

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case Nos. 2023-000667 & 2023-000668

Intellectual Capitol, Inc., Barry Newkirk and Neil Richards, Appellants,

v.

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

AND

JMI Sports and JMIS College, LLC, Appellants,

v.

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

RESPONDENTS' RESPONSE
TO APPELLANTS' MOTION TO ARGUE AGAINST PRECEDENT

Appellants' Motion takes a position seemingly at odds with the position taken in their brief. Their brief argues that "*Unisys* is irrelevant to the cases before the Court"; that "the language on which the circuit court apparently relied is mere *dicta*"; and that "the lower court's reliance on the *Unisys* decision was in error." (Appellants' Brief, pp. 15-16). Their Motion, however, concedes that *Unisys v. South Budget and Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001) is controlling precedent.

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Respondents agree that *Unisys* is controlling precedent. Further, *Unisys* is not an outlier. Its analysis is supported by the South Carolina Constitution itself. Its conclusion is also persuasively supported by the Court of Appeals for the Federal Circuit, which upheld the constitutionality of § 11-35-4230's federal counterpart, the Contract Disputes Act 41 U.S.C. §§ 7101 *et seq.*¹ *Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

Appellants continue to rely on *Carolina Glass v. State*, 87 S.C. 270, 69 S.E. 391 (1910) and argue that case, not *Unisys*, should control the dispute. *Carolina Glass*, however, concerned an overreaching statute that empowered a dispensary commission to investigate *and* determine claims based on transactions existing before the commission was created. That statute also authorized the commission to place liens on property and enjoin parties not before it from paying monies to glass companies. Further, that case was decided before South Carolina amended its Constitution in 1970 to add § 22 of Article I ("Procedure before administrative agencies; judicial review.")² And unlike the Carolina Glass Company, which never implicitly or expressly consented to the jurisdiction of the dispensary commission to determine claims against it, the Appellants voluntarily engaged in commerce with the State knowing the transactions are governed by the Procurement Code. They also voluntarily signed contracts expressly consenting to the jurisdiction of the Chief Procurement Officer.

¹ Appellant's Reply Brief mistakenly argues that the Contract Disputes Act affords "the right of a full original or *de novo* hearing *by a court of the Judicial Branch.*" (Appellants' Reply Brief, p. 11) (emphasis added). This is incorrect. In lieu of appealing the contracting officer's decision to the Board of Contract Appeals, a contractor may file suit in the Court of Federal Claims. 41 U.S.C. § 7103. But the Court of Federal Claims is an Article I legislative court, sitting without a jury, and not part of the Article III judicial branch. *Seaboard Lumber*, 903 F.2 at 1562.

² Section 22 was added to the same article containing the separation of powers clause, Art. I, § 8.

The Respondents welcome the opportunity to show this Court why *Unisys* is still good law and why, even in the absence of *Unisys*, the Appellants should be held to the agreements they signed.

Respectfully submitted,

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