

VT. SUPERIOR COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 193-3-19 Wncv

INTRALOT, INC.
Plaintiff

v.

VERMONT DEPARTMENT OF BUILDINGS
and GENERAL SERVICES et al.
Defendants

The State of Vermont contracts with private companies to run its Vermont State Lottery, which provides funds for education in Vermont. The current contract ends in 2020, and the State conducted an RFP (Request for Proposal) process to select a company for the next contract period. Plaintiff Intralot, Inc. submitted a proposal, but also filed this suit seeking to enjoin the continuation of the process under the terms of the current RFP.

An evidentiary hearing was held on Plaintiff's Motion for Preliminary Injunction on May 31, June 21, and June 28, 2019. Based on the Findings of Fact and Conclusions of Law below, the Motion is granted and the State is enjoined from continuing with the RFP process on its current terms.

Findings of Fact

There are three major players in the gaming industry nationwide: Intralot, Scientific Games, and IGT, and each has submitted a bid for the upcoming contract. They each run the lotteries in several states and participate regularly in competitive bidding processes to obtain contracts with the states and other entities. Their products serve the same basic functions, but each system has slightly different features and options, much as there are several different companies that manufacture cars for road transportation, but each brand and model has slightly different features.

Scientific Games ran Vermont's Lottery prior to 2010, when Intralot took over after winning a 10-year contract in a 2008 competitive bidding process. In 2018, Vermont initiated the RFP under scrutiny in this case. It is for a contract to start July 17, 2019 to start providing lottery services beginning July 5, 2020 with an initial period of 10 years with 2 5-year renewal options, so it could last for 20 years. Vermont law allows some forms of gaming, but not others. For example, sports betting, Keno, and internet wagering initiated from a mobile device are not currently legal in Vermont, although some are legal in other states.

The Vermont statute on the procurement process for government contracts is 29 V.S.A. § 903(a). The standard set forth in that statute is a general one: "the best interest of the State."

Administrative Bulletin 3.5 sets forth much more detailed requirements for procurement of government contracts: "An RFP must contain a clear and concise Statement of Work and describe the criteria the State is going to utilize to select the Vendor. The ground rules need to be reasonable and create a level playing field applicable to all potential bidders, and the Agency needs to follow its own ground rules." Administrative Bulletin 3.5, Section VIII(b): Standard Bidding ("Requests for Proposals" or "RFP"), Exhibit 4, page 22.

The "Purpose and Policy" section at the beginning of Bulletin 3.5 states:

This Bulletin provides guidelines for conducting procurements and contracting and establishes minimum benchmarks and protocols to ensure the solicitation and awarding of contracts for services are completed with sufficient competition. The State process is designed to: ensure fair and open competition; guard against favoritism, improvidence, extravagance, fraud and corruption; ensure the results meet Agency needs; provide for checks and balances and oversee Agency procurement activities; and protect the interest of the State and its taxpayers.

Bulletin 3.5, Section II., Exhibit 4, page 6. Thus the best interest of the State is identified as fair and transparent competition to guard against favoritism and obtain the best price for the benefit of taxpayers.

The 2008 procurement process was overseen by the Vermont Lottery Commission. Procurement for all state agencies is now overseen by the Agency of Administration Department of Buildings and General Services as required by 29 VSA § 902(a) and the current version of Bulletin 3.5.

The 2018 RFP represents a significant departure from the norm in state competitive bidding practices. The terms and scoring systems are different from what has been used in the past in Vermont and in most states. This new model of RFP was designed by gaming industry consultant Herbert Delehanty, who was hired by the Vermont Lottery to be in charge of the 2018 RFP. He first developed an earlier version of this model for Illinois, but it was not used. He also used an earlier version in Kentucky in 2009, but for Vermont, he modified it by adding two features that are fundamentally different, making this the first time that this model in its current form has been used by any state.

Intralot alleges that it does not allow for fair competition in that bidders do not know in advance what features the Commission will choose to use for purposes of awarding the contract and that the evaluation criteria lack standards and permit

subjectivity and favoritism. The State claims that it is fair because all bidders are treated the same and that it meets the statutory criterion of being "in the best interest of the State."

Mr. Delehanty was clear in his testimony that the overriding goal was to set up a system that would promote long term growth of lottery revenue. He stated that the goal was to "grow the lottery," and that the value of sales growth should be more important than cost. In designing the RFP, he did not read or take into account the Vermont procurement process requirements of Bulletin 3.5. Rather, he "left that up to the State."¹ He contends that the only important criterion is "the best interest of the State," and that this RFP meets that goal because it is designed to increase revenues for education in the future by making the value of future revenue growth potential, rather than price, the primary measurement for evaluation.

There is no evidence that any State person conducted a review of the RFP for purposes of ensuring compliance with Bulletin 3.5. Thus, the evidence shows that the standards in Bulletin 3.5 were not an important consideration in the design. There is also no evidence that 'best interest of the State' in the lottery contract context is anything other than the best interest for all government contracts: fair competition for the best price.

Bulletin 3.5 requires a procedure by which the State identifies the specifications of the product or service it is looking for, identifies the criteria by which bids will be judged, and provides the opportunity for any bidder to submit a bid for the contract on those terms, knowing in advance what they are bidding to provide and how their submission will be scored.

Bulletin 3.5 emphasizes fair competition and price: "Competition in the procurement process serves both State Agencies/Departments and potential bidders by ensuring the procurement process produces an optimal solution at a reasonable price, and allowing qualified Vendors an opportunity to obtain State business." Section VII(A) Competitive Bidding, Exhibit 4, page 20. It emphasizes the importance of Notice, Process, Predictability, and Transparency. *Id.*

Traditional practice for lottery contracts, in Vermont and elsewhere, has provided for a base system and also provided the opportunity for "Invited options," whereby certain extra potential features are identified and bidders can choose to include those or not in their bid as separate add-ons and get points for them. For example, a procurement for state-owned cars could specify traditional base-model sedans, but include Invited options for 4-wheel drive, hybrid technology, GPS, and the like. Invited options to be included in traditional contracts were selected for inclusion in the contract prior to the opening of bids. There was a maximum limit on the number of points that could be earned for Invited options.

¹ This is surprising. One would not expect an architect to design a public building without considering pertinent guidelines, e.g., zoning and fire and safety codes.

A legitimate concern is to balance on the one hand the goal of having a contract long enough so that the procurement process (which is expensive for all parties) does not have to be repeated too often, with another goal of being able to incorporate innovation during the life of the contract, such as new features enabled by new technologies.

The traditional method of creating an RFP that provides for keeping up with current and potential future developments is for the RFP process to be preceded by an RFI process: Request for Information. The State invites vendors to demonstrate what technologies and features are new and expected in the future before the RFP is even written so that the RFP can provide for innovations by choosing and identifying features to be Invited options. The State conducted an RFI process before the 2018 RFP was issued.

In the event that the Legislature changes what is legal in Vermont during the life of the contract (such as making sports betting legal), the traditional method is that a new RFP process can be instituted to implement the newly legal form of gaming.

Another traditional method of ensuring the currency, accuracy, and fairness of the RFP process is that after the RFP is initially issued, there is a "Q & A" process, in which interested vendors can submit questions about the RFP to clarify terms, seek more specificity, and propose corrections or additions. The written answers are available to all potential bidders and become part of the RFP. In this case, there was a Q & A process, and the questions and answers were published and resulted in an Amended RFP issued in January of 2019. The Amended RFP did not change the terms challenged in this suit.

A significant innovation in the RFP designed by Mr. Delehanty in 2018 for the new procurement process in Vermont is the addition of Offered options, whereby bidders may include in their bids extra features not identified in the RFP, and receive additional unlimited points for them, based on the Committee's determination of how much extra value they represent in future revenue generating potential. This feature is described more fully below.

The Amended RFP provides for scoring as follows:

Non-price points

Base system points + base bonus points (max of 1400 points)
+ Invited option points (unlimited)
+ Offered option points (unlimited)
Total points (no maximum)
+ Up to 100 extra points available for "experience & capability"²
= Total *non-price* points

² Twenty of these 100 points are for Research and Development capability but no standards for measurement are specified (an example might be at least x number of new products deployed within the previous 5 years). Plaintiff argues that this is another place in which the Amended RFP is standardless and calls for subjectivity in evaluation.

Then the Committee selects which Invited options and Offered options "are likely to be exercised" (criteria are not specified) and determines each bidder's total *non-price* score based on the selection of those items. Bidders are unaware of each other's Offered options and the points assigned to them.

Price points

Then the bidders' prices are opened. *Price points* for both the base system and selected options are calculated by applying formulae that incorporate Mr. Delehanty's plan for scoring based on revenue generating *value*.

The total final score for each bidder is made up of *non-price points + price points* as calculated according to the formulae, and that determines the highest score, but the RFP does not specify that the bidder with the highest score is the winner. Mr. Delehanty testified that under the Amended RFP, the State reserves the right to make some other decision. This appears to be supported by Section 6.4 on "Method of Award." After setting forth extensively the calculations to be used in determining points, the Method of Award section states, "The Evaluation Committee will make its recommendation to award a contract based on its written determination of which Proposal is in the best interest of the state." It does not say that the bidder with the highest number of points will be awarded the contract.

Two sections later, in Section 6.6 on "Contract Negotiation," the RFP states, "Upon completion of the evaluation process, the State may select one or more Vendors with which to negotiate a contract, based on the evaluation findings *and other criteria deemed relevant for ensuring that the decision made is in the best interest of the State.*" (Emphasis added.) Thus, the RFP does not provide for the point system to be the means of awarding the contract, as the results of scoring can be overridden by the "State" in the exercise of its judgment. This substantiates Plaintiff's claim that the terms of the RFP call for an extensive amount of subjectivity on the part of the members of both the Evaluation Committee and whatever unit of the "State" makes the final decision, presumably the Lottery Commissioners. The RFP contains no guidelines for what is in 'the best interest of the State,' but leaves it up to the decision-maker to "deem" what is "relevant."

Even though the Committee selects Invited options for scoring purposes, under the RFP, the Lottery Commission is not obliged to use them during the life of the contract. Thus, points are available for items that may never be used. Moreover, even if the Lottery decides to use an Invited option, it is not bound to do so at the price stated in the bid. Amended RFP, Section 5.3 (3), page 115. The same is true for Offered options. Thus, the Lottery can determine that it is 'likely to exercise' either an Invited or Offered option, value and score it for purposes of awarding the contract, and then not use it, or negotiate to pay for it at a different price than specified in the bid. While the bidder is bound to honor the price it included in its submission, the State is not obligated to pay that price, but may negotiate a different price.

Under the system that was used in 2008 and is apparently the norm, once the bids are submitted, the Committee selects which Invited options to include, and determines *technical* points by adding up points for the base system plus the selected Invited options for each bidder. There was a maximum number of total *technical* points available. Then the lowest cost proposal acceptable on the basis of technical points received 800 added points for *price*, and more expensive proposals received lesser numbers of price points based on percentages relative to the lowest cost. The bidder with the highest number of total technical points + price points was the winner. Price for pre-specified features was thus the governing determinant.

The following terms of the Amended RFP are challenged by Plaintiff:

1. Innovation of Offered options
2. Valuation of Invited options and Offered options
3. Valuation of points on the base system
4. No limitation on total points
5. Points available for features that may never be elected or are illegal

Innovation of Offered options

Bidders may offer a bid that includes features that were not identified in the RFP and are unknown to other bidders. For example, to continue with the car analogy, a vendor might include in its bid as an Offered option a package for tire replacement every X number of miles, or periodic car washes and detailing for 6 years, or other extras that other vendors might not know about. The Committee could conclude, based on its own investigation and judgment, that such a feature would actually save the State money in the long run (and thus arguably be in the best interest of the State) and award points for such an option sufficient to make that vendor the winner of the procurement, but the other vendors never knew that there was an opportunity to bid on such a feature. A second bidder, who actually offered the best price on the base system, could lose the contract.

The terms of the RFP allow the Lottery Committee to use the Offered options in scoring points if it determines that the offered feature is likely to be worth \$10,000 or more per year in future revenue generation, but the Lottery is not required under the RFP to ever invoke the use of the feature.

Mr. Delehanty contends that this promotes taking advantage of innovation and creativity on the part of the vendors and allows the Lottery to invoke features that will attract greater revenue over time because it builds in the ability to develop and enhance the lottery sales. However, it is inconsistent with the level playing field standards of Bulletin 3.5. The evidence is not persuasive that a comparable effect cannot be achieved through the use of an RFI process and identified Invited options that allow bidders to know what items they are bidding on and against.

The court finds that the Offered option system detracts from transparency and fairness in that all bidders do not know what features they are competing on when they enter their bids and are judged relative to other bidders based on unknown criteria. It

does not provide "clearly defined procurement criteria." Administrative Bulletin 3.5 Section VIII(A).

Valuation of Invited options and Offered options

Under the Amended RFP, the bidder is expected to identify the value that it projects the Lottery would receive for both Invited and Offered options. While the bidder is encouraged to include value information in the proposal, no particular set of assumptions or requirements are specified to ensure the accuracy of projected value. The Lottery Committee then puts its own annual revenue value estimate on each item, based on its own judgment. It could be higher or lower than the figure offered by the bidder. Then that number, if over \$10,000, is divided by \$10,000, resulting in a number of points that are added to the bidder's score. The Committee can decide to place a value on both Invited and Offered options, even if they have never been used anywhere so that there is no empirical information available for projecting revenue, or even if the options are not legal under Vermont law.

Plaintiff claims this system gives the Committee the opportunity for subjective decision-making, lacks transparency, and introduces opportunities for bias and favoritism into the process, as the Lottery can develop value numbers that lead to increased points for a favored bidder. The Defendant argues that the members of the Committee have professional expertise and should be allowed to exercise professional judgment, and that the point-per-\$10,000 in value represents fairness in that it is a quantifiable metric.

The court finds that the method for valuation of options allows for such flexibility in the determination of value by the Committee that it fails to "guard against favoritism, improvidence, extravagance, fraud and corruption." Administrative Bulletin 3.5 Section VII(A). The Defendant essentially takes the position that the public should 'trust us—we'll be fair,' but because there are no standards, required assumptions, or guidelines for the determination of estimated annual revenue value, there is such leeway that the public cannot be assured that favoritism and bias will not creep into the value determinations and result in values that provide favored bidders with sufficient additional points to tip the balance. The statute providing for the appointment of Commissioners establishes no qualification requirements for the appointment of Commissioners. There is no requirement that they be professionals. 31 V.S.A. § 651.

Valuation of points on the base system

The RFP provides that in scoring the base system, the Committee will subtract points for deficiencies and add bonus points for "estimated annual added value as determined by the Evaluation Committee." Amended RFP, Exhibit 1, page 118.

Subtractions can be made for "deficiencies" and "risks" but there is not a clear way to define or measure what those are. Under the old norm, there was a grid, called an Award Scale for Evaluation, that provided guidelines for scoring each identified criterion within the allowable total of 100 points (there are 9 specified criteria, e.g., Gaming System Configuration, Software, Facilities, etc.). There were 5 levels: 90–100, 80–89, 70–79, 60–69, and less than 60. The categories are comparable to the A, B, C, D, and Fs

used for grading in many schools. For each category, there was a "description" as to what qualified for that category and to provide guidance for scoring within the range. For example, the "description" for the 80-89 category is "The Vendor's Proposal was good for this criterion, with no more than one significant limitation."

While not precise, the grid provides some guidance for each category relative to the others as each has a specific definition. Judgment is exercised within that guideline framework. It is comparable to a teacher using identified guidelines to determine that a student's work belongs in the "B" category, and applies judgment to determine whether that should be a B+, B, or B-. The RFP allows the Committee, without such a grid, to simply place a value on deficiencies in the exercise of its discretion, based on its own independent opinion of whether there is likely to be annual lost value or added cost, and then subtract points accordingly.

Bonus points for the base system can be added by the Committee using the same method as described above for options: the Committee determines the estimated annual revenue value of enhancements to the base for each of the identified criteria, and then divides that number by \$10,000 to determine the number of bonus points to add to the base. There is a maximum number of total points available for the base system and bonus points on the base system.

There are two aspects of this system for valuation of the base system which compromise compliance with Bulletin 3.5. One is that there is no longer a grid to assist in determining what a deficiency is. Thus, grading is likely to be more subjective, as if a teacher had no guidelines as to what constitutes an A, B, etc. The Committee could simply use unfettered discretion to determine the value and resulting point subtractions for deficiencies or additions for "extra credit." The second is that such deficiencies or extras are based solely on the Committee's independent revenue determination of "lost value or added cost" or "estimated annual value added." As a result, the Amended RFP does not meet the transparency of measurement goals provided for in Bulletin 3.5.

No limitation on total points

Due to the availability of unlimited points for both Invited and Offered options, the fact that there is no maximum number of points enables a bidder to obtain the highest score as a result of points awarded for "bells and whistles" over and above the base system, even when that bidder did not offer the best price for the base system and none of those bells and whistles will ever be used as features of the Lottery.

Points available for features that may never be elected or are illegal

This circumstance is largely enabled by the Offered options feature, although it applies to Invited options as well. For example, internet betting is currently illegal in Vermont. It is included in the RFP as an Invited option. If it were selected, it would no doubt take place in bars and taverns on phones, whereas betting in bars and taverns is currently illegal in Vermont. Other currently illegal games could be an Offered option.

Whether related to Invited or Offered options, this feature is in conflict with the requirement in Bulletin 3.5 that "An RFP must contain a clear and concise Statement of Work and describe the criteria the State is going to utilize to select the Vendor. The ground rules need to be reasonable and create a level playing field applicable to all potential bidders, and the Agency needs to follow its own ground rules." Administrative Bulletin 3.5 Section VIII(B)(1).

Under the Amended RFP, a bidder can score more points than another bidder, and win the contract, for an item that is currently illegal or never appeared in the Statement of Work and may be so future-oriented (aspirational) that a reliable value cannot be determined. Bulletin 3.5 is clear that all bidders should have the opportunity to know what Work they are bidding to provide. Implicit in Bulletin 3.5 is that the product or services are needed by the State, are in compliance with the law, and that bids will be scored based on criteria designed to award the contract to the vendor that can provide the best price for identified Work.

Summary of effect

The court finds that the net effect of these features is to change the procurement process from a competitive bidding process on known identified features to be judged on identifiable criteria to one in which the State chooses a vendor based on the exercise of significant discretion. To continue the car analogy,³ instead of competitive bidding on vehicles with a specific set of specs and a predictable point system, the members of the Committee can essentially acquire information about what extras bidders are offering from each bidder separately, without the other bidders knowing what their competitors are offering, determine what models with what features they find desirable, and choose a vendor based on what that vendor might be able to offer in the future, whether it is ever going to be wanted or used by the State or not.

This is analogous to the method in which a private person buys a car: by visiting different dealerships or their websites and deciding for themselves, using subjective judgment, how much they value different packages available from different dealers (who do not know what features their competitors are offering), and then choosing the one they like best, based on their own judgment, including their own personal estimates of how valuable any extra features may be in the future. This is not the level playing field, using identified criteria and a specified scoring system, embedded in Bulletin 3.5, to be used for competitive bidding for government contracts.

While it appears that all bidders are being treated the same, actually none of them knows what the 'real' specs are when they enter their bids, because they do not know what Offered options their competitors have included that might be attractive to the

³ This analogy is of the court's own making to illustrate the meaning of the facts and was not part of the evidence, although witnesses used analogies in their testimony for the same purpose.

Committee and chosen by it and assigned a high value, whether the State will ever use it or not.

The extreme example is that a bidder might include an Offered option for sports betting, which is currently illegal but which they hope might become legal in 8–15 years. The value of such a feature may be so difficult to predict for both the vendor and the Committee that any assigned value is speculative but nonetheless under this design, because of its future revenue potential, first the vendor and then the Committee could place a value on it that is high enough to give that vendor extra points, and because there are no maximum points to be earned, those extra points could actually make that bidder the winner, even though sports betting may never become legal or even if it did, the State might not choose to offer it.

While the above example may seem extreme, it illustrates the fact that the RFP process is not designed to ensure that bidders are bidding the delivery of apples against the delivery of apples. In the car analogy, the tire or car wash package may never be used, but it served to decide the winner even though its desirability to the Lottery Commission was unknown to other bidders.

The terms of the RFP do not require a clear Statement of Work and do not provide transparency about the specifications of features to be used in bid selection and do not have sufficiently identified criteria for scoring. They do not meet the policy or procedures of Bulletin 3.5 that provide for fair competition to achieve the best price for stated work for the benefit of taxpayers. The court finds that the terms of the Amended RFP are not in compliance with the terms and specifications of Bulletin 3.5. There is no evidence that for purposes of a lottery contract, either the Legislature or the Agency of Administration has defined the ‘best interest of the State’ as meaning anything other than what is contained in Bulletin 3.5. Whether the requirements of Bulletin 3.5 are required to be observed by the State through an enforceable action brought by a bidder is a legal issue to be addressed below.

Under the Amended RFP, the timeline of events is as follows:

3/22/19	Bids were submitted
3/22/19–5/3/19	Committee evaluated the proposals
7/16/19	Contract to be signed with the winning bidder
7/17/19	Project starts
7/5/20	Implementation/Conversion to operation by winning vendor

Conclusions of Law

“The movant bears the burden of establishing that the relevant factors call for imposition of a preliminary injunction.” *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586. Those factors are: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. *Id.*

Threat of irreparable harm to the movant

Plaintiff claimed that it would suffer irreparable harm in that its reputation and hence qualifications for future contracts would be harmed by losing this contract and then having to explain that it was due to a faulty process. The evidence of this did not meet the necessary standard of proof, and the argument is not persuasive in any event because Plaintiff could lose the contract even if the process were not faulty. Similarly, Plaintiff claimed irreparable harm in that if this form of RFP is likely to pass muster in Vermont, it may be adopted in other states and subvert the nature of competitive bidding for lottery contracts nationwide. This may well be true, but it is not an effect that has been shown to occur prior to the conclusion of this lawsuit, and thus does not support issuing an injunction in this case on a preliminary basis, prior to a final decision. Moreover, other jurisdictions have their own legal standards, which may be different than the Vermont standard.

There is, however, other evidence supporting irreparable harm in the near future. The Executive Branch of Vermont State Government, through the Agency of Administration, has set forth in Bulletin 3.5 a clear statement of policy for all government contracts. It gives meaning to the 'best interest' statutory standard by setting forth not only more specifically defined policy but goals, guidelines, and standards to be used in the procurement process. It requires fair and open competition in which all bidders are on a "level playing field" in bidding for state contracts for identified Work, and it requires that all bidders' proposals be judged according to specified criteria. The beneficiaries are the State and its taxpayers.

The manner in which the goal of fair and open competition is achieved is through providing bidders with a fair set of rules for the competition. Thus, the interests of the taxpayers and bidders are aligned: to the extent that taxpayers are harmed by a process that does not promote competition, so are the bidders, and vice versa. Neither the statute nor Bulletin were adopted for the specific benefit of bidders, but to the extent taxpayers are harmed, bidders are also harmed, as they are the players through whom the process takes place.

If the process goes forward under the Amended RFP, Plaintiff will be denied the opportunity to compete for a government contract on the level playing field that the State says it requires for all contracts. There is no way that such a lost opportunity can be remedied. Once lost, the opportunity is gone. Once an Olympic athlete competes in a race that is compromised in some way, there is no way that the race that was supposed to happen can occur as it originally should have. Just as an Olympic athlete has to wait until he or she is 4 years older for the next opportunity, a new procurement opportunity for the Vermont State Lottery may not come again for 20 years. The opportunity to compete in a fair process in 2019 could not be retrieved. The real loss is to the general public in not having the process or event occur the way it was supposed to, but the participants suffer a concomitant harm.

This case is before the court on a motion for a *preliminary* injunction. Thus, the focus must be on whether there is irreparable harm that is likely to occur between now and when a final hearing can be held and a final decision rendered in the lawsuit. A final hearing has not been scheduled, and the parties' pretrial needs have not been updated so that a pretrial scheduling order can be established. It is not realistic that a final decision would be reached sooner than two months, and it could easily be longer.⁴

Under the Amended RFP timeline, the bids have been submitted and the process of evaluation is nearly concluded. The State is scheduled to award a contract on July 16th, which is just a few days away. Once a contract begins, the process for preparation for conversion takes approximately one year. The timeline calls for conversion on July 5, 2020, so there is not much leeway in preparation time.

The opportunity to "turn back the clock" and restart an RFP process that is in compliance with Bulletin 3.5 will soon be lost or seriously diminished. Unless a preliminary injunction is issued, the contract will have been awarded on the basis of a procurement process that was not in compliance with requirements for government contracts. Plaintiff has shown that it will suffer irreparable harm prior to the time that a final decision in the case can be made, as the opportunity to participate in a fair process, which was established pursuant to statutory authority and applicable to "purchases of goods/products . . . for all Agencies,"⁵ will be lost.

Another factor supporting irreparable harm is that this is not a situation in which a money judgment could be a remedy. First, the statute does not provide for a bidder to seek a civil judgment as compensation for loss of a fair procurement process, and cannot be construed to so provide. Even if it did, it would be an impossible task for Plaintiff to recalculate the number of points that "should" have been awarded to each bidder—largely because of the degree of discretion Committee members would use in determining whether and how much revenue generating value various components of bidders' proposals would have—and then even if it were to determine that it should have been the winner, it would have to show how much revenue it lost or costs it incurred as a result of the Amended RFP. A money judgment as a remedy is simply not available, and the State did not argue at the motion hearing that it was.⁶

The loss in this case for which Plaintiff seeks a remedy is not quantifiable in money, as there is no guarantee Plaintiff would be the winner in any event.. Rather, it is

⁴ The court offered the opportunity for the final hearing to be advanced on the calendar, obviating the need for a hearing on the motion for a preliminary injunction, but the State did not agree to do so.

⁵ Bulletin 3.5, Section I entitled "Authority," authorized by 3 V.S.A. § 2222(a)(2) as described below.

⁶ While the State submitted a trial court decision that included the possibility of fees for a lottery contract bidder, the cause of action in that case was entirely different (public records request) and hence the form of remedy is not applicable in this case.

the loss of its chance to participate in a fair competition, which is coextensive with the loss to taxpayers of having government contracts awarded through a competitive process. Plaintiff, as a bidder, has an interest that will be irreparably harmed if the RFP goes forward.

Potential harm to the other parties

The potential effect of a preliminary injunction on the State is that it would not proceed with a contract that is out of compliance with requirements for government contracts. This is not a harm but a benefit. As to other consequences, such as cost and delay, it is still early enough in the process to minimize both costs and delay resulting from restarting the process: no contract has been awarded yet, and the sooner the process is restarted the better to minimize expense to the State (and therefore the taxpayers) and to other bidders as well. There would be no gap in lottery services to the public or education funding, as the current contract provides for extension as necessary until the new contract is ready to be implemented.

The effect on other bidders would be two-fold: it would open the opportunity for a new RFP process that meets the fairness requirements of Bulletin 3.5 and therefore puts them on a level playing field, and by doing so promptly, it would minimize the costs associated with revision of their bids by avoiding delay until some uncertain time in the future.

Taxpayers and the public in Vermont will not be harmed, as lottery services will continue uninterrupted despite the delay, so that participants may continue to use the lottery and education funding will continue. Moreover, a contract will not be awarded that fails to comply with fair competition standards. Rather, the benefit to the State of fair competition for stated work would be enhanced.

Thus, there is minimal, if any, potential harm to others that would be caused by a preliminary injunction. Indeed, an injunction now, rather than later, would minimize harmful effects on others.

Likelihood of success on the merits

Likelihood of success on the merits depends on the standard by which to measure whether the Amended RFP complies with legal requirements. Plaintiff argues that it is out of compliance with Bulletin 3.5, and the court has so found as a matter of fact. It remains to analyze whether the requirements of Bulletin 3.5 are subject to enforcement by bidders such as Plaintiff.

At the initial hearing on the Motion for Temporary Injunction held on March 28, 2019, the State argued that the relevant statutory standard was only "the best interest of the State." At the hearing on the Motion for Preliminary Injunction, Mr. Delehanty, the witness who testified on behalf of the State in support of the Amended RFP, also relied

on "best interest of the State" as the operative standard and was clear that he had not considered Bulletin 3.5 in designing the RFP or Amended RFP. As previously noted, no State witness testified that the Amended RFP complies with Bulletin 3.5, and the State has not argued that it does.

Thus, it appears that the State's position is that "best interest of the State" is the only operative legal standard. Its source is 29 V.S.A. § 903(a). Section 903 is entitled "Requisition for supplies and materials" and section (a) provides as follows:

When any governmental agency is in need of any of the items mentioned in this chapter, the responsible officer thereof shall requisition therefor upon the Commissioner of Buildings and General Services, and the Commissioner of Buildings and General Services shall purchase the items by either advertising for bids or by letters of inquiry and the contract for those items shall be awarded to the person whose bid or quotation is *in the best interest of the State*. (Emphasis added.)

This standard is incorporated in the Amended RFP in Section 6.4 entitled "Method of Award" on page 117 of the Amended RFP: "Awards will be made in the best interest of the State."

If this were the only statement of a standard applicable to government procurement contracts, including the contracts to run the lottery, it would provide the Lottery Commission (and officials of all agencies throughout state government) with no substantive guidance and it would allow an enormous amount of discretion in awarding government contracts. The statute establishes no criteria for either definition of work or evaluation of bids and does not define requirements for the procurement process or the establishment of criteria by which to judge and score proposals.

While the State has argued that in this case, decisions would be made by professionals in the exercise of professional judgment, it has not shown that there is any legal requirement that professionals be involved.⁷ Part 6 -- "Bid Evaluation and Selection" refers several times to the "Evaluation Committee," but this court was unable to find in the Amended RFP any identification of the makeup of the Evaluation Committee or any required qualifications.

⁷31 V.S.A. § 651, entitled "State Lottery Commission," does not require minimum professional qualifications for the five members of the Lottery Commission other than that they have no pecuniary interest in any licensee or contract, and that no more than three may be members of the same political party. There is no evidence of the qualifications of the current members of the Commission. Even if current members have professional qualifications, there is no requirement that future members have professional qualifications, or that the Commission employ consultants with professional qualifications. The opportunity for bias and favoritism, even if just implicit, is open unless other standards are required.

The State argues that Bulletin 3.5 is advisory and not mandatory.⁸ However, it is the only substantive statement of the meaning of ‘best interest of the State.’ There is no other articulation of what constitutes the best interest of the State in the lottery contract context, and it is a thorough and detailed statement of not only policy but specific procedures designed to implement the goal of fair competition for the best price for identified work.

The court concludes that the “best interest of the State” standard, which is highly generalized, does provide an overarching principle, but that does not mean that it is the only applicable standard. What constitutes and gives meaning to the “best interest” standard in particular contexts is often spelled out more specifically in legislation or administrative rules and regulations. The question for the court is whether in the context of government procurement, “best interest of the State” is the *only* standard or whether agencies are required to also follow the standards set forth in Bulletin 3.5 such that enforcement is available when the terms of the Bulletin are not followed.

Bulletin 3.5 sets forth a highly developed set of rules for State “Procurement and Contracting Procedures.” By its terms, it governs the actions of all agencies in the executive branch of government. It was issued pursuant to statutory authority for the establishment of such rules: 3 V.S.A. § 2222(a)(2) provides: “In addition to the duties expressly set forth elsewhere by law, the Secretary [of Administration] shall . . . (2) With the approval of the Governor, issue general policy statements and general rules and regulations applicable to the Executive Branch of the State government to implement executive orders or legislative mandate.” Bulletin 3.5 was issued by Susanne Young, the Secretary of Administration.

It is noteworthy that there are no statutes, rules, administrative bulletins, executive orders, or other sources that set out future growth of sales and revenues as the meaning of ‘best interest of the State’ in the context of the Vermont Lottery. This was clearly Mr. Delehanty’s opinion of what is in the best interest of the State. On the contrary, Bulletin 3.5 represents a carefully articulated statement of what is in the best interest of the State when it comes to procurement of government contracts of all types.

Vermont law has a long history of substantial deference to administrative agencies in the executive branch regarding the establishment and interpretation of rules and standards applicable to their work. As to deference to the executive branch on policy and procedure, the Vermont Supreme Court has stated, “[a]s to questions of policy, however agency determinations regarding the proper interpretation of policy or methodology within the agency’s expertise are entitled to deference.” *Plum Creek Maine Timberlands LLC v. Vermont Department of Forests, Parks, and Recreation et al.*, 2016 VT 103, ¶ 25. In this case, it is the Agency of Administration that has given the “proper interpretation of policy” and “methodology” with respect to government procurement

⁸Interestingly, the Amended RFP requires compliance with two Executive Orders (page 116 of Amended RFP) but makes no reference to Bulletin 3.5.

contracts in the form of Bulletin 3.5 to implement the general principle set forth in 29 V.S.A. § 903(a). There is no evidence that any government entity has provided an exception from this overall State interest for purposes of a contract for lottery services or an alternative guideline for the meaning of the 'best interest of the State'⁹ for that context.

· If the terms of Bulletin 3.5 were to be deemed irrelevant to the lottery procurement contract in favor of only the generalized "best interest" principle implemented through discretionary decision-making, then it follows that no agency would be bound to follow the rules set forth in Bulletin 3.5. If all agencies can simply bypass Bulletin 3.5 and rely only on an internal or a consultant's interpretation of the 'best interest' standard, Bulletin requirements would lose all meaning and force and effect for all government contracts.

While the Bulletin is not a statute nor is it a rule adopted under the Administrative Procedures Act, it represents the policy of the executive branch and a carefully designed set of rules and standards to give meaning to the "best interest of the State" principle in the context of government procurement contracts. It implements the general principle set forth in 29 V.S.A. § 903(a) by being much more specific about what is required. It was adopted pursuant to statutory authority: "In accordance with 3 V.S.A. § 2222(a)(2), this Bulletin establishes the general policy and minimum standards for soliciting, awarding, processing, executing and overseeing Contracts, as well as managing contract compliance." Bulletin 3.5, Section I.

It sets forth a policy that the "best interest of the State" when it comes to procurement contracts is to have a clearly defined Statement of Work prior to bidding and defined criteria for judging contracts so that there is a level playing field, and it relies on 'fair competition to ensure the best price for defined work' as being the operative criterion that defines the best interest of the State for awarding government contracts.

With respect to RFPs, it states: "An RFP must contain a clear and concise Statement of Work and describe the criteria the State is going to utilize to select the Vendor. The ground rules need to be reasonable and create a level playing field applicable to all potential bidders, and the Agency needs to follow its own ground rules." Bulletin 3.5, Section B(1). It has a separate two-page attachment in Appendix II entitled "Statement of Work Guidelines" that includes the statement: "The problem most often seen with SOWs is a lack of specificity. A well-written SOW is a clearly descriptive scope which identifies the responsibilities of both parties and avoids any ambiguity."

The State's witness, Mr. Delehanty, was forthright in testifying that the Amended RFP is not designed according to the 'fair competition to ensure the best price for defined work' principle, but rather is designed to promote enhanced *value* to the State in the future in the form of increased revenue possibilities. While he may well be right that his

⁹ The Board of Liquor and Lottery is authorized to make rules pursuant to 3 V.S.A. chapter 25 (Administrative Procedure Act) but as to limited matters defined in 31 V.S.A. § 651, and these do not include procurement contracts.

design enables expansion of future revenue, that is not the current standard for "best interest of the State" in Vermont for government contracts and it has not been identified by State government officials as the standard for lottery contracts. Moreover, it does not have built into it safeguards to prevent subjectivity, bias, and favoritism. The terms of the Amended RFP do not meet the requirement that the award of contracts in Vermont take place on the basis of price for pre-identified Work as set forth in Bulletin 3.5, and the terms do not guard against the possibility of bias and favoritism.

The lodestar for 'best interest of the State' is fleshed out in Bulletin 3.5, and is not superseded by any alternative standard. For the reasons set forth above, the court concludes Plaintiff has shown a likelihood of success on the merits.

The public interest

Bulletin 3.5 clearly sets forth that it is in the public interest in Vermont for government contracts to be awarded on the basis of a system that provides for a level playing field and encourages competition so that taxpayer funds are used for the best price for defined goods and services, with quality judged on the basis of a transparent scoring system that uses guidelines and standards designed to avoid bias and favoritism. The Amended RFP does not meet this standard. This factor strongly favors a preliminary injunction in order to stop the progress of a faulty procurement process so that a compliant one can be put in place as soon as possible for the benefit of the State and taxpayers.

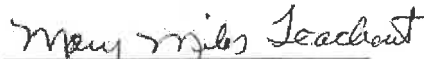
Summary

After consideration of the facts and factors pertinent to a request for a preliminary injunction, on the basis of the facts and analysis set forth above, the court concludes that all factors call for imposition of a preliminary injunction.

Order

The Motion for a Preliminary Injunction is *granted*. See separate Injunction.

Dated this 9th day of July 2019.


Mary Mijes Teachout
Superior Court Judge