IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

HILL INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**CASE NO. 3:24-cv-00049**
VIRGIN ISLANDS PUBLIC FINANCE AUTHORITY, OFFICE OF DISASTER RECOVERY,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the Court is Defendant Virgin Islands Public Finance Authority, Office of Disaster Recovery's (collectively "PFA" or "Defendant") Motion to Dismiss. [ECF 56]. Plaintiff Hill International, Inc. ("Hill") opposes the motion [ECF 69], and Defendant filed a reply [ECF 72]. For the reasons set forth below, the Court recommends that the District Court grant in part and deny in part Defendant's motion.[1]

I. BACKGROUND[2]

Hill, a project and construction management firm, sued PFA after it selected another bidder for a government contract. *See* Compl. [ECF 1-2]. In March 2024, the Office of Disaster Recovery ("ODR") issued a request for proposals ("RFP") to solicit proposals for project management ("PM") and construction management ("CM") services for federally funded recovery projects. [ECF 48-2]. Section 2.0, Scope of Work, states: "This RFP will result in a minimum of two (2)

[1] The District Court referred Plaintiff's motion to the undersigned for a Report and Recommendation. [ECF 78].

[2] As the parties are well familiar with the factual and procedural background of this matter, the following summary includes only the information most pertinent to the instant motion.

contractors that will be utilized for Project Management Services or Delivery and Construction Management Services." *Id.* at 3. Section 26.0, Contract Award and Execution, states: "ODR reserves the right to enter into a contract(s) based on the initial offers received . . . [and] the right to contract for all or a partial list of services offered in the proposals." *Id.* at 23. Section 20.0, Selection Process, explains that the "evaluation process will include separate technical and price evaluations," and sets forth evaluation criteria guidelines with associated weighting. [ECF 48-3] at 67. The technical evaluation consisted of four subfactors worth a total of 80 points, while the cost evaluation portion was worth 20 points. *Id.*

Hill submitted its proposal on May 23, 2024, seeking to provide both PM and CM services for a total cost of $30,288,984.64. [ECF 1-2] ¶ 12; *see* [ECF 49-2]. The evaluation committee reviewed the proposals on June 14, 2024, and thereafter conducted interviews with the five highest scoring firms. [ECF 50-11] at 2. The committee interviewed Hill on June 21, 2024. [ECF 1-2] ¶13.

In a letter dated August 15, 2024, PFA notified Hill that CH2M Hill, Inc. ("CH2M") had been awarded the contract. [ECF 50-4]. Hill then sought a debriefing meeting to determine why Defendant rejected its proposal. *See* [ECF 1-2] at 7–8. Prior to the meeting, Defendant provided Hill with a copy of the evaluation committee's report to ODR Director Adrienne Williams-Octalien, which recommended "the Executive Director seek the Governing Board's approval to execute a contract . . . with CH2M . . . [for] $137,235,258.00." *See* [ECF 50-10]; [ECF 50-11] at 3. The attached RFP Evaluation Summary shows that out of nine responsive bids, Hill received the second highest overall score with a total of 406 points, while CH2M received 432.5 points. [ECF 50-11] at 4. According to Hill, at the August 30, 2024 debriefing meeting, ODR Director Williams-Octalien stated "CH2M's proposal represented the 'best value.'" [ECF 1-2] ¶ 23. Finding

Defendant's response unsatisfactory, Hill decided to file suit. [ECF 1-2] ¶¶ 26–27.[3, 4]

Hill contends PFA's award to CH2M instead of Hill is "arbitrary, capricious and an abuse of discretion, and contrary to both federal and Virgin Islands procurement law." [ECF 1-2] ¶ 25. Hill cites three reasons why it should have been awarded the PM/CM services contract instead of CH2M:[5] First, the price disparity between the bids is "so great as to establish on its face that the award . . . was arbitrary and capricious." [ECF 1-2] ¶ 31. Second, the Evaluation Committee's award of a single contract contravenes the RFP's requirement to award at least two contracts. *Id.* Third, "the decision to award a single contract to CH2M was tainted by [a] conflict of interest." *Id.*[6]

Count I of the complaint asserts Hill is entitled to a declaratory judgment that PFA's decision violated federal and Virgin Islands procurement law, and that "in a properly conducted procurement, [Hill] was entitled to be selected as the awardee." [ECF 1-2] at 12–13. In support, Hill cites four federal procurement regulations relating to arbitrary action and conflicts of interest, and further contends PFA acted outside its statutory authority because the Department of Property and Procurement ("P&P") is vested with procurement power for the Government of the Virgin Islands ("GVI"). *Id.* ¶¶ 38–39. Count II asserts Hill is entitled to immediate injunctive relief, and

[3] Hill, in a September 3, 2024 letter to Director Williams-Octalien, stated there was "no justifiable basis" for PFA to award a contract for a bid exceeding Hill's by at least 90 million dollars, and that such decision was "untenable" and would "not survive scrutiny by the courts." [ECF 50-12]. Hill stated its only option was "to file a bid protest challenging this award and to seek a preliminary injunction" enjoining PFA from entering a contract with CH2M or proceeding with any work under that contract. *Id.* Hill also stated it was open to further discussions with PFA to avoid litigation. *Id.* When PFA did not respond, Hill brought the instant suit. *See* [ECF 1-2] ¶ 27.

[4] Hill filed its complaint and application for injunctive relief in Virgin Islands Superior Court on September 10, 2024. *See* [ECFs 1-2 & 1-3]. PFA removed the matter to this Court on September 12, 2024. [ECF 1].

[5] Hill repeats these same allegations in its application for injunctive relief. *See* [ECF 1-3] at 3.

[6] Hill states three of the five Evaluation Committee members are employees of the Virgin Islands Department of Public Works ("DPW"), and that CH2M's parent company, Jacobs Solutions, Inc. ("Jacobs"), "has two employees who work for DPW at DPW's offices." [ECF 1-2] ¶ 24.

urges that unless such relief is granted, Hill "will be immediately and irreparably harmed by being deprived of profits and this business opportunity to which it is entitled." *Id.* at 13–14. Count III asserts a taxpayer suit under 5 V.I.C. § 80 to prevent "the wrongful disbursement of territorial funds." *Id.* at 14–15. Hill specifically contends PFA "failed to comply with the applicable procurement rules or acted *ultra vires* when it awarded the CM/PM contract to CH2M", "acted with an appearance of impropriety/conflict of interest, is attempting to waste nearly 107,000,000 dollars of money allocated for the benefit of Virgin Islanders and has failed to comply with the express terms of the RFP by only awarding a single contact …." *Id.* ⁋⁋ 50–51.

Hill's prayer for relief echoes Counts I and II of the complaint: The complaint seeks a declaratory judgment that PFA's award of the contract to CH2M and the failure to award it to Hill was unlawful, and injunctive relief in the form of 1) a temporary restraining order restraining PFA from executing a contract with CH2M, and restraining performance of any such contract; 2) a preliminary injunction preventing PFA from performance of the contract until the Court determines the merits of the claims and whether permanent injunctive relief is warranted; and 3) "[a] preliminary and permanent injunction enjoining [PFA] from entering (or permitting performance under) any contract to provide project management and construction management services with any entity other than Hill." *Id.* at 15–16.[7]

PFA moves to dismiss this matter in its entirety. [ECF 56]. PFA first argues the Court lacks subject matter jurisdiction over Counts I and II because Hill failed to exhaust its administrative remedies by filing a bid protest with ODR before filing suit. [ECF 56-1] at 18–22. PFA further argues that the Court lacks jurisdiction over Hill's claim alleging PFA lacks procurement power

[7] Hill's motion for injunctive relief largely mirrors the complaint and asserts that all four factors a court must consider prior to granting injunctive relief weigh in its favor. *See* [ECFs 1-2 & 1-3].

because Hill fails to plead an injury in fact to establish standing. *Id.* at 22–24. PFA next argues several bases for dismissal under Rule 12(b)(6) for failure to state a claim. As to Count I, PFA contends the C.F.R. provisions Hill cites do not provide a private right of action, and that Hill fails to plead any facts to support a claim that PFA exceeded its charter. *Id.* at 24–29. As to Hill's bid protest arguments, PFA contends Hill failed to timely file its bid protest in accordance with the procedures set forth in PFA's Procurement Procedures Manual. *Id.* at 30. PFA further contends Hill belatedly raises pre-award protest grounds in this post-award bid protest action. *Id.* at 31–33. As to Hill's claim that the award to CH2M was arbitrary and capricious because its bid was $107 million higher than Hill's bid, PFA contends it was not required to select the lowest-price offeror and that Hill has plead no facts showing such award was improper. *Id.* at 34–36. Finally, PFA argues Hill fails to plead a viable claim in Count III because Hill does not allege "any territorial funds *were* wrongfully disbursed," and further does not show how PFA's award for a higher-priced bid was wrongful. *Id.* at 36–37.[8]

In opposition, Hill first contends that, under the applicable case law and the Virgin Islands code, the complaint states a claim that PFA lacked authority to issue the procurement. [ECF 69] at 6–14. Hill next contends Defendant's standing argument is baseless because it has standing to challenge an adverse procurement decision both as a disappointed bidder and as a representative of the public's interests. *Id.* at 15. As to PFA's argument that Hill waived its opportunity to challenge any pre-award protest grounds, Hill argues the Virgin Islands has not and would not adopt this waiver rule. *Id.* at 15–16. Further, the waiver rule still would not bar Hill's post-award challenge to PFA's authority to conduct the procurement, nor would it bar Hill's challenge to the

[8] PFA also moved for dismissal for insufficient service of process, [ECF 56-1] at 16–18, but later withdrew this argument. *See* [ECF 72] at 7 n.2.

number of contracts issued. *Id.* at 17, 22–25. Hill next argues that the price disparity between the bids is sufficient to show that the award to CH2M was arbitrary and irrational. *Id.* at 18–21. Hill also asserts its conflict of interest allegations are alone enough to set aside the award to CH2M, and that PFA does not challenge these allegations. *Id.* at 21–22. Next, Hill contends PFA's exhaustion argument is more properly considered under Rule 12(b)(6), and further that it lacks merit because PFA's procurement regulations do not have the force of law, neither the RFP nor Virgin Islands law require a disappointed bidder to use PFA's protest procedures, and even if such procedures do apply, Hill's September 3, 2024 letter to PFA should be considered a timely filed bid protest. *Id.* at 25–34. Hill next argues the C.F.R. provisions create rights it may enforce. *Id.* at 34–35. Finally, Hill argues Count III states a claim because the complaint alleges an illegal or unauthorized act that will result in the wrongful disbursement of territorial funds. *Id.* at 35–36.

II. LEGAL STANDARDS

A. Federal Court Jurisdiction

"Federal courts are courts of limited jurisdiction . . . [and] it is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception, for . . . [w]ithout jurisdiction the court cannot proceed at all in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (internal quotations and citations omitted). Federal courts thus have an absolute duty to verify subject matter jurisdiction if it is in doubt, and must dismiss an action where jurisdiction is lacking. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 76–77 (3d Cir. 2003); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also Dep't of Educ. v. Brown*, 600 U.S. 551,

560 (2023) ("We have an obligation to assure ourselves of litigants' standing under Article III before proceeding to the merits of a case." (internal quotations and citation omitted)).

Additionally, standing is a threshold matter of jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *accord Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016), and "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 484 (3d Cir. 1998) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." (citation omitted)). The doctrine encompasses "both the case and controversy requirements of Article III of the Constitution and certain prudential requirements," *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994), "both of which must be satisfied before a litigant may seek redress in the federal courts." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006).[9]

"[T]he 'irreducible constitutional minimum' of standing consists of three elements[:] The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "These requirements 'ensure that plaintiffs have a personal stake or interest in the outcome of the proceedings, sufficient to warrant their invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on their behalf.'" *Ballentine v. United States*, 486 F.3d 806, 814 (3d Cir. 2007) (citation omitted). "Standing is not dispensed in gross. Rather, a plaintiff

[9] "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co.*, 523 U.S. at 102. Although the District Court of the Virgin Islands is an Article IV court, its exercise of the jurisdiction of a district court is subject to the limitations of Article III. *Russell v. DeJongh*, 491 F.3d 130, 133 n.3 (3d Cir. 2007).

must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Associated Builders & Contractors W. Pa. v. Cmty. Coll. of Allegheny Cnty.*, 81 F.4th 279, 287 (3d Cir. 2023) (internal quotations and citations omitted). "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Taliaferro*, 458 F.3d at 188.

"In addition to the 'immutable requirements of Article III,'" *Trump Hotels*, 140 F.3d at 485 (citation omitted), "[p]rudential considerations further limit a plaintiff's ability to establish . . . standing." *Wheeler*, 22 F.3d at 538.

> These considerations require that: (1) a litigant assert his own legal interests rather than those of third parties; (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances; and (3) a litigant demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Id. (internal quotations and citations omitted). These limits serve, in part, "to limit access to the federal courts to those litigants best suited to assert a particular claim." *Id.* (citation omitted).

B. Federal Rule of Civil Procedure 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), "a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). "A motion to dismiss for want of standing is also properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter." *Ballentine*, 486 F.3d at 810. "In evaluating whether a complaint adequately pleads the elements of standing, courts apply the standard of reviewing a complaint pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Schering Plough*, 678 F.3d at 243; *see* Section C. below.

Rule 12(b)(1) movants may assert either a facial or factual attack on the court's subject matter jurisdiction. *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016). "The former challenges subject matter jurisdiction without disputing the facts alleged in the complaint," while the latter "attacks the factual allegations underlying the complaint's assertion of jurisdiction" by presenting competing facts. *Id.* Stated another way, "a facial attack contests the sufficiency of the pleadings, whereas a factual attack concerns the actual failure of a [plaintiff's] claims to comport [factually] with the jurisdictional prerequisites." *Const. Party of Pennsylvania v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014) (alterations in original) (internal quotations and citations omitted). Though a "facial attack offers the plaintiff the safeguard of requiring the court to consider the allegations of the complaint as true, the factual attack allows the court to 'weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Doe v. Goldstein's Deli*, 82 F. App'x 773, 775 (3d Cir. 2003) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). Thus, in assessing whether it has jurisdiction in the latter case, "[t]he court may consider . . . evidence outside of the pleadings." *Id.*[10]

Finally, "[t]he plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction." *Doe*, 82 F. App'x at 775; *see Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) ("The burden to establish standing rests with the plaintiffs."); *see also Spokeo*, 578 U.S. at 338 (where a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element of Article III standing); *accord Ballentine*, 486 F.3d at 810.

[10] "A factual challenge may occur only after the allegations of the complaint have been controverted." *Abiff v. Yusuf*, 49 V.I. 947, 950 (D.V.I. 2008); *see Mortensen*, 549 F.2d at 891–92 n.17 (explaining that a Rule 12(b)(1) "factual evaluation may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed," but "cannot occur until plaintiff's allegations have been controverted"); *see also Aichele*, 757 F.3d at 358 (a facial "attack can occur before the moving party has filed an answer or otherwise contested the factual allegations of the complaint").

C. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A complaint must, under Federal Rule of Civil Procedure 8(a)(2), contain "a short and plain statement of the claim showing that the pleader is entitled to relief." However, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007).

"[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (first alteration added) (internal quotations and citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (alteration in original) (citation omitted) (Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" (citation omitted)). Further, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In other words, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim possesses such plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (internal quotations and citation omitted). Conversely, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citation omitted). Thus, to survive a motion to dismiss, a plaintiff must allege facts sufficient to

"nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

In deciding a Rule 12(b)(6) motion, the court accepts as true all well-pled allegations in the complaint and views them in the light most favorable to the plaintiff. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). However, a court need not "accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007). The court's focus is simply whether the challenged claims should be allowed to move forward, not whether the plaintiff will ultimately prevail on his claims. *See Twombly*, 550 U.S. at 563 n.8. Accordingly, a court must determine whether the complaint includes "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted).[11]

Finally, in conducting this analysis, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, undisputedly authentic documents upon which the claims are based, and items subject to judicial notice. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010); *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (the court "may consider documents that are attached to or submitted with the complaint, and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case'" (alteration in original) (citation omitted)).

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[11] In a recent opinion, the District Court observed that "the Virgin Islands Superior Court, under a standard even less demanding than the plausibility standard, determined":

> [A] complaint should provide factual allegations sufficient to advise the responding party of the transaction or occurrence on which the claim is based and identify the claim, reciting its elements, so as to enable the defendant to respond intelligently and to enable the Court to determine on a motion to dismiss . . . whether the claim is adequately pled.

Williams v. Flat Cay Mgmt., LLC, 2023 WL 2563193, at *3 n.8 (D.V.I. Mar. 17, 2023) (citation omitted).

III. DISCUSSION

Because standing is a threshold matter of jurisdiction, the Court will first address Defendant's standing argument.[12, 13] The Court will then turn to Rule 12(b)(6) to determine whether the complaint fails to state a claim upon which relief can be granted.[14]

A. Standing

"Article III gives federal courts jurisdiction only over cases and controversies, and standing is an integral component of the case or controversy requirement." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (internal quotations and citation omitted). "[T]o survive a motion to dismiss for lack of standing, a plaintiff 'must allege facts that affirmatively and plausibly suggest that it has standing to sue.' Speculative or conjectural assertions are not sufficient." *Finkelman*, 810 F.3d at 194 (citation omitted); *see Schering Plough*, 678 F.3d at 243.

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[12] Defendant's Rule 12(b)(1) motion is properly understood as a facial attack because it contends the complaint lacks sufficient factual allegations to establish standing as to Plaintiff's procurement power claim.

[13] The Court will not address exhaustion as a Rule 12(b)(1) argument because, to the extent administrative exhaustion is required here, it is a claims-processing rule and not a statutory limit on the Court's jurisdiction. *See Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 548–49 (2019) (the Supreme Court has "stressed the distinction between jurisdictional prescriptions [which "delineat[e] the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)"] and nonjurisdictional claim-processing rules, which 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times'" (citation omitted)); *Jaludi v. Citigroup & Co.*, 57 F.4th 148, 151 (3d Cir. 2023) ("Congress can limit our jurisdiction by imposing procedural requirements. But not all procedural requirements are jurisdictional. Some speak only to the parties' duties, not our power. They prescribe the route that parties must take to the courthouse doors but do not lock those doors. To be sure, violations of a nonjurisdictional procedural requirement often end in dismissal. But because they do not deprive us of jurisdiction, we can sometimes overlook or excuse them." (citations omitted)); *Holland v. Warden Canaan USP*, 998 F.3d 70, 74 (3d Cir. 2021) (the federal courts "strongly presume that rules are not jurisdictional unless Congress says so 'clearly'" (citation omitted)); *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 970 (3d Cir. 1980) ("Except when required by statute, exhaustion of administrative remedies is not an inexorable command, but is a matter of sound judicial discretion.").

[14] Hill complains that Defendant's motion to dismiss "confusingly" addresses Hill's claims as they are stated in each count. [ECF 69] at 5 n.1. But "[t]he plaintiff is 'the master of the complaint,' and therefore controls much about her suit," *Royal Canin U.S.A., Inc. v. Wullschleger*, --- S. Ct. ---, 2025 WL 96212, at *7 (Jan. 15, 2025) (citation omitted), and "courts cannot 'assume the role of advocate or rewrite pleadings to include claims that were never presented.'" *Tires v. Gov't of V.I.*, 68 V.I. 241, 251 (Super. Ct. 2018) (citation omitted); *see also Birdman*, 677 F.3d at 172–73 ("the pleading must contain something more by way of a claim for relief than . . . a statement of facts that merely creates a suspicion that the pleader might have a legally cognizable right of action" (citation omitted)). Accordingly, the Court will frame its discussion by addressing each count as set forth in the complaint.

A plaintiff must meet this burden for each element of Article III standing. *Finkelman*, 810 F.3d at 194. Here, Hill summarily rejects PFA's standing argument as baseless under Third Circuit and Virgin Islands law, but fails to point to any facts that affirmatively and plausibly show it has standing to challenge PFA's procurement power. *See* [ECF 69] at 15.[15]

To meet the first element of standing, injury in fact, Hill must show that it suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted); *see Mielo v. Steak'n Shake Operations, Inc.*, 897 F.3d 467, 479 n.11 (3d Cir. 2018) (clarifying that the phrase "invasion of a legally protected interest" is "a distinct component of the injury in fact inquiry"); *Associated Builders*, 81 F.4th at 288 ("Standing depends on an injury to a legally protected interest."). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 578 U.S. at 339 (citation omitted). To be "concrete," the "injury must be '*de facto*'; that is, it must actually exist." *Id.* at 340. To meet the second element, Hill must show that its injury is "'fairly traceable to the challenged action of the defendant,' meaning that 'there must be a causal connection between the injury and the conduct

[15] Hill spends nine pages arguing the merits of its procurement power claim before summarily dismissing PFA's standing argument in a brief paragraph that fails to even mention Article III. Moreover, Hill's reliance on *Sea-Land Service, Inc. v. Brown*, 600 F.2d 429 (3d Cir. 1979), is inapposite. *Sea-Land* was not a case about standing, but about the scope of review of, and the appropriate remedy for, a challenge to an agency's procurement decision. The *Sea-land* court cited to its earlier opinion in *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir. 1973), wherein the court "recognized that an unsuccessful bidder for a government contract had standing to challenge an adverse procurement decision, not only on the basis of his own rights but those of the public as well." *Sea-Land*, 600 F.2d at 432. But the court in *Merriam* did not, as Hill suggests, simply hold that a disappointed bidder automatically has standing to challenge an adverse procurement decision on any basis, and without meeting Article III's standing requirements. Rather, what *Merriam* actually held is that "*a bidder who has suffered sufficient injury in fact to meet the case or controversy test of Article III* may, in pursuit of a vindication of that injury, assert not only his own rights but those of the public." 476 F.2d at 1240 (emphasis added).

In the federal procurement context, bid protesters must satisfy both Article III and the "even more stringent" standing requirements of the Tucker Act, *Island Creek Assocs., LLC v. United States*, 172 Fed. Cl. 729, 738 (2024); *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1382 (Fed. Cir. 2012), under which the protester must "demonstrate[] that 'but for the error[s]' challenged in the protest it 'would have had a substantial chance of securing' the contract." *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250, 255 (2024) (citation omitted).

complained of.'" *Brown*, 600 U.S. at 561 (citation omitted). Taking the first two elements together, the question here is whether the complaint plausibly alleges that PFA's alleged *ultra vires* conducting of the procurement caused an actual, concrete, and particularized injury to a legally protected interest of Hill. The Court finds that it does not.

Hill cannot show that its claimed injury of not being awarded the contract is fairly traceable to PFA's allegedly unlawful exercise of procurement power. To the extent Hill argues that, had P&P conducted the procurement, Hill would have been awarded the contract, such injury can only be characterized as "an undistilled exercise in conjecture and speculation," *Allco Fin. Ltd. v. Klee*, 2016 WL 4414774, at *15 (D. Conn. Aug. 18, 2016), *aff'd*, 861 F.3d 82 (2d Cir. 2017), and "[t]he line of causation . . . is attenuated at best." *Brown*, 600 U.S. at 567 (citation omitted); *see Lewis v. Gov't Emps. Ins. Co.*, 98 F.4th 452, 461 (3d Cir. 2024) ("Conjecture about how a negotiation might have played out, without more, is not enough to support . . . allegations of financial injury."). This hypothetical injury assumes, without any supporting evidence, that if P&P had conducted the procurement, P&P would have overlooked CH2M's highest overall score and instead awarded Hill a contract based on its lower-priced bid. Or perhaps Hill posits that P&P would have used a different evaluation committee, resulting in an entirely different scoring of all submitted bids (which may or may not have resulted in Hill having the highest score overall or at least the best score for the price component), or that P&P would have awarded more than one contract, and would have awarded one such contract to Hill. But "[u]ncertainty and speculation cannot hold together 'the chain to connect the challenged acts to the asserted particularized injury.'" *Gerber Prods. Co. v. Perdue*, 254 F. Supp. 3d 74, 82 (D.D.C. 2017) (citation omitted). Here, "[t]hose links are rendered even more attenuated because they depend on the [hypothetical] actions of a third party." *Id.* (collecting cases). In sum, it is purely speculative whether the award to CH2M instead

of Hill—Hill's claimed injury—can be fairly traced to PFA, and not P&P, conducting the procurement.[16]

Additionally, Hill fails to sufficiently allege redressability for this claim—"a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. In fact, Hill's merits theory appears to be in tension with the possibility that a favorable decision of this Court could redress any injury caused by PFA conducting the procurement instead of P&P. Hill argues simultaneously that PFA should have treated its lower-priced bid more favorably and awarded it the contract, and that PFA lacks statutory authority to conduct the procurement and issue the award. To paraphrase the Supreme Court in *Brown*, "it would be quite odd" for Hill to complain about PFA not awarding a contract to Hill that Hill thinks it cannot lawfully award in the first place. 600 U.S. at 562. Such incongruence is underscored in Hill's prayer for relief requesting that the Court enjoin PFA from entering or permitting performance under any contract for PM/CM services with any entity other than Hill—in effect, the complaint seeks an order compelling PFA to award the contract to Hill. *See* [ECF 1–2] at 16 (prayer for relief) and ¶ 40 (asserting Hill should have been selected as the awardee).

Finally, to the extent Hill relies on territorial law to establish Article III standing, "5 V.I.C. § 80 cannot be relied upon to establish standing in this Court because '[i]n a federal trial court . . . standing to sue is determined by federal law.'" *Bryan v. Turnbull*, 291 F. Supp. 2d 386, 389 (D.V.I.

[16] Moreover, any claim that Hill was injured by PFA's alleged failure to observe P&P's conflict of interest policy is a red herring. *See* [ECF 1-2] ¶ 39 (contending PFA "failed to observe [] the cardinal rule of P&P's procurement manual that all members of an Evaluation Committee 'shall be free of conflicts of interest'"). PFA's Procurement Procedures Manual includes a section on "Ethical Conduct Standards & Conflicts of Interest for Contract Procurement Participants," [ECF 56-5] at 31, and PFA requires evaluation committee members to complete a "Declaration of No Conflict of Interest." [ECF 56-5] at 68.

2003) (citation omitted).[17] The Supreme Court has emphasized that "standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). Further, the Supreme Court in *Spokeo* held that "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize [a suit] to vindicate [it]" because "Article III standing requires a concrete injury even in the context of a statutory violation." 578 U.S. at 341; *see Allco Fin. Ltd. v. Klee*, 2016 WL 4414774, at *19 (D. Conn. Aug. 18, 2016) ("a right to sue created by Congress in a statute does not and cannot create the standing to sue required by Article III of the Constitution"), *aff'd*, 861 F.3d 82 (2d Cir. 2017). Thus, the Territory "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 578 U.S. at 339 (citation omitted). As such, 5 V.I.C. § 80 does not confer Article III standing in federal court. "At all events, irrespective of the treatment this complaint would receive in a state court, a state legislature cannot redefine a case or controversy under the federal constitution; it cannot redraw draw the

[17] As the District Court has explained,

> Under Virgin Islands law, "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." 5 V.I.C. § 80. These suits were permitted in the Territorial Court of the Virgin Islands (now the Superior Court) and were permissible in the District Court at one time as well "without the demonstration of a particularized injury."
>
> However, in 1991 the Virgin Islands legislature vested local civil actions in the Territorial Court by passage of 4 V.I.C. § 76 and divested the District Court of all local civil suits, which include suits brought under 5 V.I.C. § 80 absent independent bases for establishing Constitutional standing. 5 V.I.C. § 80 therefore cannot independently establish standing in this Court because "[i]n a federal trial court ... standing to sue is determined by federal law."

Duncan v. United States Virgin Islands, 2021 WL 3604839, at *6 (D.V.I. Aug. 13, 2021) (internal citations omitted), *vacated on other grounds and remanded sub nom.*, *Duncan v. Governor of Virgin Islands*, 48 F.4th 195 (3d Cir. 2022).

jurisdictional metes and bounds of the federal courts." *McCahill v. Borough of Fox Chapel*, 438 F.2d 213, 218 (3d Cir. 1971).

Accordingly, the District Court should dismiss Hill's procurement power claims for lack of standing. *See Duncan*, 48 F.4th at 204 ("a lack of standing necessitates dismissal of claims" (citation omitted)); *Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570, 576–77 (3d Cir. 2024) ("Failure to allege facts 'that affirmatively and plausibly suggest . . . standing to sue' will result in dismissal of the complaint." (citation omitted)); *see also Associated Builders*, 81 F.4th at 291 ("Article III standing is 'not merely a troublesome hurdle to be overcome if possible so as to reach the merits of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution . . . .'" (citation omitted)).

B. Failure to State a Claim

In evaluating whether a complaint adequately states a claim, the Court would normally first take note of the elements the plaintiff must plead for each cause of action. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (outlining a 3-step approach to determine sufficiency of a complaint under *Iqbal* and *Twombly*).[18] Here, however, Hill does not plead any specific cause of action in Counts I and II; rather, those counts seek, respectively, declaratory and injunctive relief. As to Count III, the Court will follow the Third Circuit's three-step approach to determine whether the complaint states a plausible claim for relief under the Virgin Islands taxpayer statute.

[18] First, the court must tak[e] note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Santiago, 629 F.3d at 130 (alteration in original) (internal quotations and citations omitted).

i. Count I: Declaratory Judgment

Count I is captioned "Hill is entitled to declaratory judgment," but Plaintiff cites neither a federal nor territorial statute as the basis for this claim, nor any common law cause of action. *See* [ECF 1-2] at 12. The federal Declaratory Judgment Act ("DJA") provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. The DJA thus "enlarge[s] the range of remedies available in the federal courts," *McCahill v. Borough of Fox Chapel*, 438 F.2d 213, 214 (3d Cir. 1971) (citation omitted), but the Act itself is not a cause of action. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007) (observing that while plaintiffs styled "declaratory judgment" as a cause of action, the claims asserted were actually based in state law); *see also Cutaiar v. Marshall*, 590 F.2d 523, 527 (3d Cir. 1979) ("The statute creates a remedy only; it does not create a basis of jurisdiction, and does not authorize the rendering of advisory opinions.").[19] As the Second Circuit has explained,

> [A] request for relief in the form of a declaratory judgment does not by itself establish a case or controversy involving an adjudication of rights. In fact, the statute authorizing the declaratory judgment remedy explicitly incorporates the Article III case or controversy limitation. . . . Nor does [the DJA] provide an independent cause of action. Its operation is procedural only—to provide a form of relief previously unavailable. Therefore, a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief.

In re Joint E. & S. Dist. Asbestos Litig., 14 F.3d 726, 731 (2d Cir. 1993) (internal citations omitted); *accord Cutaiar*, 590 F.2d at 527 ("the Declaratory Judgment Act requirement of an 'actual

[19] Similarly, the Virgin Islands Declaratory Judgments statute defines the scope of available declaratory relief, but does not create a cause of action. *See* 5 V.I.C. § 1261 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.").

controversy' is identical to the constitutional requirement of 'cases' and 'controversies'" (citation omitted)); *see also Countrywide Home Loans, Inc., v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 853 (9th Cir. 2011) ("[W]hile the DJA expanded the scope of the federal courts' remedial powers, it did nothing to alter the courts' jurisdiction, or the 'right of entrance to federal courts.' . . . In other words, federal courts have discretion under the DJA only as to whether to award declaratory relief pursuant to the jurisdiction that they must properly derive from the underlying controversy between the litigants." (citation omitted)).

Accordingly, because a declaratory judgment is a remedy and not a cause of action, Hill must have a cause of action to seek such a remedy. Count I appears to offer two possible bases to merit a declaratory judgment: PFA's alleged violation of certain federal procurement regulations, and an allegation that PFA lacks procurement power under its charter. [ECF 1-2] ⁋⁋ 38–39. Neither states a cause of action under Count I. As this Court observed in its December 18, 2024 Report and Recommendation analyzing subject matter jurisdiction, the C.F.R. provisions Hill cites "do not create a private right of action." [ECF 82] at 7 n.6.[20] Nor does Count I provide the legal basis grounding Hill's procurement power claim. Moreover, as discussed above, because Hill lacks standing to bring the procurement power claim, the Court cannot grant declaratory relief as to such

[20] Hill did not object to this finding, and on January 8, 2025, the District Court approved and adopted the undersigned's recommendation in full. *See* [ECF 83].

In opposition to the motion to dismiss, Hill contends the C.F.R. provisions create rights that it may enforce. [ECF 69] at 34–35. But that a regulation applies to a procurement and reflects a public policy does not mean the regulation creates a cause of action authorizing a disappointed bidder to file suit. *See Brooks v. Barrett*, 2018 WL 6004682, at *7–8 (M.D. Ala. Nov. 15, 2018) (finding 2 C.F.R. § 200.319 does not create a legal basis for a disappointed bidder to sue under § 1983 because it does not confer a federal right). Hill's reliance on *Moses v. Neighborhood Reinvestment Corporation* to argue otherwise is thus inapposite. 2024 WL 4103699, at *8 (D.D.C. Sept. 3, 2024) (court concluded availability of cause of action under the National Defense Authorization Act precluded employee from bringing common-law tort claim for wrongful discharge in violation of public policy; court noted C.F.R. provisions employee cited in support of his wrongful discharge claim, including 2 C.F.R. § 200.318(c)(1), reflect "a public policy against conflicts of interest in government contracting").

claim.

The Court should therefore dismiss Count I because a declaratory judgment is not an independent cause of action, and Count I asserts no other cause of action that would allow the Court to grant declaratory relief.[21] Additionally, dismissal of this count will not harm Plaintiff because Hill already seeks, in its prayer for relief, a declaratory judgment. *See* [ECF 1-2] at 16.

ii. Count II: Injunctive Relief

Count II is captioned "Hill is entitled to immediate injunctive relief," [ECF 1-2] at 13, but "an injunction is a remedy, not a cause of action." *Birdman v. Off. of the Governor*, 677 F.3d 167, 172 (3d Cir. 2012); *accord Alleyne v. Diageo USVI, Inc.*, 63 V.I. 384, 418 (Super. Ct. 2015). As one district court observed,

> [a] request for injunctive relief by itself does not state a cause of action . . . An injunction is a remedy, not a separate claim or cause of action. A pleading can . . . request injunctive relief in connection with a substantive claim, but a separately pled claim or cause of action for injunctive relief is inappropriate.

Slemmer v. McGlaughlin Spray Foam Insulation, Inc., 955 F. Supp. 2d 452, 465 (E.D. Pa. 2013) (alterations in original) (citation omitted). Accordingly, because Count II is not a cause of action, and considering that Hill seeks injunctive relief in its prayer for relief and application for injunctive relief and thus will not be harmed by the dismissal of this count, the Court should dismiss Count II. *See id.*; *e.g.*, *Chruby v. Kowaleski*, 534 F. App'x 156, 160 (3d Cir. 2013) ("an injunction is a remedy rather than a cause of action, so a separate claim for injunctive relief is unnecessary"); *Jones v. GEICO Choice Ins. Co.*, 617 F. Supp. 3d 275, 287 (E.D. Pa. 2022) ("the count for injunctive relief must also be dismissed because injunctive relief is a remedy, not an independent

[21] To the extent Hill argues 5 V.I.C. § 80 provides the basis for its claim of right to declaratory or injunctive relief, the Court will address such argument in its analysis of Count III below.

cause of action"), *aff'd sub nom. Berardi v. USAA Gen. Indem. Co.*, 2023 WL 4418219 (3d Cir. July 10, 2023); *Arvidson v. Buchar*, 2017 WL 3670198, at *8 (V.I. Super. Feb. 2, 2017) ("[I]njunctive relief is a remedy and not a cause of action and must be filed as a separate motion with appropriate legal analysis. . . . As a result, the Court is unable to grant relief based on a cause of action for an injunction and must dismiss Count X.").

iii. Count III: Taxpayer Suit

In Count III, Plaintiff brings a taxpayer suit under 5 V.I.C. § 80. Hill contends PFA "improperly awarded the contract to CH2M, which will result in the wrongful disbursement of Territorial funds." [ECF 1-2] ⁋ 49. Specifically, PFA (1) "failed to comply with the applicable procurement rules or acted *ultra vires* when it awarded the CM/PM contract to CH2M," (2) "acted with an appearance of impropriety/conflict of interest," (3) "is attempting to waste nearly 107,000,000 dollars of money allocated for the benefit of Virgin Islanders," and (4) "failed to comply with the express terms of the RFP by only awarding a single contract." *Id.* ⁋⁋ 50–51.

The Virgin Islands taxpayers' suits statute provides: "A taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." 5 V.I.C. § 80. Thus, to bring a claim under the statute, a plaintiff must show: (1) it is a Virgin Islands taxpayer, and (2) an act by a territorial officer or employee that is (3) either illegal or unauthorized, or (4) will result in the wrongful disbursement of territorial funds. *See Virgin Islands Taxi Ass'n v. W. Indian Co., Ltd.*, 66 V.I. 473, 484 (2017); *Smith v. Gov't of V.I.*, 329 F.2d 131, 134 (3d Cir. 1964) ("The purpose of the statute is the salutary one of enabling taxpayers to obtain the aid of the district court to restrain any illegal acts of territorial authorities or any illegal diminution of territorial funds . . . ."); *Haynes v. Ottley*, 61 V.I. 547, 567 (2014) ("any taxpayer may sue the Government or one of its officers or employees to prevent a violation

of the law"). Contrary to PFA's assertion, a plaintiff need not allege any territorial funds were actually disbursed. Rather, the statute itself authorizes injunctive relief. *See Holmes v. Gov't of V.I.*, 370 F. Supp. 715, 717 (D.V.I. 1974). Further, a claim under the statute need not be premised on an alleged wrongful disbursement; it may also be based on an illegal or unauthorized act.

As an initial matter, the complaint alleges no facts from which the Court can conclude that Plaintiff is a Virgin Islands taxpayer.[22] The complaint asserts Hill is "a corporation organized under the laws of the state of Delaware and is licensed to do business in the Virgin Islands and acts on behalf of and as a Virgin Islands taxpayers [sic]." [ECF 1-2] ¶ 2. But the complaint makes no further allegations to substantiate Hill's claim that it brings this action as a Virgin Islands taxpayer. That the territory issued Hill a general business license does not mean that Hill has paid any Virgin Islands taxes. *See* [ECF 49-4] at 1 (business license issued on May 1, 2024). As PFA points out, nowhere does the complaint allege that Hill "has paid taxes in the Virgin Islands, does business in the Virgin Islands or is even subject to taxation in the Virgin Islands." [ECF 72] at 20. Without more, Hill's conclusory allegation that it acts as a Virgin Islands taxpayer is insufficient to show that it is in fact a Virgin Islands taxpayer within the meaning of 5 V.I.C. § 80.[23]

Assuming without deciding that Hill is a Virgin Islands taxpayer, the Court nevertheless finds that Count III fails to state a claim for relief. The complaint fails to plead sufficient facts as

[22] PFA raises this issue in its reply, but not in its initial motion. *See* [ECF 72] at 20–21. PFA also challenges Hill's taxpayer status in its response to Hill's motion for injunctive relief. [ECF 24] at 22. Hill does not address the argument in its reply to that motion. *See* [ECF 47].

[23] This is a matter of statutory standing, which "'applies only to legislatively-created causes of action' and concerns 'whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action.'" *CGM, LLC*, 664 F.3d at 52 (citation omitted); *see Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 295 (3d Cir. 2007) ("Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded this injured plaintiff the right to sue the defendant to redress his injury."); *see also Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 73 (3d Cir. 2011) ("A dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim.").

to an act by Defendant that was either illegal or unauthorized, or will result in the wrongful disbursement of territorial funds.

a. Number of Contracts

Hill contends the award to CH2M was arbitrary and capricious[24] because it "contravened the provision of the RFP requiring the award of at least two contracts." [ECF 1-2] at 11; *see id.* ¶ 51 (alleging PFA "failed to comply with the express terms of the RFP by only awarding a single contract").[25] The Court is not persuaded.

Section 2.0 of the RFP, Scope of Work, states that the "RFP will result in a minimum of two (2) contractors that will be utilized for Project Management Services or Delivery and Construction Management Services." [ECF 48-2] at 3. Other provisions, however, indicate the possibility of one or multiple awards: Section 11.0, Number of Awards, states "ODR anticipates awarding multiple contracts pursuant to this RFP," *id.* at 13, while Section 20.0, Selection Process, states "ODR, at its sole discretion, will determine which Proposal best satisfies its requirements."

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[24] In bid protests brought under the federal Administrative Procedure Act or Administrative Dispute Resolution Act, "a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350 (Fed. Cir. 2004) (citation omitted); *see Myriddian, LLC v. United States*, 165 Fed. Cl. 650, 655 (2023) ("In other words, the protestor must show that . . . '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" (citation omitted)); *accord Sea-Land*, 600 F.2d at 434 (government procurement decisions should not be overturned unless "there is no rational basis for the agency's decision," and "[a] showing of clear illegality is an appropriate standard to impose on an aggrieved bidder who seeks judicial relief"); *George & Benjamin Gen. Contractors v. Gov't of V.I. Dep't of Prop. & Procurement*, 921 F. Supp. 304, 307 (D.V.I. 1996) ("reviewing courts should not disturb the decision of government procurement agencies in awarding contracts unless the court finds that decision to have been irrational or illegal"). An agency's procurement decision is "arbitrary and capricious" if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Comprehensive Health Servs., LLC v. United States, 151 Fed. Cl. 200, 205 (2020) (citation omitted).

[25] As an initial matter, Hill's assertion that the award to CH2M is "arbitrary and capricious" is a legal conclusion not entitled to the assumption of truth.

Id. at 22. Section 26.0, Contract Award and Execution, states "ODR reserves the right to enter into a contract(s) based on the initial offers received . . . [and] the right to contract for all or a partial list of services offered in the proposals." *Id.* at 23; *see id.* at 12 (Section 8.0 states "ODR may have a single or multiple Prime Contractor(s) as the result of any contract negotiation"). Additionally, in Addendum No. 3, Defendant responded to several questions from prospective bidders regarding the number of awards. In response to a question about whether there was a maximum number of awards that would be issued, Defendant answered: "ODR reserves the right to determine the number of contractor awards." [ECF 48-3] at 8. In response to the question "Is the expectation for the bid to be awarded to a single bidder or multiple bidders?", Defendant answered: "The ODR expects to award this bid to multiple bidders." *Id.* at 27.

Thus, while there is one provision affirmatively stating there will be a minimum of two contract awards, it is improper to view this term in isolation because other provisions indicate the possibility of one or multiple awards. Taken all together, the plain and reasonable interpretation of the RFP is that Defendant had discretion to issue one or more contract awards.[26] Moreover,

[26] In bid protest actions brought against federal agencies, "[t]he principles governing interpretation of Government contracts apply with equal force to the interpretation of solicitations issued by the Government for such contracts." *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1353 n.4 (Fed. Cir. 2004). The Court agrees with Plaintiff that the Virgin Islands Supreme Court would adopt this rule as the soundest rule for the Virgin Islands. *See* [ECF 69] at 31; *Clarke v. Marriott Int'l, Inc.*, 403 F. Supp. 3d 474, 484 n.4 (D.V.I. 2019) ("in the absence of Virgin Islands Supreme Court precedent on a common law rule, courts in the Virgin Islands [] conduct what has become known as a '*Banks* analysis' to determine which legal standard to adopt" by balancing "three non-dispositive factors: (1) whether any [local or federal] courts [in the Virgin Islands] have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands" (first alteration added) (citations omitted)). Thus, when interpreting the terms of a solicitation,

> We begin with the plain language of the document. The solicitation is ambiguous only if its language is susceptible to more than one reasonable interpretation. If the provisions of the solicitation are clear and unambiguous, they must be given their plain and ordinary meaning; we may not resort to extrinsic evidence to interpret them. Finally, we must consider the solicitation as a whole, interpreting it in a manner that harmonizes and gives reasonable meaning to all of its provisions.

Banknote Corp., 365 F.3d at 1353 (internal citations omitted); *accord DFS Guam L.P. v. A.B. Won Pat Int'l Airport*

considering that Hill specifically sought (and in fact still seeks) a single contract to perform both PM and CM services, any claim by Hill that Defendant was required to award at least two contracts is dubious at best. *See* [ECF 1-2] at 16 and ⁋ 12; [ECF 49-2] at 8.

The Court further finds that the complaint fails to state a plausible claim for relief based on the number of contracts because Hill waived its opportunity to bring this challenge in the instant case by failing to raise this issue pre-award.

First, the RFP by its plain terms provides that "[f]ailure to ask questions, request changes, or submit objections shall constitute the acceptance of all terms, conditions, and requirements in this RFP," and that "[t]he issuance of a written addendum by the ODR is the only official method by which interpretation, clarification or additional information can be given." [ECF 48-2] at 12–13. Thus, to the extent Hill was unclear on the number of contracts, it was required to seek clarification on this issue. There is no indication in the complaint that Hill did so.[27] Accordingly, the Court concludes from the plain terms of the RFP that Hill's failure to raise any challenge constitutes acceptance of all provisions, and, as the Court finds here, those provisions gave Defendant discretion to award one or more contracts.

Auth., Guam, 2020 Guam 20, ¶ 137 (Dec. 7, 2020); *Acad. Express, LLC v. Washington Metro. Area Transit Auth.*, 2020 WL 3288390, at *3 (D.D.C. June 18, 2020); *ESCgov, Inc. v. BMC Software, Inc.*, 2014 WL 3891660, at *6 (E.D. Va. Aug. 7, 2014), *aff'd*, 597 F. App'x 181 (4th Cir. 2015); *see Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000) ("The RFP, like any contract, must be read in light of its purpose and consistently with common sense."); *see also Phillip v. Marsh-Monsanto*, 66 V.I. 612, 624–25 (2017) ("If a contract is unambiguous, 'the meaning of [its] terms [i]s a question of law.' . . . To determine whether a contract is ambiguous, we resort to principles of contract interpretation, keeping in mind that our primary purpose is to ascertain and give effect to the parties' objective intent. Where the language of a contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of its terms." (citations omitted)).

[27] To the contrary, Hill sought in its proposal to perform both PM and CM services, and, in its prayer for relief, still seeks the award of a single contract to perform both services. Hill's contention that what it "did or did not discuss with VIPFA in pre-award conversations is something that must await factual development" is not well taken. [ECF 69] at 23. Hill cannot plausibly claim it needs discovery to reveal what conversations, if any, Hill had with Defendant regarding the number of contracts. The complaint pleads no facts as to any pre-award challenge by Hill, and, by failing to rebut Defendant's points on this issue, Hill implicitly concedes the argument and hands Defendant the last word.

Second, in the federal procurement context, "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action." *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007).[28] Thus,

[28] As the *Blue & Gold* court explained,

> "The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter." We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has "a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation" in a subsequent action against the government.

492 F.3d at 1313 (internal citations omitted).

As Plaintiff points out, the District Court conducted a *Banks* analysis and determined the doctrine of *contra proferentem* applies in the Virgin Islands. *RLF Nazareth, LLC v. York RSG (Int'l), Ltd.*, 2023 WL 6377637, at *5 n.10 (D.V.I. Sept. 30, 2023). That case involved an ambiguous time computation term in an insurance contract and thus did not consider whether the doctrine of patent ambiguity applies to a disappointed bidder's challenge to a government solicitation. The Court is aware of no Virgin Islands cases applying the doctrine of patent ambiguity to the situation at issue here.

Blue & Gold has been widely applied in bid protest actions before the Court of Federal Claims to preclude post-bid and post-award challenges to the terms of government solicitations. *See Distributed Sols., Inc. v. United States*, 104 Fed. Cl. 368, 393, n.34 (2012) (collecting cases). While Hill states it "is aware of no state court cases" applying a waiver rule, [ECF 69] at 16, the Court easily found several. *See, e.g.*, *Seattle-Tacoma Int'l Taxi Ass'n v. Port of Seattle*, 156 Wash. App. 1025, at *6 (2010) (citing *Blue & Gold* and fairness concerns, and concluding plaintiff waived its right to challenge government's authority to issue RFP by submitting a proposal); *Inmate Calling Sols., LLC v. Iowa Commc'ns Network*, 2024 WL 4615897, at *2 (Iowa Ct. App. Oct. 30, 2024) (same, concluding plaintiff "was required to bring its statutory-authority challenges at the beginning of the bidding process and before it submitted a bid"); *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 662 (Minn. 2015) (citing *C.S. McCrossan* and finding plaintiff forfeited challenge to terms of RFP by failing to submit pre-bid protest in accordance with procedures outlined in RFP); *Kohl Partners, LLC v. City of Manchester*, 2003 WL 22474626, at *7 (D.N.H. Oct. 30, 2003) ("several courts have ruled that once a person submits a proposal in response to an RFP, he or she gives up the right to protest any of the terms of the RFP" (collecting cases)); *Hi-Tech Bed Sys. Corp. v. United States Gen. Servs. Admin.*, 2012 WL 12871622, at *8 n.8 (D. Wyo. Mar. 8, 2012) (citing *Blue & Gold* and stating plaintiff "may have effectively 'waived its opportunity to protest [RFP] term'" by waiting to bring protest after government awarded bids); *see also Sea Air Shuttle Corp. v. V.I. Port Auth.*, 800 F. Supp. 293, 301 n.10 (D.V.I. 1992) (finding that where plaintiff offeror had notice of RFP prior to deadline to submit proposals, plaintiff did "not possess standing to question any defect in the issuance of the RFP" in post-award challenge to contract award).

The reasoning underlying these decisions supports a finding that the Virgin Islands Supreme Court would adopt a waiver rule. The *Blue & Gold* court viewed its adoption of the waiver rule as consistent with its statutory obligation under the Tucker Act to "give due regard to . . . the need for expeditious resolution of the [bid protest] action." 492 F.3d at 1313 (quoting 28 U.S.C. § 1491(b)(3)). While there is no equivalent statute in the Virgin Islands, the *Blue & Gold* court further pointed to the public policy concerns "underlying the patent ambiguity doctrine [as] apply[ing]

"a prospective offeror must challenge patent solicitation ambiguities in a timely manner or be barred from relying upon a preferred solicitation interpretation in a later, post-award bid protest." *Aero Spray, Inc. v. United States*, 156 Fed. Cl. 548, 575 (2021) (finding complaint should be dismissed as untimely under Rule 12(b)(6) for failing to meet *Blue & Gold* waiver rule). A defect in a solicitation is patent if it is "an obvious omission, inconsistency or discrepancy of

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with equal force in the bid protest context":

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

492 F.3d at 1314. The court thus concluded that while the Tucker Act "contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to 'give due regard to . . . the need for expeditious resolution of the action' and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule." *Id.* at 1315.

Long before *Blue & Gold*, the Arizona Court of Appeals expressed similar fairness concerns:

> Requiring protests related to errors apparent on the face of the bid to be filed *before* the bid opening protects the integrity of the bid process. Otherwise, a bidder may wait until the bids are submitted and the contract is awarded to another candidate, then protest the bid solicitation, force another round of bidding, and adjust its prices and strategies after it has had the opportunity to view its competitors' bids. Because allowing such belated protests is prejudicial to the initial winning bidder, bidders should object to mistakes or ambiguities in a bid solicitation before they bid.

Arizona's Towing Pros., Inc. v. State, 196 Ariz. 73, 76 (Ct. App. 1999). Other courts have noted "a sound policy rationale undergirds the rule requiring timely challenges to bidding procedures":

> It would be inefficient and costly to [permit a challenge to a previously known problem] after offerors and the agency had expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation. [Contractors] cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive [an] award and then, if unsuccessful, claim the solicitation was infirm.

C.S. McCrossan Const., Inc. v. Minnesota Dep't of Transp., 946 F. Supp. 2d 851, 862 n.17 (D. Minn. 2013) (alterations in original) (quoting *Allied Materials & Equip. Co. v. United States*, 81 Fed. Cl. 448, 458 (2008)); *see also DFS Guam L.P.*, 2020 Guam 20, ¶ 100 (observing that "[t]he underlying rationale of *Blue & Gold Fleet* that parties should not be able to sit on their rights . . . is expressed throughout the public bidding case law" (collecting cases)).

These public policy and fairness concerns counsel in favor of adopting a waiver rule here.

significance." *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312 (Fed. Cir. 2016) (citation omitted). Here, to the extent that the RFP did not clearly specify whether Defendant would award one or multiple contracts, the RFP was patently ambiguous. *See id.*; *Quanterion Sols., Inc. v. United States*, 152 Fed. Cl. 434, 445 (2021) ("An ambiguity in an RFP is generally patent if offerors seek clarification of the ambiguous provision prior to submitting their proposals."); [ECF 48-3] (Addendum No. 3, containing multiple questions from potential offerors as to the number of contracts PFA would award).[29] Thus, in the absence of any allegations in the complaint that Hill challenged this ambiguity pre-award, the Court finds Hill waived its ability to raise this challenge in the instant case.[30] Further, where "a Solicitation is patently ambiguous, the government remains free to select a reasonable interpretation, as it sees fit, during the evaluation and award segments of the procurement process." *Superior Waste Mgmt. LLC v. United States*, 169 Fed. Cl. 239, 288 (2024) (citation omitted). As in *Aero Spray*, PFA "effectively adopted an interpretation that [Hill] does not prefer, but it is too late to complain about that now." 156 Fed. Cl. at 576.[31]

In sum, the complaint fails to show that PFA's award of a single contract was arbitrary and capricious because 1) the RFP allowed for a single or multiple awards, 2) Hill's failure to challenge

[29] The case Hill relies on to support its contention that any ambiguity here was latent rather than patent is easily distinguished. *See States Roofing Corp. v. Winter*, 587 F.3d 1364, 1368–72 (Fed. Cir. 2009) (discussing latent versus patent ambiguity in contract under the federal Contract Disputes Act).

[30] For the same reasons, even if Hill had standing to challenge PFA's procurement power, Hill waived this claim by failing to raise it pre-award. *Navarro Rsch. & Eng'g, Inc. v. United States*, 94 Fed. Cl. 224, 234 (2010) ("A protest of the agency's authority to enter a contract must be made prior to award."); *see, e.g.*, *Seattle-Tacoma Int'l Taxi Ass'n*, 156 Wash. App. at *6; *Inmate Calling Sols.*, 2024 WL 4615897, at *2 (plaintiff did not challenge agency's statutory authority when it issued RFP; "[i]t was only once [plaintiff] failed to secure the [contract] . . . that it claimed a fundamental fault in the process"). As to Hill's contention that *Blue & Gold* does not apply to post-award challenges to statutory violations, the case Hill relies on is not on point and also is no longer good law. *See Percipient.ai, Inc. v. United States, CACI, Inc.-Fed.*, 104 F.4th 839 (Fed. Cir.), *reh'g en banc granted, opinion vacated sub nom. Percipient.ai, Inc. v. United States*, 121 F.4th 1311 (Fed. Cir. 2024).

[31] Even if the Virgin Islands would not adopt *Blue & Gold's* waiver rule, as set forth above, Hill's post-award challenge to the number of contracts is nevertheless precluded under the plain terms of the RFP.

any ambiguity constituted acceptance of all terms, and 3) Hill waived this issue by failing to raise it pre-award. Finally, for all of these reasons, and considering that Hill sought and still seeks a single contract to perform both PM and CM services, Hill cannot show PFA had no rational basis to determine that the Territory's needs are best served by awarding one contract for the scope of work.[32]

Accordingly, Count III fails to state a plausible claim for relief because the complaint fails to plead facts sufficient to support a finding that Defendant acted without a rational basis or contrary to law by issuing a single award.

b. Conflict of Interest

Hill contends PFA's decision to award a single contract to CH2M was tainted by an appearance of impropriety or a conflict of interest. [ECF 1-2] ⁋⁋ 31(c), 51. Specifically, three of the five evaluation committee members are DPW employees, and CH2M's parent company, Jacob's, "has two employees who work for DPW at DPW's offices." *Id.* ⁋ 24. According to Hill, these circumstances give rise to an impermissible conflict of interest. *Id.* The Court disagrees.

Federal procurement regulations prohibit conflicts of interest in government contracting. *See* 2 C.F.R. §§ 200.818(c)(1) ("No employee, officer, agent, or board member with a real or

[32] "A District Court's review of an agency's procurement decision is extremely limited in scope[, and b]ecause such decisions implicate an agency's expertise, we must be careful not to substitute [our] judgment for the agency's." *Alpha Painting & Constr. Co. Inc. v. Del. River Port Auth.*, 853 F.3d 671, 683 (3d Cir. 2017) (first alteration added) (internal quotations and citations omitted); *see Sea-Land*, 600 F.2d at 434 ("courts have recognized the necessity of exercising restraint in interfering with procurement decisions and of recognizing a large measure of discretion in the contracting officers"). "Thus, a district court may not overturn a procurement decision 'unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision.'" *Alpha Painting*, 853 F.3d at 683 (citation omitted); *accord Virgin Islands Taxi Ass'n*, 66 V.I. at 491 ("judicial review of [government] procurement decisions is 'extremely limited in scope,' and [] a reviewing court should not disturb the factual bases of the [agency's] decision 'unless they are arbitrary or irrational'" (citation omitted)); *Apex Constr. Co., Inc. v. V.I. Hous. Fin. Auth.*, 2014 WL 12949641, at *4 (V.I. Super. Ct. May 19, 2014) ("The Court cannot substitute its judgment for the agency's and must not disturb the agency's decision unless it was irrational."); *see also Tip Top Constr. Corp. v. Gov't of V.I.*, 60 V.I. 724, 733 (2014) (clarifying that "the arbitrary or irrational standard applies only with respect to reviewing the factual basis for the procuring agency's decision to award a contract to a particular vendor, and does not apply when determining questions of law").

apparent conflict of interest may participate in the selection, award, or administration of a contract supported by the Federal award."), 200.319(c)(5) ("Examples of situations that may restrict competition include . . . Organizational conflicts of interest"). "A conflict of interest includes when the employee, officer, agent, or board member, any member of their immediate family, their partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from an entity considered for a contract." 2 C.F.R. § 200.818(c)(1). Similarly, the Federal Acquisition Regulations provide that "[a] contracting officer is obligated to protect the integrity of the procurement system and to avoid even the appearance of an impropriety." *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 217 (2011) (citing FAR 3.101-1). Whether an appearance of impropriety exists "depend[s] upon the circumstances in each case," but "must be based on 'hard facts' and not 'suspicion and innuendo.'" *Partner 4 Recovery v. United States*, 141 Fed. Cl. 89, 131 (2018) (alteration in original) (citations omitted)).

Here, the complaint fails to plead sufficient facts to state a plausible claim that PFA acted with an appearance of impropriety or a conflict of interest. The complaint alleges only that some of the evaluation committee members work at the same place as two employees of CH2M's parent company. But there are no allegations suggesting the evaluation committee members and Jacob's employees worked together, or that they intentionally or inadvertently exchanged information that gave CH2M an unfair advantage in preparing its bid, or caused the committee to unfairly favor CH2M or disfavor Hill. There are simply no facts alleged in the complaint from which the Court could plausibly conclude that PFA's acceptance of CH2M's bid was the result of unfair competition, favoritism, or collusion. In short, the complaint fails to plead any facts to support Hill's conclusory allegation that the circumstances here constitute an impermissible conflict of

interest.

Accordingly, Count III fails to state a claim for relief because the complaint fails to plead allegations that cross the line from conceivable to plausible that PFA's decision was tainted by a conflict of interest.[33] *See Twombly*, 550 U.S. at 570.

c. Price Disparity

Hill alleges the $107 million dollar price difference between its bid and CH2M's bid is "so great as to establish on its face that the award to CH2M was arbitrary and capricious," [ECF 1-2] ¶ 31(a), and that Defendant "is attempting to waste . . . money allocated for the benefit of Virgin Islanders." *Id.* ¶ 51. These allegations fail to state a plausible claim for relief under Count III.[34]

Firstly, Hill's assertion that the award is "arbitrary and capricious" on its face is a legal conclusion not entitled to the assumption of truth.

Second, the complaint lacks specific factual allegations showing *why*, in light of the evaluation criteria here, the award is necessarily arbitrary and capricious because of the price. Hill points to no language in the RFP suggesting price is the most important factor, or that PFA was required to award the contract to the lowest priced bid—nor could it because such language does not exist. Hill contends it "has pled enough to support its claim that the $107,000,000 difference in bids renders the award to CH2M arbitrary and irrational." [ECF 69] at 21. But the only thing Hill has pled is the price difference itself. Given that this was a "best value" procurement and that

[33] While Hill has made additional statements as to the alleged conflict in its reply in support of its application for preliminary injunction, *see* [ECF 47] at 15–18, 21–22, the Court "do[es] not consider after-the-fact allegations in determining the sufficiency of [Hill's] complaint under Rule[] . . . 12(b)(6)." *Frederico v. Home Depot*, 507 F.3d 188, 201–02 (3d Cir. 2007).

[34] Hill's arguments on this point confuse the issues and miss the mark. There is no Rule 8 "notice pleading" standard that governs this Court's inquiry under Rule 12(b)(6), nor does the Court require an administrative record to determine whether the complaint pleads sufficient facts to state a plausible claim for relief based on the price disparity between the bids. *See* [ECF 69] at 18–20.

CH2M received the highest overall score, the Court cannot reasonably infer from the price difference in and of itself that PFA's award to CH2M was without a rational basis or contrary to law. Thus, on this point, the Court agrees with Defendant that the complaint "fails to allege *any* facts from which the Court could conclude [that PFA's award to CH2M] was necessarily improper simply because [CH2M's bid] was higher than Hill's." [ECF 56-1] at 34.

Further, "[i]t is well-established that contracting officers have a great deal of discretion in making contract award decisions, particularly when, as here, the contract is to be awarded to the bidder or bidders that will provide the agency with the best value." *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1355 (Fed. Cir. 2004); *ASRC Fed. Tech. Sols., LLC v. United States*, 169 Fed. Cl. 372, 390 (2024) ("In a best value procurement, agencies have even greater discretion to determine the proper award than if the contract was awarded upon the basis of cost alone."). Here, the RFP provided for award on a "best value" basis, considering technical and price evaluations separately. [ECF 48-3] at 67. The technical component was significantly more important than price, with the technical evaluation factors worth a total of 80 points, and cost effectiveness a total of 20 points. *Id.*[35] As PFA points out, while Hill scored higher on cost-effectiveness, CH2M scored highest on the non-price factors and had the highest overall score. [ECF 24] at 14; [ECF 50-11] at 4. And, CH2M's bid fell within the acceptable range.[36] That Hill disagrees with PFA's conclusion that CH2M's technical strengths warranted paying a $137 million

[35] As PFA states, "contrary to Plaintiff's allegation that accepting a technically superior but higher priced proposal necessarily rendered the award decision arbitrary and capricious, the RFP expressly allowed for selection of a technically superior proposal by weighting the technical evaluation factors four times more important than price." [ECF 56-1] at 35.

[36] The Evaluation Committee hired a consulting group "to develop an independent cost analysis" of PM/CM services for similar projects. [ECF 50-11] at 3. Based on that analysis, the committee estimated PM/CM costs for this RFP will total $152–225 million over the 3-year contract, and range from $17–74 million per year. *Id.* Thus, CH2M's contract price of $137 million, "which averages to $45.7 million per year, align[s] with the range of the independent cost estimate." *Id.*

price premium is "quite irrelevant." *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 51 (2009); *see ASRC*, 169 Fed. Cl. at 390 (plaintiff's belief that winning bidder's "Cost/Price proposal was clearly unreasonable for the work to be performed cannot be substituted for the agency's judgment").[37] Hill cannot plausibly claim that PFA was required to select its lower-priced bid when the RFP clearly explained scoring, and price was only one of several factors.

Additionally, as the District Court has recognized, "[t]he offerors of professional services possess varying degrees of skill, and therefore the lowest bidder does not necessarily represent the best value for the public." *Sea Air Shuttle*, 800 F. Supp. at 300 (citation omitted). Thus, "[c]ontracts for professional services are more appropriately entered into based on factors other than price[, because t]he scientific knowledge and professional skill of independent professionals is difficult to quantify." *Id.* (citation omitted). Determining which proposal best meets the Territory's needs "requires an agency seeking bids to exercise its judgment in a way that ordinarily it cannot do with mathematical precision." *Allied Painting, Inc. v. Delaware River Port Auth.*, 185 F. App'x 150, 151 (3d Cir. 2006). "While contracting officers may not act illegally, they are entitled to exercise discretion upon a broad range of issues confronting them, including 'considerations of price, judgment, skill, ability, capacity and integrity' in the solicitation of business with whom the government will enter into contracts." *Keene Corp. v. United States*, 584 F. Supp. 1394, 1401 (D. Del. 1984) (citation omitted).

In sum, the complaint fails to state a plausible claim for relief on this basis because Hill fails to plead any facts from which the Court can reasonably infer that the award to CH2M was

[37] "[A]gencies need only evaluate proposals in a manner that is 'reasonable and consistent with the evaluation criteria and applicable statutes and regulations,' and [] the 'merit of competing proposals is primarily a matter of agency discretion.'" *KPMG LLP v. United States*, 139 Fed. Cl. 533, 536 (2018) (citation omitted). "Although agencies may at times make bad judgments, the role of this Court is not to make or second guess the decisions of that agency. The Court's role is to ensure that the award process was in accordance with the law, and that it was not based upon irrelevant factors, illegal practices, or in bad faith." *Id.* at 537.

arbitrary and capricious or otherwise illegal or unauthorized because of price. The RFP did not require award to the lowest price bidder and expressly allowed for award to a higher priced, technically superior proposal; CH2M received the highest overall score and higher technical score; CH2M's price was within the range; and PFA provided reason for its decision in the evaluation committee's report. All of this information is contained in the complaint and attached exhibits; thus, Hill cannot show there was no rational basis for PFA's decision.

Finally, given the above bases for dismissal, the Court need not address Defendant's exhaustion and timeliness of bid protest arguments.

IV. CONCLUSION

Accordingly, for the foregoing reasons, the Court **RECOMMENDS** that PFA's motion to dismiss be granted in part and denied in part as follows:

1) **GRANT** Defendant's 12(b)(1) motion as to standing and **DISMISS** Plaintiff's procurement power claims for lack of standing;

2) **GRANT** Defendant's 12(b)(6) motion and **DISMISS** Counts I, II, and III for failure to state a claim for the reasons stated herein;

3) **DENY** without prejudice Defendant's 12(b)(1) motion as to exhaustion; and

4) Find as **MOOT** Defendant's motion to dismiss under Rule 12(b)(5) for insufficient service of process.

Any objections to this Report and Recommendation must be filed in writing within 14 days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: March 5, 2025

/s/ G. Alan Teague
G. ALAN TEAGUE
U.S. MAGISTRATE JUDGE