Complaint are clearly insufficient to support a finding of an arbitrary and capricious decision-making process by DHSS. The Complaint merely asserts that DPS executives were unable to meet in person with Dr. Zimmerman to discuss separation of AP and CP services and that

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[48] *Id.* at 749.
[49] *Id.* at 748-50.
[50] *Id.* at 749.
[51] *Harmony Construction* had submitted the low bid for the contract that it was later denied. Its expectations with respect to the contract were materially different from the pre-proposal hopes of DPS. ("[H]ere [*i.e.*, in *Harmony Construction*] there were no established rules. Rather, the Department made the rules up as it went along, never told Harmony what they were, and only after the game was over was Harmony told that it had flunked.") *Id.* at 751. *Cf. Autotote Lottery Corp. v. Del. State Lottery Office*, 1994 WL 163633 (Del. Ch. Apr. 22, 1994) (finding that an agency's failure to consider certain adverse information about the selected bidder was not arbitrary and capricious); *Prison Health Servs.*, 1993 WL 257409 (holding that an agency's consideration of factual errors regarding unsuccessful bidder for a professional services contract did not render its decision arbitrary and capricious where those errors were not material to the final decision).

DHSS did not provide a justification for its decision not to separate AP and CP services other than to state that separation "was not an option" and that DHSS "had not had any problem in the past."

However, the Complaint also notes that Dr. Sukumar had repeatedly met with high-level DHSS employees and presented his case for the division of AP and CP services, and that these employees sought out additional information from DPS, which DPS provided them. In addition, while he did not meet with him in person, Dr. Sukumar had communicated with Dr. Zimmerman by email and provided him and DPH Medical Director Herman Ellis, M.D., an "Executive Summary" of the advantages of separating CP and AP services prior to the release of the first RFP.

DPS's reliance on DHSS's responses at the RFP 826 pre-bid meeting as conclusive evidence of a decision "based upon ignorance through lack of inquiry" is unfounded. Those answers that DPS characterizes as dismissive and evidence of a refusal to engage in a decision-making process[52] were merely statements of reality: that the released RFP had outlined a particular protocol for the receipt of bids that DHSS was subsequently bound to honor in considering them.[53] Moreover, the express purpose of the question and answer portion of the pre-bid

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[52] These include the statements that "It is not an option for us to separate them" and "It is a better option for us; that is the way the RFP was written, and that is what everybody should be preparing their bid to reflect." RFP 826 Addendum at 7-8.

[53] 29 *Del. C.* § 6982(b)(1).

meeting was to provide bidders the opportunity to "ask clarifying questions"[54] about the RFP prior to preparing their bids, not to provide a forum to debate the agency about the proper scope of its contracts. Therefore, it cannot be inferred that DHSS's failure to provide more substantive answers at the pre-bid meeting is evidence that the agency had not evaluated the merits of separating the AP and CP contracts prior to releasing the RFP.[55]

Furthermore, the rationale that DHSS did expressly provide, that "[t]his procedure works for the Division and we have not had a problem with it in the past," and that "DPH has a track record of success and we are going to continue with the combination of CP and AP"[56] is, itself, a satisfactory one. Indeed, Dr. Sukumar, himself, conceded in an email to Drs. Zimmerman and Ellis that the combination of the two services is the standard model, stating, "Traditionally laboratory service is composed of Clinical (CP) & Anatomic Pathology (AP) and

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[54] RFP 826 at 4.

[55] Although not considered by this Court for purposes of the motion to dismiss, DHSS provided a number of rationales for its decision not to split AP and CP services. "[T]he decision to request both AP and CP laboratory services in one RFP is based on the preference to: contain costs; increase proficiency of limited staff resources available to perform contract and fiscal management duties; reduce fragmentation of services; reduce the number of points of contact; increase potential for improved cost effectiveness; and streamline operating processes for frontline staff serving clients statewide." Defs.' Resp. to Pl.'s First Set of Interrogs. at 18. In addition, "Defendants state that splitting AP and CP services would double the staff time to process the RFP, to negotiate the contract and to prepare and process separate fiscal documents for each contract. In addition, at the user level it would cause confusion as to which tests are sent to which company and how they are sent. Further it could lead to other increased costs." *Id.* at 23-24.

[56] RFP 826 Addendum at 7-8.

combined as a single service for contracting."[57] Whether or not this norm is the most practical or cost-effective is not for this Court to decide. Moreover, the Court will not expand the *Harmony Construction* holding to impose upon state agencies a duty to justify adhering to established practice (and, from the record, one working to the agency's satisfaction) simply because the conventional wisdom has been called into question by an adversely affected potential proposer.

Any discretionary procurement structure will tend to advantage certain bidders over others, and those disfavored bidders will invariably come up with arguments against its use. But that disagreement cannot give rise to something akin to a due process proceeding absent evidence that the agency's decision was so patently unreasonable that it was likely the product of undue influence. Where a public agency is operating not as a regulator, but in its proprietary capacity, courts are obligated to tread particularly lightly. As such, this Court will not impose upon DHSS such additional constraints where the General Assembly has not.[58]

E. *The RFPs Were Consistent with the Competitiveness Requirement*

Next, in another attempt to show that DHSS's procurement process failed, DPS looks to the statement of purpose in 29 *Del. C.* § 6981, which points out that

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[57] Sukumar-Zimmerman Emails at 2; *see supra* note 7.

[58] Although this dispute arises in the context of an agency's efforts to obtain professional services, the discretion of the agency to define the scope of work or range of matériel to be obtained through a particular solicitation or bid is more broadly applicable to the public procurement process generally.

the procurement statute is designed to achieve a "more efficient procurement process" that would assist in "maximizing the purchasing value of public monies" and, second, to assure "fair and equitable treatment" for all bidders on State projects.[59] DPS is correct in asserting that the statement of purpose demonstrates a legislative expectation that DHSS will maintain a competitive solicitation process.[60] However, the fact that a "request for bids must not unduly restrict competition,"[61] and that there be "fair and equitable treatment for all persons who deal with the state procurement process"[62] does not create an obligation on the part of the agency to structure a given proposal to ensure that a certain number of interested parties meet all eligibility requirements.

DPS claims that DHSS has violated the statute "by failing to give due consideration to factors that could have resulted in DHSS providing more competition, better cost efficiencies, and increased quality of laboratory services";[63] specifically, in requiring bidders to bid on both the AP and CP

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[59] 29 *Del. C.* § 6901.
[60] *See Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 631 (Del. 1954) ("The request for bids must not unduly restrict competition. All persons or corporations having the ability to furnish the supplies or materials needed, or to perform the work to be done, should be allowed to compete freely without any unreasonable restrictions.") (citing 10 McQuillin, *The Law of Municipal Corporations* § 29.30, at 268 (1966)).
[61] *Furnival Mach. Co. v. New Castle County*, 1977 WL 9565 at *2 (Del. Ch. Jan. 21, 1977) (quoting McQuillin, *supra* note 60, § 29.44, at 356).
[62] 29 *Del. C.* § 6901(2).
[63] Compl. ¶ 83.

contracts and mandating the use of outdated technology.[64] However, the primary purpose of the competitiveness requirement is to "prevent waste through favoritism."[65] The Delaware Supreme Court has held that the phrase "a fair and competitive basis" deals with process, not outcomes. It simply means that there must be "compliance with the minimum requirements of competitive bidding."[66] Thus, a procurement solicitation "must not be drawn so as to limit bidding on a public project to a single bidder in the absence of a clear showing that it is essential to the public interest to do so; nor may they be so drawn as to stifle competition by rendering impossible an exact comparison of bids."[67] Similarly, "[n]o scheme or device promotive of favoritism or unfairness or which imposes limitations, not applicable to all bidders alike, will be tolerated."[68] This is not the case here, as the Complaint itself asserts that there are at least three entities able to bid on the RFPs

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[64] DPS objects to the use of teleprinters, which it argues are "archaic," "not readily available on the open market," and "cost prohibitive for most small entities." Compl. ¶ 74.

[65] *Fetters v. Mayor and Council of Wilmington*, 72 A.2d 626, 629 (Del. Ch. 1950). *See also Gannett*, 1993 WL 19714, at *3 ("The laws requiring that public contracts be awarded through competitive bidding are primarily intended for the protection of the public and not for the protection of bidders.").

[66] *Wilmington Parking*, 105 A.2d at 630. *See also id.* at 631 ("The [agency] is not restricted to any particular procedure; but whatever procedure is followed, it must not unduly restrict competition, must place all bidders on an equal footing, and must require the bids to be based upon some standard applicable to all.").

[67] *VEPCO, Inc. v. Div. of Facilities Mgmt.*, 1982 WL 116988, at *2 (Del. Ch. July 20, 1982) (citations omitted). *See also* McQuillin, *supra* note 60, § 29.44, at 356-57 ("[A]uthorities may, without violating the rule requiring freedom of competition, insert proper conditions in their proposals for bids, and the bidders are bound to observe them. . . . They are not required to prepare specifications so that every manufacturer of the type of equipment involved can meet the competitive price of every other manufacturer.").

[68] *Wilmington Parking*, 105 A.2d at 631 (quoting McQuillin, *supra* note 60, § 29.30, at 268).

as written, and none is alleged to be unduly favored by the proposal requirements.[69] Indeed, DHSS's proposal specifications did not prevent DPS, itself, from responding to RFP 826. Accordingly, there is a "reasonable relation between the purpose of the specifications and the character of the [service] to be furnished under the contract,"[70] and DHSS, therefore, has not run afoul of any competitiveness requirement explicit or implicit in the procurement statute.

F. *The RFPs Do Not Violate the "Individual Attention" Requirement*

DPS additionally argues that DHSS's reliance on past practice in determining the scope of the RFPs violates 29 *Del. C.* § 6981(g), which provides that "each project shall be given individual attention." DPS asserts that DHSS's answers in the pre-bid meeting demonstrate that "DHSS gave no individual attention to this project, and instead treated the provision of CP and AP service as a 'form' bid consistent with past conduct and without any independent justification."[71]

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[69] DPS suggested in oral argument that there may be only two entities that can successfully bid on an RFP that combines AP and CP services. However, this Court is bound by the allegations of fact pleaded in the Complaint. Regardless, it is doubtful that the existence of one less competitor would have any material impact on the Court's analysis. *Cf. Furnival Mach.*, 1977 WL 9565 (holding that the fact that specifications upon which bids were to be based were capable of being met only by a single bidder did not mean that they were arbitrary or precluded competition because there was no evidence of undue influence, favoritism, or fraud).

[70] *Id.* at *2. DHSS explained in the pre-bid meeting that the requirement for the successful proposer to use teleprinters is driven by the fact that DPH's clinics have not converted to electronic medical records, and DHSS has no expectation of going online soon. DHSS, however, intends to modify this requirement once it receives the necessary funds to update its technology. *See* RFP 826 Addendum at 6.

[71] Compl. ¶ 69.

The exact meaning of the "individual attention" clause is unclear; the text itself is vague and the Court has not been directed to any judicial explication. However, even assuming that DPS is correct in asserting that 29 *Del. C.* § 6981(g) operates to preclude the use of "form bids," as discussed in Part III.D., *supra*, there is insufficient factual support to infer that DHSS failed to give any individual attention to determining how to structure the RFP, particularly in light of DPS's zealous advocacy to separate AP and CP services. Nevertheless, whatever the true scope of the "individual attention" requirement, DPS's interpretation of this clause must be viewed as overly expansive. Broadly precluding agencies from relying on past practice in preparing procurement contracts would unduly infringe on the broad discretion that the statute is designed to provide them, and places on agencies an onerous burden that cannot be the intent of this provision.

G. *Allegations of Bias toward DPS*

Finally, DPS asserts that DHSS violated the principle of "fair and equitable treatment for all persons who deal with the state procurement process" espoused by 29 *Del. C.* § 6901(2) by creating the appearance of bias against DPS, and that this bias is the reason DHSS has chosen not to separate the AP and CP contracts. The Complaint asserts that DHSS officials made "false accusations and otherwise exhibit[ed] a hostile attitude towards and against DPS at the October 9, 2008 pre-

bid meeting,"[72] and that these statements were subsequently reiterated in an email to Dr. Sukumar from Dr. Zimmerman. DPS additionally suggests that DHSS's decision not to enter into negotiations with DPS for RFP 826 once negotiations broke down with the initially selected bidder is further evidence of this bias, particularly in light of allegations of favoritism toward other bidders[73] and the allegedly contradictory statements made by DHSS with respect to its eligibility as a bidder.[74]

In the context of the public procurement process, there is a "strong presumption that government . . . officials exercise their duties in good faith."[75] In

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[72] Compl. ¶ 76.

[73] According to the Complaint, during negotiations with Quest's account executive to subcontract the CP services under DPS's RFP 826 proposal (since Quest's failure to attend the pre-bid meeting rendered it ineligible to bid independently), the account executive noted that he was having dialogue "up the chain" of DHSS regarding RFP 826. Compl. ¶¶ 37-39. Additionally, DPS points to language in Dr. Zimmerman's email to Dr. Sukumar following the RFP 826 pre-bid meeting stating that "[w]e will be releasing a Request for Proposal early in 2009 for laboratory services" as evidence that DHSS never intended to award RFP 826 once Quest and Labcorp were ineligible to bid. Compl. ¶ 50.

[74] DPS notes that, in response to an inquiry regarding why the agency chose not to negotiate with the next responsible bidder under RFP 826, DHSS responded that "none of the other bidders were deemed acceptable," and that "there was not a next most responsible bidder." Compl. ¶ 62; RFP 868 Addendum at 3. DPS suggests that this is "totally, and dubiously, inconsistent" with the bid rejection letter it received in connection with RFP 826, which stated, "the final selection was difficult, but we regret to inform you that your proposal was not selected." Compl. ¶ 62; Sukumar Aff. ¶ 22.

[75] *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). *See also Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) ("We assume the government acts in good faith when contracting."). *Cf. Fetters*, 72 A.2d at 628 (quoting McQuillen, *supra* note 60, § 1339 for the notion that where the statute grants discretion to an agency in awarding contracts, "[w]hen the officers have exercised their discretion in the award of the contract, the presumption obtains that such action was regular and lawful, and such presumption can be overcome only by proof, that the officers acted without justification or fraudulently.").

order to overcome this presumption, a plaintiff must allege and ultimately prove, by clear and strong evidence, specific acts of bad faith on the part of the government.[76] The level of proof necessary to overcome this presumption is not an easy one to meet. "This court has always been loath to find to the contrary and it requires well nigh irrefragable proof to induce the court to abandon the presumption of good faith dealing."[77] Allegations of bad faith "must rest on a strong evidentiary footing."[78] Specifically, "to put facts relating to bad faith in play a plaintiff must first make a threshold showing of either a motivation for the Government employee in question to have acted in bad faith or conduct that is hard to explain absent bad faith."[79] Neither bald allegations of bias;[80] inferences, suspicion and innuendo;[81] nor the possibility and appearance of impropriety, without "hard facts" implying actual misconduct,[82] are sufficient to fulfill the clear and convincing proof required to show bias on the part of the government.[83]

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[76] *Asco-Falcon II Shipping Co. v. United States*, 32 Fed.Cl. 595, 604 (Fed. Cl. 1994) (citing *Continental Collection & Disposal, Inc. v. United States*, 29 Fed.Cl. 644, 652 (Fed. Cl. 1993)).

[77] *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1301-02 (Cl. Ct. 1976), *cert. denied*, 434 U.S. 830 (1977) (quotation marks omitted). The Federal Circuit has equated this to a "clear and convincing" standard of proof; specifically, "clear and convincing evidence of a specific intent to injure [the plaintiff]." *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1338 (Fed. Cir. 2004).

[78] *Orion Int'l Techs. v. United States*, 60 Fed.Cl. 338, 344 (Fed. Cl. 2004).

[79] *Beta Analytics Int'l, Inc. v. United States*, 61 Fed.Cl. 223, 226 (Fed. Cl. 2004) (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001)).

[80] *Four Points by Sheraton v. United States*, 66 Fed.Cl. 776, 784 (Fed. Cl. 2005).

[81] *Space Age Eng'g, Inc. v. United States*, 4 Cl.Ct. 739, 744-45 (Cl. Ct. 1984).

[82] *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1581-82 (Fed. Cir. 1983).

[83] *Cf. Libertatia Assocs. Inc. v. United States*, 46 Fed.Cl. 702, 706-11 (Fed. Cl. 2000) (finding that substantial evidence that agency official had repeatedly expressed contempt for plaintiff,

Simple disagreement with the agency's evaluations or conclusions is, likewise, not enough to support allegations of bias.[84]

DPS has not alleged sufficiently well-grounded facts in its Complaint to meet this exacting standard and overcome the presumption that DHSS acted in good faith, even after drawing all inferences in its favor. Further, the Complaint fails to adequately tie these broad allegations of bias back to DHSS's decision not to separate AP and CP services. Thus, any claim grounded in allegations of bias must be dismissed.

DPS's bias claim rests principally on the allegedly false accusations made by DHSS personnel at the pre-bid meeting. Consequently, it is somewhat puzzling that the Complaint provides no detail as to the substance of these falsehoods. However, assuming that the false allegations are as previously characterized by this Court,[85] they are neither facially false[86] nor sufficiently material to support a bias claim. The Complaint exhibits strongly suggest that DHSS officials believed that the statements made in the pre-bid meeting were true. If they were true, DHSS

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acted with ill will toward plaintiff, manifested specific intent to injure plaintiff, and expressed pleasure in terminating plaintiff for default was sufficient to rebut the presumption of good faith).

[84] *Four Points by Sheraton*, 66 Fed.Cl. at 784-86.

[85] *See supra* note 7. While neither party addressed the allegations at any length during oral argument, their brief description of the allegations was consistent with the Court's extrapolation here.

[86] The Court assumes that DPS equates false with knowingly untrue and not merely mistaken. *See, e.g.*, Black's Law Dictionary 1445 (8th ed. 2004) ("False statement. An untrue statement knowingly made with the intent to mislead.").

had due cause to make them at the meeting in order to preserve a semblance of impartiality in the bidding process. Even if they were false, the distinction made by DPS between DHSS's allegations and the truth as DPS sees it is subtle, at best. Accordingly, the statements are not material to the RFP process or to DPS's suitability as a proposer. Indeed, although DPS asserts that the allegations "created an appearance of bias" that "chilled" any potential relationship DPS could have established with any entities present at the meeting, the allegations appear to have had no negative effect on DPS's ability to negotiate with Quest and Labcorp, or to submit a proposal for RFP 826. Ultimately, that there was a tense conversation at a pre-bid meeting between DPS and DHSS representatives cannot suffice to provide the factual predicate for DPS's conclusory allegation that DHSS was biased against DPS in its agency decision-making. A dust-up over differing policy perspectives, alone, does not sustain a conclusory allegation of bias.

In addition, DPS's claim for bias is only actionable to the extent that it proffers evidence that bias impacted DHSS's decision to continue to combine AP and CP services. But DPS's main support for this claim occurred only after RFP 826 was released.[87] As discussed above, there is no material allegation that DHSS exhibited bias toward DPS before the release of RFP 826 (and considerable evidence exists to the contrary); thus this Court cannot infer that bias against DPS

[87] As RFP 868 merely functions as a resolicitation for RFP 826, it would be expected to employ the same approach adopted in RFP 826.

had any meaningful impact on its decision to continue combining AP and CP services, especially given the fact that this decision is consistent with DHSS's historical practice.

With respect to DHSS's decision not to negotiate with DPS in the fallout of RFP 826, this, too, cannot be seen as the product of bias on the part of the agency. The Request for Proposal for RFP 826 states that "[i]f negotiations fail to result in an agreement . . . the Department may terminate negotiations and select the most responsive bidder, prepare and release a new RFP, or take such other action as the Department may deem appropriate."[88] This is consistent with Section 6983, which states that, while the agency "may" negotiate with other firms following a failure to negotiate a successful contract, "[a]t any point in the negotiations process, the agency may, at its discretion, terminate negotiations with any or all firms."[89]

That DHSS's statements were allegedly inconsistent is of no legal moment. Although DHSS told DPS in its rejection letter that the "final selection was difficult" it did not provide any explanation for why the selection was difficult or give any indication that the agency would contract with DPS if negotiations with the prevailing bidder fell through. Further, even if this facial inconsistency suggested a failure of candor in the part of DHSS, it would not sustain an inference of bias toward DPS.

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[88] RFP 826 at 25.
[89] 29 *Del. C.* § 6982(b)(3).

Additionally, the statements by Quest's agent and by Dr. Zimmerman also do not help DPS's claim. The disclosure of conversations between Quest and DHSS employees regarding Quest's failure to bid on RFP 826 does not infer undue bias; DPS, itself, was having conversations with DHSS employees both before and after the release of the RFP, as well.[90] Dr. Sukumar's October emails with Dr. Zimmerman evidence one such conversation. With respect to the Zimmerman email, even construing it in the light most favorable to DPS—that DHSS was already considering a re-bid of RFP 826 following a pre-bid meeting that a majority of the eligible competitors failed to attend—does not constitute undue bias against DPS.

As the facts alleged in the Complaint are not sufficient to overcome the presumption of good faith conduct, DPS's bias claim must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss is granted.[91] An implementing order will be entered.

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[90] Sukumar Aff. ¶ 4; Sukumar-Zimmerman Emails.
[91] With this conclusion, DPS's motion to compel becomes moot.