

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, W.VA.:
BUSINESS COURT DIVISION

WEST VIRGINIA RADIO CORPORATION,
a corporation,

Plaintiff,

vs.

//

CIVIL ACTION NO. 13-C-468
(BCD Judge Thomas C. Evans, III)

WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS, WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., WEST VIRGINIA MEDIA
HOLDINGS, LLC, ANDREW A. PAYNE, III, DAVID
B. ALVAREZ, ALBERT BRAY CARY, JR., RALPH
BALLARD, RICHARD BALLARD, OLIVER LUCK,
JAMES P. CLEMENTS, and IMG COLLEGE, LLC,

Defendants.

ORDER

(Re: "Motion for Partial Summary Judgment of West Virginia University Board of Governors as to Count I of Counterclaim and All Claims Asserted by Plaintiff Based Upon RFP 90002782X" and "Motion for Partial Summary Judgment of West Virginia University Board of Governors as to All Claims Asserted by Plaintiff Based Upon RFP 90003005")

Pending before the court for decision are the referenced motions for partial summary judgment, filed by West Virginia University Board of Governors ("WVU BOG" or "BOG").¹

¹ Other Defendant have joined in these motions, as follows: (1) Defendants West Virginia Media Holdings, LLC and Bray Cary's Motion for Partial Summary Judgment as to all Claims Asserted by Plaintiff Based Upon RFP 90003005; (2) Defendant, Oliver Luck's Motion for Relief and Joinder in Motions for Partial Summary Judgment of Defendant, West Virginia University Board of Governors as to All Claims Asserted by Plaintiff Based Upon RFP 90002782X and 90003005; (3) Defendant, Andrew A. Payne, III's Motion for Relief and Joinder in Motions for Partial Summary Judgment of Defendant, West Virginia University Board of Governors as To All Claims Asserted by Plaintiff Based Upon RFP 90002782X and 90003005; (4) Defendant James P. Clements' Motion for Relief and Joinder in Motions for Partial Summary Judgment of Defendant, West Virginia University Board of Governors as To All Claims Asserted by Plaintiff Based Upon RFP 90002782X and 90003005; (5) Motion for Relief and Joinder of Defendant, David B. Alvarez, in Motions for Partial Summary Judgment of Defendant, West

Plaintiff West Virginia Radio Corporation ("WV Radio"), has filed its Response in Opposition to the Motions for Partial Summary Judgment filed by the West Virginia University Board of Governors, and WVU BOG has filed its Reply thereto.

In deciding these motions, the court has considered the pleadings, the motions, the response and the reply, and exhibits to the foregoing, as submitted by the Plaintiff and Defendant WVU BOG. The court has also considered the memoranda of authorities submitted in support of the motions, the response of the Plaintiff and the Reply filed by Defendant WVU BOG.

For the reasons assigned herein, the court is of the opinion that the said motions must be denied.

Procedural Statement

1. This is a lawsuit in which "the West Virginia University Board of Governors, its members, and WVU officers, employees or agents acting within the scope of their employment are party defendants." (See Verified and Supplemental Amended Complaint, ¶ 15). Defendants Payne and Alvarez are members of the WVU BOG and Defendants Clements and Luck are WVU officials against whom allegations of breach of fiduciary duties, fraud, and civil conspiracy are advanced. (Id. ¶¶ 5-6, 10-11.) In sum, WV Radio contends that WVU BOG failed to ensure compliance with applicable procurement laws in the process of bidding and awarding of WVU's Third-Tier Media Rights, thereby denying WV Radio the opportunity to participate in a fair bidding process for these rights. (Id. ¶¶ 178-191.) Against WVU BOG, the following is alleged: Count I is a claim for relief in mandamus seeking a declaration that any

contract entered into by WVU and IMG College, LLC ("IMG") is void; an injunction preventing the WVU BOG from awarding or finalizing a contract for the Third-Tier Media Rights to any entity affiliated with or contracting with West Virginia Media Holdings, LLC ("WV Media"); an injunction preventing the WVU BOG from awarding or finalizing a contract for the Third-Tier Media Rights to any entity affiliated with or contracting with IMG; an injunction requiring the WVU BOG to debar IMG from participating in the bid process, negotiations or contracting for the Third-Tier Media Rights; and, an injunction requiring the WVU BOG to complete the original media rights RFP process and award the rights to the best remaining bidder after IMG and WV Media have been debarred. Count VI asserts a claim for injunctive relief seeking to compel the WVU BOG to disclose records requested pursuant to the Freedom of Information Act ("FOIA"), *W.Va. Code § 29B-2-1, et seq.* in their entirety.

2. In answering the Verified Supplemental and Amended Complaint, the WVU BOG asserted a Counterclaim against Plaintiff WVRC, pursuant to Rules 13 and 57 of the *West Virginia Rules of Civil Procedure* and the Uniform Declaratory Judgments Act, *W. Va. Code §§ 55-13-1 to 16*.

Count I of the Counterclaim seeks a declaration that its rejection of all proposals and cancellation of the first RFP was proper and in accordance with all applicable laws, policies, procedures, rules, and the provisions of the RFP itself.

3. The motions for partial summary judgment seek a declaration, as a matter of law, on Count I of the Counterclaim that the WVU BOG had the authority to cancel the first RFP, and that Plaintiff WVRC did not have had any reasonable expectation that the RFP process would not be cancelled once the proposals were submitted.

Moreover, because, as it is alleged, the WVU BOG properly cancelled the first RFP and WVRC had the opportunity to submit a proposal in response to the second RFP but declined to do so, the claims by Plaintiff WVRC against the WVU BOG in Counts I and VI of the Verified Supplemental and Amended Complaint based on its conduct with regard to that first RFP must also be dismissed. Finally, the motion for partial summary judgment relating to claims for relief based on RFP 90003005 seeks a dismissal, based on lack of standing, because the Plaintiff WVRC failed to submit a bid in relation to this Request for Proposal.

4. Discovery in this case is incomplete. BOG, nonetheless, is of the opinion that only questions of law based on undisputed facts entitle it to partial summary judgment on all claims relative to the award of the Third Tier Media rights contract pursuant to the second RFP.

Plaintiff argues that there has been no factual development of the claims asserted by the Plaintiff, and that the pending motions are premature. Since the pending motions were submitted, the court entered a scheduling order and fixed a date in July, 2014 for the completion of "fact" discovery.

5. These motions seek to obtain a judicial declaration that WVU BOG was lawfully permitted to cancel the first Request for Proposal - - even in the face of claims of fraud, collusion, civil conspiracy and administrative protest - - and that claims for relief based on the award of the Third Tier Rights contract pursuant to the 2nd Request for Proposal must be dismissed due to lack of standing on the part of WVRC, who failed to submit a bid in response to the 2nd RFP.

STATEMENT OF UNDISPUTED MATERIAL FACTS

6. West Virginia University decided in early 2012 to publish a REQUEST FOR PROPOSALS ("RFP") seeking proposals to generate revenue through the management and sale of its sponsorship and media assets. WVU published RFP 90002782X, the first RFP, on June 8, 2012.

7. By the October 2, 2012 deadline, the University had received proposals from six (6) vendors, including WVRC and IMG. The Evaluation Committee ultimately pared down the proposals to two finalists, one of which was IMG. Plaintiff WVRC was not a finalist, its proposal having been rated the last of the six. IMG as the winner, and the University sent a non-binding letter of intent to IMG on January 13, 2013, regarding its award of the contract.

8. A WVRC director, John Raese, corresponded on several occasions with Defendant Clements and WVU BOG raising concerns about the first Media Rights RFP, identified as "RFP 90002782X." As reflected in these letters, Mr. Raese alleged misconduct that amounted to violations of law that seriously undermined the integrity of the Media Rights RFP. On February 20, 2013, The University suspended negotiations with IMG.

9. On March 5, 2013, West Virginia University retained the Office of the Attorney General to assist in the internal review of the RFP process and to examine other allegations raised by the losing proposer, WVRC. On April 15, 2013, the Office of the Attorney General published its Report on West Virginia University's Multimedia Rights. The Report contained a number of significant findings and conclusions, including that all current proposals should be rejected and the multimedia rights matter

should be rebid, and that all proposers should be allowed to participate in the rebid process. The Report also recommended that the confidentiality of submitted bid documents should be maintained.

The AG's Report was a limited disclosure, the parameters and content of which was controlled by WVU.

The AG's report admitted violations of procurement laws and regulations by WVU BOG member Defendant Alvarez, WVU BOG Chairman Defendant Payne, and Defendant Luck in his capacity as WVU Athletic Director.

The same day the Report was released, WVU announced that it would cancel the RFP and rebid the contract as recommended by the Attorney General.

10. Plaintiff WVRC filed a formal procurement protest on April 19, 2013, wherein WVRC challenged the rebidding of the RFP and requested that WVU instead resurrect the original bids from the 'innocent' bidders, re-appoint the original two members of the voting committee, Mike Szul and Mike Parsons, select a third committee member from within WVU, and score the proposals in accord with the original scoring criterion, consistent with WVU Procurement Rules.

11. The protest of WVRC was denied summarily, without a hearing. (See May 14, 2013 Letter from Brenda Mowen to WV Radio, attached to Plaintiff's Response to the motions, as "Exhibit 7"). This Protest was a challenge to: (1) the integrity of the Media Rights RFP; and (2) WVU's purportedly unfettered right to cancel a protest and re-bid the Third-Tier Media Rights and therein allow tainted entities to participate. (See Exhibit 5, Plaintiff's Response to the pending motions, at pp. 7-13.)

On May 16, 2013, Plaintiff WVRC filed its "Request For Reconsideration" of the First Protest. (See May 16, 2013 West Virginia Radio Corporation Request For Reconsideration of the Protest of the Process and Rebidding of Proposal Number 90002782X-West Virginia University Third-Tier Athletic Sponsorship And Media Rights, Exhibit 9 to Plaintiff's response). WV Radio's request for reconsideration was refused. (See May 29, 2013 Letter from Daniel Durbin to Frank Simmerman, attached to Plaintiff's response as Exhibit 10.)

12. On May 14, 2013, West Virginia University published the second RFP related to its sponsorship and multi-media rights. The second RFP contained changes from the first RFP, based purportedly on what the University had learned in the marketplace through the first RFP process about the athletic sponsorship and media rights services it wanted. Contractual requirements or terms that had been developed during the first RFP process were also included.

13. Three bids were submitted to the second RFP, and the contract was awarded to IMG COLLEGE, LLC, on July 11, 2013. Plaintiff WVRC did not submit a bid to the second RFP, but did file an administrative protest to the second RFP. This protest was also denied, summarily, without a hearing.

The second WVRC protest stated that Request for Proposal 90003005 was "tailored" to cater to one exclusive Proposer/Bidder and its subcontractor: IMG College and WV Media. As such, Request for Proposal was entirely improper and which further frustrated and tainted the procurement process and evidences WVU's systemic non-compliance with its own procurement rules.

14. The verified Amended Complaint of Plaintiff WVRC has alleged, among other things, that WVU BOG, through entity actions and the acts and omissions of its agents, officers, members, and chairman, did as follows:

A. Violated procurement laws and regulations by distributing confidential information related to the Media Rights RFP's pre-publication and dissemination (See the verified Amended Complaint, ¶¶ 118-119);

B. Violated procurement laws and regulations by providing Defendant WV Media, a potential bidder and the ultimate sub-contractor/partner/joint venturer with IMG COLLEGE, LLC, confidential information related to the RFP's pre-publication and dissemination (id. ¶¶ 118-120);

C. Violated procurement laws and regulations when the Chairman of the WVU BOG was provided with confidential information in order to provide Defendant WV Media with an inside track to secure the Third-Tier Media Rights contract (id. ¶¶ 118-124);

D. Failed to provide oversight of the evaluation of proposals submitted in response to the Media Rights RFP, and in so doing, through omission, consented to the Evaluation Committee's abandonment of objective scoring criteria (id. ¶ 135);

E. Failed to provide oversight of the evaluation of proposals submitted in response to the Media Rights RFP and in so doing, consented to or otherwise allowed Defendant Oliver Luck, the WVU Athletic Director, to stack the Evaluation Committee in order to guarantee the award of the Third-Tier Media Rights to Defendant WV Media (id. ¶ 134);

F. Failed to afford WV Radio mandated hearings on administrative protests (id. ¶ 153);

G. Endorsed a Second Media Rights RFP establishing additional evaluation criteria that made the financial proposal/benefit to WVU the primary factor for consideration in order to elevate the rank of Defendant IMG based on its purported guarantee and was a sham procurement process tailored by WVU and the Insider Defendants to ensure that Defendant IMG and its partner/joint venturer, or subcontractor, Defendant WV Media, would and did succeed in obtaining the Third-Tier Media Rights (id. ¶¶ 154-156); and,

H. Improperly delegated their duties to monitor and approve of significantly sized contracts, including that entered into by WVU and IMG (see Ex. 2 to Plaintiff's Response to the pending motions, Appendix II at 108-113, Resolution of Board of Governors delegating authority).

It is also alleged that the unlawful acts of WVU BOG "are not the result of inadvertence or errors made in good faith, but instead are the purposeful result of a fraudulent scheme to benefit WV Media, a corporation, certain Insider Defendants," (Id. ¶ 187.) It is further alleged that the actions and omissions of WVU in respect to the entire bidding process of the Third-Tier Media Rights constituted "fraud, collusion, and the palpable abuse of discretion." (Id. ¶ 188.)

15. Plaintiff WVRC, by its verified pleading, alleges specific factual allegations that cumulatively allege a pattern of systemic unlawful, fraudulent, and collusive activities undertaken by WVU officials, WVU BOG, certain members of the WVU BOG, to unlawfully and intentionally violate procurement laws and regulations and otherwise

contravene the law of West Virginia in relation to the entire Third-Tier Media Rights process. The verified Amended Complaint alleges that the precise nature and scope of WVU BOG's violations were, by design, concealed from the public and remain exclusively within WVU BOG's possession.

15. There is a factual dispute at this point in the litigation as to whether it may be fairly inferred that the second RFP was tailored to meet the prior proposal of Defendant IMG COLLEGE, LLC.

16. WVU BOG concedes that the process relating to the management and sale of its sponsorship and media assets was subject to the procurement rules and procedures of WVU.

CONCLUSIONS OF LAW

1. In considering motions pursuant to West Virginia Rule of Civil Procedure ("Rule") 56, the West Virginia Supreme Court has stated that, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Aetna Cas. & Sur. Co., v. Fed. Ins. Co.*, 148 W. Va. 160, 171 (1963) (emphasis added). A "material fact" that precludes summary judgment is one that has the capacity to sway the outcome of the litigation under the applicable law. *Pritt v. Republican Nat. Comm.*, 557 S.E.2d 853, 859 (W. Va. 2001.)

A party opposing summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence. Syl. pt. 5, *Marcus v. Holley*, 217 W. Va. 154 (2005.) And, a motion for summary judgment should be denied when the moving party merely makes conclusory assertions that no genuine

issue of material fact exists and that the moving party is entitled to judgment at law. ***Thornton v. Town of Eleanor***, 182 W. Va. 634, 636 (1990.) The facts set forth in a plaintiff's verified complaint constitute sworn statements to be treated as an affidavit for purposes of a motion for summary judgment. ***See Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc.***, 202 W. Va. 81, 85 (1998).

2. The WVU BOG has been statutorily authorized to exercise certain autonomy with respect to purchasing and procurement. The governing boards of both Marshall and West Virginia University are authorized to undertake purchasing and procurement independently, including but not limited to, the authority to "[p]urchase or acquire all materials, supplies, equipment, services and printing required" without approval from the Higher Education Policy Commission or its Vice Chancellor for Administration. *W. Va. Code § 18B-5-4(d)(1)*. The statute also requires that the WVU BOG adopt rules to govern the purchasing and procurement function. *W. Va. Code § 18B-5-4(e)*. As a result, the WVU is exempt from the mandates of the *West Virginia Higher Education Purchasing Procedures Manual* adopted by the Higher Education Policy Commission, or any of its purchasing or procurement policies.

3. The West Virginia Supreme Court of Appeals has stated "it is apparent that the legislative scheme as it relates to this matter is replete with instances in which a heightened level of independence has been statutorily granted to the WVU and Marshall University Boards of Governors." ***W. Va. Univ. Bd. of Governors v. W. Va. Higher Educ. Policy Comm'n***, 221 W. Va. 187, 197, 653 S. E. 2d 649, 659 (2007). The Court cited § 18B-5-4 to illustrate that West Virginia University has "preferential rights in the purchase or acquisition of materials, supplies, equipment, services and

printing." *Id.* n. 14. Further, the statutory provisions of *W. Va. Code § 5A-3-1, et seq.*, regarding the Purchasing Division within the Department of Administration, which apply to all other spending units of state government, "do not control or govern the purchase, acquisition or other disposition of any equipment, materials, supplies, services or printing by the . . . governing boards . . ." *W. Va. Code § 18B-5-6*. In fact, the Legislature has mandated that the WVU BOG "promulgate a rule on purchasing procedures." *W. Va. Code § 18B-5-9(n)*; *see also W. Va. Code § 18B-5-4(e)*.

4. WVU BOG has promulgated rules relating to purchasing procedures. The West Virginia University Procurement Rules provide that "[a]lthough issuance of a solicitation does not compel award of a contract, a solicitation should be canceled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the University's best interest." *Id.*, § 5.26.2 (emphasis added).

The Procurement Rules further provide that "[e]ach solicitation issued by the University shall state that the solicitation may be canceled." *Id.*, § 5.26.4.1 (emphasis added). The first RFP did, indeed, expressly state on Page 2 under a heading titled "DISCLAIMER" that WVU "reserves the right to cancel this RFP with or without cause or notice." The Procurement Rules also provide that "[p]rior to award, all bids, proposals or expressions of interest may be rejected in whole or in part when the Chief Procurement Officer determines in writing that such action is in the University's best interest . . ." Based upon the statutory authority of the WVU BOG and its implementing Procurement Rules, specifically §§ 5.26.2 and 5.26.4, it is undisputed that the WVU BOG had the authority to cancel any request for proposals.

5. Other pertinent provisions of the WVU Procurement Rules that were not followed by WVU BOG, are the following:

"In the event the protestor requests a hearing on the merits of the protest the Chief Procurement Office shall set a time and place for the hearing. The hearing shall be conducted in an informal manner; technical rules of evidence shall not apply. It shall be recorded and an official record shall be prepared. Following the hearing, the Chief Procurement Officer shall issue a written decision."

WVU Procurement Rules (2006), Rule 7.2.4

WVU Procurement Rules mandate a hearing on the merits upon the filing of a Request for Reconsideration:

The Associate Vice President for Finance shall review the request for reconsideration and issue a decision in writing. In the event the aggrieved party requests a hearing on the merits, the Associate Vice President for Finance shall set a time and place for the hearing. The hearing shall be conducted in an informal manner; technical rules of evidence shall not apply. It shall be recorded and an official record shall be prepared. Following the hearing, the Associate Vice President for Finance shall issue a written decision.

WVU Procurement Rules (2006), Rule 7.3.2

6. The parties have not cited cases from the Supreme Court of Appeals of W. Va. that address the issues in controversy in this case. While WVU and Marshall plainly are not bound by the statutory provisions of *W.Va. Code § 5A-3-1, et seq.*, regarding the Purchasing Division within the Department of Administration, which apply to all other spending units of state government, nonetheless, the case of ***State ex rel. E.D.S. Fed. Corp. v. Ginsberg***, 163 W. Va. 647, 259 S.E.2d 618 (1979) provides analogous authority from the W. Va. Supreme Court of Appeals in its interpretation of the law applicable to claims made by an unsuccessful bidder who alleges arbitrary, capricious or similar conduct by the State, acting through its agents, in connection with the procurement process.

In that case, in 1978 the West Virginia Department of Welfare decided to computerize its system for processing Medicaid claims. The State publicly advertised for proposals for the design and operation of its computer system. The RFP was 39 typewritten pages. In response to the RFP, four companies submitted proposals. One was E.D.S. Federal Corporation and another The Computer Company, the eventual recipient of the contract. E.D.S. filed a mandamus case in Circuit Court, during the pendency of which a contract was entered into by the State with the Computer Company. E.D.S. maintained that its bid was the lowest responsible bid, and that it was therefore entitled to the contract. The Supreme Court of Appeals agreed. In that case, the court stated:

“[T]here is no question that a bidder who goes to the expense of preparing a complex proposal has a right to rely upon both the contracting authority's integrity and intelligent use of discretion which necessarily must align with a public body's institutional rules.”

State ex rel. E.D.S. Fed. Corp. v. Ginsberg, 163 W. Va. 647, 659 (1979).

The court also stated:

Fraud is always grounds for bringing action in mandamus against state officials in contract cases, and if contractor has been encouraged to rely to his detriment by state officials and has undertaken expense to submit low, responsible bid which is then rejected by reason of outrageous abuse of discretion, bidder also has additional grounds for relief”

Id., at 163 W. Va. 659.

6. The court is of the opinion that, under these circumstances, with the verified allegations of fraud, collusion, civil conspiracy, and arbitrary and capricious conduct, issues of material fact exist on several important issues, one of which is whether WVU BOG possessed the unqualified right to cancel the RFP process, and this is so even though the WVU Procurement Rules and the RFP state that it does. For this reason, the motions for partial summary judgment must be denied.

Although a governmental entity retains wide discretion to accept or reject offers during the public procurement process, such "discretion does not include an unlawful departure from its own rules and from state procurement statutes." ***Planning & Design Solutions v. City of Santa Fe***, 118 N.M. 707, 712 (1994). Stated differently, a governmental body cannot evade applicable laws and hide known wrongs under the color of a cancellation. *Id.* at 713; ***see Weber v. City of Philadelphia***, 437 Pa. 179, 183 (1970) (municipality could not cancel competitive bid process when charged with acting fraudulently, collusively, or in bad faith); ***Centech Group, Inc. v. U.S.***, 78 Fed. Cl. 496, 505 (Cl. Ct. 2007) ("Court possesses jurisdiction to determine if the corrective action taken by a procuring agency as a result of a bid protest was reasonable under the circumstances"); ***Cardell, Inc. v. Twp. of Woodbridge***, 115 N.J. Super. 442, 450 (N.J. Super. Ct. 1971) ("unbridled power to reject bids, even where such right is reserved" would violate public policy, contravene legislative intent of competitive bidding law, and "afford a means by which the statute can be evaded under the color of the rejection of any and all bids").

In ***Planning & Design Solutions, supra***, the City of Santa Fe published a request for proposals to solicit bids for professional services related to the development of a

mixed use community. 118 N.M. at 709. The RFP listed and weighted four evaluation criteria. *Id.* The city, after evaluating the 11 received proposals according to the criteria set forth in the request for proposal, abandoned the objective criteria and ultimately awarded the RFP to the highest ranked local firm that had submitted a responsive bid. *Id.* After a protest by the "most advantageous" bidder, the city rescinded the contract award and voted to reject all 11 proposals and reissue the RFP with a new evaluation factor: locality. *Id.* When a bidder filed suit challenging the lawfulness of Santa Fe's actions, the city moved for summary judgment, partly grounded upon its purported right to cancel the RFP, reject all bids, and re-bid. *Id.* at 712.

The court held that cancellation of an RFP process did not invalidate the plaintiff's claims related to the process and the subsequent "remedial" actions of the city. Specifically, the court noted that, despite the fact that the city retained the right to cancel, a governmental entity could not cure its previous actions and unlawful activities through cancellation and re-bidding. *Id.* The finding was premised upon a showing by the plaintiff of arbitrary and capricious behavior on the city's part. The court found the following actions were arbitrary and capricious: (1) introducing a locality requirement after the bids were opened and thereby abandoning the objective evaluation criteria published in the RFP; (2) awarding the contract to the fourth ranked bidder; and (3) rejecting the proposals after making the contract award. *Id.* at 713. Although not discussed in great detail, the Court in Planning & Design Solutions did note that "of all the interests involved in competitive bidding, the public interest is the most important." *Id.* at 710.

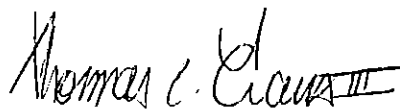
While the case law cited in support of this legal conclusion are not binding precedent, nonetheless, the principles therein stated are persuasive to this court. The process of managing and marketing the Third Tier Media rights by WVU BOG is of high public interest and importance. The public, and the bidders, fairly expect that the State officials administering the process will act with integrity and fairness. Where it is alleged that this did not occur, the public interest in the fair administration of the process is not served by a law that allows WVU BOG merely to cancel the RFP and issue another, particularly, where, as here, it is alleged that the second RFP was "tailored" to meet the bid of IMG COLLEGE, LLC.

Based on the foregoing, it is therefore **ORDERED** that the pending Motions for Partial Summary Judgment be, and they are hereby, denied and overruled. The objections and exceptions of the Defendants is noted and preserved.

The clerk shall forward true copies of this Order to the attorneys of record herein.

All of which is **ORDERED**, accordingly.

ENTER: November 22, 2013



Thomas C. Evans, III, Circuit Judge
Business Court Division