DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder County Justice Center 1777 6th Street Boulder, CO 80302 Tel: (303) 441- 3740	DATE FILED: May 27, 2022 6:03 PM CASE NUMBER: 2022CV30207
Plaintiff: CERES ENVIRONMENTAL SERVICES, INC.; **v.** **Defendants:** 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; and **Defendant-Intervenor:** MARSHALL TOGETHER, a Colorado nonprofit corporation.	**COURT USE ONLY**
	Case No.: 2022CV30207 Div.: COC Ctrm.:
Order on Motion to Dismiss	

This matter comes before the Court on a motion to dismiss (C.R.C.P. 12(b)(1) and (5)) that has been submitted by the Plaintiff and joined by the Defendant-Intervenor. The Plaintiff, Ceres, opposes the motion. All briefs have been submitted.

Introduction

Ceres has filed a complaint asking for judicial review under C.R.C.P. 106(a)(4) and for declaratory relief. Ceres alleges that the Defendant County (Boulder) has improperly conducted a

bidding process and accepted a bid awarding a contract to DRC Emergency Services rather than to Ceres. The contract concerns the massive cleanup necessitated by what is commonly known as the Marshall Fire that occurred in Boulder County on December 30, 2021. That fire destroyed over 1,000 homes. In order for those who suffered these losses might begin to rebuild, the clean-up was required. Prior to filing this lawsuit, Ceres appealed the award to DRC to the Boulder County Commissioners. That appeal was rejected. This suit followed.

Boulder claims this case should be dismissed for lack of standing and ripeness as to the claim for judicial review and the claim for declaratory relief should be dismissed because Ceres fails to state a plausible claim for relief.

Standing and Ripeness

For Ceres to withstand the motion to dismiss for lack of standing and failure to state a claim, it must have suffered an injury in fact and have a legally protected interest. Ceres asserts that under Colorado law, an unsuccessful bidder suffers an injury in fact when it alleges that its ranking was the product of a corrupt, unlawful, or unfair process and that it would have won in a fair process. *Schaden v. DIA Brewing Co. LLC,* 478 P.3d at 1274-75.

However, even though the Plaintiff alleges a corrupt bidding process legally prohibited by the holding in *Schaden v. DIA Brewing Co. LLC* 478 P.3d 1264, in that Boulder improperly had DRC change its proposal, *Schaden* does not apply. As Defendants point out, the defendant, DIA Brewing Co. LLC, was a private entity and the claims against the private company rather than a government entity were bid-rigging, tortious interference with a prospective business opportunity, civil conspiracy, and violations of the Colorado Organized Crime Control Act. *Schaden* did not involve a claim for judicial review.

Ceres' alleged injuries are speculative, and it cannot reasonably be concluded that Ceres would have obtained the award. In *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission,* 620 P.2d 1051 (1980) our Supreme Court held "While the economic impact of lawful competition may, as a practical matter, inflict an injury, it cannot confer standing under Wimberly[1] unless the economic interest harmed is protected by a statutory or constitutional provision-i.e., unless a legislative intent to protect economic interests from competitive harm is explicit or fairly inferable from the statutory provisions under which an agency acts or if the legislature expressly confers standing on competitors to seek review of agency action." An unsuccessful bidder has no statutory protections.

Furthermore, case law in Colorado does not support the proposition that Ceres does indeed have any protected property interest under the due process clause. *Ewy v. Sturdevant* 962 P.2d 911 (Colo. App. 1998) cited by the Defendants is instructive. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Citing Board of Regents v. Roth,* 408 U.S. 564 (1972). Therefore, even accepting the Plaintiff's factual allegations that the Defendant's practices were "the product of a corrupt, unlawful, or unfair process," Ceres still lacks standing to proceed and the Court lacks jurisdiction.

Ceres also asserts that the bidding process was quasi-judicial and therefore C.R.C.P. 106 applies. In support of this proposition, Plaintiff cites *Prairie Dog Advocates v. City of Lakewood,* 20 P.3d 1203 (Colo App. 2000). That case held that an action may be quasi-judicial even in the absence of a statutory requirement for notice and a hearing if the decision is likely to protect adverse interests of specific

[1] *Wimberly v. Ettenberg*, 570 P.2d 535 (1977)

individuals or businesses. But that case, a case in which prairie dog advocates protested the city's decision to eradicate prairie dogs, also held that the city's action was administrative rather that quasi-judicial. The Court of Appeals found that the nature of the proceeding was administrative in nature, rather than quasi-judicial because "it relates to a matter of temporary operation and effect, does not express a new city policy, is not directed to particular individuals, and is intended to carry out existing legislative policies regarding the management and operation of parks as expressed in the city's ordinances." *Prairie Dog Advocates, supra,* at 1208. Even accepting the Plaintiff's factual allegations as true, the Marshall Fire clean-up project relates to a "temporary operation."

Ceres lacks standing and fails to state a claim. This Court lacks jurisdiction. The motion to dismiss all claims is granted.

Dated: May 26, 2022

By the Court:

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Kenneth M. Plotz, Judge