DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th Street, Boulder, CO 80302 (303) 441-3750 CERES ENVIRONMENTAL SERVICES, INC., **Plaintiff**, v. BOULDER COUNTY, a county of the State of Colorado; BOARD OF COUNTY COMMISSIONERS, COUNTY OF BOULDER; MATT JONES, CLAIRE LEVY, and MARTA LOACHAMIN, in their official capacity as members of the Boulder County Board of County Commissioners., **Defendants**. Attorneys for Defendants: David Hughes, Deputy County Attorney, #24425 Catherine R. Ruhland, Deputy County Attorney, #42426 BOULDER COUNTY ATTORNEY P.O. Box 471, Boulder, CO 80306 Phone No.: 303-441-3190 | Fax No.: 303-441-4794 dhughes@bouldercounty.org truhland@bouldercounty.org	▲ COURT USE ONLY ▲ Case Number: 2022CV30207 Div.: COC

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants Boulder County, Board of County Commissioners of Boulder County, Colorado and Commissioners Matt Jones, Claire Levy, and Marta Loachamin, in their official capacities ("the County") request an order dismissing Plaintiff's Complaint with prejudice pursuant to C.R.C.P. 12(b)(1) and C.R.C.P. 12(b)(5). In support, the County states as follows:

Conferral

On April 12, 2022, counsel for the County conferred with counsel for Ceres Environmental Services, Inc. ("Ceres") regarding this Motion. Ceres objects to the relief requested in this Motion.

Background

Grass wildfires and straight-line winds of epic proportions beginning on December 30, 2021 resulted in severe damage and total loss of residential homes and commercial buildings in unincorporated Boulder County, the City of Louisville, and the Town of Superior, Colorado (the "Marshall Fire"). The fire destroyed more than 1,000 homes. (Am. Compl. ¶ 12.) The sheer amount of destruction from the Marshall Fire resulted in debris that must be removed so that the fire survivors can begin rebuilding their homes and their lives. (*See id*.) Shortly after the fire, Boulder County, in coordination with the State of Colorado, the Federal Emergency Management Agency ("FEMA"), Superior, and Louisville, began a process to establish a private property debris removal program ("PPDR") intended to benefit fire survivors and the surrounding community. (Ex. 1 to Am. Compl. p. 2).

The County solicited bids and underwent a comprehensive evaluation process to select a vendor to perform PPDR on up to 1000 private properties destroyed by the unprecedented Marshall Fire. (*See* Ex. 1 to Am. Compl. pp. 1-6.) The County evaluated the bids based on its four outlined criteria – project cost (50%), timeline (20%), past experience and similar projects (20%), and references (10%). (Am. Compl. ¶ 28.) Ceres, a Florida for-profit corporation (Am. Compl. ¶ 5; Ex. 1 to Am. Compl. p. 9), was one of eleven companies that bid on the project, but it was not selected as a finalist. (Am. Compl. ¶¶ 29, 33; Ex. 1 to Am. Compl.pp. 2-3.)). Instead,

the County selected DRC Emergency Services, LLC ("DRC") as the winning bidder. Not only was DRC's proposal the most competitively priced (Ex. 1 to Comp. at 4), but Ceres' total estimated total project costs were almost 30% higher than DRC and higher than 5 other bidders. (Marshall Fire Score Sheet retrieved from https://assets.bouldercounty.org/wp-content/uploads/2022/02/marshall-fire-rfp-Final-Total-Score-and-Bid-Tab.pdf). Ceres appealed the award of the bid to the Board of County Commissioners (the "Board"), but the Board denied the appeal. (Am. Compl. ¶¶ 48-49). The County later awarded the contract to DRC, and DRC has begun debris clean-up under the contract. Ceres now seeks to stop this critical recovery work by invalidating Boulder County's contract with DRC. (Am. Compl. p. 16). As shown below, the Court has no jurisdiction to hear this case and Ceres had failed to state a claim for relief.

Argument

I. Standard of Review

A. C.R.C.P. 12(b)(1)

Standing and ripeness are threshold jurisdictional prerequisites. *See Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004); *Wibby v. Boulder Cty. Bd. of Cty. Comm'rs*, 2016 COA 104, ¶ 9, *cert. denied,* No. 2016SC640, 2016 WL 7336782 (Colo. Dec. 19, 2016); *Dicocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314 (Colo. App. 2006). Once raised, standing must be determined prior to a decision on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.,* 2014 CO 77, ¶ 7. If a court determines that standing does not exist, it must dismiss the case. *Wimberly v. Ettenberg,* 570 P.2d 535, 539 (Colo. 1977).

Jurisdiction pursuant to C.R.C.P. 106(a)(4), ripeness, and standing implicate the Court's subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1). A plaintiff has the burden of proving

jurisdiction pursuant to C.R.C.P. 12(b)(1). *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 871 (Colo. App. 1996). If necessary, a court may make factual findings to resolve a jurisdictional issue, which will not be disturbed on appeal unless clearly erroneous. *Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1383-84 (Colo. 1997). If, as in this case, the underlying facts related to jurisdiction are undisputed, a court may resolve the issue as a matter of law. *See id*.

B. C.R.C.P. 12(b)(5)

The County seeks dismissal of Ceres's declaratory relief claim pursuant to C.R.C.P. 12(b)(5) for failure to state a claim. In ruling on a 12(b)(5) motion, a court must accept as true all fact allegations, but it is not required to accept legal conclusions as true. *Warne v. Hall*, 2016 CO 50, ¶ 9. A complaint only survives a motion to dismiss if it states a plausible claim for relief. *Id.*

II. Ceres, a Losing Bidder, Does Not Have Standing to Challenge the Contract Award

This lawsuit is "nothing but a contest between rival contractors for the patronage of [Boulder County]." *Colorado Paving Co. v. Murphy*, 78 F. 28, 31 (8th Cir. 1897). A losing bidder's lawsuit based on purported violations in the process cannot stand. *Id.* Because Boulder County's bidding process is "for the protection of the public, not the bidders," Ceres does not have standing to challenge the award. *Ewy v. Sturteveant*, 962 P.2d 991, 995 (Colo. App. 1998).

To demonstrate standing, Ceres is required to establish that (1) it suffered an injury in fact and (2) its injury was to a legally protected interest. See *Wimberly*, 570 P.2d at 538; *Ainscough*, 90 P.3d at 855-56. The first prong of the test, the injury-in-fact requirement, "maintains the separation of powers mandated by article III of the Colorado Constitution by preventing courts from invading legislative and executive spheres." *Hickenlooper*, ¶ 9. "Because

judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial 'determination may not be had at the suit of any and all members of the public.'" *Id.* (quoting *Wimberly*, 570 P.2d at 538). Thus, "an injury that is overly indirect and incidental to the defendant's action will not convey standing." *Id.* at ¶ 12 (quotations omitted). The second prong, the legally protected interest requirement, promotes judicial self-restraint. *Id.* at ¶ 10. Because there is no legal basis in either federal or state law upon which Ceres can bring a claim, Ceres does not have a legally protected interest.

A. Ceres, a third-place bidder, has not suffered an injury in fact.

Ceres does not allege that, had the County done its procurement process differently, it would have inevitably chosen Ceres as the winning bidder. Rather, Ceres only alleges without further support that "the procurement process for the Marshall fire cleanup project harmed Ceres and Colorado taxpayers by awarding the project to DRC . . ." (Am. Comp. ¶ 1.) Likewise, Ceres claims alleged procurement process violations "harmed . . . . competing bidders, like Ceres." (*Id*. ¶ 3.)[1] Finally, Ceres alleges that "[a]s a would-be winner of RFP #7301-22, Ceres has suffered irreparable harm that is sufficient to establish its standing to bring suit . . ." (*Id*. ¶ 51.) The above allegations are the only allegations related to injury in the entire Complaint, but none of them specify an injury in fact.

Ceres leaves the alleged "harm" undefined. Ceres does not allege that it suffered bodily harm, financial loss, or trespass to its property. Moreover, Ceres does not allege that it has paid a

[1] Ceres does not allege that it will suffer an injury if FEMA determines it will not obligate funds to the PPDR project. In fact, to the extent Ceres is arguing about its interests as a taxpayer, Ceres, as a federal taxpayer but not a Colorado taxpayer, would avoid expenditure of its federal taxes on the project if FEMA does not obligate the funds.

dime of taxes in Boulder County or even in the State of Colorado.[2] At best, Ceres's alleged injury is its failure to realize the profits it would have gained had it secured the bid for the PPDR project. This alleged injury is entirely speculative because Ceres was not even the second-place bidder, and Ceres does not allege (because it cannot allege) that but-for the alleged incorrect procurement conduct it would have been awarded the bid.

Like the plaintiff in *Ewy,* Ceres's sole claimed injury in fact is an alleged property interest in the award of a contract to it rather than a competitor. *Ewy*, 962 P.2d at 995. "This interest arises for the most part, according to the plaintiffs, from [its] interest in the integrity of the bidding process." *Id.* However, a losing bidder does not have property right to a public contract it was not awarded, even if there is an allegation the bidding process was improper. This is because "the public bidding process . . . is for the protection of the public, not the bidders." *Id.* Bidders, as bidders, have no standing to challenge the property of an award of a public contract." Thus, Ceres cannot meet its burden of showing it suffered an injury in fact and the Court lacks jurisdiction.

B. Ceres has no legally protected interest in the County's procurement process or federal regulations related to the award of FEMA funds.

Even assuming the conditions surrounding the County's award of PPDR contract to DRC meets the first prong of the *Wimberly* test, Ceres lacks standing because it cannot meet the second prong. "A legally protected interest may rest in property, arise out of contract, lie in tort or be conferred by statute." *Wibby*, 2016 COA 104, ¶ 12. Thus, "a court should consider whether

[2] Even if Ceres were a taxpayer, taxpayer standing must be based on alleged constitutional violations. *Rechberger v. Boulder Cty. Bd. of Cty. Comm'rs*, 2019 COA 52, ¶ 11. There are no constitutional claims in this case, and there is no allegation that the County is prohibited by the constitution or otherwise from spending taxpayer dollars on PPDR, even if those funds are not reimbursed by FEMA.

the plaintiff has asserted a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Id.* The only bases for a cause of action that Ceres cites -- section 9.1 of the Boulder County Policy Manual and sections 200.317-326 of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards– do not create a legally protected interest.

The purpose of Boulder County's Procurement policies is to ensure that "all purchases and commitments to purchase from budget funds shall be made in compliance with the Local Government Budget Law of Colorado." (Purchasing Policy 9.1 retrieved from https://assets.bouldercounty.org/wp-content/uploads/2022/02/personnel-policy-and-procedures-manual-section-9.1-purchasing-and-procurement.pdf.) These policies are "guidelines and thresholds," with the intent to "[p]rocure for the county, at the best economic and sustainable advantage, all requested goods and services of the highest quality necessary to reliably accomplish the function or service which is required." (*Id.* and Purchasing Policy 9.1(A)(1).) Nothing in the Policy or Procedures indicate they were enacted for the benefit of bidding vendors like Ceres, whose only interest is an opportunity to profit from a taxpayer funded project. Although the process allows vendors to appeal an award decision to the Board of County Commissioners, the Board has unfettered discretion to consider such an appeal, and no private right of action is specified for vendors. (Purchasing Policy 9.1(G)(9).)

The County's procurement policies are exactly the type of policies that courts have repeatedly rejected as creating a right of action in a vendor. As the Colorado Court of Appeals noted in dismissing all claims of a losing bidder in *Intermountain Systems, Inc. v. Gore Valley/Big Horn Water Districts*, 654 P.2d 872, 873 (Colo. App. 1982), the purpose of

procurement policies and regulations are "to protect property holders and taxpayers." Because the County did not create a private right of action for disappointed bidders through its procurement policies, Ceres does not have a protected legal interest under *Wimberly*. *See also L&M Enters. v. City of Golden*, 852 P.2d 1337, 1338 (Colo. App. 1993) (finding that losing bidder had no private cause of action against governmental entity).

Likewise, a disappointed bidder does not have an implied cause of action against a Colorado local government arising out of federal procurement regulations. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 200.317 to -326, does not provide Ceres with a private cause of action or grant it rights. Instead, it merely provides standards for how a federal agency—in this case FEMA—will determine whether it will fund a project—here, the Marshall Fire debris removal. *See* 2 C.F.R. § 200.320 ("A non-Federal entity must have and use documented procurement procures . . . ."). For formal procurements with sealed bids, the regulations require an adequate number of qualified sources, sufficient specifications allowing the bidder to respond, a prescribed time and place for opening the bids, and a contract award "to the lowest responsive and responsible bidder." *Id*. at (b)(1). Significantly, "any or all bids may be rejected if there is a sound documented reason." *Id.*

Nothing in 2 C.F.R. § 200.317 to -326 creates a private right of action, nor does it establish statutory rights for private bidders hoping to be awarded a federally funded contract

with a local government such as Boulder County.[3] "Federal rights are not created either by regulations 'alone' or by any valid administrative interpretation of a statute creating some enforceable right." *Brooks v. Barrett*, No. 2:18-cv-565-GMB, 2018 U.S. Dist. LEXIS 194627, at *18 (M.D. Ala. Nov. 15, 2018) (citing *Harris v. James*, 127 F.3d 993, 1008 (11th Cir. 1997)). And, to state a claim pursuant to a federal regulation, a plaintiff must show that a federal statute "confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right." *Id.* (finding that 31 U.S.C. § 503, the statute upon which the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards is based, does not confer any federal right); *see also L'ggrke v. Benkula,* 966 F.2d 1346, 1347-48 (10th Cir. 1992) (finding no implied cause of action arising out of federal statutes and regulations enforced by a federal entity); *and see Planned Parenthood of Kan. & Mid-Mo. v. Moser,* 747 F.3d 814, 824 (10th Cir. 2014) (denying private parties a right of action for an injunction under a federal statute because "there is a powerful alternative remedy available to deter and sanction violations" because the federal agency can refuse to provide funds to the State or "even clawback money [the state] has misspent.").

Ceres's assertion that it has standing pursuant to *Schaden v. DIA Brewing Co., LLC*, 2021 CO 4M, is wrong. (Ceres Am. Mot. for PI 12 n.9.) *Schaden* involved a losing bidder's claims against the winning bidder for "bid rigging, tortious interference with a prospective business opportunity, civil conspiracy, and violation of the Colorado Organized Crime Control Act." *Id.* ¶

[3] Ceres's preliminary injunction motion cites to a number of cases by losing bidders against the United States concerning federal procurement. These cases are brought pursuant to the Tucker Act, which explicitly provides that a Federal Court has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals . . . ." 28 U.S.C. § 1491(b)(1). Boulder County, its commissioners, and the other named defendants are not federal agencies. No state or federal statute grants similar causes of actions against a Colorado local government. Thus, these cases do not give Ceres standing for this claim.

8. Not only has Ceres not made bid rigging and conspiracy claims here, but it cannot because the Colorado Governmental Immunity Act bars all such claims against Boulder County and its employees. *Id.* (noting that the district court dismissed the claims against the government officials pursuant to governmental immunity); C.R.S. § 24-10-106(1) ("a public entity shall be immune from liability for all claims for injury which lie in tort or could lie in tort"). And, the *Schaden* court found that plaintiff had alleged injury in fact because but for the alleged bid rigging, the plaintiff alleged it would have won the bid. Here, Ceres alleges violations of the procurement process procedures, but it does not allege bid rigging or conspiracy (and it cannot because of governmental immunity), particularly under the heightened standard required to allege fraud. C.R.C.P. 9(b); *Schaden*, ¶ 9 (noting that plaintiff's allegations sounded in fraud and were subject to Rule 9(b).).

Therefore, Ceres did not suffer an injury to a legally protected interest under federal law and lacks standing under the second prong of the *Wimberly* test.

III. Ceres's claims regarding the potential FEMA award are not ripe.

This case is not ripe for consideration because Ceres's complaint is premised upon the allegation that "FEMA *may* refuse reimbursement for all or some of the Cleanup costs . . ." (Am. Comp. ¶ 47) (emphasis added). Notably absent from Ceres's Complaint is any allegation that FEMA has made a decision about FEMA funding. Thus, Ceres's complaint is premised on an event that has not occurred and is unlikely to occur.

Ripeness is a jurisdictional issue that may be raised under C.R.C.P. 12(b)(1). *Timm v. Prudential Ins. Co.,* 259 P.3d 521, 528 (Colo. App. 2011). As with standing, ripeness is a jurisprudential doctrine that limits the court's exercise of its power to further the separation of

powers design of Colorado government. *Bd. of Dirs. v. Nat'l Union Fire Ins. Co.,* 105 P.3d 653, 656 (Colo. 2005). Ripeness tests whether the issue is real, immediate, and fit for adjudication. *Id.* As shown below, this Court should refuse to consider the matters raised by Ceres because they are uncertain and future contingent matters that suppose speculative injury that may never occur. *See id.*

Ripeness requires that "there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). Ceres's claims are not sufficiently immediate because they depend on the outcome of a decision by a federal agency that is entirely outside of the County's control. Although Ceres claims that FEMA would be more likely to award disaster funds if the County undertook a do-over of its process, such a claim is pure speculation. Ceres cannot know the outcome of a future decision by FEMA regardless what relief the Court might order today. Thus, there is no relief that this court can issue that will conclusively resolve any alleged conflict over the outcome of a future decision by FEMA, and the case is not ripe.

IV. The Board's Decision to Deny Ceres's Appeal was Administrative and Not Subject to Rule 106(a)(4) Review

Because the Board's March 8, 2022 decision denying Ceres's appeal is administrative, not quasi-judicial, this Court does not have jurisdiction pursuant to Rule 106(a)(4) .[4] (*See* Boulder County (2022, Mar. 8) Meeting of Board of Cty. Comm'rs at Item 4.h, retrieved from

[4] The Board's award of the contract to DRC referenced in paragraph 54 of the Amended Complaint was made on February 10, 2022. (*See* Boulder County (2022, Feb. 10) Meeting of Board of Cty. Comm'rs at 2:27:15 ("Meeting"), retrieved from https://pub-bouldercounty.escribemeetings.com/Meeting.aspx?Id=df663f8c-ae0d-420d-add4-74fcf9108f0a&lang=English.) Ceres filed the Complaint on April 5, 2022, more than 28 days after the February 10, 2022 decision. *See* C.R.C.P. 106(b).

https://pub-bouldercounty.escribemeetings.com/Meeting.aspx?Id=75b1ac57-71b4-4502-8580-42e754353a11&Agenda=PostMinutes&lang=English&Item=36&Tab=attachments.) C.R.C.P. 106(a)(4) provides for judicial review of "judicial or quasi-judicial" actions by "any governmental body or officer or any lower judicial body," but does not apply to administrative or ministerial actions. *Yakutat Land Corp. v. Langer*, 2020 CO 30, ¶ 16 ("Rule 106(a)(4) actions 'are designed to permit review of quasi-judicial governmental conduct only.'" (internal citation omitted).) While there is no litmus test for whether a particular action is quasi-judicial, the central focus of the test is the nature of the governmental decision and the process by which it is reached. *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.,* 757 P.2d 622, 627 (Colo. 1988). "A quasi-judicial action is generally characterized by the following factors: (1) a local or state law **requiring** that notice be given before the action is taken; (2) a local or state law **requiring** that a hearing be conducted before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case." *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 300 (Colo. App. 2007) (emphasis added).

The Board's decision to deny Ceres's appeal and affirm the award of the bid to DRC does not contain any of the characteristics of a quasi-judicial decision. Unlike, for example, a decision to approve a land use application, no individual's protected interests are affected by awarding a contract to a particular bidder. While Ceres certainly would have received a benefit had the County awarded the bid to it, it did not receive an entitlement simply by bidding on the contract. *See* Section II(B), above.

Likewise, no preexisting legal standards exist for the award of the contract or for evaluation of the appeal. For the award determination, "[t]he BOCC [Board] reserves the right to reject any or all bids and to accept any portion of bid or all items bid, if deemed in the best interest of Boulder County." (Purchasing Policy 9.1(G)(8)(c).) For the appeal, no standards to evaluate the appeal are specified. (*See Id*. at 9.1(G)(9).)

Finally, the County procurement policies and procedures do not require notice or a hearing prior to awarding a contract. Instead, for the bid award, a written recommendation is sent by Purchasing "to the BOCC [Board] for its selection and award at a business meeting." (Purchasing Policy 9.1(G)(8)(b).) Likewise, for an appeal of a bid award "the BOCC may, at its sole discretion, permit the vendor to address its appeal in a business meeting, or may make a decision based on the written appeal and response. (Purchasing Policy 9.1(G)(9)(b).) In the event the BOCC schedules the matter for a business meeting, it will notify the vendor in writing of the date and time of such meeting." (*Id.*) Thus, a hearing on an appeal is permitted but certainly not required. Ceres does not allege that the Board conducted a hearing regarding its appeal.

The County's procurement policies show that the Board was simply making an administrative budget decision when it awarded the bid to DRC. The County, like other local governments, must make hundreds of contract decisions for the County to function, and it would be absurd to characterize each of these decisions as quasi-judicial decision appealable by any disappointed vendor. Accordingly, "[t]he adoption of budgetary items is legislative, not judicial, in character," and not subject to C.R.C.P. 106(a)(4) review. *Tisdel v. Bd. of Cnty. Comm'rs*, 621 P.2d 1357, 1360 (Colo. 1980) (noting that "clearly, the Board's adoption of a budget is not a judicial or quasi-judicial function."); *Tihonovich v. Williams*, 582 P.2d 1051, 153-54 (Colo.

1978) (finding a 106(a)(4) does not apply to a Board's budget decision because "adoption of a budget is not a judicial or quasi-judicial function, but is commonly considered to be a legislative and administrative function.")

Because the County did not make a quasi-judicial decision appealable under C.R.C.P. 106(a)(4), the Court lacks jurisdiction and it should dismiss this claim.[5]

V. Conclusion

For the foregoing reasons, Defendants request that the Court dismiss Ceres's Complaint with prejudice.

Respectfully submitted this 18th day of April 2022.

BOULDER COUNTY ATTORNEY

By: */s/ Catherine R. Ruhland*
Catherine R. Ruhland,
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ATTORNEYS FOR DEFENDANTS

[5]Even if Rule 106(a)(4) were an appropriate claim, then the declaratory relief claim must be dismissed because Rule 106(a)(4) is the "exclusive judicial remedy" for a judicial or quasi-judicial decision. *Gale v. City & Cty. of Denver*, 2020 CO 17, ¶ 16.

CERTIFICATE OF SERVICE

I certify that on April 18, 2022, I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** via Colorado Courts E-Filing (CCEF), which will either serve the same via e-mail or United States mail to the following:

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