LEGAL ASPECTS OF PROCUREMENT
"SKINNY"

2. State indemnifies Contractor - not legal

The State neither indemnifies nor defends its contractors 104

3. Contractor indemnifies state
   a. personal injury - example
   b. no limit on liability
4. Issues
   a. **Indemnification**: contractor indemnifies state for damages incurred by state; state must pay damages first; indemnity agreement only as good as contractor's pocketbook 107
   b. **Indemnification & Insurance**: contractor acquires insurance to cover that contractual obligations (not part of standard CGL); no duty to defend; gives a deep pocket to fund liability created by indemnification clause
   c. **Additional Named Insured**: contractor has liability insurance (CGL) and carrier names state as additional named insured; carrier pays state, carrier has duty to defend state

C. Liquidated Damages
1. What are liquidated damages?
2. Limits on when the state can agree to pay liquidated damages.
3. Can the state forgive liquidated damages due from the contractor?
4. Is your liquidated damages clause unenforceable as a penalty?
   a. Moser v. Gosnell 108
   b. UCC 2-718(1) 123
5. Exclusive Remedy?
   a. Bannon v. Knauss 111
   b. UCC 2-719(1)(b) 121

616 N.E.2d 1204

Court of Appeals of Ohio, Sixth District, Lucas County.

MacKINNON-PARKER, INC., Appellant,
v.
LUCAS METROPOLITAN HOUSING AUTHORITY, Appellee.

No. L-92-062.

Decided Dec. 30, 1992.

PER CURIAM.

This case is on appeal from the May 9, 1991 judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellee, Lucas County Metropolitan Housing Authority. On appeal, appellant, MacKinnon-Parker, Inc., asserts the following assignment of error:

"The trial court erred in determining that no valid enforceable contract existed between the parties."

On July 10, 1989, appellee issued an "invitation for BIDS" regarding the renovation of Brand Whitlock Homes (the "project") pursuant to R.C. 3735.36. Interested bidders were given bid documents regarding the bid process and specifications for the project. Appellant submitted its bid on August 23, 1989, which was determined to be the lowest bid. A "Notice of Contract Award" was received by appellant about September 26, 1989. Pursuant to appellee's request, appellant continued to submit various documents until it was notified on November 16, 1989 that the Department of Housing and Urban Development had not approved the project. Appellee requested new bids on the project on December 4, 1989.

Appellant brought suit against appellee on January 10, 1990, asserting that appellee had breached its contract with appellant and that appellee had misrepresented to appellant that the Department of Housing and Urban Development had approved the project. On May 9, 1991, the trial court granted summary judgment to appellee on the breach-of-contract claim, finding that there was no contract between the parties. On January 21, 1992, the trial court granted summary judgment to appellee on the misrepresentation claim, finding that appellee was immune from liability regarding the misrepresentation claim under R.C. Chapter 2744. Although appellant appealed from both judgments of the trial court, its arguments on appeal concern only the May 9, 1991 judgment.

In its sole assignment of error, appellant argues that the trial court erred by finding that no contract existed between the parties. In essence, appellant argues that a contract was formed between the parties by appellant's submission of a bid (the "offer") and by appellee's statements regarding its intent to award the contract and its issuance of a Notice of Contract Award to appellant (the "acceptance"). Appellee argues that no contract existed because no formal written contract was executed in this case, as required by the bid documents and by R.C. 153.12.

Summary judgment is appropriate if:

"the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. * * *" Civ.R. 56(C).

[1][2][3] In *Commr. of Highland Cty. v. Rhoades* (1875), 26 Ohio St. 411, the Ohio Supreme Court held that a contract is formed when a party inviting construction bids accepts a proposed bid and gives notice of the acceptance of the bid to the bidder. *Id.* at paragraph one of the syllabus. The only purpose of a later agreement to execute a formal written contract is to evidence the contract entered into. *Id.* at 418. Thus, the bidder may rightfully reject a formal written contract which modified the terms of the original contract. *Id.* at 419. This rule is not applicable, however, where it is understood that the acceptance of the bid and execution of a formal written contract are both conditions to the formation of a contract between the parties. *Hughes v. Clyde* (1884), 41 Ohio St. 339, 340, and *Berkeley Unified School Dist. v. Barnes Constr. Co.* (N.D.Cal.1953), 112 F.Supp. 396, 399. This two-part acceptance of the contract may be imposed by the invitation to accept the bids or by virtue of the fact that the party seeking the bid is

authorized by statute to contract only under certain circumstances, *i.e.*, by a formal written contract. *Id.; State ex rel. Cleveland Trinidad Paving Co. v. Bd. of Pub. Serv.* (1909), 81 Ohio St. 218, 90 N.E. 389; *Pfaff Constr. Co. v. Leonard* (1931), 40 Ohio App. 246, 178 N.E. 328; *State ex rel. Greiner v. Bd. of Purchase of Zanesville* (App.1934), 17 Ohio Law Abs. 244; and *State ex rel. Bolan Constr. Co. v. Dept. of Highways* (App.1933), 15 Ohio Law Abs. 630, affirmed (1934), 127 Ohio St. 587, 190 N.E. 246.

Both parties argue that the language of the bid documents in the case before us support their conclusion regarding the formation of a contract between the parties. The bid form states in pertinent part as follows:

"2. In submitting this bid, it is understood that the right is reserved by the Lucas Metropolitan Housing Authority to reject any and all bids. If written notice of the acceptance of this bid is mailed, telegraphed or delivered to the undersigned within 30 days after the open thereof, or at any time thereafter before this bis [*sic*] is withdrawn, the undersigned agrees to execute and deliver a contract in the prescribed form and furnish the required bond within ten (10) days after the contract is presented to him for signature."

The Information for Bidders document states in pertinent part:

"Each bid shall be accompanied by cash, an approved surety company bid bond or a certified check upon a solvent bank, made payable to the Lucas Metropolitan Housing Authority in an amount equal to five (5) percent of the bid, tendered as a guarantee that the bidder will, if the award is made to him, enter into a bona fide contract with Lucas Metropolitan Housing Authority for this work and furnish a performance bond required under the specifications within a period of ten (10) days after the awarding of the contract. If for any reason whatsoever the bidder fails to enter into a proper contract and to execute a guarantee bond as required by the specifications. [*sic*] the amount of such guarantee shall be retained by the Lucas Metropolitan Housing Authority as liquidated damages sustained by reason of his failure to do so."

The Instructions to Bidders document states in pertinent part as follows:

"7. *Bid Security*

"Each bid must be accompanied by cash, certified check of the bidder, or a bid bond prepared on the form of bid bond attached hereto, duly executed by the bidder as principal and having as surety thereon a surety company approved by the Owner, in the amount of 5% of the bid. Such cash, checks or bid bonds will be returned to all except the three lowest bidders within three days after the opening of the bids, and the remaining cash, checks, or bid bonds will be returned promptly after the Owner and the accepted bidder have executed the contract, or if no award has been made within 30 days after the date of the opening of bids, upon demand of the bidder at any time thereafter, so long as he has not been notified of the acceptance of his bid."

"8. *Liquidated Damages for Failure to Enter into Contract*

"The successful bidder, upon his failure or refusal to execute and deliver the contract and bonds required within 10 days after he has received notice of the acceptance of his bid, shall forfeit to the Owner, as liquidated damages for such failure or refusal, the security deposit with his bid."

"* * *

"10. *PERFORMANCE AND PAYMENT BOND, EXECUTION OF CONTRACT*

"a. Subsequent to the award and within ten days after the prescribed forms are presented for signature, the successful bidder shall execute and deliver to the LHA a contract in the form furnished in such number of counterparts as the Local Authority may require."

The Bid Bond states in pertinent part as follows:

"NOW, THEREFORE, if the Principal shall not withdraw said bid within the period specified therein after the opening of the same, or, if no period be specified, within sixty (60) days after the said opening, and shall within the period specified therefor, or, if no period be specified within ten (10) days after the prescribed forms are presented to him for signature, enter into a written contract with the LHA in accordance with the bid as accepted, and give bond with good and sufficient surety or sureties, as may be required, for the faithful performance and proper fulfillment of such contract; or in the event of the withdrawal of said bid within the period specified, or the failure to enter into such contract and give such bond within the time specified, if the Principal shall pay the LHA the difference between the amount specified in said bid and the amount for which the

LHA may procure the required work or supplies or both, if the latter amount be in excess of the former, then the above obligation shall be void and of no effect, otherwise to remain in full force and virtue."

The Notice of Contract Award sent to appellant states in pertinent part as follows:

"This is to advise you that your proposal for the above referenced project has been *accepted by this Authority and approved by HUD,* Cleveland.

"We are preparing the necessary Construction Contract documents. Please contact our office at 259-9533 in order that they may be executed by your firm." (Emphasis added.)

Appellee also contends that it has no power under R.C. 153.12 to contract without a formal written contract. Appellee relies on that portion of R.C. 153.12 that reads in pertinent part as follows:

"(A) With respect to award of any contract for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement made by the state, or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district in the state or a political subdivision or that is authorized by state law, the award, and execution of the contract, shall be made within sixty days after the date on which the bids are open."

Appellant argues, in response, that R.C. 3735.36 controls the power of appellee to contract. That section reads as follows:

"When a metropolitan housing authority has acquired the property necessary for any project, it shall proceed to make plans and specifications for carrying out such project, and shall advertise for bids for all work which it desires to have done by contract, such advertisements to be published once a week for two consecutive weeks in a newspaper of general circulation in the political subdivision in which the project is to be developed. The contract shall be awarded to the lowest and best bidder."

[4] The trial court concluded, as a matter of law, that the above documents informed appellant that the approval of the bid and award of the contract to appellant would not constitute acceptance of the contract until a formal written contract was executed. We agree. Under either R.C. 153.12 or 3735.36, it is clear that appellee cannot bind itself until a formal written contract is executed. Thus, the trial court correctly concluded that no contract existed between the parties as a matter of law.

Accordingly, appellant's sole assignment of error is found not well taken.

Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the court costs incurred on this appeal.

Judgment affirmed.

GLASSER, P.J., HANDWORK and SHERCK, JJ., concur.

857 P.2d 53

Supreme Court of Oklahoma.

The INDIANA NATIONAL BANK, a national banking association, Appellant,
v.
STATE of Oklahoma DEPARTMENT OF HUMAN SERVICES; Robert Fulton, Director, State of Oklahoma Department of Human Services; Office of State Finance, State of Oklahoma; Victor Thompson, Director of State Finance, State of Oklahoma; Office of Public Affairs, State of Oklahoma; Delmas Ford, Director, Office of Public Affairs, State of Oklahoma and Oklahoma Development Authority, Appellees,
and
Prudential-Bache Securities, Inc., Appellee/Additional Defendant.

No. 71787.

July 20, 1993.
As Corrected July 21, 1993.

Assignee of lease/purchase agreement for computer equipment brought breach of contract action against Department of Human Services (DHS). The District Court, Oklahoma County, Leamon Freeman, J., granted summary judgment in favor of DHS and assignee appealed. The Court of Appeals affirmed summary judgment to DHS, and assignee petitioned for certiorari. The Supreme Court, Lavender, V.C.J., held that: (1) DHS lacked authority to modify lease/purchase agreement to add nonsubstitution clause after Office of Public Affairs (OPA) had awarded contract; (2) no genuine issue of material fact existed as to whether OPA approved modification of agreement; and (3) DHS was not estopped to deny validity of modified agreement.

Court of Appeals' opinion vacated, trial court judgment affirmed.

Simms, J., concurred in judgment.

Summers, J., concurred in part and dissented in part.

LAVENDER, Vice Chief Justice.

In this matter appellant, Indiana National Bank (INB) challenges a trial court grant of summary judgment to appellee, the Oklahoma Department of Human Services (DHS). We affirm the trial court. [FN1]

FN1. Also pending before us is Case No. 74,771, a separate, but related appeal by INB challenging the trial court dismissal, for failure to state a claim upon which relief could be granted, of Prudential-Bache Securities, Inc., also a defendant below.

FACTS AND PROCEDURAL HISTORY

[1][2] The case concerns the acquisition of computer equipment by the Oklahoma Office of Public Affairs (OPA) for use by DHS. In December 1983, DHS requested OPA to seek bid proposals for the lease/purchase of a central processing computer unit. Although DHS requested a 60 month term, at the time, DHS, and apparently OPA, were under the impression a State agency could not enter into a lease/purchase agreement that would bind the State for a future fiscal year conditioned solely on continued fiscal year appropriations by the Legislature because they believed such a contract provision would violate certain State constitutional and statutory provisions and that the agreement had to contain a clause allowing termination at the end of each fiscal year. The request for bid proposals, thus, provided in pertinent part: "[DHS] may not be obligated for expenditures in future fiscal years. Therefore bids must provide clauses to permit cancellation at the end of each fiscal year, June 30, where appropriate." [FN2]

FN2. After the matters pertinent to this case transpired we decided *U.C. Leasing, Inc. v. State Board of Public Affairs,* 737 P.2d 1191 (Okla.1987), an opinion which cleared up the area of the law involving acquisitions of such equipment by State entities. In *U.C. Leasing* we held that State constitutional and statutory fiscal year limitation clauses were *not* violated where a 60 month lease (a State agency as lessee) explicitly provides that if the Legislature fails to allocate or appropriate funds for payment, lessee is not obligated to pay beyond the period for which funds have been allocated. *Id.* at 1195. The converse of this would, of course, be true, i.e. the agency would be bound if adequate appropriations were made by the Legislature. This is so because the obligation is not absolute and in all events binding on the State, but is contingent upon

continued funding on a fiscal year basis by the Legislature continuing to appropriate funds to satisfy the obligation. *Id.* Thus, it turns out DHS, as all now appear to concede, was wrong in its view on what could be agreed to in regard to the lease/purchase agreement. We are here, however, concerned with whether the nonsubstitution clause was invalid because it was only inserted into the agreement executed by DHS *after* the bid was accepted by OPA, not whether such a clause might have been valid had it initially been a part of the bid accepted by OPA. We note in 1989 the Legislature amended § 85.4 of the Central Purchasing Act to sanction the use of nonappropriation clauses in lease/purchase situations involving the acquisition of equipment. 74 O.S.Supp.1989, § 85.4(H).

We further note INB argues in its certiorari materials and in its June 5, 1989 Reply Brief that even without the nonsubstitution clause the agreement as awarded by OPA could not simply be unilaterally terminated by DHS at the end of a fiscal year. We refuse to consider the argument for two reasons. One, no such argument was made in the trial court. INB relied only on the nonsubstitution clause of the modified agreement. In fact, INB expressly referred to the nonsubstitution clause in its April 13, 1987, brief opposing DHS' motion for summary judgment as, "[T]he crux of the controversy at bar" and it exclusively relied on the modified agreement executed by DHS to support its claim. Parties may not present new issues on appeal which seek reversal of a trial court grant of summary judgment which were not presented to the trial court. *Northrip v. Montgomery Ward & Co.,* 529 P.2d 489, 491-494 (Okla.1974); *See also Great Plains Federal S & L v. Dabney,* 846 P.2d 1088, 1089-1090, f.n. 2 (Okla.1993); *Jones v. Alpine Investments, Inc.,* 764 P.2d 513, 515 (Okla.1987) (generally parties on appeal are limited to the issues presented to the trial court). Further, no such issue is remotely covered by any issue of error set forth in the petition in error. Failure to raise an issue in the petition in error is fatal to its consideration on appeal. *Kirschstein v. Haynes,* 788 P.2d 941, 955 (Okla.1990); *Timmons v. Royal Globe Insurance Company,* 653 P.2d 907, 912 (Okla.1982).

In January, 1984, OPA issued an Invitation to Bid. Public Leasing Corporation, (PLC), not a party here, responded with a bid which included a form lease/purchase agreement for an IBM computer, series 3081. Paragraph 4.1 of PLC's form agreement submitted with its bid provided in pertinent part:

> It is understood and agreed between the parties hereto that the State of Oklahoma is a governmental entity subject to certain funding restrictions imposed by law, which restrictions prevent the State of Oklahoma from making an unconditional committment (sic) to a contract that obligates the State of Oklahoma beyond the current fiscal year or that obligates the State to pay charges which have not been appropriated by the Legislature of the State of Oklahoma. Accordingly, this Agreement shall be renewed for each Fiscal Year during this Agreement **if the State of Oklahoma or authorized body thereof has approved such renewal *and* has had sufficient funds appropriated to continue the data processing function performed by the equipment under this Agreement for such Fiscal Year.**
>
> It is further agreed that in the event the State of Oklahoma does not renew this Agreement as provided above, such termination shall not constitute a default hereunder nor give rise to or result in any additional Customer liability or penalty whatsoever, except that [PLC] shall have the right to collect all sums due and owing under this Agreement up to the expiration of the fiscal year for which funds have been appropriated. The State of Oklahoma agrees to notify [PLC] of any nonrenewal and nonappropriation at the earliest possible time in writing. Nothing contained herein shall otherwise limit any remedies that either party may have under the laws of the State of Oklahoma.

(R. 198). (emphasis added).

OPA issued a Notice of Award of Contract to PLC, accepting the bid. The face of the Notice contained the following language: "This contract shall be in force until expiration date or until 30 days after notice has been given by the State of Oklahoma of its desire to terminate the contract". The initial contract period was specified to be 1-1-84 through 12-31-84 on the face of the Notice. Three days after the Notice was issued, Robert Fulton, Director of DHS, executed a similar lease/purchase agreement to the form agreement sent with PLC's bid, but which was modified to add the following nonsubstitution clause at the end of the first paragraph to Paragraph 4.1 quoted above:

This paragraph shall not be construed so as to permit Lessee to terminate the Lease in order to acquire any other equipment or to allocate funds directly or indirectly to perform essentially the same applications for which the equipment is intended.

(R. 10).

About three weeks later Fulton also executed an Addendum to the modified agreement. In February 1984, DHS's First Assistant General Counsel, issued an opinion referring to the Equipment Lease and Addendum No. 1 between PLC and the State (the modified lease agreement). The opinion stated in pertinent part:

2. The Lease ... has been duly authorized, executed and delivered by the Lessee and constitutes a valid, legal and binding agreement enforceable in accordance with its terms.

3. No further approval, consent or withholding of objections is required from any federal, state or local governmental authority with respect to the entering into or performance by the Lessee of the Lease and the transactions contemplated thereby and the Lessee has sufficient appropriation to pay all amounts due under the lease for the current fiscal year.

(R. 69).

In April, 1984, PLC assigned its interest in the contract to Prudential-Bache Securities, Inc. (PruBache). Soon after, PruBache assigned to INB. In August, 1985, OPA sent a Notice of Award of Contract directly to INB renewing the existing contract for the time period of 7-1-85 through 6-30-86. (R. 276). The face of the Notice contained the same 30 day termination clause as on the initial Notice sent to PLC.

In May, 1986, DHS notified INB it would not renew the contract due to lack of appropriations by the Legislature. (R. 230). This reason for nonrenewal is subject to dispute. This is so because DHS replaced the IBM series 3081 with an IBM series 3090.

INB claimed breach of contract because the nonsubstitution clause forbid cancellation to replace with equipment providing essentially the same functions as the IBM 3081. It also claimed failure to pay the June 1986 lease and maintenance payments. In defense DHS argued the nonsubstitution clause was invalid because only OPA had authority to approve such a modification. It also asserted alternatively the new IBM 3090 equipment had greater capacity and additional functions so the nonsubstitution clause was not violated. It also denied it owed the June 1986 payment.

[3][4] On cross-motions for summary judgment (INB's being partial on the issue of liability only) the trial court denied INB's motion and granted complete summary judgment to DHS determining it was undisputed OPA had not approved the modification. He ruled as a matter of law the nonsubstitution clause was invalid and DHS had the right to cancel the contract. [FN3]

FN3. On appeal, INB did not preserve its objection to DHS's alleged failure to make the June 1986 payment because no such issue is raised in the petition in error. *Kirschstein v. Haynes* and *Timmons v. Royal Globe Insurance Company, supra,* note 2. INB appears to contend in its certiorari brief that it may still obtain review of the issue because the trial court acted outside its subject matter jurisdiction when it did not base its decision to grant summary judgment on the evidence presented in regard to this issue. As authority for that proposition, it refers us to *Isenhower v. Isenhower,* 666 P.2d 238 (Okla.App.1983). It is true subject matter jurisdiction cannot be waived by the parties, and it is proper to address even when it has not been raised in the trial court or preserved on appeal. *Isenhower* does not, however, support the view the trial court acted outside his jurisdiction by granting any part of DHS' motion for summary judgment. It merely holds a court does not have jurisdiction to render judgment on a statutorily void contract. We are aware of no principle of law that simply because a trial court may have made a mistake in granting summary judgment to a party as to a certain aspect of the case, that such involves an act outside the trial court's subject matter jurisdiction. Accordingly, INB had to preserve the June 1986 payment issue in its petition in error to obtain review. It did not and we refuse to consider it further.

INB appealed. The Court of Appeals affirmed, citing *City of Merrill v. Wenzel Bros. Inc.,* 88 Wis.2d 676, 277 N.W.2d 799 (1979) for the proposition the Invitation to Bid and the bid (and its contents) constituted the whole agreement to which the parties

were bound. The terms of these documents control over any conflicting or later added provisions contained in the modified "contract" such as the nonsubstitution clause and that clause was, thus, invalid. It also determined to allow such modification would thwart the intent of the public competitive bidding laws by creating a negotiating situation only *after* a bid had been accepted by the agency in charge of accepting bids, here OPA and, therefore, DHS had no authority to bind the State to such a clause. The Court of Appeals also held because the modification containing the nonsubstitution clause was outside the scope of DHS's authority, DHS could not be estopped to deny its validity, relying on *State ex rel. Commissioners of Land Office v. Frame,* 200 Okl. 650, 199 P.2d 215, 217 (1948), which held the State cannot be estopped by the unauthorized acts of its officers. We previously granted certiorari. [FN4]

FN4. In our order granting certiorari we granted the petition of INB for certiorari and denied the petition of PruBache.

SUMMARY JUDGMENT

[5][6][7][8][9][10] Summary judgment is a device used to reach a final judgment where there is no dispute as to any material fact. *Manora v. Watts Regulator Co.,* 784 P.2d 1056, 1058 (Okla.1989). A court may look beyond the pleadings to evidentiary material to determine whether any issue remains for jury determination. *Flanders v. Crane Co.,* 693 P.2d 602, 605 (Okla.1984). The court may consider evidence outside the pleadings such as depositions, admissions, answers to interrogatories and affidavits. 12 O.S.1991, Ch. 2, App., Rule 13. The court may not weigh evidence, but only review the evidence presented to determine whether there is a factual dispute. *Stuckey v. Young Exploration Co.,* 586 P.2d 726, 730 (Okla.1978). All inferences in the evidence must be taken in favor of the party opposing the motion. *Erwin v. Frazier,* 786 P.2d 61, 62 (Okla.1989). Summary judgment is improper if under the evidence, reasonable men could reach different conclusions from the facts. *Runyon v. Reid,* 510 P.2d 943, 946 (Okla.1973). The moving party has the burden of showing there is no substantial controversy as to any material fact. *Loper v. Austin,* 596 P.2d 544, 545 (Okla.1979). After this showing, the opposing party must demonstrate there exists a material fact in dispute which would justify a trial. *Martin v. Chapel, Wilkinson, Riggs and Abney,* 637 P.2d 81, 84 (Okla.1981). These burdens may be met by circumstantial evidence. *Manora, supra,* 784 P.2d at 1058.

For the purposes of reviewing the grant of summary judgment to DHS we must decide whether after the bid was accepted by OPA the nonsubstitution modification could be valid without approval of OPA. If not, we must decide if a factual controversy exists as to whether OPA approved the modification. Finally, we must determine whether DHS is estopped from denying the validity of the modification under the facts as presented.

OPA WAS THE ONLY ENTITY AUTHORIZED TO NEGOTIATE AND MODIFY THE CONTRACT

[11] The Oklahoma Legislature adopted the Central Purchasing Act, 74 O.S.1981, § 85.1 et seq., as amended, to govern the expenditures of the various governmental agencies in acquiring goods or services. The Act provides the State Purchasing Director, under the Supervision of the Director of Public Affairs, has the *sole and exclusive* authority and responsibility for the acquisition of all materials, supplies, equipment, and services acquired, used or consumed by state agencies, subject to certain exceptions not pertinent here. 74 O.S.Supp.1983, § 85.5. Section 85.5 also gives the Director of Public Affairs the authority and responsibility to promulgate rules and regulations governing the form, time and manner of submission of any bids submitted for contracts to furnish items or services [§ 85.5(3)], and the conditions under which written contracts for such purchases are to be required and the conditions and manner of negotiating such contracts. § 85.5(4). The Act requires competitive bidding for most major purchases and is designed to protect the public at large by promoting economy in government and reducing the likelihood of fraud. *State of Oklahoma ex rel. Cartwright v. Tidmore,* 674 P.2d 14, 16 (Okla.1983). It also insures that government officials are accountable to the public, and are discharging their duties competently and responsibly. *Id.* The instant acquisition of computer equipment was subject to the Act and its provisions concerning competitive bidding.

[12] In conformity with the rulemaking responsibility, rules were passed which are contained in an official publication entitled "How to Sell to the State of Oklahoma", pertinent portions of which were attached to DHS' materials in support of summary judgment. As agency rules they have the force and effect of law. *Toxic Waste Impact Group v. Leavitt,* 755 P.2d 626, 630 (Okla.1988). The rules provide in pertinent part as follows:

C. Bid Contents--Terms and conditions

1. Entire Agreement. The terms and conditions of this section together with the Invitation to Bid and any other sheets or documents made a part of the Invitation to Bid, shall constitute the entire agreement between the parties.

2. Modifications. An addendum will be issued for any changes in, additions to, or waivers of specification, terms, or conditions of a bid. This addendum must be issued by the Central Purchasing Division.

3. Offer Firm For Thirty Days. Return of an Invitation to Bid constitutes a valid offer guaranteed for a minimum of thirty (30) days by the vendor.

(bolding in original)

The language on the back of the Invitation to Bid further stated:

13. All bids submitted are subject to "Central Purchasing Rules and Regulations," and these General or any Special Conditions and specification listed herein--all of which are made a part of this bid invitation by reference.

14. This bid is submitted as a legal offer and any bid when accepted by the Office of Public Affairs constitutes a firm contract.

(R. 193).

[13] The rules and the language on the Invitation to Bid, coupled with the sole and exclusive authority given to the Purchasing Director of OPA in § 85.5, to acquire all materials, supplies, equipment and services used by State agencies, make it abundantly clear that when OPA awards a contract it is OPA that had to agree to any changes after the bid was submitted. The regulations describe the terms of the entire agreement as the bid contents, the Invitation to Bid and any other sheets or documents made a part of the Invitation to Bid. Thus, when OPA awarded the contract based on these documents the entire agreement between the parties was formed. [FN5] INB points to no statute or rule that would be relevant to the instant situation which expresses an intent to allow agencies the ability to modify contractual terms submitted with a bid after OPA has awarded a contract, and, like the Court of Appeals, we believe to allow any material modifications by agencies after a contract is awarded by OPA, without approval of OPA, would completely undermine the intent and purpose behind the Act. [FN6]

FN5. INB attempts to make much of the fact the form agreement which was a part of the bid proposal from PLC sent to OPA contains numerous blank spaces. This is correct. However, what INB fails to realize is that most, if not all, of the information that one would normally have expected to go in these blank spaces *was* contained in other documents that OPA's pertinent rules considered part of the entire agreement between the parties. Two examples INB points to are that the form lease does not identify the proposed lessee, nor describe the equipment to be leased. The lessee was clearly shown to be DHS on the Request for Bid Proposal DHS sent to OPA, which was sent out with the Invitation to Bid. It was the entity seeking the assistance of OPA in acquiring the equipment. DHS was also identified on the face of the Invitation to Bid as the State agency the equipment was to be shipped to *and* the State agency to be charged and invoiced. As to not describing the equipment INB's argument is flawed because the equipment is described in more than one place on documents which became part of the contract. It is described on the face of the Invitation to Bid sent out by OPA and on the face of the Invitation to Bid executed by PLC and returned to OPA, which constituted, with supporting documents, PLC's bid proposal, which was then accepted by OPA. It is also more fully described on a related document attached to PLC's bid. It is also worth pointing out the Notice of Award of Contract from OPA to PLC also contained the monthly lease/purchase and the maintenance prices, as did PLC's executed return of the Invitation to Bid. Thus, INB's argument does not hold water. Even assuming some blank space in the form agreement did not correspond to information in another document that did become part of the agreement pursuant to OPA rule this fact would merely be a red herring to what we are considering here, to wit: was the nonsubstitution clause part of the agreement without being approved by OPA? We need not and, therefore, do not decide whether it would be better practice for OPA to require a form agreement sent in as part of a bid to be formerly executed and have all the blank spaces thereto filled in. For the purposes of our case we merely note the entire agreement as described in OPA's rules *was*

executed on behalf of PLC by the signature of that firm which appeared on the return of the Invitation to Bid, i.e. PLC's bid proposal.

FN6. Although there may be a situation or situations where another State agency other than OPA is entitled to itself award the contract if approval is given by OPA of any conditions the agency is to follow, and other pertinent restrictions of the competitive bid laws are followed, INB has not relied on any such scenario in this case and, here, as is clear from the record, it was OPA that issued the Notice of Award of Contract. An example of such a potential situation is discussed in Attorney General Op. No. 78-228 where in the past the Central Purchasing Division has entered into price agreements or contracts for commodities of common usage by agencies of the State. Notification is then given to all agencies in the form of a purchasing division contract price schedule. The agencies may then purchase directly from the vendor, apparently awarding their own contract. As noted, however, such a situation would involve the prior approval of OPA and a prior agreement with a vendor for commodities in common usage by State agencies. 74 O.S.Supp.1983, § 85.4 would also appear to allow an agency to purchase equipment for itself, but before doing so written authorization would have been required from the Purchasing Director. These situations are, however, not involved here.

The language of the Act and the rules clearly indicate it is OPA that is to be the sole entity with the authority to negotiate and accept contract offers, with certain exceptions not relevant here. [FN7] To allow agencies to subsequently negotiate and modify material clauses after other parties have been excluded through the competitive bidding process undermines the integrity of the system and makes such a system meaningless. We do not believe in the instant situation the Legislature intended or contemplated such a result, nor do we believe the rules of OPA allow for such a subsequent material modification. [FN8] Because the rules governing the modification of contracts have the force and effect of law, DHS was powerless to waive their requirements. *Ashland Oil, Inc. v. Corporation Com'n.*, 595 P.2d 423, 426 (Okla.1979).

FN7. This is not to say OPA is not to consult in good faith with a requesting agency during the process. 74 O.S.Supp.1983, § 85.5, specifically requires OPA to consult with a requesting or purchasing agency.

FN8. We further note the modified agreement with the nonsubstitution clause appears to violate Rule C(3) which provides the bid proposal shall be considered a valid offer guaranteed for a minimum of 30 days. PLC's bid proposal is stamped received by OPA on January 13, 1984. The modified agreement was executed by Fulton on January 30, 1984, i.e. within the 30 day period, which was also three days after the bid had been accepted by OPA. It also appears to violate Rule C(2) as it seems to be nothing more than an attempt to modify the bid after the bid had already been accepted by OPA. INB argues these just cited rules really have nothing to do with our situation because they are only concerned with modifying a bid prior to acceptance by OPA. This argument is obviously flawed. Although INB appears technically correct these rules are concerned with modifying a bid prior to acceptance, we believe it would defy logic to allow the bid to be modified after acceptance, but not before, *without approval of OPA*. Possibly an agency can modify an agreement in certain nonmaterial ways without involving OPA, but when a material modification (here the nonsubstitution clause) is at issue it would hold the potential for completely disrupting the competitive bidding process to allow each of the numerous State agencies free hand to negotiate and agree to such modifications. INB's apparent argument that the Central Purchasing Act and the competitive bidding laws are only to insure the equipment is needed and the best price is paid therefore is also flawed. Such terms, although extremely important, are certainly not the only material terms of contracts contemplated by the Act. How, when or why a contract may be terminated without breach, as many other issues, are also important, as evidenced by this case, where the monetary amount at issue involves in the area of $2 million dollars.

INB cites *U.C. Leasing v. State Board. of Public Affairs,* 737 P.2d 1191 (Okla.1987), to support an

argument negotiations and subsequent modifications between agencies and private contractors is permitted under the Act after OPA has awarded a contract. In *U.C. Leasing,* we stated:

> ... [Appellee's predecessor] submitted a proposal for bid which resulted in a written lease agreement and the State Board of Public Affairs issuing an award of contract for the lease of one message switching device. Thereafter, Appellant negotiated with [predecessor] for additional features and equipment to be added to modify the original system, all of which became a part of the lease agreement.

Id. at 1193-1194.

[14] INB asserts *U.C. Leasing,* thus, somehow sanctioned the authority of agencies other than OPA to negotiate modifications to agreements after OPA has accepted a bid, without obtaining ultimate approval by OPA. We disagree. The facts of *U.C. Leasing* as revealed by the opinion do not indicate such modifications were unauthorized by OPA or lacked OPA approval. Accordingly, *U.C. Leasing* does not hold other State agencies are authorized to modify contracts entered into between OPA and private vendors. We now squarely hold it is only OPA that has authority to approve material modifications of agreements once it has accepted a bid in response to an invitation to bid, in the absence of some other Legislative authority to the contrary or specific approval from OPA sanctioning another agencies' authority to agree to such a modification. To rule otherwise would completely obliterate the Central Purchasing Act.

THE NONSUBSTITUTION CLAUSE WAS NOT PART OF THE ORIGINAL AGREEMENT BETWEEN THE STATE AND PLC

[15][16][17] DHS produced evidence through the affidavit of the Purchasing Director of the State of Oklahoma that the modified agreement containing the nonsubstitution clause was never submitted to or approved by OPA. INB offered no evidence we can discern to the effect the modified agreement was submitted to or approved by OPA prior to OPA's acceptance of PLC's bid proposal. Its only argument as to OPA approval is that OPA somehow approved the modified agreement when it directly sent INB the Notice of Award of Contract for the fiscal year 7-1-85 through 6-30-86, which we discuss momentarily. Thus, as to the nonsubstitution clause not being approved by OPA prior to its awarding of the initial contract to PLC, the affidavit of the Purchasing Director stands unrefuted. A material fact set forth in the statement of a movant for summary judgment supported by admissible evidence is deemed admitted unless specifically controverted by a statement of the adverse party supported by admissible evidence. 12 O.S.1991, Ch. 2, App., Rule 13(b). *See Liberty National Bank and Trust Company v. Ginn,* 832 P.2d 33, 35 (Okla.App.1992). Therefore, we must take as true the fact the agreement was modified without the knowledge or approval of OPA. Because the nonsubstitution clause was not a part of the bid originally submitted by PLC to OPA and no evidence exists in this record the clause was approved prior to acceptance of PLC's bid proposal it cannot be considered to have been part of the original agreement.

THE RENEWAL OF THE LEASE/PURCHASE AGREEMENT

[18] We start with the unrefuted evidence of the affidavit of the Purchasing Director that the modified agreement was never submitted to or approved by OPA. In opposition to this affidavit INB argues OPA must have known the contract it awarded to PLC was modified because OPA sent the renewal for 7-1-85 through 6-30-86 directly to INB and it points to the Assignments from PLC to PruBache, and from PruBache to INB which refer to the contract date as January 30, 1984 (the date the modified agreement was executed), rather than January 27, 1984 (the date OPA awarded the contract to PLC) and the Addendum dated February 22, 1984 signed by Fulton. INB argues because the only "contract" it was assigned was the one containing the nonsubstitution clause this could have been the only contract OPA renewed in 1985 and that this evidence is sufficient to create a factual question as to whether OPA approved the modified agreement with the nonsubstitution clause. We disagree.

[19] For a contract to be modified the mutual assent of both parties is required. *State ex rel. Oklahoma Capitol Improvement Authority v. Walter Nashert & Sons, Inc.,* 518 P.2d 1267, 1270 (Okla.1974). There is no evidence in the reviewable record OPA assented to or agreed to the nonsubstitution clause, but only that it somehow knew INB was to receive the lease payments under the original contract awarded by OPA. No evidence in opposition to DHS' motion for summary judgment was presented by INB that tends to show OPA ever saw the modified agreement or the assignment documents which may have alerted OPA the contract it had awarded had been modified. At

most INB relies on pure speculation. We must decide this case on the reviewable evidence properly put before the trial court by the parties and not on what evidence may exist which might show OPA approved the modified agreement. *Frey v. Independence Fire and Casualty Co.,* 698 P.2d 17, 20 (Okla.1985) (a ruling on a motion for summary judgment must be rested on the record then before the trial court rather than one that could have been assembled). INB simply presented no evidence that OPA approved the modified agreement or even knew it existed. In this situation there is no material factual dispute as to whether OPA approved the modification. The reviewable record, in the form of the unrefuted affidavit of the Purchasing Director of OPA, shows it did not.

DHS CANNOT BE ESTOPPED FROM DENYING THE NONSUBSTITUTION CLAUSE

[20] The general rule is the application of estoppel is not allowed against the state, political subdivisions or agencies, unless it would further a principle of public policy or interest. *Burdick v. Independent School Dist.,* 702 P.2d 48, 53 (Okla.1985). INB asserts there is a compelling interest in requiring the State to follow through on its obligations else its reputation and credibility with merchants be irreparably damaged. DHS argues the goals of the Central Purchasing Act will be thwarted if agencies are allowed to negotiate with private vendors. In our view the elements of estoppel are not met here nor is there any compelling interest which would further a principle of public policy which might call for its application against DHS.

[21][22] The elements necessary to establish an equitable estoppel are (1) a false representation or concealment of facts, (2) made with actual or constructive knowledge of the fact, (3) to a person without knowledge of, or the means of knowing, those facts, (4) with the intent it be acted upon, and (5) the person to whom it was made acted in reliance upon it to its detriment. *Burdick,* 702 P.2d at 55. The essential element of estoppel is not intent, but rather, action on the part of another in justifiable reliance upon the conduct of the party allegedly estopped. *Bay Petroleum Corp. v. May,* 264 P.2d 734, 736 (Okla.1953).

[23] The false representation in this case is apparently the assertion DHS had authority to negotiate and agree to modifications in the contract entered into between OPA and a private vendor without OPA approval. DHS did not have such authority. However, any assertions by DHS of such authority were not made to an entity who was without knowledge *or the means of knowing* these facts. Both the statutes and the rules granting OPA the exclusive authority to negotiate contracts were published and available to private vendors. The legal opinion of staff counsel of DHS stating the modified contract need not be authorized by OPA cannot be used to set aside law governing a contract between a private vendor and OPA. Finally, as far as any reliance on OPA's possible later approval of the modified contract is concerned, INB could not have acted in reliance upon such an act because it had already purchased the assignment over a year earlier. [FN9]

> FN9. Furthermore, to the extent INB *appears* to argue in one or more of its appellate submissions we should apply estoppel against *OPA* because of some act or omission on that agency's part, such argument is yet another issue neither raised in the trial court or in the petition in error. Thus, we refuse to consider it.

Further, we held in *Ashland, supra,* 595 P.2d at 426, the doctrine of estoppel has no application to agencies when their acts are beyond the authority granted to them, or *ultra vires.* This holding is justified because persons dealing with public officials are charged with notice of limitations upon their powers. *Id.; See also State v. Frame, supra,* 199 P.2d at 217 (those who deal with officers of the State are bound to know the extent of their authority). Thus, DHS cannot be held estopped from denying the validity of the nonsubstitution clause even if its agents mistakenly or falsely asserted it had authority to approve such modifications because it had no such authority.

The Court of Appeals held DHS' First Assistant General Counsel acted outside the scope of his authority by stating the modified contract was valid, because such an interpretation directly contradicted the Oklahoma competitive bidding requirements. INB claims the nonsubstitution clause does not directly contradict the Oklahoma bidding statutes and DHS attorney, T.H.T. was acting within the scope of his authority when he issued the legal opinion stating the modifications to the original contract did not require authorization from OPA. Accordingly, it argues the rule in *Ashland* does not apply in this case.

It is true that part of the duties of DHS counsel include evaluating the legality of action taken by the agency. However, the legal advice of DHS counsel

is directed to *agency personnel, not private outside parties.* To advise private vendors of the legality of OPA contracts does not fall within the staff attorney's duties, and such advice is outside his scope of authority. Further, as stated previously, private parties cannot, as a matter of law, be said to be justified in relying on a legal opinion of DHS personnel because they were charged with notice of the limitations of DHS' power to modify contracts.

We finally note we can discern no compelling public policy that would warrant applying estoppel against DHS in this case. The overriding public policy interest is that found in the Central Purchasing Act which generally requires private vendors selling goods and services to State agencies to deal with a central entity (OPA) to promote efficient and cost effective use of taxpayer money and to prevent fraud in these dealings. If we allowed estoppel here it would send a signal State agencies and private vendors could potentially ignore the provisions of the Central Purchasing Act to enter into various sweetheart contractual provisions which the courts would enforce based on the doctrine of estoppel. We decline to make such a ruling. For these reasons we hold DHS is not estopped to deny the validity of the nonsubstitution clause.

The decision of the Court of Appeals is **VACATED** and the judgment of the trial court is **AFFIRMED.**

HODGES, C.J., and HARGRAVE, ALMA WILSON, KAUGER and WATT, JJ., concur.

SIMMS, J., concurs in judgment.

SUMMERS, J., concurs in part; dissents in part.

26 S.E.2d 501

Supreme Court of South Carolina.

RABON
v.
STATE FINANCE CORPORATION.

No. 15562.

July 17, 1943.

Appeal from County Court of Richland County; A. W. Holman, County Judge.

Action by H. P. Rabon against State Finance Corporation for breach of an alleged contract and damages. From a judgment for plaintiff, defendant appeals.

Reversed with instructions.

T. S. SEASE, Acting Associate Justice.

This action is one for the breach of an alleged contract to extend the time for the payment of a promissory note executed by respondent to appellant, and for the resulting damage allegedly suffered by reason of the filing of the assignment of wages executed and delivered by respondent to secure the payment of the promissory note.

The case was tried before the Honorable A. W. Holman and a jury, resulting in a verdict in favor of the respondent for $1,500 actual damages. Thereafter a motion for a new trial was noted and argued. Judge Holman granted a new trial unless the respondent should remit the sum of $1,000 upon the record, the respondent remitted the required sum. This appeal is from the judgment in favor of the respondent in the sum of $500.

The appellant questions the judgment by eight exceptions. It is unnecessary to set out the exceptions, it will suffice to state that they raise two legal questions which are determinative of this appeal. They are: (1) Is the contract sued upon supported by a valid, legal consideration? (2) Was any competent, relevant testimony offered to prove that the contract sued upon was supported by a legal, valid consideration? If the answer to the foregoing questions be in the affirmative, the judgment of the lower Court should be affirmed. If the questions be answered in the negative, the trial Judge erred in overruling appellant's motion for a nonsuit and direction of a verdict in its favor, and the judgment of the lower Court should be reversed and the case remanded to the lower Court with direction that judgment be entered for the appellant under rule 27 of this Court.

[1] It is elemental, and requires no citation of authority for the proposition that before a party can recover for the breach of a contract, that he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on.

[2] It has been the established law of South Carolina since the commencement of its jurisprudence that a contract is an agreement on sufficient consideration, to do or not to do a particular thing. Therefore, the consideration is one of the vital elements of a valid binding contract, and no contract is complete without a valid, legal consideration.

Is the alleged contract here sued upon supported by a valid legal consideration?

The complaint, after alleging the execution and delivery of the promissory note by the respondent and the execution and delivery of the assignment of wages, then goes on to allege that respondent became delinquent in the payment of the promissory note (it was payable in twelve equal monthly installments), and further that the respondent "feeling that the assignment above referred to might be presented to his employer, went to the defendant's office for the purpose of making arrangements to have some one else pay up the entire amount then owing to defendant in order to prevent the possibility of the filing of said assignment, and at which time the defendant through its servant, agent and employee, Fred C. Patterson, who was also president of said corporation, acting within the regular scope and authority of his employment as such agent, servant and employee and as president of said defendant, *told plaintiff to go ahead and not worry about the two monthly payments of Twelve ($12.00) Dollars each, which were in arrears on his promissory note at that time, that he could catch up the two payments some time before the last payment was due and payable thereon.*" (Italics added.)

The foregoing quotation from the complaint states all of the facts which might be taken to show the contract upon which respondent seeks to recover.

It is unquestionably true that the respondent was legally obligated from the date of the execution and

delivery of the note and assignment to pay the note according to its terms. The respondent only alleges that the appellant through its president told him not to worry, that he could catch up the payments then in arrears "some time before the last payment was due and payable." The respondent did not allege that he agreed to catch up the payments in arrears.

The complaint only alleges that respondent agreed to do something that he was legally bound to do. The proof offered by respondent only tends to show that the respondent agreed to do that which he was already legally bound to do. Is an agreement to do that which one is already legally bound to do sufficient consideration to support a new agreement?

[3] The authorities from this and other jurisdictions are unanimous in holding that such an agreement is not sufficient to support a new contract. See 12 Am.Jur. No. 88 (and note 17) Page 582; 17 Corpus Juris Secundum, Contracts, § 112, page 466; American Law Institute's Restatement of the Law, Contracts, Chapter 3, No. 76, pages 82-86.

[4] In Blair v. Howard, 144 Fla. 421, 198 So. 80, 81, a case which involved the foreclosure of a real estate mortgage, the defendant pleaded an extension of the maturity date of the note. The answer alleged that the plaintiff agreed to extend the maturity date of the note if defendant would pay the past due interest and taxes and that he had paid the past due interest and taxes, as agreed. The Supreme Court of Florida reversed the judgment of the lower Court, and decided that there was no proof of a contract, which was binding to extend the time of payment of the obligation which was the subject matter of the suit. In the course of its opinion the Court quoted with approval the following rule: "'and it is not a sufficient consideration for an agreement to extend the time of payment that the debtor promises to do anything which he is legally bound to do.' Citing 21 R.C.L. 12."

The Kentucky Supreme Court in Pool v. First Nat. Bank of Princeton, 287 Ky. 684, 155 S.W.2d 4, 5, applied the same rule; the following is taken from the opinion in that case: "This action was instituted by appellee to collect interest on these notes from October 6, 1933, to the dates that the principals of said notes were retired, the interest prior to October 6, 1933, having been paid by the debtors. Appellants by answer alleged that during the depression of 1933 and subsequent years, the bank allowed many persons, including both appellants, to renew their notes without collecting interest thereon in pursuance of a policy adopted by the board of directors which was approved by the state banking commissioner and the Comptroller of Currency of the United States; and that it was agreed between appellants and the board of directors that no interest was to be charged after October 1933. This agreement was denied by the bank and much proof was introduced on both sides of the question, none of which we deemed to be material for the following reasons: The original contracts between the Pools and the bank, evidenced by notes executed by the Pools and accepted by the bank, recited that interest was to be paid from the date of maturity of the respective notes. The subsequent renewals of these obligations did not constitute new contracts but merely extended the due date of the original contracts; and if the bank had agreed, as is contended by appellants, to the extension of time for the payment of the obligations without payment of interest, the agreement was without consideration and unenforceable."

The language of the U. S. District Court of Maryland sets forth the rule in very positive terms in United States v. Lange, D. C., 35 F.Supp. 17, 19: "The rule in Maryland, which is the law generally, is that a promise to do, or actually doing, no more than that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance. In other words a promise by one party to a substituting contract to the osposite party to prevent a breach of the contract is without consideration. Or, stated in still another way, where the promise of the one is no more than a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract."

This Court has applied the same rule in Nesbitt v. Louisville, C. & C. R. Co., 2 Speers 697, which decision was followed in Colcock & Co. v. Louisville, C. & C. R. Co., 1 Strob. 329, 12 S.C.L. 141.

For other decisions supporting this rule. see United States F. & G. Co. v. Crais 13 La.App. 691, 127 So. 414; Eastman v. Miller, 113 Iowa 404, 85 N.W. 635; Schaadt v. Mutual Life Ins. Co. of New York, 2 Cal.App. 715, 84 P. 249; MacDanz v. Northern States Power Co., 206 Minn. 510, 289 N.W. 58; Ochs v. Equitable Life Assur. Soc., 8 Cir., 111 F.2d 848; Grand Trunk Western R. Co. v. H. W. Nelson Co., 6 Cir., 116 F.2d 823; Quarture v. Alleghany County, 141 Pa.Super. 356, 14 A.2d 575; Fisher County Pipe

Line Co. v. Snowden & McSweeny, Tex.Civ.App., 143 S.W.2d 675; Hogan v. Supreme Camp of the American Woodmen, 146 Fla. 413, 1 So.2d 256.

[5] When the pleadings and proof are considered in connection with the foregoing authorities it is clear that there was no legal or valid consideration to support the agreement sued upon, and therefore the trial Judge erred in refusing to grant appellant's motions for a nonsuit and the direction of a verdict made upon the ground that the agreement sued upon was without consideration.

In view of what has been said, we consider it unnecessary to discuss the other questions raised by the exceptions.

It is, therefore, ordered that the judgment of the lower Court is hereby reversed and this case is remanded to the lower Court with instructions to enter judgment in favor of the defendant under Rule 27 of this Court.

BAKER, FISHBURNE, and STUKES, JJ., and E. H. HENDERSON, A. A. J., concur.

SECTION 11-35-1530. Competitive sealed proposals.

(1) Conditions for Use. If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section. The board may provide by regulation that it is either not practicable or not advantageous to the State to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding. Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 9 of this code must be entered into by competitive sealed proposals, except as otherwise provided in Sections 11-35-1550 (Small purchases), 11-35-1560 (Sole source procurements), and 11-35-1570 (Emergency procurements).

(2) Public Notice. Adequate public notice of the request for proposals must be given in the same manner as provided in Section 11-35-1520(3).

(3) Receipt of Proposals. Proposals must be opened publicly in accordance with regulations of the board. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.

(4) Request for Qualifications.

(a) Before soliciting proposals, the procurement officer may issue a request for qualifications from prospective offerors. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.

(b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.

(5) Evaluation Factors. The request for proposals must state the relative importance of the factors to be considered in evaluating proposals but may not require a numerical weighting for each factor. Price may, but need not, be an evaluation factor.

(6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the

solicitation requirements. All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

(7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals. If price is an initial evaluation factor, award must be made in accordance with Section 11-35-1530(9) below.

(8) Negotiations. Whether price was an evaluation factor or not, the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

(a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;

(b) during the negotiation process as outlined in item (a) above, if the procurement officer is unsuccessful in his first round of negotiations, he may reopen negotiations with any offeror with whom he previously negotiated; or

(c) the procurement officer may make changes within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers.

(9) Award. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 11-35-1530(8). The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 11-35-1520(10).

Supreme Court of Alaska.

KENAI LUMBER COMPANY, INC., Appellant,
v.
Robert LeRESCHE, Commissioner of Dept. of Natural Resources of the State of Alaska; Geoffrey Haynes, Director of Division of Lands of Dept. of Natural Resources; Frederick H. Boness, Deputy Commissioner of Dept. of Natural Resources; and South-Central Timber Development, Inc., Appellees.
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., Cross-Appellant and Appellee,
v.
KENAI LUMBER COMPANY, INC., Cross-Appellee and Appellant.

Nos. 5733, 5755.

June 11, 1982.

OPINION

MATTHEWS, Justice.

In this case we are asked to review the legality of a negotiated amendment to a long term timber sale contract between the State of Alaska and South-Central Timber Development, Inc. The amendment has been challenged by Kenai Lumber Company, Inc., which operates a currently under-utilized sawmill in Seward, and competes with South-Central in the purchase of timber. The basis for Kenai's claim is that the changes which the amendment makes are so significant that they amount to a circumvention of the competitive bidding process under which the original contract was let. The trial court on cross motions for summary judgment ruled that the amendment was lawful. We agree for the reasons expressed herein.

I

The original timber sale contract, designated Icy Cape No. 1, was made on December 1, 1969 following advertisement for public bids pursuant to AS 38.05.120. South-Central was the only bidder at the auction and received the award at the minimum stumpage prices established by the state.[FN1]

FN1. The prices were.$7.00 per 1,000 board feet (m.b.f.) for Sitka spruce saw logs and $2/m.b.f. for hemlock saw logs.

The sale area consists of approximately 13,760 acres in a remote location on the coast of south-central Alaska adjacent to Icy Bay. The contract estimates that some 206,800,000 board feet of timber can be taken from this area. [FN2] The contract requires all timber within the boundaries of the sale area meeting certain minimum specifications to be cut. The contract is to expire 20 years from the date of execution unless extended by the state. It contains a provision concerning the primary manufacture of the timber cut as follows:

FN2. Of this amount approximately 106,200 m.b.f. were Sitka spruce saw logs and 100,600 m.b.f. were hemlock saw logs.

Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the state. Primary manufacture shall be as defined under Section 406.104 of the "Timber Sale Regulations" and as further defined in the Governor's Policy Statement for primary manufacture dated April 8, 1968, a copy of which is attached hereto and hereby made a part of this contract.[FN3]

FN3. Section 406.104 of the Timber Sale Regulations in existence as of the date of execution of the contract provides:
Primary Manufacture. The Director may require that primary manufacture of logs, cordwood, bolts, or other similar products be accomplished within the State of Alaska.
The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means:
(a) The breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants, or
(b) Manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product.)
Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be

considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American Standards Association specifications are considered to have received primary manufacture.

The Governor's Policy Statement for primary manufacture, referred to in the contract, provides: Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips made from timber processing wastes shall be considered to have received primary manufacture and export will be permissive on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only, e.g. to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 406.104 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

The contract calls for reappraisal of the prices of the timber at the end of five years after the effective date of the contract and thereafter in three year intervals.[FN4] A section of the contract incorporates by reference the state timber sale regulations. Of interest here is section 155 of the regulations pertaining to amendments and modifications:

> FN4. Apparently the intent of the contract was to allow two years for construction of the roads and loading facilities which would be needed before timber cutting and transportation could take place. A special provision of the contract required that a minimum of ten million board feet be cut and paid for by the end of the third year.

Amendments to and modifications of the contract may be made in writing and become a part of the contract upon mutual agreement of the director and the purchaser; provided that such amendment or modification does not materially affect or change the meaning or intent of the contract.[FN5]

> FN5. 11 A.A.C. 76.155.

From 1970 through 1978 South-Central cut timber from the sale, squared it in compliance with the primary manufacturing requirement at its mill on Jakolof Bay, several hundred miles from the sale area, and exported the squared timber, called "cants," to Japanese markets. During this period the contract was amended on six occasions. These amendments included two price changes under the reappraisal provision of the contract,[FN6] and one amendment allowing 3,200,000 board feet of spruce and hemlock to be exported as round logs, that is, logs not subjected to primary manufacture.

> FN6. The first, effective December 1, 1974 changed spruce saw logs to $16.25/m.b.f. and hemlock saw logs to $12.00/m.b.f. and the second effective December 1, 1977 changed the price for spruce saw logs to $25.00/m.b.f. and hemlock saw logs to $18.00/m.b.f.

The 7th amendment, agreed to in January of 1979, is the amendment in question in this case. The most important change it makes is that it waives the primary manufacturing requirement. Another important change deletes from the sale area all lands at an elevation above 400 feet and substitutes additional acreage. The deleted lands contain approximately 40,000,000 board feet of timber. About 14,000,000 board feet may be cut from the added acreage. The amendment also changes the stumpage prices, increasing the price of spruce to $80.00/m.b.f. and of hemlock to $28.00/m.b.f. Other aspects of amendment No. 7 include a provision that South-Central must also take logs suitable only for the manufacture of wood pulp or pay a fine; a provision which on the whole increases the penalty imposed on South-Central for failing to remove trees meeting the contract specifications; a provision increasing the penalty for leaving high stumps; and a provision making the new state Forest Resources and Practices Act, AS 41.17.010.950, applicable to the sale immediately rather than one year following the

amendment as would otherwise be the case. At the time of the amendment it was estimated that the total harvestable timber remaining was some 87,000,000 board feet.

Due to a change in the administration of the air pollution control laws it became apparent in 1978 that South-Central's Jakolof Bay mill could not continue to operate beyond June of 1979 without making extensive changes in the burner used to dispose of the slabs created by primary manufacture. These changes were judged by South-Central to be economically unfeasible. South-Central therefore sought a waiver of the primary manufacture requirement from the state. The state granted the waiver, making the following findings:

FINDINGS AND WAIVER OF PRIMARY MANUFACTURE

Based on a review of the experience since this sale was let in 1969, the following findings are made:

(1) Actually, only four jobs, those of sawyer, off-bearer (of slab), millwright and night watchman, are added by the primary manufacture milling operations.

(2) That the waiver of primary manufacture will provide economic incentive for the more intense utilization of additional timber and will create at least as many jobs in the woods as were created through the milling operation.

(3) That given the limited volume in this sale, it will not be economic to install chipping operations or pneumatic shiploading facilities. Also, there is no other economic method of salvaging the slab created by primary manufacture.

(4) The one known economic method of disposing of the slab is by burning in a wigwam burner.

(5) That since Icy Bay is an area of pristine air quality at present, it is doubtful that the required permit could be obtained (see the case of National Asphalt Pavement Assoc. v. Train (D.C.Cir.), 539 F.2d 775 (1976).

(6) That, rather than continue a practice which requires waste of commercially valuable sapwood (by slabbing) and also causes potential air quality deterioration (by burning), it is submitted that it may be preferable to permit round-log export.

(7) That the outer ring, or sapwood, of the log is the most commercially valuable portion because of close grain, freedom from knots and consistent color and grain.

(9) [FN7] That under present primary manufacture requirements, a sizable percentage of the valuable sapwood is cut, burned, and wasted.

FN7. There is no finding numbered 8.

(10) It is further found that there is a strong market for the valuable sapwood and because of that strong market there will be a higher utilization of the forest products from this sale if round log export is permitted.

(11) Also a higher price will be obtained for the state's timber resources if primary manufacture is waived.

(12) Also, there will be benefits to the long-term management of Alaska's forest lands resulting from higher utilization.

The justification for deleting those portions of the sale area lying above 400 feet and for making a partial substitution of adjacent low lands is also expressed in formal findings made by the state:

REDUCTION OF SALE AREA FOR PROTECTION OF GOAT HABITAT

Based upon the representations of the Habitat Division of the Alaska Department of Fish & Game, the following findings are made:

(1) That at the time this Contract was let in 1969, there had been limited funds for studying the fish and game habitat protection. Accordingly, the area received less intensive study than might otherwise have been the case.

(2) That subsequent investigation has revealed that timber stands at certain elevations and along certain slopes are vital to the protection of the goat population at Icy Bay.

(3) That these designated slopes are necessary for providing a proper wintering habitat for the goat population of Icy Bay.

(4) That it will support the sound conservation of wildlife resources at Icy Bay if these needed habitat areas are deleted from the Timber Sale.

(5) That although the timber purchaser has made certain capital investments based on the volume of timber within the contracted sale area, the purchaser is willing to amend the sale area by deleting the area essential to goat habitat if the stumpage is amortized over the lower volume.

II

Kenai's challenge to amendment No. 7 in this court is based solely on the ground that the amendment violates the rule that material modifications may not be made to a contract let under a competitive bidding statute. This sale was made pursuant to AS 38.05.120 which requires that timber sales larger than 500,000 board feet be made by competitive bidding.[FN8]

We alluded to the rule relied on by Kenai in McKinnon v. Alpetco Co., 633 P.2d 281, 287 (Alaska 1981):

> FN8. AS 38.05.120 provides in relevant part:
> Timber and other materials shall be sold either by sealed bids or public auction, depending on which method is determined by the commissioner to be in the best interests of the state, to the highest qualified bidder as determined by the director. The 500 m.b.f. exception is expressed in AS 38.05.115.

> (G)enerally a government contract that was initially competitively bid cannot be materially amended because that is tantamount to forming a new contract, which should be accomplished by starting all over again with competitive bidding.

This rule has been judicially imposed in order to guard against circumvention of competitive bidding requirements. Competitive bidding itself is designed to ensure that government obtains the most favorable terms possible in its contracts, and to protect the public from the possibility of favoritism, fraud, and corruption on the part of public officials. Libby v. City of Dillingham, 612 P.2d 33, 42 (Alaska 1980) (plurality opinion); id. at 44 (Rabinowitz, C. J., concurring).

(1) Under the terms of this contract, competitive bidding can only be effective to accomplish these purposes for the first five years of the contract. Thereafter, the price of the timber is to be determined by state appraisals. These appraisals are based on current market and cost conditions and are not indexed to the original bid price. Kenai has not challenged this aspect of the contract and we therefore assume it to be legal for the purposes of this case. Based on this assumption we believe that, with one exception which we will discuss later, the rule prohibiting material modifications of competitively bid contracts has no application to amendment No. 7. That rule could not operate to ensure that the state receive the best price possible because price under this contract is determined privately; nor could it prevent favoritism, fraud or corruption on the part of state officials for the same reason.[FN9]

> FN9. This does not mean that the state officials are entirely free to modify long term timber sale contracts after the first reappraisal date has passed. As we have previously noted, 11 A.A.C. 76.155 prohibits contract amendments which "materially affect or change the meaning or intent of the contract." Kenai, however, did not brief in its opening brief the question whether amendment No. 7 violates this regulation and we therefore do not pass on this point. In its reply brief it made no more than a conclusory assertion that s 155 prohibits material modifications, with no analysis or citation of authority. Under these circumstances we consider this point to have been waived. See Hitt v. J. B. Coghill, Inc., 641 P.2d 211, 213 n.4 (Alaska 1982); State v. O'Neill Investigations, Inc., 609 P.2d 520, 528 (Alaska 1980).

The evidence in this case indicates that the primary manufacture requirement detracts from rather than adds to the value of the end product. Thus a prospective purchaser of state timber would be willing to pay a higher stumpage price if there were no such requirement. If, therefore, an amendment to the contract had been made eliminating primary processing within the initial five year period a persuasive argument could be made that the protections which are meant to be afforded by competitive bidding had been by-passed. However, once the initial period is over the competitively established price is no longer effective and the removal of the primary processing requirement is merely another market condition to be taken into account during reappraisal.

Essentially the same observations can be made with respect to the economic aspects of the change removing from the sale lands above 400 feet and substituting adjacent low lands. Kenai contends, quite plausibly, that the costs of harvest are less and the product value is higher in the newly substituted acreage than in the lands deleted from the sale. If those changes had been made during the first five years of the contract a legitimate question whether competitive bidding had been improperly circumvented would be presented. As it is, however, those changes are now simply new conditions to be reflected in each reappraisal.

(2) The one aspect of amendment No. 7 to which the rule prohibiting material changes potentially applies is the physical addition of timber land in partial substitution for the deleted acreage. The additional land has never been subject to the competitive bidding process. However, for the following reasons, the rule does not prohibit this change.

(3) Not all amendments to competitively bid contracts are prohibited, only those regarded as material. The concept of materiality in this context has not been satisfactorily captured in a single phrase. One court has spoken of "an essential change of such magnitude as to be incompatible with the general scheme" of competitive bidding; [FN10] another has phrased the question to be whether the amendment "so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract, that it constitutes a new undertaking." [FN11] These formulations simply recognize that the materiality concept prohibits those changes which tend to be subversive of the purposes of competitive bidding. In determining whether an amendment has this tendency, courts have found the following factors to be of importance:

FN10. Morse v. City of Boston, 253 Mass. 247, 148 N.E. 813, 815 (1925), on later appeal, 260 Mass. 255, 157 N.E. 523 (1927).

FN11. Albert Elia Building Co., Inc. v. New York State Urban Development Corp., 54 A.D.2d 337, 388 N.Y.S.2d 462, 467 (1976).

(1) the legitimacy of the reasons for the change; [FN12]

FN12. See Myers v. Wood, 173 Mo.App. 564, 158 S.W. 909, 912 (1913).

(2) whether the reasons for the change were unforeseen at the time the contract was made; [FN13]

FN13. See Sekerez v. Lake County Board of Commissioners, 345 N.E.2d 865, 868-69 (Ind.App.1976); Myers v. Wood, 158 S.W. at 912.

(3) the timing of the change; [FN14]

FN14. See Albert Elia Building Co., Inc. v. New York State Urban Development Corp., 388 N.Y.S.2d at 467.

(4) whether the contract contains clauses authorizing modifications; [FN15]

FN15. Myers v. Wood, 158 S.W. at 913. However, a clause authorizing modifications may not be so broadly read as to negate the statutory requirement of competitive bidding. Morse v. City of Boston, 148 N.E. at 816.

(5) the extent of the change, relative to the original contract.[FN16]

FN16. See Albert Elia Building Co., Inc. v. New York State Urban Development Corp., 388 N.Y.S.2d at 467.

Applying these factors to the substitution of timber lands in this case leads to the conclusion that the substitution was not material for purposes of the rule prohibiting material changes.

The reason for the change was that the Department of Fish and Game had discovered after the contract was awarded that the mountainside included in the sale area contained important winter habitat for mountain goats. The Department therefore requested that the sale be modified by deleting this area. Since this deletion would eliminate an area containing some 40,000,000 board feet which the state had contractually committed to South-Central, it was necessary in order to obtain the agreement of South-Central to provide substitute timberland.

This appears to be a legitimate rather than a pretextual reason for modifying the contract. It furthers the state's strong interest in maintaining or increasing existing population levels of game animals.[FN17] Nor was the importance of the deleted area as wildlife habitat appreciated when the original contract was made. There is nothing suspicious about the timing of the change since it was made more than nine years after the initial contract was entered into, and timber cutting had taken place under the contract for seven years with about 58% of the total estimated volume in the original sale having by then been cut.[FN18] While the contract does not specifically authorize replacing one timber area with another, the change here was relatively small, the substituted timber amounting to less than 7% of the total originally sold.

FN17. See Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979); State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854, 859 n.18 (Alaska 1978).

FN18. See p. 218 supra.

In a contract of this magnitude and duration it is to be expected that changes in circumstances will occur and that new perceptions concerning needed

environmental protections will develop. A measure of flexibility is obviously required to be able to respond intelligently to the needs created by those changes. The substitution of timber here does not exceed permissible bounds.

III

The court awarded attorney's fees to South-Central of $40,000.00. Kenai challenges this as unreasonable, and contends further that no attorney's fees should have been awarded since this case is within the public interest exception to the rule that the prevailing party is entitled to an award of partial attorney's fees.[FN19]

> FN19. Kenai argues that the public interest it has sought to vindicate lies in protecting the integrity of the competitive bidding process.

(4)(5) The determination of court awarded attorney's fees is committed to the discretion of the trial court and reviewable on appeal only for an abuse of discretion. Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose. Alaska State Bank v. General Insurance Co., 579 P.2d 1362, 1370 (Alaska 1978). South-Central's attorneys expended some 845.8 hours in the defense of this case and South-Central paid them $75,624.00. The only argument made by Kenai that the court's award of $40,000.00 is unreasonable is that Kenai's actual attorney's fees were less than that sum. This, however, does not demonstrate that South-Central's attorneys' billings were unreasonable for opposing sides in a lawsuit do not necessarily have equal burdens. We therefore conclude that Kenai has not demonstrated that the court's award was manifestly unreasonable.

(6) We have recognized that in cases involving issues of genuine public interest an unsuccessful plaintiff should not be burdened with payment of a part of his opponent's attorney's fees under Civil Rule 82. Thomas v. Bailey, 611 P.2d 536, 539 (Alaska 1980); Horowitz v. Alaska Bar Association, 609 P.2d 39, 42 (Alaska 1980); Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974). This exception has been made because of a fear that "awarding fees in this type of controversy will deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorney's fees." Id. at 1136. Accord, Anchorage v. McCabe, 568 P.2d 986, 990 (Alaska 1977).

In Anchorage v. McCabe, we identified three criteria useful in identifying public interest litigation:

(1) Is the case designed to effectuate strong public policies?

(2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?

(3) Can only a private party have been expected to bring the suit?

568 P.2d at 991. Accord, Thomas v. Bailey, 611 P.2d at 539 n.7. The foregoing can arguably be answered favorably to Kenai in this case. However, our cases establish what can be regarded as a fourth criterion which excludes this case from the public interest exception.

In Weaver Bros., Inc. v. Alaska Transportation Commission, 588 P.2d 819, 823 (Alaska 1978); Lynden Transport, Inc. v. State, 532 P.2d 700, 717 (Alaska 1975), and Mobil Oil Corp. v. Local Boundary Commission, 518 P.2d 92, 104 (Alaska 1974), we upheld attorney's fees awards against parties who had raised important questions of public interest but did not prevail. In Mobil we stated:

> Because the sums at stake in this controversy are large enough to prompt a suit without consideration of the public interest, the superior court could have concluded that the property owners were acting in their private interests and not in behalf of the public.

Id. at 104. In Lynden we quoted with approval the foregoing language, 532 P.2d at 717, and in Weaver Bros. we stated, citing Lynden and Mobil Oil :

> (I)t appears to us that the competitive advantage sought by appellant in this litigation takes the case outside of the notion of public interest litigation.

588 P.2d at 823. Based on these authorities what we have called the fourth criterion may be expressed as whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance. Such a litigant is less apt than a party lacking this incentive to be deterred from bringing a good faith claim by the prospect of an adverse award of attorney's fees.

On this record, since Kenai was a competitor of South-Central and was seeking a continuing source of timber to process in its mill, the court could have concluded that it had sufficient economic reasons to challenge the amendment regardless of the grounds

for the challenge. Under these circumstances we decline to hold that the award of attorney's fees to South-Central was an abuse of discretion.

AFFIRMED.

RABINOWITZ, Chief Justice, dissenting.

I do not agree with the court's ruling that the state and South-Central were free to eliminate the primary manufacture requirement of their timber sale contract. In my view the court places its imprimatur upon precisely the kind of modification to a competitively bid contract that the judicially-imposed rule against material modifications is designed to prevent.

The Alaska legislature has decreed that an important state resource and asset, timber, is to be disposed of only by competitive bidding.[FN1] This legislative mandate and its underlying policies are rendered ineffectual if the state and South-Central may discard their competitively bid contract and substitute in its stead a significantly different agreement. On the record presented in this case I must conclude that the primary manufacture requirement was an important term of the timber sale contract and that waiver of that requirement wrought an impermissible material change in the contract. I so conclude for several reasons. First, the primary manufacture requirement was an express condition of the state's request for bids, and the state candidly admits that the requirement was "a significant part of the consideration for the State's agreement to sell timber to South-Central." Second, the administrative regulation authorizing a primary manufacture requirement in timber sale contracts [FN2] and the governor's policy statement urging primary manufacture,[FN3] both of which were incorporated into the contract between the state and South-Central, were undoubtedly designed to further the strong state interest in not exporting jobs in the often depressed forest products industry; [FN4] this state policy is subverted by elimination of the primary manufacture requirement. Third, Kenai Lumber plausibly suggests that the timber sale might have attracted different bidders and bids had the primary manufacture requirement not been included in the state's request for bids,[FN5] and the court concedes that such a requirement affects the price that potential bidders are willing to pay for state-owned timber. In light of these factors I am unable to agree that the state and South-Central were at liberty to waive the primary manufacture requirement of their competitively bid contract.

FN1. AS 38.05.115, .120.

FN2. See Section 406.104 of the timber sale regulations, 11 AAC 76.130, the full text of which is reproduced at note 3 of the court's opinion.

FN3. This policy statement, which provides in part that "(r)ound logs may not be exported as a marketable commodity," is set forth at note 3 of the court's opinion.

FN4. I note also that both California and Oregon prohibit the export of state-owned timber without primary manufacture. See Cal.Pub.Res. Code s 4650.1 (West Supp.1982); Or.Rev.Stat. s 526.805 (1979).

FN5. South-Central was the only bidder on the contract in question.

I further disagree with the majority's conclusion that the question of the materiality of the primary manufacture requirement need not be reached because the original contract authorized renegotiation of its terms after five years and at regular intervals thereafter. If the statutory competitive bidding requirements are to have any continuing viability, the parties to a competitive bid contract may not circumvent the legislature's mandate by including in their contract a provision which authorizes any and all modifications.[FN6] I recognize that the parties to a long-term contract for the sale of state-owned timber must be afforded a fair degree of latitude to make good faith modifications to their agreement in order to account for inevitable fluctuations in the market for timber and to respond to a myriad of factors which may not have been foreseeable at the time the timber was placed on bid. It does not follow, however, that the parties must be afforded unfettered license to rewrite their agreement; the judicially-imposed rule proscribing material modifications limits the power to alter a competitively bid contract and, in my view, that limit was exceeded when the state and South-Central removed the primary manufacture requirement from their contract.

FN6. The court recognizes that "a clause authorizing modification may not be so broadly read as to negate the statutory requirement of competitive bidding" but in my view fails to apply this rule to the state's and South-Central's power to alter their competitively bid contract.

B- 266,257, B- 266,258, 96-1 CPD P 50

Matter of: LDDS WorldCom
February 8, 1996

J. Randolph MacPherson, Esq., Sullivan & Worcester, for the protester.
Francis J. O'Toole, Esq., Robert J. Conlan, Jr., Esq., Joseph C. Port, Jr., Esq., and Michael L. Shore, Esq., Sidley & Austin; and Nathaniel Friends, Esq., and Steven W. DeGeorge, Esq., AT & T Corporation, for AT & T Corporation, an interested party.
Carl Wayne Smith, Esq., and H. Jack Shearer, Esq., Defense Information Systems Agency, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Same issues and arguments as those resolved in a recent decision involving the same agency and the same procurement will not be considered as no useful purpose would be served.

2. Protest alleging that agency cancellation of solicitations prior to receipt of responses from offerors was improper is denied where the record shows that the cancellation decision was reasonable; there is no evidence that the agency issued the solicitations without intending to award contracts; and the regulatory requirement for a written determination supporting the cancellations, cited by the protester, does not apply because the solicitations were canceled before receipt of responses.

3. Contention that the agency improperly modified an existing contract beyond its scope instead of holding a separate competitive procurement is denied where a review of the contract terms shows that the added services could have been anticipated from the face of the contract itself, and where the added services are not materially different from the services currently procured under the contract.

DECISION

LDDS WorldCom protests the cancellation of solicitation Nos. RG20JUL951511 and RG20JUL951512 by the Defense Information Systems Agency (DISA), and the agency's corresponding decision to obtain these services from AT & T via the Defense Commercial Telecommunications Network (DCTN) Contract. LDDS contends that the agency is improperly consolidating services onto AT & T's DCTN contract, and onto an upcoming sole-source transition contract the agency intends to award to AT & T until completion of a global competition for these telecommunication services. [FN1] LDDS also protests that the consolidation of international services onto the DCTN contract (and transition contract) exceeds the scope of those contracts, and that the agency has awarded an improper letter contract to AT & T.
We deny the protest.

BACKGROUND

On July 20, 1995, DISA received a requirement from the Air Force for two separate 1.544 megabit per second circuits to be in place not later than October 16. These dedicated circuits were to connect McChord Air Force Base (AFB), Washington, with Nellis AFB, Nevada, and Gunter AFB Annex, Alabama, with Tyndall AFB, Florida. Since these services involve command and control of military forces, they are exempt from the coverage of the government-wide FTS 2000 contract, pursuant to the terms of 10 U.S.C. s 2315 (1994). While these services normally would have been ordered using AT & T's DCTN contract, DISA procurement personnel concluded that they could not properly fill these requirements on the DCTN contract because it was slated to expire on February 29, 1996. Since the two circuits had an estimated 60-month service life, DISA procurement personnel decided instead to procure the two circuits competitively via posting on an electronic bulletin board.
On July 27, DISA placed a telecommunications service request, commonly referred to as an "inquiry," on its electronic bulletin board available to the telecommunications industry. This bulletin board uses an accelerated

competitive procedure, known as an "Inquiry/quote/Order" process, whereby the inquiry references certain standard DISA provisions and contains information unique to the requirement. Offerors respond with a quote, and if successful, receive an order for the service. The inquiry required that quotes be received by 3 p.m. on August 11. After placing inquiries for these two dedicated circuits on the bulletin board, DISA's procurement personnel received guidance explaining that use of the DCTN contract to procure new services was appropriate even if the duration of the new requirements exceeds the remaining term of the DCTN contract or the term of the planned sole source transition contract. In addition, this guidance advised that, whenever appropriate, the DCTN contract should be the contract of first choice in fulfilling such requirements. Thus, on August 4, a week before quotes were due, DISA canceled the two solicitations. This protest followed. [FN2]

DISCUSSION

Of the four challenges raised by LDDS--improper cancellation of the solicitations for the two circuits; improper consolidation of services onto AT & T's contracts; inclusion of services beyond the scope of the DCTN and transition contracts; and award of a letter contract to AT & T in violation of the restrictions on such awards--two raise the same arguments involving the same contract actions raised by Sprint in its protest involving the DCTN and transition contract, Sprint Communications Co., supra. Since these two issues--i.e., the propriety of the agency's decision to consolidate telecommunications services on the DCTN and transition contracts, and the nature of the alleged letter contract--and the arguments raised are the same as in the earlier protest, which was resolved in the agency's favor by the decision of January 25, we see no useful purpose to be served by our further consideration of these issues.

See RMS Indus., B-247465; B-247467, June 10, 1992, 92-1 CPD p 506; Wallace O'Connor, Inc., B-227891, Aug. 31, 1987, 87-2 CPD p 213.

Instead, we focus on LDDS's challenge to the cancellation of the solicitations for the two circuits, and its contention that the agency is using the DCTN and transition contracts to procure international services beyond the scope of those two contracts.

Cancellation of the Two Solicitations

LDDS argues that the agency decision to cancel the two electronic solicitations was improper, and that the agency failed to follow the guidelines in the Federal Acquisition Regulation (FAR) applicable to decisions to cancel solicitations.

Our prior decision in Sprint sets forth in detail the agency's decision to consolidate services onto the DCTN and transition contracts until completion of a major competitive procurement planned for early 1997. While we recognize that the agency could procure these services on a piecemeal basis using competition, we also recognize the benefits associated with streamlining the unwieldy system currently used by the Department of Defense, and procuring these services using consolidated procurements designed to achieve significant economies of scale. Sprint Communications Co., supra at 10-12. As discussed at length in Sprint, we find nothing unreasonable in the agency's decision to consolidate its telecommunications services onto the DCTN and transition contracts. Thus, in the general sense that the cancellations at issue here are part of the agency's implementation of that decision, we have no objection to the cancellations.

With regard to the two solicitations at issue here, LDDS argues that the agency violated FAR s 15.402(c), which admonishes agencies not to issue solicitations under which they have no intention of awarding a contract. LDDS also argues that the contracting officer was required to make a written determination, pursuant to the terms of FAR s 15.608(b), explaining the basis for rejecting all quotes received in response to the solicitations. In our view, LDDS is wrong on both counts.

First, there is no evidence in the record that the agency issued these solicitations with the knowledge that it would cancel them. Instead, the record shows that agency personnel had a good faith belief, until advised otherwise, that they could not order services under the DCTN and transition contracts slated to last longer than the life of the contracts themselves. Since the agency changed its position after placing these requirements on the bulletin board, but before quotes were received, we see nothing in the record to support a finding that the agency improperly issued the solicitations with no intent to award a contract.

Second, the requirement in FAR s 15.608(b) for preparing a written determination for canceling a solicitation after receipt of proposals, on its face, does not apply in a situation where the agency canceled the solicitation 8 days after posting the requirement, and a week before quotes were due. See Valix Federal Partnership I v. Department of the

Air Force, GSBCA No. 12038- P, Oct. 30, 1992, 93-2 BCA p 25,595, 1992 BPD p 326.

Addition of International Services to DCTN Contract

As part of its challenge to the agency's decision to consolidate services on the DCTN and transition contracts, LDDS argues that the agency is adding international services to the contract, which, LDDS claims, are beyond the contract's scope and must be the subject of a separate competitive award. We disagree.

As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. s 21.3(m)(1) (1995); National Linen Serv., B-257112; B-257312, Aug. 31, 1994, 73 Comp. Gen. 265, 94-2 CPD p 94. We will, however, consider a protest that a modification is beyond the scope of the original contract, and that the subject of the modification thus should be competitively procured absent a valid sole- source justification. Neil R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD p 212; Everpure, Inc., B-226395.4, Oct. 10, 1990, 90-2 CPD p 275. In determining whether a modification improperly exceeds the scope of the contract, we consider whether there is a material difference between the modified contract and the contract originally competed. CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD p 364; Clean Giant, Inc., B-229885, Mar. 17, 1988, 88-1 CPD p 281.

The materiality of a modification is determined by examining factors such as the magnitude of the changes in relation to the overall effort, CAD Language Sys., Inc., supra, whether the nature and purpose of the contract has been altered by the modification, Clean Giant, Inc., supra, and whether the field of competition would be materially changed by the contract modification. Rolm Corp., B-218949, Aug. 22, 1985, 85-2 CPD p 212.

The record here shows that from the inception of the DCTN contract in 1984, until January 26, 1995, the DCTN contract was not used to procure international services. In fact, LDDS has provided a statement from the contracting officer at the time the DCTN contract was solicited, indicating that he considered the use of the DCTN contract for international services beyond the scope of the contract.

While the understanding of the former contracting officer is a useful indicator of the agency's mindset at the time the agency solicited these services, it is not a substitute for a reasoned review of the contract document itself and a comparison of the existing and modified services. Such a review shows that the original DCTN contract as solicited contained an option for extending these services "to users located outside the [Continental United States]." Although the agency is not here exercising that option, the presence of the option in the solicitation, issued some 12 years ago, provides strong evidence that offerors could have expected that international services might be covered by the contract at some point in the future. In addition, the contract contains numerous other performance requirements that, while less explicit than the option provision, strongly suggest that the DCTN contract might be used to procure services reaching beyond the borders of the continental United States. [FN3] Finally, there is nothing about international telecommunications services that differs from the existing services other than their destination.

In sum, the record shows that services such as these are not materially different from those currently procured via this contract, and do not alter the nature or purpose of the contract from one seeking specialized telecommunications services. Accordingly, we conclude that the services at issue are within the scope of the DCTN contract.

The protest is denied.

Comptroller General of the United States

FN1. Our prior decision in Sprint Communications Co., B-262003.2, Jan. 25, 1996, 96-1 CPD p 24, includes a detailed discussion of AT & T's DCTN contract and the proposed sole-source award of a transition contract until completion of an upcoming competition already underway. In that decision, our Office denied Sprint's challenge to the award of the sole-source transition contract to AT & T. The decision also addressed other issues relevant here, as explained below.

FN2. LDDS first filed an agency-level protest challenging the cancellation of the solicitations for these services, and other services. After receiving the agency decision denying its protest, LDDS filed a timely challenge with our Office.

FN3. For example, the performance specifications section of the DCTN contract, at paragraph 2.2.1, requires the contractor to "meet the needs of the National Command Authorities (NCA), the DOD, and the Military Departments (MILDEPs) under crisis and emergency conditions such as mobilization of U.S. forces for overseas deployment, military exercises, mobilization and transfer of resources for assistance to allies, military participation during natural disasters, and evacuation of Americans from hostile environments."

The notion that the contractor in every one of these situations would be required to stop providing services at the U.S. border, while troops progress elsewhere, is unreasonable.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1995-2

In re:	)	
	)	
Protest of Eldeco, Inc.;	)	ORDER
Appeal by Eldeco, Inc.	)	
	)	

This case came before the South Carolina Procurement Review Panel (Panel) for hearing on March 8, 1995, on the appeal of ElDeCo, Inc. (Eldeco) of a decision by the Chief Procurement Officer (CPO) denying Eldeco's protest.

Present and participating in the hearing before the Panel were Eldeco represented by Frank Cisa, Esquire; Hay Construction Co., Inc. represented by Rob Robertson, III, Esquire; SC Department of Mental Health represented by Alan Powell, Esquire; and Office of General Services represented by Delbert Singleton, Esquire.

FINDINGS OF FACT

The parties stipulated that the facts, as found by the Chief Procurement Officer (CPO), are not in dispute. The following facts are the findings of the CPO as well as facts from the Record. The South Carolina Department of Mental Health (DMH) contracted with Hay Construction Co., Inc. (Hay) to construct a facility for Waccamaw Community Mental Health Services (Project). The project's Architect is Drakeford Architects (Drakeford). Hay listed Eldeco in its bid as its electrical subcontractor.

DMH contracted for the construction of this facility with Hay under the provisions of a Contract dated September 13, 1993, for a total Contract Sum of $2,889,000.00. The Contract contains the following provision:

> Owner and Contractor agree to extend the time allowed to accept Alternates 1, 2, 3 and 6 for a period of sixty (60) days following the signing of this

agreement. The agreed amounts of the Alternates are as follows:

Alternate No. 1:	$ + 325,000.00
Alternate No. 2:	$ + 175,000.00
Alternate No. 3:	$ + 128.000.00
Alternate No. 6:	$ + 285,000.00

DMH did not accept Alternates 1,2, 3, or 6 within the 60 days as allowed by the Contract due to lack of funds.

Hay entered a contract (Subcontract) with Eldeco on October 28, 1993 for $211,497.00, for the electrical work for the Project. (Record p. 111). Eldeco performed electrical work on the Project.

In a May 17, 1994, letter to Eldeco, Hay requested pricing on Alternates No. 1 and No. 2, since the time to accept the alternates had passed. On July 12, 1994, Eldeco provided a cost estimate for the electrical installation work which was priced per the latest edition of Means Electrical Cost Data (Means). In a July 12, 1994, letter to Eldeco, Hay stated that "...the Architect and Owner have a serious problem with your price increase of over 250% from the original Alternate bids." Hay also instructed Eldeco not to use Means to price the work and requested that it resubmit its pricing immediately. On July 15, 1994, Eldeco submitted an estimate which was generated by its in-house computer. The total for Alternate No. 1 was $83,986.21 and $10,177.71 for Alternate No. 2, which were close to the totals based on Means.

DMH instructed Hay to request pricing on the Alternates from other sources. Mancill Electric Company, Inc. (Mancill) quoted a price, based on Alternate No. 1 and Alternate No. 2, which was almost half of Eldeco's estimated price. In a July 29, 1994, letter to Hay, Mancill provided a "revised" bid of $42,733.00 for this electrical installation which provided a deduct for $2,640.00 for alternate fixtures and a deduct of $1,527.00 to delete a conduit run to the telephone board. In a November 3, 1994, letter to Eldeco, Hay rejected the July

15, 1994, proposal and stated that DMH felt that Eldeco's prices were out of line for the work. Hay also stated that "as a result this change order work has been awarded to Mancill Electric."

In a November 18, 1994, letter to Hay, Eldeco claims that Hay has breached its agreement with Eldeco and that the "State Procurement Code" has been violated. In a November 23, 1994, letter to the CPO, Eldeco initiated a Resolution Proceeding on this contract controversy.

In a December 9, 1994, letter to Eldeco, Hay offered to cancel the Mancill subcontract and award the work to Eldeco, a total amount of $43,733.00 less $4,432.00, the value of work already performed by Mancill, resulting in a price of $38,301.00. In a December 12, 1994, letter to Hay, Eldeco explained that Mancill's estimate was not detailed enough to evaluate and referred to Eldeco's estimate as very detailed, accurate and consistent with change order pricing. Eldeco further testified at the Panel hearing, that it could not evaluate Mancill's price estimate, as it was not sufficiently detailed, and neither Hay nor DMH contacted Eldeco to explain where on its detailed change order estimate, Eldeco was out of line.

The CPO conducted a hearing on January 11, 1995, and issued a decision on January 23, 1995. (Record p. 8-16). Eldeco appeals the CPO decision by letter dated February 2, 1995. (Record p. 3).

CONCLUSIONS OF LAW

Eldeco argues that the additional electrical work must be given to Eldeco under its subcontract with Hay. Article 7.1 of the Subcontract, which is required by Article 5.3.1 of the General Conditions of the Contract For Construction (General Conditions), provides as follows:

> The Contractor binds itself to the Subcontractor under this Agreement in the same manner as the Owner is

> bound to the Contractor under the Contract Documents. (Record p. 114)

Eldeco argues that this Article requires Hay, the Contractor, to utilize Article 7 of the Contract in dealing with Eldeco under the Subcontract and thus a change order or change directive under Article 7 of the Contract must involve Eldeco through the integration of Article 7.1 of the Subcontract. Because the Contractor has the right to be involved in the change order process under Article 7 of the Contract, the subcontractor has the same right to be involved in the change order process because of Article 7.1 of the Subcontract.

Eldeco is attempting to bring itself into the change order process with its argument that the Contract and Subcontract are integrated contracts, so that Eldeco has a right to be included in the change order decision. However, another article of the Subcontract directly addresses the subject of Change Orders. The Subcontract in Article 6.1 allows the Contractor to order "changes in the Work which are within the general scope of this Agreement. Adjustments in the contract price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Contract Documents." [underline added] (Record p. 114). The Contract Documents in Article 7 of the General Conditions of the Contract For Construction state:

> 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents. (Record p. 88).

A change order under Section 7.1.2 of the Contract requires the agreement of the Owner, Contractor, Architect and, when required, the State Engineer. (Record p. 102). The change order for the electrical work awarded to Mancill contains the agreement of the required parties . The Panel finds that neither

the Contract nor the Subcontract requires the consent of the subcontractor to a change order, so the change order between Hay, DMH and the Architect for additional work was appropriate.

Eldeco also contends that the Contract requires the use of a change directive if agreement cannot be reached on a change order. Article 7.3.2 of the General Conditions of the Contract provides a "Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order." (Record p. 88). This contention is based on the same argument that Eldeco, the subcontractor, is required to be involved in the negotiation of the change agreement. As the Panel previously stated, the subcontractor is not required to be involved in a change order agreement, the appropriate parties agreed on the change order, so a change directive was not required.

Eldeco further argues that Hay was required to award additional work under the contract to Eldeco, and not allowed to bid shop for other subcontractors. A subcontractor may be substituted on a project for very limited reasons. S.C. Code Ann. section 11-35-3020(2)(b)(iii) (1993) provides:

> No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except for one or more of the following reasons:
> ...(i) with the consent of the using agency for good cause shown.

The CPO found that Code section 11-35-3020 (2)(b)(iii) applies only to the initial award and not to additional work. The Panel disagrees, as the Code Section does not contain words limiting the time frame of the requirement. The statute does allow substitution of subcontractors after the required approval is given. The Panel agrees with the CPO and finds that Hay obtained the approval required under the Code to award the additional work to a different

subcontractor. (Record p. 13). The "using agency", DMH, consented to substituting the electrical subcontractor based on the "good cause shown" of an increase in price estimate of almost 250% from the original price bid by Eldeco. The Panel agrees that a price increase of 250% from the original price bid on alternates is good cause to substitute a subcontractor. Once the subcontractor was substituted, the additional work was awarded based on a Change Order properly negotiated between the Owner, Architect, and Contractor, with approval of the State Engineer.

Eldeco also argues in its protest letter that the additional work is not within the scope of the original contract, and therefore is required to be bid under S. C. Code Ann. section 11-35-3020 (1993), which requires competitive bidding for construction contracts. S. C. Code Ann. section 11-35-3040 (1993), provides in part:

> (1) Contract Clauses. State construction contracts and subcontracts promulgated by regulation pursuant to Section 11-35-2010(2) may include clauses providing for adjustment in prices, time of performance and other appropriate contract provisions including but not limited to: (a) the unilateral right of a governmental body to order in writing: (i) all changes in the work within the scope of the contract, and ...
> (2) Price Adjustments. Adjustments in price pursuant to clauses promulgated under subsection (1) of this section shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including reasonable profit. Costs...shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor: ...
> (iii) by agreement on a fixed price adjustment;

S. C. Code Ann. section 11-35-3040(1) (1993) allows contract clauses "providing for adjustment in prices" including "the unilateral right of a governmental body to order in writing all changes in the work within the scope of the contract". The additional work in the change order was originally listed as Alternates in the bid, and therefore was clearly within the scope of the contract. Under these provisions, DMH correctly used the change order provisions in the Contract to adjust the scope of work of the Contract, and add the cost as an agreed "fixed price adjustment".

For the foregoing reasons, the Panel finds that DMH properly replaced Eldeco as the electrical subcontractor and issued a change order for the additional work. Eldeco's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Gus J. Roberts, Chairman

Columbia, SC
March 31, 1995.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	(REVISED)
	)	
S.C. Patients' Compensation Fund	)	
	)	
v.	)	
	)	
Modus21, LLC	)	Case No. 2013-5
	)	
(Contract Controversy)	)	

On June 4, 2014, the South Carolina Patients' Compensation Fund (the PCF) filed a Motion for Reconsideration asking the Panel to reconsider its May 6, 2014 order regarding the contract controversy between it and Modus21, LLC. The PCF asked the Panel to reconsider its ruling regarding the application of Regulation 19-445.2015 to contract controversies and various factual findings. On June 5, 2014, the Chief Procurement Officer (the CPO) filed a separate Motion to Reconsider, asking the Panel to reverse its decision regarding the application of Regulation 19-445.2015 to the dispute before it. By letter dated June 17, 2014, the Panel advised the parties that it would entertain written legal memoranda on the issue of the application of Regulation 19-445.2015 to contract controversies, but that it would not revisit the factual findings complained of by the PCF. In addition, the Panel indicated that it would consider written arguments regarding "bad faith" as an element under Regulation 19-445.2015(D). After receiving and considering the written briefs of the parties, the Panel now withdraws its original order, dated May 6, 2014, and substitutes this one in its place.

This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4230(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). The South Carolina Patients'

Compensation Fund (the PCF) and Modus21, LLC (Modus21) have each appealed the May 9, 2013, decision by the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO). This case involves numerous disputes concerning the contract between the PCF and Modus21 for the replacement of the aging computer database the PCF used to run its insurance business with a new Member Management System (MMS). To aid its review, the Panel conducted a three-day hearing from December 3 through December 5, 2013. Helen F. Hiser, Esquire, and Tommy E. Lydon, Esquire, represented the PCF at that hearing. Robert D. Fogel, Esquire, represented Modus21, and William Dixon Robertson, III, Esquire, represented the CPO.

Taking into account and considering all of the testimony, the demeanor and the credibility of the witnesses; all of the evidence, stipulations, pleadings, and documents submitted by the parties; and all of the memoranda and argument submitted by the parties' counsel, the Panel hereby submits this ORDER.

Findings of Fact

I. State Term Contract for Third-Party Consulting

The contract between the PCF and Modus21 has its origins in a solicitation issued by ITMO on August 18, 2006. Record at PRP2566 – PRP2586 (Request for Proposal (RFP), Solicitation 07-S7276). Through this solicitation, ITMO sought to procure independent third party consulting services to review and develop an improvement process for governmental entities. Record at PRP2568. The Scope of Work section of the RFP provided the following overview of the services desired:

> It is the intent of the State of South Carolina to solicit a Solutions-based State Term Contract(s) to allow governmental entities the ability to seek the assistance of an independent third party to better understand their current value and to develop an improvement process. This process should include financial

The CPO found that Addenda 001 and Addenda 002 to SOW 002 lacked consideration because Modus21 was already obligated to provide reporting functionality under SOW 002. The Panel disagrees and finds that the evidence before it establishes that the reporting functionality desired by the PCF was not included in SOW 002. In other words, the Panel finds that the scope of work was changed by adding the reporting component. In addition, the addenda were presented to the PCF in writing and were approved by Ms. Coston. Therefore, the Panel concludes that these addenda satisfy the requirements of section 11-35-310(4)[25] of the Procurement Code and that Modus21 is entitled to retain the $7,200 it was paid under Addenda 001 and 002 to SOW 002.

III. Statements of Work 003 through 010

As discussed above, the work performed under SOWs 003; 004 and Addendum 001; 008; 009; and 010 involved the delivery of custom software coding and exceeded the scope of the state term contract. This work was not competitively bid and represented a material change to the contract. The Panel recognizes the public contracting rule that prohibits the making of material modifications to contracts entered into under a competitive bidding statute. *Kenai Lumber Company, Inc. v. LeResche*, 646 P.2d 215 (Ak. 1982); *Matter of: LDDS WorldCom*, B-266257 (Comp. Gen.), 96-1 CPD P 50, 1996 WL 51207; *cf.* S.C. Code Ann. § 11-35-3070 (architectural, engineering, or construction changes). As a result, the Panel concludes that Ms. Coston, the PCF Board, and the ITMO procurement officer all lacked the authority to engage Modus21 to write custom software code. The Panel also concludes that Modus21 was well aware of the prohibition in the state term contract against writing custom software code. *Cf. In re: Protest of Technology Solutions, Inc.*, Panel Case No. 2001-3 (September 14, 2001) (wherein

[25] Section 11-35-310(4) defines "change order" as "any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract." S.C. Code Ann. § 11-35-310(4) (2011).

the Panel found a vendor failed to prove that an "emergency" contract had been ratified by an agency and was not entitled to payment because the vendor relied on the representation of an IT employee who lacked the authority to bind the government). Therefore, the Panel finds that SOWs 003; 004 and Addendum 001; 008; 009; and 010 were unauthorized contracts.

In his order, the CPO applied Regulation 19-445.2015 in determining how to address the statements of work outside the scope of the state term contract. S.C. Code of State Regulations, Reg. 19-445.2015 (2011). The CPO specifically applied subsection (D) of the regulation, which provides:

> Upon finding after award that an award is in violation of law and that the recipient of the contract acted fraudulently or in bad faith, the appropriate chief procurement officer shall declare the contract null and void unless it is determined in writing that there is a continuing need for the supplies, services, information technology, or construction under the contract and either (i) there is no time to re-award the contract under emergency procedures or otherwise; or (ii) the contract is being performed for less than it could be otherwise performed. If a contract is voided, the State shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the State is entitled to recover the greater of (i) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided, or (ii) the difference between payments under the contract and the value to the State of the supplies, services, information technology, or construction it obtained under the contract. The State may in addition claim damages under any applicable legal theory.

S.C. Code of State Regulations, Reg. 19-445.2015(D). Thus, to proceed under this provision of the regulation, two elements must be established: (1) that an award has been made in violation of law, and (2) that the contract recipient acted "fraudulently or in bad faith." The Panel has agreed in part with the CPO that certain statements of work were unauthorized contracts because they involved custom coding. Thus, the first element under Regulation 19-445.2015(D) has been satisfied.

The CPO found that the second element was also met because Modus21 knowingly performed work outside the scope of the state term contract and that it did so for purposes of financial gain. Modus21 has appealed this finding of bad faith, arguing that it performed work outside the scope of the Master Agreement at the insistence of the PCF and that it did so openly and with the knowledge of the PCF, as evidenced by Ms. Coston's signatures on these statements of work. Moreover, Modus21 argues that the CPO's finding that it was motivated by financial gain failed to take into consideration the numerous hours it worked at no charge.

"Bad faith" is not defined by the Procurement Code. However, both the South Carolina Supreme Court and the South Carolina Court of Appeals have quoted from Black's Law Dictionary when considering the issue:

> **Bad faith.** The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or will.

Black's Law Dictionary 72 – 73 (Abridged 5th Ed. 1983); *see, e.g., State v. Griffin*, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915); *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 42 – 43, 664 S.E.2d 83, 88 – 89 (Ct. App. 2008). Adopting this definition, the Panel finds that "bad faith" under Regulation 19-445.2015(D) requires more than a determination that work was performed outside the scope of the original agreement; there must also be some showing of "dishonest purpose" or "furtive design." Based on the record before it and all of the testimony heard over the course of three days, the Panel finds that Modus21 did not act out of a "dishonest purpose" or "furtive design," but rather out of a desire to satisfy its customer and to complete the project successfully. Therefore, the Panel finds that the second element of

subsection (D) is not met and reverses the CPO's decision to the extent it relied on that provision of the regulation.

The Panel must now consider whether any other provision contained in the regulation can resolve the dispute between the parties. Subsection (C) governs the termination of an unlawful or unauthorized contract not accompanied by fraud or bad faith on the part of the contract recipient. Regulation 19-445.2015(C) provides that a settlement claim by the contract recipient after the State terminates a contract may either be "made in accordance with the contract" or "made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination" if the contract does not contain termination provisions. S.C. Code of Regulations, Reg. 19-445.2015(C). In the instant case, Modus21 has been paid in full for all of the statements of work, and it is the State, not Modus21, seeking "settlement." Therefore, the Panel finds that subsection (C) is not helpful to the resolution of this contract controversy and cannot be reasonably applied under the circumstances.

Nonetheless, the Panel finds that the unauthorized contracts uncovered during the course of these proceedings may be addressed by the contract controversy statutory provision itself. Section 11-35-4320 of the Procurement Code provides that the CPO "may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law." S.C. Code Ann. § 11-35-4320 (2011). Based on this statutory provision, the Panel finds that the CPO acted properly in declaring SOWs 003; 004 and Addendum 001 to SOW 004; 008; 009; and 010 null and void under the prohibition against material modifications to contracts executed under a competitive bidding statute. Thus, the Panel affirms his decision requiring

Modus21 to return all amounts[26] paid to it under these statements of work. *Cf. Service Management, Inc. v. State Health and Hum. Svcs. Fin. Comm'n*, 298 S.C. 234, 238, 379 S.E.2d 442, 444 (1989) ("A private party has no right to public funds received as a result of the unauthorized conduct of a government employee.").

With regard to SOWs 005, 006, and 007, the Panel finds that these statements of work, contrary to the CPO's ruling, were within the scope of the state term contract. Moreover, the PCF never rejected any deliverables under these statements of work during their performance periods. Thus, the Panel concludes that Modus21 is entitled to keep the amounts the PCF paid to it under SOWs 005, 006, and 007. However, the Panel also concludes that Addendum 001 to SOW 005 called for development work which was outside the scope of the state term contract. Accordingly, Modus21 is directed to return the $2,785 it received under this addendum.

IV. The PCF's Claims Seeking Recovery of Mr. Stanley's Fees, Lost Staff Time, and Attorney's Fees and Costs

In its appeal to the Panel, the PCF also sought compensation for lost staff time, recovery of the fees it paid to Mr. Stanley, and recovery of attorney's fees and cost. The Panel finds that these damages are not recoverable under the terms of the Master Agreement and denies the PCF's request to recover these damages.[27] Record at PRP125 ¶ 10.1.

Conclusion

In conclusion, for the reasons stated herein, the Panel hereby affirms the CPO's ruling in part and reverses the CPO's ruling in part.

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[26] Under the Panel's determination, the following amounts shall be returned to the PCF: $54,208 for SOW 003; $73,525 for SOW 004 and Addendum 001; $275.50 for SOW 008; $751.25 for SOW 009; and $12,225.75 for SOW 010.

[27] The Panel also notes that it does not believe Mr. Stanley's fees would have been recoverable in any event as they were paid in violation of the Procurement Code.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: _____
C. BRIAN MCLANE, SR., CHAIRMAN

This 9th day of September, 2014.

Columbia, South Carolina

SECTION 11-35-30. Obligation of good faith.

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

Stated Differently: you must observe reasonable commercial standards of fair dealing when performing the tasks required by the code.

SECTION 11-35-4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement.

(1) Right to Protest; Exclusive Remedy.

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) The rights and remedies granted in this article to bidders, offerors, contractors, or subcontractors, either actual or prospective, are to the exclusion of all other rights and remedies of the bidders, offerors, contractors, or subcontractors against the State.

(d) The rights and remedies granted by subsection (1) and Section 11-35-4410(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

(2) Protest Procedure. (a) A protest pursuant to subsection (1)(a) must be in writing, filed with the appropriate chief procurement officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the appropriate chief procurement officer within the time provided in subsection (1).

(b) A protest pursuant to subsection (1)(b) must be in writing and must be received by the appropriate chief procurement officer within the time limits established by subsection (1)(b). At any time after filing a protest, but no later than fifteen days after the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code, a protestant may amend a protest that was first submitted within the time limits established by subsection (1)(b). A protest, including amendments, must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.

(3) Duty and Authority to Attempt to Settle Protests. Before commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer, the head of the purchasing agency, or their designees may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The appropriate chief procurement officer, or his designee has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If in the opinion of the appropriate chief procurement officer, after reasonable attempt, a protest cannot be settled by mutual agreement, the appropriate chief procurement officer shall conduct promptly an administrative review. The appropriate chief procurement officer or his designee shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a

decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision under subsection (4) along with a statement of appeal rights pursuant to Section 11-35-4210(6) must be mailed or otherwise furnished immediately to the protestant and other party intervening. The appropriate chief procurement officer, or his designee, also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 11-35-4210(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

(8) Notice of Chief Procurement Officer Address. Notice of the address of the appropriate chief procurement officer must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type solicitation.

SECTION 11-35-4310. Solicitations or awards in violation of the law.

(1) Applicability. The provisions of this section apply where it is determined by either the appropriate chief procurement officer or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the appropriate chief procurement officer after review under Section 11-35-4210 or by the Procurement Review Panel after review under Section 11-35-4410(1).

(2) Remedies Prior to Award. If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:
(a) canceled;
(b) revised to comply with the law and rebid; or
(c) awarded in a manner that complies with the provisions of this code.

(3) Remedies After Award. If, after an award of a contract, it is determined that the solicitation or award is in violation of law;
(a) the contract may be ratified and affirmed, provided it is in the best interests of the State; or
(b) the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

(4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 11-35-4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND In re: Petition for Administrative Review GTECH CORPORATION, Petitioner, v. SOUTH CAROLINA EDUCATION LOTTERY, Respondent.	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL CASE NO. 2002-4 ORDER

This matter came before the South Carolina Procurement Review Panel (the "Panel") on May 8, 2002, for a hearing on the sole issue of the Panel's jurisdiction over a Petition for Administrative Review (the "Petition") filed with the Panel by GTECH Corporation ("GTECH"). Present and participating in the hearing before the Panel were GTECH, represented by Henry P. Wall, Esquire and E. Wade Mullins, Esquire; South Carolina Education Lottery ("SCEL"), represented by M. Elizabeth Crum, Esquire and Baylen T. Moore, Esquire; and the Information Technology Management Office ("ITMO"), represented by Keith C. McCook, Esquire.

FINDINGS OF FACT

On September 18, 2001, ITMO issued RFP Number 02-S4626 (the "RFP") for the purpose of soliciting proposals for a vendor to design, install and operate online lottery ("Online Lottery") services for SCEL. Scientific Games International, Inc. ("SGI") and GTECH responded to the RFP. The RFP specified that there would be approximately 3100 education lottery retail sites ("Retail Sites") requiring telecommunication installation services. The RFP set forth the online system functional requirements, i.e., performance standards, but required the proposers to design, implement, operate and maintain a system that fully meets those functional requirements.

In its proposal, SGI identified AT&T as its subcontractor that would provide these telecommunication installation services for the Retail Sites. On October 25, 2001, a Notice of Intent to Award the contract to SGI was issued. GTECH did not file a protest. On October 30, 2001, SCEL and SGI entered into a contract for "Statewide On-line Gaming Systems and Services" (the "Contract"). The Contract, in accordance with the RFP, required the contractor, SGI, to be fully responsible for all work under the contract, including services, equipment or materials supplied by a subcontractor and to be the single point of contact with SCEL.

After execution of the Contract and SGI and AT&T had begun implementation of their respective tasks regarding the Online Lottery, AT&T informed SGI that it would not, in fact, be able to make the telecommunication installs at all of the education lottery Retail Sites prior to the lottery's commencement date of March 6, 2002. SGI proposed to hire BellSouth Corp. to cover the approximately 2100 education lottery Retail Sites that AT&T would not be able to cover by the Contract deadline. On or about February 12, 2002, SCEL and SGI executed an "Agreement for Providing Cover" (the "Cover Agreement") by which both parties to the agreement preserved their respective rights under the Contract and the "South Carolina Consolidated Procurement Code," S.C. Code Ann. §§ 11-35-10, et seq. (Supp. 2001) (the "Code"). The Cover Agreement did not change the scope of the Contract. The number of Retail Sites, the cost to SCEL of installation at the Retail Sites (SGI is responsible for additional costs), and the time for installation to be completed remained the same. The Cover Agreement further provided that SCEL did not object to SGI's contracting with an additional subcontractor, BellSouth, so that SGI could timely implement the Online Lottery since it could not timely complete the approximately 2100 Retail Site telecommunication installations required under the Contract with AT&T.

On February 19, 2002, pursuant to S.C. Code Ann. §§ 11-35-4310 and 11-35-4410(1)(b), GTECH filed a Petition[1] with the Panel, seeking direct Panel review and requesting that the Panel declare "SGI's response to the RFP, as modified by the alternative solutions, non-responsive and non-compliant with the requirements of the RFP". GTECH's petition also sought GTECH's proposal preparation costs ("Costs"). The Petition did not seek cancellation of the Contract between SGI and SCEL, re-award of the Contract to GTECH or re-solicitation of the Contract.

GTECH alleged that there were defects in the SGI proposal and/or that SGI knew or should have known, based upon the reservations AT&T expressed in its letter to SGI, at the time it submitted the proposal that AT&T could not make the telecommunication installations at the education lottery Retail Sites in a timely manner. GTECH also alleged that SGI deliberately misled SCEL by saying it could implement the lottery by February 20, 2002.

The AT&T letter was available to GTECH under the South Carolina Freedom of Information Act ("FOIA") after the Notice of Intent to Award was posted[2].

On February 20, 2002, the Panel requested that GTECH submit a brief distinguishing its Petition from the case of Hitachi Data Systems Corporation v. Leatherman, 309 S.C. 174, 420, S.E.2d 843 (1993) and specifying what "written determination, decision, policy or procedure," as specified in Section 11-35-4410(1)(b), GTECH was appealing. On April 1, 2002, GTECH submitted its "Memorandum in Support of Panel's Statutory Authority to Review Petition for Administrative Review Filed Pursuant to S.C. Code Ann. § 11-35-

[1] There were four (4) exhibits attached to the Petition: Ex. A was the RFP; Ex. B was the Contract between SCEL and SGI; Ex. C was correspondence between SCEL & SGI regarding AT&T's performance; and Ex. D was an excerpt from the RFP. GTECH provided the Panel with a copy of the Cover Agreement as an exhibit to its Memorandum in Support of Jurisdiction. The Panel notes that there were no objections to the exhibits and that exhibits may be filed in support or opposition to subject matter jurisdiction.

4410(1)(b)" ("Memorandum in Support") to the Panel. GTECH's Memorandum in Support asserted the Cover Agreement between SCEL and SGI that was executed on February 12, 2002, as the written determination or decision upon which its Petition was based. On April 3, 2002, the Panel notified SCEL and ITMO that each could submit reply briefs regarding the Panel's jurisdiction. On April 18, 2002, SCEL submitted a memorandum in opposition to the Petition. Also on April 18, 2002, ITMO submitted correspondence indicating its position that the matter should be remanded to the CPO[3]. The hearing on the sole issue of the Panel's jurisdiction to entertain GTECH's Petition was set for argument on May 8, 2002.

On the late afternoon of May 7, 2002, GTECH served a Reply Brief by fax on SCEL and filed the same with the Panel on the morning of May 8, 2002 prior to the hearing. This Reply Brief raised allegations and issues not raised in the Petition. In the Petition, GTECH only alleged that AT&T was a subcontractor for SGI. In its Reply Brief, GTECH attempted to add a contradictory allegation that SGI and AT&T are parallel-prime contractors, not contractor and subcontractor. Absent any allegations in the Petition, GTECH argued in its Reply Brief that the Cover Agreement constitutes a new procurement on a de-facto sole source or emergency basis or that it constitutes a cardinal change to the Contract. Although it acknowledged that the Panel lacks jurisdiction to hear the issue, GTECH further argued in its Reply Brief that the Cover Agreement represents an unconstitutional pledge of the State's resources to pay the debt of a private corporation. The Petition did not allege that AT&T was a prime contractor, that the cover Agreement was a new procurement because it was tantamount to an emergency or sole source contract, or that the Cover Agreement constituted a cardinal change from the Contract.

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[2] The RFP puts a prospective offeror on notice of its right to protest and of the availability of FOIA.

[3] The Panel concludes as a matter of law that having found that it does not have jurisdiction to hear the Petition, it necessarily does not have jurisdiction to remand.

CONCLUSIONS OF LAW

GTECH has sought to invoke the Panel's authority or original jurisdiction pursuant to S.C. Code Ann. §§ 11-35-4410(1)(b) and 11-35-4310 to review directly its Petition. GTECH has not cited any other statutory basis for the Panel to have jurisdiction or authority to review the Petition[4]. The Code is the comprehensive legislative scheme passed by the South Carolina General Assembly to govern and regulate the purchasing of goods and services by the State of South Carolina, by and through its agencies, boards and commissions. S.C. Code Ann. §§ 11-35-20 and 11-35-40 (Supp. 2001). See also Unisys Corporation v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E.2d 273 (2001).

The Code "provides legal and contractual remedies for parties aggrieved as a result of the procurement process." (Emphasis added).

Hitachi, 420 S.E.2d 843, 846. The Panel is a creature of statute and, as such, can only exercise that authority expressly delegated to it or delegated by necessary implication. E.g., Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 360 (1996). Under the clear terms of Section 11-35-4410(1)(b), the Panel has only been delegated the authority to and only has jurisdiction to hear, without prior review by the CPO, "requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction..." (emphasis added)that could not otherwise have been brought before a CPO under Sections 11-35-4210, 4220 or 4230.

The cardinal rule of statutory construction is that the legislative intent must be ascertained and it must prevail. Gardner v. Biggart, 208 S.C. 331, 417 S.E.2d 858 (1992). In

[4] As noted below, Petitioner, in its Petition, sought administrative review pursuant to Section 11-35-4310(1). See Petition, p. 1. This section does not confer authority on the Panel to hear petitions for administrative review but is simply the Code section that sets forth the remedies available to either a Chief Procurement Officer ("CPO") or the Panel when a solicitation or award of a contract is made in violation of the law.

ascertaining the legislative intent of a statute, the courts look to the clear and unambiguous language of the statute. Defender Properties, Inc. v. Doby, 307 S.C. 336, 415 S.E.2d 383 (1992). It is black letter law that "[w]here a statute is clear and unambiguous, the terms of the statute must be given their literal meaning." Medlock v. 1985 Ford F-150 Pick Up, 308 S.C. 68, 417 S.E.2d 85, 87 (1992), citing Duke Power Co. v. South Carolina Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987); see also Hitachi, 420 S.E.2d 843; Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). "When such terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641, 644 (1992), citing Gunnells v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968).

Another cardinal rule of statutory construction is that the statutory provisions do not stand alone but must be read in the context of the Code as a whole. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Sutherland Statutory Construction, 5th Ed., § 46.05, p. 103 (1992). See also Keonig v. South Carolina Dept. of Public Safety, 325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996). Further, the statutory language in question must also "be read in a sense which harmonizes with its subject matter [the Code] and accords with its general purposes." Hitachi, 420 S.E.2d 846 citing Multi-Cinema, Ltd. v. S.C. Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987).

Based upon these principals of statutory interpretation and the clear and unambiguous language of the Code, the Panel concludes as follows.

ISSUE I: THE PANEL DOES NOT HAVE JURISDICTION UNDER S.C. CODE § 11-35-4410(1)(b) TO REVIEW THE ISSUES RAISED IN GTECH's PETITION

Pursuant to S.C. Code § 11-35-4410(1), the Panel is charged with the responsibility to review and determine:

> (a) requests for review of written determinations of the chief procurement officers under Sections 11-35-4210 (6), 11-35-4220 (5), and 11-35-4230 (6); and
>
> (b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures. (Emphasis added.)

A. THE COVER AGREEMENT IS NOT A WRITTEN DETERMINATION OR DECISION UNDER SECTION 11-35-4410(1)(b).

S.C. Code Ann. § 11-35-4410(1)(a) gives the Panel the authority and responsibility to review written determinations of the CPOs under Sections 11-34-4210(6)[5], 11-35-4220(5)[6] and 11-35-4230(6)[7]. Each of these decisions is a unilateral decision. S.C. Code Ann. § 11-35-4410(1)(b) gives the Panel the authority and responsibility to review "other written determinations or decisions" ("Determination or Decision") not reviewable by the CPO. GTECH argues that the Cover Agreement is such a Determination or Decision. The Panel disagrees.

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[5] Decision regarding a vendor protest of a solicitation or award of a contract.
[6] Determination regarding a vendor debarment or suspension.
[7] Decision regarding a contract controversy of a contract awarded under the Code.

While the Code does not expressly define Determination or Decision, the Panel finds the plain meaning of the words as well as their repeated use in the Code as a whole indicate that the Cover Agreement is not a Determination or a Decision. "Determination" is defined to mean "the decision of a court or administrative agency" (Black's Law Dictionary) or "the act of making or arriving at a decision" (The American Heritage College Dictionary, 3rd Edition (1993)). Decision is defined to mean "a determination arrived at after consideration of facts, and, in legal context, law" (Black's Law Dictionary) or "the passing of judgment on an issue under consideration" (The American Heritage College Dictionary, 3rd Edition (1993)). Determination and Decision each indicate by way of definition that upon considering the facts and/or law in support of and in opposition to a matter, a judicial or administrative body rendered a unilateral finding. Therefore, Determination and Decision do not refer to a mutual agreement by parties to a contract.

Legislative intent with respect to the use of the "determination" and "decision" throughout the Code is also instructive. The Code is replete with examples of the use of "determination" and "decision." S.C. Code Ann. § 11-35-2410 sets forth an exhaustive list, including Sections 11-35-4210, 11-35-4220, and 11-35-4230 cited above, of Code sections requiring written determinations or decisions under the Code. Each of these determinations or decisions is a unilateral determination or decision made by a State agency. Some of these determinations or decisions are not reviewable by the CPO. The only avenue for review of such determinations or decisions is under the provisions of S.C. Code § 11-35-4410(b)(1).

In arguing that the Panel has jurisdiction to hear its Petition, GTECH also relies on In re Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc., Case Nos. 96-4 and 96-5 to support its position that the Petition can be reviewed under S.C. Code Ann. § 11-35-4410(1)(b). In Three Rivers, the Panel was asked to review Three Rivers Solid Waste Authority's procurement policy. Three Rivers argued that, as a political subdivision, it was not subject to the Code, and that, in any event, the petition was untimely filed. In dismissing the protest, the Panel found:

> Since the Panel lacks jurisdiction under the fifteen-day time limit, the issue of the Panel's review of a political subdivision's procurement policy is not addressed.

GTECH contends: "Implicit in this decision is the Panel's determination that it has jurisdiction to hear a petition filed directly with the Panel in its original jurisdiction under S.C. Code Ann. § 11-35-4410(1)(b)." Three Rivers does not stand for the proposition that the Panel has the authority to and must hold a merits hearing on a petition simply because a party files a petition with the Panel seeking review of a document the party has denominated as a Determination or Decision.

Under the clear and unambiguous language of Section 11-35-4410(1)(b) and based upon its usage throughout the Code, Determinations or Decisions are unilateral determinations and decisions made by administrative (executive) agencies of the State within the context of exercising their respective authorities under the auspice of the Code. Determination and Decision are each the result of unilateral action on the part of an administrative body, not a mutual agreement by parties to a contract.

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The Cover Agreement in question is not a unilateral determination or decision of SCEL and it is not a Determination or Decision within the meaning of Section 11-35-4410(1)(b). The Cover Agreement is a mutual agreement between SGI and SCEL, the parties to the contract. The Cover Agreement preserved the legal rights of SGI and SCEL vis-a-vis any contract controversy issues that might arise from SGI's addition of BellSouth as a second subcontractor to complete the telecommunication installations at the Retail Sites.[8] Further, S.C. Code Ann. § 11-35-4410(1)(b) expressly provides that the Panel only has jurisdiction to review those matters that could not have been brought before the CPOs in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230. As stated above in the Findings of Fact, "GTECH alleged that there were defects in the SGI proposal and/or that SGI knew or should have known, based upon the reservations AT&T expressed in its letter to SGI, at the time it submitted the proposal that AT&T could not make the telecommunication installations at the education lottery Retail Sites in a timely manner. The AT&T letter was available to GTECH under the South Carolina Freedom of Information Act ("FOIA") after the Notice of Intent to Award was posted." Clearly, these findings of fact refer to an issue which GTECH could have timely raised before the CPO within fifteen days of the date notification of award was posted in accordance with Section 11-35-4210 of the Code. The Panel lacks jurisdiction to hear GTECH's Petition under Section 11-35-4410(1)(b).

[8] "The parties enter into this Agreement in the spirit of cooperation, without prejudice to the pre-existing rights and obligations among themselves and expressly intending to preserve all pre-existing rights and obligations among themselves. By entering into this Agreement, the parties hereto acknowledge and agree that none of the rights and obligations among the parties hereto with respect to the Education Lottery shall be altered, amended or affected except as specifically set forth herein." Cover Agreement, ¶ 4.

ISSUE II: THE PANEL HAS NO JURISDICTION UNDER SECTION 11-35-4310.

S.C. Code Ann. § 11-35-4310 provides, in pertinent part:

> (1) Applicability. The provisions of this section apply where it is determined by either the appropriate chief procurement officer or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the appropriate chief procurement officer after review under Section 11-35-4210 or by the Procurement Review Panel after review under Section 11-35-4410(1).
>
> . . .
>
> (4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 11-35-4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs. (Emphasis added)

Section 11-35-4310 by its clear and express terms only sets forth the remedies available to an unsuccessful bidder where either the appropriate CPO or the Panel, after administrative review, has found that the solicitation or award of a contract is in violation of law. It does not provide a jurisdictional basis for either the Panel or a CPO to hear a petition filed pursuant to Section 11-35-4410(1)(b) since protests of the solicitation or award of a contract must be pursued under Section 11-35-4210 in the first instance.

GTECH has requested that the Panel award to it Costs. Based upon the allegations of the Petition, the Panel lacks authority to award Costs to GTECH. The only subpart of S.C. Code § 11-35-4310 that authorizes either the CPO or the Panel to award the "protesting bidder or offeror" reasonable reimbursement, including its bid preparation costs, is Section 11-35-4310(4). Under the clear and unambiguous language of this section, it only authorizes award of Costs to a successful protestant after a successful protest pursuant to S.C. Code § 11-35-4210. GTECH has made no such protest. There is no basis for the Panel to invoke jurisdiction under this statute.

ISSUE III. SEVERAL ALLEGATIONS OF GTECH's REPLY BRIEF ARE NOT TIMELY

S.C. Code Ann. § 11-35-4410(1)(b) requires that any petition to the Panel from a written determination or decision must be filed within fifteen days of the written determination. GTECH contends that the Cover Agreement is the Determination or Decision from which it appeals. The Cover Agreement was executed on or about February 12, 2002. GTECH raised three new issues in its Reply Brief, filed with the Panel on May 8, 2002. Those issues are: (1) SGI and AT&T are parallel-prime contractors instead of being contractor and subcontractor respectively; (2) the Cover Agreement constituted a new procurement as either a de-facto sole source or emergency procurement or the Cover Agreement constitutes a cardinal change of the Contract; and (3) the Cover Agreement constitutes an unconstitutional pledge to pay the debt of a private corporation. Those issues were raised well beyond the fifteen day jurisdictional limitation and the Panel has no jurisdiction to entertain them.

CONCLUSION

For the foregoing reasons, the Petition for Administrative Review is dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

By: _____

Patricia T. Smith, Chairperson

Columbia, South Carolina

June 7, **2002.**

PROTESTS
BEFORE THE
CHIEF PROCUREMENT OFFICERS

AN OVERVIEW

http://www.state.sc.us/mmo/legal/lawmenu.htm

This brochure is issued for informational purposes only. Nothing contained herein shall be construed to bind the Chief Procurement Officers as to any practice described herein.

Introduction: Before it can enter into a procurement contract, state government must comply with the requirements established by the South Carolina Consolidated Procurement Code. When an actual or potential bidder believes that the state has failed to follow those requirements, the bidder may submit a protest. (Section 11-35-4210 of the South Carolina Code of Laws) If a protest is properly submitted, the appropriate Chief Procurement Officer ("CPO") will administratively review that protest. This pamphlet is intended to give the public a general outline of how the CPOs typically handle the administrative review of a protest.[1]

Since being established in 1981, the CPOs have operated informally. No formal practices or procedures have been adopted. *By publishing this pamphlet, the CPOs do not intend to prescribe or define the process. Rather, this pamphlet is published solely to assist those unfamiliar with the process. Please be aware that the information offered here is general. Practices among the CPOs may differ. Moreover, this pamphlet should not be considered as an interpretation or restatement of the law. To the extent this pamphlet is inconsistent with any code or precedent, it should be disregarded.*

The Law: Special rules govern the state's procurement process. In conducting their administrative reviews, the CPOs are guided by these laws and apply them carefully. Vendors appearing before the CPO's should be acquainted with the applicable laws. Special attention should be given to the South Carolina Consolidated Procurement Code (S.C. Code Ann. §§ 11-35-10 to -5270), the Procurement Regulations (23 S.C. Code Ann. Regs. 19-445.2000), the opinions of the South Carolina Procurement Review Panel, and the opinions of our state courts. The Code, the Regulations, and the decisions of the Panel are available on the World Wide Web. Address on front cover.

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[1] The Chief Procurement Officers are authorized to resolve contract controversies by S.C. Code Ann. § 11-35-4230. This brochure does not address that process. For information on that process, please see our website. Address on front cover.

Who Can Participate: If a hearing is held, the CPOs will usually allow the following players to participate: protestants, apparent successful vendors, the state agencies involved, and the responsible procurement office. Procurements regarding construction may also include a representative of the State Engineer's Office.

Lawyers: Many participants choose to retain legal counsel; however, it is not required. Regulation 19-446. *The CPOs seek to ensure that everyone gets a fair opportunity to present their protest, whether or not they have a lawyer.*

Starting the Process: The Procurement Code provides a limited amount of time to file a protest. A protest must be received within that time by the appropriate CPO. While no particular form is required, protests are typically in the form of a letter. The content is more important than the form; your protest letter must "set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." Section 11-35-4210(2). The CPOs typically will not consider an issue not raised by the protest letter. *The CPOs find it helpful if a protest letter identifies the exact statutory or regulatory requirement you claim the state failed to follow and exactly what relief you want.* The more specific you are, the better.

Burden of Proof: The person filing a protest ("the protestant") bears the burden of proving their case by a preponderance of the evidence. Be prepared to explain your protest and to provide evidence proving your case.

How are Protests Decided:The Procurement Code requires that the appropriate CPO administratively review your protest. If appropriate, the CPO may hold a hearing to assist him in that process. If a hearing is held, the protestant will be notified in advance and in writing.

The Hearing: At hearings, all parties are given a chance to speak and introduce exhibits. The hearings are held in a large conference room with all the parties sitting around the table. By custom, the CPO sits at the end of the table. The CPO's lawyer sits to the CPO's right. The responsible procurement office sits at the CPO's left. Beyond that, parties sit wherever they can find room. Anyone actually testifying will ordinarily sit at the table while testifying.

At these hearings, no formal rules of procedure apply.[2] In a typical hearing, the following course may be followed. After a brief welcome, the CPO asks everyone to introduce themselves and to sign an attendance sheet. The responsible procurement office then introduces key documents from the procurement file, including the solicitation, any relevant responses, and a chronology of significant events. After marking these exhibits, the CPO hears motions. *Motions:* Motions are a request from a party for the CPO to dispose of a protest, or some part of it, before hearing all the evidence. As the CPOs have not adopted any formal rules, no particular types of motions are necessary. In the past, the CPOs have entertained Motions to Dismiss for lack of jurisdiction (*i.e.*, protest not timely) and Motions to Dismiss for failure to state an issue of protest upon which relief can be granted.

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[2] While no formal rules of procedure are followed, some lawyers argue, or make motions based upon, appropriate portions of the South Carolina Rules of Civil Procedure. While such argument is welcome, the process is an "administrative review," not a trial. Accordingly, the CPOs will entertain such argument at their discretion.

If the protest is not resolved by a motion, parties are often given an opportunity to make a brief opening statement that explains their position. The CPOs do not always ask for opening statements, and parties need not make one. If allowed, parties are sometimes asked to speak in the following order: the protestant, the apparent successful vendor, the responsible procurement office, the acquiring state agency. Of course, the order varies depending upon which parties are involved. Once established, the same order is usually followed for the duration.

After opening statements, if any, the protestant is asked to present its case. A protestant is required to present evidence to prove its case. Simply stating your position will not suffice. After the protestant has presented its case, the remaining parties will be allowed to respond. Depending on the complexity of the case and how many parties are involved, protestants may be asked to present their entire case either all at once or one protest issue at a time.

The CPOs should be addressed by their last name, e.g., Mr. Jones. Titles such as your honor and judge are unnecessary.

Evidence: As stated above, no formal rules apply at a CPO hearing. While the South Carolina Rules of Evidence do not apply,[3] a party may object to the introduction of evidence if they feel the evidence is not relevant, trustworthy, or otherwise appropriate.[4] Evidence usually comes from documents or witnesses.

Witnesses: A party representing themselves may testify on their own behalf. Otherwise, witnesses usually testify in response to questions. Parties and their witnesses should generally address themselves to the CPO, not to each other. After a witness has testified, each party is given an opportunity to ask that witness questions (cross examination). After all parties have questioned a witness, the CPO and the CPO's lawyer may also question a witnesses. Additional questions are generally not allowed after the CPO has questioned a witness.

Documents: Documents may be offered as evidence, but other parties may object to their use. If you plan to offer documents to the CPO for review, please bring enough complete copies for everyone. Typically you will need six copies, one each for the protestant, the apparent successful offeror, the state agency involved, the responsible procurement office, the CPO, and the CPO's lawyer. You need not bring copies of the solicitation (IFB or RFP) or any of the bids or proposals. These documents will be available at the hearing.[5]

Record of the Hearing: The hearings are recorded solely for the CPO's convenience. The recordings are not transcribed. Witnesses may or may not be sworn, depending upon the CPO's individual preference.

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[3] The South Carolina Rules of Evidence are only mandatory for contested cases. S.C. Code Ann. § 1-23-330(1) (1986). As protest hearings are not "contested cases" as defined by the Administrative Procedures Act, the rules do not apply.

[4] While not required to do so, lawyers are encouraged to state their objections with reference to the South Carolina Rules of Evidence.

[5] When more than one party is represented by a lawyer, the lawyers are asked to exchange and, when possible, agree on the admissibility of, all exhibits prior to the hearing. **Exhibits should not be marked prior to the hearing.**

If a CPO's decision is appealed to the Procurement Review Panel, all documents marked as exhibits during the CPO's hearing, as well as the protest letter, will be forwarded to the Procurement Review Panel.

Appeal: Any decision by a Chief Procurement Officer may be appealed to the South Carolina Procurement Review Panel, in accordance with S.C. Code Ann. § 11-35-4410.

Chief Procurement Officers

Chief Procurement Officer for Information Technology
Office of the State CIO
1201 Main Street, Suite 820
Columbia, SC 29201
Telephone 737-1900
Facsimile 737-4452

Chief Procurement Officer for Goods and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
Telephone 737-0600
Facsimile 737-0639

Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201
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Facsimile 737-0639

SECTION 11-35-4410. Procurement Review Panel.

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(a) requests for review of written determinations of the chief procurement officers under Sections 11-35-4210 (6), 11-35-4220 (5), and 11-35-4230 (6); and

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

[remainder of statute omitted]

11-35-1520(13)

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;

(b) failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;

(c) failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization, and the bid carries such a signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, thereon, provided that the bidder states under oath that it received the amendment prior to bidding and that the bidder will stand by its bid price or,

(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the governmental body;

(e) failure of a bidder to furnish an affidavit concerning affiliates;

(f) failure of a bidder to execute the certifications with respect to Equal Opportunity and Affirmative Action Programs;

(g) failure of a bidder to furnish cut sheets or product literature;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

(k) failure of a bidder to furnish its bidder number; and

(l) notwithstanding Section 40-11-180, the failure of a bidder to indicate his contractor's license number or other evidence of licensure, provided that no contract shall be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.

MINOR INFORMALITIES

Touchstone:

The South Carolina Procurement Review Panel has issued numerous opinions explaining the application of the minor informality exception. Protest of American Sterilizer Co., Case No. 1983-2 (failure to include a mandatory, enforceable affidavit of non-collusion is a minor informality); Protest of Miller's Tire Service, Case No. 1984-6 (failure to produce sample to pass a performance test is not a minor informality); Protest of CNC Company, Case No. 1988-5 (failure to specify installation charge was not a minor informality); Protest of Miller of Columbia, Inc., Case No. 1989-3 (failure to include all unit prices is not a minor informality); Protest of ECB Construction Co., Case No. 1989-7 (failure to list subcontractors is not a minor informality); Protest of National Computer Systems, Inc., Case No. 1989-13 (failure to include a sample photocopy of student tests, which were needed to demonstrate that the offeror could supply legible copies, was a minor informality, despite being mandatory); Protest of Gregory Electric Co., Case No. 1989-17(II) (failure to include documents regarding vendor's qualifications is a minor informality, despite being mandatory); Protest of General Sales Co., Case No. 1989-20 (failure to include FEIN or Social Security number is a minor informality; failure to provide a model number is a minor informality; changing opening date on a bid is insufficient to acknowledge receipt of an amendment); Protest of ACMG, Inc., Case No. 1990-4 (on the facts, failure to quote a fixed price considered a minor informality); Protest of Pizzagalli Construction Co., Case No. 1991-8 (while not determinative, mandatory nature of a requirement is evidence of whether it is essential; failure to bid mandatory alternatives is not a minor informality); Protest of Harbert

Const. Co., Case No. 1991-17 (failure to provide a contractor's license is not a minor informality); Protest of Justice Technology, Inc., Case No. 1992-4 (failure to respond exactly as required by the RFP is a waivable technicality if all essential requirements are met); Protests of Orangeburg-Calhoun-Allendale-Bamberg Community Action Agency, Inc., Case No. 1992-15 (failure to provide a fixed price is not a minor informality; failure to provide information regarding insurance is not a minor informality); Protest of Industrial Sales Co., Case No. 1993-11 (I) (errors in cost proposal cannot be waived as a minor informality) reversed on different grounds by 1993-11S; Protest of Andersen Consulting, Case No. 1993-18 (failure to include an offer for a voice response unit in the RFP was not a minor informality); Protest of Network Solutions, Inc., Case No. 1993-22 (failure to offer data back-up without operator intervention is not a minor informality); Protest of Brantley Construction Co., Case No. 1994-6 (a mistake in bidding an alternate as an "add to" rather than as a "deduct from" cannot be waived as a minor informality); Protest of Triad Mechanical Contractors, Case No. 1994-12 (allowing an agency to define in the bid documents, what dollar threshold will be considered trivial; failure to acknowledge an addendum that does not modify the requirements of the RFP is a minor informality); Protest of Blue Bird Corp., Case No. 1994-15 (when a solicitation's design specifications allow offerors to meet or exceed those specifications, offers that vary from but exceed the exact specifications may be accepted as minor informalities; where actual offer meets specifications, the State may waive as a minor informality, an inadvertent notation or diagram that offeror did not meet specifications; conditional obligation in bid bond was a minor informality; failure to provide the manufacturer's name for a part bid is a minor informality); Protest of Handi-

House of Newberry, Case No. 1996-1 (failure to provide warranty information is not a minor informality); Protest of Blue Cross Blue Shield of SC, Case No. 1996-9 (providing a facsimile signature, rather than an original, may be waived as a minor informality); Protest of Coca-Cola Bottling Co., Case No. 1996-13 (failure to provide a single or aggregate commission percentage, rather than commission rates for each product, is not a minor informality); Protest of Abbott Laboratories, Case No. 1997-4 (qualification of obligation to provide baby formula samples free of charge could not be waived as a minor informality; modification of termination for convenience clause is not a minor informality); Protest of Todd, Bremer & Lawson, Inc., Case No. 1997-14 (failure to provide the fee schedule in a separate envelope is a minor informality); Protest of Koch Industries, Case No. 1999-4 (failure to initial the resident vendor preference form is not a minor informality). The Supreme Court and Attorney General have also weighed in on this issue. See Ray Bell Construction Co. v. School District of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998) (listing multiple subcontractors in the disjunctive is not waivable as a minor informality) and 1976 S.C. Op. Atty. Gen. No. 4393 (failure to file a contractor's qualification statement is a minor informality). Probably the best explanation of the Panel's analysis on this issue appears in Protest of National Computer Systems, Inc., Case No. 1989-13 and Protest of Gregory Electric Co., Case No. 1989-17(II). All the authorities must, however, be viewed in light of legislative changes to the procurement code. Since the code was first enacted in 1981, several changes have taken place with regard to minor informalities, and the wording of section 11-35-1520(13) must always be consulted.

537 S.E.2d 299

Court of Appeals of South Carolina.

Edward D. SLOAN, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of Greenville County, and on behalf of all others similarly situated, Appellant,

v.

The SCHOOL DISTRICT OF GREENVILLE COUNTY, South Carolina, an Agency of the State of South Carolina, J. Coleman Shouse, Vivian Richardson, Debra Bush, Margaret Burch, Ralph Chandler, Marilyn Hendrix, Valerie Hollinger, Roger Meek, Tommie Reece, William Renninger, Leola Robinson, and Ann Southerlin, Respondents.

No. 3238.

Heard April 12, 2000.
Decided Aug. 21, 2000.

CONNOR, Judge:

Edward D. Sloan, Jr., individually, and as a citizen, resident, taxpayer, and registered elector of Greenville County, and on behalf of all others similarly situated, brought this declaratory judgment action against the School District of Greenville County and the individual members of the District board. Sloan requested a declaration that certain contracts entered into by the District were *ultra vires* to the District's procurement code, invalid, and illegal. Sloan also asked the court to enjoin performance and payment of the illegal contracts. The trial court granted the District's motion to dismiss, finding Sloan lacked standing to contest the District's actions. It also found Sloan had no implied right of action under the District's procurement code. Sloan appeals. We reverse and remand.

FACTS

The District awards contracts amounting to $25,000 or more through competitive sealed bidding under its procurement code. [FN1] That code provides an emergency procurement may be made when an emergency condition arises and the need cannot be met through normal procurement methods. The code limits such procurement to "when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulation." The District's applicable regulation provides examples of such emergency conditions, including floods, epidemics, riots, equipment failures, and fire loss. The regulation also requires the condition "must create an immediate and serious need for supplies, services, equipment, or construction[,] ... the lack of which would seriously threaten: (1) the functioning of the District; (2) the preservation or protection of property; or (3) the health or safety of any person." The emergency procurement is to "be made with as much competition as is practicable under the circumstances."

> FN1. The District is exempt from the provisions of the South Carolina Consolidated Procurement Code, pursuant to S.C.Code Ann. § 11-35-70 (Supp.1999), as it has adopted its own procurement code and its procedures have been approved by the Office of General Services.

On February 23, 1998, the District decided to procure construction contracts for three schools under the emergency exception to its competitive sealed bid procedure. It justified the need for the emergency procurement by asserting it would assure completion of the construction prior to school opening in August 1999, as required by the "Long-Range Facilities Plan." Eston Skinner, a purchasing agent in the District's procurement office spoke to Larry Sorrell, the Manager of Audit and Certification for the State Budget and Control Board, to get his input. Sorrel advised the District had the option of doing an emergency procurement, but warned the District would be cited in the procurement department's audit for not starting the project in time to allow for a normal bidding procedure. He also advised that a disenchanted contractor or other aggrieved party could protest the emergency procurement. The District's procurement code allows determinations under the emergency exception to be challenged if "they are clearly erroneous, arbitrary, capricious or contrary to law."

The District invited contractors to submit fee proposals for the construction of the three middle school projects. After reviewing the proposals, the District awarded the contracts to Beers-York Construction Company, Inc. for construction of all three schools. Construction of the schools began soon thereafter.

Sloan brought this declaratory judgment action challenging the award of the contracts. He conceded he did not try to bid on the project. Instead, he

asserted he was a taxpayer contesting an illegal expenditure. Relying on *Citizens for Lee County, Inc. v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992), the trial court found Sloan did not having standing in this case. As an alternate ground for dismissal, the court held Sloan did not have an implied right of action under the District's procurement code.

TAXPAYER STANDING

[1] Sloan argues the trial court erred in holding he lacked standing to challenge the District's award of the contracts.

[2][3] A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Blandon v. Coleman,* 285 S.C. 472, 330 S.E.2d 298 (1985). "Standing is 'a personal stake in the subject matter of a lawsuit.' " *Newman v. Richland County Hist. Preserv. Com'n,* 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997) (quoting *Bailey v. Bailey,* 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). In *Florence Morning News, Inc. v. Building Comm'n,* 265 S.C. 389, 218 S.E.2d 881 (1975), the South Carolina Supreme Court held:

> A **private person** may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. '(I)t is not sufficient that he has merely a general interest common to all **members of the public.**'

Id. at 398, 218 S.E.2d at 884-85 (emphasis added) (quoting *Ex parte Levitt,* 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937)). Deciding the plaintiffs in *Florence Morning News* lacked standing, the Supreme Court specifically noted they did not "sue as taxpayers." *Id.* at 398, 218 S.E.2d at 885.

In the case at bar, Sloan is not maintaining this action as a "private person," nor is he maintaining it merely as a "member of the public." Sloan has pursued this action as a taxpayer of Greenville County.

In *Mauldin v. City Council,* 33 S.C. 1, 11 S.E. 434 (1890), the South Carolina Supreme Court examined the issue of taxpayer standing. [FN2] In *Mauldin,* taxpayers challenged the purchase of an electric plant by the city council as *ultra vires,* claiming the purchase increased their tax burden. *Id.* at 15, 11 S.E. at 434. The Court explained how taxpayers differ from other members of the general public and how taxpayers suffer harm from *ultra vires* acts. *Id.* at 18-21, 11 S.E. at 435-36. The *Mauldin* court stated:

> "The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county ... are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county ...."

Id. at 20, 11 S.E. at 436 (quoting *Newmeyer v. Missouri & Miss. R.R. Co.,* 52 Mo. 81 (1873)). The Court held the taxpayers were "not the whole public, but comparatively a small part of it." *Id.* at 18, 11 S.E. at 435. The taxpayers "constitute a class specially damaged by the alleged unlawful act," and therefore have "a special interest in the subject-matter of the suit, distinct from that of the general public." *Id.* at 19, 11 S.E. at 436 (quoting *Mayor and City Council of Baltimore v. Gill,* 31 Md. 375, 394 (1869)).

A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina. In *Sligh v. Bowers,* 62 S.C. 409, 40 S.E. 885 (1902), taxpayers of a school district challenged the school district's plan to relocate a school building. The taxpayers alleged "all expenditures of the public money [on the new school] are without lawful authority." *Id.* at 411, 40 S.E. at 886. The taxpayers' standing to challenge the allegedly illegal expenditures was not in question, but the South Carolina Supreme Court, quoting the United States Supreme Court, held:

> This is an unlawful use of the public funds, which the court, in the exercise of its equitable powers, will enjoin. In *Crampton v. Zabriskie,* Mr. Justice Field used this language: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county ... there is at this day no serious question."

Id. at 413, 40 S.E. at 887 (citation omitted) (quoting *Crampton v. Zabriskie,* 101 U.S. 601, 609, 25 L.Ed. 1070 (1879) [FN3]).

> FN2. In *Mauldin,* the Supreme Court held that operation of certain utilities by cities and towns would be *ultra vires.* After *Mauldin,* the South Carolina Constitution was amended to allow cities and towns to operate water systems. *See Berry v. Weeks,* 279 S.C. 543, 309 S.E.2d 744 (1983) (explaining history of constitutional provisions relating to waterworks).

FN3. Recently, in *United States v. City of New York,* 972 F.2d 464 (2nd Cir.1992), the court stated, "[M]unicipal taxpayer standing has ancient roots in our jurisprudence." *Id.* at 470 (citing *Crampton,* 101 U.S. at 609).

In *Kirk v. Clark,* 191 S.C. 205, 4 S.E.2d 13 (1939), a bondholder sued the County Board of Commissioners and the Treasurer of Chesterfield County to enjoin the misapplication and diversion of tax funds collected for the payment of his bonds. Although the plaintiff had standing as a bondholder, the South Carolina Supreme Court stated, "The principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law." *Id.* at 210, 4 S.E.2d at 15.

In *Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301 (1985), the plaintiff taxpayers sued the Mayor and City Council of Greenwood for illegally reimbursing expenses incurred at a convention. The defendants questioned the taxpayers' standing to bring the action. Holding the taxpayers had standing, the Supreme Court confirmed that taxpayers "have an interest in seeing that city officials disburse funds in a lawful manner." *Id.* at 480, 330 S.E.2d at 302.

Although South Carolina has allowed taxpayer standing in other contexts, we have not been confronted with a case wherein a taxpayer challenges a violation of a statute requiring competitive bidding in the award of governmental contracts. However, other states have addressed this issue and held taxpayers have standing because competitive bidding laws are for the benefit of taxpayers. *Independent Enters. Inc. v. Pittsburgh Water & Sewer Auth.,* 103 F.3d 1165, 1178 (3rd Cir.1997) ("Statutes requiring the award of public contracts to the lowest bidder exist solely for the benefit of taxpayers, and only taxpayers suffer a legally cognizable injury from a violation of the statute that entitles them to bring suit."); *United States v. City of New York,* 972 F.2d 464 (2nd Cir.1992) (holding taxpayer had standing to challenge legality of contracts awarded in violation of competitive bidding requirement); *Browning-Ferris, Inc. v. Manchester Borough,* 936 F.Supp. 241, 244 (M.D.Pa.1996) ("[A]n action to enjoin a municipality from awarding a contract to any but the lowest responsible bidder may be brought only by a taxpayer of the municipality which has created the governmental entity awarding the contract ...."); *Lawrence Brunoli, Inc. v. Town of Branford,* 247 Conn. 407, 722 A.2d 271, 274 (1999) ("This court has long maintained that '[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders; they should be construed to accomplish these purposes fairly and reasonably with sole reference to the public interest.' ") (quoting *John J. Brennan Constr. Corp. v. City of Shelton,* 187 Conn. 695, 448 A.2d 180, 184 (1982)); *Beaver Glass & Mirror Co. v. Board of Educ.,* 59 Ill.App.3d 880, 17 Ill.Dec. 378, 376 N.E.2d 377, 380 (1978) (holding unsuccessful bidder did not have standing because competitive bidding "statute was enacted for the benefit and protection of taxpayers"); *Alliance for Affordable Energy v. Council of New Orleans,* 677 So.2d 424 (La.1996) (holding taxpayers had standing to challenge authority of city council to exempt certain public contracts from competitive bidding statute); *Eastern Missouri Laborers Dist. Council v. St. Louis County,* 781 S.W.2d 43, 46 (Mo.1989) (holding taxpayers had standing to challenge county contracts awarded without competitive bidding and explaining, "The primary basis for taxpayer suits arises from the need to ensure that governmental officials conform to the law. It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers." (citation omitted)); *National Waste Recyc., Inc. v. Middlesex County Improv. Auth.,* 150 N.J. 209, 695 A.2d 1381, 1387 (1997) ("Public bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good."); *Dick Enters., Inc. v. Metropolitan/King County,* 83 Wash.App. 566, 922 P.2d 184, 185 (1996) ("Competitive bidding statutes exist to protect the public purse from the high costs of official fraud or collusion.").

The taxpayers of Greenville County have a direct interest in the proper use and allocation of tax receipts by the District. Therefore, we find Sloan, as a taxpayer of Greenville County, has standing to challenge the District's award of the allegedly illegal contracts due to the District's failure to abide by the competitive sealed bidding requirements in its procurement code.

PUBLIC IMPORTANCE

Our decision to allow Sloan to proceed with this suit does not rest entirely on his status as a taxpayer of Greenville County. Recently, in *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999), the

Supreme Court held "a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* at 531, 511 S.E.2d at 75. In *Baird,* the plaintiffs alleged Charleston County committed an *ultra vires* act by exceeding its statutory authority to issue hospital bonds. The Court explained the case impacted a profound public interest--the public health and welfare--and stated the citizens of Charleston County "have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development." *Id.* Accordingly, the Supreme Court held the plaintiffs had standing to proceed. *Id.* at 531, 511 S.E.2d at 75-76.

In this case, the public interest involved is the prevention of the unlawful expenditure of money raised by taxation. "Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts.... Taxpayers must have some mechanism of enforcing the law." *Eastern Missouri Laborers Dist. Council,* 781 S.W.2d at 47.

Although the District adopted its own procurement code, the General Assembly's intent is relevant when examining the public policy of competitive sealed bidding in the award of public contracts. The General Assembly stated its intent as follows:

> Section 2. It is the intent of the General Assembly to ensure that the heads of state agencies, departments, and institutions are held accountable for the effective and efficient use of the public resources entrusted to them annually in the appropriation process.
> Act No. 178, 1993 S.C. Acts 1367.

As required by law, the language used in the District's procurement code is "substantially similar" to the General Assembly's expression of intent. S.C.Code Ann. § 11-35-70 (Supp.1999) (requiring school districts' procurement codes to be "substantially similar" to the South Carolina Consolidated Procurement Code). In particular, it states:

> The underlying purposes and policies of this code are:
> 1. to provide increased economy in procurement activities and to maximize to the fullest extent practicable the purchasing values of funds of the District;
> ...
> 9. to promote increased public confidence in the procedure followed in public procurement

The General Assembly's intent and the District's purposes are equivalent. Both manifest the desire to ensure continued public trust and confidence in governmental spending.

The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed ... without showing that the municipality suffered any alleged injury." 18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.26 (3d ed.1993); *see* 5 Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04 [11] (2d ed.1999) (stating that where a bid statute has been disregarded, injury to taxpayers is almost conclusively presumed). The Missouri Supreme Court went a step further and held, "Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, it is illegal and should be enjoined." *Eastern Missouri Laborers Dist. Council,* 781 S.W.2d at 47.

[4] The requirement of standing "is not an inflexible one." *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse,* 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Accordingly, in addition to Sloan's standing as a taxpayer, we find the issues involved "are of such wide concern" that this declaratory judgment action should be decided for future guidance in the expenditure of public funds pursuant to competitive sealed bidding requirements. *Id.; Baird,* 333 S.C. at 531, 511 S.E.2d at 75; *Gilstrap v. South Carolina Budget & Control Bd.,* 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied.").

TRIAL COURT'S RELIANCE ON *CITIZENS FOR LEE COUNTY v. LEE COUNTY*

The trial court relied on *Citizens for Lee County, Inc. v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992), in which the Supreme Court found a special- interest group and two citizens did not have an implied right

of action under the procurement code. The Court also held the plaintiffs lacked standing to maintain a suit under the procurement code because their interest or the inurement of any alleged prejudice to them was indistinguishable from that of other members of the general public. *Citizens for Lee County,* 308 S.C. at 28-29, 416 S.E.2d at 645.

The trial court's reliance on *Citizens for Lee County* was misplaced and is inapposite for the following reasons. First, Sloan's declaratory judgment action involves an allegedly illegal expenditure of public funds by the District. In *Citizens for Lee County,* an expenditure of public funds was not at issue. Instead, the issue was a lease agreement between Lee County and a private corporation to maintain a solid waste disposal facility on county property. This lease agreement did not involve the expenditure of public funds by Lee County.

Second, Sloan is maintaining this action as a taxpayer. In *Citizens for Lee County,* there is no mention of the plaintiffs' status as taxpayers and the Supreme Court did not rule on that issue. The Supreme Court identified the plaintiffs as "a special-interest group and two private citizens." *Id.* at 28, 416 S.E.2d at 645 (emphasis added). The Supreme Court addressed the plaintiffs' standing only in the context that the plaintiffs were private parties whose interests were "indistinguishable from that of other members of the general public." *Id.* at 29, 416 S.E.2d at 645.

Citizens for Lee County stands for the proposition that a procurement code does not create an implied right of action for special-interest groups and private citizens who do not have "a direct, intrinsic interest in the procurement practices of governmental entities." *Id.* As explained above, competitive sealed bidding requirements are principally for the benefit of taxpayers to ensure their money is spent wisely. As a taxpayer, Sloan has "a direct, intrinsic interest in the procurement practices" of the District, and therefore, he has an implied right of action under the District's procurement code.

[5][6] We also must consider whether Sloan has stated a sufficient cause of action under the Declaratory Judgment Act. When bringing an action under the Declaratory Judgment Act, "[a]ll that is required is that the [plaintiff] demonstrate a justiciable controversy." *Brown v. Wingard,* 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). Sloan's allegations of expenditures by the District in violation of the competitive sealed bidding requirement demonstrate a justiciable controversy.

For the foregoing reasons, we find the trial court erred in holding Sloan lacked standing to pursue this declaratory judgment action.

REVERSED AND REMANDED.

GOOLSBY and HOWARD, JJ., concur.

SECTION 11-35-310. Definitions.

Unless the context clearly indicates otherwise:

(24) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

(25) "Procurement officer" means any person duly authorized by the governmental body, in accordance with procedures prescribed by regulation, to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.

(26) "Purchasing agency" means any governmental body other than the chief procurement officers authorized by this code or by way of delegation from the chief procurement officers to enter into contracts.

(36) "Using agency" means any governmental body of the State which utilizes any supplies, services, information technology, or construction purchased under this code.

(37) "Designated board office" and "designated board officer" means the office or officer designated in accordance with Section 11-35-540(5).

SECTION 11-35-510. Centralization of materials management authority.

All rights, powers, duties, and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by a state governmental body pursuant to the provisions of law relating thereto, and regardless of source of funding, are hereby vested in the appropriate chief procurement officer. This vesting of authority is subject to Sections 11-35-710 (Exemptions), 11-35-1250 (Authority to Contract for Auditing Services), 11-35-1260 (Authority to Contract for Legal Services), Section 11-35-1550 (Small Purchases), Section 11-35-1570 (Emergency Procurements), Section 11-35-3230 (Exception for Small Architect-Engineer, and Land Surveying Services Contracts), and Section 11-35-3620 (Management of Warehouses and Inventory).

SUBSTANTIAL PERFORMANCE: Exists when the contractor has performed all material requirements of the entire contract or a divisible portion thereof, such that the underlying purpose of the contract has not been substantially impaired. Stated another way, a material breach has not occurred.

General Rules: If a contractor has substantially performed, termination for cause would not be warranted, but the state would be entitled to recover any damages resulting from the contractor's failure to fully perform. If a contractor has not substantially performed (i.e., has materially breached the contract), the state may terminate for cause. If the state terminates for cause and the contractor's breach is not found to be substantial, the state may be liable for breach of contract.

Application: In the absence of an agreement to the contrary, the concept of substantial performance is generally applicable to contracts for either construction, services, or goods mixed with services. Different rules apply to a sale of goods governed by the Uniform Commercial Code. S.C. Code Ann. § 36-2-601.

TERMINATION FOR CAUSE: Should the contract administration process NOT be successful, it may become necessary to terminate a contract. Generally, MMO will only support a "Termination for Cause" if the Contractor has failed to "Substantially Perform". Contracts are not usually terminated because a Contractor does not completely or perfectly perform (minor non-performance issues remain). Contracts may be "Terminated for Cause" due to minor non-performance issues when the contract documents expressly require "Perfect Performance". Agencies are expected to pay Contractors based on their performance. Incomplete performance should receive proportionately incomplete payment. **Refer to the Termination Letter Attachment #5 for details.**

As to buyer's remedies generally, see § 36–2–711.
As to letters of credit, see §§ 36–5–101 et seq.

Research and Practice References—
67 Am Jur 2d, Sales §§ 372 et seq.
77 CJS, Sales §§ 181 et seq.
6 Am Jur Pl & Pr Forms (Rev ed), Sales, Form 2:342 (complaint, petition, or declaration; allegation; refusal to permit inspection of goods).
6 Am Jur Pl & Pr Forms (Rev ed), Sales, Form 2:345 (instruction to jury; right to inspect, test, and sample goods in dispute and to preserve evidence).
18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 2—Sales, §§ 253:1321 et seq. (preserving evidence of goods in dispute).

PART 6

BREACH, REPUDIATION AND EXCUSE

SEC.

§ 36–2–601. Buyer's rights on improper delivery.

Subject to the provisions of this chapter on breach in installment contracts (§ 36–2–612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§ 36–2–718 and 36–2–719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole;

(c) accept any commercial unit or units and reject the rest.

HISTORY: 1962 Code § 10.2-601; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: No one general equivalent provision but numerous provisions, dealing with situations of non-conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes: Partial acceptance in good faith is recognized and the buyer's

remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of changes: To make it clear that:

1. A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross references:

Sections 2-602(2) (a), 2-612, 2-718 and 2-719.

Definitional cross references:

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section1-201.

"Goods". Section 2-105.

"Installment contract". Section 2-612.

"Rights". Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

Section 2-601 recognizes that the buyer may treat the sales contract as breached when the goods "fail in *any* respect to conform . . ." This seems to express the view of strict performance of sales contracts whereby any deviation in quality or quantity results in a breach unless it comes within the maxim of de minimis non curat lex. As expressed by Judge Learned Hand in Mitsubishi Goshi Kaisha v Aaron & Co., 16 F2d 185, 186 (2d Cir 1926), "There is no room in commercial contracts for the doctrine of substantial performance". The factual question of degree as to the extent of deviation which goes beyond a mere de minimis and constitutes a breach will remain. As expressed in section 275 of the Restatement of Contracts, "It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise for an agreed eschange."

No South Carolina decision has ever expressly stated a rule of strict performance although where the court finds that the parties intend time to be of the

essence or where performance within a prescribed time is an express condition precedent, failure to perform within the time constitutes a breach. S. F. Bowser & Co. v Crescent Filling Station, 133 SC 281, 130 SE 870 (1925); Jennings v Bowman, 106 SC 455, 91 SE 731 (1916). The case of Rivers v Gruget, 2 Nott & McC 265 (1820) which said that a slight or temporary defect in a horse does not constitute a breach, may be an expression of the de minimis rule and not necessarily an adoption of substantial performance as a standard for sales contracts. See also, Leroy Dyal & Co. v Allen, 161 F2d 152 (4th Cir 1947), a case under the Federal Perishable Agricultural Commodities Act (7 USCA Section 499(a)) which applies a rule of substantial performance, where the court detects a tendency to modify the harsh rule of strict performance.

The rule of strict performance does not apply to installment contracts covered by Commercial Code Section 2-612 which allows rejection of an installment for non-conformity only "if the non-conformity substantially impairs the value of that installment." Also Commercial Code Section 2-504 which qualifies the buyer's right to reject in shipment cases where the seller has failed to put the goods in possession of a carrier or has failed to notify the buyer of the shipment "only if material delay or loss ensues." Also the right of rejection under this section would be subject to the right of the seller to cure his defective tender under Commercial Code Section 2-508. Finally, the buyer's right of rejection may be expressly limited by agreement such as for repair and replacement of non-conforming goods in lieu of rejection.

Where there is improper delivery, this section gives the buyer the choice of three alternative courses of action. The first alternative is to reject all of the goods as provided in subsection (a). In accord, Green v Camlin, 229 SC 129, 92 SE2d 125 (1956).

Subsection (b) permits the buyer to alternatively accept all of the goods. Commercial Code Sections 2-607 and 2-714 make it clear that an acceptance of the non-conforming goods would not prevent recovery of damages for breach of contract. In accord, Southern Brick Co. v McDaniel, 187 SC 243, 196 SE 893 (1938); Liquid Carbonic Co. v Coclin, 161 SC 40, 159 SE 461 (1931); Elner v Haverty Furniture Co., 128 SC 151, 122 SE 578 (1923).

Subsection (c) gives the buyer the flexibility of partial acceptance and rejection, but only as to commercial units. (See Commercial Code Section 2-105(6) for definition of "commercial unit." The reason for this limitation is that the value to the seller of a remaining part of a commercial unit may be unduly impaired by division. Thus, the test is whether the acceptance of a part unduly impairs the value of the rejected portion. While there are no South Carolina cases directly in point, this subsection would go beyond the limitations on the buyer's right to accept a part only when the contract is divisible and not if indivisible. See, Williston, Sales, Section 493 (rev ed 1948).

Cross references—

As to rejection of goods, see § 36-2-602.

As to what constitutes acceptance of goods, see § 36-2-606.

As to instalment contract, breach of, see § 36-2-612.

As to contractual limitations of remedy, see §§ 36-2-718, 36-2-719.

As to when action is taken seasonably, see § 36-1-204.

As to contract requiring payment before inspection, see § 36-2-512.

As to buyer's right to inspection before payment or acceptance, see § 36-2-513.

As to rejected goods, see §§ 36-2-603, 36-2-604.

As to failure to make effective rejection, as acceptance, see § 36-2-606.

As to seller's remedies on wrongful rejection by buyer, see § 36-2-703.

As to buyer's security interest for payments on price and for expenses, see § 36-2-711.

Excerpts
on
Divisible or Installment Contracts
from
A Treatise on the Law of Contracts
by
Samuel Williston
(the bible on contract law)

When a contract is divisible into corresponding pairs of part performances which may be deemed agreed equivalents, a party may claim compensation for that portion of the contract already performed before that party's breach terminates the contract . . ..

Its effect [of this rule] is to give a party who has performed one of these parts the right to its agreed equivalent just as if the parties had made a separate contract with regard to that pair of corresponding parts.

However, only those apportionable parts that are substantially performed need be compensated. A party is not entitled to recover for a less than substantial partial performance of a divisible portion of the contract . . . .

Where there has been a breach of a divisible portion of a divisible contract, the injured or nonbreaching party can recover damages for that portion of the contract, but its remaining contractual duties are not necessarily discharged.

Therefore, even where the contract is viewed as divisible, a breach of a divisible portion of the contract may excuse the injured party from further performance if the breach is nevertheless deemed material as to the whole contract.

. . . the party responsible for the uncured material failure can claim compensation for any parts that he has already performed, but he cannot enforce the contract with respect to any other pair of corresponding parts, including the part or parts that he has failed to perform.

Purposes:

To make it clear that:

1. The repudiating party's right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the repudiation, there can be no retraction under this section.

2. Under subsection (2) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

Cross reference:

Point 2: Section 2-609.

Definitional cross references:

"Aggrieved party". Section 1-201.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

Section 2-611(1) states the general common law rule that repudiation may be retracted before time for performance has arrived or until the other party has either manifested an election to rescind the contract or changed his position. See, Williston, Sales, Section 585(c) (rev ed 1948); Rest. Contracts, Section 319 (1936). See Swift & Co. v Goldberg, 121 SC 190, 113 SE 358 (1922) which seems to recognize this principle.

Subsection (2) recognizes that the initial repudiation is a justification for the other party to demand adequate assurance of performance under Commercial Code Section 2-609 as a condition to an effective retraction.

Subsection (3) states the effect of retraction as reinstating the party's rights under the contract with allowance for any delay occasioned by the repudiation.

Cross references—

As to assurance of due performance, see § 36–2–609.

Research and Practice References—

67 Am Jur 2d, Sales §§ 308, 520, 552 et seq., 710 et seq.

78 CJS, Sales §§ 387 et seq., 486 et seq.

6 Am Jur Pl & Pr Forms (Rev ed), Sales, Forms 2:591–2:593 (anticipatory repudiation; retraction).

18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 2—Sales, §§ 253:1461 et seq. (retraction of an anticipatory repudiation).

3 Am Jur Proof of Facts 2d, Anticipatory Repudiation of Contract for Sale of Goods, §§ 6 et seq. (proof of anticipatory repudiation of sales contract).

3 Am Jur Proof of Facts 2d, Anticipatory Repudiation of Contract for Sale of Goods, §§ 12 et seq. (proof of anticipatory repudiation by failure to give adequate assurance of performance).

§ 36–2–612. "Installment contract"; breach.

(1) An "installment contract" is one which requires or autho-

rizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

HISTORY: 1962 Code § 10.2-612; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Section 45(2), Uniform Sales Act.

Changes: Rewritten.

Purposes of changes:

To continue prior law but to make explicit the more mercantile interpretation of many of the rules involved, so that:

1. The definition of an installment contract is phrased more broadly in this Article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this Article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This Article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment, for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an "installment contract." If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this Article.

3. This Article rejects any approach which gives clauses such as "each delivery is a separate contract" their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of "a separate contract for all purposes", a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation.

4. One of the requirements for rejection under subsection (2) is non-conformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as a condition to the right to acceptance must, however, have some basis in reason, must avoid

imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. The defect in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under subsection (2) an installment delivery must be accepted if the non-conformity is curable and the seller gives adequate assurance of cure. Cure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This Article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation. Adequate assurance for purposes of subsection (2) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect "waived." Prior policy is continued, putting the rule as to buyer's default on the same footing as that in regard to seller's default.

7. Under the requirement of seasonable notification of cancellation under subsection (3) a buyer who accepts a non-conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith, extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

Cross references:

Point 2: Sections 2-307 and 2-607.

Point 3: Section 1-203.

Point 5: Sections 2-208 and 2-609.

Point 6: Section 2-610.

Definitional cross references:

"Action". Section 1-201.

CASE NOTES

"Goods".—The definition of "goods" in subsection (1) is broad, but it must be noted that this article deals with, and the definition of goods is cast in terms of, the contract for sale; and sale "consists in the passing of title from the seller to the buyer for a price." (Code 1962 § 10.2-106.1). Computer Servicenters, Inc. v Beacon Mfg. Co., 328 F Supp 653 (D SC 1970).

An agreement for performance of data processing services by the plaintiff for the defendant, with a separate charge for supplies unless the defendant provided them, where the payment contemplated was for the analysis, collection, storage, and reporting of certain data supplied the plaintiff by the defendant, was not an agreement for the sale of goods. Computer Servicenters, Inc. v Beacon Mfg. Co., 328 F Supp 653 (D SC 1970).

§ 36–2–106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming to contract"; "termination"; "cancellation".

(1) In this chapter unless the context otherwise requires *"contract"* and *"agreement"* are limited to those relating to the present or future sale of goods. *"Contract for sale"* includes both a present sale of goods and a contract to sell goods at a future time. A *"sale"* consists in the passing of title from the seller to the buyer for a price (§ 36–2–401). A *"present sale"* means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are *"conforming"* or conform to the contract when they are in accordance with the obligations under the contract.

(3) *"Termination"* occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) *"Cancellation"* occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

HISTORY: 1962 Code § 10.2-106; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)—Section 1 (1) and (2), Uniform Sales Act; Subsection (2)—none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4)—none.

Changes: Completely rewritten.

Purposes of changes and new matter:

1. Subsection (1): "Contract for sale" is used as a general concept throughout

SECTION 11-35-2030. Multi-term contracts.

(1) Specified Period. Unless otherwise provided by law, a contract for supplies or services shall not be entered into for any period of more than one year unless approved in a manner prescribed by regulation of the board; provided, that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
(2) Determination Prior to Use. Prior to the utilization of a multi-term contract, it shall be determined in writing by the appropriate governmental body:
(a) that estimated requirements cover the period of the contract and are reasonably firm and continuing;
(b) that such a contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in state procurement.
(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled.
(4) The maximum time for any multi-term contract is five years. Contract terms of up to seven years may be approved by the Director of the Office of General Services. Contracts exceeding seven years must be approved by the Budget and Control Board.

19-445.2135. Conditions for Use of Multi-term Contracts.

[paragraphs A through D omitted]

E. Solicitation.
The solicitation shall state:
(1) the estimated amount of supplies or services required for the proposed contract period;
(2) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
(3) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the state's rights or the contractor's rights under any termination clause in the contract;
(4) that the procurement officer of the governmental body must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;
(5) whether bidders or offerors may submit prices for:
(a) the first fiscal period only;
(b) the entire time of performance only; or
(c) both the first fiscal period and the entire time of performance;
(6) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
(7) that, in the event of cancellation as provided in (5) (c) [should be (E)(3) of this Subsection, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.
[paragraphs F and G omitted]

SECTION 11-35-4230. Authority to resolve contract and breach of contract controversies.

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code.

(2) Request for Resolution; Time for Filing. Either the contracting state agency or the contractor or subcontractor, when the subcontractor is the real party in interest, may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one year of the date the contractor last performs work under the contract; except that in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

(3) Duty and Authority to Attempt to Settle Contract Controversies. Before commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer or his designee shall attempt to settle by mutual agreement a contract controversy brought pursuant to this section. The appropriate chief procurement officer has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer or his designee promptly shall conduct an administrative review and issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision pursuant to subsection (4) and a statement of appeal rights under Section 11-35-4230(6) must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The appropriate chief procurement officer also shall post a copy of the decision at a time and place communicated to all parties participating

in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 11-35-4230(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

SECTION 11-35-4320. Contract controversies.

Remedies available in a contract controversy brought under the provisions of Section 11-35-4230. The appropriate chief procurement officer or the Procurement Review Panel, in the case of review under Section 11-35-4410(1), may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law.

551 S.E.2d 263

Supreme Court of South Carolina.

UNISYS CORPORATION,
Appellant/Respondent,
v.
The SOUTH CAROLINA BUDGET AND CONTROL BOARD DIVISION OF GENERAL SERVICES INFORMATION TECHNOLOGY MANAGEMENT OFFICE, as an agency of the State of South Carolina, as agent for the South Carolina Department of Health and Human Services (formerly the South Carolina Health and Human Services Finance Commission), and as agent for the South Carolina Department of Social Services; Voight Shealy, in his official capacities as Acting Information Technology Management Officer and Chief Procurement Officer of the Information Technology Management Office; Ronald E. Moore, in his official capacities as Technology Management Officer and Chief Procurement Officer of the Information Technology Management Office; the South Carolina Department of Health and Human Services; and the South Carolina Department of Social Services, Defendants,
Of whom The South Carolina Budget and Control Board Division of General Services Information Technology Management Office, as an agency of the State of South Carolina, as agent for the South Carolina Department of Health and Human Services (formerly the South Carolina Health and Human Services Finance Commission), and as agent for the South Carolina Department of Social Services; Ronald E. Moore, in his official capacities as Technology Management Officer and Chief Procurement Officer of the Information Technology Management Office; the South Carolina Department of Health and Human Services; and the South Carolina Department of Social Services are Respondents/Appellants.

No. 25342.

Heard June 6, 2001.
Decided Aug. 14, 2001.

Rehearing Denied Sept. 12, 2001.

MOORE, Acting Chief Justice:

This dispute involves the State's multi-million dollar contract with appellant Unisys Corporation for the implementation of a state-wide automated child support enforcement system as required under the federal Family Support Act of 1988. Unisys appeals the dismissal of its complaint. We affirm.

FACTS

On February 22, 1993, respondent Information Technology Management Office (ITM Office) issued a Request for Proposal (RFP) soliciting bids for a child support enforcement system. The system was to be in effect by October 1, 1995. After a bidder's contest to the February RFP, an amended RFP was issued on October 8, 1993. This RFP was further amended six times in October and early November 1993. On November 9, Unisys submitted a successful bid. As a result, on December 30, 1993, Unisys signed an agreement to provide the system. This agreement was signed by respondent Budget and Control Board on January 27, 1994.

More than four years later, in September 1998, respondents (collectively "the State") submitted a request for resolution of a contract controversy pursuant to the South Carolina Consolidated Procurement Code, S.C.Code Ann. § 11-35- 4230 (Supp.2000). The request was submitted to Ronald Moore, the Chief Procurement Officer (CPO) for the ITM Office. The State alleged various breaches of contract by Unisys, including the failure to meet federally mandated deadlines for the system to be operational. Further, it alleged fraud in the inducement of the contract, and unfair and deceptive acts in violation of the South Carolina Unfair Trade Practices Act, S.C.Code Ann. § 39-5-20 (1985) (SCUTPA). Unisys responded to the State's request for resolution by moving for dismissal on several grounds asserting essentially that the CPO lacked jurisdiction. [FN1]

> FN1. On the merits, Unisys alleged the State had breached the contract by failing to meet its obligations including inadequate payment to Unisys in an amount totaling approximately $8.5 million.

Unisys then filed this action in circuit court seeking damages for breach of contract, a declaratory judgment regarding the inapplicability of the

Procurement Code on jurisdictional and constitutional grounds, and an injunction against the State's proceeding under the Procurement Code. The State answered and filed a counterclaim alleging breach of contract, breach of warranty, fraud in the inducement, and a violation of SCUTPA. [FN2] The State then moved to dismiss under Rule 12(b)(1), (6), and (8), SCRCP, on the grounds the circuit court lacked subject matter jurisdiction of the dispute between the parties which was governed by the Procurement Code, Unisys had failed to state facts sufficient to constitute the causes of action asserted, and there was another action pending between the same parties for the same claim.

> FN2. The State claimed it was exposed to $117 million per year in federal sanctions because of Unisys's failure to complete and implement the system for which it had contracted. Further, it sought an injunction "requiring Unisys to give the fully documented, latest version of the [system] source code to the State."

The trial judge found the Procurement Code was the exclusive means of resolving the dispute between the parties and disposed of Unisys's constitutional challenges to the Procurement Code proceeding. He dismissed Unisys's complaint and the State's counterclaims but enjoined the pursuit of the Procurement Code proceeding pending this appeal. Unisys appealed the dismissal of its complaint and the State cross-appealed the injunction pending appeal.

UNISYS'S APPEAL

1. Novel issue

Unisys contends the trial judge erred in disposing of its constitutional challenges to the Procurement Code proceeding on a Rule 12(b)(6) motion to dismiss because these are novel and complex issues. We disagree.

[1] As a general rule, important questions of novel impression should not be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss. *Evans v. State,* 344 S.C. 60, 543 S.E.2d 547 (2001). Here, the questions involved are questions of law and Unisys points to no factual issues that require further development. This issue is without merit.

2. Exclusive jurisdiction of circuit court

[2][3] The trial judge found the procedure set forth in the Procurement Code, as provided in § 11-35-4230, is the exclusive means of resolving this dispute. Unisys contends this was error because the circuit court has exclusive jurisdiction under S.C.Code Ann. § 15-77-50 (1976). [FN3]

> FN3. Unisys also cites art. V, § 11, of our State Constitution which vests the circuit court with general jurisdiction in civil cases as follows: The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.
> To the extent Unisys's brief may be read to argue that this constitutional provision in itself guarantees the circuit court's jurisdiction over its suit, this argument is incorrect. Article X, § 10, provides: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." Accordingly, jurisdiction over actions against the State is established by the General Assembly and is not endowed by the Constitution.

Section 15-77-50 provides:

> The circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

[4] Unisys contends § 15-77-50 vests exclusive jurisdiction in the circuit court under *Kinsey Constr. Co. v. S.C. Dep't of Mental Health,* 272 S.C. 168, 249 S.E.2d 900 (1978). *Kinsey* involved two breach of contract actions against the Department of Mental Health. The Department argued it enjoyed sovereign immunity from actions on a contract and that the exclusive remedy available to the plaintiffs was limited to that allowed under former § 2-9-10 [FN4] which provided:

> FN4. Repealed by 1981 S.C. Act No. 148, § 14.

> All claims for the payment for services rendered or supplies furnished to the State shall be presented to the State Budget and Control Board by petition, fully setting forth the facts upon which such claim is based, together with such evidence thereof as the Board may require. The petition shall be filed with the chairman of the Board at least twenty days prior to the convening of the General Assembly.

The Court held that by entering a contract, the State waives its sovereign immunity and consents to be sued for breach thereof. Further, § 2-9-10 was not the exclusive remedy available to plaintiffs in light of § 15-77-50 which vests jurisdiction of civil actions against the State in the circuit court.

We decline to follow *Kinsey* [FN5] in this case. First, *Kinsey* is distinguishable from the case at hand. In *Kinsey,* § 15-77- 50 was enacted *after* the limited remedy provided in § 2-9-10. [FN6] In contrast, here § 11-35-4230 is the later statute and therefore takes precedence over § 15-77-50. *See Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000) (more recent and specific legislation controls if there is a conflict between two statutes).

> FN5. *Kinsey* was expressly overruled in *McCall v. Batson,* 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985), "to the extent [it holds] that an action may not be maintained against the State without its consent."

> FN6. Section 15-77-50 was enacted in 1954, S.C. Act. No. 154; § 2-9-10 was enacted in 1878, S.C. Act. No. 459.

[5] Moreover, five years before *Kinsey,* in *Harrison v. South Carolina Tax Comm'n,* 261 S.C. 302, 199 S.E.2d 763 (1973), we specifically held that § 15-77-50 is not a blanket waiver of sovereignty but is essentially a venue statute governing instances where the State is subject to suit. [FN7] *Kinsey* does not attempt to distinguish or overrule *Harrison* but discords with *Harrison*'s essential conclusion that § 15-77-50 is not a general waiver of sovereign immunity. If the *Kinsey* court were actually following *Harrison,* as it purports to do, [FN8] it would have found the State had waived its immunity only to the extent permitted under § 2-9-10. We find the decision in *Kinsey* conflicts with the basic principle that a statute waiving the State's immunity from suit, being in derogation of sovereignty, must be strictly construed. *Truesdale v. South Carolina Highway Dep't,* 264 S.C. 221, 213 S.E.2d 740 (1975), *overruled in part on other grounds, McCall v. Batson, supra; Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't.,* 217 S.C. 423, 60 S.E.2d 859 (1950). Accordingly, we now overrule *Kinsey* and reaffirm *Harrison*'s interpretation of § 15-77-50 as a venue statute.

> FN7. *See also Whetstone v. South Carolina Dep't of Highways and Pub. Transp.,* 272 S.C. 324, 252 S.E.2d 35 (1979) (confirming § 15-77-50 is essentially a venue statute).

> FN8. The *Kinsey* opinion cites *Harrison* as "recognizing jurisdiction in the circuit court and providing for venue in cases in which the sovereign immunity doctrine is inapplicable." *Kinsey,* 272 S.C. at 174, 249 S.E.2d at 903.

In conclusion, § 15-77-50 does not trump § 11-35-4230 to vest exclusive original jurisdiction in the circuit court.

3. Application of § 11-35-4230.

The trial judge found § 11-35-4230 vested the CPO and Procurement Review Panel (Review Panel) with exclusive original jurisdiction over the dispute between Unisys and the State. This section provides in large part:

> **§ 11-35-4230. Authority to resolve contract and breach of contract controversies.**
>
> (1) Applicability. This section applies to controversies between the State and a contractor or subcontractor when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recision. The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor or subcontractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code.
>
> (2) Request for Resolution; Time for Filing. Either the contracting state agency or the contractor or subcontractor when the subcontractor is the real party in interest may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the general nature of the controversy and the relief requested with enough particularity to give notice of the issues to be decided....
>
> (3) Duty and Authority to Attempt to Settle

Contract Controversies. Prior to commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer shall attempt to settle by mutual agreement a contract controversy brought under this section. The appropriate chief procurement officer shall have the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer shall promptly conduct an administrative review and shall issue a decision in writing within ten days of completion of the review. The decision shall state the reasons for the action taken.

...

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5)....

Unisys contends the trial judge's ruling was erroneous for the following reasons.

a. Legislature's authority to enact § 11-35-4230

[6] Article X, § 10, of our State Constitution provides: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." Unisys contends this section limits the General Assembly to providing for jurisdiction in matters *against* the State and therefore does not authorize § 11-35-4230 because that statute applies as well to suits brought *by* the State.

[7][8] The State Constitution is a limitation upon and not a grant of power to the General Assembly. *Army Navy Bingo, Garrison No. 2196 v. Plowden,* 281 S.C. 226, 314 S.E.2d 339 (1984). "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." *Johnson v. Piedmont Mun. Power Agency,* 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.

We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11-35-4230.

b. Construction of § 11-35-4230

[9] Unisys contends the language of § 11-35-4230 is insufficient to vest exclusive jurisdiction in the CPO and Review Panel. Subsection (1) of this statute provides: "The procedure set forth in this section shall constitute *the exclusive means* of resolving a controversy between the State and a contractor ... concerning a contract solicited and awarded under the provision of the South Carolina Consolidated Procurement Code." (emphasis added). Unisys claims this language means that when the parties *voluntarily* chose to proceed under the Procurement Code, § 11-35-4230 is the exclusive means of undertaking that procedure. Unisys contends the term "exclusive means," when strictly construed, is not sufficient to wrench jurisdiction from the circuit court. We disagree.

This Court has used the terms "exclusive means," "exclusive remedy," and "exclusive jurisdiction" synonymously when discussing the Workers' Compensation Act. *See* S.C.Code Ann. § 42-1-540 (1985) (providing the rights and remedies provided under that Act "shall exclude all other rights and remedies)." *See, e.g., Loges v. Mack Trucks, Inc.,* 308 S.C. 134, 417 S.E.2d 538 (1992) (exclusive means); *Carter v. Florentine Corp.,* 310 S.C. 228, 423 S.E.2d 112 (1992) (exclusive remedy); *McSwain v. Shei,* 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive jurisdiction). Thus, the term "exclusive means" has been used to indicate exclusivity of jurisdiction.

[10] Further, because a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute. *Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't, supra.* The term "exclusive means" must therefore be strictly construed to limit suits on contracts with the State to the forum provided in § 11-35-4230. Application of the strict construction rule, contrary to Unisys's assertion, results in upholding the exclusivity provision of § 11-35-4230.

c. Effective date

[11] Under ¶ 3.3, the contract between the State and

Unisys provides:

> Any action at law, suit in equity or judicial proceeding for the enforcement of this contract or any provision thereof shall be instituted only in the Circuit Court in the County of Richland, State of South Carolina.

Unisys contends this provision, rather than § 11-35-4230, determines in what forum this controversy must be heard.

[12] Unisys argues the "exclusive means" provision of § 11-35-4230 was added by statutory amendment "effective for bids or proposals solicited on or after July 1, 1993," [FN9] and it therefore does not apply here because the original RFP was issued on February 25, 1993, *before* this provision became effective. We disagree. The contract itself recites that it is based on an RFP issued on October 8, 1993. Since this RFP was issued *after* the pertinent 1993 amendment, the amendment applies.

FN9. 1993 S.C. Act No. 178, § 38.

[13] Further, we find the "exclusive means" provision of § 11-35-4230 overrides the contract provision to the extent it requires that any suit on the contract be brought in circuit court. [FN10] Contractual relationships formed pursuant to the Procurement Code are highly regulated contracts. We have recognized that the underlying goals of the Procurement Code serve important public interests concerning this particular contractual relationship. *Ray Bell Constr. Co. v. School Dist. of Greenville County,* 331 S.C. 19, 501 S.E.2d 725 (1998); *see generally* S.C.Code Ann. § 11-35-20 (Supp.2000) (purpose and policies of Procurement Code). We now hold contracts formed pursuant to the Procurement Code are deemed to incorporate the applicable statutory provisions and such provisions shall prevail. *Accord S.J. Amoroso Constr. Co. v. United States,* 12 F.3d 1072 (Fed.Cir.1993) (mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law); *see generally Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947) (anyone entering contract with federal government takes the risk of accurately ascertaining limit of government agent's authority as defined by legislation); *cf. Jordan v. Aetna Cas. & Sur. Co.,* 264 S.C. 294, 214 S.E.2d 818 (1975) (statutory provisions relating to an insurance contract are deemed part of the contract as a matter of law and prevail over conflicting contractual provisions).

FN10. The State contends the statute controls because subject matter jurisdiction cannot be bestowed by consent of the parties. As discussed in footnote 13, *infra,* however, the exhaustion of administrative remedies, which this case involves, does not pertain to subject matter jurisdiction. *Ward v. State,* 343 S.C. 14, 538 S.E.2d 245 (2000).

Accordingly, to the extent ¶ 3.3 of the contract conflicts with § 11- 35-4230, it is overridden. We therefore construe this contract provision to require simply that the circuit court of Richland County is the proper venue for any appeal of the Review Panel's decision. *See* S.C.Code Ann. § 11-35- 4410(6) (Supp.2000) (appeal of Review Panel's decision is to circuit court).

4. Right to jury trial and due process.

Unisys contends that requiring it to proceed under the Procurement Code violates its constitutional right to a jury trial and deprives it of procedural due process. We disagree.

a. Right to jury trial

[14] Article I, § 14, of our State Constitution provides: "The right of trial by jury shall be preserved inviolate." Unisys claims that under this provision, it is entitled to a jury trial on its contract controversy with the State.

[15] It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868. *C.W. Matthews Contracting Co. v. South Carolina Tax Comm'n,* 267 S.C. 548, 230 S.E.2d 223 (1976); *Richards v. City of Columbia,* 227 S.C. 538, 88 S.E.2d 683 (1955); *State v. Gibbes,* 109 S.C. 135, 95 S.E. 346 (1918). The right to a jury trial does not apply to actions against the sovereign that were not recognized in 1868. *C.W. Matthews Contracting, supra; accord Ex parte Bakelite Corp.,* 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789 (1929) (Seventh Amendment does not preserve right to jury trial on claims against the federal government because they were not recognized at common law).

At the time our constitution was adopted in 1868, the State was immune from suit on a contract. *Treasurers v. Cleary,* 37 S.C.L. (3 Rich. Law) 372 (1832) (action on debt against the State); *see also Hodges v. Rainey, supra* (observing that in 1934 the

State was protected by total sovereign immunity and could be sued in tort or contract only when it consented). Accordingly, art. I, § 14, does not guarantee the right to a jury trial on a contract with the State.

b. Due process

Unisys contends the proceeding available under the Procurement Code violates art. I, § 22, of our State Constitution on several grounds. This provision states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

[16] Unisys contends that CPO Ronald Moore, who is the "appropriate CPO" referred to in § 11-35-4230 to hear this controversy, [FN11] is not impartial because he was involved in the contract negotiations and amendments and investigated disputes as they arose under the contract. Mr. Moore has in fact recused himself and has designated Voight Shealy, the Assistant Director of the Office of General Services, to serve as acting CPO in this matter. Unisys complains this substitution is unauthorized. We disagree.

> FN11. Section 11-35-310(5) and (6) indicate the "appropriate chief procurement officer" is the head of the Information Technology Office of the State. This is Ronald Moore.

Section 11-35-840 (Supp.2000) provides:

> Subject to the regulations of the board, the chief procurement officers may delegate authority to designees or to any department, agency, or official.

This section is part of Article 3 of the Procurement Code entitled, "Procurement Organization." It is therefore a provision with general application to all functions of the CPO including those functions regarding dispute resolutions under § 11-35-4230. Accordingly, Mr. Moore may delegate his authority to hear this matter.

Unisys further complains that Mr. Shealy is not competent to hear this matter and, in fact, no one in the ITM Office has sufficient expertise and none is qualified to serve. Conversely, it claims everyone in the ITM Office was "intimately involved" in this project and cannot be impartial.

[17] Under § 11-35-4230(6), Unisys may seek a review of the CPO's decision by the Review Panel. This review is *de novo.* S.C.Code Ann. § 11-35-4410(1) (Supp.2000). An adequate *de novo* review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body. *Ross v. Med. Univ. of South Carolina,* 328 S.C. 51, 492 S.E.2d 62 (1997) (administrator's lack of impartiality cured by *de novo* review before impartial panel). The members of the Review Panel are not ITM Office employees, *see* § 11-35-4410(d), and there is no basis for questioning their impartiality. As far as expertise, we question whether a circuit court judge would have any more expertise in the area of procurement contracts. Moreover, technical expertise is not a requirement of due process.

[18] Unisys further claims a due process violation because the General Assembly has established no specific procedures applicable to dispute resolutions before the CPO. We rejected a similar argument in *Tall Tower, Inc. v. South Carolina Procurement Review Panel,* 294 S.C. 225, 363 S.E.2d 683 (1987), and held the Review Panel's failure to formally adopt rules and procedures is not fatal to due process requirements where there is an opportunity to be heard at a meaningful time and in a meaningful manner.

In this case, the procedure set forth by the Review Panel provides for representation by counsel, opening statements, the presentation of evidence, direct, cross, re-direct, and re-cross examination of witnesses, and closing statements. The complaining party presents its case first and bears the burden of proof. The Review Panel may receive additional evidence although issues are generally limited to those presented to the CPO. Since this proceeding meets due process requirements and is *de novo,* Unisys can show no substantial prejudice from the lack of an established procedure before the CPO. *Ross, supra; Tall Tower, supra.*

Finally, Unisys contends an administrative body cannot rule on the constitutionality of statutes and therefore it should not be required to proceed under the Procurement Code. *See Ward v. State,* 343 S.C. 14, 538 S.E.2d 245 (2000) (administrative body cannot rule on constitutionality of statute). This argument overlooks the fact that the circuit court has already ruled on Unisys's constitutional challenges to

the Procurement Code and these issues will not be before the CPO or the Review Panel.

In conclusion, the trial judge properly found no due process violation.

5. Claims for fraud, SCUTPA violation, and punitive damages.

Unisys contends the CPO and Review Panel have no authority to resolve the State's claims against Unisys alleging fraud in the inducement, unfair trade practices under SCUTPA, and punitive damages based on Unisys's allegedly willful misrepresentations. It contends this contract controversy should therefore proceed in circuit court as a matter of judicial economy.

[19] Section 11-35-4230(1) specifically provides it is the exclusive means of resolving controversies between the State and a contractor that "arise under or by virtue of a contract between them *including, but not limited to,* controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recision." (emphasis added). Further, S.C.Code Ann. § 11-35-4320 (Supp.2000) provides the CPO or the Review Panel "may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract *or by applicable law.*" (emphasis added). Accordingly, the legislature has clearly indicated its intent that the administrative proceeding under the Procurement Code applies to the State's claims in this case for fraud in the inducement, which involves misrepresentation, and punitive damages. *See Smyth v. Fleischmann,* 214 S.C. 263, 52 S.E.2d 199 (1949) (punitive damages recoverable for fraudulent act independent of breach). Further, any punitive damages award is ultimately reviewable by the circuit court on appeal. *See generally Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991) (providing for review of punitive damages award by judge).

[20] The State's cause of action under SCUTPA is a different matter. S.C.Code Ann. § 39-5-40(a) (1985) exempts from SCUTPA:

> Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of the State or the United States or actions or transactions permitted by any other South Carolina State law.

In *Ward v. Dick Dyer and Assocs., Inc.,* 304 S.C. 152, 403 S.E.2d 310 (1991), we rejected a "general activity" analysis that would exempt all activities regulated by an administrative body. We retained, however, the exemption recognized in *State ex rel. McLeod v. Rhoades,* 275 S.C. 104, 267 S.E.2d 539 (1980), for a security transaction because it is a "unique transaction .... subject to strict regulation and must comply with stringent requirements." 304 S.C. at 155 n. 1, 403 S.E.2d at 312 n. 1. Similarly, we hold transactions under the Procurement Code are exempt from SCUTPA and the State's SCUTPA cause of action is not a viable claim. [FN12]

> FN12. Our holding does not infringe on the Attorney General's right of action on behalf of the State pursuant to SCUTPA. *See, e.g.,* S.C.Code Ann. §§ 39-5-50 through -120 (1985).

The fact that the SCUTPA cause of action is not viable, however, does not effect the determination whether administrative remedies must be exhausted but simply means the SCUTPA action is subject to dismissal in either forum. In conclusion, judicial economy does not mandate that this action be heard in circuit court.

6. Dismissal under Rule 12(b)

[21][22] Since Unisys is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper. Further, because an action was pending pursuant to the Procurement Code as required when this action was brought, dismissal was also proper under Rule 12(b)(8). *See Southern Ry. Co. v. Order of Ry. Conductors,* 210 S.C. 121, 41 S.E.2d 774 (1947) (exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency). [FN13]

> FN13. We note that, contrary to the trial judge's ruling, the required exhaustion of administrative remedies goes to the prematurity of a case and not subject matter jurisdiction. *Ward v. State, supra; see generally Dove v. Gold Kist, Inc.,* 314 S.C. 235, 442 S.E.2d 598 (1994) (subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong). Accordingly, Unisys's complaint was not properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

STATE'S CROSS-APPEAL

[23] On cross-appeal, the State challenges the trial judge's temporary injunction against the Procurement Code proceeding during the pendency of this appeal. A stay pending appeal is moot upon disposition of the appeal on the merits. *South Carolina Tax Comm'n v. Gaston Copper Recycling, Corp.*, 316 S.C. 163, 170 n. 1, 447 S.E.2d 843, 844 n. 1 (1994); *see generally Seabrook v. City of Folly Beach,* 337 S.C. 304, 523 S.E.2d 462 (1999) (issue moot where decision on appeal will have no practical effect). Accordingly, we need not address this issue.

AFFIRMED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice C. VICTOR PYLE, Jr., concur.

Contracts Completed By Agencies

File a "Contract Controversy" with the appropriate Chief Procurement Officer (CPO) when necessary. The agency will use its legal counsel to file a contract controversy when they cannot resolve a disagreement with the Contractor. Often the disagreement involves termination terms. Refer to Attachment #6 for more information. Please note that the Contractor may also file a "Contract Controversy." The MMO Contract Administrator should receive a courtesy copy of the documents submitted to the CPO.

Contracts Completed by MMO for a Specific Agency(s)

When warranted, the MMO Buyer will advise the Agency Buyer of his option to file a "Contract Controversy" with the appropriate Chief Procurement Officer (CPO). The agency should use its legal counsel to file a contract controversy when a disagreement with the Contractor cannot be resolved by personnel below the CPO level. Refer to Attachment #6 for more information. Please note that the Contractor may also file a "Contract Controversy." The MMO Contract Administrator should receive a courtesy copy of the documents submitted to the CPO.

Statewide Term Contracts Completed by MMO

"Contract Controversy" procedures should be initiated and completed when a disagreement with the Contractor cannot be resolved by personnel below the CPO level. The MMO Buyer should work with MMO legal counsel and Agency Buyer to determine the appropriate roles for MMO and Agency personnel to play throughout the process. Refer to Attachment #6 for more information. Please note that the Contractor may also file a "Contract Controversy." The MMO Contract Administrator should receive a courtesy copy of the documents submitted to the CPO.

468 S.E.2d 645

Supreme Court of South Carolina.

Susan H. DEAN, Respondent,
v.
RUSCON CORPORATION, Petitioner.

No. 24394.

Heard Oct. 4, 1995.
Decided March 25, 1996.
Rehearing Denied April 18, 1996.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

BURNETT, Justice:

We granted certiorari to review the Court of Appeals' opinion in *Dean v. Ruscon Corporation,* Op. No. 94-UP-188 (Ct.App. filed July 19, 1994). We reverse.

FACTS

In September 1984, Respondent Susan H. Dean (Dean) purchased a building located at 216 King Street in Charleston after a contractor had inspected it and determined it to be structurally sound. At the time of purchase, Dean did not notice any cracks in the masonry or facade of the building. During October and November of 1984, Petitioner Ruscon Corporation (Ruscon) performed pile driving activities at a nearby construction site for the Omni Hotel. Early in November 1984, Dean observed a fine crack approximately three feet in length at the front right corner of the building and concluded that the crack was attributable to Ruscon's pile driving.

Dean immediately hired a contractor and structural engineer to inspect the building. They recommended that she place a strain gauge on the crack and monitor it daily. Dean understood that unless there was a change in the gauge or crack, the damage could be corrected by placing right angle steel bracing on both corners of the building. Based upon her understanding that the crack posed no structural problems, she began renovations to the building in the amount of $194,553.09.

During the summer of 1985, Ruscon resumed pile driving activities adjacent to the block where Dean's building was located. In August 1985, Dean noticed that the original crack had expanded and the facade of the building was bulging and buckling at the location of the original crack. Another crack also appeared on the opposite side of the building. Dean closed her business which was located in the building after being informed that the building was no longer structurally sound.

In April 1991, Dean filed this lawsuit. At trial, Dean's expert opined that the damage to Dean's building was "most reasonably caused by the pile driving activity" which Ruscon performed in 1984, rather than the pile driving performed in 1985. Moreover, Dean testified that from her observations she believed the damage to her building resulted from the 1984 pile driving activities.

The circuit court directed a verdict in favor of Ruscon concluding that Dean discovered potential damage to her building in 1984 and associated it with Ruscon's pile driving activities. Therefore, as a matter of law Dean's lawsuit accrued in November 1984. Because she filed her lawsuit in April 1991, the circuit court determined that Dean was barred by the six year statute of limitations. The Court of Appeals reversed.

ISSUE

Does a jury question exist as to whether Dean's case is barred by the statute of limitations?

DISCUSSION

The Court of Appeals concluded that a question of fact existed as to whether Dean was reasonably diligent in determining whether the damage to her building was attributable to Ruscon thereby triggering the running of the statute of limitations in 1984. Accordingly, it reversed the circuit court's direction of verdict. We disagree.

[1][2][3] A cause of action for trespass upon or damage to real property which arises or accrues prior to April 5, 1988, must be commenced within six years. S.C.Code Ann. § 15-3-530(3) (1976). The discovery rule is applicable to actions brought under § 15-3-530(3). *See Santee Portland Cement Co. v. Daniel Int'l Corp., 299* S.C. 269, 384 S.E.2d 693 (1989) (citing *Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co.,* 515 F.Supp. 64 (D.S.C.1979), *aff'd,* 644 F.2d 877 (4th Cir.1981)). According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from

the wrongful conduct. *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist. *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.,* 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. granted,* 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed,* 288 S.C. 468, 343 S.E.2d 613 (1986).

[4] Dean contends that the crack which appeared in 1984 and the bulging of the bricks in 1985 present two distinct harms and, therefore, our holdings in *Benton v. Roger C. Peace Hosp.* [FN1] and *Santee Portland Cement, supra,* are controlling. In *Benton,* a Downes Syndrome patient fell from his wheelchair and suffered facial lacerations which were readily apparent and discoverable. Later, a second more insidious injury arose from neurological damage which could have been caused by the fall or something else. Because the nature of the neurological injury was not discoverable by the appearance of facial lacerations, we held these injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.

FN1. 313 S.C. 520, 443 S.E.2d 537 (1994).

In this case, the evidence establishes that in 1984 Dean's consultants advised her that the damage resulting from pile driving could be corrected by steel braces if the crack did not change. The experts also advised her to monitor the crack, and if it did in fact expand, corrective measures would need to be reevaluated to ensure the building's continued structural integrity. Dean admitted that she personally believed the damage to her building resulted from the pile driving activities of 1984, and that when she first noticed the crack, she thought the structure of the building was compromised. Moreover, Dean acknowledged that the initial crack appeared in the right front corner of the building and that the subsequent enlargement of the crack and bulging of bricks appeared in the same location. We find this case distinguishable from *Benton* in that the resulting harm to Dean's building in 1985--enlarged crack and bulging bricks--by being in the same location and of the same nature as the original harm, evolved from Ruscon's 1984 pile driving activities. Therefore, because the subsequent harm was not separate and distinguishable, it was discoverable in 1984.

Dean's reliance upon *Santee* is also misplaced. In *Santee,* minor cracks, which are common in cement structures, appeared in cement storage silos. The cracks were repaired. After an inspection, the repairs were considered to be permanent, and the consultants found the silos to be in good condition. It was not until later that the cracks in the silos were determined to be caused by the defective placement of steel reinforcement rods. Because the rods were inside concrete walls, the defects were undetectable. In this case, however, the potential damage to Dean's building was not latent, but was apparent in November 1984. Indeed, there is no question that Dean initially discovered the damage in 1984 and associated it with Ruscon's pile driving activities.

Next, Dean relies upon *Graniteville Co., Inc. v. IH Services, Inc.* [FN2] to support her contention that by retaining experts in November 1984 to evaluate the damage, she exercised reasonable diligence in discovering whether a cause of action arose from Ruscon's wrongful conduct. In *Graniteville,* the injured party employed an expert eight days after noticing damage to determine its cause. The Court of Appeals held that when an injury requires an expert to determine its cause and an expert is retained, there is evidence that the injured party exercised reasonable diligence and the statute of limitations should be tolled. Accordingly, the statute was tolled for eight days--which was the date the injured party discovered that a cause of action existed.

FN2. 316 S.C. 146, 447 S.E.2d 226 (Ct.App.1994).

Here, the evidence establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage. As a result, Dean was warned that the crack might expand. In fact, Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984. Because Dean had *notice* in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date. Dean's subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved. Moreover, the fact that Dean may not have comprehended in 1984 that the original

crack would expand causing the building to ultimately buckle is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., supra.*

[5] When the trial court rules on a directed verdict motion, it must view the evidence as well as all favorable inferences in the light most favorable to the non-moving party, and if more than one reasonable inference can be drawn from the testimony, the case should be submitted to the jury. *Santee Portland Cement Co. v. Daniel Int'l Corp., supra.* Here, however, there was no question of fact for the jury to decide because the only reasonable conclusion supported by the evidence is that Dean's lawsuit accrued in November 1984, and by filing her lawsuit in April 1991, she was barred by the six year statute of limitations. Accordingly, the circuit court correctly directed a verdict for Ruscon and the judgment of the Court of Appeals is

REVERSED.

FINNEY, C.J., and MOORE and WALLER, JJ., concur.

TOAL, A.J., not participating.

The State neither indemnifies nor defends its contractors

Indemnity

The term "indemnity" means "[a] duty to make good any loss, damage, or liability incurred by another." *Black's Law Dictionary* (9th ed. 2009). An "indemnity clause" is "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. — Also termed hold-harmless clause; save-harmless clause." *Id.*[1]

For nearly fifty years, South Carolina's attorneys general have consistently opined that state agencies have no authority to enter into indemnity or "hold harmless" agreements.[2] In fact, the Attorney General has even advised against the use of qualifying language – *e.g.*, "so far as the laws of the State permit" or "insofar as it lawfully may" – on the grounds that such language does not validate otherwise illegal indemnity obligations. *Id.*

Clauses that create an indemnity are not always obvious. No specific language or "magic words" are required to support indemnification, and a written agreement can be established without specifically expressing the obligation as indemnification.[3] An indemnification agreement is created when the words used express an intention by one party to reimburse or hold the other party harmless for any loss, damage, or liability.[4] A indemnity agreement can exist even when not described as indemnification.[5]

To illustrate language creating an indemnity obligation, consider this classic example appearing in form construction contracts:

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[1] In most instances, an indemnity agreement is any promise to pay another party for a loss or damage that party incurs to a third party. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 584 S.E.2d 375, 377 (2003) ("[T]he default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification."). Nevertheless, the language used to craft "an indemnify clause [may] provide for other forms of compensation, including one in which a first party is liable to a second party for a loss or damage the second party might incur." *Id.*

[2] *Letter to Wayne F. Rush*, S. C. Att'y Gen. Op. of September 29, 2004.

[3] *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002). *See, also*, *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 242 F.3d 1035, 1041 (11th Cir.2001) (particular language not required as long as intent is clear).

[4] Robert L. Meyers III & Debra A. Perelman, Symposium, *Risk Allocation through Indemnity Obligations in Construction Contracts*, 40 S.C. L.Rev. 989, 990 (1989).

[5] 41 Am. Jur. 2d, *Indemnity* § 7.

> … Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work ….

AIA Document A201-1997, General Conditions of the Contract for Construction, Article 3.18.1. Unfortunately, contracts are not always so clear. Suppose the agreement provided for a contractor's indemnity, as above, then listed specific circumstances where the indemnity obligation did not obtain. Suppose the list were followed by a sentence reading "Owner shall be responsible for any costs or damages that result from any of these causes." Does this language create an obligation for the owner to indemnify the contractor for the excepted circumstances?

Now consider a provision that the owner is responsible for claims arising from his use of the project during construction. Does language that "Owner must pay any judgment resulting from such claims" mean just that he is on his own? Or does it mean he will pay any judgment, *including one against the contractor*, resulting from the owner's activities on the jobsite?

Rules requiring clear and unequivocal language to impose an indemnity obligation may resolve the cases above in the owner's favor.[6] The better practice, though, is not to risk it. If you see a provision obligating the state or an agency to pay a judgment, make sure it cannot be construed as an indemnity. If you aren't sure, add language to remove any ambiguity. For example, you may add the following phrase after an unclear sentence: "provided that nothing in this section creates any obligation for owner to hold contractor harmless from, or defend contractor against, such claims."

Defense

Closely related to indemnity is a duty to defend. "A duty to defend is a 'specific obligation to assume, upon tender, the defense obligations and costs of another.'"[7]

A duty to defend may be expressly stated, or it may be implied in a broad "save harmless" provision; an agreement to hold another harmless "from any and all loss, cost, or

[6] For example, in the absence of a legal duty a contractual promise to hold harmless "should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." 41 Am. Jur. 2d, Indemnity § 7.

[7] MT Builders, L.L.C. v. Fisher Roofing, Inc., 197 P.3d 758 (Ariz. App. Div. 1 2008) (quoting Steven G.M. Stein & Shorge K. Sato, *Advanced Analysis of Contract Risk-Shifting Provisions: Is Indemnity Still Relevant?*, 27 Construction Lawyer 5, 9 (Fall 2007)). *See*, *generally*, *Crawford v. Weather Shield Mfg.*, 38 Cal. Rptr. 3d 787, 806 (Cal. Ct. App. 2006), *aff'd*, 187 P.3d 424 (2008) ("A defense obligation is of necessity a current obligation. The idea is to mount it, render it, and fund it now, before the insured's-or indemnitee's-default is taken, or trial preparation is compromised.").

expense" probably means you may be obligated to pay for his lawyer as well as any judgment he suffers when the lawyer settles or loses the case.

For many of the same reasons state agencies lack authority to indemnify, the Attorney General has opined that a governmental entity may not agree to defend a contractor against claims. This prohibition applies even where the claims arise from the government's own acts or omissions.[8]

Fortunately, defense clauses are easy to spot. They are most often stated in, or implied from, broad indemnity provisions, like the one quoted above. Or, they may stand alone as a separate clause or sentence within the overall indemnity section. In the latter case, look for language like "defend and indemnify" or "including attorney's fees."

Notification of a claim usually triggers a duty to defend. If the contractor is obligated to give you notice of claims, keep looking. There's probably a duty to defend lurking. If you aren't sure, the disclaimer phrase at the end of the Indemnity section, above, should catch any hidden or implied duty to defend.

Tips

□ Remove any clause that clearly creates any obligation for the government to indemnify anyone. Likewise, remove any language that expresses an intention by the government to reimburse or pay the other party for any loss, damage, liability, or judgment.

□ Take the same approach to language that requires you to provide a defense against claims, or to save harmless from costs, or attorney's fees, or expenses of suit.

□ If you suspect that a clause imposes an indemnity obligation on the government and you cannot get the contractor to remove the language, add clarifying language to the offending sentence. Use a phrase like this one: "provided that nothing in this section creates any obligation for the State to hold contractor harmless from, or defend contractor against, such claims."

[8] *Letter to John. J. Fantry, Jr.*, S.C. Att'y Gen. Op. of March 6, 2012 (Concluding that a governmental entity may not agree to defend a contractor against claims arising from acts or omissions of either the governmental entity or the contractor.)

Example of **Third Party Claims Indemnification.**

Notwithstanding any limitation in this agreement,

Contractor shall

defend and indemnify

the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees

against all suits or claims of any nature (and all damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities attributable thereto)

by any third party

which arise out of, or result in any way from,

any defect in the goods or services acquired hereunder
or
from any act or omission of Contractor, its subcontractors, their employees, workmen, servants or agents.

Contractor shall be given written notice of any suit or claim. State shall allow Contractor to defend such claim so long as such defense is diligently and capably prosecuted through legal counsel. State shall allow Contractor to settle such suit or claim so long as (i) all settlement payments are made by (and any deferred settlement payments are the sole liability of) Contractor, and (ii) the settlement imposes no non-monetary obligation upon State. State shall not admit liability or agree to a settlement or other disposition of the suit or claim, in whole or in part, without the prior written consent of Contractor. State shall reasonably cooperate with Contractor's defense of such suit or claim. The obligations of this paragraph shall survive termination of the parties' agreement.

513 S.E.2d 123

Court of Appeals of South Carolina.

Jack L. MOSER, Barbara J. Moser and JLM Enterprises, Inc., Appellants,
v.
James W. GOSNELL and Vivian A. Gosnell, Respondents.

No. 2951.

Heard Jan. 14, 1999.
Decided March 1, 1999.

STILWELL, Judge:

This breach of contract action involves a dispute over the terms of a covenant not to compete. Jack L. Moser, Barbara J. Moser and JLM Enterprises sued James W. and Vivian A. Gosnell and alleged that the Gosnells breached the covenant. Both parties moved for summary judgment. The trial court denied the Mosers' motion and granted the Gosnells' in part. The Mosers appeal. We affirm.

FACTS

The Gosnells owned Certified Cleaning and Contractors until 1994 when they sold the business to the Mosers. Certified was a full-service construction and carpet cleaning company that performed a variety of services including remodeling, renovation, restoration, and painting. Prior to purchasing Certified, the Mosers received a business brochure outlining Certified's wide variety of services. They also received a prospectus which revealed that up to 80% of Certified's revenue came from insurance funded restoration work and the remaining revenue came from carpet cleaning and other non-insurance funded services.

The Gosnells entered into an Asset Purchase and Sale Agreement for the sale of substantially all of the assets of Certified to the Mosers for $585,000. The preamble to the Agreement stated that the "Seller is in the business of insurance funded restoration work for fire and water damage as well as commercial and residential carpet cleaning and the like."

The Agreement required the Gosnells to enter into a covenant not to compete, a copy of which was incorporated by reference into and supported the Agreement. The covenant stated "Seller has been engaged in the business of insurance funded restoration work for fire and water damage as well as commercial carpet cleaning throughout upstate South Carolina." One hundred forty-five thousand dollars of the total purchase price was attributed to the covenant. The Gosnells agreed that for three years, and within the geographical limits of Greenville, Spartanburg, and Laurens counties, they would not:

> own, manage, operate, control, represent, be employed by, participate in, or be connected in any manner, directly or indirectly as consultant, shareholder, employee, partner or in any fashion whatsoever, with the ownership, management, operation or control of any person or other entity that is engaged in the same business as Seller was in prior to this sale.

The covenant also provided that in the event of a "breach or threatened breach," the Mosers would be entitled to both injunctive relief and damages "in an amount equal to the purchase price of the business." Certified eventually went out of business, and the Mosers sued, seeking liquidated damages of $585,000.

The trial court held that the Mosers' claims against the Gosnells were limited to only insurance funded services and commercial carpet cleaning. The court concluded that the covenant unambiguously defined Certified's business as "insurance-funded restoration work for fire and water damage as well as commercial carpet cleaning throughout upstate South Carolina." Thus, any non- insurance funded restoration, remodeling, repair services, and residential carpet cleaning performed by the Gosnells was allowed under the covenant.

The court also found that the Gosnells breached the covenant by engaging in insurance related projects within the designated areas of the covenant and reserved the issue of damages for a jury. [FN1] The court found that any breach by the Gosnells of the covenant "may total no more than a few thousand dollars." Thus, it determined that the liquidated damages provision constituted a penalty because the amount of damages stipulated to in the covenant was disproportionate to any probable damage resulting from a breach.

> FN1. We note one inconsistency in the trial court's order. The court stated in its order that it denied the Mosers' motion for summary judgment. However, the court actually granted partial summary judgment to the Mosers on insurance related projects that the Gosnells admitted violated the

covenant. The parties subsequently reached a settlement of these admitted violations of the covenant.

DISCUSSION

Summary judgment is appropriate where it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Tupper v. Dorchester County,* 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Barr v. City of Rock Hill,* 330 S.C. 640, 500 S.E.2d 157 (Ct.App.1998).

I. Covenant Not to Compete

[1] The precise issue presented is whether the covenant prevented the Gosnells from engaging in services other than "insurance funded restoration work for fire and water damage and commercial carpet cleaning." The trial court held that it did not and we agree.

[2][3][4][5] Generally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Cafe Assocs. v. Gerngross,* 305 S.C. 6, 406 S.E.2d 162 (1991). When a contract is clear and unambiguous, the construction of the contract is a question of law for the court. *Conner v. Alvarez,* 285 S.C. 97, 328 S.E.2d 334 (1985). In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract. *Id.* at 101, 328 S.E.2d at 336. When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning. *Id.*

The language of the covenant expressly and unambiguously limits application of the covenant to insurance funded restoration work and commercial carpet cleaning. Specifically, the operative provision of the covenant prohibits the Gosnells from competing in the "same business" as Certified for a period of three years in certain designated counties. In the recital clause, the covenant defines the business as "insurance funded restoration work for fire and water damage as well as commercial carpet cleaning."

Therefore, the express language of the covenant evidences the parties' intentions to prevent the Gosnells from competing *only* in insurance funded services and commercial carpet cleaning, the primary focus of Certified's business prior to the sale. Therefore, the court correctly held that the Gosnells did not violate the covenant by engaging in non-insurance funded work and residential carpet cleaning.

The Mosers argue that the recital clause in the covenant should be considered along with other evidence indicating that Certified's business prior to the sale was more expansive than that included in the covenant. The Mosers point out that the business brochure, prospectus, and Agreement provide proof that the parties intended for the covenant to apply to all work performed by Certified prior to the sale.

It is uncontested that Certified's business prior to the sale consisted of a variety of services. Nevertheless, the covenant specifically and unambiguously prevented the Gosnells from competing only in insurance funded projects and commercial carpet cleaning. That Certified's business was actually broader than that defined in the covenant is irrelevant to the interpretation and application of the covenant. Furthermore, because the covenant is clear and unambiguous, we look only to the language of the covenant and not to extrinsic evidence to determine the intent of the parties. *See C.A.N. Enters., Inc., v. South Carolina Health & Human Servs. Fin. Comm'n,* 296 S.C. 373, 373 S.E.2d 584 (1988) (when a contract is clear and unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms).

II. Damages Clause

[6] The Mosers also argue the trial court erred in holding that the liquidated damages provision of the covenant is an unenforceable penalty. We disagree.

[7][8] The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties. *Tate v. LeMaster,* 231 S.C. 429, 99 S.E.2d 39 (1957). The determination does not necessarily depend upon the language used in the contract. *Id.* Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties. *Benya v. Gamble,* 282 S.C. 624, 321 S.E.2d 57 (Ct.App.1984), *cert. granted,* 284 S.C. 366, 326 S.E.2d 654, *and cert. dismissed,* 285

S.C. 345, 329 S.E.2d 768 (1985).

[9][10] The test for determining whether a stipulation constitutes a penalty is whether "the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from breach of the contract." *Tate,* 231 S.C. at 442, 99 S.E.2d at 46. If the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages for nonperformance, the stipulation is for liquidated damages. *Id.* at 441, 99 S.E.2d at 45-46. However, where the stipulation is not based upon contemplated actual damages but is intended to provide punishment for breach of the contract, it is a penalty. *Id.*

Here, it is evident from the covenant's language that the purpose of the damages provision was to deter the Gosnells from breaching the covenant and to punish the Gosnells upon a breach. The covenant provides that the Mosers are entitled to damages of $585,000 in the event of a breach or threatened breach. Thus, the covenant prevents not only actual competition but also threatened competition. Clearly, damages of $585,000 could not reasonably have been intended as a predetermined measure of actual damages for the mere threat of a breach by the Gosnells. Rather, damages of such magnitude were designed for punishment.

[11] Additionally, the liquidated damages provision is an unenforceable penalty because the stipulated sum is clearly disproportionate to any probable damage resulting from a breach. At the time the parties signed the covenant, the parties could not reasonably have believed that any probable damage resulting from a breach of the covenant would amount to $585,000. In fact, the evidence presented to the trial court revealed that the actual damages resulting from the Gosnells' breach amounted to only a few thousand dollars. Therefore, the trial court did not err in holding that the liquidated damages provision of the covenant is an unenforceable penalty. Accordingly, the order of the trial court is

AFFIRMED.

HOWELL, C.J., and ANDERSON, J., concur.

320 S.E.2d 470

Court of Appeals of South Carolina.

James W. BANNON and Sally S. Bannon, Respondents,
v.
Donald R. KNAUSS, Appellant.

No. 0247.

Heard Feb. 22, 1984.
Decided Sept. 4, 1984.

BELL, Judge.

This is an action for damages for breach of a contract to purchase real estate. The sellers, James and Sally Bannon, sued the purchaser, Donald Knauss. The trial resulted in a jury verdict of $17,300 for the Bannons. Knauss appeals. We affirm.

The Bannons owned an unimproved ocean front lot in Sea Pines Plantation on Hilton Head Island. On April 25, 1980, Knauss executed a written offer on a standard form real estate contract offering to purchase the lot for $330,000. The lot was one of the few remaining ocean front lots in Sea Pines and was apparently the only one on the market at that time. Knauss left the written offer and his check for $1500 earnest money with the real estate agent who had listed the property. The offer was presented to the Bannons. They accepted it in writing on May 7, 1980.

The contract called for a closing date of December 30, 1980. In early June, Knauss decided not to consummate the purchase. He did not pay the next deposit of $23,500, which was due on June 1st. Instead, he notified the Bannons that he would not perform and was forfeiting his $1500 deposit as provided in the contract.

The Bannons thereupon sued Knauss for specific performance of the contract. They amended their complaint to seek damages after they sold the property on December 1, 1980, to another purchaser for $310,000.

The trial judge directed a verdict for the Bannons on the issue of liability, but submitted the issue of damages to the jury. The verdict of $17,300 represented the difference between the contract price of $330,000 and the resale price of $310,000 less the $1500 deposit and a $1200 savings on the real estate agent's commission as a result of the difference in the sales price.

I.

Knauss first contends the issue of damages should not have gone to the jury because the contract limited the seller's remedy for breach to retention of the deposit money. He relies on the following clause in the contract:

> If Purchaser fails to fully perform his obligation hereunder, he shall forfeit the earnest money deposit, which shall be divided equally between Seller and [the realtor], provided, however, that the amount to be received by [the realtor] shall not exceed the amount of the commission it would have earned had this sale been completed.

In Knauss's view, this clause provided the sole remedy for a purchaser's breach of the contract.

[1][2] ***In the absence of clear language in the contract to the contrary, a nonbreaching party may normally elect either to pursue a remedy specified in the contract or to sue for any other remedy available for the breach.*** The presence of a liquidated damages clause in a contract does not in itself limit the remedies available to the nonbreaching party. *Rubinstein v. Rubinstein,* 23 N.Y.2d 293, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968); *Fletcher v. United States,* 303 F.Supp. 583 (N.D.Ind.1967), aff'd, 436 F.2d 413 (7th Cir.1971). However, the parties may agree that the liquidated damages specified in the contract are the sole remedy for breach. *Cooley v. Call,* 61 Utah 203, 211 P. 977 (1922). If such a limitation is reasonable in the circumstances, the courts will enforce it. *Id.; Curran v. Williams,* 352 Mich. 278, 89 N.W.2d 602 (1958); *cf., Tate v. LeMaster,* 231 S.C. 429, 99 S.E.2d 39 (1957); *Owens v. Hodges,* 26 S.C.L. (1 McMul.) 106 (1841).

[3] In a contract for sale of real estate, a clause providing forfeiture of the earnest money if the purchaser defaults is ordinarily construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. *First Trust & Savings Bank v. Pruitt, et al.,* 121 S.C. 484, 113 S.E. 469 (1922); *Stewart v. Griffith,* 217 U.S. 323, 30 S.Ct. 528, 54 L.Ed. 782 (1910); *Biscayne Shores, Inc., to Use of New Biscayne Shores Co. v. Cook,* 67 F.2d 144 (3d Cir.1933). If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money. *Southeastern Land Fund, Inc. v. Real Estate*

World, Inc., 237 Ga. 227, 227 S.E.2d 340 (1976).

[4] We find no language in the Bannons' contract which makes retention of the earnest money the seller's exclusive remedy. Nothing suggests the parties intended the forfeiture clause to limit the purchaser's liability for breach. On the contrary, the clause appears to be included for the benefit of the seller and the real estate agent, not the purchaser. We, therefore, see no reason to depart from the ordinary construction given to such clauses.

[5] Knauss claims he understood the forfeiture clause to limit his liability for breach to the amount of the deposit. Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. *Blakeley v. Rabon,* 266 S.C. 68, 221 S.E.2d 767 (1976). It does not depend on the subjective, after the fact meaning one party assigns to it.

Accordingly, the Bannons were entitled to sue for damages and the circuit judge properly submitted the issue of damages to the jury.

II.

Knauss next contends the Bannons should have been nonsuited with prejudice because they failed to prove actual damage. He claims the Bannons' lot either maintained or increased its value after the contract was breached, so that they lost nothing by his failure to perform.

[6][7][8] In an action for breach of a contract to purchase real estate, general damages may be measured by the difference between the contract price and the fair market value of the property at the time of the breach. *Southeastern Land Fund, Inc. v. Real Estate World, Inc., supra; Barr v. MacGlothlin,* 176 Va. 474, 11 S.E.2d 617 (1940). On a motion for nonsuit, the evidence must be viewed in the light most favorable to the plaintiff. *Champion v. Whaley,* 280 S.C. 116, 311 S.E.2d 404 (S.C.App.1984). The Bannons presented evidence which, if credited by the jury, tended to establish a fair market value of $310,000 at the time of the breach. Since the contract price was $330,000, there was sufficient evidence of actual damage to survive a motion for nonsuit.

III.

Knauss also excepts to the trial court's failure to hold, as a matter of law, that the Bannons failed to mitigate their damages. In essence, he is complaining that the Bannons resold the property for less than $330,000. Since the evidence of value was in conflict, it was for the jury, not the court, to decide the question of failure to mitigate.

[9] The judge instructed the jury on the seller's duty to mitigate damages. The evidence showed that $310,000 was the highest offer the Bannons received after the property was relisted. They refused a lower offer of $300,000. From the evidence, the jury could have found that $310,000 was the fair market value of the property. Thus, the jury could have concluded the property was resold at full market value. The Bannons were under no duty to continue listing the property until they received an offer equal to Knauss's; their only duty was to take reasonable steps to avoid those damages which were avoidable once the contract was breached. *Hunter v. Southern Railway Co.,* 90 S.C. 507, 73 S.E. 1017 (1912); *Rosenberg v. Stone,* 160 Va. 381, 168 S.E. 436 (1933). The evidence provided no basis for the court to hold, as a matter of law, that the Bannons unreasonably failed to mitigate damages. That question was properly submitted to the jury.

IV.

Knauss finally excepts to the trial judge's refusal to grant a mistrial because of a failure adequately to cure an erroneous or incomplete instruction.

In his general charge to the jury, the trial judge initially instructed them that there was only one form of verdict in the case, a verdict for the plaintiff, and that the only issue for them to decide was the amount of damages. Before allowing the jury to commence deliberation, however, he recalled them and charged that his prior instruction was incomplete: they could also return a verdict for the defendant if they found the plaintiffs had failed to mitigate damages. He concluded this supplemental charge by stating: "... [Y]ou could bring in the verdict: We find for the defendant. ... [O]f course, both verdicts depend[ ] upon your view of the case." To cure further his prior omission, he then told the jury:

> That's an error that I made and I would like for you to take that into consideration. And certainly, the fact that I had failed or forgotten to charge the other verdict, certainly doesn't mean that I have any feeling in the case because I do not have any feeling in the case. You, alone, decide the facts.

[10][11] An instruction that there is only one issue for the jury to decide, when other issues or defenses

exist, may be cured by the trial court and is not prejudicial when followed by an additional instruction which includes the issue previously omitted. *Ackerman v. One Mack Truck and Trailer,* 191 S.C. 74, 3 S.E.2d 684 (1939). Likewise, if the court commits error in some portion of the charge, it may cure the error by withdrawing the erroneous part, instructing the jury that the erroneous portion is withdrawn and should be disregarded, and giving them a correct instruction on the issue covered by the erroneous charge. *Central of Georgia Railway Co. v. Ray,* 133 Ga. 126, 65 S.E. 281 (1909).

[12] Whether the trial judge's initial instruction in this case is regarded as erroneous or merely incomplete, we hold it was adequately cured by the additional instruction. The additional instruction informed the jury an inadvertent mistake had been made, told them to disregard the mistake, and gave them a correct charge on the omitted point. Once those steps were taken, a reasonably intelligent jury would understand they could return a defendant's verdict if they found a failure to mitigate damages. Indeed, during oral argument Knauss's counsel was unable to suggest anything more the trial judge could have done to cure the error. We, therefore, sustain the judge's refusal to grant a mistrial for failure adequately to cure the mistaken instruction.

For the foregoing reasons, we overrule Knauss's exceptions as having no merit. The judgment is

AFFIRMED.

SANDERS, C.J., and SHAW, J., concur.

Procurement Code for State and Local Governments, which it developed in cooperation with, among others, the National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers. One of the primary goals of the revision project was to encourage the competitive use of new forms of project delivery in public construction procurement; and

"(2) it is the intent of the General Assembly to facilitate the use of these alternate forms of project delivery by adopting, as modified herein, those portions of the new model code related to Article 5 (Procurement of Infrastructure Facilities and Services) of the model code. To that end, the relevant official comments to the model code, and the construction given to the model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act."

§ 11–35–3025. Approval of architectural, engineering or construction changes which do not alter scope or intent or exceed approved budget.

Each agency of state government shall be allowed to approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts, within agency certification, which do not alter the original scope or intent of the project, and which do not exceed the previously approved project budget.

HISTORY: Added by 1993 Act No. 178, § 28, eff July 1, 1993; Amended by 1997 Act No. 153, § 1, eff June 13, 1997.

Editor's Note

See § 11–35–3070 for a nearly identical provision enacted by 2008 Act No. 174, § 6.

Effect of Amendment

The **1997** amendment reprinted this section with no apparent change.

Library References

72 C.J.S., Public Contracts § 24.

§ 11–35–3030. Bond and security.

(1) Bid Security.

(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design–bid–build procurement in excess of fifty thousand dollars and other contracts as may be prescribed by the State Engineer's Office. Bid security is a bond provided by a surety company meeting the criteria established by the regulations of the board or otherwise supplied in a form that may be established by regulation of the board.

(b) Amount of Bid Security. Bid security must be in an amount equal to at least five percent of the amount of the bid at a minimum.

(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating must be given one working day from bid opening to cure the deficiencies. If the bidder is unable to cure these deficiencies within one working day of bid opening, his bid must be rejected.

(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid before bid opening pursuant to Section 11–35–1520(7), action must not be had against the bidder or the bid security.

(2) Contract Performance Payment Bonds.

(a) When Required–Amounts. The following bonds or security must be delivered to the governmental body and become binding on the parties upon the execution of the contract for construction:

(i) a performance bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

(ii) a payment bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond must be in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

CODE OF LAWS OF SOUTH CAROLINA 1976 *ANNOTATED*
TITLE 36. COMMERCIAL CODE
CHAPTER 2. COMMERCIAL CODE--SALES
PART 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT
§ 36-2-209. Modification, rescission and waiver.

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter (§ 36- 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

HISTORY: 1962 Code § 10.2-209; 1966 (54) 2716.

<General Materials (GM) - References, Annotations, or Tables>

OFFICIAL COMMENT

Prior uniform statutory provision: Subsection (1)--Compare Section 1, Uniform Written Obligations Act; Subsections (2) to (5)--none.

Purposes of changes and new matter:

1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

3. Subsections (2) and (3) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, contrary to the decision in Green v Doniger, 300 NY 238, 90 NE2d 56 (1949); it does not include unilateral "termination" or "cancellation" as defined in Section 2-106.

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to

the quantity of goods set forth in it there is safeguard against oral evidence.

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).

Cross References:

Point 1: Section 1-203.

Point 2: Sections 1-201, 1-203, 2-615 and 2-616.

Point 3: Sections 2-106, 2-201 and 2-202.

Point 4: Sections 2-202 and 2-208.

Definitional Cross References:

"Agreement" Section 1-201.
"Between merchants" Section 2-104.
"Contract" Section 1-201.
"Notification" Section 1-201.
"Signed" Section 1-201.
"Term" Section 1-201.
"Writing" Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

The usual rule of contract law is that while a contract of sale may be modified by agreement of the parties, an attempt to modify an existing contract is invalid if not supported by consideration. Thus where there already exists a contractual duty to perform, an express unilateral agreement to modify is of no effect since an agreement to do that which one is legally required to do is not sufficient consideration to support a new contract. T. H. Colcock & Co. v Louisville C. & C. Ry., 1 Strob 329 (1847); Rabon v State Finance Corp., 203 SC 183, 26 SE2d 501 (1943).

The application of this rule to sales contracts is thought to create a harsh and uncommercial result where one party agrees to modify the terms of an existing contract for the sale of goods. Thus, Commercial Code Section 2- 209(1) would change existing law by removing the requirement of consideration for the enforceability of a good faith modification of a sales contract. It should be noted that Commercial Code Section 2-103 generally imposes "good faith" duty which should be read into this rule. Thus, some legitimate commercial reason must be found to have induced the agreement as where there is a sudden change in the market conditions whereby one party voluntarily agrees to modify the price terms of the contract. The section would clearly not apply where a party threatens non-performance for no commercially justified reason if the other does not agree to a price modification, this being bad faith.

Section 2-209(2) would seem to change a principle of general contract law which permits an oral modification of a written contract (when supported by consideration) even though it contains a provision that the contract can be modified only by a writing. See Fass v South Atlantic Life Ins. Co., 105 SC 107, 89 SE 558 (1916). See also Williston, Contracts Section 1828 (Rev ed 1936). With the removal of the requirement of consideration for an effective modification by subsection (1), subsection (2) would afford protection against false allegations of oral modification where a written contract expressly requires any modification to be in writing.

Section 2-209(3) provides an additional safeguard against false allegations of oral modifications by requiring a writing if

the contract as modified would fall within the Statute of Frauds (Commercial Code Section 2-201). Probably in accord by analogy from sale of land cases in South Carolina: Doar v Gibbes, Bailey Eq. 371 (1831); Williams v Bruce, 110 SC 421, 96 SE 905 (1918). But see, Searles v Auld, 118 SC 430, 111 SE 785 (1921) where the court enforced an oral modification of the contract for a sale of land which could be reconciled on the ground that the oral modification had been acted upon.

Since this subsection deals only with modification it would not seem to disturb the cases in South Carolina which hold that there may be an oral rescission of a contract falling within the Statute of Frauds. Midland Roofing Co. v Pickens, 96 SC 286, 80 SE 484 (1913)(chattel); Moseley v Witt, 79 SC 141, 60 SE 520 (1907).

Section 2-209(4) states an exception to the rule of subsections (2) or (3) with respect to the requirement of a writing by waiver. This is in accord with Florence Printing Co. v Parnell, 178 SC 119, 182 SE 313 (1934) which refused to apply the Statute of Frauds where the party had relied on an oral extension of time and thus did not insist on the time specified by the written contract.

Section 2-209(5) would operate as a limitation on subsection (4) by preventing a waiver of the requirement of the writing by sending notice of retraction of the modification before it is acted on to the detriment of the other party. While there are no South Carolina cases directly in point, this is the view of the Restatement, Contracts Section 297 (1932).

CROSS REFERENCES

Excuse for delay in delivery or nondelivery, see §§ 36-2-615, 36-2-616.

Obligation of good faith, see § 36-1-203.

Definitions of "termination" and "cancellation", see § 36-2-106.

LIBRARY REFERENCES

Frauds, Statute of k131(1).
Sales k89.
Westlaw Key Number Searches: 185k131(1); 343k89.
C.J.S. Frauds, Statute of §§ 151 to 152.
C.J.S. Sales §§ 109 to 114, 117.

LAW REVIEW AND JOURNAL COMMENTARIES

Accord and Satisfaction. 26 SC L Rev 175.

Annual Survey of South Carolina Law: Contract Law. 38 SC L Rev 35 (Autumn 1986).

Mather, Contract Modification Under Duress. 33 SC L Rev 615, May 1982.

NOTES OF DECISIONS

328 S.C. 475, 492 S.E.2d 404

Court of Appeals of South Carolina.

The PLANTATION SHUTTER COMPANY, INC., Respondent,

v.

Ricky EZELL, Appellant.

No. 2724.

Submitted Sept. 9, 1997.
Decided Sept. 29, 1997.

Company which had contracted to custom-build and install shutters on home sued homeowner to collect balance owed on contract, and homeowner counterclaimed for breach of contract and breach of warranty. The Circuit Court, Lexington County, George W. Jefferson, Master-in-Equity, granted judgment to company and denied judgment to homeowner. Homeowner appealed, and the Court of Appeals, Goolsby, J., held that: (1) contract was predominantly contract for sale of goods and thus was governed by Uniform Commercial Code (UCC), and (2) homeowner's failure to give written notice of rejection resulted in acceptance of shutters.

Affirmed.

West Headnotes

[1] Sales k3.1
343k3.1
In considering whether transaction that provides for both goods and services is contract for sale of goods governed by South Carolina version of Uniform Commercial Code (UCC), courts generally employ predominant factor test; under test, if predominant factor of transaction is rendition of a service with goods incidentally involved, UCC is not applicable, but if contract's predominant factor is sale of goods with labor incidentally involved, UCC applies.

[2] Sales k3.1
343k3.1
Contract for special manufacture and installation of shutters for home was predominantly contract for sale of goods, and thus was governed by South Carolina version of Uniform Commercial Code (UCC); while contract did authorize "work" to be performed, contract was entitled "Terms of Sale," and did not provide for installation charges.

[3] Sales k179(6)
343k179(6)
For rejection of goods to be effective under South Carolina version of Uniform Commercial Code (UCC), buyer must notify seller in writing. Code 1976, § 36-2-602(1).

[4] Sales k179(6)
343k179(6)
Failure of buyer of custom-made shutters to notify seller in writing that he was rejecting goods resulted in acceptance of goods, so that seller was entitled to recovery of contract price under South Carolina version of Uniform Commercial Code (UCC) after buyer failed to pay for shutters; fact that seller's own employees communicated, in writing, level of buyer's dissatisfaction did not constitute notice of rejection, since buyer himself must communicate rejection, and dissatisfaction did not indicate that buyer considered source of his dissatisfaction a breach. Code 1976, § 36-2- 606(1)(b).

[5] Sales k179(6)
343k179(6)
Notice of facts constituting breach of sales contract is not the same as notice that buyer considers those facts to be a legal breach, as is required under South Carolina version of Uniform Commercial Code (UCC). Code 1976, § 36-2- 602(1).

****405 *477** Joseph L. Smalls, Jr., of Smalls Law Firm, Columbia, for Appellant.

Hardwick Stuart, Jr., and Deborah R. J. Shupe, of Berry, Adams, Quackenbush & Dunbar, Columbia, for Respondent.

GOOLSBY, Judge:

The Plantation Shutter Company, Inc. (seller) instituted this action against Ricky Ezell (buyer) to collect the balance owed on a contract for specially manufactured interior shutters sold to the buyer and installed in his home. The buyer answered and counter-claimed for breach of contract and breach of warranty. The master granted judgment to the seller and denied judgment to the buyer. The buyer appeals. We affirm. [FN1]

FN1. Because oral argument would not aid the court in resolving these issues, we decide the case without oral argument pursuant to Rule 215, SCACR.

FACTS

On May 30, 1994, the seller's representative met with the buyer to give him an estimate for interior window shutters for his new home. The representative left a proposed sales contract totaling $5,985.75 with the buyer. The contract did not contain any indication that time was of the essence, but approximated the time for performance at three to five weeks. In mid-June, the buyer returned the executed sales contract to the seller with the required partial payment.

Due to a delay in shipment of components, the seller experienced a slight delay in delivery of the shutters to the ***478** buyer's home. The seller gave the buyer a five per cent discount on the sales price because of this delay. In late July, the seller sent workers to the buyer's home to install the shutters.

The buyer was not satisfied with 12 of the 37 panels. The seller agreed to remake them. About one month later, the seller ****406** completed installation with the remade panels.

Following installation of the remade panels, the buyer's complaints prompted several meetings with the seller. The buyer also informed the seller he did not like the exposed hinges. To accommodate the buyer, the seller agreed to provide side strips to hide the hinges at no extra cost, make adjustments to the shutters where necessary, and further discount the contract price for a total discount of $800.00. The buyer and the seller executed an addendum dated September 13, 1994, concerning this additional work. Like the original contract, the addendum did not indicate time was of the essence, but estimated the time for performance at two weeks. At this same time, the buyer asked the seller for an estimate on shutters for the third floor of his home.

Pursuant to the addendum, the seller specially manufactured side strips for the buyer to hide the hinges. The seller made several attempts to schedule an appointment to install them and make adjustments to the shutters already in place, but the buyer never responded. On October 6, 1994, the seller sent installers to the buyer's home to perform the remainder of the work, but the buyer denied them access.

PREDOMINANT FACTOR TEST

I.

The buyer first argues the master erred by applying the Uniform Commercial Code (UCC) to the contract.

[1] In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test. *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F.Supp. 442 (D.S.C.1977). Under this test, if the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. *Id.* at 445. If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. *Id.* at 444. In most cases in which the contract calls for a ***479** combination of services with the sale of goods, courts have applied the UCC. James J. White & Robert S. Summer, *Uniform Commercial Code* § 1-1, at 4 (4th ed. 1995).

In *Kline Iron & Steel Co. v. Gray Communications Consultants, Inc.*, 715 F.Supp. 135 (D.S.C.1989), the district court determined the UCC applied to a transaction involving the construction of a television tower. The contract neither mentioned any services nor quoted a separate price for them, although some service would necessarily be involved in erecting the television tower. The contract referred to the purchaser of the tower as "[b]uyer, a term indicative of a transaction for the sale of goods." *Id.* at 140. Moreover, the warranty language was that of a sales contract. *Id.*

[2] Here, the contract does not provide for installation charges. The document is entitled "Terms of Sale." By signing the contract, however, the "customer" authorized the "sales representative" to do the "work" as specified. Although the term "work" sounds more like a service contract term, looking at the contract as a whole, it is predominantly a contract for the sale of goods; therefore, we must apply the UCC. *See J. Lee Gregory, Inc. v. Scandinavian House,* 209 Ga.App. 285, 433 S.E.2d 687 (1993) (stating that when a contract for the purchase of replacement windows included a lump sum charge, and approximately two-thirds of that cost was for the windows, even though a substantial amount of service was necessarily involved, the contract was for the sale of goods); *Pittsley v. Houser,* 125 Idaho 820, 875 P.2d 232 (App.1994) (purchasing

carpet by contract for a lump sum charge for the carpet and installation, when the particular carpet was the focus, not who installed it, created a contract for the sale of goods); *Riffe v. Black,* 548 S.W.2d 175 (Ky.Ct.App.1977) (finding that when a contract for the purchase of a swimming pool included services necessary to ensure the goods were merchantable and fit for the ordinary purpose, the contract was for the sale of goods); *Mennonite Deaconess Home & Hosp., Inc. v. Gates Eng'g Co.,* 219 Neb. 303, 363 N.W.2d 155 (1985) (finding that when a contract was for the purchase of a particular roofing material which was specially manufactured and supplied by seller, the contract was for the ****407** sale of goods); *Meyers v. Henderson Constr. Co.,* 147 N.J.Super. 77, 370 A.2d 547 (1977) (contracting for the purchase and installation of prefabricated overhead doors, which included a ***480** lump sum charge for the equipment and installation, made it a nondivisible mixed contract, and the contract was for the sale of goods because the service element did not dominate the subject matter, even though the overhead doors were useless without the performance of installation services).

II.

The buyer argues the master incorrectly applied the UCC in finding the buyer accepted the goods and awarding the seller the contract price as damages.

An ineffective rejection by the buyer is an acceptance by the buyer. S.C.Code Ann. § 36-2-606(1)(b) (1976). Therefore, we must consider whether the buyer effectively rejected the shutters. Section 36-2-602(1) provides that a buyer must reject goods "within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." S.C.Code Ann. § 36-2-602(1) (1976).

[3] In construing section 36-2-602(1), our courts have determined that for a rejection of goods to be effective, a buyer must notify a seller in writing. *Southeastern Steel Co. v. Burton Block & Concrete Co.,* 273 S.C. 634, 258 S.E.2d 888 (1979); *American Fast Print Ltd. v. Design Prints of Hickory,* 288 S.C. 46, 339 S.E.2d 516 (Ct.App.1986).

[4] The buyer does not dispute that he did not send written notification of rejection to the seller. Instead, the buyer asserts that the seller's "own employees communicated, in writing, to the [seller] the level of dissatisfaction that the [buyer] expressed," and that this writing satisfies the writing requirement. We disagree.

[5] As we just noted, section 36-2-602 requires the *buyer* to notify the seller in writing. The buyer simply failed to do this here. Moreover, notice of facts constituting a breach is not the same as notice that the buyer considers those facts to be a legal breach. *See Southeastern Steel Co. v. W.A. Hunt Construct. Co.,* 301 S.C. 140, 390 S.E.2d 475 (Ct.App.1990). The buyer's dissatisfaction did not put the seller on notice of the buyer's claim that he considered the source of his dissatisfaction a breach. The buyer negotiated discounts due to the delay and alterations due to non-conformities; then the buyer signed a second agreement to this effect. The buyer also asked for an estimate on the cost to purchase and install ***481** blinds on the third floor of the house. The seller, then, had no reason to believe the buyer considered the delay and non-conformities to be a legal breach.

Because the buyer failed to notify the seller in writing that he was rejecting the goods, he did not effectively reject the goods, and he thereby accepted them. Because we hold that the buyer legally accepted the shutters, we find the court correctly awarded the contract price as the measure of damages. S.C.Code Ann. § 36-2-709 (1976). [FN2]

> FN2. Because we find there was no rejection by the buyer, we do not address the buyer's contention that the seller failed to cure the nonconforming offer. *See Advance Int'l, Inc. v. North Carolina Nat'l Bank of S.C.,* 320 S.C. 533, 466 S.E.2d 367 (1996) (in which the supreme court vacated an opinion by the court of appeals to the extent certain issues were addressed in dicta).
> We also do not address the buyer's other contentions concerning breach of an implied warranty of workmanship and the applicability of the Magnuson-Moss Act, 15 U.S.C. § 2301(10), because although the buyer presented these issues to the master, the master did not rule on them, and the buyer never made a motion to amend or alter judgment pursuant to Rule 59(e). These issues are therefore not preserved for appellate review. *Degenhart v. Knights of Columbus,* 309 S.C. 114, 420 S.E.2d 495 (1992).

AFFIRMED.

CURETON and CONNOR, JJ., concur.

CODE OF LAWS OF SOUTH CAROLINA 1976 *ANNOTATED*
TITLE 36. COMMERCIAL CODE
CHAPTER 2. COMMERCIAL CODE--SALES
PART 7. REMEDIES

§ 36-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section (§ 36-2-718) on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

HISTORY: 1962 Code § 10.2-719; 1966 (54) 2716.

<General Materials (GM) - References, Annotations, or Tables>

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

2. Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

Cross References:

Point 1: Section 2-302.

Point 3: Section 2-316.

Definitional Cross References:

"Agreement" Section 1-201.
"Buyer" Section 2-103.
"Conforming" Section 2-106.
"Contract" Section 1-201.
"Goods" Section 2-105.
"Remedy" Section 1-201.
"Seller" Section 2-103.

SOUTH CAROLINA REPORTER'S COMMENTS

Section 2-719(1)(a) expresses a policy in favor of freedom of contract with respect to contractual modification of limitation of remedies. This principle is generally in accord with several South Carolina cases which have recognized the validity of terms in a contract for the sale of goods limiting the seller's liability for breach of warranty to replacement or correction of defective parts. Deiter v Frick Co., 169 SC 480, 169 SE 297 (1933); Westinghouse Electric & Mfg. Co. v Glencoe Cotton Mills, 105 SC 133, 90 SE 526 (1916). See also Livingston v Reid-Hart Parr Co., 117 SC 391, 109 SE 106 (1921); Stono Mines v Southern States Phosphate & Fertilizer Co., 76 SC 327, 56 SE 982 (1907). Note that this policy of freedom of contract is limited by Commercial Code Sections 2-718 with regard to liquidation of damages, 2-302 relating to "unconscionability" of contract provisions, and subsections (2) and (3) of this section.

Under subsection (1)(b) resort could be had alternatively to other remedies provided in the Code unless the contract expressly provides that the limited or modified remedy is exclusive.

Subsection (2) permits resort to other remedies when a limitation of remedies clause "fails of its essential purpose" by subsequent developments. Subsection (3) repeats the "unconscionable" rule of Commercial Code Section 2- 302 and renders limitation of damages for injury to person prima facie unconscionable. These restrictions on freedom of contract reflect a public policy decision aimed at avoiding unfair limitations or liability. See Deiter v Frick Co., 169 SC 480, 169 SE 297 (1932) where the contract term limiting seller's liability to furnishing duplicate parts did not save the seller from consequential damages resulting from failure to supply replacement parts forcing the buyer to shut down plant operations.

EDITOR'S NOTE

"This act," referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

CROSS REFERENCES

Unconscionable contract or clause, see § 36-2-302.

Contractual limitations as restricting buyer's rights on improper delivery, see § 36-2-601.

LIBRARY REFERENCES

Sales k418(6), 426.
Westlaw Key Number Searches: 343k418(6); 343k426.

C.J.S. Sales §§ 237, 281 to 284, 376, 402.

RESEARCH REFERENCE

Encyclopedias

CODE OF LAWS OF SOUTH CAROLINA 1976 *ANNOTATED*
TITLE 36. COMMERCIAL CODE
CHAPTER 2. COMMERCIAL CODE--SALES
PART 7. REMEDIES
§ 36-2-718. Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this chapter other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this chapter on resale by an aggrieved seller (§ 36- 2-706).

HISTORY: 1962 Code § 10.2-718; 1966 (54) 2716.

<General Materials (GM) - References, Annotations, or Tables>

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Under subsection (1) liquidated damages clauses are allowed where amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (2) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under subsection (1). A special exception is made in the case of small amounts (20% of the price or $500, whichever is small) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (2) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

Cross References:

Point 1: Section 2-302.

Point 2: Section 2-706.

Definitional Cross References:

"Aggrieved party"	Section 1-201.
"Agreement"	Section 1-201.
"Buyer"	Section 2-103.
"Goods"	Section 2-105.
"Notice"	Section 1-201.
"Party"	Section 1-201.
"Remedy"	Section 1-201.
"Seller"	Section 2-103.
"Term"	Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

Section 2-718(1) condones the liquidated damage clause in sales contracts so long as the amount is reasonable. The common law rule is generally in accord with the courts refusing to enforce the agreement as penal when the amount fixed is so great as to exceed any reasonable forecast of compensation. See 3 Williston, Sales, Section 599L (rev ed 1948). Thus in William & Co. v Vance & Moseley, 9 SC 344 (1877), a clause in a contract for the sale of cotton calling for liquidated damages of $2.00 per bale for every bale of cotton less than 500 bales which was not consigned and shipped as stipulated, was held to be valid liquidated damages. Also, approving liquidated damage clauses in South Carolina are the cases of Witte v Weinberg, 375 SC 579, 17 SE 681 (1891); Norwood & Co. v Faulkner, 22 SC 367 (1884). On the other hand it was held in Murray & Co. v Ouzts, 117 SC 388, 109 SE 122 (1921) that a clause in the contract calling for reimbursement of all expenses and 20 per cent of the purchase price to be paid in the event of breach was a penalty and unenforceable. These cases can be reconciled on the basis that the provisions for liquidated damages in the Williams case was not at such variance with the actual damages, while in the Murray case it was. The additional standards of this Commercial Code Section in measuring the reasonableness of the liquidated damages by considering the difficulties of proof of loss and obtaining an adequate remedy would seem to be proper standards which the courts would employ in addition to the more frequently stated test of relationship to actual damages.

Where a buyer pays in part of the purchase price for goods and then defaults, the courts have not been in agreement as to whether the buyer can recover such payments. Where the amount paid on the purchase price is in excess of the damages which the seller suffers by the breach, many courts employ an equitable principle to prevent a forfeiture by requiring an accounting for such amount. See 3 Williston, Sales, Section 599m (rev ed 1948). But see Hansbrough v Peck, 72 US (5 Wall) 520 (1867) in which the United States Supreme Court took the position that the breaching party will not be permitted to recover back what he has advanced. This Commercial Code Section takes the position that the buyer should not be made to forfeit an amount of payments which would be so unreasonably large that it amounts to a penalty. Under subsection (2)(a), the buyer may recover back any amount of payments called for as liquidated damages in excess of a reasonable amount as measured by subsection (1). In the absence of such terms, subsection (2)(b) prescribes the outside limits of the amount which may be retained by the seller as twenty percent of the value of the total performance or $500, whichever is smaller. This formula follows the spirit of those cases which prevent a penalty but by a more certain, albeit arbitrary, standard.

Section 2-718(3) qualifies the above by allowing the seller to offset against the buyer's claim the actual damages suffered, and the value of any benefits received by the buyer.

Section 2-718(4) requires compliance with the resale standards of Commercial Code Section 2-706 by a seller who receives goods in part performance and learns of the buyer's breach prior to disposing of such goods.

CROSS REFERENCES