

VERMONT SUPERIOR COURT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 397-7-19 Wncv

MEAD JOHNSON & COMPANY
Plaintiff

v.

STATE OF VERMONT OFFICE OF
PURCHASING & CONTRACTING
Defendant

Opinion and Order on Motion for Preliminary Injunction

Defendant the State of Vermont Office of Purchasing & Contracting (OPC) recently concluded a procurement process involving sealed bids for a contract to supply baby formula for the Vermont Women, Infants, and Children Program (WIC). Plaintiff Mead Johnson & Company (Mead) bid on the contract, which eventually was awarded to a competitor, Gerber Products Company (Gerber).¹ Mead seeks review under Vt. R. Civ. P. 75 of the concluded procurement process, claiming that OPC unfairly modified the bidding process in violation of Vermont Agency of Administration Bulletin 3.5 (Procurement and Contracting Procedures). The only relief sought in the complaint is injunctive relief requiring OPC to “rebid” the contract in compliance with Bulletin 3.5 and any applicable federal regulations. With the complaint, Mead filed a Vt. R. Civ. P. 65(b) motion for a preliminary

¹ Gerber has intervened in this case.

injunction intended to stay any performance on the new contract pending final relief in this case and to require OPC to rebid the contract.

On October 3, 2019, the Court held a hearing on the motion. Mead was represented by Melissa Copeland, Esq., and William Clark, Esq. OPC was represented by Assistant Attorney General David McLean. Gerber was represented by Gary Franklin Esq. At the hearing, Mead withdrew its request for a stay of performance of the contract and, instead, solely sought preliminary injunctive relief in the form of an order requiring OPC to rebid the contract.

The parties agree that the facts material to preliminary injunctive relief are not in significant dispute, and the parties did not seek an evidentiary hearing.

I. The Facts

Federal regulations require that WIC baby formula contracts go to the lowest bidder, which is the one who offers the State the highest rebate on program sales. OPC received three bids in response to a request for proposals (RFP) for the WIC program described above, from Abbott Products Company, Gerber, and Mead. Abbott had supplied baby formula to the State prior to the disputed procurement process. Initially, OPC awarded the new contract to Abbott, though it did not offer the most advantageous rebate. OPC considered the costs involved to switch to a different supplier and concluded that Abbott's bid was the lowest effective cost.

The original RFP set out evaluation criteria in Section 3.3. OPC reserved broad discretion over how it determines the State's best interests in Section 3.3.1, which provided: "The State shall have the authority to evaluate Responses and

select the Bidder(s) as may be determined to be in the best interest of the State and consistent with the goals and performance requirements outlines in this RFP.”

OPC had relied upon its broad discretion in Section 3.3.1 to consider the above-described transitioning costs.

Gerber objected to the contract award to Abbott, and the State’s consideration of switching costs.² OPC consulted with federal regulators and determined that it should have excluded such transition costs from its evaluation of the bids.

OPC then notified all three bidders that it would “rebid” the contract. It later clarified that it would “remove” Section 3.3.1 from the RFP and reevaluate the three original bids without consideration of switching costs. On that basis, the lowest cost bidder was Gerber. OPC awarded the contract accordingly.

Mead—the third-place finisher under both bid processes—then sent OPC a letter protesting this process. As relevant here, its principal objection is that OPC should have issued a new, corrected RFP when OPC determined that its original evaluation and award of the contract was flawed and then accepted *new* bids. The process OPC actually undertook, argues Mead, violates a provision of the Vermont Agency of Administration’s Bulletin 3.5 and federal regulations that require bids to be based on the most recent data available.

Bulletin 3.5 sets out the Agency of Administration’s comprehensive policies

² It apparently raised its objection by filing a lawsuit against the State. The record of this case does not disclose what may have transpired in that case except that it prompted OPC to reconsider its analysis of the bids.

on procurement and contracting in the Executive Branch of government. Its stated purpose is, in part, as follows.

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 § II, at 6. Bulletin 3.5 is an Agency policy statement that is updated a number of times a year. It is not an agency rule, and it was not promulgated pursuant to the Administrative Procedures Act, 3 V.S.A. §§ 800–848. Neither Bulletin 3.5; the statute empowering the Agency to adopt it, 3 V.S.A. § 2222(a)(2); nor other relevant statutes purport to create any right in bidders to contest procurement procedures or outcomes administratively or to seek judicial review of those issues.

Mead argues that OPC’s reconsideration of the original bids violated Bulletin 3.5 § VIII(B)(1), at 22. That subsection includes the following: “Once an RFP or bid solicitation has been issued, and prior to the submission of bids, an Agency may issue an Addendum which may modify any aspect of the RFP.” It was improper, Mead argues, for OPC to “modify” the RFP after the submission of bids.

Mead also maintains that OPC needed to rebid the contract because federal regulations required the bids to be based on “6 months of the most recent participation and issuance data.” 7 C.F.R. § 246.16a(c)(5)(i). Mead implies that the

data used for the original bids had become stale once OPC decided to reconsider those bids after RFP modification, thus violating federal statute. OPC did not take action in response to Mead's objection letter other than to provide it a written response.

Mead claims that OPC's failure to rebid the contract in these circumstances makes the procurement process unlawful. It seeks an order requiring OPC to start the procurement process over and to rebid the contract. It argues that, otherwise, it will be deprived of its entitlement to a fair and lawful bidding process.

II. *Preliminary Injunction*

The Vermont Supreme Court has described the standards applicable to a motion for preliminary injunction as follows:

A preliminary injunction is an extraordinary remedy never awarded as of right. In each instance, we must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. The movant bears the burden of establishing that the relevant factors call for imposition of a preliminary injunction. The trial court here rightly identified the main factors guiding its review under Vermont law: (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.

Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 205 Vt. 586, 596 (internal quotations omitted).

After considering the existing record and the arguments of both sides, the Court makes the following determinations.

A. *Likelihood of Success on the Merits*

Mead has not identified any statutory right to contest either the procedure or outcome of the procurement process at issue in this case, and Bulletin 3.5 similarly contains no provisions providing any such procedure or relief.³ Mead also does not argue that Bulletin 3.5 otherwise creates any right privately enforceable by it or contract bidders generally. Mead claims, instead, that it is entitled to relief under Vt. R. Civ. P. 75(a).

Rule 75 sets forth the procedure used for review of governmental action that is not reviewable under Rule 74 but that is “otherwise available by law.” *Id.* Review is typically only “otherwise available” “as a matter of general law by proceedings in the nature of certiorari, mandamus, or prohibition.” Vt. R. Civ. P. 75—Reporter’s Notes; *see also* Vt. R. Civ. P. 81(b) (abolishing certain extraordinary writs).

Mead argues that its claim in this case is in the nature of certiorari, and that mandamus also applies. The Court is not persuaded as to either assertion.

Certiorari provides a limited form of review of “judicial” or “quasi-judicial” functions

³ Mead does not claim that it should have won the contract or that there has been any deprivation of due process in this case. Nor would such a claim have a likelihood of success. Generally, a disappointed bidder has no property interest on which to predicate a due process claim. *See Skaskiw v. Vermont Agency of Agriculture*, 2014 VT 133, ¶ 21, 198 Vt. 187, 198 (“Because a bidder has nothing more than a unilateral hope or expectation of securing a contract, a disappointed bidder typically has no legitimate claim of entitlement and thus no protected property interest.”); *cf. Franklin County Sheriff’s Office v. St. Albans City Police Dept.*, 2012 VT 62, ¶ 15, 192 Vt. 188, 195 (no legally protected interest for standing purposes because Sheriff’s Office has no “legally protected right to ‘fair competition’” in bidding on municipal contract.).

exercised by lower tribunals.

Certiorari is a writ issued by a superior to an inferior court of record, or to some other tribunal or officer exercising a judicial function, directing the certification of the record and proceedings in order that the record may be revised and corrected in matters of law. It is an extraordinary remedy and one of limited scope and function. It issues only in those cases in which compelling public necessity or other unusual circumstances make ordinary modes of proceeding inadequate, and the review thus occasioned is limited to keeping the inferior tribunal within the limits of its jurisdiction and insuring that that jurisdiction is exercised with regularity. The availability of the writ is also limited in that the writ will issue only when there is no other adequate remedy at law, and no other means of review is available.

Rhodes v. Town of Woodstock, 132 Vt. 323, 323–25 (1974) (citations omitted). “The office of the writ of certiorari is to provide for a review of the judicial action of inferior courts . . . exercising judicial functions.” *Burton v. Selectmen, Town of Springfield*, 124 Vt. 502, 504 (1965).

A judicial or quasi-judicial action “is one in which all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure; and that no one deprived of such rights is bound by the action taken.” *Goddard v. City of Albany*, 684 S.E.2d 635, 638 (Ga. 2009); *see also Frawley v. Police Com’r of Cambridge*, 46 N.E.3d 504, 514 (Mass. 2016) (“[W]hen assessing whether a proceeding is quasi-judicial, ‘we have looked to the form of the proceeding . . . and the extent to which that proceeding resembles judicial action.’” (citation omitted)); *Eneh v. Minnesota Dep’t of Health*, 906 N.W.2d 611, 614 (Minn. Ct. App. 2018) (“A quasi-judicial decision occurs when an agency conducts an investigation into a disputed claim and weighs evidence, applies that

evidence to a prescribed standard, and reaches a binding decision on the matter.”).

Mead claims that it sent a letter of objection to OPC, which considered it and responded in writing and that *that process* “was clearly quasi-judicial in nature.” Mead’s Reply at 2 (filed Aug. 21, 2019). The Court disagrees. In the Court’s view, that process appears to have been a purely administrative action that exhibits none of the hallmarks of judicial or quasi-judicial activity and that likely occurs numerous times a day in many state agencies. Mead cites to no entitlement to any notice, hearing, right to present evidence, or other process in the nature of judicial action before OPC, and no such process occurred. Mead’s claim is not in the nature of certiorari.

Mead’s argument that its claim is in the nature mandamus fares only slightly better. “A court can issue a writ of mandamus . . . only under certain circumstances: (1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official’s judgment or discretion; and (3) there must be no other adequate remedy at law.” *Petition of Fairchild*, 159 Vt. 125, 130 (1992).

Mead asserts that OPC violated federal regulations and Bulletin 3.5 and the fact of those violations entitles it to mandamus relief. There is no clear showing of any failure to fulfill a ministerial duty, however. *See Bargman v. Brewer*, 142 Vt. 367, 369 (1983) (noting that a ministerial act is one “regarding which nothing is left to discretion” (citation omitted)); *see also State v. Forte*, 159 Vt. 550, 555 (1993)

(duty appropriate for mandamus must be “simple and definite”) (citation omitted)). Bulletin 3.5 describes the process through which the State exercises its considerable discretion in the area of procurement. Mead argues that OPC’s reconsideration of the original bids violated a ministerial duty in Bulletin 3.5 § VIII(B)(1), at 22, to alter the terms of an RFP only by formal Addendum. OPC never issued a formal Addendum in this case, and it could not have properly done so under Bulletin 3.5 § VIII(B)(1) because the Addendum process cannot be done once bids are submitted. Hence, argues Mead, OPC should have rebid the contract entirely.

OPC’s reconsideration of the bids in this matter was not wholly dependent on any modification of the RFP, however. The State explained at oral argument that OPC, by ostensibly removing Section 3.3.1 from the RFP, narrowed its available discretion over the evaluation of the bids. OPC originally had relied on its *general* discretion under Section 3.3.1 to consider transition costs. Section 3.3.1 preserved OPC’s broad discretion over its evaluation of the bids; however, it did not affirmatively require or not require consideration of transition costs. Nothing else in the RFP required or forbade OPC from considering transition costs. Upon determining that transition costs had been impermissibly considered as far as federal regulatory requirements go, OPC could have simply exercised the same broad discretion under Section 3.3.1 *not* to consider switching costs that it had previously exercised to consider switching costs. Instead, it chose to eliminate Section 3.3.1 altogether; but the effect was the same. In other words, OPC’s purported elimination of Section 3.3.1 was an entirely moot point—it had no actual

impact on OPC's decision-making process. The Bulletin 3.5 § VIII(B)(1) requirement to issue Addendums in appropriate circumstances does not clearly apply under these facts, and Mead cites no other potentially mandatory Bulletin 3.5 provisions that control in these circumstances.

Likewise, in light of the minor change at issue here, OPC's decision not to begin the entire bidding process anew was likely an appropriate discretionary application of Bulletin 3.5 policies. Mead cannot claim *any* prejudice from the failure to begin the bidding process anew. All original bidders knew of the need, under federal law, to be the low bidder. Nothing related to the elimination of Section 3.3.1 would have altered in any way the need for the successful bidder to be the lowest bidder or how any bidder might construct the details of its bid. OPC's reconsideration of the bids worked only to the potential detriment of Abbott. Gerber and Mead stood in the same position and each was aware that it should submit the lowest bid—without regard to transition costs. Gerber submitted the lowest bid. Notwithstanding the provisions of Bulletin 3.5, under such facts, Mead has proffered no persuasive basis under in mandamus law to require a new bidding process and afford it another bite at the apple.

Moreover, while federal regulations require bids to be based on the most recently available data, the bids in this case appear to have been based on the most recently available data at the time of bidding, and the regulations do not require new bids or new data during the time that the state evaluates bids and awards the contract. In addition, OPC represented at oral argument that the federal regulators

had been advised of the bidding process in this case and indicated that they had no objection to the contemporaneity of that data used in the bidding process. There is no apparent ministerial duty at issue in this case.

Even if there were, however, Mead neglects to cite any “clear and certain right to the action sought by the request for a writ.” Mandamus must be predicated on such a right. *Skiff v. South Burlington School District*, 2018 VT 117, ¶ 25, 201 A.3d 969, 976–77 (residents’ mandamus claim against school district improperly founded on nonexistent constitutional right); *Wool v. Menard*, 2018 VT 23, ¶ 18, 207 Vt. 25, 34–35 (inmate’s mandamus claim about competitive bidding properly predicated on statutory right to telephone services at “lowest reasonable cost”; *Petition of Fairchild*, 159 Vt. 125, 130 (1992) (adjacent landowners’ mandamus claim against Town properly predicated on right to enforce relevant judicial decision and Town zoning regulations).

Mead relies heavily on this Unit’s (prior term) recent decision in *Intralot v. Vermont Dep’t of Bldgs. and General Services*, No. 193-3-19 Wncv (Wash. Super. Ct. July 9, 2019). In *Intralot*, the court preliminarily enjoined the State from awarding a lottery services contract based on an RFP that the court determined violated Bulletin 3.5. The decision does not appear to analyze the basis for a Rule 75 claim, and it does not mention certiorari or mandamus. Relief appears to have been ordered based on the unstated conclusion that Bulletin 3.5 is directly enforceable in court against the agency seeking bids and during an ongoing bidding process.

Intralot is unlike this case. The bidding process here is over. Further, Mead expressly asserts a Rule 75 claim and does not argue that Bulletin 3.5 is directly enforceable in court by it otherwise. *Intralot*, therefore, is not helpful in this this matter. In any event, that decision is not binding, and the Court is not obligated to follow it. To the extent that ruling is inconsistent with this Court’s analysis of Rule 75, the Court declines to follow it in the circumstances of this case.

Mead has not established a likelihood of success on the merits.

B. *Threat of Irreparable Harm*

Mead claims that without preliminary injunctive relief it will be irreparably harmed insofar as it will forever lose its *entitlement* to a bidding process that complies with the law.⁴ To establish irreparable harm, a party “must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.” *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotations omitted). In addition, the purported irreparable harm “must be shown to be actual and imminent, not remote or speculative.” *Id.*

Here, Mead fails entirely to provide any rationale for needing injunctive relief on a preliminary basis—as opposed to following a determination of the merits. No such need is evident to the Court. It appears from the parties that there is need of little discovery in this matter and that the case could be decided promptly on a

⁴ Mead is not claiming damages in this case, and it is not asserting that, if the bidding process had been executed properly, it would have won the contract.

summary judgment record. Presumably, if Mead becomes entitled to the order it seeks in this case—requiring OPC to rebid the contract—then OPC will be ordered to do just that, and Mead will have the complete relief it has sought.

There is no indication in the record that irreparable harm will occur without preliminary relief.

C. Harm to Other Parties and the Public Interest

OPC argues that preliminary injunctive relief could cause it to deviate from federal regulations requiring it to implement a “cost containment measure” and thus place federal funding at risk, jeopardizing the stability of Vermont’s WIC program and risking harm to those who depend on it. Mead responds that this concern is overblown and Vermont likely will be able to extend regulatory deadlines with federal regulators. The record is insufficient to substantially evaluate these factors.

But, at the hearing, Gerber and the State additionally argued that a preliminary injunction could work potential harm to the WIC program and its recipients. There have been significant investments made thus far in Gerber’s activities. Supply lines have been created, education programs have begun, and participants have obtained benefits cards to obtain WIC program formula through Gerber. To the extent preliminary injunctive relief would cause any disruption or confusion relating to such services, it weighs against the imposition of such relief.

III. *Conclusion*

Mead bears the burden of proving that it is entitled to the extraordinary remedy of a preliminary injunction. It has not established any meaningful likelihood of success on the merits or that the lack of preliminary relief will cause any irreparable harm. Although the parties have provided little evidence related to the factors addressing harm to the other parties and the public interest, what little evidence there is, weighs against injunctive relief. Further, the Court notes that, because the burden is on Mead, the inability to better evaluate these final two factors weighs against providing extraordinary relief.

ORDER

For the foregoing reasons, Mead's Motion for Preliminary Injunction is denied. The parties shall submit a proposed scheduling order within 21 days.

Dated this __ day of October 2019 at Montpelier, Vermont.

Timothy B. Tomasi,
Superior Court Judge