

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
FIFTH JUDICIAL CIRCUIT)

JMI Sports and JMIS College, LLC,)

Docket No. 2022-CP-40-02536)

Petitioners-Plaintiffs,)

vs.)

ORDER ON ALL)
MOTIONS TO DISMISS)

Michael B. Spicer, Chief Procurement)
Officer, South Carolina State Fiscal)
Accountability Authority, Division of)
Procurement Services, and Clemson)
University,)

Respondents-Defendants.)

Intellectual Capital, Inc., Berry Newkirk)
And Neil Richards,)

Docket No. 2022-CP-40-02656)

Petitioners-Plaintiffs,)

vs.)

Michael B. Spicer, Chief Procurement)
Officer, South Carolina State Fiscal)
Accountability Authority, Division of)
Procurement Services, and South)
Carolina Workers' Compensation)
Commission,)

Respondents-Defendants.)

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This matter came before the Court on various motions to dismiss filed by Respondents-Defendants. A hearing was conducted on January 5, 2023 and January 24, 2023 by WebEx. Present at the hearing were John Schmidt, III, Esq. on behalf of Petitioners-Plaintiffs; Manton M. Grier, Jr., Esq. on behalf of Michael B. Spicer, Procurement Officer, State Fiscal Accountability Authority; Boyd Nicholson, Jr., Esq. on behalf of Clemson University; and Michael Montgomery, Esq. on behalf of South Carolina Workers' Compensation Commission ("SCWCC"). Respondents-Defendants Spicer and South Carolina State Fiscal Accountability Authority filed a Motion to Dismiss under Rule 12(B) in lieu of Answer; Clemson University and SCWCC each

filed a Motion to Dismiss or Alternatively for Judgment on the Pleadings pursuant to SCRCR Rules 12(b)(1), 12(b)(6), 12(b)(8) and Rule 12(c).

The grounds for the motions to dismiss are: (1) the General Assembly of the State of the South Carolina has mandated that the Office of the Chief Procurement Officer (“CPO”) is the exclusive forum for deciding contract controversies involving governmental bodies as set forth in S.C. Code Ann. § 11-35-4230 (also referred to herein as the “Contract Controversy Provision”), and (2) JMI and Clemson, the parties to the contract controversy described in one of the complaints, have agreed that “all disputes, claims, or controversies relating to the Agreement [between them] shall be resolved exclusively by the appropriate CPO.” As a result, Respondents-Defendants argue the Court should dismiss this action because Petitioners-Plaintiffs have failed to exhaust their administrative remedies and because the Court lacks subject matter jurisdiction to hear this matter. Respondents-Defendants also argue that the Court should dismiss this action because Petitioner-Plaintiffs have failed to state facts sufficient to constitute a cause of action against Clemson and SCWCC. Finally, and in the alternative, the parties argue that the South Carolina Supreme Court has previously upheld the Contract Controversy Provision that Petitioners-Plaintiffs now challenges in this action. *See Unisys Corp. v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001).

The Contract Controversy Provision, which is part of the State Consolidated Procurement Code, “applies to controversies between a governmental body and a contractor ... 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 rescission.” S.C. Code Ann. § 11-35-4230(1). The procedure set forth in the Contract Controversy provision “constitutes the exclusive means of resolving a controversy between a governmental body and a contractor ... concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code.” *Id.* This language is unequivocal and requires that the CPO decide the claims set forth in the Request for Contract Controversy Resolution submitted by Clemson and SCWCC.

The Chief Procurement Officer (CPO), not the circuit court, has exclusive jurisdiction over this dispute between the parties regarding the contracts. Controversies between governmental bodies and contractors arising out of contracts governed by the Procurement Code are resolved pursuant to S.C. Code Ann. § 11-35- 4230, which vests exclusive jurisdiction with the CPO and

the Procurement Review Panel. The Supreme Court affirmed the exclusivity of the CPO's and Panel's jurisdiction in *Unisys v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). Although the Petitioners-Plaintiffs argue that Unisys is wrong because it "never mentions the Separation of Powers," the Court expressly held that 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. 346 S.C. at 169, 551 S.E.2d at 270 (emphasis added). Here, a contract controversy involving these same parties, "Clemson University v. JMI Sports and JMIS College, LLC, CPO Case No. 2022-116" and "Request for Resolution of a Contract Controversy by South Carolina Worker's Compensation Comm'n, CPO Case No. 2020-213A", are currently pending before the Chief Procurement Officer ("CPO"). The CPO has exclusive jurisdiction over these controversies.

Pointing to Article I, §§ 3 and 8 of the South Carolina Constitution, Petitioners-Plaintiffs also argue that the Contract Controversy Provision violates the Separation of Powers and Due Process Clauses of the South Carolina Constitution with respect to a governmental body's claim against a private entity. The Supreme Court held the opposite in *Unisys*, and Petitioners-Plaintiffs arguments must fail. Analyzing not just Article X, § 10, the Supreme Court addressed the arguments of *Unisys* across the broad sweep of the State Constitution:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. "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."

346 S.C. at 169, 551 S.E.2d at 269-70 (internal citations omitted). In *Unisys*, while the Supreme Court did not specifically mention Article 1, Section 8 of the State Constitution, the Supreme Court did analyze Article V, Section 11 of the State Constitution which vests in the circuit court general jurisdiction in civil cases. The Supreme Court unequivocally held that "[t]here 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." 346 S.C. at 169, 551 S.E.2d at 270 (emphasis added).

Thus, the Supreme Court held, the state's claims against Unisys were properly before the CPO. The limitations set by the legislature under the Procurement Code do not violate the

authority of the judicial branch to adjudicate the legal issues. The CPO has exclusive jurisdiction over the contract controversy between the parties here, and because Petitioners-Plaintiffs have failed to exhaust their administrative remedies, this Court dismisses this action. Petitioners-Plaintiffs claims are premature at this point.

Further, while Plaintiffs assert there is a constitutional issue under Article V, Section 1 vesting judicial power in the state courts, the proceedings under Section 11-35-4230 are not judicial proceedings. Section 11-35-4230 requires the review of any contractual dispute between a governmental body and a contractor to follow provisions of the Procurement Code under which the contract was procured. The means of resolving any contract controversy relates to a dispute based upon the contract itself and does not consider other legal claims that can be asserted by the parties. Further, any decision on the contract is subject to de novo review before the Procurement Review Panel as the final administrative review. S.C. Code Ann. Section 11-35-4410. The decision of the Procurement Review Panel is final as to administrative review. However, the decision of the Procurement Review Panel is subject to judicial review. *See* S.C. Code Ann. Section 11-35-4410. Therefore, the parties are not denied the opportunity to adjudicate the resulting issues before the courts. The parties have the opportunity to challenge the constitutionality of the applicable statutory provisions upon the exhaustion of the administrative remedies.

Petitioners-Plaintiffs also cite to *Carolina Glass Co v. State*, 87 S.C. 270, 69 S.E. 391 (1910)¹ as support for its separation of powers argument. In that case, the Supreme Court determined that the Legislature was not empowered to pass an act declaring that an individual is indebted to the state. The powers of the State Dispensary Commission that adjudicated a claim against the State were declared invalid by the Supreme Court because the Commission did not have authority to *pass final judgment* on the claim in violation of Art. 5, Section 1 of the State Constitution. In this case, there is no final adjudication to be made by the State thereby depriving the parties of judicial review. The statutory provisions of S.C. Code Ann. Sections 11-35-4230 and 11-35-4410 establish the right to judicial review. Ultimately, the courts have the opportunity to determine the rights of the parties and adjudicate any legal claims the parties may have.

¹ *Carolina Glass Co. v. State* was expressly overruled in *McCall v. Batson*, 285 S.C. 243, 251, 329 S.E.2d 741 (1985), "to the extent [it holds] that an action may be maintained against the State without its consent."

Based upon the foregoing arguments, **IT IS HEREBY ORDERED**, that the motions to dismiss are **GRANTED** on the basis that the parties have failed to exhaust their administrative remedies. Further, any constitutional challenge to the statutory provisions is premature until a resolution of the administrative proceeding. Therefore, these cases are **DISMISSED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW

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Richland Common Pleas

Case Caption: Jmi Sports , plaintiff, et al vs Chief Procurement Officer, defendant, et al
Case Number: 2022CP4002536
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IT IS SO ORDERED!

s/ Alison Renee Lee

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Jmi Sports et al
PLAINTIFF(S)

South Carolina State Fiscal Accountability Authority et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before the Court on Plaintiffs' motion to reconsider dismissal of the case. This Court has reviewed the motions, briefs and arguments of counsel. This Court relies on Unisys Corp. v. South Carolina Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) which addressed the constitutionality of the State Procurement Code as the exclusive means of resolving a contract controversy governed by the Procurement Code. The Supreme Court specifically stated there is "no constitutional provision" limiting the legislature's power to establish the exclusive forum for deciding contract controversies involving governmental bodies set forth in S.C. Code Ann. Section 11-35-4230. Therefore, the motion to reconsider is DENIED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/13/2023 .

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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Richland Common Pleas

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Case Number: 2022CP4002536
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IT IS SO ORDERED

s/ Alison Renee Lee, Chief Administrative Judge

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