

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

WEST VIRGINIA RADIO CORPORATION,
a corporation,

Plaintiff,

vs.

//

CIVIL ACTION NO. 13-C-468
(BCD Judge Thomas C. Evans, III)

WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS, WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., WEST VIRGINIA MEDIA
HOLDINGS, LLC, ANDREW A. PAYNE, III, DAVID
B. ALVAREZ, ALBERT BRAY CARY, JR., RALPH
BALLARD, RICHARD BALLARD, OLIVER LUCK,
JAMES P. CLEMENTS, and IMG COLLEGE, LLC,

Defendants.

ORDER

(Re: "Plaintiff West Virginia Radio Corporation's Motion for Partial Summary Judgment as to Certain Relief Sought in Count I of Plaintiff's Complaint: Voidance of West Virginia University and IMG College, LLC's Contract Regarding The Third-Tier Media Rights")

Pending before the Court for decision is the referenced Motion for Partial Summary Judgment ("Motion"), filed by West Virginia Radio Corporation ("WV Radio").

Defendants West Virginia University Board of Governors ("WVU BOG") and IMG College, LLC ("IMG") have separately filed Responses in Opposition to the Motion filed by WV Radio¹, and WV Radio has filed its Reply thereto.

¹ Defendants Clements, Defendant Luck, and Defendant Alvarez have joined in *WVU BOG's Response in Opposition* to WV Radio's Motion for Partial Summary Judgment.

In deciding this Motion, the Court has considered the pleadings, the Motion and brief in support, the responses thereto, and the reply, and exhibits to the foregoing, as submitted by WV Radio, WVU BOG, and IMG, together with argument thereon presented at a hearing.

For the reasons set forth herein, the Court is of the opinion that the motion for summary judgment must be denied.

PROCEDURAL STATEMENT

1. This is a civil action in which "The West Virginia University Board of Governors, its members, and WVU officers, employees or agents acting within the scope of their employment, among others, are party defendants." (See Verified and Supplemental Amended Complaint, ¶ 15.)
2. Count I is a claim for relief in mandamus through which WV Radio seeks, among other things: a declaration that any contract entered into by West Virginia University ("WVU") and IMG is void.
3. On February 17, 2014, WV Radio filed its Motion, seeking to void the Agreement to License West Virginia University Athletic Properties ("Agreement to License"), dated July 11, 2013, entered into by and between WVU BOG and IMG.
4. Specifically, WV Radio's Motion seeks declarations, as matters of law: (1) that the WVU BOG-IMG Agreement to License is void as a matter of law due to the systemic violations of WVU Procurement Rules in the Third-Tier Media Rights process; or, alternatively, (2) that the WVU BOG-IMG Agreement to License is void as a matter of law because certain Insider Defendants had, and apparently still possess, a direct

financial interest in the Third-Tier Media Rights contract, in contravention of the West Virginia Ethics Act.

5. After extensive briefing, on May 23, 2014, the Court heard oral argument from counsel for WV Radio, WVU BOG, and IMG on the issues raised by the Motion and all related pleadings. Counsel for the remaining Defendants were in attendance at the hearing, but did not address the merits of the pending Motion or other substantive matters.

6. During oral argument, the Court inquired as to whether revenue-generating higher education contracts contracted for, or procured by, WVU are within the statutory purview of W. Va. Code § 18B-5-4, such that the remedial clause authorizing voidance as an appropriate remedy, located specifically at W. Va. Code § 18B-5-4(n), is applicable and, when applied, voids the Agreement to License as a matter of law premised upon the arguments advanced by WV Radio in the Motion.

7. The Court directed WV Radio, WVU BOG, and IMG to submit proposed orders discussing and dispositively addressing: (1) the application of W. Va. Code § 18B-5-4, et seq., to revenue-generating higher education contracts contracted for or procured by WVU; and (2) whether the Agreement to License is void as a matter of law.

8. As an additional preliminary, procedural matter, the Court **FINDS**, as more fully set forth in the transcript of the hearing on the Motion, that there are genuine issues of material fact that preclude entry of summary judgment on the ground that certain Insider Defendants, specifically Defendants Payne and Alvarez, possessed improper interests in a government procurement contract, through their holdings in

Defendant West Virginia Media Holdings (“WV Media”), such that the Agreement to License is void as a matter of law. Accordingly, the Court will not presently address that argument herein; the motion for summary judgment is denied on that alternative ground.

STATEMENT OF UNDISPUTED MATERIAL FACTS

9. On June 8, 2012, WVU publicly released Request for Proposals 90002782X, (“RFP 90002782X”) seeking to generate income through the management, servicing, and licensure of specified sponsorship and media assets via a licensing agreement, whereby an outside vendor would manage and otherwise service specific sponsorship and media assets related to WVU Athletics.

10. Historically, WVU had managed, sold athletic sponsorship, and otherwise serviced media assets owned by WVU through the Mountaineer Sports Network (“MSN”), a division of the West Virginia University Department of Intercollegiate Athletics. (See Office of the Attorney General’s Report on West Virginia University Multimedia Rights, dated April 15, 2013, at 2-3, Exhibit 3 to Defendant IMG College, LLC’s Response in Opposition to the Motion.)

11. WVU published Request for Proposals 90002782X to seek a provider of multimedia and marketing services for the University. As the face of RFP 90002782X states, it was seeking proposals from offerors “to provide Multi-Media and Marketing Services....” (RFP 90002782X at 1, Exhibit 2 to Defendant IMG College, LLC’s Response in Opposition to the Motion (emphasis added); see also *id.* at 12 [“selected/invited

offerors are required to submit a Proposal for conducting activities and delivering the services specified within the RFP specifications (emphasis added)]; *id.* at 21 [“If you are the selected Firm, you shall be expected to create and develop your own distribution plan for broadcast, distribution, and promotion of the radio and television programming, corporate sponsorship, signage, Internet advertising, game program sales, and related promotion and broadcasts currently being provided by and/or coordinated with WVU. The selected firm shall be responsible for all aspects of this service.” (emphasis added)].

12. By October 2, 2012, WVU had received six responsive proposals to RFP 90002782X, including proposals from WV Radio and IMG. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 7.)

13. WVU ultimately selected IMG as the “winner” of RFP 90002782X, and on January 13, 2013, sent a letter of intent to contract to IMG. (*Id.*)

14. After delivery of the letter of intent to contract, John R. Raese, a co-owner of WV Radio, corresponded on several occasions with Defendant Clements and WVU BOG raising concerns about the integrity of RFP 90002782X. (*Id.* ¶ 8.)

15. On February 20, 2013, WVU suspended negotiations with IMG. (*Id.*)

16. On March 5, 2013, WVU retained the West Virginia Office of the Attorney General to assist in its internal review of the propriety of RFP 90002782X and to examine the allegations raised by WV Radio and John R. Raese. (*Id.* ¶ 9.)

17. On March 15, 2013, WV Radio placed WVU on notice of its intent to have all grounds for protest related to RFP 90002782X heard at a formal, administrative

hearing. (See Mar. 15, 2013 Letter from Frank E. Simmerman, Jr. to Brenda Mowen, Exhibit 5 to Plaintiff's Reply in Support of its Motion.)

18. On April 15, 2013, the West Virginia Office of the Attorney General published its Report on West Virginia University's Multimedia Rights ("AG's Report"). The AG's Report was a limited disclosure, the parameters and content of which WVU controlled. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 9.)

19. The AG's Report admitted violation of procurements laws and regulations by WVU BOG Member/Defendant Alvarez, WVU BOG Chairman/Defendant Payne, and Defendant Luck in his capacity as WVU Athletic Director. (Id.)

20. Per the AG's investigation, "multiple individuals within the WVU Office of Procurement, Contracting, and Payment Services maintained that revenue-generating contracts are subject to the Procurement rules and statute." (See Office of the Attorney General's Report on West Virginia University Multimedia Rights, dated April 15, 2013, at 11, Exhibit 3 to Defendant IMG College, LLC's Response in Opposition to the Motion.) Additionally, the AG's Report observed that WVU, having decided to proceed by a competitive Request for Proposals process, was bound by the West Virginia Procurement Rules. (Id.)

21. At the AG's recommendation, on April 15, 2013, WVU announced that it would cancel RFP 90002782X and rebid the contract *without limiting the participation of Defendants WV Media or IMG in the rebid process*. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 9.)

22. On April 19, 2013, WV Radio filed a formal procurement protest to RFP 90002782X. (Id. ¶ 10.) The Protest was a challenge to: (1) the integrity of the Media Rights RFP; and (2) WVU's purportedly unfettered right to cancel an RFP process and re-bid the Third-Tier Media Rights and therein allow tainted entities, specifically Defendants WV Media and IMG, to participate. (Id. ¶¶ 10, 11; see also Protest of RFP 90002782X at 7-13, Exhibit 1 to Plaintiff West Virginia Radio Corporation's Memorandum in Support of its Motion.)

23. WV Radio, in its Protest of RFP 90002782X, requested a hearing on the merits of its Protest. (See Protest of RFP 90002782X at 14, Exhibit 1 to Plaintiff West Virginia Radio Corporation's Memorandum in Support of its Motion.)

24. WVU, however, summarily denied WV Radio's formal procurement protest without a hearing, notwithstanding WVU's Procurement Rules requiring such a hearing. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 11.)

25. On May 14, 2013, WVU published RFP 90003005 related to its Third-Tier Media Rights. (Id. ¶ 12.)

26. On May 16, 2013, WV Radio filed a Request for Reconsideration of its formal procurement protest to RFP 90002782X. (Id.) WVU also summarily denied WV Radio's Request for Reconsideration without a hearing. (Id.)

27. On June 12, 2013, WV Radio exercised its administrative right and filed a protest to RFP 90003005 with the West Virginia University Office of Procurement. (See Protest of RFP 90003005, Exhibit 4 to Plaintiff West Virginia Radio Corporation's Memorandum in Support of its Motion.)

28. In its Protest of RFP 90003005, WV Radio affirmatively alleged as follows:
“Based upon Protestor’s review, it is Protestor’s position that Request for Proposal 90003005 was ‘tailored’ to cater to one exclusive Proposer/Bidder and its subcontractor: IMG College and WV Media. As such, Request for Proposal 90003005 is an entirely improper Proposal that further frustrates and taints the procurement process and evidences WVU’s systemic non-compliance with its own procurement rules.” (Id. at 5.)

29. In its June 12, 2013 Protest, WV Radio again requested a hearing on the merits of its administrative Protest. (Id.)

30. On July 8, 2013, WV Radio’s Request for Reconsideration was refused and no hearing was provided. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 11; see also July 8, 2013 Daniel A. Durbin Letter to Frank E. Simmerman, Jr., Exhibit 6 to Plaintiff West Virginia Radio Corporation’s Memorandum in Support of its Motion.)

31. On June 19, 2013, WV Radio filed a Verified Complaint in the Circuit Court of Monongalia County, West Virginia, asserting various legal theories against the Defendants.

32. Faced with litigation challenging the legal validity of any contract entered into pursuant to the Third-Tier Media Rights procurement process involving IMG and WV Media, WVU BOG and IMG proceeded to execute the Agreement to License on July 11, 2013, whereby WVU BOG granted Defendant IMG and Defendant WV Media the right to manage, sell, and otherwise service the majority of WVU’s athletic sponsorship and media assets, i.e., its Third-Tier Media Rights, pursuant to a revenue-generating

contract. (Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 13; see also WVU-IMG College, LLC Agreement to License executed July 11, 2013, Exhibit 8 to IMG College, LLC's Response in Opposition to the Motion; July 11, 2013 IMG College Press Release, Exhibit 7 to Plaintiff West Virginia Radio Corporation's Memorandum in Support of its Motion.)

33. WVU BOG, by and through Narvel Weese, the WVU Vice-President of Administration and Finance, and on behalf of its Department of Intercollegiate Athletics, entered into the Agreement to License with IMG. (See WVU-IMG College, LLC Agreement to License, Exhibit 8 to IMG College, LLC's Response in Opposition the Motion.)

This Agreement to License is a revenue-generating, public procurement contract entered into by and between WVU BOG and IMG, whereby WVU acquired an outside vendor, IMG, to provide WVU with multimedia and marketing services to WVU.

By entering into the Agreement to License, WVU acquired "a multimedia partner to serve the university and its fans." (Defendant IMG College, LLC's Response in Opposition to the Motion, at 1).

In exchange for the conveyance of those multimedia and sponsorship rights, IMG is required to pay WVU at least \$86.5 million over the initial 12-year term of the License Agreement.

34. The Agreement to License, entered into by WVU BOG and IMG on July 11, 2013, contains the following:

- A. WVU, as licensor, grants unto IMG, the licensee, during the term of the license, the exclusive worldwide right and license to produce, sell, broadcast, rebroadcast and make any other use of all audio broadcasts, play by play descriptions and transmissions (live, contemporaneous and/or delayed) with respect to University Athletic Events (as defined in the agreement) or Coaches' Show, including any pre-season, half-time and post-game coverage), whether over the radio, Internet, world-wide web, satellite radio or any other medium. WVU acknowledged that IMG's license included the right to sell all Sponsorships and advertising associated with the broadcasts. See Agreement to License, pp. 12 and 13.
- B. WVU, as licensor, grants unto IMG, the licensee, the exclusive worldwide right and license to produce, sell, market and distribute all publications and written materials set forth in exhibits to the agreement, including the right to sell all Sponsorships and Advertising associated with such publications and written materials. *Id.*, at p. 13.
- C. WVU, as licensor, grants unto IMG, the licensee, the exclusive right and license to sell Advertising and promotional signage for areas, Sponsorship display/platforms available as of the Effective Date in and around stadiums, coliseums, arenas, and facilities. *Id.* at p. 13
- D. WVU, as licensor, grants unto IMG, the licensee, the exclusive worldwide right and license to produce, sell, broadcast, rebroadcast and make any other use of audio/video game broadcasts, coaches' shows and periodic

highlight/talk shows and other television programming (“Telecasts”) for University’s Athletic Teams, as described in exhibits, including the right to sell all Sponsorships and Advertising associated with such Telecasts. Id., at p. 14.

- E. WVU, as licensor, grants unto IMG, the licensee, the exclusive worldwide right to those promotional and hospitality opportunities, as well as University’s official digital platform rights, as described in the exhibits made a part of the agreement. Id.

The Agreement to License obligates IMG to provide the following services to WVU for a term that expires June 30, 2025, unless earlier terminated or extended for up to ten (10) additional years: (1) production, sale, broadcast, rebroadcast, and management of WVU Athletics’ radio assets, including production, sale and management of radio in all forms, *i.e.*, game broadcasts, coaches shows, daily report, special programming, streaming, satellite, etc., to specifically include sale of all sponsorships and advertising associated with WVU Athletic broadcasts; (2) production, sale, and management of WVU Athletics’ television assets, including production, sale, and management of live telecasts, pay-per-view, coaches shows, replays, special programming, etc.; (3) production, sale, and management of WVU Athletics’ print publications, including game day publications, roster cards, schedule cards, posters, signage at athletic venues, internet/digital publications, official athletic website and coaches websites, audio/video streaming subscriptions, auctions, podcasts, photo store, apps, social media, etc.; (4) production and management of at-event impact, *i.e.*, on-site

promotions, displays, sampling, etc.; (5) production and management of game entitlements, i.e., title and presenting sponsorships; and (6) management of WVU Athletic hospitality/tailgate areas.

Certain WVU Athletic assets and categories of rights are expressly excluded from the rights that the Agreement to License requires IMG to service. (WVU-IMG College, LLC Agreement to License at 12-16, 26, Exhibit 8 to IMG College, LLC's Response in Opposition the Motion.)

35. Additionally, pursuant to the Agreement to License, WVU is obligated to make expenditures including "Two Million Five Hundred Thousand Dollars (\$2,500,000) in support of new, revenue generating assets... as soon as reasonably possible for use by the Parties," and "in addition to the Initial Capital Improvements, on or before August 1, 2019,... invest and expend at least Three Million Five Hundred Thousand Dollars (\$3,500,000) on supplemental capital improvements... which will present revenue generating assets to be utilized as part of the Licensed Rights." (See WVU-IMG College, LLC Agreement to License at 31, Exhibit 8 to IMG College, LLC's Response in Opposition the Motion.) The afore-described capital expenditures "shall result in equipment that is owned, insured and maintained by" WVU. (Id.)

36. WVU BOG concedes that the process relating to the management and sale of its sponsorship and media assets, i.e., WVU's Third-Tier Media Rights, was subject to the procurement rules and procedures of WVU (the "Procurement Rules"). [Order Entered Nov. 22, 2013, Statement of Undisputed Material Facts, ¶ 16 (emphasis added)].

CONCLUSIONS OF LAW

37. In considering a motion filed pursuant to West Virginia Rule of Civil Procedure 56, the West Virginia Supreme Court has stated that, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Aetna Cas. & Sur. Co., v. Fed. Ins. Co., 148 W. Va. 160, 171 (1963).

38. A dispute about a material fact is "genuine only when a reasonable jury could render a verdict for the non-moving party if the record at trial were identical to the record compiled in the summary judgment proceeding before the trial court." Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W. Va. 692, 698 (1996).

39. Summary judgment is designed to effect expedient resolution of controversies on the merits without resort to a protracted trial if there is essentially no real dispute as to salient facts or if a dispute purely involves a question of law. HN Corp v. Cyprus Kanawha Corp., 195 W. Va. 289, 293 (1995).

40. Interpreting a West Virginia statute, administrative rule, or regulation presents a purely legal question. Syl. Pt. 2, W. Va. Univ. Bd. of Governors v. W. Va. Higher Educ. Pol. Comm'n, 221 W. Va. 187 (2007).

41. The Plaintiff maintains that the July 11, 2013, Agreement to License is void, because it was entered into by WVU in violation of WVU's own procurement rules. For the remedy of a declaration that the Agreement to License is void, the Plaintiff relies on *W. Va. Code 18B-5-4(n)*, which provides as follows:

§ 18B-5-4. Purchase or acquisition of materials, supplies, equipment, services and printing

....

(n) If the governing board, council or commission purchases or contracts for materials, supplies, equipment, services and printing contrary to sections four through seven of this article or the rules pursuant to this article, the purchase or contract is void and of no effect.

Plaintiff maintains that Agreement to License is a contract for services and, therefore, subject to the provisions of this statute; however, Defendant IMG maintains that because the Agreement to License is a "revenue-generating contract," *W. Va. Code 18B-5-4*, and the procurement rules promulgated pursuant to it, are wholly inapplicable.

The relevant provisions of this statute are as follows:

§ 18B-5-4. Purchase or acquisition of materials, supplies, equipment, services and printing

(a) The council, commission and each governing board shall purchase or acquire all materials, supplies, equipment, services and printing required for that governing board or the council or commission, as appropriate, and the state institutions of higher education under their jurisdiction, except the governing boards of Marshall University and West Virginia University, respectively, are subject to subsection (d) of this section.

(b) The commission and council jointly shall adopt rules governing and controlling acquisitions and purchases in accordance with this section. The rules shall ensure that the following procedures are followed:

....

(5) Bids are advertised on all purchases exceeding \$25,000, and made by means of sealed or electronically-submitted bids and competitive bidding or advantageous

purchases effected through other accepted governmental methods and practices.

Competitive bids are not required for purchases of \$25,000 or less. (emphasis added)

....

(d) Pursuant to this subsection, the governing boards of Marshall University and West Virginia University, respectively, may carry out the following actions:

(1) Purchase or acquire all materials, supplies, equipment, services and printing required for the governing board without approval from the commission or the Vice Chancellor for Administration and may issue checks in advance to cover postage as provided in subsection (f) of this section;

(2) Make purchases from cooperative buying groups, consortia, the federal government or from federal government contracts if the materials, supplies, services, equipment or printing to be purchased is available from these groups and if this would be the most financially advantageous manner of making the purchase;

(3) Select and acquire by contract or lease all grounds, buildings, office space or other space, and capital improvements, including equipment, if the rental is necessarily required by the governing board; and

(4) Use purchase cards under terms approved for the commission, the council and governing boards of state institutions of higher education and participate in any expanded program of use as provided in subsection (u) of this section.

(e) The governing boards shall adopt sufficient accounting and auditing procedures and promulgate and adopt appropriate rules subject to section six, article one of this chapter to govern and control acquisitions, purchases, leases and other instruments for grounds, buildings, office or other space, and capital improvements, including equipment, or lease-purchase agreements. (emphasis added)

....

(g) When a purchase is to be made by bid, any or all bids may be rejected. However, all purchases based on advertised bid requests shall be awarded to the lowest responsible bidder taking into consideration the qualities of the articles to be supplied, their conformity with specifications, their suitability to the requirements of the

governing boards, council or commission and delivery terms. The preference for resident vendors as provided in section thirty-seven, article three, chapter five-a of this code applies to the competitive bids made pursuant to this section. (emphasis added)

(h) The governing boards, council and commission shall maintain a purchase file, which shall be a public record and open for public inspection.

(1) After the award of the order or contract, the governing boards, council and commission shall indicate upon the successful bid the following information:

(A) Designation as the successful bid;

(B) The reason any bids were rejected; and

(C) The reason for rejection, if the mathematical low vendor was not awarded the order or contract. (emphasis added)

W. Va. Code § 18B-5-9. Higher education fiscal responsibility, provides in pertinent part as follows:

(n) The governing boards of Marshall University and West Virginia University, respectively, each shall promulgate a rule on purchasing procedures in accordance with section six, article one of this chapter.

42. The court has not been cited to any case of the W. Va. Supreme Court of Appeals that constitutes precedent for resolution of the issue of whether W. Va. Code 18B-5-4 applies to "revenue-generating contracts." The court has considered the few cases from other jurisdictions that have decided whether "revenue-generating contracts" are subject to statutes providing for competitive bidding in relation to public contracts. The court has also considered familiar West Virginia statutory rules of construction relative to our statutes.

43. The relief WVRC seeks - - to have the Agreement to License declared void under W. Va. Code § 18B-5-4(n) - - requires the Court to apply West Virginia's traditional rules of statutory construction, the primary role of which is "to ascertain and give effect to the intention of the Legislature." Syl. Pt. 2, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 647 S.E.2d 920 (2007). "When the language chosen by the Legislature is plain, [the Court will] apply, rather than construe, such legislative language." *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 351, 624 S.E.2d 783, 788 (2005). "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Phillips*, 220 W. Va. at 491, 647 S.E.2d at 927. The Court cannot "read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, [they] are obliged not to add to statutes something the Legislature purposely omitted." *Id.* (quoting *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)) (first alteration in original). "Any subsequent policy changes must come from the Legislature itself and, in the absence of constitutional or statutory authority to the contrary, [the Court] has no blanket power to recast the statute to meet its fancy." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 126, 464 S.E.2d 763, 768 (1995).

44. To begin, the July 11, 2013, Agreement to License, which the court is asked to declare void, constitutes in large measure an assignment or sale of property rights to IMG for the duration of the license. It is an exclusive license, with minor exceptions

that are set out therein. WVU BOG cannot grant a license for these same rights to another during the license period and WVU BOG can no longer, itself, market its multi-media third-tier rights.

In Modern Licensing Law § 5:4, Raymond T. Nimmer and Jeff C. Dodd, Type of transaction—Licenses: exclusive and nonexclusive, the following appears:

“In contrast, as suggested by the word “exclusive,” an exclusive license ordinarily entails a commitment by the licensor that it will not engage in additional licensing covering the same informational subject matter within the same scope of application. In many cases, an exclusive license more resembles an assignment than it does a nonexclusive license. In copyright law, indeed, exclusive licenses are defined as a “transfer” of ownership of the copyright. []

“There are other implicit consequences of an “exclusive” license. For example, granting an “exclusive” license may mean that the licensor itself is precluded from using the licensed subject matter within the scope and conditions of the exclusive license. At least potentially, then, the license may be exclusive as to all parties. Whether or when that occurs depends on the intellectual property covered by the license and, of course, the terms of the contract.[] UCITA, which follows general common law on this point, states that:

“A grant of an “exclusive license,” or a grant in similar terms, means that:

(A) for the duration of the license, the licensor will not exercise, and will not grant to any other person, rights in the same information or informational rights within the scope of the exclusive grant; and

(B) the licensor affirms that it has not previously granted those rights in a contract in effect when the licensee's rights may be exercised.[]

“These are interpretive or default rules, subject to any contrary agreement of the parties. In general, however, when an exclusive license contains this type of exclusivity commitment, it very closely resembles an assignment as to the rights covered. The

presumption that no right to use is retained under an assignment is an ordinary concomitant of a sale of rights.[]

45. Indicia in the plain reading of this statute that lead the court to conclude that revenue-generating contracts are not within the contemplation of the statute, are as follows:

1) Subsection (g) of *W. Va. Code 18B-5-4* provides that “[w]hen a purchase is to be made by bid, any or all bids may be rejected. However, all purchases based on advertised bid requests shall be awarded to the lowest responsible bidder.”

A revenue-generating contract is ordinarily awarded to the “highest” responsible bidder. The statute does not state that revenue-generating contracts are an exception to the “lowest responsible bidder” standard. Revenue-generating contracts are not mentioned in the statute.

In *Double Eagle Golf, Inc. vs. City of Portland*, 322 Or. 604, 910 P.2d 1104 (1996), the Supreme Court of Oregon interpreted a statute that required that a public contracting agency award a public contract to the “lowest responsible bidder.” The court held that the competitive bidding statute was inapplicable to the award of a concession contract, the primary purpose of which was to raise revenue for the agency. The court stated that had the legislature intended to regulate the procedures for awarding revenue-generating, concession contracts by public contracting agencies, it could easily have done so and did not.

2) The Legislature intended that only purchases in excess of \$25,000 be subject to competitive bidding. The rules to be promulgated are required to provide that “[c]ompetitive bids are not required for purchases of \$25,000 or less.” See *W. Va. Code 18B-5-4(b)(5)*.

With a revenue-generating contract, WVU BOG is not “purchasing” goods or services. No money is paid by WVU to IMG for the services that are subject to the Agreement to License.

In *Pair-A-Dice Acquisition Partners, Inc., vs. Board of Trustees of the Galveston Wharves*, 185 F. Supp.2d 703 (SD Texas)(2002), the United States District Court held that the Texas competitive bidding laws did not apply in a situation where a municipality requested proposals for a revenue-generating agreement that did not call for expenditures by the municipality. The District Court held that the Texas competitive bidding statute applied solely to situations where the municipality was going to expend more than \$25,000.00 in connection with the purchase or acquisition.

3) When considered in the context in which it is used in *W. Va. Code 18B-5-4*, “contracts” unambiguously refers to contracts for purchases and acquisitions.

46. WVU Procurement Rules (2006) appear to include provisions relating to revenue-generating contracts such as the Agreement to License. WVU Procurement Rule 5.3.5.4 provides that, “[i]n situations where vendors are competing to provide a service that will generate income for an institution, the award shall be made to the highest responsible and responsive bidder, taking into consideration the factors in clause 5.3.5.1.” These rules appear to have promulgated pursuant to *W. Va. Code 18B-*

5-1 et seq. Plaintiff posits that the Agreement to License should be held void under W. Va. Code 18B-5-4(n), because of undisputed violations of the procurement rules relating to revenue-generating contracts, and W. Va. Code 18B-5-4(n), which requires that contracts made in violation of the statute or the rules promulgated pursuant to Article 5, be declared void.

Under West Virginia law, however, rules cannot enlarge statutory enactments. See Syl. Pt. 4, *Callaghan v. W. Va. Civil Serv. Com'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980) (“Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.”).

Since the Court has determined that W. Va. Code §§ 18B-5-4 through -7 do not, as a general rule, apply to revenue-generating contracts, there can be no statutory basis in those sections for the adoption and application of broad-based, procurement rules for revenue-generating contracts.

However, the plain language of W. Va. Code § 18B-5-4(n), where the remedy of avoidance appears, refers to “purchases or contracts [] contrary to [] the rules pursuant to this article.” W. Va. Code § 18B-5-4(n) (emphasis added). Accordingly, the Court must determine whether the remaining sections in Chapter 18B, Article 5 provide a basis for the adoption and application of broad-based procurement rules for revenue-generating contracts.

Only section nine (18B-5-9), entitled “Higher education fiscal responsibility,” merits closer scrutiny. Section nine primarily concerns accounting and auditing

requirements. *W. Va. Code § 18B-5-9*. It references opportunities for revenue-generation in the context of services provided by the governing boards, and then only with respect to consolidation of purchasing and administrative practices and the supply of natural resources and alternative fuel resources. *Id.* Additionally, although section nine requires WVU BOG to promulgate certain rules, the language of the statute plainly refers only to “a rule on purchasing procedures.” *W. Va. Code § 18B-5-9(n)*. Section nine does not establish statutory authority for adoption of broad-based rules governing revenue-generating contracts, primarily because those revenue-generating contracts do not require that WVU “purchase” or expend money, which is how the term “purchasing” is used throughout Article 5.

The Court concludes that, with limited and inapplicable exceptions, Chapter 18B, Article 5 does not create a statutory basis for the adoption and application of broad-based rules applicable to revenue-generating contracts.

Accordingly, to the extent that WVU has adopted broad-based procurement rules for revenue-generating contracts, the Court concludes that those cannot be “rules under [Chapter 18B, Article 5].” *See W. Va. Code § 18B-5-4(n)*. Thus, the WVU Procurement Rules cannot be applied pursuant to *W. Va. Code § 18B-5-4(n)* to void the Agreement to License.

The Court finds support for its conclusion in the Supreme Court of Appeals decision in *Maikotter v. Univ. of W. Va. Bd. of Trs./W. Va. Univ.*, 206 W. Va. 691, 527 S.E.2d 802 (1999). The plaintiff-appellant in *Maikotter*, Eva Diane Maikotter, was a classified, non-exempt (i.e., hourly) employee of WVU who sued when WVU rejected

her application to transfer into a classified, exempt (i.e., salaried) position and instead hired an outside individual. *Id.* at 693, 527 S.E.2d at 804. Ms. Maikotter argued that the statute permitted a classified, non-exempt employee (such as herself) to transfer into any “job opening,” and WVU improperly altered the statutory language when its rules permitted only classified, non-exempt employees to transfer into other non-exempt positions. *Id.* at 695, 527 S.E.2d at 806. The *Maikotter* court agreed with Ms. Maikotter’s position, holding that “had the members of the Legislature wished to limit or describe the types of ‘job openings’ affected, they had ample opportunity; they did not, and it is for neither WVU, nor this Court, to insert words into the statute.” *Id.* at 696, 527 S.E.2d at 807. Moreover, it refused to alter its conclusion despite finding that the plain language of the statute had the potential to cause difficulty for WVU. *Id.* at 696-97, 527 S.E.2d at 807-08. It held that “[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency’s rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.” *Id.* at 696, 527 S.E.2d at 806.

Like the *Maikotter* court, this Court is bound to apply the statutory language. Chapter 18B, Article 5 does not create a statutory basis for the adoption and application of broad-based rules applicable to revenue-generating contracts. Accordingly, no rules exist under Article 5 that could be invoked to void the License Agreement. *See W. Va. Code § 18B-5-4(n)*.

Based on the foregoing, it is therefore **ORDERED** that the pending Motion for Partial Summary Judgment be **DENIED**.

This ruling merely provides that the Agreement to License will not be rescinded, or held to be void, under the voidance provisions of W. Va. Code 18B-5-4(n).

The objections and exceptions of the Plaintiff are noted and preserved.

The clerk shall forward true copies of this Order to the attorneys of record herein.

All of which is **ORDERED**, accordingly.

ENTER: July 24, 2014



Thomas C. Evans, III, Circuit Judge
Business Court Division
State of West Virginia