

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-23-7229

Appellate Case No. 2011-202686

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S.C. Supreme Court
Petitioner,

Stevens Aviation Inc.,

v.

DynCorp International LLC and Science Applications
International Corporation,

Defendants,

Of whom DynCorp International LLC is,

Respondent.

BRIEF OF RESPONDENT

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Statement of Issues

- I. **The Court of Appeals correctly reversed the trial court decision to grant partial summary based on a finding that the Subcontract incorporated the Teaming Agreement.**
- II. **The unambiguous Subcontract did not create an exclusive relationship between DynCorp and Stevens as a matter of law.**
- III. **The Court of Appeals acted within its authority to grant partial summary judgment to DynCorp.**
- IV. **This Court's precedent bars Stevens from arguing that the Subcontract is ambiguous.**

Statement of the Case and Facts¹

DynCorp International LLC (“DynCorp”) began efforts in early 2000 to obtain a contract for an aircraft maintenance project from the United States Army. Ultimately, those efforts proved successful. The Department of Defense awarded United States Prime Contract No. DAAH23-00-C-0226 (“Prime Contract”) for aircraft maintenance to DynCorp in 2001.

1. The Teaming Agreement

Prior to the award of the Prime Contract, DynCorp approached Stevens Aviation, Inc. (“Stevens”), a subcontractor, regarding DynCorp’s contract bid proposal to the Department of Defense. {Complaint dated August 24, 2009; R. 31; App. p. 31}. DynCorp and Stevens subsequently executed a Teaming Agreement to “cooperate in preparing and submitting one or more competitive proposals . . . in an attempt to obtain the award of a contract for the Project.” {Teaming Agreement dated March 16, 2000 ¶1.04; R. 146; App. p. 146}.

The Teaming Agreement set forth the roles and responsibilities of DynCorp and Stevens respecting the submission of the proposal to the Department of Defense. {*Id.*, Hearing Transcript dated October 21, 2009 p. 8; R. 102; App. p. 102}. The Teaming Agreement’s sole purpose was for DynCorp to procure the Prime Contract from the government. {*Id.*}. The Teaming Agreement, by its own terms, expired upon an “[a]ward of a subcontract by DynCorp to Stevens” {Teaming Agreement ¶2.02(h);

¹ DynCorp combines the Statement of the Case and the Statement of the Facts for the sake of brevity and clarity. The procedural history and facts overlap significantly in this action, and a combination of these sections allows for elimination of repetition.

R. 147; App. p. 147}. In addition, the Subcontract contained merger clauses. {Subcontract, Exhibit A to Complaint at p. 3 (“Preamble”); p. 51; R. 45; 93; App. p. 45, 93}.²

2. The Subcontract

After the Department of Defense awarded the Prime Contract for aircraft maintenance to DynCorp, DynCorp and Stevens executed Subcontract No. LCCS/SAI1001 (“the Subcontract”) in which Stevens agreed to perform certain repair and maintenance work on C-12 and RC-12 military aircraft upon the issuance of a purchase order from DynCorp. {Subcontract, Exhibit A to Complaint; R. 42; App. p. 42}. The Subcontract did not identify Stevens as DynCorp’s sole or exclusive service provider for this repair and maintenance work. {*Id.*; R. 42-93; App. p. 42-93}.

Under the Subcontract, DynCorp, as general contractor under the Prime Contract, required “the services of a subcontractor experienced in the management, provision, repair and support of C-12/RC-12 Aircraft to fulfill certain requirements of the Prime Contract” {*Id.*; R. 45; App. p. 45}. Accordingly, Stevens entered into the Subcontract “as a subcontractor to DynCorp, to provide . . . support in the form of management, repair, skilled labor, materials, facilities and engineering data for the maintenance and repair of the Government’s fleet of C-12/RC-12 Aircraft . . .” {*Id.* at p. 3; *Id.* at ¶B.1.A.; R. 45, 57; App. p. 45, 57}. The Subcontract did not provide for work to be performed on UC-35 aircraft. {Subcontract, Exhibit A to Complaint; R. 42; App. p. 42-93}. The scope of the work to be provided by Stevens pursuant to this

² The Teaming Agreement also terminated on March 16, 2002. See Teaming Agreement ¶2.02(e) (setting forth that the agreement would terminate after a “[l]apse of 24 months from the effective date of this Agreement.”). {R. 146; App. p 146}.

agreement was set forth in the pricing schedule and statement of work of the Subcontract. *{Id. at ¶B.1-B.4, C.1; R. 57-64; App. p. 57-64}*.

The parties operated under the Subcontract from 2001 through the filing of Stevens' lawsuit. During that time, and in accordance with the Subcontract, DynCorp sent only C-12/RC-12 planes to Stevens for maintenance and repair. *{Hearing Transcript p. 39; R. 133; App. p. 133}*. Stevens filed this suit against DynCorp, alleging claims for breach of the Subcontract. *{Complaint dated August 24, 2009; R. 35; App. p. 35}*. Stevens claimed the Subcontract was exclusive and required DynCorp to send to Stevens all C-12/RC-12 and UC-35 aircraft submitted to DynCorp under the Prime Contract for the purposes of allowing Stevens to perform the aviation maintenance services specified in the Subcontract. *{Id.; R. 35-36; App. p. 35-36}*. DynCorp answered and denied those claims. *{Answer; R. 23; App. p. 23}*.

3. Motions in the Trial Court

DynCorp filed a motion for judgment on the pleadings, arguing the Subcontract failed to create an exclusive relationship with Stevens as a matter of law. *{DynCorp's Motion for Judgment on the Pleadings filed September 17, 2009; R. 458; App. p. 458}*. DynCorp contended the Subcontract, standing alone, was unambiguous and failed to create an exclusive contractual relationship with Stevens. *{Id.}*. Stevens countered by filing its motion for judgment on the pleadings, or in the alternative, motion for partial summary judgment, claiming the unambiguous Subcontract created an exclusive relationship between the parties. *{Stevens' Motion for Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009; R. 390; App. p. 390}*. In its request for judgment as a matter of law, Stevens argued that

the Subcontract, and the Subcontract alone, unambiguously required DynCorp “to send to Stevens all C-12/RC-12 and UC-35 aircraft submitted to DynCorp under the [Prime Contract] for the purposes of allowing Stevens to perform the aviation maintenance services specified in that Agreement.” {*Id.*; R. 391; App. p. 391}. Stevens alternatively argued that if the trial court found the Subcontract agreement to be ambiguous, then Stevens was entitled to partial summary judgment because the Teaming Agreement constituted *extrinsic evidence* of the parties’ intent as to exclusivity. {*Id.*; R. 390-91; App. p. 390-91}. Stevens did not argue in its motion that the Teaming Agreement had been incorporated into the Subcontract and that, as an incorporated agreement, it was unambiguous.

The trial court conducted a hearing on the cross-motions for judgment as a matter of law. {Hearing Transcript dated October 21, 2009; R. 95; App. p. 95}. At the hearing, Stevens argued that the Subcontract was unambiguous and that no extrinsic evidence could be considered. {*Id.* at p. 35-36, 47; R. 129-30, 141; App. p. 129-30, 141}. Stevens also admitted the Subcontract was unambiguous in response to a direct question from the trial court:

The Court: You have no problem giving me your contentions about the other aspects. I’m just simply asking you is it your contention that this contract is or is not ambiguous, and that’s a simple yes or no question.

Counsel for Stevens: My answer to that question is, no, it is not ambiguous.

{R. 130; App. p. 130}.

The trial court *sua sponte* raised a question of whether the Subcontract *incorporated* the Teaming Agreement and whether collectively the Subcontract and

Teaming Agreement created an exclusive relationship between Stevens and DynCorp. {*Id.* at p. 7; R. 101; App. p. 101}. DynCorp argued the Teaming Agreement was not incorporated into the Subcontract, and that if the trial court desired to review extrinsic evidence with respect to Stevens' summary judgment motion, DynCorp was first entitled to engage in discovery and present a complete record on the parties' intentions respecting the contract.³ {*Id.* at p. 47; R. 141; App. p. 141}. DynCorp also contended the Subcontract could not create an exclusive relationship between DynCorp and Stevens. Instead, the Subcontract created an invoice-based contract. {*Id.*}.

The trial court denied both motions for judgment on the pleadings, but the trial court granted Stevens' motion for partial summary judgment. The trial court found (1) that the Subcontract incorporated the Teaming Agreement and collectively formed an unambiguous contract and (2) that the Subcontract constituted a requirements contract that forced DynCorp to use Stevens as the exclusive provider of aviation repair and maintenance services for all aircraft, including UC-35 planes. {Order Granting Partial Summary Judgment, dated November 17, 2009; R. 2-11; App. p. 2-11}.

DynCorp filed a Rule 59(e) Motion to Reconsider, arguing, *inter alia*, that the court erred: (1) in incorporating the Teaming Agreement into the Subcontract, (2) in finding the Subcontract constituted a requirements contract, (3) in granting partial summary judgment prior to allowing the parties to conduct discovery, and (4) in finding that the Subcontract was exclusive as a matter of law, and in failing to find it was non-exclusive as a matter of law. {DynCorp's Motion and Memorandum Supporting

³ After the hearing, pursuant to the trial court's request, DynCorp submitted a letter setting forth discovery it would engage in should the trial court desire to consider summary judgment. {Letter from Wm. Brown dated October 23, 2009, R. 158; App. p. 158}.

Motion to Reconsider; R. 197, 199; App. p. 197, 199}. The trial court denied this motion. {Order denying DynCorp's Motion to Reconsider; R. 1; App. p. 1}.

4. Proceedings before the Court of Appeals

DynCorp timely appealed to the Court of Appeals. {DynCorp's Notice of Appeal; R. 171}. DynCorp argued to the Court of Appeals that the trial court erred by finding (1) the Subcontract incorporated the entire Teaming Agreement, (2) the Subcontract and incorporated Teaming Agreement combined to form an unambiguous requirements contract, and (3) the unambiguous Subcontract created an exclusive relationship that required DynCorp to send all C-12, RC-12, and UC-35 aircraft. {DynCorp's Brief and Reply Brief to Court of Appeals; App. at Tab 1 and Tab 3}. DynCorp also argued to the Court of Appeals its entitlement to judgment as a matter of law because the unambiguous Subcontract did not create an exclusive relationship as a matter of law. {*Id.*}. Stevens countered by claiming the trial court correctly incorporated the Teaming Agreement and that, even if the trial court erred, the Subcontract standing alone entitled Stevens to partial summary judgment on the exclusivity issue. {Stevens' brief to Court of Appeals p. 9; App. at Tab 2}. Stevens alleged "[t]he *Subcontract is unambiguous on its face*, and requires DynCorp to send to Stevens all C-12/RC-12 and UC-35 aircraft sent to DynCorp under the Prime Contract, i.e., the Subcontract created a relationship of 'exclusivity.'" {Stevens' Brief to Court of Appeals. p. 9 (emphasis added); App. at Tab 2}. Stevens also argued that "[e]ven if one were to interpret the Subcontract, without considering the incorporated Teaming Agreement, its only reasonable interpretation would be that it is a 'requirements contract' which created a relationship of 'exclusivity' between Stevens

and DynCorp.” {Stevens’ Br. p. 42; App. at Tab 2}. Stevens’ brief to the Court of Appeals dedicated an *entire section* (section V) solely to establishing the Subcontract was unambiguous and entitled Stevens to summary judgment even if the Teaming Agreement was not incorporated into the Subcontract. {Stevens’ Br. p. 45-48; App. at Tab 2}.

The Court of Appeals rejected Stevens’ arguments, and held that (1) the trial court improperly found the Subcontract incorporated the Teaming Agreement; (2) the unambiguous Subcontract did not create an exclusive relationship between the parties; and (3) the Subcontract instead created an invoice-based pricing arrangement. {Opinion; App. at Tab 4}. Additionally, because the Court of Appeals determined that the Subcontract standing alone was unambiguous, it found that DynCorp was entitled to judgment because the Subcontract was non-exclusive as matter of law. {*Id.*}.

Stevens petitioned for rehearing and rehearing en banc, which the Court of Appeals denied. {Stevens’ Petition for Rehearing; App. at Tab 5; Order denying Petition for Rehearing; App. at Tab 8}. This Court granted Stevens’ petition for a writ of certiorari. {Order granting certiorari}.

Argument

The Court of Appeals correctly reversed each of the trial court’s errors. Stevens also now incorrectly claims the Court of Appeals acted on an issue not before the court when it ruled that the Subcontract was not exclusive as a matter of law. However, Stevens itself argued to the Court of Appeals that the Subcontract was unambiguous and that it, standing alone, created an exclusive relationship between the parties as a matter of law. The Court of Appeals agreed with Stevens that the

Subcontract standing alone was unambiguous and the Subcontract must be construed as a matter of law. However, in doing so, the Court of Appeals found that Stevens' contentions regarding exclusivity were wrong. Hence, as a matter of law, the Subcontract did not create an exclusive relationship and DynCorp was entitled to judgment in this regard. Therefore, this Court should affirm the Court of Appeals.

DynCorp's responds to the arguments presented in Stevens' brief as follows:

-- Argument section I in this brief sets forth why the Court of Appeals correctly reversed the trial court on the issue of incorporation of the Teaming Agreement and corresponds to argument section III set forth in Stevens' brief.

-- Argument section II in this brief corresponds to argument section II in Stevens' brief to this Court and sets forth why the Court of Appeals correctly held the unambiguous Subcontract did not create an exclusive relationship as a matter of law.

-- Argument section III in this brief addresses Stevens' argument section I of its brief and sets forth why the Court of Appeals acted within its authority to grant judgment as a matter of law to DynCorp.

I. The Court of Appeals correctly reversed the trial court decision to grant partial summary based on a finding that the Subcontract incorporated the Teaming Agreement.

A. The trial court improperly found that the Subcontract incorporated the Teaming Agreement.

The Court of Appeals properly held that the Subcontract did not incorporate the Teaming Agreement and reversed the trial court. The trial court erred in determining that an incorporation had occurred for several reasons. First, the Subcontract did not expressly incorporate the Teaming Agreement under the applicable test for

incorporation. Second, the Subcontract's integration clauses superseded the Teaming Agreement. Third, the Teaming Agreement terminated upon execution of the Subcontract.

1. The express terms of the Subcontract precluded a finding that the Teaming Agreement was incorporated into the Subcontract under controlling federal law.

The Subcontract only references the Teaming Agreement once. Stevens maintained that because the Subcontract "expressly" **referenced** the Teaming Agreement "by title and date," such was sufficient to incorporate the Teaming Agreement into the Subcontract. {Brief of Stevens to the Court of Appeals p. 15; App. at Tab 2}. This reference, however, is insufficient to allow incorporation. The Court of Appeals properly reversed the trial court and held the Subcontract did not incorporate the Teaming Agreement as a matter of law.

The language used in a contract to incorporate extrinsic material by reference:

[M]ust explicitly, or at least precisely, identify the written material being incorporated and **must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract .**

Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1345 (Fed. Cir. 2008) (emphasis added); *see also Carahsoft Tech. Corp. v. United States*, 86 Fed. Cl. 325, 350 (2009). It is not sufficient for the contract to merely acknowledge that the referenced material is relevant to the contract as background or negotiating history. *Northrop*, 535 F.3d at 1345. While "magic words" may not be required, explicit, precise, and clear words are needed. *Id.*

As shown by the above excerpt from *Northrop*, incorporation constitutes a two part test, and both elements must be satisfied. First, the incorporating contract must particularly reference the document to be incorporated. Second, the language used must explicitly and precisely communicate that the purpose of the reference is to incorporate it into the contract. *Id.* The Subcontract contains no explicit and precise language indicating an intent to incorporate the Teaming Agreement. Stevens ignores this second part of the incorporation test.

The only reference in the Subcontract to the Teaming Agreement is found in the preamble of the Subcontract, stating:

[T]he parties entered into a Teaming Agreement (“TA”) executed on 16 March, 2000, which identifies the roles and responsibilities of the parties as Prime and Subcontractor in a cooperative effort to perform the requirements of [the Prime Contract].

{Subcontract, Exhibit A to Complaint, p. 3; R. 45; App. p. 45}. This reference in the preamble merely served to recap the historical background information that led up to the formation of the Subcontract via the efforts of the parties and this mere reference is insufficient to incorporate it into the Subcontract. *See Northrop*, 535 F.3d at 1345.

Also, the Subcontract included specific and explicit language to preclude incorporation. Notably, the very next clause of the Subcontract expressly refutes that the reference to the Teaming Agreement was meant to incorporate it into the Subcontract by providing:

Whereas, this Subcontract supersedes all prior written or oral agreements between the parties, excluding the Proprietary Data Exchange Agreement executed on 16 March, 2000, and constitutes the entire agreement between the parties hereto with respect to this Subcontract.

{Subcontract, Exhibit A to Complaint; R. 45; App. p. 45}.

Moreover, when the parties sought to incorporate material into the Subcontract, they knew how to do so with specific and explicit language. The Subcontract expressly incorporates provisions on federal acquisition regulations by stating:

This Subcontract incorporates the following clauses by reference with the same force and effect as if they were given in full text.

The Subcontract also provides:

The following Federal Acquisition Regulations (FAR) and the Department of Defense FAR Supplement (DFAR) clauses are incorporated into this Subcontract.

{Subcontract, Exhibit A to Complaint; p. 44; App. p. 86}.

For these acquisition provisions, the parties used specific and explicit language to incorporate the material into the Subcontract. The parties used no such language regarding the Teaming Agreement because there was never an intent to incorporate it into the Subcontract⁴.

2. The integration clauses of the Subcontract precluded incorporation of the Teaming Agreement.

The trial court also erred in incorporating the Teaming Agreement because the Subcontract contained express provisions that demonstrate that the Subcontract is a

⁴ Further, other express terms of the Subcontract preclude a finding of incorporation of the Teaming Agreement. The termination, renewal, dispute resolution, and notice terms of the Subcontract further demonstrate the error in the trial court's finding that the Teaming Agreement had been incorporated into the Subcontract. {See Subcontract, Exhibit A to Complaint, p. 3; R. 45; App. p. 45; Teaming Agreement ¶ 2.02(h), ¶ 2.02(e); R. 147, 146; App. pp. 146, 147}. The terms of such provisions of the Subcontract are facially incompatible with the terms of the corresponding provisions of the Teaming Agreement, thus demonstrating there could be no incorporation.

complete and integrated agreement. The terms of the agreement contain a clear integration clause:

This Subcontract constitutes the entire undertaking and agreement of the parties with respect to the subject matter hereof, and supersedes all prior representations and agreements, except for those specifically and expressly incorporated herein. It shall not be varied, except by an instrument in writing of subsequent date duly executed by authorized representatives of the parties.

{Subcontract, Exhibit A to Complaint; R. 45; App. p. 45}. The Subcontract's intent is further clarified by the introductory provision which states:

Whereas, this Subcontract supersedes all prior written or oral agreements between the parties, excluding the Proprietary Data Exchange Agreement executed on 16 March, 2000, and constitutes the entire agreement between the parties hereto with respect to this Subcontract.

{Subcontract, Exhibit A to Complaint; R. 45; App. p. 45}. The Teaming Agreement was a prior agreement between Stevens and DynCorp to which these integration clauses referred.⁵ Therefore, the trial court erred in failing to give effect to these integration provisions. *See Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1347 (Fed. Cir. 2008) (holding integration clause barred a litigant from relying upon extrinsic evidence to contradict the unambiguous contract).

⁵ The parties also entered into a Proprietary Data Exchange Agreement prior to the execution of the Subcontract. The parties exempted that agreement from the superseding effect of the Subcontract with clear and express language agreed to by the parties. The only remaining prior agreement to which the integration clauses applied was the Teaming Agreement. The integration clauses would be rendered meaningless if they did not apply to the Teaming Agreement. *See, e.g., Price v. United States*, 46 Fed. Cl. 640, 647 (2000) (holding that a court must give reasonable meaning to all parts of a government contract and not render portions of the government contract meaningless).

3. The Teaming Agreement had terminated and could not be incorporated into the Subcontract.

The Teaming Agreement provided the duration of its viability and set forth the events of termination. Paragraph 2.02 of the Teaming Agreement provided that:

[T]he term of this Agreement shall be for the period beginning on the effective date hereof, and ending on the occurrence of the earliest of the following events:

.....

(h) Award of a subcontract by DynCorp to Stevens for its designated portion of the project as set forth in Paragraph 2.01 hereof.

{Teaming Agreement ¶ 2.02; R. 147; App. p. 147}. This unambiguous language provided that the Teaming Agreement expired, by its own terms, upon execution of the Subcontract. The Teaming Agreement also terminated on March 16, 2002. *See* Teaming Agreement ¶2.02(e) (setting forth that the agreement would terminate after a “[l]apse of 24 months from the effective date of this Agreement.”). {R. 146; App. p. 146}. As an expired, terminated agreement, the Teaming Agreement could not have been incorporated into the Subcontract. Thus, the Court of Appeals correctly reversed the trial court’s ruling.

B. The Court of Appeals gave proper consideration to the “whereas” clause contained in the preamble to the Subcontract.

Stevens’ argument misrepresents the Court of Appeals’ analysis regarding the effect of the “whereas” clause. Contrary to Stevens’ interpretation, the Court of Appeals did not ignore the reference to the Teaming Agreement “simply because it was set forth in a ‘whereas’ clause” as alleged by Stevens. {*See* Brief of Petitioner p. 21}. Rather, the Court of Appeals correctly held that the terms in the “whereas” clause could not control over the express terms of the Subcontract. {Opinion No. 4857; App.

at Tab 4}. The Court of Appeals' analysis comports with the controlling law on the efficacy of "whereas" clauses. As recognized by the Court of Appeals, the general rule is:

[W]hereas clauses are not considered contractual and cannot be permitted to control the express provisions of the contract.

See, e.g., KMS Fusion v. U.S., 36 Fed. Cl. 68, 77 (1996) (emphasis added); *Aramony v. United Way of America*, 254 F.3d 403, 413 (2nd Cir. 2001) (holding that a "whereas" clause cannot create any right beyond those arising from the operative terms of the contract); *Devan Motors of Fairfield, Inc. v. Infiniti Div. of Nissan North America*, 579 F.Supp.2d 294 (D. Conn. 2008) (recognizing that "whereas" clauses cannot control over the operative terms of the contract); *Trafton v. Rocketplane Kistler, Inc.*, 2010 U.S. Dist. LEXIS 18955 (E. Dist. Wisc. 2010) (holding that "[i]t is well established . . . that 'whereas' clauses exist merely to provide context and are not themselves part of the agreement"); *Microtel Franchise & Dev. Corp. v. County Inn Hotel*, 923 F. Supp. 415 (W.D. New York 1996) (same)⁶.

Regardless, the Court of Appeals considered all terms of the Subcontract and found that "[r]ead in its entirety, moreover, the Subcontract reveals that the parties did not intend to incorporate the Teaming Agreement as a whole." *Id.* (emphasis added)}. The Court of Appeals then correctly illustrated, with specific examples, how the express terms of the Subcontract refuted a finding of exclusivity. For example, the

⁶ The cases cited in Stevens' brief do not stand for the proposition that a "whereas" clause can control over the express terms of the contract. Rather, a reading of these cases reflects that the court considered the "whereas" clause in those cases because the clause was consistent with the express contract terms as a whole.

Court of Appeals noted the pricing schedule and statement of work established that DynCorp must pay Stevens only for the services ordered and only to the extent that maintenance was properly performed by Stevens. Thus, the Court of Appeals properly held that because the operative terms of the Subcontract did not establish incorporation, the “whereas” clause could not be used to vary those terms.

Stevens also incorrectly claims that the Court of Appeals was required to “handpick certain duties to incorporate” from the Teaming Agreement into the Subcontract. {Brief of Petition p. 22}. Aside from the fact that Stevens never made this argument to the trial court or the Court of Appeals, this argument lacks merit. The Court of Appeals properly held that the duties relied upon by Stevens do nothing more than set forth background information and the history of the Teaming Agreement. The Court of Appeals noted that the duties of Stevens referenced in the Teaming Agreement addressed efforts related to DynCorp submitting a bid for the Prime Contract.

In any event, the “whereas” provision referencing the Teaming Agreement was merely a historical reference and not an attempt at incorporation. Therefore, for all of these reasons, the Subcontract cannot be read to incorporate the Teaming Agreement⁷ and this Court should affirm the holding of the Court of Appeals.

⁷ Stevens alleges that DynCorp has “conceded” that if the incorporation of the Teaming Agreement into the Subcontract were upheld, then Stevens prevails. {Brief of Petitioner p. 12}. DynCorp has *never* made any such concession and has in fact denied making such a concession in the past. {See DynCorp Brief to Court of Appeals; Reply Br. p. 14}. DynCorp has consistently refuted any claim which Stevens has asserted to the effect that an exclusive relationship exists.

C. The law of the case doctrine requires this Court to affirm the Court of Appeals' holding that the Subcontract did not incorporate the Teaming Agreement.

The Court of Appeals' ruling that the Teaming Agreement was not incorporated had a supporting basis which Stevens did not challenge in its brief. Therefore, the law of the case doctrine should bar Stevens' challenge to the Court of Appeals' ruling on incorporation. In the opinion, the Court of Appeals detailed how the trial court erred in incorporating the Teaming Agreement into the Subcontract. {Opinion No. 4857 at p. 4; App. at Tab 4}. The Court of Appeals set out the applicable test for incorporation. {*Id.*; App. at Tab 4 (internal citations omitted)}. The Court of Appeals then made two rulings. The first was that Stevens' reliance on the "whereas" clause was misplaced because such clauses "cannot be permitted to control the express provisions of the contract." {*Id.*; App. at Tab 4}. Second, the Court of Appeals found no incorporation because "[r]ead in its entirety, moreover, the Subcontract reveals that the parties did not intend to incorporate the Teaming Agreement as a whole." {*Id.*; App. at Tab 4}.⁸

Stevens sought relief on the issue of incorporation from this Court based solely on the Court of Appeals' first ruling – its treatment of the "whereas" provision. {*See* Stevens' Petition for Certiorari p. 18 and Brief of Petitioner p. 20-22}. As set forth above, Stevens' argument regarding the "whereas" provision should be rejected – that

⁸ Stevens' argues that the Court of Appeals failed to consider "certain duties" from the Subcontract that would allow incorporation. This argument lacks merit. {Brief of Petitioner p. 22}. Stevens did not cite any duties from the Subcontract to support this argument. Rather, Stevens relies solely on language from the Teaming Agreement, and in particular, Attachment B thereto (see p. 22, Appendix cites p. 151-52, 408-09), as well as the non-operative "whereas" provision of the Subcontract (see p. 22, Appendix cite p. 45). Neither of these references support Stevens' claim that the Subcontract incorporated the Teaming Agreement as shown herein.

provision was merely a historical reference and in any event it could not control over the other operative terms of the Subcontract. Stevens did *not* specifically challenge the Court of Appeals' ruling that, reviewing the Subcontract as a whole, it did not incorporate the Teaming Agreement under the applicable test of incorporation. Thus, this alternative ruling is the unchallenged law of the case. *See, e.g., Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (holding that the law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so); *Ables v. Gladden*, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008) ("An unappealed order, right or wrong, is the law of the case"). The Court of Appeals' holding that the Subcontract did not incorporate the Teaming Agreement should thus be affirmed for this reason as well.

II. The unambiguous Subcontract did not create an exclusive relationship between DynCorp and Stevens as a matter of law.

After rejecting Stevens' argument regarding incorporation of the Teaming Agreement into the Subcontract, the Court of Appeals then analyzed Stevens' arguments that the Subcontract standing alone created an exclusive relationship with DynCorp. The Court of Appeals correctly held the Subcontract did not create an exclusive relationship as a matter of law.

A. The Subcontract cannot support a finding of exclusivity as a matter of law.

The trial court erred in finding that the Subcontract was a "requirements contract which obligated DynCorp to send/refer to Stevens all C-12, RC-12, and UC-35 aircraft sent to DynCorp under the Prime Contract for the performance of specified

maintenance work.” {Order p.4-5; R. 7-8; App. at Tab 4}. The Subcontract failed to establish an exclusive relationship between DynCorp and Stevens as a matter of law.

When a contract contains no quantity or total amount terms, the federal law of government contracts enforces such contracts only to the extent services are actually ordered and provided. *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302 (Fed. Cir. 1998). In *Coyle’s*, the court examined a contract for the supply of “all labor, service, equipment, transportation, materials, and supplies to provide subterranean termite control and related services on assigned properties” *Coyle’s Pest Control*, 154 F.3d at 1303. The court ruled the contract did not require the primary party to assign properties to Coyle exclusively, but that the contract entitled Coyle to provide all labor and services for only **assigned** properties. *Id.* at 1305.

The same analysis applies here in that Stevens was entitled, subject to various contract terms, to provide labor and services only for assigned planes. Stevens’ arguments ignore the pricing schedule and statement of work in the Subcontract. The pricing schedule listed the supplies and services to be provided by Stevens under the Subcontract. {Subcontract, Exhibit A to Complaint; R. 59-63; App. p. 59-63}. For each base/option year, the pricing schedule contains the applicable terms of sale. {R. 59-63; App. p. 59-63}. With respect to the quantity and amount columns, the parties intentionally left blank the specific quantity or amount for any of the work presently in dispute. {R. 59-63; App. p. 59-63}. Under the Subcontract, a quantity only existed upon issuance of a purchase order to Stevens by DynCorp when it sent designated C-12/RC-12 planes for maintenance and repair.

The statement of work in the Subcontract likewise establishes that the Subcontract is not exclusive. Section B of the Subcontract contains the statement of work. {Subcontract, Exhibit A to Complaint; R. 57-64; App. p. 57-64}. The statement of work lists the supplies and services to be provided by Stevens under the Subcontract. {*Id.* at ¶B.1-B.4, C.1; R. 57-64; App. p. 57-64}. At no time does the statement of work designate Stevens as the sole provider of maintenance and repair services for any aircraft. Moreover, the Subcontract specifically designated which aircraft Stevens was to service, if any. The Subcontract specifically only allows for C-12/R-12 planes to be issued to Stevens via a purchase order. {Opinion No. 4857 at 88-89; App. at Tab 4; Subcontract Section B; R. 57-63; App. p. 57-63}. The Subcontract did not provide that Stevens was to service “all” C-12/R-12 aircraft that were forwarded to DynCorp under the Prime Contract. Moreover, the Subcontract never once established that Stevens was to perform work on any UC-35 aircraft. The parties’ specific reference to only C-12 and RC-12 aircraft in the scope of work refutes exclusivity because nowhere in the statement of work are UC-35 aircraft mentioned.

Just as the plaintiff in *Coyle’s Pest Control*, Stevens can only enforce the Subcontract for services actually ordered [by DynCorp] and provided by Stevens. Stated differently, Stevens can only enforce the Subcontract for work ordered under a purchase order and actually completed by Stevens.⁹

⁹ The trial court and Stevens erroneously relied on *Ceredo Mortuary Chapel, Inc. v. United States*, 29 Fed. Cl. 346 (1993). {Order p. 5 (“This court thus finds the analysis in *Ceredo* to be persuasive”); R. 8; App. at Tab 4}. The *Ceredo* rationale no longer applies in this context. *Ceredo* based its decision on an “implied exclusivity” in order to render the Subcontract there as an enforceable requirements contract. However, such “implied exclusivity” reasoning has since been rejected, as explained below. *Ceredo* relied upon the holding of *Torncello v. United States*, 681 F.2d 756, 761 (Ct.

Further, the fact that the Subcontract contains no guaranteed minimum quantity term refutes Stevens' construction of the Subcontract under the *Coyle's Pest Control* decision, as set forth above. *See also Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 301 (2004) ("Therefore, because the contract between the parties lacks a guaranteed minimum quantity term, the contract is only enforceable to the extent of the work performed by the Plaintiff"). Moreover, DynCorp could never agree to an overall minimum number of planes to be serviced with Stevens, as the number of planes to be serviced is determined solely by the United States Government, and not DynCorp. Therefore, the Subcontract establishes that no exclusivity exists as a matter of law, and that the contract is one for services actually ordered and provided.

Stevens incorrectly alleges the Court of Appeals focused on only seven words (which Stevens does not specifically identify) in the Subcontract to find the Subcontract did not create an exclusive requirements contract. {Brief of Petitioner p. 14-16}. This argument distorts the Court of Appeals' opinion, and is simply untrue.

The Court of Appeals held that "**a thorough review** of the provisions establishing the remaining maintenance obligations reveals that the Subcontract does not create 'the exclusive right and legal obligation to fill all of [DynCorp's] needs for the . . . services described in the contract.'" {Opinion No. 4857 at 89; App. at Tab 4 (emphasis added)}. The Court of Appeals also found that the Subcontract, as a whole,

Cl. 1982, in order to find implied exclusivity. *Coyle's Pest Control* specifically rejected this analysis from *Torncello*, and by extension, in *Ceredo*. The United States Court of Appeals for the Federal Circuit held that "this court rejects the notion that *Torncello v. United States* requires it to save an otherwise unenforceable indefinite quantity contract by interpreting it as an implied requirement contract." *Coyle's Pest Control*, 154 F.3d at 1304.

created an invoice-based pricing arrangement, holding that “DynCorp must pay Stevens for the services under the Subcontract only to the extent that maintenance was performed.” *{Id. at 88-89; App. at Tab 4}*.

The Court of Appeals made these findings due to the controlling rule that the existence of such a pricing arrangement precludes the finding of an exclusive contractual relationship. *{Opinion No. 4857 at 89; App. at Tab 4 (citing Coyle’s Pest Control)}*. *Coyle’s Pest Control* held that contracts that “furnish all labor . . . and related services on *assigned* properties” are “not an exclusive requirements contract.” *Coyle’s Pest Control*, 154 F.3d at 105-06 (emphasis in original). The Court of Appeals reviewed the operative terms of the Subcontract, compared it to that of *Coyle’s Pest Control*, and held that the invoice-based pricing structure required DynCorp to pay Stevens for the services under the Subcontract only to the extent that maintenance was performed under an invoice.¹⁰ *{Opinion No. 4857 at 89; App. at Tab 4}*.

The Court of Appeals used the terms of the statement of work, the strip and paint services, and the site organizational maintenance obligations in the Subcontract as examples demonstrating the flaws in Stevens’ argument.¹¹ The Court of Appeals, however, did not rule based *only* on these examples from the Subcontract’s terms, as claimed by Stevens. Rather, a fair reading of the opinion is that the Court of Appeals found the Subcontract as a whole was not exclusive and then used examples from it to

¹⁰ This holding was consistent with the default provisions of the Subcontract. The condition of default for DynCorp was not paying an invoice. DynCorp could not default by failing to send planes to Stevens. *{R. 84 ¶ B; App. p. 84}*.

¹¹ It should be noted that these provisions set forth the entirety of the parties’ obligations under the Subcontract.

illustrate that the position advanced by Stevens was wrong. Hence, the Court of Appeals' holding that the Subcontract did not create an exclusive relationship between DynCorp and Stevens should be affirmed.

B. The non-exclusive nature of the contract does not render the Subcontract void.

Stevens next contends that the Court of Appeals' opinion effectively renders the Subcontract void. {Brief of Petitioner p. 16}. This argument is without merit. The Subcontract is valid and enforceable as a purchase order pricing structure contract.¹²

Stevens claims *Torncello v. United States* renders the Subcontract an unenforceable indefinite quantity contract, and that hence, the Subcontract should be construed as an enforceable requirements contract. {Brief of Petitioner p. 16}. This argument should be rejected. In *Coyle's Pest Control*, the court considered this same argument and found it lacked merit. The court held:

In approving the Board's judgment, this court rejects the notion that *Torncello v. United States* requires it to save an otherwise unenforceable indefinite quantity contract by interpreting it as an implied requirements contract.

Coyle's Pest Control, 154 F.3d at 1304. The court also reasoned that a contract is not an exclusive requirements contract if the contract only requires a party to "furnish all labor . . . and related services on **assigned** properties." *Id.* at 1305-06 (emphasis in original). The court found the contract enforceable and "Coyle is entitled to payment only for services actually ordered by HUD and provided by Coyle." *Id.* at 1306.

¹² This argument does not afford Stevens any relief. Even if the Subcontract were found void, Stevens does not win. The Subcontract would not thereby transform into an exclusive contract. *See, e.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (reiterating the general principle that "it is not the function of the court to rewrite contracts for parties").

This is the precisely the situation here. The Subcontract required DynCorp to pay Stevens for certain completed services at certain pricing, but only upon issuance of a purchase order to, and performance by, Stevens. Therefore, the Subcontract was not void. It remained enforceable due to the purchase order pricing structure. When a purchase order is made by DynCorp under the Subcontract, various terms in the Subcontract apply to the work to be done by Stevens and to payments to be made by DynCorp. The Court of Appeals' opinion adhered to this well-settled rationale and properly held that the Subcontract was not void and did not create an *exclusive* relationship in favor of Stevens. This Court should thus affirm.

C. The isolated Subcontract provisions relied upon by Stevens do not conflict with the Court of Appeals' ruling of non-exclusivity.

Stevens alleges the Court of Appeals failed to address several provisions of the Subcontract respecting exclusivity. {Brief of Petitioner p. 17-18}. None of these provisions referenced by Stevens, however, support a finding of exclusivity. As a result, this Court should reject Stevens' arguments.

First, Stevens relies on the Subcontract's definition of the term "Aircraft" to support its claim of exclusivity under the Subcontract. {Brief of Petitioner p. 17, point 1}. This term in the general definitions part of the Subcontract does not establish an exclusive contractual relationship. The Subcontract does not use that general term in describing the work to be performed by Stevens. Rather, the Subcontract is specific in defining the work Stevens is to perform, and on which planes, upon the issuance of a

purchase order by DynCorp.¹³ Further, the Statement of Work of the Subcontract is specifically limited to C-12 and RC-12 planes. As such, these terms of the Subcontract control and apply to Stevens' work, rather than a general definition of "Aircraft." *See, e.g., United States v. Pielago*, 135 F.3d 703 (11th Cir. 1998) (holding that general terms and provisions in a contract ordinarily yield to more specific terms in the contract, and the court will restrict the more general term by the more specific terms and provisions); 17A C.J.S. *Contracts* § 328 (summarizing the same). *See also U.S. Postal Servs., Inc. v. American Postal Workers Union*, 922 F.2d 256, 260 (5th Cir. 1991) ("When a specific and a general provision of an agreement conflict, well-established principles of construction require that the specific trump the general provision."). Therefore, reliance on the definitional term "Aircraft" cannot support a finding of an exclusive contractual relationship for Stevens.

Second, in an effort to create exclusivity, Stevens points to language in the Subcontract in section B.1 that Stevens "shall" provide certain specified work and materials to DynCorp. {Brief of Petitioner p. 17, point 2}. Stevens argues this language is "mandatory" and thus supportive of exclusivity. However, the language relied on by Stevens does not impose obligations on DynCorp. Instead, the mandatory language relates only to the obligations that *Stevens* must perform under the Subcontract. {Subcontract Section B.1; R. 57-63; App. p. 57-63}. If Stevens failed to perform its obligations, then it would be in default under the Subcontract. Exclusivity and obligation to perform contract requirements are two distinct principles, in any

¹³ Notably, none of the citations that Stevens presented to the Court of Appeals for the word "Aircraft" in the Subcontract are used in any part of the Subcontract that outlines the work to be performed by Stevens.

event. Therefore, reliance on this language cannot support a finding of an exclusive contractual relationship.

Stevens next argues that the Subcontract's termination clauses and automatic renewal provisions support a finding of exclusivity, as they are at odds with the Court of Appeals' conclusion that DynCorp was not required to send planes to Stevens. {Brief of Petitioner p. 18, point 3}. These provisions do not support Stevens' position. They exist to protect DynCorp from default by Stevens for failure to perform services as ordered by DynCorp under the purchase order pricing structure. The Court of Appeals' opinion does not render these clauses ineffective. These termination provisions allow DynCorp to terminate the Subcontract based on the services provided by Stevens under a related purchase order, as found by the Court of Appeals.

Contrary to Stevens' assertions, the Subcontract's automatic renewal provisions do not indicate an exclusive contract and Stevens misrepresents the provisions. {Brief of Petitioner p. 18, point 4}. Stevens argued to the Court of Appeals that the Subcontract would "automatically extend each time the term of the Prime Contract was extended." {*See, e.g.*, Petition for Certiorari p. 14}. This is inaccurate. The Subcontract would only be extended concurrent with the extension of specifically defined Prime Contract Options Periods, as identified in Stevens' Subcontract, and only if Stevens was not otherwise in default. The mere fact that the term of a Subcontract generally runs concurrently with the Prime Contract term does not impact exclusivity, but rather speaks to a prime contractor's efforts to secure subcontractors to perform work when and if it that prime contractor orders such work. None of the renewal clauses in the Subcontract create an exclusive contractual relationship between

DynCorp and Stevens. In fact, the term clauses in the Subcontract are entirely unrelated to such a claim.

A simple reference to the underlying Prime Contract entered into between DynCorp and the government in the preamble of the Subcontract does not support a finding of exclusivity in the Subcontract. {Brief of Petitioner p. 18, points 5 and 6}. The scope of work Stevens may be called on to provide is set forth under the statement of work and pricing schedules in the Subcontract. This Court should reject Stevens' argument that since its Subcontract referenced the Prime Contract, this meant it had exclusivity with DynCorp. It would not be unusual for various subcontractors to mention a Prime Contract in their respective subcontracts. Such does not create exclusive relationships.

In sum, none of the provisions upon which Stevens relies support a finding of exclusivity or contradict the Court of Appeals' opinion. Therefore, the Court of Appeals' holding that the Subcontract did not create an exclusive relationship between DynCorp and Stevens as a matter of law should be affirmed.¹⁴

¹⁴ Stevens' divisibility argument misrepresents which party had the burden of proof before the trial court. Stevens claims in brief that DynCorp never argued divisibility to the trial court; "[t]hus Stevens had no reason, or opportunity, to address whether Section C.1 was 'divisible.'" As a result, Stevens avers the Court of Appeals erred in holding the Subcontract was not exclusive as a matter of law. {Brief of Petitioner at p. 19-20}. This argument ignores the fact that Stevens had the burden of proof to establish its entitlement to partial summary judgment on the issue of whether the Subcontract was exclusive. Therefore, it was Stevens who failed to argue what it needed to establish its claim. Stevens elected to pursue this litigation and claim exclusivity. However, Stevens declined to argue divisibility.

D. The law of the case doctrine should lead this Court to affirm the Court of Appeals' holding that the Subcontract did not create an exclusive relationship.

Stevens did not challenge all of the grounds upon which the Court of Appeals found that the Subcontract did not create an exclusive relationship. Stevens failed to challenge the holding of the Court of Appeals that the Subcontract did not include per-unit pricing for the UC-35 planes, and, therefore, Stevens was not entitled to any UC-35 planes under the Subcontract.¹⁵

The Court of Appeals specifically ruled that the Subcontract does not apply to UC-35 aircraft. {Opinion No. 4857 at 87; App. at Tab 4}. Stevens even acknowledges the Court of Appeals made such a ruling. {See Brief of Petitioner p. 9 (“The Court **first** concluded that the Subcontract did not apply to UC-35 aircraft”) (emphasis added)}. However, Stevens has failed to seek certiorari on that issue and thus did not challenge this ruling. Stevens instead offers the statement that the UC-35 ruling was unnecessary because the Court of Appeals “went on to hold that DynCorp had no obligation under the Subcontract to send *any* aircraft to Stevens.” {Brief of Petitioner p. 9 (emphasis in original)}. This does not represent a challenge to the specific UC-35 Court of Appeals' ruling. Even assuming *arguendo* the Court of Appeals had found that the Subcontract required DynCorp to send *some* aircraft to Stevens, those aircraft

¹⁵ Stevens alleges DynCorp never “raised the UC-35 as an issue on appeal until its reply brief.” {Brief of Petitioner p. 9, footnote 5} This is categorically incorrect. DynCorp raised this issue throughout this appeal. For example, DynCorp argued in its initial brief to the Court of Appeals that: “[T]he contract specifically designated which aircraft Stevens was to service. The Subcontract limited the aircraft to C-12/RC-12 planes alone. At no point does the Subcontract provide that Stevens was to service “all” C-12/RC-12 aircraft. Moreover, the Subcontract never once establishes that Stevens was to perform work on **any UC-35** aircraft. . . . The definition of aircraft, generically encompassing all C-12/RC-12 and UC-35 aircraft, coupled with the parties' specific reference to C-12/RC-12 aircraft in the Scope of Work [of the Subcontract], actually refutes exclusivity since nowhere else in the statement of work are UC-35 aircraft mentioned.” {App. at Tab 1; Brief of DynCorp p. 24-25 (emphasis added)}.

could not include UC-35 planes because, as held by the Court of Appeals, “[t]he Subcontract does not include per-unit pricing for UC-35s, and therefore, it cannot be construed as an enforceable requirements contract for that aircraft.” {Opinion No. 4857; App. at Tab 4}. Thus, the failure of Stevens to seek relief from this ruling precludes this Court from considering it. *See ML-Lee Acquisition Fund, L.P.*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes law of the case); *Bone*, 399 S.C. at 576, 733 S.E.2d at 205; *Gladden*, 378 S.C. at 569, 664 S.E.2d at 448.

As a result, the Subcontract does not include UC-35 aircraft, DynCorp has no obligation to send any of those aircraft to Stevens, and such is the law of the case. Without any requirement to send Stevens any UC-35 aircraft, the Subcontract cannot be found to create an exclusive relationship. Therefore, this unappealed ruling precludes this Court from finding the Subcontract created an exclusive requirements contract relationship between the parties. The Court of Appeals’ holding that the Subcontract did not create an exclusive relationship should thus be affirmed. At minimum, it must be affirmed as to all UC-35 aircraft based on the law of the case doctrine.

III. The Court of Appeals acted within its authority to grant partial summary judgment to DynCorp.

Stevens falsely claims the Court of Appeals could not grant summary judgment to DynCorp. {Brief of Petitioner p. 11-13}. The Court of Appeals possessed the inherent authority to grant summary judgment to DynCorp based on the procedural backdrop and arguments made here. Stevens dedicated a substantial portion of its trial argument and appellate argument asking the courts to find Stevens entitled to judgment

as a matter of law as to exclusivity, even if the Teaming Agreement was not incorporated into the Subcontract. DynCorp argued to the contrary that the Subcontract was unambiguously non-exclusive as a matter of law. Therefore, Stevens' argument should be rejected and the Court of Appeals' holding affirmed.

A. An appellate court has the inherent authority to grant summary judgment to a non-moving party and such action is common and consistent with appellate practice in South Carolina.

Appellate courts have the power to grant summary judgment to a non-moving party when the reasoning for the grant of summary judgment has been addressed by the moving party. Moreover, this power is consistent with our courts' decisions addressing similar matters where issues of law are presented to the appellate court via cross motions. Such is the case here. Thus, the Court of Appeals' grant of partial summary judgment should be affirmed.¹⁶

Initially, this Court should note that appellate courts possess the inherent authority to grant summary judgment to a party even if that party did not request such relief from the trial court.¹⁷ *See, e.g., In the matter of Continental Airlines*, 981 F.2d 1450 (5th Cir. 1993) (recognizing the appellate "court has the power to render summary judgment for a non-moving party if we find that the moving party is not

¹⁶ Even if the Court of Appeals erred, the remedy is not reversal or for this Court to find the Subcontract is exclusive. Instead, the remedy would just be for a remand to the trial court with instructions to enter partial summary judgment to DynCorp.

¹⁷ Moreover, this inherent authority gains additional support from the fact that South Carolina trial courts and appellate courts employ the same standard in analyzing a summary judgment decision. *See, e.g., Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010) ("An appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRCP").

entitled to summary judgment and that no factual dispute exists and the nonmoving party is entitled to summary judgment as a matter of law”); *Goldstein v. Jones*, 32 A.D.3d 577 (N.Y. App. Div. 2006) (granting summary judgment as a matter of law to a non-moving party based on the record on appeal); 5 C.J.S. *Appeal & Error* § 1082 (recognizing the inherent authority of an appellate court to enter summary judgment to a party even if that party did not request such relief from the trial court); 6 James W. Moore, et al, *Moore’s Federal Practice*, 56.12 at 161-65) (2nd ed. 1991). Such a grant of summary judgment by an appellate court to the non-moving party is particularly appropriate when the reasoning for the grant of summary judgment has been addressed by the moving party. *See, e.g., LaSalle Bank Nat. Ass’n v. Nomura Asset Capital Corp.*, 14 A.D.3d 366 (N.Y. App. Div. 2005) (granting summary judgment to the non-moving party when the moving party had opportunity to address the issue in the trial court); *Johnson v. Earnhardt’s Gilbert Dodge*, 132 P.3d 825 (Ariz. 2006) (recognizing that the appellate courts can reverse a summary judgment order and grant judgment for the non-moving party based on grounds that the moving party had the opportunity to refute in the trial court).¹⁸

Moreover, our courts frequently enter orders when dealing with similar matters of law that are consistent with this authority. In fact, this Court recently pronounced that when competing motions for judgment as a matter of law are filed, “the parties concede the issue before [the appellate court] should be decided as a matter of law.”

¹⁸ None of the cases cited by Stevens support a finding to the contrary. {Brief of Petitioner p. 11}. Those cases do not address the inherent power of the appellate court to issue a judgment as a matter of law to the non-moving party on an issue argued by the moving party in the trial court.

Weigand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E. 432, 434 (2011).¹⁹ This pronouncement did not establish new law in South Carolina. Rather, the Court just clarified a position that had commonly been employed numerous times by our appellate courts. It is not uncommon for an appellate court to determine an issue of law when both sides seek a determination on that issue of law and have argued each side. *See, e.g., Weigand*, 391 S.C. at 163-64, 705 S.E.2d at 434; *In re Hosp. Pricing Litigation v. King*, 377 S.C. 48, 659 S.E.2d 131 (2008); *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 666 S.E.2d 892 (2008); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007); *Walde v. Assoc. Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012); *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 693 S.E.2d 33 (Ct. App. 2010). These cases illustrate the obvious—when the issue of law decided by the appellate court leaves nothing to be determined in the trial court, the appellate court can enter judgment for the opposing non-moving party in its opinion.²⁰

¹⁹ The competing motions at issue in *Weigand* were cross motions for summary judgment. In this matter, the competing motions were DynCorp's motion for judgment on the pleadings and Stevens' motion for judgment on the pleadings and alternatively for partial summary judgment. This difference in form of the motion is a distinction without a difference. Both a motion for judgment on the pleadings and a motion for summary judgment seek the same relief—namely, judgment as a matter of law. The logic espoused in *Weigand* applies equally to this matter.

²⁰ What Stevens wants is for an appellate court to be limited to merely rejecting positions espoused by a party respecting the law, rather than being capable of pronouncing what the law actually is. This surely cannot be the law of this State.

The fact that DynCorp did not seek summary judgment in the trial court is irrelevant.²¹ This is especially true because Stevens fully argued the issue of exclusivity and argued against the reasoning that ultimately formed the basis of the Court of Appeals' grant of partial summary judgment to DynCorp. In fact, Stevens extensively argued the Subcontract, and the Subcontract alone, unambiguously established exclusivity between the parties as a matter of law.

For instance, Stevens argued to the trial court that “[h]ere, the Subcontract Agreement, read as a whole, clearly reveals that the expectations of the parties were that Stevens would do the defined work on *all* C-12/RC-12 and UC-35 aircraft submitted to DynCorp.” {App. p. 275 (emphasis in Stevens' original)}. Stevens also argued that “[w]ithin the four-corners of the Subcontract Agreement there is a host of provisions which make clear that the *only reasonable* interpretation of it is that DynCorp had a contractual obligation to send *all* C-12/RC-12 and UC-35 aircraft to Stevens.” {R. 379 (italics in Stevens' original); App. p. 379}.

Additionally, Stevens extensively argued to the Court of Appeals that the Subcontract *alone* was unambiguous and created an exclusive relationship between the parties. Stevens claimed “[t]he Subcontract is unambiguous on its face, and requires DynCorp to send to Stevens all C-12/RC-12 and UC-35 aircraft sent to DynCorp under the Prime Contract, i.e., the Subcontract created a relationship of ‘exclusivity.’” {Stevens' Br. p. 9; App. at Tab 2}. Moreover, Stevens argued that “[e]ven if one were to interpret the Subcontract, without considering the incorporated Teaming Agreement,

²¹ DynCorp did move for judgment as a matter of law [i.e., judgment on the pleadings with the Subcontract being included as part of the pleadings] on this issue of whether the Subcontract created an exclusive relationship between the parties. {App. p. 458}.

its only reasonable interpretation would be that it is a ‘requirements contract’ which created a relationship of ‘exclusivity’ between Stevens and DynCorp.” {Stevens’ Br. p. 42; App. at Tab 2}.

Most tellingly, the entirety of section V of Stevens’ brief to the Court of Appeals was dedicated solely to establishing its entitlement to summary judgment even if the Teaming Agreement was not incorporated into the Subcontract. {Stevens’ Br. p. 45-48; App. at Tab 2}. Stevens noted, *inter alia*, that “the Subcontract on its face, even without the Teaming agreement, is susceptible to only one *reasonable* interpretation, *i.e.*, that it obligated DynCorp to send to Stevens all C-12, RC-12, and UC-35 aircraft sent to DynCorp under the Prime Contract.” {Stevens’ Br. p. 45-46 (emphasis in Stevens’ original); App. at Tab 2}.

The Court of Appeals had authority to enter partial summary judgment in favor of DynCorp. Stevens argued to the lower court that the Subcontract was unambiguous and should be construed as a matter of law. The Court of Appeals obliged Stevens, construed the contract as a matter of law, but found that Stevens’ contentions regarding exclusivity were wrong. Hence, judgment was awarded against Stevens on the issue and in favor of DynCorp.

Once the appellate mandate returns with the remittitur, the Court of Appeals’ holding that the Subcontract is not exclusive as a matter of law would bind the trial court and Stevens. The trial court would have no discretion to rule contrary to the appellate court holding. The result is the same whether the Court of Appeals remanded the action to the trial court with instructions to enter partial summary judgment to DynCorp, or whether the Court of Appeals made the ruling in its own opinion. In

either procedural posture, Stevens could not argue to the trial court that the Subcontract was exclusive in the face of the Court of Appeals' opinion to the contrary. The Court of Appeals' determination should thus be affirmed.

B. The principles of judicial economy also empowered the Court of Appeals to grant summary judgment to DynCorp.

It would have been a waste of judicial resources for the Court of Appeals to remand this matter to the trial court for further proceedings. Once the court determined that the Subcontract was not exclusive as a matter of law, there was nothing left to determine or argue in the trial court. The Court of Appeals could have remanded to the trial court with instructions to enter judgment in favor of DynCorp on the grounds that the Subcontract was not exclusive as a matter of law. However, the interests of judicial economy would have not been served. Rather, the Court of Appeals simply went ahead and granted the partial summary judgment to conserve court resources. It was empowered to do so.

Our appellate courts often address issues or rule on matters in the interests of judicial economy. *See, e.g., S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding judicial economy weighed in favor of resolution by the appellate court because “both parties have fully briefed the issue”); *City of Aiken v. Cole*, 289 S.C. 239, 243, 345 S.E.2d 760, 762 (Ct. App. 1986) (finding remand unwarranted because it was clear that the injunction should be denied). In *Hollins v. Richland County School District*, 310 S.C. 486, 427 S.E.2d 654 (1993), this Court declined to remand an issue despite the fact the trial court did not rule on the issue. This Court reasoned that:

[R]emand would not serve the interests of judicial economy. A ruling adverse to [plaintiff] would necessitate a second appeal to this Court on the precise issue which the parties have briefed: A ruling favorable to [plaintiff] would mandate a new trial which is the result we reach today.

Id. at 490 n.3, 427 S.E.2d at 656 n.3.

Such is precisely the situation here. Stevens fully argued and briefed to the trial court and the Court of Appeals that the Subcontract was unambiguous and should be interpreted as a matter of law. Moreover, Stevens fully debated and joined the issues with DynCorp respecting whether the Subcontract created or did not create exclusivity in favor of Stevens as a matter of law. The grant of summary judgment to DynCorp on this issue precludes the waste of judicial resources because there is nothing left for the lower court to determine. Thus, there was no need to remand this matter to the trial court to interpret whether the Subcontract was non-exclusive. Therefore, the Court of Appeals was well within its power to enter partial summary judgment in favor of DynCorp. This Court should affirm.

IV. This Court's precedent bars Stevens from arguing that the Subcontract is ambiguous.

Throughout its brief to this Court, Stevens now claims that the Subcontract contains ambiguities which preclude summary judgment and warrant resolution by a jury. *See* Brief of Petitioner p. 18-19, 20.²² This argument contradicts the position that Stevens has taken throughout this litigation, all as is set forth above. Stevens consistently maintained to both the trial court and the Court of Appeals that the

²² Stevens also took this position in its petition for a writ of certiorari. {Petition p. 15, first indented paragraph; p. 16, lines 6-10; and p. 17, line 5}.

Subcontract standing alone was unambiguous and ripe for summary judgment on the issue of exclusivity. However, now that the Court of Appeals rejected that position, Stevens shifts gears and argues the opposite. This Court has recently held that such a change in position at this stage of the litigation is improper. As a result, this Court should reject this argument.

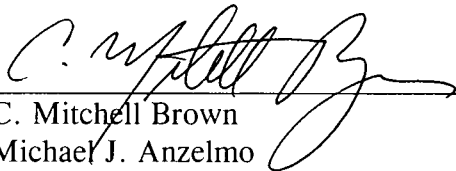
Stevens did not take the position that the Subcontract was ambiguous until the Court of Appeals ruled against it. This Court has declared such a shift in position to be improper. In *Clarendon County v. TYKAT, Inc.*, 394 S.C. 21, 714 S.E.2d 305 (2011), this Court recognized that a party cannot argue one position on a summary judgment issue before the trial court and then subsequently take the opposite position on the same issue before the appellate court. In that case, TYKAT moved for summary judgment in the trial court, arguing that no genuine issues of material fact existed. *Id.* The trial court denied TYKAT's motion. *Id.* On appeal, TYKAT presented an alternative argument that summary judgment was premature because discovery would have revealed a genuine issue of material fact. *Id.* This Court rejected TYKAT's new argument, finding TYKAT "cannot now be heard to assert summary judgment was premature." *Id.* This Court recognized that TYKAT was bound by its initial position on the issue. The same logic applies here to bar Stevens' new argument that the Subcontract was ambiguous.²³ As a result, this Court should reject Stevens' arguments on this issue.

²³ Conversely, DynCorp's positions in this litigation have always been and still are: 1) the Subcontract stands alone and does not incorporate the Teaming Agreement; 2) judgment as a matter of law is appropriate as to the Subcontract; 3) DynCorp, not Stevens, should get judgment as a matter of law as to the Subcontract; 4) no extrinsic evidence should be considered as the Subcontract is unambiguous; and 5) if the court

Conclusion

For the reasons stated herein, this Court should affirm the Court of Appeals.

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found ambiguity and if the Teaming Agreement were considered as "extrinsic evidence" of intent of the parties, then a ruling as to summary judgment would be premature and instead discovery should be allowed and a full record presented regarding the intentions of the parties. By contrast, Stevens always insisted on a ruling as a matter of law and argued no further discovery was needed or permissible.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-23-7229

Appellate Case No. 2011-202686

Stevens Aviation, Inc., Petitioner,
v.
DynCorp International LLC and Science Applications
International Corporation, Defendants,
Of whom DynCorp International LLC is, Respondent.


PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for DynCorp International LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: **Brief of Respondent**

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August 14, 2013