THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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,

of whom DynCorp International LLC is,..... Respondent.

Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent DynCorp International LLC ("DI") requests rehearing of *Stevens Aviation Inc. v. DynCorp International LLC*, Op. No. 27369 (S.C. Sup. Ct. filed March 26, 2014) (Shearouse Adv. Sh. No. 12 at 24) ("the Opinion"). DI respectfully submits that rehearing and/or issuance of a new opinion affirming the Court of Appeals in full is warranted, or, failing that, the Court of Appeals should have been affirmed in part and reversed in part and the matter remanded because the Court overlooked or misapprehended several matters of both fact and law.

Argument

Rehearing is proper in this action for several reasons. First, the Opinion grants relief never requested by Stevens and on a basis that Stevens rejected **forty-two (42)** times before the trial court, the Court of Appeals, and this Court. Second, the Court misapprehended that the *Ace-Federal* court actually held that a supply contract, such as this Subcontract, does ***not*** have to qualify as one of the three traditional supply contract types in order to be enforceable. Third, the Opinion reflects a misapprehension of certain Subcontract terms and is thus grounded on mistaken facts. Fourth, the Court misapprehended or overlooked several reasons why the Subcontract cannot be a requirements contract and, in any event, the public policy reasons against finding an exclusive requirements contract by implication, rather than only when clear and explicit.

I. Stevens never argued that the Subcontract required DI to send only C-12 and RC-12 planes; therefore, the Court issued a ruling on a ground never advanced by Stevens.

A. Stevens consistently argued it was entitled to all planes or none.

Before the trial court, the Court of Appeals, and even this Court, Stevens consistently and exclusively argued it was entitled it to ***all*** C-12, RC-12, ***and*** UC-35 airplanes, or the Subcontract was unenforceable. Stevens ***never argued*** that the Subcontract created an exclusive relationship for only C-12 and RC-12 airplanes, as found by this Court.[1] DI argued consistently there was no exclusivity with respect to any planes. Hence, ***neither party*** to the contracts before the Court argued the Subcontract, standing alone, was an exclusive requirements contract only as to C-12

[1] Nor did the circuit court or Court of Appeals make any such finding.

and RC-12 planes. This Court overlooked this fact in interpreting the parties' agreement to be something neither party, which negotiated and executed the Subcontract, has suggested it was.

Stevens stated to the Court of Appeals:

> The parties agree that the subcontract has no numerical "quantity" term. Thus, the obligation imposed by its terms ***can only be one of two alternatives***: DynCorp was contractually obligated to send ***all aircraft*** to Stevens that it received from the Army; or DynCorp had no obligation to ever send even a single aircraft to Stevens.

{Stevens' Petition for Rehearing p. 6-7; App. p. Tab 5 at p. 6-7 (emphasis added)}. This claim constituted a mere continuation of that advanced to the trial court by Stevens:

> [T]he Subcontract Agreement, read as a whole, is subject to no other meaning than that DynCorp is obligated to send to Stevens ***"all"*** C-12/RC-12 and UC-35 aircraft for the purpose of allowing Stevens to perform the aviation maintenance services specified therein.

{Stevens' Brief in Support of its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 12; R. 376; App. p. 376 (emphasis in original}.[2] Importantly, Stevens has maintained this position from the inception of the action and continued throughout oral argument before this Court.

Stevens first argued for the all-or-nothing interpretation of the Subcontract in the Complaint. {Complaint ¶¶ 13, 30(a), and 30(b); R. 33, 35-36; App. p. 33, 35-36}.

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[2] The use of the word "all" is emphasized by Stevens because Stevens devoted over four pages of the brief in support to argue how that term is defined to mean all three types of airplanes by the Subcontract and how other courts have construed such a term. {*See* Stevens' Brief in Support of its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 12-16; R. 376-380; App. p. ___}.

Stevens continued this all-or-nothing argument twenty-four (24) times in its filings with the trial court.[3] Stevens stressed this point throughout its arguments to the trial court noting that:

> Within the four-corners of the Subcontract Agreement there is (sic) 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.

{Stevens' Brief in Support of its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 15; R. 379; App. p. 379 (emphasis in original}. Stevens again emphasized that:

> There is only one ***reasonable*** interpretation of the Subcontract Agreement that is supported by the plain language of its provisions, and which gives meaning to each and every provision contained therein: the Subcontract obligates DynCorp to send to Stevens ***all*** C-12/RC-12 and UC-35 aircraft submitted to DynCorp under the "Prime Contract."

{Stevens' Opposition to DynCorp's Motion for Judgment on the Pleadings p. 20; R. 290; App. p. 290 (emphasis in original)}.

At the motions hearing, the trial court specifically asked Stevens "what relief are you asking the Court to grant you?" {Transcript p. 34; R. 128; App. p. 128}. Stevens responded: "To give us partial summary judgment on the issue of whether the contract obligated DynCorp to send Stevens all C-12, RC-12, and UC-35 aircrafts for

[3] *See* Stevens' Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 1; R. 390; App. p. 390; Stevens' Brief in Support of its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 1, 3, 12, 15, 16, 17, 19, 24; R. 365, 367, 376, 377, 379, 380, 381, 383, 388, 379; App. p. 365, 367, 376, 377, 379, 380, 381, 383, 388, 379; Stevens' Reply in Support of its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment p. 1; R. 240; App. p. 240; Stevens' Opposition to DynCorp's Motion for Judgment on the Pleadings p. 1, 2, 5, 6, 7, 11, 20; R. 271, 272, 275, 276, 277, 281, 290; App. p. 271, 272, 275, 276, 277, 281, 290.

the work specified in the contract." {*Id.*; *see also* Transcript p. 33, 34, 43; R. 127, 128, 137; App. p. 127, 128, 137}.

Stevens' all-or-nothing position did not end with the trial court. Stevens argued in its brief to the Court of Appeals 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' Brief to Court of Appeals p. 45-46; App. p. Tab 2 at p. 45-46 (emphasis in original); *see also Id.* at p. 1, 9, 34, 38-39, 47; App. p. Tab 2 at p. 1, 9, 34, 38-39, 47}. After the Court of Appeals rejected this claim, Stevens advanced the same argument on rehearing, noting that its position was:

> When the subcontract is considered ***as a whole***—as required under the governing law—there is only one reasonable interpretation: the subcontract was a requirements contract that created an exclusive relationship between Stevens and DynCorp with respect to ***all*** the specified work.

{Stevens' Petition for Rehearing p. 12; App. p. Tab 5 at p. 12 (initial emphasis in original, second emphasis added); *see also Id.* at 7; App. p. Tab 5 at p. 7}.

In its Petition for a Writ of Certiorari, Stevens doubled down on its "all-or-nothing" approach to the interpretation of the Subcontract, arguing:

> The parties have agreed all along that the Subcontract has no numerical "quantity" term. Thus, the obligation imposed by its terms ***can only be one of two alternatives***: DynCorp was contractually obligated to send ***all aircraft*** to Stevens that it received from the Army; or DynCorp had no obligation to ever send even a single aircraft to Stevens.

{*See* Stevens' Petition for a Writ of Certiorari p. 13 (emphasis added); *see also id.* at p. 5}. Stevens reiterated this same "all-or-nothing" argument in its brief to this Court. {*See* Stevens' Brief to Supreme Court p. 16; Stevens' Reply Brief p. 10}.

In sum, Stevens never presented any argument, even in the alternative, that the Subcontract could require DI to send anything less than all C-12, RC-12, ***and*** UC-35 airplanes. Of course, as this Court properly found, there was no price term, much less exclusivity, with respect to UC-35 planes. In holding that the Subcontract did not require DI to send Stevens any UC-35 planes, this Court rejected Stevens' "all planes" argument. Op. No. 27369 at 34-35. Therefore, this Court should have, according to Stevens, ruled that Stevens was entitled to nothing. In holding that the Subcontract created an exclusive relationship for only C-12 and RC-12 planes, the Court: 1) ruled on an argument never advanced by Stevens; 2) interpreted the Subcontract in a manner partially favorable to Stevens, by adopting an interpretation of the Subcontract which Stevens rejected numerous times; and 3) granted relief that Stevens never sought. Hence, this Court should grant rehearing.

B. Stevens asked this Court to decide whether the Teaming Agreement was incorporated into the Subcontract, not how to interpret the Subcontract without regard to the Teaming Agreement.

Stevens consistently maintained to the Court of Appeals that the circuit court must resolve whether the Subcontract alone requires DI to send all C-12, RC-12, and UC-35 airplanes to Stevens. After the Court of Appeals issued its opinion, Stevens argued that the Court of Appeals ruled on an issue not properly before it. Stevens maintained that the "sole issue on appeal was whether the trial court correctly found that a 'teaming agreement' entered into by the parties was incorporated into the

subcontract." {Stevens' Petition for Rehearing p. 4; App. p. Tab 5 at p. 4}. Stevens stated the Court of Appeals had only two disposition options: the Court of Appeals "should either have affirmed the trial court's finding on the incorporation issue, or reversed its finding on the incorporation issue and remanded to ***allow the trial court, in the first instance, to interpret the subcontract*** without the teaming agreement." {*Id.* (emphasis added); *see also Id.* at p. 17-18; App. p. Tab 5 at p. 4}.

Stevens stressed this position to this Court, both in its certiorari petition and in its brief, by again arguing that:

> The ***sole issue on appeal*** was whether the trial court correctly determined that the Teaming Agreement was incorporated into the Subcontract . . . . Thus, the Court of Appeals should have either affirmed the trial court's findings on the incorporation issues (and, consequently the interpretation issue), or reversed its finding on the incorporation issue and remanded this case to allow the trial court to interpret the Subcontract with the Teaming Agreement.

{Stevens' Pet. for Writ of Certiorari p. 10-11; Stevens' Brief p. 12}(emphasis added).

This Court did not directly address what Stevens claimed was the "sole issue" before this Court—whether the Teaming Agreement was incorporated into the Subcontract. Op. No. 27369 at 34 ("Accordingly, we find the unambiguous language of the Subcontract, regardless of whether the Teaming Agreement is incorporated, establishes an exclusive relationship between the parties as to C-12 and RC-12 aircraft covered by the Prime Contract."). The Teaming Agreement was not so incorporated, for all of the reasons DI set forth in its briefing to this Court. Moreover, the circuit

court ***did not rule*** on or interpret the Subcontract standing alone. Stevens admitted this fact during oral argument before this Court. [4]

This Court should have affirmed the Court of Appeals' holding that the circuit court erred in incorporating the Teaming Agreement into the Subcontract. Because this Court admonished the Court of Appeals for granting summary judgment to DI on the Subcontract alone when DI did not make such a motion, this Court should not have, respectfully, done the same thing in favor of Stevens. Instead, assuming the entry of summary judgment by an appellate court on a basis not moved for below is improper in this matter, this Court should have affirmed the Court of Appeals' ruling that there was no incorporation of the Teaming Agreement, and next should have remanded the action to the circuit court for a determination of the Subcontract, ***as requested by Stevens***. As petitioner to this Court, Stevens had the ability to frame its requested relief should Stevens prevail in whole or in part. Stevens did so by requesting complete reversal of the Court of Appeals, or, failing that, affirmance of the Teaming Agreement incorporation ruling by the Court of Appeals and a remand to the circuit court for further proceedings on the interpretation of the Subcontract standing alone. This Court instead granted Stevens relief it did not ask for, and issued a ruling for the first time as to the Subcontract standing alone in favor of Stevens.

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[4] At oral argument, Justice Hearn asked counsel on what basis Stevens claimed entitlement to UC-35 airplanes. Counsel responded the Teaming Agreement as incorporated into the Subcontract provided that basis. Justice Hearn then asked whether the trial court ruled on the incorporation basis and on the Subcontract alone on an alternative basis. Counsel for Stevens replied: "We don't take that interpretation. When we look at the Order I think it says that it incorporates in the Teaming Agreement and that is the basis, the primary basis for the Judge's rule, Judge McIntosh's ruling. So if the Court of Appeals disagrees with that, I think that they, excuse me, or I'm sorry. If the Court of Appeals disagrees with that I think the proper course is to reverse the trial court on the issue of incorporation and that's fine. I think where we run into problems is when we go a step further and we ask the Court of Appeals to interpret the subcontract absent the incorporation." *Note*: quotation taken from transcription of the oral argument tape from this Court.

II. This Court misapprehended and misapplied *Ace-Federal* to the facts of this case.

In the Opinion, the Court held that the Subcontract "must fit into one of three forms: a contract for a definite quantity, a contract for an indefinite quantity, or a requirements contract" and cited *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1331 (Fed. Cir. 2000). *See* Op. No. 27369 at 30. The Court then used this citation to reject DI's contention that the Subcontract constituted an enforceable purchase order contract arrangement. *Id.* at 31 n.1. However, *Ace-Federal* did ***not*** hold that a contract such as this Subcontract must fit into one of the three possible types of supply contracts to be enforceable. Rather, the *Ace-Federal* Court found the contract there to be enforceable despite the fact that it did not fit into ***any*** of the three types of supply contracts listed above. *Ace-Federal*, therefore, supports a finding that the Subcontract constituted an enforceable purchase order contract arrangement.

The *Ace-Federal* court construed a services or supply contract. *Ace-Federal*, 226 F.3d at 1330. There, the government services administration ("GSA") entered into contracts with ten contractors to provide transcription services to government agencies. *Id.* at 1330-31. The contractors eventually filed suit, claiming the GSA breached the contracts because agencies were sending transcription work to companies not in the contract. *Id.* at 1331. The GSA defended by claiming "that none of the contractors had an exclusive arrangement to provide services," and, therefore, the GSA did not breach the contract by bypassing the contractors and sending work to other companies. *Id.* at 1331. The GSA specifically argued that the contracts were unenforceable because the contracts did not qualify as "one of the three possible types of supply

contracts." *Id.* Thus, the government argued the contractors could not recover damages "because the contract did not guarantee that any work would be awarded" to the contractors. *Id.* at 1332.

On appeal, the Federal Circuit began its analysis (as this Court did in this Opinion) by stating the proposition that "[c]ontract terms . . . must fit into one of the three possible types of supply contracts: those for a definite quantity, those for an indefinite quantity and those for requirements." *Id.* at 1331. However, the court next recognized that it "should not be blinded by how one labels a contract" and analyzed the contract under traditional contract principles. *Id.* at 1331-32. The court held that a "contract is ***not unenforceable*** merely because it does ***not*** fit neatly into a recognized category." (emphasis added) *Id.* at 1332. The court emphasized that:

> To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation and sufficient definiteness so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy.

Id. (internal citations and quotations omitted). The court applied these traditional principles to reject the GSA's argument and find the contracts contained consideration despite the lack of an exclusive promise from the GSA to provide all work described in the contract to the contractors. *Id.*

Specifically, the court held that "the possibility of obtaining work from a listing in the [contract] schedule had real business value, ***even if there was no guarantee of obtaining a certain amount of work***." *Id.* (citing *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960) (emphasis added). The contractors' consideration was "for the promise of performance which would have given him a ***chance*** at business and profit and where

the value of a ***chance*** for profit is not outweighed by a countervailing risk of loss . . . ." *Id.* (citing *Locke*, 283 F.2d at 524) (emphasis added).

Notably, the court made this holding despite the fact that the contractors had no guarantee of receiving ***any*** work under the contracts, finding that "[t]he government's promise, just as in *Locke*, has substantial business value . . . ." *Id.* Therefore, the court recognized that a contract can be enforceable (1) despite not fitting into one of the three recognized traditional supply contract categories and (2) despite the fact that the contractor is not guaranteed to receive ***any*** work under the contract.

The Court in its Opinion overlooks the fact that *Ace-Federal* actually supports DI's—not Stevens'—position respecting the Subcontract. The Subcontract provides real business value to Stevens, and Stevens provided consideration for the Subcontract. Just as the contractors did in *Ace-Federal*, Stevens entered into the Subcontract "for the chance at business and profit." Moreover, DI's promise to provide Stevens that chance for business and profit had "substantial business value" for Stevens, just as the contractors in *Ace-Federal* were afforded real value. Stevens could (and did) work on many planes ordered and provided by DI, and, in turn, Stevens received payment for that work ordered by DI. Stevens cannot avoid the fact that it entered a binding contract merely because the Subcontract does not fit into one of the three traditionally recognized categories for supply contracts. The Subcontract was created with the requisite consideration and mutuality of obligation to create a valid purchase order contract arrangement.

The Court also overlooked the fact that the Federal Acquisition Regulations (FARs) incorporated into the Subcontract do not support the Court's interpretation of

the Subcontract. The incorporated FARs refute a finding that the Subcontract qualified as one of the three traditional contract types relied on by the Court in the Opinion. The FARs provide form clauses which are intended to be incorporated if an agreement falls within one of the three categories identified by the court: (1) definite quantity (FAR 52.216-20), (2) requirements (FAR 52.216-21), and (3) indefinite quantity (FAR 52.216-22). However, even though the Subcontract contained six pages of incorporated FARs, **none of these provisions relating to the three traditionally recognized categories are incorporated into the Subcontract**. This is further proof that that none of these types of contracts were intended by the parties in executing the Subcontract. FAR 16.703 expressly recognizes a "Basic Ordering Agreement," which provides basic terms to be incorporated in later agreements. That is the agreement existing here. Hence, rehearing should be granted for these reasons.

III. The Opinion reflects a misapprehension of the Subcontract terms and is grounded on mistaken facts.

The Court should grant a rehearing and substitute an opinion fully favorable to DI because the Court's interpretation of key Subcontract terms is grounded expressly upon misunderstood facts, resulting in erroneous conclusions respecting exclusivity.

First, the Court misapprehends the meaning of "site organizational maintenance" under the Subcontract. In rendering its decision, the Court states that "'site organizational maintenance' is work that needs to be performed at a special location—Stevens' facilities," Op. No. 27369 at 34, and, from there concluded "Stevens is to perform all 'strip and paint' work and all 'site organizational maintenance' work, but is to do so subject to DynCorp's instructions." Op. No. 27369

at 34. But the Court's premise was incorrect. The "site" is DI or the government—not Stevens. Stevens is a "depot" under the Subcontract. [5]

"Site" is defined as "facilities provided by DynCorp and/or the Government under the Statement of Work, which are used and maintained for the base operation support." {Subcontract p. 8; R. 50; App. p. 50}. Therefore, "site" is the home base of the plane. "Site organizational maintenance" is repair work done by DI at the home base of the plane. The Subcontract provides that sometimes, work normally done by DI at the plane's home base, can by agreement be done at Stevens' facility. {App. 58}. The pertinent clause states:

> Both parties recognize that ***at times*** it will be beneficial for work that ***would normally been performed at the site*** by the site personnel to be accomplished at [Stevens'] facility.

{Subcontract p. 16; R. 58; App. p. 58 (emphasis added)}. This language thus does not support a contractual right of Stevens to perform "all" site organizational maintenance. By misapprehending the meaning of "site organizational maintenance" the Court erroneously concluded: "[i]n short, we interpret these provisions as meaning that Stevens is to perform . . . *all* 'site organizational maintenance' work, but is to do so subject to DynCorp's instructions." Op. No. 27369 at 34. This conclusion that Stevens is to perform ***all*** site organizational maintenance work is defeated by the language of the Subcontract quoted above, noting that the site organizational maintenance work would "normally" by performed at the site (i.e., DI or the Government) but that "at times" it could be "beneficial" for the work to be

[5] The fact that Stevens is the depot is shown by the fact that almost identical language in the definition of the CLIN exists for Site Organizational Maintenance, but "SAI" (the name tag for Stevens in the Subcontract) is used instead of the word "depot." {R. 58; App. p. 58}.

accomplished at Stevens' facility. Hence, the Court's incorrect assumption of what this work is led it to an incorrect conclusion on exclusivity. This provision actually shows that Stevens is not exclusive as to this work because the "site organizational work" is actually "normally" performed at the "site" (not by Stevens) instead of at the "depot."

The Subcontract provides further that Stevens will perform site organizational maintenance only "when DynCorp determines that such action is to their benefit . . . ." {*Id.*}. For Stevens to do this work, Stevens was first required to have provided an estimate of costs to DI. {Subcontract p. 35; R. 77; App. p. 77}. Only if DI agreed to this estimate would Stevens be able to perform the site level work. {*Id.*}. The Subcontract specifically noted that if an impasse occurred regarding the time needed to correct the item, Stevens was not to do the work, and code the work as "noted, but not corrected." {*Id.* (last paragraph before Section H.10)}. Again, this language does ***not*** support exclusive rights to this work for Stevens. Because the Opinion misapprehended the facts and switched which party is a "site" and which party is a "depot," the language cited by the Court actually support DI's position. The Court thus incorrectly analyzed the "at the direction of" language in the Subcontract in light of its erroneous belief that Stevens was a "site." *See* Op. No. 27369 at 33-34.

As shown above, the Subcontract's Statement of Work granted DI the ability to determine if Stevens does the site organizational work in the statement of work: "As directed by DynCorp, [Stevens] shall accomplish work at [Stevens'] facility, that would normally be performed at the site by the site personnel." {Subcontract p. 22; R. 64; App. p. 64}. Again, this provision in reality shows that DI—not Stevens—normally performs the work but that Stevens could perform certain work if DI directed it to do

so. This was a correctly determined by the Court of Appeals. This Court's misinterpretation of the facts thus requires rehearing.

Second, the Court misapprehends the nature of the work to be performed by Stevens under the Subcontract. The Court incorrectly assumed that Stevens' scope of work involved a simple inspection as to ***all*** C-12 and RC-12 planes, after which some of those planes are stripped and painted as needed. In this regard, the Court stated:

> As we understand the Subcontract, C-12 and RC-12 aircraft would come to Stevens for an inspection. After Stevens performed the inspection, some of the inspected aircraft would need to be stripped and painted. Thus, the "at the direction of" language for the strip and paint work is best interpreted as meaning that DynCorp directs Stevens as to which aircraft need to be stripped and painted and how they are to be stripped and painted.

See Op. No. 27369 at 33. This is an incorrect understanding of the Subcontract terms and work thereunder.

The Subcontract required Stevens to perform an Aircraft Condition Inspection ("ACI") on assigned planes. An ACI is not a simple inspection.[6] Rather, an ACI comprised an extensive list of tasks that must be completed on all planes ***assigned.*** The subcontract states that the "ACI includes . . . equipment, tools, lubricants . . . and strip and repaint to perform all requirements of Appendix P of Attachment 1, Statement of Work. An ACI includes performing the inspection and the correction of minor

[6] Appendix P to the Prime Contract's Statement of Work provides the listing of the full tasks needed to complete an ACI. However, neither party felt the Appendix P to the Prime Contract's Statement of Work was necessary to resolution of this appeal. The ACI is not a simple visual inspection of the plane. It consists of 260 individual tasks. As part of the ACI, substantial portions of the plane must be disassembled and removed from the plane so that they and parts they cover can be examined and repaired. This includes, but is not limited to, removal of flap assemblies, propeller spinners, rudder assemblies, outboard wing assemblies, seats for pilots and passengers, cabin interior (headliner and side panels), toilet assembly, engine and accessory cowlings. If the Court believed that an understanding of the scope of an ACI was important to the interpretation of the Subcontract, then the proper remedy should have been a remand to the trial court to analyze that attachment.

discrepancies . . . ." {Subcontract p. 15, 22; R. 57, 64; App. p. 57, 64}. The time allowed under the subcontract to complete an ACI is 48 days, while a strip and paint alone is 25 days. {Subcontract p. 10, 25; R. 52, 64; App. p. 52, 64}. The pricing for an ACI is about twice that of a strip and paint. {Subcontract p. 17; R. 59; App. p. 59}.

Similarly, the "strip and paint" statement of work provides that Stevens "shall provide all labor, services, facilities, equipment . . . required to strip and completely repaint aircraft (***for other than ACI requirements***), at the direction of DynCorp." {Subcontract p. 10; R. 64; App. p. 64 (emphasis added)}. The strip and paint provision is separate from the ACI. {Subcontract p. 10, 25; R. 52, 64; App. p. 64}. While all ACIs include a strip and paint, plus other work, not all strip and paint jobs require an ACI. Under the Subcontract, DI has the discretion to decide whether certain planes would be sent to Stevens for a strip and paint only.

Therefore, the Court misapprehended the nature of the Subcontract and the work to be performed by Stevens on assigned planes. This misapprehension permeated the Court's analysis. The Subcontract did not create a right of Stevens to make an inspection of all planes, and then strip and paint certain planes at the direction of DI, as the Court concluded. Instead, the Subcontract involves DI assigning certain planes, at its discretion, to Stevens for either ACI work, strip and paint work, or both. Thus, the Court should grant rehearing and issue a substituted opinion fully in favor of DI.

Third, the Court misapprehends the term "Aircraft" in the Subcontract. The Opinion states that the "Subcontract defines 'Aircraft' as including 'all C-12 and RC-12 aircraft covered by the Prime Contract." *See* Op. No. 27369 at 32. The Court overlooks the fact that the defined term "Aircraft" is ***never*** used in describing the ***any***

of the work to be performed by Stevens under the Subcontract. Rather, the Subcontract is more specific, limiting work to be performed to what is set forth in the statement of work and pricing schedule for the specifically enumerated C-12/RC-12 planes. The work to be performed by Stevens on those C-12/RC-12 planes manifests upon issuance of a purchase order to Stevens.

The Court in its Opinion relied on the fact that Stevens was "needed to 'strip and completely repaint *aircraft*." *See* Op. No. 27369 at 32 (emphasis added by the Court). After citing that Subcontract clause, the Court pointed to the definition of "Aircraft" as proof that this clause supports exclusivity. *Id.* However, the clause cited by the Court does ***not*** use the term "Aircraft" in capitalized form. Rather, the clause cited used "aircraft" in lower case form. Thus, the definitional term is inapplicable and has no impact on the issue of exclusivity in the contract. [7]

Fourth, the Opinion misapprehends the default provisions of the Subcontract, finding the termination provisions "superfluous" unless the Subcontract was a requirements contract. *See* Op. No. 27369 at 33. But, the termination provisions are necessary to address work in progress for planes assigned to Stevens by a purchase order. As reflected above, when Stevens is assigned a plane, its assigned work on that plane can be substantial. If Stevens failed to adhere to terms of work under the Subcontract, then DI would need a mechanism to terminate as to those particular planes. Without the termination provisions, DI could not protect itself with respect to

[7] The Court's reliance on the term "fleet" is also misplaced for the same reasons. *See* Op. No. 27369 at 32. At no time does the Subcontract discuss the term "fleet" in the Statement of Work to be performed. The use of "fleet" is consistent with a purchase order contract as allowed in *Ace-Federal* and *Locke*. Just as in those cases, the contractor would be paid for the work it actually performed because the contractors had no expectation under the contract for the entirety of the work, i.e., the "fleet" in this matter. Instead, Stevens would provide services to the portions of the fleet sent to it by DI by issuance of a purchase order.

work needed but undone on assigned planes. Thus, the Court misapprehended this fact, and the clause is not superfluous.

Fifth, the Court misapprehends the need for a "total funding" clause in the Subcontract. The clause is not superfluous as stated in the Opinion. *See* Op. No. 27369 at 32. DI could issue purchase orders to Stevens for any number of planes, up to the total funding under the Prime Contract. The clause is necessary to ensure that Stevens could not seek purchase orders that would exceed the total amount of funding under Prime Contract. Thus, the clause has effect. Hence, rehearing is warranted and the Court should issue an opinion fully in favor of DI.

IV. The Court misapprehended or overlooked several reasons why the Subcontract cannot be a requirements contract and the public policy reasons why exclusive requirements contracts should not be found to exist by implication.

The Court overlooked or misapprehended key reasons why the Subcontract cannot be an exclusive requirements contract in any respect in favor of Stevens. The presence of certain terms and the absence of others in the Subcontract defeats a conclusion of exclusivity in favor of Stevens. Further, public policy reasons militate against a finding of implied exclusivity based on stray and misapprehended terms. Contracting parties need predictability in their contracts and should not be saddled with exclusive requirements contracts claims in the absence of express and clear agreed-upon terms of exclusivity. As a result, rehearing should be granted and a substituted opinion should be issued in favor of DI.

First, DI's ***only*** default event under the Subcontract (short of it becoming insolvent) ***is non-payment on an invoice***. {R. 84; App. p. 84}. There is no mention of

failure to supply certain plane quantities, certain types of planes, or the like as a default by DI under the Subcontract. This shows DI is correct that this contract is a fixed fee, purchase order based, non-exclusive contract. To the extent DI sends, under the contract, C-12 and RC-12 planes for work, then DI agrees to a certain pricing schedule for that work. That is all the contract is for.

Second, the parties intentionally left blank the specific quantity or amount for any of the work in the pricing schedule—Section B. ***No minimum quantity, estimated quantity, or maximum quantity is listed, all of which are typical of requirements contracts***. The pricing schedule listed the supplies and services to be provided by Stevens under the Subcontract. {R. 59-63, App. 59-63}. For each base/option year, the pricing schedule contains the applicable terms of sale. Indeed, under the Subcontract, a quantity only exists, and thus a total amount, upon issuance of a purchase order to Stevens when it sends later designated C-12/RC-12 planes for maintenance and repair. An estimated quantity is a hallmark[8] of a requirements contract, and that hallmark is missing in the Subcontract.

Third, the Subcontract does not contain mandatory language directed at DI, nor words of exclusivity. 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 DI. {Brief of Petitioner p. 17, point 2}. However, the language relied on by Stevens does not impose obligations on DI. Instead, the mandatory language relates only to the obligations that ***Stevens*** must perform under the Subcontract. {App. p. 57-

[8] The Court in *Ceredo Mortuary Chapel, Inc. v. United States*, 29 Fed. Cl. 346, __ (1993) stated: "While all agreements containing estimated orders may not be requirements contracts, requirements contracts will usually include estimated quantities."

63}. If Stevens failed to perform its obligations, then it would be in default under the Subcontract.

Fourth, sections G.1.B and G.5.D of the Subcontract support DI's arguments. G.1.B requires Stevens to only invoice against specific purchase orders and G.5.D guarantees Stevens payment only on issued purchase orders. These provisions support the interpretation that Stevens would get paid for planes sent to them, but only on a purchase order basis, and that Stevens was not guaranteed "all" work on any planes.

Fifth, section A.2, entitled "Contracts with Customer and Other Subcontractors" of the Subcontract discusses the fact that DI "is responsible" for "communications" with ***other subcontractors***. While Stevens says this could be a reference to subcontractors doing jobs unrelated to the work of Stevens, it remains the case that this provision appears in the Subcontract and can and should be read to be a reference negating exclusivity with respect to Stevens, a subcontractor.

Sixth, exclusive contracts between contractors and subcontractors with the Government raise anti-trust and price-fixing concerns regarding which this Court can take judicial notice. *See* Scott M. McCaleb, *Exclusive Teaming Agreements and Competitor Collaborations: Friends or Foes of Competition?*, Wiley Rein LLP (May 1, 2000).[9] The government has noted that such agreements can "effectively diminish competition" or, in fact, "effectively eliminate[e] any competition" in this marketplace. *Id.* In fact, this concern can lead to contracts being forced to reform to include "a consent to subcontract clause (as prescribed in the Federal Acquisition

[9] http://www.wileyrein.com/publications.cfm?sp=articles&id=518.

Regulation Subpart 44.2) to ensure adequate competition ***at the subcontractor level***," like Stevens. *Id.*

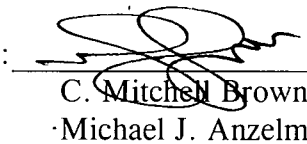
Seventh, and finally, to pull isolated terms from a Subcontract and find that the terms create by implication an exclusive requirements contract is not good public policy. In order for there to be exclusivity and a requirements contract, the language for such should be clear and express. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302 (Fed. Cir. 1998) (determining that exclusivity did not exist based on the terms of the contract). Permitting implied exclusivity in a case should as this leads to instability in the business environment of our State. For example, manufacturers, many of whom have invested here, need to feel comfortable that their innumerable contracts with various vendors cannot, by implication gathered from certain terms in a given contract, lead to accusations that they have violated some supposed vendor exclusivity rights. Unless the contract language is clear and express, exclusive rights should not be implied. Here, Stevens was in fact sent many planes by DI pursuant to its Subcontract purchase order arrangement, but it had no exclusive rights as to any planes.

Conclusion

Based on the foregoing, this Court should grant rehearing and issue a new opinion correcting the matters misapprehended and overlooked in Op. No. 27369.

Signature Page Attached

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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April 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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., ...	Respondent,
v.	
DynCorp International LLC and Science Applications International Corporation,.....	Defendants,
Of whom DynCorp International LLC is,.....	Appellant

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:

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