

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

CENTER FOR APPLIED INNOVATION, LLC)

Plaintiff,)

v.)

Case No. CL 21-590-4

COMMONWEALTH OF VIRGINIA,)
STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA,)

Serve: Peter Blake, Director)
101 N. 14TH St., 10TH FL)
James Monroe Building)
Richmond, VA 23219 – 3659)

BARNES & THORNBURG, LLP)
SERVE: Corporation Service Company, Registered Agent)
100 Shockoe Slip Fl 2,)
Richmond, VA, 23219 - 4100, USA)

Defendants.)

K. CIRCUIT COURT OF THE CITY OF RICHMOND
FEB 11 2021
EDWARD F. JEWETT, CLERK
BY _____ D.C.
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**MOTION FOR DECLARATORY JUDGMENT AND
PETITION FOR TEMPORARY & PERMANENT INJUNCTION**

Plaintiff Center for Applied Innovation, LLC (“CAI” or “Plaintiff”), a Virginia limited liability company, by counsel, respectfully asks that a declaratory judgment be entered in its favor in accordance with Virginia Code § 8.01-184 and respectfully moves this Court for a temporary and permanent injunction ordering defendants Commonwealth of Virginia, State Council of Higher Education for Virginia (“SCHEV”) and Barnes & Thornburg, LLP (“B&T”) to cease immediately any and all work and efforts on SCHEV Contract Number: 245-110420 (under Request for Proposal (RFP): Number: 245-110420, Title: Marching Toward Inclusive Excellence: An Equity Audit and Investigation of Virginia Military Institute, Commodity Codes: 95231), which was unlawfully awarded in violation of the Virginia Public Procurement Act. In support of this motion/complaint, CAI respectfully represents as follows.

Facts Common to All Counts

1. Plaintiff CAI is a Virginia limited liability company which regularly conducts business in the Commonwealth of Virginia. CAI is a Virginia limited liability company, certified by both the Virginia Office of the Secretary of Veteran's Affairs and the United States Department of Veterans Affairs as a Service-Disabled Veteran-Owned Small Business (SDVOSB) that provides wide ranging services on projects, including, but not limited to interviews, surveys, investigations, analysis, data collection, and actionable recommendations for process organizational and institutional improvement. CAI maintains an Office of Human Research Protections and Food and Drug Administration federally registered Institutional Review Board (IRB) that operates in full compliance with 45 CFR 46.111(a)(7) and 21 CFR 56.111(a)(7) under Office of Management and Budget (OMB) guidelines and policies.
2. Defendant SCHEV is the department of Virginia vested with the responsibility and power relating to the procurement and project identified as Request for Proposal (RFP): Number: 245-110420, Title: Marching Toward Inclusive Excellence: An Equity Audit and Investigation of Virginia Military Institute, Commodity Codes: 95231. Defendant B&T is an Indiana Limited Liability Partnership, which qualified to do business in Virginia on November 25, 2020 (per State Corporation Commission records). Upon information and belief, B&T is a law firm engaged in the practice of law in many jurisdictions. Upon information and belief, B&T does not have a presence within the Commonwealth of Virginia, besides its registered agent which is located in the City of Richmond.

3. On or about November 5, 2020, SCHEV issued a Request for Proposal, identified as RFP Number: 245-110420, Title: Marching Toward Inclusive Excellence: An Equity Audit and Investigation of Virginia Military Institute, Commodity Codes: 95231.¹
4. The RFP was subject to the Virginia Public Procurement Act §§2.2-4300 *et seq* (the “VPPA”), which SCHEV violated in multiple material respects in its award to B&T because the award was arbitrary and capricious and not the honest exercise of discretion. Attached as Exhibit A is CAI’s Supplemental Protest of Award² documenting those violations.
5. Several entities submitted proposals, including CAI and B&T. *See* Exhibit A, Ex. 40 (**CAI Proposal**) & Ex. 1, pg. 17-103 (visible parts of **B&T Proposal** not including redacted parts).
6. The Notice of Intent to award to B&T was dated December 7, 2020 but was not provided to CAI or available for viewing on eVA until December 9, 2020.³
7. As an unsuccessful bidder on the RFP, CAI attempted, beginning immediately after the December 9 posting of the award on eVA, to secure access to the procurement records necessary to protest the intention to award (which access is statutorily mandated under § 2.2-4360 and § 2.2-4342), but SCHEV has acted to prevent, obstruct, and unreasonably restrict the required access from being provided to CAI over the ensuing 2 months. *See*

¹ A copy of the RFP can be found in Exhibit A, Ex. 45.

² The Supplemental Protest included a few typos, specifically: Page 27, the paragraph of text immediately above the Section III. d. subheading “**d.Systematic Arbitrary and Unequal treatment of offerors**”: (i) 12 lines above subheading, change “West point” to read “West Point”; (ii) 9 lines above subheading, change “commission” to read “commissioned”; and (iii) 5 lines above subheading, change “VMI” to read “CAI”.

³ *See* Exhibit A, Ex. 3.

Exhibit A, pg. 2-8 (detailing timelines and SCHEV's failure to provide appropriate access).

8. Normally under the VPPA, an unsuccessful competitive negotiation offeror/bidder such as CAI has 10 days from the Commonwealth or municipal government agency's notification of either intent to award, or notification of award, to file its protest; "...[h]owever [pursuant to Virginia Code § 2.2-4360 A.] , if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in **public records pertaining to the procurement transaction** that are subject to inspection under § 2.2-4342, then the time within which the protest shall be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 2.2-4342, or at such later time as provided in this section." The "public records pertaining to the procurement transaction" in this RFP (collectively referred as "the procurement records" throughout this Complaint and the Supplemental Protest attached as Exhibit A) are indeed subject to inspection under § 2.2-4342 D., (emphasis added in preceding sentence), which provides, in pertinent part: "D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award..." As of the date of the filing of this Complaint, SCHEV has still not provided unsuccessful bidder CAI the required access to the procurement records pursuant to the VPPA, as CAI demonstrates below in this Complaint and in pages 2-8 of its Supplemental Protest (Exhibit A to the Complaint).
9. Because of SCHEV's initial failures to provide CAI access to the procurement records, doubtless in an unlawful effort to "run out the clock" on any protest by CAI, on

December 15, 2020 CAI filed an initial protest of the Notice of Intent to Award over its lack of access to the procurement records as an unsuccessful bidder (the “Mid-December Access Protest”). *See* Exhibit A, pg. 2-8. Because no such access had been granted CAI by SCHEV, it was impossible for CAI to formulate a protest on the merits as contemplated by Virginia Code § 2.2-4360 and § 2.2-4342. SCHEV denied the Mid-December Access Protest on December 18, 2020. As of that denial, CAI had yet to have access to the procurement records, and SCHEV did nothing to remedy that lack of access, a pattern of conduct that continued into at least mid-January 2021 (as demonstrated below in this Complaint and in the Supplemental Protest that is attached as Exhibit A).

10. Despite SCHEV’s pro-forma denial of CAI’s Mid-December Access Protest, CAI continued to engage with SCHEV for an additional week in December 2020 regarding access to the procurement records for the RFP. SCHEV advised CAI that it was in discussions with the Virginia Department of Government Services (“DGS”) to provide CAI with virtual access to the procurement records in response to CAI’s President’s request based on his risk factors for COVID infection (CAI’s President even offering to sign a non-disclosure agreement). Tellingly, despite SCHEV’s repeated statements to CAI that it was working with DGS to make the records available electronically (which statements CAI now knows to be intentional misrepresentations, DGS reported in response to a FOIA request from CAI that DGS has no records of any such coordination.⁴ After misrepresenting to CAI that it had coordinated with DGS a virtual

⁴ See Exhibit C In response to CAI’s FOIA request, DGS responded that no records of any such coordination exist, despite CAI’s repeated requests for FTP or other virtual access to the procurement records and SCHEV’s repeated assurances to CAI that such coordination between DGS and SCHEV was ongoing. DGS’s FOIA response demonstrates that SCHEV never coordinated in good faith with CAI for access to the records and SCHEV did not

means of access to the procurement records for CAI, SCHEV cited the AOG's following rationale for thwarting, hindering, and unreasonably restricting CAI's statutorily guaranteed access to the procurement records, during the pandemic which SCHEV well knew impacted CAI's President who had disclosed to them his underlying conditions as a 90% service-disabled veteran: "Our Attorney General has determined because of the media situation around this procurement and other offerers activities the procurement file can only be viewed in person at this time."⁵

11. Because SCHEV and the AOG refused to provide CAI's President accommodations for his underlying conditions that his Veterans Administration physician attested might place him at an increased risk for severe illness from the virus that causes COVID-19, therefore recommending telework, CAI's President was forced to drive from his home in Yorktown to Richmond (and back) multiple times in an effort to obtain in-person access to the procurement records, as unlawfully and unreasonably mandated by SCHEV with input from the AOG, which was difficult because SCHEV staff were not being required to work in SCHEV offices during the December 2020 pandemic surge – indeed, they were working remotely due to the pandemic. Furthermore, because of SCHEV's refusal to made reasonable COVID-19 accommodations to CAI, its African-American research assistant, who is also at higher risk for COVID-19 due to his background, did not attend. For example, on December 11, 2020 CAI's President traveled to Richmond, but no SCHEV representative was available at SCHEV's offices there to meet him. On December 14, 2020, the CAI representative arrived at the SCHEV offices, as agreed, for

conduct any legitimate engagement with DGS to make those records available to CAI by secure FTP. As shown in Exhibit A and Exhibit C, SCHEV's lack of good coordination with CAI was indeed intentional and at the direction of OAG deliberately to conceal SCHEV's and OAG's shenanigans from CAI, other Offerors, the media, and especially the public

⁵ See Exhibit A, Ex 2 (Email from SCHEV's Jennifer Brooks, December 15, 2020)

CAI's third attempt to review the procurement records, with CAI following the SCHEV-published protocols to gain access by coordinating with front desk security personnel and records confirm his attempted calls to SCHEV for an escort at 7:54 am, 8:02 am and 8:34 am. CAI later confirmed that no SCHEV employees were in the building at the scheduled time and did not actually report for work that day until much later.⁶

12. Yet another example, in addition to the multiple incidents documented in pages 2-8 of the Supplemental Protest attached as Exhibit A, of SCHEV's unreasonable and illegal (under the VPPA) actions in denying, thwarting, and unreasonably restricting CAI's in-person access to the procurement records, after SCHEV's December 21, 2020 denial of CAI's requested disability and COVID-19 accommodations, is SCHEV's only grudgingly providing CAI the wholly inadequate time period of two hours to review the procurement records, but only in person at SCHEV's downtown Richmond offices on December 22, 2020, after yet another drive by CAI's President, a 90% service-disabled veteran, from Yorktown to Richmond.⁷

13. On December 23, 2020 CAI notified SCHEV of the results of its limited review of the procurement records citing the paltry amount of time (only two hours) arbitrarily allotted by SCHEV to review and transcribe significant portions of ten (10) proposals and over 1,000 pages of documents was insufficient. CAI notified SCHEV of additional concerns; its intent to continue updating its initial Mid-December Access Protest; and its intent to continue reviewing the remaining procurement records required to complete the protest by filing a Supplemental Protest. SCHEV did not respond to CAI's additional

⁶ See Exhibit A, bullet extending from bottom of its page 4 through top of its page 5, and footnote 17 to Exhibit A.

⁷ See Exhibit A, final two bullets at the bottom of its p.6

concerns.⁸ SCHEV did state that it was refusing to provide CAI any further access to the procurement records until after January 5, 2021 (because no one at SCHEV would be working from December 24, 2020 until January 3, 2021) - - CAI was directed to contact the SCHEV staff on January 5, 2021 to schedule additional access to the procurement records, an admission by SCHEV that CAI had not received adequate access to the procurement records as of its final work day of 2020: December 23.⁹

14. From SCHEV's various actions and obstructions throughout December 2020 (documented above in this Complaint and in the Supplemental Protest that is Exhibit A) CAI realized that SCHEV's unlawful scheme, in violation of the VPPA, was to deny, thwart, and unreasonably restrict any access to the procurement records by CAI (an unsuccessful bidder statutorily guaranteed access pursuant to Virginia Code § 2.2-4360 and § 2.2-4342), submitted on December 23, 2020 a pro-active Freedom of Information Act (FOIA) to SCHEV requesting the full procurement records be immediately released and provided to CAI electronically, if the contract was awarded to B&T before CAI was granted further (and actually reasonable) access to the procurement records after January 5, 2021. This was to allow SCHEV time completely to prepare the records for immediate release. SCHEV confirmed receipt of the FOIA request and acknowledged it would act on CAI's request if the contract was awarded.¹⁰
15. Contrary to its representations to CAI, SCHEV signed the contract resulting from the award to B&T as of December 30, 2020 (during the time period that SCHEV had claimed it was closed for the Holidays and none of its employees were working).

Inexplicably, SCHEV waited nine (9) days, until the late afternoon of Friday January 8,

⁸ See Exhibit A, final bullet at bottom of its page 6, and footnote 28 & Ex 24 to Exhibit A.

⁹ See Exhibit A, penultimate bullet on its page 6, and footnote 27 & Ex 23 to Exhibit A

¹⁰ See Exhibit A, first bullet at top of its page 7, and footnote 29 & Ex 25 to Exhibit A

2021, to post notice of the award on eVA¹¹ - - an action that can only be deemed to be in furtherance of its scheme to delay, thwart, and deny CAI the statutorily guaranteed access to procurement records. Consistent with that scheme, SCHEV violated the law on FOIA by not responding to CAI's December 23, 2021 FOIA request until January 13, 2021, sixteen (16) days after the statutory deadline for its FOIA response; even if SCHEV had requested the 7-day extension available under the FOIA statute (which it did not), SCHEV would have still violated the FOIA statute deadline by failing to send CAI responsive documents until January 13, 2021.

16. The January 13, 2021 response to CAI's FOIA request was not only untimely, it was incomplete – SCHEV claimed “Governor’s privilege” and/or “Governor’s working papers privilege” to redact and withhold procurement records from CAI, in violation of Virginia Code § 2.2-4364, § 2.2-4360, and § 2.2-4342. Examples of procurement records required to be in the procurement records, yet redacted or otherwise withheld from CAI by SCHEV, either through SCHEV’s limited, untimely response to CAI’s December 23, 2020 FOIA request and/or otherwise during SCHEV’s 5+ weeks since December 8, 2020 of denying, thwarting and/or unreasonably restricting CAI’s access to the procurement records, include (none of the following were in the response to the December 23, 2020 FOIA request that CAI received on January 13, 2021):

- SCHEV’s January 13, 2021 FOIA response only contains 7 of the 10 proposals/bids submitted by offerors that CAI briefly viewed in the procurement records during its limited 2-hour in-person review on December 22, 2020, although a SCHEV internal email provided with the FOIA response indicates that SCHEV received a total of twelve (12) proposals/bids – consequently, 3 and 5 proposals are missing from the

¹¹ See Exhibit A, Ex 1 and 4th bullet on its page 7, as well as footnotes 32-33 & Ex 28 to Exhibit A

records that CAI received in SCHEV's response to CAI's December 23, 2020 FOIA request.

- There are also five (5) email strings in that FOIA response that were not in the procurement records that CAI viewed on December 22, 2020; accordingly, there is a discrepancy of hundreds of pages of documents.
- All attachments mentioned in emails in the procurement records that specifically reference attachments or other procurement records (questions in negotiations, evaluation panel instructions, etc.)
- All documentation regarding the Q&A for the RFP, including, without limitation, sources of answers to questions, who answered, etc.
- Letter dated October 23, 2020 and accompanying documentation that offeror/bidder Barnes and Thornburg LLP ("B&T") sent prior to the RFP to the Governor of Virginia, Legislative Black Caucus (members of the Virginia Senate and/or House of Delegates), Virginia Lt. Governor and Attorney General, describing B&T's approach while soliciting the contract from those Virginia Government officials to whom the letter was addressed.
- October 30, 2020 Work Plan for the VMI Investigation signed by Governor Northam, at least partially released or disclosed to the Washington Post (see October 30, 2020 article) and sent by the Governor to various state agencies for use as the basis for the RFP and its specifications.
- Documentation covering evaluation panel, scoring and results to include the individual evaluator proposal scoring, notes, etc. and SCHEV's own instructions to the evaluation panel say are releasable to the public.

- Summary of evaluations worksheets and all individual evaluator scoring and notes.
- All notes and other changes that bidders/offerors made to their proposals after negotiations.
- Portions of the winning offeror/bidder B&T's proposal appear redacted from the B&T proposal that was viewed in-person in the procurement records by CAI on December 22, 2020 (partial, redacted SCHEV disclosure in 1/13/21 FOIA response).
- The email (obtained through another FOIA) of Deputy Secretary of Education Fran Bradford, one of the evaluators of the RFP proposals/bids, in which she referred to the result of the RFP award as an "investigation" (placing the word investigation in quotes) indicating that she and the Department of Education did not regard the effort as an actual legitimate investigation [if that email of Ms. Bradford is not in the procurement records for this RFP, what else is being hidden from CAI or otherwise "cleansed" from the procurement records?]
- Instructions to the evaluation panel members.
- Numerous meeting schedules, notes, agendas, and the questions (collectively "Additional Missing Documents") created in connection with contacts and other communications with the four (4) selected vendors in round 2, and then the two (2) final vendors in round 3, which Additional Missing Documents are mentioned in emails released in SCHEV's 1/13/21 response to CAI's 12/23/20 FOIA request but not provided in that 1/13 response.
- Bid tabulations and related documents.
- All Post-Award correspondence.

- Protests by CAI, another offeror/bidder Special Investigations, and by any other offeror/bidder with the results/responses to such Protests.
- Identity of offerors/bidders submitting proposals in the competitive negotiation process (only partially disclosed in SCHEV's 1/13/21 response to CAI's 12/23/20 FOIA request).
- Required DGS waiver (with justification) pre-proposal conference that is mandatory under the VPPA. See November 2, 2020 email.
- RFP posting/advertising requirements and other justifications to waive or avoid VPPA requirements.
- Documents named or referenced as attachments in the emails released in the January 13 response to the December 22 FOIA that are records related to the procurement.
- All documentation regarding negotiations with offerors/bidders.
- Copy of the original, unredacted proposal by successful offeror/bidder B&T.
- Licenses, references and all other documentation required of the offerors/bidders, as well as results of all reference checks on the offerors/bidders.
- Awardee Insurance.

17. As further detailed in Exhibit A, CAI's January 23, 2021 Supplemental Protest of the award, filed ten (10) days after its January 13, 2021 receipt of the partial procurement records (with many missing documents, including, without limitation, those identified in the 24 bullets in the preceding paragraph of this Complaint), is timely pursuant to § 2.2-4360 since it was filed within ten (10) days of CAI's receipt/access to some procurement records, even though CAI has still not received full access to all of those procurement records (and many records remain missing) as of the filing of this Complaint, all as

documented in the 24 bullets within the preceding paragraph of this Complaint. *See also* Exhibit A, pg. 2-8 (detailing CAI's timelines despite SCHEV's schemes and multiple failures to provide, and various attempts to thwart and unreasonably restrict, appropriate access by unsuccessful bidder CAI in violation of the VPPA).

18. On February 5, 2021, SCHEV responded to the Supplemental Protest that CAI filed on January 23, 2021, stating that Supplemental Protest will not be considered on grounds that it is untimely. *See* Exhibit B (SCHEV letter dated 2/5/2021). SCHEV's February 5 refusal to address the valid and timely protest is a blanket and improper denial of CAI's January 23 Supplemental Protest, the only protest on the merits which CAI was able to prepare because of SCHEV's pervasive and ongoing unlawful actions in preventing, obstructing, and unreasonably restricting CAI's statutorily protected access to the procurement records. Strangely, SCHEV states that it is modifying ("updating") the contract with B&T, based on CAI's Supplemental Protest, received which means that SCHEV has effectively acknowledged (and admitted) the merits of the claims presented in the Supplemental Protest.

19. SCHEV's reliance on the "Governor's privilege" and/or "Governor's working papers privilege" it claimed in its January 13, 2021 response to CAI's December 23, 2020 FOIA request, in SCHEV's redacting and/or withholding procurement records from CAI, in violation of Virginia Code § 2.2-4364, § 2.2-4360, and § 2.2-4342, is sorely misplaced for various reasons, among them waiver of the Governor-related privileges claimed, and the overriding policy of the VPAA for government agencies to produce to an unsuccessful offeror/bidder all the procurement records for the RFP in question without any withholding or redaction that might be allowable under FOIA. Although

SCHEV did not begin drafting the RFP until October 30, 2020, after publication of the Governor’s Work Plan, and the RFP itself was not published until November 5, 2020, the October 30, 2020 Washington Post article: *Two VMI board members quit before vote to remove Stonewall Jackson statue* by reporter Ian Shapira.¹² contains exact RFP specifications that could not have reasonably been obtained without access to the Work Plan itself or its details provided directly by the Governor or his Office to the Washington Post reporter-

- Mr. Shapira’s October 30 article states: “*Meanwhile, Northam wrote a letter Thursday [October 29, 2020] to various state officials outlining the process for the VMI inquiry.*” This was the day before Frances Bradford’s email and before SCHEV was tasked to produce the RFP.
- The article continues: “*In the next two to three weeks, he [Northam] said the state will hire a third party to conduct the investigation.*” This corresponds to the urgency and timeline we that demonstrates shows SCHEV intentionally shortened the normal acquisition cycle for procurements of this complexity to meet the Governor’s directions and, in so doing, limit competition.
- Mr. Shapira’s article also states: “*He [Northam] said he hopes the team will use interviews, focus groups and anonymous surveys and that it will review documents and other relevant school policies.*” [Emphasis Added] – This is the exact wording later published in the RFP at RFP III, A.
- The October 30 article continues: “*He [Northam] also said the team will identify any civil rights violations or immediate or past threats of racial violence.*” – This is the exact wording later published in the RFP at RFP II, A “*Objective 1: The Special Investigation Team conducts an organizational investigation to identify any civil rights violations or immediate threats of racial violence...*” [Emphasis Added].
- Mr. Shapira’s article concludes: “*Northam set December as the deadline for a preliminary report and June 2021 as the date for final findings and recommendations. The June 2021 report was never mentioned in any document until the RFP Was published per RFP V, C: “*June 1, 2021 – Deadline for Special Investigation Team’s final report with its findings and recommendations. The**

¹² See Exhibit D to this Complaint.

¹³ See Exhibit A, Ex 35.

Special Investigator Team is encouraged to provide the final report by or before this date.”

20. Although the above-italicized (supposedly) confidential information and, more likely than not, the entire Governor’s October 30, 2020 Work Plan itself, were provided selectively to the Washington Post, SCHEV refused to provide it to CAI and any other offerors/bidders who requested it in the RFP’s pre-proposal Questions and Answers stating: “*SCHEV is unaware of any legal requirement to disclose this information nor is it material to the RFP.*”¹³ SCHEV later refused to provide the Governor’s Work Plan and other information in response to CAI’s FOIA citing that: “*...certain documents were not provided pursuant to § 2.2-3705.7 of the Code of Virginia, specifically the Governor’s working papers exclusion, which also covers certain officials within the Governor’s Office and the documents were prepared for the Office’s deliberative use.*”
21. Other FOIA requests to the Governor’s office and other State agencies for his October 30, 2020 Work Plan have resulted in completely redacted copies of the October 30, 2020 Work Plan being provided to CAI. These actions by SCHEV and the Governor (or his staff) in making certain supposedly confidential disclosures of Work Plan details to media while concealing the Work Plan from CAI and the other legitimate offerors/bidders (and the media writ large) is further evidence of the Governor’s office’s/administration’s and its agency SCHEV’s arbitrary, capricious and unlawful actions regarding this procurement. Moreover, the statements made by the Governor (or

¹³ See Exhibit A, Ex 35.

¹⁴ CAI serves discovery along with this civil action seeking the long-concealed, and mostly withheld (without justification under the VPPA) procurement records for this RFP. However, SCHEV has thus far demonstrated it is fully committed to avoid providing the access CAI is entitled under the VPPA, pursuant to SCHEV’s extensive hide-the-ball scheme as documented throughout this Complaint and its Exhibits.

his staff) in the interview with the Washington Post, as evidenced by the content of October 30 article, waive and extinguish any claim of Governor's privilege or of Governor's working papers exclusion/exemption.

22. In reviewing the entirety of this Complaint and the Supplemental Protest (and its exhibits) attached as Exhibit A, it is abundantly clear that SCHEV, aided by the AOG, Governor's office, and other Virginia Government officials and agencies, employed tricks, artifices, outright misrepresentations, and intentional omissions to engage in an unlawful scheme to fraudulently conceal =from CAI, material portions of the procurement record for the RFP, all in violation of the VPPA, Virginia Code § 2.2-4360 and § 2.2-4360. Those tricks, artifices, outright misrepresentations, and intentional omissions are documented, among other places, in the 24 bullets/items at the end of paragraph 16 of this Complaint and in the Section entitled "Timing of Protest" from the top of page 2 to the top of page-8 of the attached Supplemental Protest (Exhibit A to this Complaint), those 5-6 pages containing 28 separate bullets/items with 34 supporting footnotes (footnotes 2-35) citing and relying on various exhibits to Exhibit A (CAI's Supplemental Protest). Under the VPAA, Virginia Code § 2.2-4376 (Misrepresentations prohibited): "No public employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious or fraudulent statements or representations; or make or use any false writing or document knowing it to contain any false, fictitious or fraudulent statement or entry." Moreover, under Virginia Code § 2.2-4377, the VPAA provision immediately following § 2.2-4376, any person convicted of a willful violation of the VPPA shall be "shall be guilty of a Class 1 misdemeanor. Upon conviction, any public

employee, in addition to any other fine or penalty provided by law, shall forfeit his employment."

23. This legal action is brought pursuant to Virginia Code § 2.2-4364 (c) on grounds that the denial of the protest (*See Exhibits A & B*) was improper and the award to B&T not an honest exercise of discretion, but rather was arbitrary and capricious, and furthermore was not in accordance with the Constitution of Virginia, applicable state law (including, without limitation, the VPPA) or regulation, and/or the terms or conditions of the Request for Proposal.
24. As detailed in CAI's 32-page Supplemental Protest, which included 125 footnotes and additional 632 pages of exhibits, there is overwhelming evidence and multiple reasons why the award to B&T was arbitrary and capricious in violation of the Virginia Public Procurement Act. *See Exhibit A, Sections II, III and IV (pg. 8-31)*. The challenges detailed are also based upon the extremely limited access SCHEV has provided, as the required access has been and continues to be unlawfully denied by SCHEV. *See Exhibit A, pg. 1-8*.
25. The following is a brief summary of the bases for relief sought in this court, which are more extensively detailed in Exhibit A, which is incorporated herein by express reference:
 - a. SCHEV, aided by the AOG and Governor's office, unlawfully withheld in large part from the unsuccessful bidder CAI, and unreasonably restricted its access the procurement records for this RFP in violation of the VPAA; moreover many of the procurement records were fraudulently concealed from CAI over a period of 5-6 weeks between December 8, 2020 – January 13, 2021.

- b. The request for proposal was unlawfully designed to with the goal and aim of awarding to a specific contractor. *See Exhibit A, pgs. 8-12.*
 - i. SCHEV's failure to investigate and/or respond to these serious issues is highly disconcerting.
- c. B&T's bid failed to adhere to the explicit requirements of the RFP, and its bid should have been rejected at the earliest stage of RFP bid evaluation. *See Exhibit A, pgs. 12-17.*
 - i. B&T clearly did not comply with the RFP's all-inclusive Pricing Requirement. *See Exhibit A, pgs. 12-14.*
 - ii. SCHEV's arbitrary and capricious price scoring of B&T's Price Proposals under the RFP explicit requirements (as compared to CAI's and the other offerors' pricing) in obvious favor of an award to its pre-selected winner B&T was arbitrary, capricious and demonstrated bias in favor of one of the RFP offerors over the others. The documented "ends" of SCHEV, as demonstrated in many of the numerous Exhibits attached to CAI's Supplemental Protest , appear to "justify" its use of any means available to anoint its pre-selected awardee B&T. This whole process, especially as it pertains to SCHEV's scoring of pricing (and its failure to eliminate B&T as a non-responsive bidder in the earliest stages of the evaluation) was blatantly unlawful and in violation of the letter and spirit of the VPPA, which can only be remedied by the vacating or withdrawal of the award to B&T. B&T was not authorized to do business in Virginia on November 20, 2020 when it submitted its bid, and it made incorrect

and material representations on the status of its application to the SCC for certificate of authority in its proposal for the award. *See Exhibit A, pgs. 14-17.*

- d. Improper and arbitrary award of bonus points to B&T in scoring. *See Exhibit A, pgs. 17-24.*
 - i. Improper “Bonus” Points Beyond Those Permitted under Scoring Scale
See Exhibit A, pgs. 17-18.
 - ii. Improper & Arbitrary Awarding of Points and Credit to B&T for issues beyond the scope of the RFP & failures to deduct Points for inadequacies.
See Exhibit A, pgs. 18-24.
 - 1. Compare Unfair Treatment and Consideration of other Bidders (Not B&T). *See Exhibit A, pg. 24.*
 - iii. Improper Points for Pricing. *See Exhibit A, pg. 24.*
- e. Arbitrary Application of RFP Requirements and Scoring. *See Exhibit A, pgs. 24-27.*
- f. Systematic Arbitrary and Unequal treatment of other offerors/bidders, including CAI. *See Exhibit A, pgs. 27-28.*
- g. Block voting by members of the RFP’s evaluation panel is improper and results in an arbitrary and capricious award. *See Exhibit A, pgs. 28-29.*
- h. Additional General Arbitrary Treatment Benefiting B&T. *See Exhibit A, pgs. 29-30.*

i. Protest on grounds that the contract awarded to B&T differs so greatly from that envisioned in the RFP so as to constitute a different RFP. *See Exhibit A*, pgs. 30-31.

i. It is interesting to note that SCHEV claims it will now be changing the contract in response to CAI's Supplemental Protest, an admission of the merit of CAI's Supplemental Protest on this point. *See Exhibit B*.

26. The overwhelming evidence detailed in paragraph 13 (and Exhibit A) detail the multiple reasons why the award of contract to B&T must be vacated, voided, and enjoined. SCHEV has not denied the merits of any of the claims presented. CAI expects to uncover additional evidence supporting the unlawful nature of the award to B&T, once it is granted the access to procurement records guaranteed under the Virginia Public Procurement Act (Virginia Code § 2.2-4360 and § 2.2-4342).

Count I: Declaratory Judgment

27. Paragraphs 1-26 are incorporated herein by reference and realleged.

28. As detailed above, SCHEV violated the Virginia Public Procurement Act as the award of contract to B&T was arbitrary and capricious, and not an honest exercise of discretion.

29. CAI requests that this Court find that: (1) SCHEV violated the Virginia Public Procurement Act, (2) that the award to B&T under the RFP was arbitrary and capricious, in violation of Virginia law, and therefore void.

30. CAI requests a Judgment Order granting the following relief: (1) declaring the contract between SCHEV and B&T to be void, and (2) ordering that SCHEV provide forthwith to CAI full and unredacted access to the procurement file as required by the Virginia

Public Procurement Act, with CAI having ten (10) days after such full and unredacted access to amend this Complaint.

Count II: Temporary and Permanent Injunction

31. Paragraphs 1-30 are incorporated herein by reference and realleged.
32. The Court should grant the requested temporary injunction (to be confirmed in permanent injunction) because: (1) CAI is likely to succeed on the merits, (2) CAI, and the citizens of the Commonwealth of Virginia, are likely to suffer irreparable harm in the absence of the relief sought, (3) the equities favor CAI and the granting of this injunction, and (4) it is in the public interest to ensure government projects are awarded in a fair and impartial manner in conformity with the Virginia Public Procurement Act. *See* Virginia Code § 2.2-4300(c) (The central goal of the act being “...that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety...”)
33. CAI is likely to succeed on his claim that SCHEV violated the Virginia Public Procurement Act and that the award to B&T was unlawful as it was arbitrary and capricious. *See* Exhibit A.
34. The evidence to be presented before this Court will clearly demonstrate SCHEV blatantly violated the Virginia Public Procurement Act in multiple material respects and awarded the contract to B&T, and without an injunction, B&T will actually begin the work on this stalled procurement (noting that on February 4, 2021, it submitted an interim report to SCHEV stating that, among other things, the substantive work under the award had not yet commenced) and/or B&T will continue to perform services under a contract that was unlawfully awarded.

35. Without an injunction, CAI and all citizens of the Commonwealth of Virginia will suffer irreparable harm. As a bidder, CAI was entitled to fair and unbiased process for awarding a contract on the RFP. All citizens of the Commonwealth are entitled to rest assured that government funding is provided in a fair, lawful manner, free of corruption and impropriety. Without the injunction sought, B&T has or will immediately begin to perform the substantive work it was not entitled to be awarded. CAI and all citizens will be irreparably harmed by permitting a contract that was illegally awarded to be performed (to be paid for with Virginia tax payer dollars). Additionally, CAI will have been deprived of a fair and appropriate opportunity to bid for the work in question.
36. B&T may attempt argue that any such harm could be remedied by a damages award, however, that is not possible under the Virginia Public Procurement Act. SCHEV and B&T should not benefit from SCHEV's extensive unlawful conduct in connection with this RFP and award, by being permitted to continue with the unlawful contract.
37. The equities balance in favor of granting the injunction. SCHEV has engaged in multiple instances of unlawful conduct, as set out above, harming CAI, the public (all citizens of Virginia) and very process created to protect the public from corruption. No party would be harmed by the issuance of the requested injunction, as it will permit the Virginia Pubic Procurement Act to be complied with. B&T cannot claim to be harmed by having Virginia law followed, as it cannot expect to benefit from SCHEV's unlawful conduct.
38. The public interest weighs in favor of enforcing and requiring that the Virginia Public Procurement Act be followed in order to ensure that government contracts are awarded in an open equitable process which is free of corruption and the appearance of impropriety. As detailed herein (*See* paragraph 20 & Exhibit A), there is a multitude of

issues which raise serious concerns regarding the integrity of the process followed on this RFP. An injunction will protect CAI from having its rights (including, without limitation, the right to a procurement process free of corruption and impropriety) violated and will ensure the public process for bids is followed and result in awards according to the laws of the Commonwealth.

WHEREFORE, Plaintiff Center for Applied Innovation, LLC respectfully requests that this Court issue a temporary and permanent injunction, to remain in effect until the conclusion of the trial in this matter, or until such other time as the Court may deem prudent, enjoining and restraining Commonwealth of Virginia, State Council of Higher Education for Virginia and Barnes & Thornburg, LLP from performing any further services pursuant to the contract awarded under Request for Proposal (RFP): Number: 245-110420, Title: Marching Toward Inclusive Excellence: An Equity Audit and Investigation of Virginia Military Institute, Commodity Codes: 95231. Plaintiff further requests that judgment be entered as follows:

(1) declaring that the Commonwealth of Virginia, State Council of Higher Education for Virginia violated the Virginia Public Procurement Act in arbitrarily and capriciously awarding the contract to Barnes & Thornburg, LLP,

(2) Finding and declaring that the contract between Commonwealth of Virginia, State Council of Higher Education for Virginia and Barnes & Thornburg, LLP is void,

(3) ordering that Commonwealth of Virginia, State Council of Higher Education for Virginia provide forthwith to the Plaintiff Center for Applied Innovation, LLC with

full and unredacted access the procurement records for this project,¹⁴ with CAI having ten (10) days after such full and unredacted access to amend this Complaint.

(4) and awarding the plaintiff costs and any and all further relief the Court may deem appropriate.

CENTER FOR APPLIED INNOVATION, LLC

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¹⁴ CAI serves discovery along with this civil action seeking the long-concealed, and mostly withheld (without justification under the VPPA) procurement records for this RFP. However, SCHEV has thus far demonstrated it is fully committed to avoid providing the access CAI is entitled under the VPPA, pursuant to SCHEV's extensive hide-the-ball scheme as documented throughout this Complaint and its Exhibits.