RECEIVED

May 31 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE FIFTH JUDICIAL CIRCUIT, RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2022-CP-40-02536
Appellate Case No. 2023-000668
and
Case No. 2022-CP-40-02656
Appellate Case No. 2023-000667

JMI Sports and JMIS College, LLC,

…….Appellants,

vs.

Chief Procurement Officer, South Carolina
State Fiscal Accountability Authority,
Division of Procurement Services and Clemson University

……...Respondents

and

Intellectual Capitol, Inc., Barry Newkirk,
And Neil Richards,
…….Appellants,

vs.

Chief Procurement Officer, South Carolina
State Fiscal Accountability Authority,
Division of Procurement Services, and
South Carolina Workers' Compensation
Commission,
……..Respondents.

MOTION TO DISMISS APPEAL

Respondents Clemson University ("Clemson"), the South Carolina Workers' Compensation Commission ("WCC"), and Chief Procurement Officer, South Carolina State Fiscal Accountability Authority and Division of Procurement Services (collectively the "State" or "CPO"), by and through their undersigned counsel, hereby move to dismiss this appeal of appellants JMI Sports and JMIS College, LLC (collectively "JMI") and Intellectual Capitol, Inc. ("ICAP") (JMI and ICAP are collectively referred to as the "Appellants").

The Court should dismiss this action because the Appellants failed to exhaust the administrative remedies available to them.

BACKGROUND

On November 8, 2021, Clemson submitted a contract controversy to the Chief Procurement Officer ("CPO") of the State of South Carolina seeking, among other things, a ruling from the CPO that JMI breached its contract with Clemson and owed money damages to Clemson, and that Clemson owed no damages to JMI. Similarly, on December 20, 2020, the WCC submitted its Request for Resolution to the CPO, initiating a contract controversy against ICAP seeking, among other things, a ruling from the CPO that ICAP failed to deliver a contracted for software product and owed money damages to the WCC.

Clemson and the WCC filed these proceedings pursuant to S.C. Code Ann. § 11-35-4230(1) (also hereinafter referred to as the "Contract Controversy Provision"), which is a part of the Consolidated Procurement Code and which "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." The dispute resolution procedure set forth in the

Contract Controversy Provision and related statutes within the Consolidated Procurement Code "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.* (emphasis added). *See also Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office*, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001) (holding that held that the term "exclusive means" in the Contract Controversy provision "must therefore be strictly construed to limit suits on contracts with the State to the forum provided in § 11–35–4230.").

On May 16, 2022, JMI filed an action (the "Clemson Lawsuit") in the Richland County, South Carolina Court of Common Pleas against Clemson and the State, seeking a declaratory judgment that the CPO has no jurisdiction in the contract controversy filed by Clemson against JMI and also seeking an order enjoining the contract controversy before the CPO between Clemson and JMI. Four days later, ICAP filed a virtually identical lawsuit (the "WCC Lawsuit") in the same Circuit Court against the WCC and the State, seeking relief identical to that sought in the Clemson Lawsuit. Each of the Respondents filed motions to dismiss. The Honorable Alison R. Lee heard arguments concerning these motions on January 5, 2023, and January 24, 2023.[1]

Judge Lee issued an Order On All Motions to Dismiss on January 31, 2023 (the "Order"), dismissing the Clemson and WCC Lawsuits. The Order states, in part, as follows:

> 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.

[1] During these proceedings, the parties agreed to consolidate the Clemson Lawsuit and the WCC Lawsuit.

Order at 5. The Appellants moved for reconsideration, which Judge Lee denied on April 13, 2023, stating:

> 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.

Appeals of the Clemson Lawsuit and the WCC Lawsuit. [2]

DISCUSSION

The Contract Controversy Provision provides the exclusive means of resolving disputes between the State and a private contractor arising out of a contract procured under the Procurement Code. Such disputes must be initiated as a contract controversy before the CPO. A decision by the CPO is final "unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1)". S.C. Code Ann. § 11-35-4230(6). The decision of the Procurement Review Panel, in turn, "is final as to administrative review and may be appealed only to the court of appeals pursuant to Section 1-23-380…." S.C. Code Ann. § 11-35-4410(6). Only a party "who has exhausted all administrative remedies available" and "who is aggrieved by a final decision in a contested case is entitled to judicial review" before the court of appeals. S.C. Code Ann. § 1-23-380. As Judge Lee properly found,

[2] Respondents consent to the consolidation of the two appeals as the issues presented are identical.

the Appellants have failed to exhaust their administrative remedies. *See* Order at 5. This finding is consistent with the South Carolina Supreme Court's opinion in *Unisys.*, which had a procedural history remarkably similar to this case. As in the Clemson Lawsuit and the WCC Lawsuit, the state agency in *Unisys* submitted to the CPO a request for resolution of a contract controversy pursuant to the Contract Controversy Provision. 346 S.C. at 164, 551 S.E.2d at 267. The vendor in *Unisys,* like the Appellants here, filed an action in circuit court seeking, among other things, an injunction against the state agency's proceeding under the Contract Controversy Provision. *Id*. The trial court found the Consolidated Procurement Code was the exclusive means of resolving the dispute between the parties and dismissed Unisys's complaint. *Id*. On appeal the Supreme Court held in part that the vendor had not exhausted its administrative remedies. *Unisys Corp.,* 346 S.C. at 176, 551 S.E.2d at 273 ("Unisys is required to exhaust its administrative remedies as a matter of law."). The Supreme Court also held that "because an action was pending pursuant to the Procurement Code as required when this action was brought, dismissal was also proper….." 346 S.C. at 176-77, 551 S.E.2d at 273 (citing *Southern Ry. Co. v. Order of Ry. Conductors*, 210 S.C. 121, 41 S.E.2d 774 (1947) for the proposition that "exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency)." *Id.*

Respondents are aware of *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000), in which the Court held that retirees were not required to exhaust administrative remedies when bringing a declaratory judgment action challenging the constitutionality of a statute, as the ALJ could not rule on the constitutionality of a statute. *Ward*, however, is inapplicable. The Petitioners are not challenging the facial validity of Section 11-35-4230; instead, they are only challenging the statute as it applies to claims *by the State*. *See Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (2001) (holding

that retirees were required to exhaust administrative remedies where the challenge was, not to the constitutionality of the Act as a whole, but rather to how the Act "applies to a limited class of state employees").

The Appellants, therefore, have yet to exhaust all the remedies afforded to them under the Consolidated Procurement Code, and their appeals must be dismissed.

CONCLUSION

For foregoing reasons, Respondents respectfully request that this Court dismiss this consolidated appeal.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

/s/ Boyd B. Nicholson, Jr.
Boyd B. Nicholson, Jr.
S.C. Bar No. 65387
P. O. Box 2048
Greenville, SC 29602
Phone: (864) 240-3200
Facsimile: (864) 240-3300
nnicholson@hsblawfirm.com

ATTORNEYS FOR RESPONDENT CLEMSON UNIVERSITY

MONTGOMERY WILLARD, LLC

s:/ Michael H. Montgomery
Michael H. Montgomery
S.C. Bar No. 4034
1002 Calhoun Street (29201)
Post Office Box 11886
Columbia, South Carolina 29211-1886
(803) 779-3500
Facsimile (803) 799-2755
mhm@montgomerywillard.com

ATTORNEYS FOR RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CHIEF PROCUREMENT OFFICER, et. al.

s/ Manton M. Grier
S.C. Bar. No. 70525
Office of General Counsel
State Fiscal Accountability Authority
1201 Main Sreet, SUire 350
Columbia, SC 29201
(803)-737-0600
mgrier@ogc.sc.gov
ATTORNEY FOR CHIEF PROCUREMENT OFFICER, SFAA, DIVISION OF PROCUREMENT SERVICES

Columbia, South Carolina
May 31, 2023