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

HILL INTERNATIONAL, INC. **Plaintiff,** **vs.** **VIRGIN ISLANDS PUBLIC FINANCE AUTHORITY, OFFICE OF DISASTER RECOVERY** **Defendant.**	**Case No. 3:24-cv-00049** [redacted]

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY RELIEF

Defendant Virgin Islands Public Finance Authority ("VIPFA"), parent corporation of the Virgin Islands Office of Disaster Recovery ("ODR"), through the undersigned counsel, respectfully submits its brief in opposition to Plaintiff Hill International, Inc.'s ("Hill") Motion for a Temporary Restraining Order, Preliminary Injunction, and Declaratory Relief ("Motion for TRO/PI").

I. Introduction

The Court must deny Plaintiff's request for injunctive relief because Plaintiff has failed to demonstrate any harm it would incur, let alone irreparable harm, from VIPFA's contract award to CH2M/Hill, Inc. ("Awardee" or "CH2M") for project management and construction management to accelerate disaster recovery from Hurricanes Irma and Maria, which had a devastating impact on the United States Virgin Islands ("U.S. Virgin Islands" or "Territory"). By contrast, both VIPFA and the public will suffer immediate and irreparable harm by further delay in recovery

[redacted]

efforts to remediate the public health emergency resulting from two back-to-back Category 5 hurricanes in September 2017, which caused significant damage and destruction to hospitals and schools, as well as to roads and other public facilities. The entire population—over 100,000 residents—were impacted by the devastation brought on by the storms, with winds of over 185 miles per hour and up to 20 inches of rain in some areas. Irma crossed the islands as a windstorm tearing the roofs off buildings in her path; Maria came behind and caused water damage to all of the unprotected structures in the district of St. Thomas – St. John while inflicting severe damage on the district of St. Croix.

To expedite the recovery efforts, VIPFA, an independent instrumentality of the Government of the United States Virgin Islands, solicited proposals through Request for Proposal, No. 001-2024-STX/STT/STJRFP (the "RFP") from qualified and licensed firms ("Respondents") to support the Rebuild USVI Super Project Management Office ("Super PMO") by providing project management and construction management for federally funded recovery projects in the U.S. Virgin Islands in the amount of approximately $16.7 billion. This work needs to be performed to alleviate many health and safety issues resulting from the hurricanes.

After a competitive process that included evaluation of multiple Respondents' technical and price proposals, and oral interviews with the Respondents that had the top five technical scores, VIPFA chose CH2M as the best-value awardee. Plaintiff is a disappointed Respondent who was not chosen for award under the RFP. This case should not be in this court (or any court) at all. Instead of following the bid protest process identified in the RFP, Hill has filed this action. Notably, Hill did not label this action as a bid protest, but that is exactly what this action is. In fact, Hill recently conceded that this is a bid protest: "The instant lawsuit is an emergency bid protest challenging an award made by Defendant to a company …." Motion for Remand at 1,

Docket No. 21. Hill failed to exhaust its administrative remedies. Hill disingenuously fails to mention anywhere in its pleadings that Hill had an opportunity and obligation to file a bid protest in accordance with the RFP and the relevant procurement manual but failed to do so. Not only is Hill not entitled to injunctive relief, but this case is also subject to immediate dismissal with prejudice.

Finally, the Court must also deny the request for injunctive relief because Plaintiff has failed to demonstrate any likelihood of success on the merits. As to the alleged merits of the improperly filed case, Hill fails to mention anywhere in its pleadings that Hill had an opportunity and obligation to challenge any aspect of the RFP (including whether there was the possibility of a single award) before proposals were submitted but failed to do so. Hill fails to bring to the Court's attention the many provisions in the RFP that put Respondents on notice that there was a possibility of a single award. Hill also disingenuously fails to mention that, [redacted] In addition, Hill falsely claims it is a taxpayer of the Virgin Islands, yet it only registered for a General Business License in the Virgin Islands on May 1, 2024, and therefore it is highly unlikely that it has paid one cent of tax to the Virgin Islands.

The granting of injunctive relief through a temporary restraining order or preliminary injunction is an extraordinary remedy that should only be granted in limited circumstances. As set forth below, the legal standard for both extraordinary remedies is the same — and requires Plaintiff to demonstrate a reasonable probability of success on the merits — that it will suffer irreparable harm if the injunction is denied, that the granting of preliminary relief will not result in even greater harm to the nonmoving party, and that the public interest favors such relief. Plaintiff has not and cannot meet the standard for the extraordinary remedy that it seeks.

A prerequisite for a temporary restraining order is the threat of imminent harm. Here, Plaintiff has failed to explain, much less demonstrate, how it will suffer any harm before a hearing on its Motion for Preliminary Injunction has been fully briefed and heard by this Court. This is because such imminent harm does not exist. Indeed, had Plaintiff been concerned about the imminence of harm, it would have *timely* pursued its right to protest the award using the bid procedures established and set forth in the RFP. *See* RFP, Exhibit 1 at §14.0 "Protests." Yet Plaintiff missed the deadline for protesting the award of a contract under the RFP and, moreover, deliberately failed to inform the Court of this important fact.

II. Standard of Review

It is well settled that the granting of injunctive relief through a temporary restraining order or preliminary injunction is an extraordinary remedy that should only be granted in limited circumstances. *Beberman v. U.S. Dep't of State*, No. CV 2014-0020, 2016 WL 1181684, at *2 (D.V.I. Mar. 24, 2016) (citations omitted). The same legal standard applies to Plaintiff's requests for a temporary restraining order and for a preliminary injunction. *Id.* (citations omitted). In either case, Plaintiff must demonstrate each of the following four elements: "(1) a reasonable probability of success on the merits; (2) that [it] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Id.* (citations omitted).

III. Argument

A. Plaintiff Failed to Exhaust Administrative Remedies

1. Plaintiff Disregarded Bid Protest Requirements Set Forth in the RFP and Applicable VIPFA Rules

Plaintiff's request for injunctive relief must be denied because Plaintiff has failed to exhaust its administrative remedies as expressly required by the terms of the RFP and the applicable VIPFA rules, and therefore this matter is not properly before this Court.

This case arises out of VIPFA's decision to select Awardee CH2M, instead of Plaintiff, for contract award under the RFP. The RFP provides that a disappointed bidder "may" file a bid protest, and it directs that all bid protests "must" be "delivered to the ODR Director at the address below…" Ex. 1 at § 14.0. The RFP then directs prospective protestors to "utilize the ODR protest procedures." *Id*. ODR's protest procedures are set forth in the VIPFA Procurement Procedures Manual (the "Manual"), a current copy of which is attached hereto as Exhibit 2.

Exhibit J to the Manual provides the procedures for filing and adjudication of a bid protest. *Id*. at 72-75. With respect to the time for filing a post-award bid protest, the Manual states unambiguously that protests must be filed within five (5) days after notice of award, and no more than ten (10) days after the date of contract award:

> If a protest is filed by a bidder or proposer after the bid opening or proposal due date, the protest must be filed within five (5) business days after the protesting bidder has received written confirmation via electric transmission, fax, certified mail or by hand service, from the VIPFA that its bid or proposal has not been accepted. In no event may a protest be filed later than ten (10) business days after the date of contract award.

Id. at 72. The Manual provides for judicial review of that administrative decision *only after* adjudication of the bid protest by the ODR Director: "If the protesting party does not agree with

the final determination, it has the right to pursue any administrative remedies or legal action it deems appropriate." *Id*. at 73.

Despite Hill styling its Complaint and Motion for TRO/PI as a "request for declaratory and injunctive relief" — this case must be viewed as a bid protest. Indeed, the Manual defines a bid protest as "a challenge to the award or proposed award of a contract for the procurement of goods and services or such challenge to the terms of the solicitations." *Id*. at 5. Comparatively, in its Complaint, Plaintiff challenges the award to CH2M: "VIPFA/ODR's decision to award the contract to CH2M, and to deny the award to Hill is arbitrary, capricious, and an abuse of discretion, and contrary to both federal and Virgin Islands procurement law." Compl. ¶ 25.

Further, the outcome sought by Plaintiff is the remedy afforded by a bid protest. The Manual provides that the available protest remedies are a stay of the solicitation or contract award, suspension of contract performance, or other further action if deemed necessary to protect VIPFA's interest. *See* Ex. 2 at 73-74. In its Complaint, Plaintiff similarly asks the Court for a suspension of the contract award to CH2M in the form of a Motion for TRO/PI restraining VIPFA from "executing any contract with CH2M" and "any performance of any contract" by CH2M, and "entering (or permitting performance under) any contract to provide project management and construction management services with any entity other than Hill." Compl. at 12-13. Thus, despite naming its pleadings a Complaint and Motion for TRO/PI, Plaintiff has really filed a bid protest.

Plaintiff itself acknowledged the need to file a bid protest to challenge VIPFA's award decision when it informed VIPFA of its intent to do so. *See* September 3, 2024 Hill Letter to ODR, Exhibit 3 ("[a]t this point, *our only alternative is to file a bid protest challenging this award*") (emphasis added). Nevertheless, in contravention of the RFP terms and the Manual, Plaintiff never filed such a bid protest with VIPFA as required prior to filing this action seeking declaratory and

injunctive relief.[1] Accordingly, Plaintiff has not received a final determination by the Director that is ripe for judicial review. Simply put, Plaintiff's request for injunctive relief must be denied because Plaintiff has jumped the gun. As Plaintiff has failed to exhaust its administrative remedies, its request for declaratory and injunctive relief are not properly before this Court.

2. Plaintiff Declined to File a Bid Protest Because It Would Have Likely Been Denied by VIPFA As Untimely

Plaintiff's decision to ignore the required bid protest procedure is a transparent effort to avoid dismissal of its protest as untimely. Plaintiff not only failed to file a bid protest with VIPFA, but it also failed to do so within the five-day period after it received the Notice of Non-Award. *See* Ex. 2 at 72 (Manual). Recognizing its inability to file a timely protest after its debriefing with VIPFA, Plaintiff has tried to circumvent the RFP Rules and VIPFA Procurement Procedure by improperly filing its protest in court instead of following the bid protest procedures set forth in the RFP.

By email dated August 15, 2024, VIPFA sent a Notice of Non-Award to T. Andrew Robinson, Vice President, Resiliency and Disaster Recovery at Hill. The letter informed Hill that Hill's proposal was not selected for award. *See* Non-Selection Notice, Exhibit 4. Accordingly, Hill's bid protest was due to VIPFA by August 22, 2024 — five business days after August 15, 2024. However, it was not until September 3, 2024, long after the bid protest deadline had passed, that Plaintiff informed ODR Director Adrienne Williams-Octalien of its intent to "file a bid protest challenging this award and to seek a preliminary injunction enjoining the Agency from entering into a contract with the alleged winning bidder or from proceeding with any work under a contract

[1] Plaintiff has now conceded this action is a bid protest: "The instant lawsuit is an emergency bid protest challenging an award made by Defendant to a company …." *See* Motion for Remand at 1, Docket No. 21.

with that bidder." Ex. 3. Realizing its protest would be dismissed as untimely, however, Plaintiff instead filed this action.

Plaintiff failed to file a bid protest with the ODR Director at all, let alone within the five-day period after receiving the Notice of Non-Award. Instead, in direct contravention of the terms of the RFP and the VIPFA Procurement Manual, Plaintiff initiated this action seeking declaratory and injunctive relief. This type of forum-shopping is disallowed by the VIPFA. *See* Ex. 2 at 73 (Manual) (explaining that judicial review is only available after obtaining a final determination in the administrative bid protest process).

Had Plaintiff filed its protest with VIPFA after sending its September 3 letter stating its intent to do so, it would have likely been dismissed or denied as untimely. The Court's review of the final determination would have been properly limited to whether VIPFA properly dismissed or denied the protest as untimely. *See id*. As such, this Court should not entertain Hill's clear end-run around the required bid protest procedures.

B. Plaintiff Has Failed to Demonstrate Likelihood of Success on the Merits

The Court must deny the Motion because Plaintiff has failed to demonstrate any likelihood of success on the merits on any of the three counts in its Complaint. For the reasons discussed here, Plaintiff lacks any factual or legal support for its untimely, speculative, and unfounded bid protest – which Plaintiff has improperly re-styled as an action for declaratory judgment and request for injunctive relief under Counts I and II of the Complaint. Plaintiff also cannot demonstrate likelihood of success on the merits of its taxpayer suit under Count III as Plaintiff is not a taxpayer in the U.S. Virgin Islands and therefore lacks standing to bring such an action.

1. Plaintiff Has Failed to Support Its Speculative Conflict of Interest Allegations with Any Facts

Plaintiff has failed to demonstrate any likelihood of success on the merits of its conflict of interest claim; rather, Plaintiff's speculation is entirely without factual support and readily disproved. Plaintiff asserts a potential conflict of interest from facts that – even if true – do not demonstrate even the appearance of a conflict of interest, let alone an actual conflict of interest. Plaintiff asserts only that members of the evaluation committee and employees of the awardee's parent company did work for the same government agency. But Plaintiff alleges no facts that any individual from either the Awardee or its parent company tried to, or did, have any improper influence on the evaluation of proposals or award selection. Rather, to the contrary, as shown herein, both the evaluation committee and the Awardee each certified to the lack of any actual or potential conflict of interest. Plaintiff attempts to conjure up a cloud of suspicion regarding the procurement, but it cannot succeed on the merits because its argument is based solely on speculation and innuendo rather than facts.

To allege that the procurement was tainted based on a conflict of interest between certain evaluation committee members and individuals working at the parent company, Plaintiff was required to plead facts to support its conflict of interest claim. Plaintiff was required to present "clear and strong evidence" to overcome the presumption that government officials have acted in good faith. *Smart, Inc. v. Virgin Islands Hous. Auth.*, 320 F. Supp. 2d 332, 339 (D.V.I. 2004). Specifically, to overcome this presumption of good faith, Plaintiff had to present compelling evidence, "'well-nigh irrefragable proof' to induce the [C]ourt to abandon the presumption of good faith [and] fair dealing." *Id.* (citations omitted). Plaintiff has not remotely met this burden, but instead relies only on self-serving speculation. Indeed, Plaintiff's Complaint neither alleges any specific actions taken by the evaluation committee members, nor any employee of Awardee's

parent company Jacobs, much less such compelling and irrefutable evidence. For example, Plaintiff does not allege that any Jacobs employee reached out to any member of the evaluation committee. Nor does it allege that any evaluation committee member talked with, let alone was influenced by, any employee of Jacobs. Nor does Plaintiff allege that the evaluation committee's award decision was in fact impacted by any purported influence by Jacobs. Indeed, the *only* facts alleged by Plaintiff are (1) "three of the five Evaluation Committee members – namely, [redacted] – are employees of the Virgin Islands Department of Public Works ("DPW")"; (2) "CH2M's parent is Jacobs Solutions, Inc. ("Jacobs")"; and (3) "Jacobs has two employees who work for DPW at DPW's offices." Motion for TRO/PI at 6. Plaintiff then infers that this somehow yields an impermissible conflict of interest. *Id.* Missing in Plaintiff's baseless assertion is any explanation as to how or why these three assertions suggest, much less create, a conflict of interest. As Plaintiff has simply made bare allegations with no factual support behind them at all, this assertion falls far short of the "well-nigh irrefragable proof" needed to succeed on the merits of a conflict of interest claim.

Further, the speculations raised by Plaintiff are easily disproved by disclosures made by the individual evaluators and by Awardee CH2M in its proposal. Each Respondent to the RFP was required to "disclose any existing contractual work for the USVI Government, whether directly or through a parent company, subsidiary company or associated company or independent contractor(s) hired by the Respondent," *see, e.g.*, Ex. 1 at § 12.0, and certified, by submitting its proposal, that neither it, nor any affiliated or associated company, had any conflicts of interests for this RFP. *Id.* §§ 12.0, 17.0, and Attachment 3 ¶15. CH2M included such a conflict of interest certification in its proposal. Williams-Octalien Declaration, Exhibit 5 ¶ 28.

To further ensure there was no conflict of interest, VIPFA required conflict of interest certifications from each evaluator. *See id.* ¶ 29, Sub-exhibits A-E (Williams-Octalien Declaration) (certifying for each evaluator that, to the best of the evaluator's knowledge, "there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest for myself"). Each evaluator has additionally confirmed that Jacobs had no involvement in the evaluation of proposals or any award decision. *See* Declaration of Evaluator [redacted], Exhibit 6 ¶¶ 19-21; Evaluator [redacted], Exhibit 7 ¶¶ 5-7; Evaluator [redacted] Exhibit 8 ¶¶ 5-7; Evaluator [redacted] Exhibit 9 ¶¶ 5-7; Evaluator [redacted] Exhibit 10 ¶¶ 5-7. The ODR Director has additionally confirmed that no employee of CH2M or its parent, Jacobs Solutions Inc., had any role in developing the RFP, statement of work, or evaluation criteria. *See* Ex. 5 ¶ 27, (Williams-Octalien Declaration)

VIPFA asked clarifying questions to certain Respondents related to potential conflicts of interest, including to Hill. After reviewing the Respondents' responses to these clarifying questions, VIPFA confirmed that there were no conflicts of interest involving any Respondent. *See* Evaluation Committee Report, Exhibit 11 at 2.

VIPFA was entitled to rely on this information from all Respondents and Plaintiff has not provided any information, other than speculation, to suggest otherwise. *See Goel Services, Inc. in Ass'n with Grunley Constr. Co., Inc.*, B-404168 (Comp. Gen.), 2011 CPD ¶ 59, 2011 WL 1035353, at *6 (January 12, 2011)[2] (Protest denied where "the agency represents that the individual certified

[2] Courts in the Virgin Islands look to other jurisdictions when there is no definitive Virgin Islands case law on a subject. *See. e.g.*, *In re Tutu Wells Contamination Litig.*, 994 F. Supp. 638, 652 (D.V.I. 1998) (noting the "Court will look to case law mainly from district courts within the Third Circuit, as the Court has uncovered no cases decided by the District Court of the Virgin Islands on the subject"); *DeCastro v. Stuart*, No. CIV.A. 2001-20, 2004 WL 744194, *3 (D.V.I. Apr. 2, 2004) ("Given that there is no determinative Virgin Islands case law or statute, we look at the law of other jurisdictions in addressing this issue for the first time."). This is particularly true for issues involving procurements by federal entities, as the Plaintiff has noted. *See* Motion for TRO/PI at 10n.5; *Tip Top Constr. Corp. v. Gov't of Virgin Islands*, 60 V.I. 724, 733-736 (V.I. 2014) (relying on cases decided by the Court of Federal Claims and

that neither he nor his family have any financial or other ties to BIG that could constitute a conflict of interest, […], and the protester has not provided any evidence to establish the existence of a conflict or bias in the evaluation. We will not attribute bias in the evaluation of proposals on the basis of inference or supposition. This protest ground is denied.") (internal citations omitted). Plaintiff has neither explained nor shown that any Jacobs employee was involved in any procurement decision related to this RFP, nor that any Jacobs employee was a member of the Evaluation Committee for this RFP. Nor has Plaintiff asserted that any Jacobs employee had any ability to influence the award decision or any member of the evaluation committee.

Finally, Plaintiff's reliance on 2 CFR Part 200 in support of its conflict of interest argument is of no avail. Section 200.318 precludes any agency official from participating in the selection of awardees if it has a conflict of interest. Section 200.319 precludes contractors that have worked on developing the specifications for a solicitation from benefitting from that inside information and therefore precludes such a contractor from bidding on a subsequent contract award. Plaintiff cannot succeed on the merits of a claim that the VIPFA violated these regulations because Plaintiff has pleaded no facts to support a conflict of interest finding under either regulation. As shown above, Plaintiff makes no assertion that any Jacobs or CH2M employee, officer, or agent has participated in the selection, award, or administration of this contract, much less that any VIPFA employee, officer, or agent had any real or apparent conflict of interest — either directly, or through a family member, partner, or an organization that employs or is about to employ any such employee, officer, agent, family member, or partner. Indeed, the Awardee and each evaluator certified that there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest. *See* Ex. 5 ¶ 29 (Williams-Octalien Declaration – citing Bid

U.S. Court of Appeals for the Federal Circuit in holding that a procurement decision by the VI Department of Property and Procurement was unlawful).

Evaluation Committee Conflict of Interest Forms); *see also* Exs. 6-10 (Declarations of Evaluators). Nor has Plaintiff alleged any facts that any Jacobs employee has had any involvement in the development or drafting of any specifications, requirements, statements of work, or anything else for that matter related to this RFP. To the contrary, the ODR Director certified that they had no involvement whatsoever. *See* Ex. 5 ¶¶ 27-30 (Williams-Octalien Declaration). In short, despite citing this federal grant regulation, Plaintiff has not pleaded any facts—let alone "well-nigh irrefragable proof" — to support a finding that the clause has been contravened by VIPFA, and the facts already in the record demonstrate the opposite. Accordingly, Plaintiff's distorted claim should be denied for this reason.

2. Plaintiff Has Failed to Allege Any Facts or Law to Demonstrate VIPFA Erroneously or Irrationally Selected a Higher-Priced Respondent for Contract Award

a. Awardee Scored Substantially Higher than Plaintiff Across the Evaluation Factors

Plaintiff cannot succeed on the merits because VIPFA chose the Respondent that represented the best value for the USVI. First, this was a best-value procurement, not a lowest price-technically acceptable ("LPTA") procurement, and therefore VIPFA was not required to accept the lowest-price proposal (even assuming Plaintiff met all of the technical requirements, which it did not). Here, the RFP made clear that the evaluators were to determine which Respondent presented the best value for the Virgin Islands, using both price and non-price evaluation factors. Therefore, VIPFA was not required to make award to the lowest-price proposal.

Second, Plaintiff's allegation that VIPFA failed to consider its lower price is readily disproved by the Evaluation Committee Report identified by Plaintiff. Plaintiff correctly asserts that it proposed a lower price than the Awardee and that it received a higher average score for the Cost Effectiveness evaluation factor. Compl. ¶ 20. Plaintiff's argument, however, ignores the fact

that price was only worth 20 out of 100 possible points (20%), and that the Awardee received the highest overall score, and the highest score across the other four evaluation factors worth 80 out of 100 possible points (80%). *See* Ex. 11 (Evaluation Committee Report). Overall, the Awardee received 432.5 total points, as compared to Plaintiff's 406 points. The Awardee's total average score was 86.5 out of 100 possible points, whereas Plaintiff came in second with a total average score of 81.2 points. *See id.* As shown in the following summary of the Evaluation Committee Report scoring table, the Evaluation Committee broke this down further by evaluation factor, showing that the Awardee received higher average scores across the other four evaluation factors, which were: Technical Evaluation-Responsiveness to RFP, Technical Approach and Methodology, Experience and Qualification, and References:

	Factor 1	**Factor 2**	**Factor 3**	**Factor 4**	**Factor 5**
	Technical - Responsiveness to RFP (Average Score)	Technical Approach and Methodology (Average Score)	Experience and Qualifications (Average Score)	References (Average Score)	Cost Effectiveness (Average Score)
Awardee CH2M	4.7	27.8	29.2	14	10.8
Plaintiff Hill	4.4	24.6	24.2	12.4	15.6

See id.

Given that it received lower scores in 80% of the evaluation factors, Plaintiff cannot rationally succeed on the merits of its argument that its lower price should have necessarily resulted in a contract award, as this was not a LPTA procurement, and price was not the most important evaluation factor. Rather, Cost Effectiveness was only worth a total of 20 out of 100 possible points, indicating its relatively low importance as to the other non-price evaluation factors. *See* Ex. 12 at 41 (RFP, Addendum No. 3).

Plaintiff incorrectly asserts that the Agency failed to consider its lower price. In its evaluation, VIPFA did not disregard or overlook Plaintiff's lower price as Hill contends. *See* Motion for TRO/PI at 10-11. Indeed, the evaluators recognized Plaintiff had a lower price, as evidenced by its higher rating in Cost Effectiveness as compared to the Awardee. However, low price does not necessarily mean high quality, nor is it an indication of a complete proposal. Rather, the Evaluation Committee identified a particular disadvantage in Plaintiff's construction management capabilities. *See* Ex. 11 at 2. As documented in the Evaluation Committee's report, VIPFA reasonably did not select Hill merely because it offered a lower price, but instead went with the company that overall presented the best value to VIPFA.

Further confirming the reasonableness of this decision, the Evaluation Committee's Cost Analysis also compared the Awardee's price against VIPFA's independent cost analysis. *See id.* at 3. The independent cost analysis was prepared by a neutral third party, Boston Consulting Group ("BCG"), before the receipt of proposals. BCG developed a range for the independent cost analysis: $152-$226 million. *Id*. The Evaluation Committee confirmed that the Awardee's price of $137 million aligned with the range established by BCG in the independent cost analysis, and in fact was lower than the range, further cementing the reasonableness of VIPFA's award decision. *See id.*

b. VIPFA's Technical Evaluation of Plaintiff Revealed a Failure to Propose Sufficient Staff for the Construction Management Scope of Work

Hill's argument that the award decision to CH2M, rather than Hill as the low-priced Respondent, lacks a rational basis. The Evaluation Committee selected CH2M on a best-value basis and the Evaluation Committee determined that Hill's proposal did not fully capture [redacted] *See* Ex. [redacted] ([redacted] Declaration). In particular, the evaluators determined that [redacted]

[redacted] The evaluators were concerned that these gaps in Hill's proposal [redacted] Hill ignores the weakness of its proposal, not mentioning one word about its failure to demonstrate that its proposal [redacted] Hill cannot succeed on the merits of its claim alleging the award decision to CH2M was arbitrary and capricious.

3. VIPFA Had the Discretion to Make a Single Award and Hill Waived any Argument Related to the Single Award as Its Interpretation of the RFP

a. The RFP Provided the VIPFA with Discretion to Determine the Number of Awardees

VIPFA retained the right to award one contract. Plaintiff ignores, and does not bring to the Court's attention, many provisions within the RFP that provided notice to Respondents that a single award could be made or multiple awards. There is a long list of provisions that provided notice to Respondents that a single award was an option under the RFP. Under "Number of Awards," the RFP stated that it *anticipated* but did not require multiple awards:

> **11.0 NUMBER OF AWARDS**
> ODR **anticipates** awarding multiple contracts pursuant to this RFP. Awards can be made solely for specific disciplines in the scope of work. Nothing in this paragraph shall be construed in derogation of ODR's right, in its sole discretion, to cancel this RFP.

Ex. 1 at 12 (RFP) (emphasis added). Nothing in this section uses mandatory language, such as "shall" or "must" to require multiple awards. Plaintiff failed to bring this provision to the Court's attention.

In another provision of the RFP, VIPFA provides:

> **8.0 USE OF SUBCONTRACTORS**
> **ODR may have a single or multiple Prime Contractor(s) as the result of any contract negotiation, and that Prime Contractor(s) shall be responsible for all deliverables specified in the RFP and proposal.** This general requirement notwithstanding, Respondents may enter subcontractor arrangements, however, they shall acknowledge in their proposal, total responsibility for the entire contract.
>
> If the Respondent intends to subcontract for portions of the work, the Respondent shall identify in its proposal any subcontractor relationships and include specific designations of the tasks to be performed by the subcontractor. The documentation required of the Prime Contractor is also required for any subcontractor. The Prime Contractor shall be the single point of contact for all subcontract work. Every subcontract shall incorporate and follow the terms of the contract between the Prime Contractor and ODR.
>
> Unless provided for in the contract with ODR, the Prime Contractor shall not contract with any other party for any of the services herein contracted without the express prior written approval of ODR. The Prime Contractor shall be responsible for fulfillment of all terms of the contract, timing, and payments to subcontractors regardless of funding provided by ODR. The [P]rime Contractor must include Exhibit G Subcontractor Statement in their proposal, which affirms the following: "I have read and understand the IFB, and final version of the proposal submitted by (Proposer)."

Id. at 11 (emphasis added). This provision clearly provides that there may be one or multiple awardees. Plaintiff failed to bring this provision to the Court's attention.

In another provision of the RFP, VIPFA provides:

> **9.0 ISSUING AND PROCURING OFFICE**
> This RFP is being issued for the Virgin Islands Office of Disaster Recovery (ODR), a subsidiary division of the Virgin Islands Public Finance Authority, an independent instrumentality of the Government of the United States Virgin Islands by the Issuing office listed below. Please refer all inquiries to:
>
> Virgin Islands Office of Disaster Recovery (ODR)
> Virgin Islands Public Finance Authority
> ATTN: Adrienne L. Williams-Octalien, Director
> 14A & 14C Strand Street
> Frederiksted, St. Croix VI 00840
>
> From the issue date of this RFP **until a determination is made regarding the selection of a Respondent**, refer all contacts concerning this RFP to

> info@usviodr.com Any violation of this condition is cause for the ODR to reject a Respondent's package. The ODR will NOT be responsible for any oral information given by any employees.

Id. at 11 (emphasis added). This provision addresses the selection of a singular Respondent, not multiple Respondents. Plaintiff also failed to bring this provision to the Court's attention.

In another section of the RFP, VIPFA provided:

> **16.0 STANDARD CLAUSES FOR CONTRACTS WITH ODR**
> **Because the ultimate contract will be between the Respondent and ODR**, the contract shall be governed by certain standard ODR terms and conditions. Respondent shall certify that it will adhere to the terms and conditions set forth in the contract, and any subsequent changes deemed appropriate by ODR.

Id. at 13 (emphasis added). Again, this provision references a single Respondent as the awardee. Plaintiff failed to bring this provision to the Court's attention.

In the "Selection Process" provision in the RFP, VIPFA provides:

> **20.0 SELECTION PROCESS**
> **ODR at its sole discretion, will determine which Proposal best satisfies its requirements**. …

Id. at 21 (emphasis added). Again, this provision references an award to a single proposal – not multiple proposals. Plaintiff failed to bring this provision to the Court's attention.

In another provision, VIPFA provided the following:

> **21.0 ORAL INTERVIEWS**
> **Respondent(s) may be required to participate in an oral interview**. . . .

Id. at 21 (emphasis added). This provision references VIPFA's option of awarding one or multiple awards. Plaintiff failed to bring this provision to the Court's attention.

In another provision, VIPFA provided the following:

> **26.0 CONTRACT AWARD AND EXECUTION**
> **ODR reserves the right to enter into a contract(s)** based on the initial offers received without further discussion of the proposals submitted.

Id. at 22 (emphasis added). This provision again references VIPFA's option of awarding one or multiple awards. Plaintiff failed to bring this provision to the Court's attention.

VIPFA's sole discretion was again stated when VIPFA revised the evaluation scoring table in Addendum No. 3, Attachment D:

> ***ATTACHMENT D:***
> ***Amended Section 20.0 Selection Process Evaluation Criteria Table***
> 20.0 SELECTION PROCESS
> **ODR at its sole discretion, will determine which Proposal best satisfies its requirements.**

Ex. 12 at 41(emphasis added). Plaintiff failed to bring this provision to the Court's attention.

Finally, VIPFA answered questions that were incorporated into the RFP through Addendum No. 3. An example is illustrative:

> No 38:
>
> Section 2.0 Scope of Work, Paragraph 4: This paragraph states, "… this RFP will result in a minimum of two (2) contractor that will be utilized …" Is there a maximum number of contractor awards the ODR will issue for the Project Management or Delivery and Construction Management Services?
>
> **Answer: ODR reserves the right to determine the number of contractor awards.**

Addendum No. 3 to RFP, Exhibit 12 at 8 (emphasis added). Plaintiff failed to bring this answer to the Court's attention. Here, VIPFA clearly reserved the right to determine the number of contractor awards. This supersedes any contradictory language in the RFP as the latest statement from VIPFA on the subject. *See, e.g.*, *Rai, Inc.; the Endmark Corp.*, B-250663, B-250663.2, 93-1 CPD ¶ 140, 1993 WL 41358, at *1, *7 (February 16, 1993) (GAO acknowledges that subsequent amendments with contradictory terms superseded the original solicitation and the first seven amendments).

Hill's argument that there could only be multiple awards fails based on the language within the RFP. Additionally, any contradictory language is no longer applicable based on Addendum No 3.

b. Alternatively, the RFP Contained a Patent Ambiguity Regarding the Number of Offerors, which Plaintiff Failed to Protest Prior to the Proposal Submission Deadline

Assuming, *arguendo*, that the contradictory language is not superseded by Addendum No. 3, Plaintiff, at best, has identified a patent ambiguity in the RFP. A patent ambiguity arises where there is "an obvious omission, inconsistency or discrepancy of significance" that "could have been discovered by reasonable and customary care." *See, e.g.*, *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312-13 (Fed. Cir. 2016) (internal quotations omitted). It is clear from the RFP provisions cited above that VIPFA retained its discretion to award a single award or multiple awards under the RFP. However, Hill's argument relies on a contract provision that indicates multiple awards. Hill's interpretation of the RFP that only multiple awards could be made is just that — Hill's interpretation. Under well-established bid protest rules and case law at the Government Accountability Office and the Court of Federal Claims, when there is a patent ambiguity, a pre-award protest (filed before the proposal due date) must be filed or the issue is waived. *See* 4 C.F.R. § 21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."). *See also Blue & Gold, Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). The Federal Circuit addressed a post-award protest ostensibly challenging the evaluation of the awardee's proposal that in reality challenged patent ambiguities in the terms of the solicitation. The Court of Federal Claims agreed with the defendants, and the Federal Circuit affirmed, holding that "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 afterwards in a § 1491(b) [Tucker Act] action in the Court of Federal Claims." *Id.* Hill waived any right it had to challenge this patent ambiguity, and such waiver precludes Hill's interpretation of the patent ambiguity. *See id.*

Additionally, Hill could have asked a question during the question and answer period to obtain clarity regarding the patent ambiguity. In fact, the RFP provides the following:

> Failure to ask questions, request changes, or submit objections shall constitute the acceptance of all terms, conditions, and requirements in this RFP. The issuance of a written addendum by the ODR is the only official method by which interpretation, clarification or additional information can be given. If the ODR amends this RFP, they will email the addenda to all potential Respondents.

Ex. 1 at 11-12. Hill failed to do so, and for this additional reason, waived any right to challenge VIPFA's interpretation of the RFP's terms.

c. [redacted]

Plaintiff also fails to inform the Court that [redacted] *See* [redacted]). Indeed, [redacted] Hill has now conveniently changed its position when it lost the competition and complains about a single award.

4. Plaintiff Lacks Standing to Bring a Taxpayer Suit

Plaintiff further cannot show likelihood to succeed on the merits of Count III of Plaintiff's Complaint. In Count III, Hill alleges harm by way of a taxpayer suit under 5 V.I.C. § 80. Plaintiff argues that VI taxpayers are harmed by the award of a more expensive contract. *See* Compl. ¶ 52.

However, Hill lacks standing to bring a taxpayer suit in the first place. "To sustain a taxpayer suit under Title 5, Section 80, a plaintiff must show: (1) that [it] is a Virgin Islands taxpayer; and (2) that territorial funds were wrongfully disbursed." *Olive v. DeJongh*, 57 V.I. 24, 39 (Super. Ct. 2012). Contrary to Plaintiff's misrepresentation, Hill cannot show that it is a Virgin Islands taxpayer. Instead, Plaintiff Hill only applied for and received a General Business License in the USVI on May 1, 2024. Given the relatively short time it has possessed a Virgin Islands' Business License, it is highly unlikely Plaintiff has paid any taxes to the Virgin Islands Government.

Thus, Plaintiff cannot show a reasonable probability of success on the merits regarding this claim, nor any irreparable injury as a taxpayer by denial of the relief, as Plaintiff lacks standing to sustain a taxpayer suit under 5 V.I.C. § 80.

C. The Balance of Harms Favors the VIPFA, Not Plaintiff

The balance of harms clearly favors the VIPFA, whose subsidiary, the ODR, is charged with expediting disaster recovery relief to the people of the U.S. Virgin Islands in the wake of Hurricanes Irma and Maria, as opposed to Plaintiff, whose only articulated harm is the loss of its ability to turn a profit under the subject contract. A moving party must show that without preliminary injunctive relief, "[it] will likely experience irreparable harm." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000). Irreparable harm is "harm [that] cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989); *see also 3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 554 (2015) (A party moving for a preliminary injunction "must demonstrate that the injunction is necessary to avoid 'certain and imminent harm for which a monetary award does not adequately compensate'—in other words, harm without an adequate legal remedy.") (citation omitted). "This is not an easy burden." *Adams*, 204 F.3d at 485. Ultimately, a preliminary injunction "must protect a plaintiff from the cause of irreparable harm ***and nothing more***."

Beberman v. Blinken, Civ. No. 2023-0036, 2023 WL 5836059, *3 (D.V.I Sept. 8, 2023) (citing *I.M. Wilson, Inc. v. Grichko*, 2019 WL 5394113, at *4 (E.D. Pa. Oct. 22, 2019)) (emphasis added).

1. VIPFA Will Suffer Irreparable Harm if Forced to Delay the Contract Start Date and Remedial Efforts

There can be no question that VIPFA will be harmed by a delay in its ability to alleviate the well-documented significant damage caused by Hurricanes Irma and Maria for the people of the U.S. Virgin Islands. "The preliminary injunction test balances the harms between the parties." *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 68 V.I. 584, 600 (2018). Hill argues that delaying services to the Virgin Islands and its people is a "slight" harm in comparison to its own harms related to not receiving the contract. Motion for TRO/PI at 15. This position is not only incorrect, but also reflects precisely Hill's failure to comprehend the urgency and circumstances of the contract.

It is widely understood that delaying or otherwise interfering with the government's ability to receive the services for which it contracted "until a proper bid is undertaken" is harmful to the government. *Tires v. Government of Virgin Islands*, 68 V.I. 241, 256 (Super. Ct. 2018) (denying temporary restraining order). Hill asserts, without support, that the Virgin Islands will not be seriously harmed by a delay in implementing the contract; its bald assertions are not enough to show that the balance of harms tips in favor of the moving party. Rather, the moving party has a burden to show, with evidence, that the non-moving party will not experience significant harm. *See id.* at 256-57.

The importance of the projects at stake directly affects how the Court should evaluate the balance of harms. *See Magellan Corp. v. United States*, 27 Fed. Cl. 446, 448 (1993) (denying preliminary injunction, and noting that harms associated with a delay in the government receiving important services, such as national security technology, were more serious than delays in

receiving "toilet seats or belt buckles"). The contract at issue is for the provision of project and construction management services that are critical to the provision of a wide range of services, including health care infrastructure and education system facilities. Without this contract, the Virgin Islands cannot make the necessary repairs after the natural disasters and their compounding effects. Any delays will adversely affect the ability of the government to remediate the harm caused by these hurricanes.

Indeed, the importance of this work is evidenced by the increased funding recently received by the VIPFA in response to the critical needs of the Territory, which became particularly acute due to hurricanes Irma and Maria, and COVID. *See* Federal Emergency Management Agency, *Biden-Harris Administration Approves Federal Cost Share Increase for Hurricane Irma and Maria Projects in the U.S. Virgin Islands*, FEMA (Feb. 8, 2024).[3] The contract is essential for the provision of virtually all future services related to addressing the Virgin Islands' recovery — including needed repairs to hospitals, community health clinics, care centers for the elderly, schools, fire stations, correctional facilities, potable water systems, wastewater systems, undergrounding power lines, and roadway reconstruction. The contract is the foundation for all these services, as it will administer dozens of subcontracts and manage the construction of these facilities. *See, e.g.*, Ex. 1 at 2-7 (RFP). The importance of these services cannot be overstated, and any delay would cause severe harm.

VIPFA's immediate need to commence contract performance is further impacted by the federal cost-share deadlines. Beginning in February 2024, the federal government has temporarily increased the availability of federal funding provided to the Virgin Islands to provide assistance for the major, ongoing damage from hurricanes Irma and Maria. *See* Ex. 5, ¶ 16 (Williams-

[3] Retrieved from https://www.fema.gov/press-release/20240208/biden-harris-administration-approves-federal-cost-share-increase-hurricane.

Octalien Declaration); *see also Biden-Harris Administration Approves Federal Cost Share Increase for Hurricane Irma and Maria Projects in the U.S. Virgin Islands, supra*. This change allows projects to be funded at 95%-98% cost to the federal government *if* the projects are finished by December 31, 2035. *Id*. VIPFA issued the RFP for this contract shortly after the announcement about the provision of federal funds. VIPFA currently operates at a spending pace of $500 million per year, but will need the services of the contract to enable the office to double this pace in order to spend the more-than-$10 billion federal dollars allotted to assist the Territory in the next ten years. *See id.* at ¶ 17-19 (Williams-Octalien Declaration). Larger rebuilding projects that are not completed by December 31, 2035 will revert back to the standard cost-share and will require a local match amount, which the Territory cannot afford. *See id*. If the VIPFA is subject to further delay, and the 2035 deadline is not met, it risks leaving billions of dollars on the table, and projects not complete, which will negatively impact the health and safety of the Virgin Islands and the education of its younger population. *See id*. ¶ 23-26. The Government will be unable to meet the increased cost-share amounts after 2035 and would be forced to leave critical projects unfunded and unfinished. *See id*.

As Director Williams-Octalien explained, further delay in the start of this contract would result in an adverse impact to the regular operations of the Government. *See id*. Until the Super PMO is established and operational, employees from various departments with projects are performing project management functions to the detriment of their core functions. *See id*. ¶ 25. For example, the rebuild of the Donna Christensen Complex is time-consuming and affects the ability of the Commissioner of the Department of Health and her executive team to focus on the day-to-day functions of her department. *See id*. The creation of the Super PMO to perform this

important work will also permit these various officials and employees to return to their core functions of managing and delivering essential Government services. *See id*.

The delay in implementing the contract therefore would not only be costly to the VIPFA, but, as discussed below, would have virtually immeasurable consequences to the Virgin Islands and its citizens. *See infra* at Section D. By contrast, Hill has failed to identify a single harm, let alone an irreparable harm, warranting a temporary injunction or a preliminary injunction. As such, Hill has failed to meet its burden of showing how the balance of harms weighs in its favor. This Court should therefore deny Hill's Motion for TRO/PI.

2. By Contrast, Plaintiff Has Demonstrated No Irreparable Harm, Only Financial Harm

Hill's claims for relief are focused solely on its own financial losses. This is, by definition, harm in want of a legal remedy, which is exclusively provided through the normal adjudication process. *Bannum, Inc. v. United States*, 56 Fed. Cl. 453, 456 (2003) ("Preliminary relief is generally not available if money damages would provide an adequate remedy."). Financial harm cannot be the basis for preliminary injunctive relief, except "in extraordinary circumstances, such as the prospect of insolvency or an inability to collect damages." *Id.*

Hill has failed to allege such extraordinary circumstances here. While Hill has alleged harm based on the loss of the potential profit it hoped to achieve from the contract, it has not shown that such harm is irreparable. For example, Hill has not claimed that it would go out of business or suffer some other financial loss so great and immediate that potential damages obtained through trial are insufficient. *See Navient Sols., LLC v. United States*, 141 Fed. Cl. 181, 184 (2018) (holding that the loss of a contract, in connection with an allegation that it would cause the company to go out of business, could cause irreparable harm). Hill is not an incumbent contractor that would potentially lose employees, subcontracts, or other means of performance capacity or capabilities

during the time spent litigating its case. *Comprehensive Health Servs., LLC v. United States*, 151 Fed. Cl. 200, 207 (2020) (finding no irreparable harm warranting a TRO when the contractor was not an incumbent or otherwise on-site and prepared to immediately perform). Similarly, Hill does not have offices in the Virgin Islands, and has provided no evidence of otherwise investing in infrastructure in anticipation of the contract such that it would suffer an unrecoverable loss without a preliminary injunction. In fact, VIPFA's independent research reveals Plaintiff has only recently—May 1, 2024—obtained the most basic form of Virgin Islands' business license thereby indicating Hill's lack of any meaningful presence in the Virgin Islands.

Hill asserts that "a bid protestor can always show irreparable harm." Motion for TRO/PI at 14. This is false. The case law is replete with examples of courts denying preliminary injunction relief because a bid protestor failed to demonstrate that it would suffer irreparable harm. *See, e.g.*, *SEKRI, Inc. v. United States*, No. 21-778, 2023 WL 1428644 (Fed. Cl. Jan. 31, 2023) (preliminary injunctive relief denied because plaintiff failed to show allegedly improper procurement caused irreparable harm); *KPMG LLP v. United States*, 139 Fed. Cl. 533, 537 (2018) (same); *Alion Sci. & Tech. Corp. v. United States*, 74 Fed. Cl. 372 (2006) (same).

All but one of the cases Hill cites to in support its irreparable harm claim are inapposite because those cases consider whether a *permanent* injunction was the appropriate remedy *after* coming to a final decision on the merits following months of briefing. *See CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722 (2014) (determining whether permanent injunction was an appropriate remedy after plaintiff fully adjudicated and succeeded on the merits of its claim); *Lawrence Brunoli, Inc. v. Town of Branford*, 722 A.2d 271 (Conn. 1999) (same); *Overstreet Elec. Co. v. United States*, 47 Fed. Cl. 728 (2000) (same); *Heritage of Am., LLC v. United States*, 77 Fed. Cl. 66 (2007) (same); *Great Lakes Dredge & Dock Co. v. United States*, 60 Fed. Cl. 350 (2004)

(same). The inquiry into irreparable harm is different when considering whether to issue a preliminary injunction, or a permanent injunction, partly because the court is reticent to restrict a party's actions before the party has had an opportunity to defend itself. *See Actionet, Inc. v. United States*, 2019 U.S. Claims LEXIS 259, *7 (Fed. Cl. Mar. 29, 2019) (finding danger of loss was not enough to sustain a TRO regardless of whether it eventually may support a permanent injunction because the question of whether there is "sufficient harm" to support a permanent injunction employs a different calculus than whether there is sufficient harm to support a temporary injunction).

In the one case Hill cites in support of its irreparable harm claim that does concern preliminary injunctive relief, the court denied the plaintiff's motion. *Akal Sec., Inc. v. United States*, 87 Fed. Cl. 311, 319 (2009) (rejecting plaintiff's claims that it was "irreparably harm[ed] because it '[was] wrongfully deprived of the opportunities of the market place … and stands to lose a profit,'" after finding the plaintiff's claims of harm were undermined by its low likelihood of success and outweighed by the government's reliance on the contract commencing). Accordingly, none of the cases cited by Plaintiff support its unfounded legal conclusion.

Besides claiming pure financial loss, Hill has failed to specifically allege any irreparable harm that exists. To the extent Hill's claims of loss are too vague to recover monetary damages, they are also too speculative to obtain preliminary injunctive relief. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487-88 & n.13 (3d. Cir. 2000) (in order to get preliminary injunctive relief, threatened harm "must not be speculative"); *see also Walters v. Parrott*, 2006 V.I. LEXIS 63, *2-3 (Super. Ct. Sept. 20, 2006) ("Remote or speculative harm will not provide a basis for the issuance of a temporary restraining order"). Any reduced competitive disadvantage Hill may claim is "speculative and 'does not demonstrate irreparable harm.'" *SVD Stars II, LLC v. United States*,

138 Fed. Cl. 483, 488 (2018). Additionally, Hill's failure to timely file a bid protest further demonstrates the fact that there is no concrete, immediate irreparable injury. *See EDP Enters. v. United States*, 56 Fed. Cl. 498, 501 (2003) ("It is well-recognized that delay in seeking enforcement of rights is evidence of a lack of irreparable harm.").

Ultimately, Hill seeks to cancel the award in order to reopen the bidding process and has not alleged that this relief will be unavailable after adjudication of the claim. If Hill succeeds on its claim after adjudication, Hill will be able to re-bid on the contract, and if it wins, it has identified no reason it cannot perform the contract at that time – thus, the full remedy Hill seeks is not irreparable, but rather is available through trial and does not warrant preliminary injunctive relief. *See KPMG LLP v. United States*, 139 Fed. Cl. 533, 537 (2018) (denying preliminary injunction because if plaintiff won at trial on the merits, plaintiff would still have an opportunity to compete for, receive, and perform the contract).

Because Hill has failed to identify any alleged harms that are not reversible, it has failed to meet its burden to obtain preliminary injunctive relief. *See Actionet, Inc. v. United States*, 2019 U.S. Claims LEXIS 259, *8 (Fed. Cl. Mar. 29, 2019) (denying injunctive relief despite plaintiff alleging further entrenchment of the awardee, employee attrition, and monetary loss because allegations were speculative and did not demonstrate *why* the harms were irreversible).

D. Public Interest Would Be Substantially Harmed by a Delay in Disaster Recovery Efforts

The public would be significantly harmed by further delays in disaster recovery efforts. The consequences of any further delay to the expedient reconstruction of damaged public facilities and the timely commencement of all federally funded projects threaten the health and safety of the public. As discussed earlier, VIPFA must double the speed of its disaster recovery effort to meet

the FEMA cost-share deadlines to have any hope at finishing the over 40 projects identified in the RFP under the Super PMO. *See* Ex. 5, ¶ 17-18 (Williams-Octalien Declaration).

It is in the direct interest of the public to address the ongoing health and safety issues as soon as possible. *See V.I. Taxi Ass'n v. W. Indian Co., Ltd.*, 65 V.I. 155, 177 (Super. Ct. 2016), *aff'd sub nom. V.I. Taxi Ass'n v. W. Indian Co., Ltd.*, 66 V.I. 473 (2017) ("In exercising their sound discretion, Courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

As discussed, in September 2017, Category 5 storms Hurricanes Irma and Maria hit the USVI. These storms caused major disruptions to health care in the Territory. For instance, Roy L. Schneider Hospital ("Schneider") is the only hospital on St. Thomas and has the only fully equipped emergency department for St. Thomas and St. John, serving approximately 45,000 people. *See* Muhammad Abdul Baker Chowdhury et al., *Health Impact of Hurricanes Irma and Maria on St Thomas and St John, US Virgin Islands, 2017–2018*, American Journal of Public Health 109, no. 12: 1725-1732 (Dec. 1, 2019);[4] *see also* United States Census Bureau, *2020 Island Areas Censuses: U.S. Virgin Islands* (2022).[5] *See also* Ex. 5 ¶ 8 (Williams-Octalien Declaration). Following the landfall of Hurricane Irma, Schneider experienced loss of power, collapse of the fourth floor of the hospital, destruction of the building housing its cancer center, and flooding of the emergency department. *See Chowdhury et al., supra.; See also* Ex. 5 ¶ 8 (Williams-Octalien Declaration). Even worse, the Governor Juan F. Luis hospital ("JFL") was found decimated to the point of needing a temporary replacement. *See* Office of Congresswoman Stacey E. Plaskett, *Plaskett Announces $834 Million Dollars in Federal Grant Funding for Rebuild of Juan F. Luis*

[4] Retrieved from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6836793/pdf/AJPH.2019.305310.pdf.
[5] Retrieved from https://www.census.gov/data/tables/2020/dec/2020-us-virgin-islands.html.

Hospital, Plaskett Official Website, (May 26, 2023)[6]; *see also* Ex. 5 ¶ 6 (Williams-Octalien Declaration). FEMA ordered the demolition of the existing 231,655 sq. ft. hospital facility and a 426,609 sq. ft. replacement facility incorporating up-to-date building codes and standards. *Id.* As the replacement facility remains unbuilt, the hospital now operates out of a small modular unit. *See* Ex. 5, ¶ 6 (Williams-Octalien Declaration). Currently, VIPFA has a pending solicitation for a bundle including JFL and the Donna Christensen Complex health clinic in St. Croix. *See id*. ¶ 7.

Access to health care is one of the most fundamental necessity and interests of any population. Without the Super PMO, health care professionals are taken away from their abilities to manage the day-to-day functions of their various departments to focus on rebuilding efforts, further exacerbating the strain on public health on all three islands. *See id*. ¶ 25. "[T]he Government's responsibility to ensure qualified healthcare services for the citizens of the territory should not be sidestepped for private interests whose injury, when measured against the public concerns, is insubstantial." *Government of Virgin Islands by & through Encarnacion v. Health Quest, LLC*, 2023 VI SUPER 63U, ¶ 46 (Super. Ct. Oct. 31, 2023).

In addition to the public's interest in adequate health care, a delay in project oversight would further multiply the devastating impacts of the storms on the Territory's education system. For instance, included in VIPFA/ODR's request is the complete rebuild of St. Thomas's largest high school, Charlotte Amalie High School ("CAHS"). *See* Ex. 5, ¶ 11 (Williams-Octalien Declaration). Like JFL, the high school was assessed and approved for a complete replacement by FEMA (including classrooms, administrative offices, library, cafeteria, kitchen, bathrooms, stairways, balconies, hallways and all fixtures, equipment and contents to replace the campus with a new campus). *See* Virgin Islands Department of Education, *Coastal Consistency Determination*

[6] Retrieved from https://plaskett.house.gov/news/documentsingle.aspx?DocumentID=4297.

Request: Charlotte Amalie High School Reconstruction Project, Virgin Islands Department of Planning and Natural Resources Official Website (June 1, 2022).[7] The education infrastructure situation in the Territory edges on dire. *See* Ex. 5, ¶ 11 (Williams-Octalien Declaration). While the Virgin Islands Department of Education has remained dedicated to prioritizing minor residents' academic success, the public is harmed by further delay of facility rebuilds while their modular units naturally continue to collect mold and other unpreventable hazards. *See* Isabelle Teare, *Teachers at CAHS walk out of their classrooms, bring attention to noxious mold conditions*, WTJX Channel 12 (Aug. 29, 2024)[8]; *see also* Ex. 5, ¶ 11 (Williams-Octalien Declaration). Not only distracting VI children from their education, but these conditions also affect their safety. *Id.* Even now, the Territory experiences "walk-outs" by teachers at Charlotte Amalie High School to raise attention to the conditions present since the Hurricane, highlighting the public's immediate interest in allowing ODR to begin remediation as soon as possible. *Id.*

"On the element of public interest, Virgin Island courts should seek to prevent the parties from halting specific acts presumptively benefitting the public until the merits can be reached and a determination made as to what justice requires." *Wrensford v. V.I. Gov't Hosp. & Health Facilities Corp.*, 2024 VI SUPER 12, ¶ 67 (V.I. Super. Mar. 1, 2024) (internal punctuation omitted). Given the urgent need for reliable health services and education facilities alone, Hill cannot credibly argue that the element of public interest weighs in its favor. Hill's argument that the public's confidence in the procurement process is important does not withstand the public's clear expressed interest in reconstructing essential public facilities as efficiently and expeditiously as possible.

[7] Retrieved from https://dpnr.vi.gov/wp-content/uploads/2023/01/Part-2-CAHS-CZM-FCD-LETTER-New-Build.pdf.
[8] Retrieved from https://newsfeed.wtjx.org/2024-08-29/teachers-at-cahs-walk-out-of-their-classrooms-bring-attention-to-extreme-noxious-mold-conditions.

II. Conclusion

For the foregoing reasons, Hill's Motion for a Temporary Restraining Order, Preliminary Injunction, and Declaratory Relief must be denied in full.

Dated: September 19, 2024

/s/ David A. Bornn
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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of September 2024, the preceding document and corresponding exhibits were filed electronically with the Clerk of Court using the CM/ECF system, which will send notifications of this filing to all who have made appearances.

/s/ David A. Bornn
David A. Bornn