

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NEBRASKA FAMILIES COLLABORATIVE,
doing business as "Promiseship," a Nebraska Non-
Profit Corporation; and KATHY BIGSBY
MOORE, an individual Nebraska citizen and
taxpayer,

Plaintiffs,

v.

The NEBRASKA DEPARTMENT OF
ADMINISTRATIVE SERVICES; the
NEBRASKA DEPARTMENT OF HEALTH &
HUMAN SERVICES; JASON JACKSON, in his
official capacity as DIRECTOR, DEPARTMENT
OF ADMINISTRATIVE SERVICES; and
DANNETTE SMITH, in her official capacity as
CEO OF THE DEPARTMENT OF HEALTH &
HUMAN SERVICES; SAINT FRANCIS
MINISTRIES, INC., a Kansas Non-Profit
Corporation; SAINT FRANCIS COMMUNITY &
RESIDENTIAL SERVICES, INC., a Kansas Non-
Profit Corporation; and SAINT FRANCIS
COMMUNITY SERVICES IN NEBRASKA,
INC., a Nebraska Non-Profit Corporation,

Defendants.

Case No. CI 19-2255

ORDER

LANCASTER COUNTY
2019 OCT 15 AM 11:44
CLERK OF THE
DISTRICT COURT

This case came before the Court for hearing on September 10, 2019. Thomas J. Kenny and Edward M. Fox appeared for the Plaintiffs. Ryan S. Post and Phoebe L. Gydesen appeared for the Defendants Nebraska Department of Administrative Services, Nebraska Department of Health & Human Services, Jason Jackson, and Dannette Smith (State Defendants). Michael C. Cox and John V. Matson appeared for the Defendants Saint Francis Ministries, Inc., Saint Francis Community & Residential Services, Inc., and Saint Francis Community Services in Nebraska, Inc. (Saint Francis Defendants). The Court took two motions under advisement at the end of the hearing: (1) the State Defendants' Motion to Dismiss Amended Complaint, and (2) the Plaintiffs' Motion for Temporary Injunction. Being fully advised, the Court orders as follows.



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I. FACTUAL BACKGROUND

A. Request For Proposal No. 5995 Z1.

On January 9, 2019, the Nebraska Department of Administrative Services (DAS) posted Request For Proposal for Contractual Services No. 5995 Z1. Ex. 13 at ¶ 4. The purpose of the request for proposal (RFP) was to solicit bids for on-going management of child welfare cases and related services in Douglas and Sarpy Counties (known as the Eastern Service Area). Ex. 16, Ex. 2(b) at 791. The proposed contract term was 5 years with an option to renew for 2 additional 1-year periods. *Id.* at 748. DAS's State Purchasing Bureau had procurement responsibilities for the RFP. *Id.* at 760.

The RFP instructed bidders to conform their proposals to all instructions, conditions, and requirements in the RFP. Ex. 16, Ex. 2(b) at 760. The RFP warned that nonconforming proposals might be found non-responsive. *Id.* One requirement was that bidders abide by all state and federal statutes and regulations. *Id.* at 803. A non-exhaustive list of state statutes in the RFP included Neb. Rev. Stat. § 43-4204 (Reissue 2016), which at the time included rules about corporate structure, but not Neb. Rev. Stat. § 68-1207 (Reissue 2018), which requires a provider to have caseloads between 12 and 17. *Id.* at 804.

The instructions in the RFP also included several topics that bidders "should" address. These topics included corporate structure. Ex. 16, Ex. 2(b) at 814. The RFP warned bidders that failing to sufficiently address § 43-4204 might, "in the sole discretion" of the Nebraska Department of Health and Human Services (DHHS), cause the bid to be rejected. *Id.* The RFP also stated that bidders should discuss their personnel plan and provide certain information about subcontractors. *Id.* at 816–17.

The RFP addressed some procedural issues, too. Under “**BID CORRECTIONS**,” the RFP provided:

A bidder may correct a mistake in a bid prior to the time of opening by giving written notice to the State of intent to withdraw the bid for modification or to withdraw the bid completely. Changes in a bid after opening are acceptable only if the change is made to correct a minor error that does not affect price, quantity, quality, delivery, or contractual conditions. . . .

Ex. 16, Ex. 2(b) at 763.

Under “**AWARD**,” the RFP provided:

The State reserves the right to evaluate proposals and award subawards in a manner utilizing criteria selected at the State’s discretion and in the State’s best interest. After evaluation of the proposals, or at any point in the RFP process, the State of Nebraska may take one or more of the following actions

Ex. 16, Ex. 2(b) at 765.

These actions included: “Waive deviations or errors in the State’s RFP process and in bidder proposals that are not material, do not compromise the RFP process or a bidder’s proposal, and do not improve a bidder’s competitive position.” Ex. 16, Ex. 2(b) at 765.

Bidders also had access to the State of Nebraska Vendor Manual (Vendor Manual). In terms similar to the RFP, the Vendor Manual allowed bidders to make corrections and allowed the State to waive deviations or errors. Ex. 12, Ex. A at §§ 7.14, 9.1. Additionally, Section 8.1 of the Vendor Manual says, “Clarification to an RFP response may be sought in order to score the response.” Ex. 12, Ex. A. The purpose of a clarification under Section 8.1 is help the State evaluate a bid. *Id.* Thus, a clarification under Section 8.1 “[o]ccurs prior to intent to award.” *Id.*

B. Saint Francis and PromiseShip’s proposals.

In April 2019, DAS announced that two contractors had submitted bids: PromiseShip and Saint Francis Ministries, Inc. (Saint Francis). Ex. 13 at ¶ 5. PromiseShip was the incumbent contractor under a contract expiring on December 31, 2019. Ex. 14 at ¶ 6. Saint Francis is an organization that provides child and family services in other parts of Nebraska, as well as Kansas, Oklahoma, Arkansas, Mississippi, Texas, Honduras, and El Salvador. Ex. 15 at ¶ 5.

The technical proposal in Saint Francis’s bid was nearly 200 pages long. Ex. 16, Ex. 2(c). Saint Francis proposed to use the Intensive Family Preservation (In Home Services) and Reintegration, Foster Care, and Adoption (RCA) service models. Ex. 16, Ex. 2(c) at 941. Saint Francis’s proposal showed how the models worked in two flowcharts. Ex. 16, Ex. 2(c) at 956–57. PromiseShip, on the other hand, proposed to continue operating under its current Structured Decision Making model. Ex. 8.

Regarding the board of directors requirement in Neb. Rev. Stat. § 43-4204 (Reissue 2016), Saint Francis stated that it would form a new entity if awarded the contract. Ex. 16, Ex. 2(c) at 900. Saint Francis explained that it already had connections in Nebraska and had “identified a number of individuals who are residents of Nebraska and are affiliated with Saint Francis, the Episcopal Church, or both with sufficient experience in child welfare, health care, and nonprofit management to serve as board members of the new entity.” *Id.*

As required by the RFP, Saint Francis included three reference letters, including a letter from Phyllis Gilmore, who served as the Secretary of the Kansas Department for Children and Families from 2012 to 2018. Ex. 16, Ex. 2(c) at 940. Gilmore recommended Saint Francis to the State of Nebraska:

Saint Francis has a long history of providing high-quality case management for children and families in child welfare cases. They use a delivery system of evidence-based prevention services that has proven to strengthen families. They also work diligently to

establish reunification of a child with his family whenever possible. If that is not possible, they endeavor to provide good foster care and or adoption in a timely manner. Saint Francis is a very capable candidate for the case management services needed in your state and I highly recommend them to you.

Ex. 11, Ex. H.

Finally, Saint Francis's proposal included a staffing plan that detailed more than 30 anticipated positions. In the field for "Case Managers," the proposal stated "62 Staff" and "Target Case Load of 25." Ex. 16, Ex. 2(c) at 992.

C. Scoring of the bids.

In May 2019, DAS posted evaluation criteria for the RFP. Ex. 13 at ¶ 6. The evaluation criteria included three parts: (1) corporate overview, (2) technical approach, and (3) cost proposal. *Id.* The State also asked Saint Francis and PromiseShip to appear for oral interviews, in part because of the substantial difference in their cost proposals. Ex. 11, Ex. B at 200–201. The evaluation criteria allotted points for their performance during the oral interviews. Ex. 13 at ¶ 6. The proposals were evaluated by 9 individuals selected by DAS and DHHS. Ex. 11, Ex. B at 186; Ex. 13 at ¶ 6.

On June 3, 2019, the Department of Administrative Services posted the scores. Saint Francis received 2907.57 points and PromiseShip received 2714.00 points. Ex. 13 at ¶ 7. The breakdown of the scoring was as follows:

	Possible Points	PromiseShip	St. Francis
1.0 Corporate Overview	300	275.83	265.00
2.0 Technical Approach	1700	1483.00	1362.17
2.1 Financial Requirements	200	153.50	101.00
3.0 Cost Proposal	880	606.87	880.00
Total Points without Oral Interview	3080	2419.20	2608.17
4.0 Oral Interview	446	294.8	289.4
Total Points with Oral Interview	3526	2714.00	2907.57

Matt Wallen, the director of DHHS’s Division of Children and Family Services, stated that Saint Francis’s proposal considered the “changing child welfare landscape,” whereas PromiseShip’s proposal focused on the “way child welfare services had traditionally been provided.” Ex. 14 at ¶ 8. Wallen said that Saint Francis had better accounted for the newlyenacted Family First Prevention Services Act, which expanded federal assistance for preventative services. Ex. 11, Ex. B at 137.

On June 3, 2019, DAS posted a notice of intent to award the contract to Saint Francis. Ex. 13 at ¶ 8. The notice is dated June 4. Ex. 16, Ex. 2(a) at Depo. Ex. 21. On June 14, PromiseShip submitted a formal written protest. Ex. 13 at ¶ 9.

D. Discussions after the State announced its intent to award the contract to Saint Francis.

As noted above, Saint Francis’s personnel plan stated that employees with the title “Case Manager” would have a target caseload of 25. But § 68-1207 requires caseloads of 12 to 17. In late June 2019, the State and Saint Francis discussed Saint Francis’s proposal and the caseload requirements in § 68-1207.

On June 21, a DHHS procurement officer emailed Tom Blythe, one of Saint Francis’s executives. The procurement officer stated: “The State requires a clarifying response from St.

Francis (1) Verifying that [Saint Francis] will comply with this requirement for a caseload worker per 12 to 17 cases; and (2) Describing how it will meet this requirement without any increase in the costs included in the bid.” Ex. 11 at Ex. A.

Three days later, Blythe responded that Saint Francis used a “dyad approach” for reunification services, under which multiple employees work on the same child’s case. Ex. 11 at Ex. A. Blythe stated that Saint Francis’s model satisfied the caseload requirements in § 68-1207. Ex. 11 at Ex. A. But he also said that Saint Francis could “switch our proposed model to a case management staffing model which would provide one case manager for 12–17 cases.” *Id.* Doing so, however, would increase Saint Francis’s proposed costs by \$15 million over the life of the contract. *Id.*

The chief operating and legal officer of DHHS, Bo Botelho, replied that increasing the cost proposal would invalidate Saint Francis’s bid. Ex. 11 at Ex. A; Ex. 11, Ex. B at 63. Botelho instructed Blythe that the State “need[ed] to know how you will meet the statutory requirement under the proposed model and cost.” Ex. 11 at Ex. A.

On June 25, 2019, DHHS asked Saint Francis to further clarify its proposal in a face-to-face meeting. Ex. 11, Ex. B at 234. The meeting occurred on June 26. Ex. 11, Ex. D. The first item on the meeting’s agenda was “Clarification of Case Management Ratio.” *Id.* at 379. The agenda also included other topics not related to caseloads. *Id.*

The day after the meeting, Blythe emailed DAS’s State Purchasing Bureau the following: “Saint Francis Ministries recognizes the statutory requirement of 12-17 cases per Case Manager. Within our proposal we have identified a total of 116 Bachelor’s level staff whose primary responsibility is case management based upon the population served.” Ex. 16, Ex. 2(a) at Depo. Ex. 28; See Ex. 15 at ¶ 13. Wallen explained that Saint Francis identified employees in its

proposal other than “Case Managers” who were also “case-carrying members.” Ex. 11, Ex. B at 272–73. Wallen said that the “actual number in their proposal” had not changed. *Id.*

E. Execution of the contract.

On July 3, 2019, the State denied PromiseShip’s protest and signed a contract with Saint Francis. Ex. 13 at ¶¶ 10, 14. The contract is No. 86793 O4. Ex. 13, Ex. B. The contract’s term is July 2, 2019 to June 30, 2024. *Id.*

Also on July 3, the State and Saint Francis signed Addendum One to the contract. Ex. 13, Ex. B. Under a section for “Additional Negotiated Terms,” Addendum One provides:

Case Management Ratio

In its proposal, Subrecipient provided information on staffing levels and case management ratios.

Subrecipient recognizes the statutory requirement of 12-17 cases per Case Manager. Within its proposal it has identified a total of 116 Bachelor’s level staff whose primary responsibility is case management based upon the population served. Subrecipient’s allocation of the staff below to case management services allows for Subrecipient to meet the statute without additional cost to its proposal. Staff allocation (below) may change to meet the actual Case Management needs, thus ensuring statutory case load requirements are met.

- 62 to provide service to children in out of home placement;
- 30 to provide Case Management to youth placed in Kinship Homes; and
- 24 to serve children maintained in their own homes.

Subrecipient has thus agreed that it shall meet the requirements set forth in Neb. Rev. Stat. § 68-1207.

The State is currently transitioning services from PromiseShip to Saint Francis under a 6-month plan. Ex. 14 at ¶ 11. As part of this process, Saint Francis has hired a Regional Vice President; contacted colleges about recruitment; interviewed candidates for director, supervisor, and other positions; searched for office space; met with providers; and trained staff on policies and procedures. Ex. 15 at ¶ 8.

After the State announced its intent to award the contract to Saint Francis, PromiseShip has experienced personnel challenges. As of August 29, 2019, PromiseShip has lost 33 case

managers and 3 case management supervisors. Ex. 10 at ¶ 7. PromiseShip has been unable to fill openings. Ex. 11, Ex. K at ¶ 42. Fundraising has also been more difficult. *Id.*

II. PROCEDURAL BACKGROUND

In July 2019, PromiseShip and the Plaintiff Kathy Bigsby Moore sued the State Defendants for declaratory and injunctive relief. The Plaintiffs alleged that Moore was a taxpayer and child welfare advocate. The exhibits also show that she was a member of PromiseShip's board of directors from 2013 to 2019. Ex. 11, Ex. M at ¶ 4.

The Plaintiffs did not make the winning bidder a party in their original complaint. On August 12, 2019, the Court determined that the winning bidder was an indispensable party and granted the Plaintiffs 30 days to make the winning bidder a party.

Two days later, the Plaintiffs filed an Amended Complaint for Declaratory and Injunctive Relief. In addition to the State Defendants, the Plaintiffs now sue the Saint Francis Defendants. The Plaintiffs sue the two State officers—Defendants Jackson and Smith—in their official capacities. Am. Compl. ¶¶ 5–6.

The Plaintiffs allege that the State Defendants acted in bad faith, arbitrarily, capriciously, or contrary to state law. Am. Compl. ¶¶ 48–116. The Plaintiffs fault the State Defendants for accepting Saint Francis's proposal even though it included a caseload target of 25 for "Case Managers." They allege that the State Defendants let Saint Francis change its bid to account for the caseload requirement. They further argue that Saint Francis's proposal did not include adequate information about corporate governance, subcontractors, and transportation regulations. And they claim that Saint Francis's cost proposal was too low and that Saint Francis had performed poorly under a contract with the State of Kansas. This summary of the Plaintiffs' allegations is far from exhaustive.

The Amended Complaint includes three counts: (1) a count under the Uniform Declaratory Judgments Act; (2) a count under Neb. Rev. Stat. § 84-911 (Reissue 2014), which allows courts to declare rules or regulations invalid; and (3) a count under the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to -1622. The third count is only against the Saint Francis Defendants.

The Amended Complaint's prayer for relief includes the following requests: declare that the contract between the State and Saint Francis is void; enjoin the Defendants from terminating PromiseShip's contract; and enjoin the Defendants from transitioning services to Saint Francis.

The Plaintiffs moved for a temporary injunction on the same day that they filed the Amended Complaint. They ask the Court to temporarily enjoin the Defendants from terminating PromiseShip's contract, implementing Saint Francis's contract, transitioning services to Saint Francis, and violating Nebraska laws and regulations.

On August 19, 2019, the State Defendants moved to dismiss the Amended Complaint under Neb. Ct. R. Pldg. §§ 6-1112(b)(1) and (6).

III. EVIDENTIARY RULINGS

At the September 10, 2019 hearing, the parties offered exhibits but asked to file written objections and responses. The Court allowed them to do so. The Court now sustains the objections to Ex. 9 at ¶¶ 9, 11, 12; Ex. 10 at ¶¶ 3, 4, 16; Ex. 11, Ex. K at ¶¶ 17, 18, 20, 43; Ex. 11, Ex. L at ¶ 14; Ex. 11, Ex. M at ¶¶ 18, 20, 22, 24, 25; Ex. 14 at ¶¶ 7, 23; and Ex. 15 at ¶¶ 9, 10, 11, 12. The Court overrules the remaining objections and receives the exhibits.

Regarding Exhibit 8, the Court does not take judicial notice of the following documents: Direct Service Workers' Recommendations for Child Welfare Financing and System Reform, January 2012; Division of Children and Family Services: Child Welfare Overview; Performance

Audit Report, Foster Care and Adoption in Kansas: Reviewing Various Issues Related to the State's Foster Care and Adoption System, Part 3, A Report to the Legislative Post Audit Committee by the Legislative Division of Post Audit, State of Kansas, April 2017; Report of the Child Welfare System Task Force to the 2019 Kansas Legislature; Report of Child Welfare System Task Force to the 2018 Kansas Legislature; Kansas again keeping foster kids in offices, by John Hanna, <https://www.kansas.com/news/politics-government/article230534164.html>. The Court takes judicial notice of the remaining documents in Exhibit 8.

IV. STATE DEFENDANTS' MOTION TO DISMISS

A. Sovereign immunity.

The State Defendants argue that sovereign immunity bars some of the Plaintiffs' claims. Generally, the State of Nebraska is immune from suit under the Nebraska and federal constitutions. *Amend v. Neb. Pub. Serv. Comm'n*, 298 Neb. 617, 905 N.W.2d 551 (2018). The Legislature can waive the State's immunity, but courts only recognize a statutory waiver that is express or overwhelmingly implied by the text. *Id.*

The Legislature waived the State's immunity for lawsuits challenging the validity or a rule or regulation under Neb. Rev. Stat. § 84-911 (Reissue 2014). See *Engler v. State Accountability & Disclosure Comm'n*, 283 Neb. 985, 814 N.W.2d 387 (2012). Thus, the Plaintiffs' claims under § 84-911 are not barred by sovereign immunity.

But the Plaintiffs' claims against the Defendants DAS and DHHS under the Uniform Declaratory Judgments Act are barred. The Act does not waive the State's immunity. *Burke v. Bd. of Trustees of the Neb. State Colleges*, 302 Neb. 494, 924 N.W.2d 304 (2019). A suit against a state agency is the same as a suit against the State. See *Engler v. State Accountability & Disclosure Comm'n*, 283 Neb. 985, 814 N.W.2d 387 (2012).

The Plaintiffs' claims against the State officers in their official capacities, on the other hand, are not barred. Official capacity suits are generally a suit against the entity for which the officer works. *Sanitary & Improvement Dist. No. 1 v. Adamy*, 289 Neb. 913, 858 Neb. 913, 858 N.W.2d 168 (2015). If the plaintiff is suing for money damages, then the State is the real party in interest and is protected by sovereign immunity. *Id.* But lawsuits against officers for prospective relief are not treated as actions against the State. *Id.* The State Defendants do not argue that the Plaintiffs' claims for declaratory and injunctive relief require the expenditure of public funds. Thus, the officers—Defendants Jackson and Smith—are not immune from the Plaintiffs' claims under the Uniform Declaratory Judgments Act. See *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 810 N.W.2d 149 (2012).

B. Standing.

The State Defendants also argue that PromiseShip lacks standing. Standing is a jurisdictional requirement. *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 916 N.W.2d 698 (2018). It refers to the legal or equitable right, title, or interest in the subject matter of the controversy. *Id.* Although standing is a legal issue, evidence is sometimes necessary to determine whether a plaintiff has the required interest. See John P. Lenich, Nebraska Civil Procedure § 6:5 at 271 (2019), citing *Hagan v. Upper Republican Nat. Res. Dist.*, 261 Neb. 312, 622 N.W.2d 627 (2001), *Sanitary and Imp. Dist. No. 347 v. City of Omaha*, 8 Neb. App. 78, 589 N.W.2d 160 (1999). The party invoking a court's jurisdiction has the burden of establishing the elements of standing. *Wisner, supra*.

Common law standing usually requires a plaintiff to show an injury in fact that is actual or imminent. *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 810 N.W.2d 149 (2012). An injury in fact is an injury that is concrete in both a qualitative and temporal sense.

Frenchman-Cambridge Irrigation Dist. v. Dep't of Nat. Res., 281 Neb. 992, 801 N.W.2d 253 (2011). The injury must be distinct and palpable, not abstract, and actual or imminent, not conjectural or hypothetical. *Id.*

The Nebraska Supreme Court has recognized two exceptions to the requirement of common law standing. First, a resident taxpayer may sue to enjoin the illegal expenditure of public funds raised for governmental purposes. *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 810 N.W.2d 149 (2012). The State Defendants do not dispute that the Plaintiff Moore has standing under this rule. See *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004) (taxpayer had standing to challenge award of public contract).

Second, a taxpayer also has standing to challenge official action that involves the form of government under which the taxpayer is required to live. See *Cunningham v. Exxon*, 202 Neb. 563, 276 N.W.2d 213 (1979). Courts refer to this rule as the “exception for matters of great public concern.” E.g., *Thompson v. Heineman*, 289 Neb. 798, 826, 857 N.W.2d 731, 754 (2015). But the exception is limited to cases involving the form of government, not important policy matters generally. Compare *Thompson, supra* (taxpayers had standing because they “alleged violations of the constitutionally required distribution of political powers”), with *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564 (2009) (“harm to the natural resources and aesthetic beauty of the state” was not a matter of great public concern), and *Nebraskans Against Expanded Gambling, Inc. v. Nebraska Horsemen's Benevolent & Protective Ass'n*, 258 Neb. 690 (2000) (the “proliferation of gambling” was not a matter of great public concern).

The Plaintiff PromiseShip has neither alleged nor proved that it is a taxpayer, so neither standing exception applies here. The Court's focus, therefore, is whether PromiseShip has common law standing. The State Defendants direct the Court's attention to *Day v. Beatrice*, 169

Neb. 858, 101 N.W.2d 481 (1960). In *Day*, the unsuccessful bidder on a municipal garbage contract sued the city. The plaintiff sought to enjoin the city from performing under the contract with the winning bidder, to declare the parties' rights, and to obtain damages. Among other things, the unsuccessful bidder argued that it had made the low bid and that the city council had not validly accepted the winning bidder's proposal. The district court dismissed the claims for injunctive and declaratory relief.

The Supreme Court affirmed the dismissal of the unsuccessful bidder's claims on their merits. But the court also explained that the unsuccessful bidder was not a "proper party":

An unsuccessful bidder is not a proper party to bring an injunction suit to prevent an unlawful expenditure of funds by public officials unless he is also a taxpayer, which must be properly alleged and proved. In a suit in equity a representative cause of action cannot properly be joined with an individual cause of action. An unsuccessful bidder has no contractual right to enforce. The plaintiff by his bid proposed to contract for certain work, but his bid was not accepted. It was a proposal only that bound neither party, and as it was never consummated by a contract the city acquired no rights against the plaintiff nor he against the city. The injury, if any, resulting from the rejection of his bid fell upon the public and not upon him personally. We do not say that in a proper case a bidder may not compel the acceptance of his bid where the rejection of it appears to be wholly arbitrary or fraudulent, and against the interests of the public. But ordinarily an unsuccessful bidder for public work has acquired no legal right to protect, either in law or equity, since the letting of contracts to the lowest bidder is regarded as being for the benefit of the public and not for individual bidders.

Day, supra, 169 Neb. at 866, 101 N.W.2d at 487–88.

Here, unlike the unsuccessful bidder in *Day*, PromiseShip currently has a contract with the State and seeks to enjoin the State Defendants from terminating its contract. Further, the Amended Complaint alleges that the State Defendants rejected PromiseShip's bid arbitrarily and

in bad faith. As explained below, the Court concludes that the Plaintiffs have not shown a strong probability of success on the merits of these claims. But that does not mean that the Plaintiffs cannot ultimately prevail. At this stage, the Court will not dismiss PromiseShip from the lawsuit for lack of standing.

V. MOTION FOR TEMPORARY INJUNCTION

The Plaintiffs' Motion for Temporary Injunction is also before the Court. Under Neb. Rev. Stat. § 25-1063 (Reissue 2016), a court may issue a temporary injunction if it appears by the complaint that the plaintiff is entitled to the relief demanded and such relief includes restraining some act which, if committed during the litigation, would produce great or irreparable injury to the plaintiff. The purpose of a temporary injunction is to preserve the status quo until the court finally decides the case on its merits. *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

Generally, a plaintiff must prove four elements to obtain a temporary injunction: (1) irreparable harm, (2) probability of success on the merits, (3) balance of the hardships, and (4) the public interest, if relevant, favors issuing the injunction. John P. Lenich, Nebraska Civil Procedure § 18:2 (2019). These elements are not weighted equally in every case, and sometimes a weaker showing on one element can be overcome by strong showing on the remaining elements. *Id.* at § 18:4.

A. Irreparable harm.

An injury is irreparable if damages will not adequately compensate the injured party or cannot be measured with certainty. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004); see also Lenich, *supra*, at § 18:3. Considering the likelihood that the State Defendants will be immune from damages, the Court concludes that the harm is irreparable. Further, in the

context of a permanent injunction, the Nebraska Supreme Court has said that the injury from an illegal expenditure of public funds is inherently irreparable. See *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

B. Probability of success on the merits.

The Plaintiffs must also show a strong probability of success on the merits. *Lenich, supra*, at § 18:2. It has been said that this element is the most important one. 42 Am. Jur. 2d *Injunctions* § 18.

Agencies letting bids for service contracts must comply with Neb. Rev. Stat. § 73-504 (Reissue 2018). Section 73-504 provides:

Except as provided in section 73-507:

- (1) All state agencies shall comply with the review and competitive bidding processes provided in this section for contracts for services. Unless otherwise exempt, no state agency shall expend funds for contracts for services without complying with this section;
- (2) All proposed state agency contracts for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the division procurement manual or a process approved by the Director of Administrative Services. Bidding may be performed at the state agency level or by the division. Any state agency may request that the division conduct the competitive bidding process;
- (3) If the bidding process is at the state agency level, then state agency directors shall ensure that bid documents for each contract for services in excess of fifty thousand dollars are prereviewed by the [materiel] division [of the Department of Administrative Services] and that any changes to the proposed contract that differ from the bid documents in the proposed contract for services are reviewed by the division before signature by the parties;
- (4) . . .
- (5)

The Vendor Manual provides that contracts let for competitive bidding will be awarded to the lowest responsible bidder under Neb. Rev. Stat. § 81-161 (Reissue 2014). Section 81-161(1) states in part:

In determining the lowest responsible bidder, in addition to price, the following elements shall be given consideration:

- (a) The ability, capacity, and skill of the bidder to perform the contract required;
- (b) The character, integrity, reputation, judgment, experience, and efficiency of the bidder;
- (c) Whether the bidder can perform the contract within the time specified;
- (d) The quality of performance of previous contracts;
- (e) The previous and existing compliance by the bidder with laws relating to the contract;
- ...
- (k) Such other information as may be secured having a bearing on the decision to award the contract.

Courts strictly construe competitive bidding statutes in favor of a public letting. See, e.g., *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985). But after a project is opened for public bidding, a public body has discretion to select the contractor. See *Best v. Omaha*, 138 Neb. 325, 293 N.W. 116 (1940). The leading case on judicial review of public contracts is *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). There, two contractors submitted bids on a municipal project that were identical in every way except price. The city chose a local contractor, although it had not submitted the low bid. A taxpayer sued the city to declare the contract void and enjoin the city from performing under it.

In *Rath*, the Nebraska Supreme Court described the broad discretion enjoyed by public bodies when they let contracts:

Recognizing that public bodies exercise an official discretion when awarding bids, we have stated that courts will show deference when reviewing challenges to a public body's responsibility determinations and award decisions: Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.

Id. at 284–85, 673 N.W.2d at 887 (quotation omitted).

If two responsible contractors submit bids that are identical except for price (the situation in *Rath*), then the public body does not have discretion to choose the more expensive contractor. But if the public body has discretion, courts are “essentially limited to reviewing that decision for bad faith.” *Id.* at 285, 673 N.W.2d at 887.

With that overview, the Court turns to the merits of the Plaintiffs' claims under the Uniform Declaratory Judgments Act. The Plaintiffs' main argument is that the State Defendants had to reject Saint Francis's proposal because it stated that employees with the job title “Case Managers” would have a target case load of 25. Under Neb. Rev. Stat. § 68-1207 (Reissue 2018), caseloads in the Eastern Service Area must range between 12 and 17.

Other issues raised by the Plaintiffs include (but are by no means limited to) the following:

- Saint Francis's cost proposal was too low.
- Saint Francis was not a responsible bidder because it performed poorly under a contract in Kansas.
- Saint Francis's proposal did not adequately describe how it would comply with the requirement in Neb. Rev. Stat. § 43-4204 (Reissue 2016)—now found at Neb. Rev. Stat. § 68-1212(3) (Supp. 2019)—that a majority of the lead agency's board of directors be Nebraska residents who are not employed by the lead agency or a subcontractor.

- Saint Francis’s proposal did not adequately describe how it would use subcontractors.
- Saint Francis’s proposal did not adequately describe how it would comply with transportation rules.

The Court has considered the Plaintiffs’ other arguments and decided that they do not warrant discussion here.

The Court concludes that the Plaintiffs have not shown that they are likely to succeed on the merits. The Court first emphasizes that the State Defendants had discretion to decide whether non-responsiveness made a proposal nonconforming. The RFP provided that proposals “shall” conform to the RFP but “may” be found non-responsive if they did not conform. Ex. 16, Ex. 2(b) at 760.

Regarding caseloads, the RFP stated that bidders must agree to abide by all applicable state and federal statutes and regulations. Saint Francis agreed to do so. The RFP did not require bidders to describe how they would comply with the caseload rule in § 68-1207, but it did say that bidders “should” describe their personnel plan. Ex. 16, Ex. 2(b) at 816. Saint Francis’s proposal included a personnel plan that detailed more than 30 anticipated roles, including “Case Managers.” Ex. 16, Ex. 2(c) at 992. In the field for “Case Managers,” Saint Francis identified a “Target Case Load of 25.” Ex. 16, Ex. 2(c) at 992.

If individuals with the job title “Case Managers” would be the only individuals making assessments and providing ongoing support, then Saint Francis’s proposal might have been inconsistent with § 68-1207. But Saint Francis’s proposal did not state that only “Case Managers” would be providing such services. So a target caseload of 25 for such individuals was not necessarily inconsistent with the caseload rule in § 68-1207.

And, in fact, Saint Francis explained to the State that individuals with other job titles would also be managing cases. The State determined that these other individuals would count toward the caseload requirement in § 68-1207. The evidence suggests that the other individuals identified by Saint Francis were already listed in its proposal but had not been included in the caseload target for “Case Managers.”

The Plaintiffs argue that the discussions between Saint Francis and the State were unlawful because they occurred after DAS published the intent to award. The Plaintiffs refer to the Vendor Manual, which states that a “Clarification” occurs before intent to award. Ex. 12, Ex. A. But the Vendor Manual might be a guidance document which, although binding on the agency, does not create any legal right or duty. See Neb. Rev. Stat. § 84-901(5) (Cum. Supp. 2018); Ex. 12 at ¶ 7. Further, the fact that the Vendor Manual allows for a “clarification” before an intent to award does not mean that the State is thereafter barred from investigating whether the winning bidder can perform the contract consistent with the law.

Under the Vendor Manual, the State retained the right to waive any deviations or errors that are not material, do not invalidate the legitimacy of the proposal, and do not improve the bidder’s competitive position. Ex. 12, Ex. A. To decide whether the State can or should waive deviations or errors, it may want to ask the winning bidder to explain part of its proposal. Here, the discussions between the State Defendants and Saint Francis after the intent to award showed that individuals with job titles other than “Case Managers” would be providing child protective services for purposes of the caseload rule in § 68-1207. During these discussions, Saint Francis did not change the personnel, services, or costs in its proposal. So to the extent that the caseload target referred to in Saint Francis’s proposal was an error or deviation from the RFP, the State Defendants had discretion to waive it.

The Plaintiffs' arguments about other alleged deviations from the RFP also do not appear likely to succeed at this early stage of the litigation. Saint Francis's proposal discussed matters like subcontractors, corporate structure, and transportation. The Court probably will not say that the responses were so deficient as to compel the State to reject the proposal.

Regarding corporate structure, Neb. Rev. Stat. § 43-4204 (Reissue 2016) required a lead agency to have a "board of directors of which at least fifty-one percent of the membership is comprised of Nebraska residents who are not employed by the lead agency or by a subcontractor of the lead agency." Saint Francis's proposal stated that it would form a new entity if it won the contract and had already identified individuals "affiliated with" Saint Francis, the Episcopal Church, *or* both that could serve as board members. Ex. 16, Ex. 2(c) at 900. This response is not inconsistent with § 43-4204. Persons affiliated with the Episcopal Church are not necessarily individuals employed by Saint Francis or its subcontractors. Further, the RFP stated that bidders "should" describe their corporate structure and provide certain information about subcontractors, which suggests that a response to these questions was not mandatory. Ex. 16, Ex. 2(b) at 814, 816–17.

Finally, at this stage, it does not seem likely that the Court will substitute its opinion for that of the State Defendants concerning Saint Francis's responsibility and the reasonableness of its cost proposal. A bidder's responsibility depends on subjective factors. See *Rath, supra*. The Plaintiffs have not shown that they are likely to prove that the State Defendants' decision to award Saint Francis the contract was arbitrary or motivated by favoritism, ill will, or fraud. See *id.*

The Court also concludes that the Plaintiffs have not shown that they are likely to succeed under Neb. Rev. Stat. § 84-911 (Reissue 2014). Although the Plaintiffs do state a claim

under that section, their arguments are not compelling. Section 73-504(2) expressly allows DAS to determine how contracts for services in excess of \$50,000 will be bid. The State Defendants argue that several of the “rules or regulations” identified by the Plaintiffs are not rules or regulations at all, but rather guidance documents. See Neb. Rev. Stat. § 84-901 (Cum. Supp. 2018); Neb. Rev. Stat. § 84-901.03 (Cum. Supp. 2018). And an affidavit offered by the State Defendants states that they did not receive a request under § 84-901.03 to convert such documents into rules or regulations. Ex. 12 at ¶ 11.

C. Balance of the hardships.

The balance of the hardships also does not favor granting a temporary injunction. The State and Saint Francis have already executed a contract and Saint Francis is preparing to receive cases. Some employees have left PromiseShip and more will probably do so in the future. But Saint Francis also has made investments that would be stranded while the temporary injunction was in place. The Plaintiffs have not shown that the balance of the hardships is in their favor.

D. Public interest.


Finally, the Plaintiffs have not shown that the public interest favors a temporary injunction. PromiseShip argues that it is a better contractor than Saint Francis, but that decision was entrusted to the State’s discretion. PromiseShip also notes that a temporary injunction would delay transitioning cases to Saint Francis. PromiseShip argues that such a delay is in the public interest because transitioning cases from one caseworker to another has a negative impact on case outcomes. But PromiseShip has already lost 20% of its case managers. Transitioning these children to new caseworkers employed by PromiseShip only to transition the same children new caseworkers again if Saint Francis wins on the merits would not be in the public interest. Further, considering that PromiseShip has already lost one-fifth of its caseworkers and is struggling to fill

openings, the Court has some concerns about PromiseShip's ability to continue as the lead agency.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the State Defendants' Motion to Dismiss Amended Complaint is **SUSTAINED IN PART AND OVERRULED IN PART**. The Court dismisses the Defendants Nebraska Department of Administrative Services and Nebraska Department of Health & Human Services from Count One of the Amended Complaint. The Court otherwise overrules the State Defendants' Motion to Dismiss Amended Complaint. The Plaintiffs' Motion for Temporary Injunction is **OVERRULED**.

DATED this 10th day of October, 2019.

BY THE COURT:


Kevin R. McManaman
District Court Judge