

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4857 (S.C. Ct. App. filed July 27, 2011)

Stevens Aviation, Inc.....Petitioner,

v.

DynCorp International LLC Respondent.

**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOLUME III**

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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

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

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court prematurely granted partial summary judgment before the parties completed any discovery and were given the opportunity to present a full and complete record to the circuit court.
- II. The trial court improperly granted partial summary judgment on grounds not before the court.
- III. The trial court erred in incorporating the Teaming Agreement into the Subcontract.
- IV. The unambiguous Subcontract did not create an exclusive relationship between DynCorp and Stevens as a matter of law.

STATEMENT OF THE CASE

In March 2001, DynCorp International, LLC ("DynCorp") entered into a subcontract with Stevens Aviation, Inc. ("Stevens") in which Stevens agreed to perform certain repair and maintenance work on C-12/R-12 military aircraft. {See Subcontract, Exhibit A to Complaint; R. 42}. The subcontract never identifies Stevens as DynCorp's sole or exclusive service provider for repair and maintenance work. {Id.; R. 42-93}.

Stevens filed this suit against DynCorp alleging claims for breach of the subcontract entered into by the parties and for breach of the implied covenant of good faith and fair dealing. {Complaint dated August 24, 2009; R. 29}. Central to Stevens' allegations was its claim that DynCorp breached the exclusive nature of the parties Subcontract. {Id.; R. 35-36}. DynCorp answered on September 14, 2009. {Answer of DynCorp; R. 23}.

DynCorp then filed a motion for judgment on the pleadings, arguing the Subcontract failed to create an exclusive relationship with Stevens. {DynCorp's Motion for Judgment on the Pleadings filed September 17, 2009; R. 458}. Stevens countered by filing its motion for judgment on the pleadings, or in the alternative, a motion for partial summary judgment, claiming the 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}. The trial court conducted a hearing on the cross-motions on October 21, 2009. {Hearing Transcript dated October 21, 2009; R. 95-145}. The trial court granted Stevens' motion for partial summary judgment, holding the Subcontract constituted an

exclusive requirements contract that required DynCorp to use Stevens as the exclusive provider of aviation repair and maintenance services. {Order Granting Partial Summary Judgment in favor of Plaintiff Stevens Aviation, Inc. dated November 17, 2009, R. 2-11}. The trial court denied DynCorp's subsequent motion to reconsider. {DynCorp's Motion and Memorandum Supporting Motion to Reconsider; R. 197, 199; Order denying DynCorp's Motion to Reconsider; R. 1}. DynCorp served and filed a timely notice of appeal. {DynCorp's Notice of Appeal; R. 171}.

STATEMENT OF FACTS

In early 2000, DynCorp International, LLC ("DynCorp") began efforts to obtain a contract for an aircraft maintenance project from the United States Army. Ultimately, the Department of Defense awarded United States Prime Contract No. DAAH23-00-C-0226 (hereinafter "Prime Contract") for aircraft maintenance to DynCorp.

Prior to the award of the Prime Contract, DynCorp approached Stevens Aviation, Inc. ("Stevens"), to participate as a possible subcontractor under DynCorp's bid proposal to the Department of Defense. {Complaint dated August 24, 2009; R. 31}. On March 16, 2000, DynCorp and Stevens 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 ¶1.04; R. 146}. The Teaming Agreement set forth the roles and responsibilities of DynCorp and Stevens in order to submit a proposal and allow DynCorp to procure the prime contract from the government. {Id., Hearing Transcript dated October 21, 2009 p.8; R. 102}. The Teaming Agreement, by its own terms, expired upon an "[a]ward of a

subcontract by DynCorp to Stevens for its designation portion of the project”

{Teaming Agreement ¶2.02(h); R. 147}.¹

In early 2001, the Department of Defense awarded the Prime Contract for aircraft maintenance to DynCorp. {Complaint, R. 32}. Thereafter, DynCorp and Stevens executed Subcontract No. LCCS/SAI1001 (hereinafter “the Subcontract”).² {Subcontract, Exhibit A to Complaint; R. 42}. The Subcontract superseded the Teaming Agreement, providing:

[T]his 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.

{Id. at p. 3 (“Preamble”); R. 45}. The parties agreed that the Subcontract was fully integrated and constituted:

[T]he entire undertaking and agreement of the parties with respect to the subject matter hereof, and supersedes all prior representations and agreements, except 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.

{Id. at p.51; R. 93}.

The Subcontract also specifically delineated the roles of the parties and the scope of the work to be performed. Specifically, DynCorp, as general contractor under the Prime Contract, required “the services of a subcontractor experienced in the

¹ The Teaming Agreement also terminated on March 16, 2002. See Teaming Agreement ¶2.02(e) (setting forth that the agreement would terminate after a “[I]apse of 24 months from the effective date of this Agreement.”). {R. 146}.

² The Teaming Agreement terminated upon execution of the Subcontract. See Teaming Agreement p.1, ¶ 2.2(h). {R. 147}.

management, provision, repair and support of C-12/R-12 Aircraft to fulfill certain requirements of the Prime Contract” {Id.; R. 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/R-12 Aircraft” {Id. at p.3; Id. at ¶B.1.A.; R. 45, 57}. The Subcontract set forth the pricing schedule and statement of work that controlled the work to be provided by Stevens. {Id. at ¶B.1-B.4, C.1; R. 57-64}. In short, the subcontract obligated Stevens to perform certain repair and maintenance work on C-12/R-12 military aircraft. {Id. at p.3; R. 45}. Nowhere does the Subcontract identify Stevens as an exclusive or sole provider for repair and maintenance work for the aircraft under the Prime Contract. The parties operated under this agreement from 2001 through the filing of Steven’s lawsuit. During that time, DynCorp sent only C-12/R-12 planes to Stevens for maintenance and repair under the Subcontract. {Hearing Transcript p. 39; R. 133}.

Stevens filed this suit against DynCorp alleging claims for breach of the Subcontract entered into by the parties and for the breach of the implied covenant of good faith and fair dealing. {Complaint dated August 24, 2009; R. 29}. Central to all of Stevens’ allegations was its claim that DynCorp breached the Subcontract because it allegedly required DynCorp to send to Stevens all C-12/R-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. 35-6}. DynCorp filed a motion for judgment on the pleadings, arguing the Subcontract failed

to create an exclusive relationship with Stevens. {DynCorp's Motion for Judgment on the Pleadings filed September 17, 2009; R. 458}.

Stevens countered by filing its motion for judgment on the pleadings, or in the alternative, a motion for partial summary judgment, claiming the 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}. In its request for judgment on the pleadings, Stevens argued that the Subcontract, and the Subcontract alone, unambiguously required DynCorp "to send to Stevens all C-12/R-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}. Alternatively, Stevens argued that in the event that 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}. At no point did Stevens 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 on October 21, 2009. {Hearing Transcript dated October 21, 2009; R. 95}. No discovery had been engaged in by either party at this time. At the hearing, Stevens first posited that the Subcontract was unambiguous and that no extrinsic evidence could be considered. {Id. at p.35-36, 47; R. 129-30, 141}. However, the trial court asked questions regarding 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}. The Subcontract's preamble recites that the parties had entered the Teaming Agreement. {Id.; R. 101}. DynCorp argued the Teaming Agreement clearly could not be incorporated into the Subcontract, and that if the trial court desired to consider summary judgment and review extrinsic evidence, 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}. 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}.

The trial court denied both motions for judgment on the pleadings. The trial court granted Stevens' motion for partial summary judgment, holding that (1) the Subcontract incorporated the Teaming Agreement and collectively was an unambiguous contract, and (2) that the Subcontract constituted a requirements contract that required DynCorp to use Stevens as the exclusive provider of aviation repair and maintenance services. {Order Granting Partial Summary Judgment in favor of Plaintiff Stevens Aviation, Inc. dated November 17, 2009; R. 2-11}. DynCorp filed a Rule 59(e) Motion to Reconsider, arguing, *inter alia*, (1) that the court erred in incorporating the Teaming Agreement into the Subcontract, (2) that the court erred in *sua sponte* finding the Subcontract constituted a requirements contract, (3) that the court erred in granting partial summary judgment prior to allowing the parties to conduct discovery, and (4) that the court erred in failing to find the Subcontract was not exclusive. {DynCorp's

³ In addition to the Teaming Agreement, Stevens also submitted two affidavits in support of its motion for partial summary judgment. {R. 395, 438}.

Motion and Memorandum Supporting Motion to Reconsider; R.197, 199}. The trial court denied DynCorp's motion to reconsider. {Order denying DynCorp's Motion to Reconsider; R. 1}. This appeal followed. {DynCorp's Notice of Appeal; R. 171}.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a circuit court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Hooper v. Ebenezer Sr. Servs. & Rehab. Center, 386 S.C. 108, 111, 687 S.E.2d 29, 32 (2009). In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

ARGUMENT

The trial court erred in granting partial summary judgment to Stevens on the central issue in this matter, specifically whether the Subcontract creates an exclusive relationship requiring DynCorp to send to Stevens all aircraft submitted to DynCorp under the Prime Contract. The trial court's ruling is in error for several reasons. First, the trial court prematurely granted partial summary judgment before the parties completed any discovery and were given the opportunity to present a full and complete record to the trial court. Second, the trial court improperly awarded summary

judgment to Stevens on grounds that it did not request. Third, the trial court erred in incorporating the Teaming Agreement into the Subcontract. Finally, the unambiguous Subcontract did not create an exclusive "requirements contract" between DynCorp and Stevens. As a result of these errors, this Court should reverse the trial court's grant of partial summary judgment.

I. The trial court prematurely granted partial summary judgment before the parties completed any discovery and were given the opportunity to present a full and complete record to the trial court.

In its order, the trial court specifically considered extrinsic evidence regarding the parties' intent on the issue of exclusivity. The trial court granted Stevens' summary judgment on the key issue of exclusivity despite the fact that DynCorp had no opportunity to conduct discovery relevant to the issue. Such a grant of partial summary judgment contradicts well-settled South Carolina precedent on when a court may properly grant of summary judgment.⁴ Accordingly, this Court should reverse the grant of partial summary judgment.

It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial of the disputed factual issues. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, summary judgment is

⁴ The Subcontract's choice of law provision only applies to contract construction, not procedure: "[T]his Subcontract will be construed and interpreted according to the federal common law of government contracts" {Subcontract, Exhibit A to Complaint dated August 24, 2009; R. 72}. Accordingly, the Court should follow binding decisional law interpreting South Carolina's Rules of Civil Procedure with respect to this issue.

not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003).

Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. Baughman. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. See, e.g., Jones ex. rel. Jones v. Enter. Leasing Co.-S.E., 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009); Gauld v. O’Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001); Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

South Carolina’s courts routinely reject motions for summary judgment as improper when the non-movant has had no opportunity to participate in discovery. For example, in Baughman, the court reversed a grant of partial summary judgment as premature prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543. There, the trial court had granted defendant’s motion for partial summary judgment because plaintiff’s expert failed to establish the requisite standard of care. Id. at 111, 410 S.E.2d at 543. However, plaintiff argued that further discovery was necessary

prior to granting partial summary judgment to defendants on the issue of liability. Id. at 112, 410 S.E.2d at 543. The supreme court agreed, holding that the further discovery was needed to properly develop the record on this issue prior to a grant of partial summary judgment. Hence, the supreme court reversed the grant of partial summary judgment based on the fact that plaintiff had not been afforded the full and fair opportunity to conduct discovery on the issue. Id.

This matter is analogous to Baughman. Here, the trial court recognized that no discovery had taken place on the issue of the parties' intent as to exclusivity. {Hearing Transcript p. 46-47; R. 140-41}. The trial court further indicated agreement that it was premature to grant summary judgment on this issue because the record had not been fully developed on the issue of exclusivity. {Id.; R. 139-40}. As a result, the trial court even requested that the parties submit "an outline as specifically as you can the information you think you're going to find out about what the other party's intent was" {Id. at p.49; R. 143}. Further the court stated: "I'm going to take that motion for partial summary judgment under advisement. Before I make that ruling I want to see how discovery may alter my thinking." {Id.; R. 143}. Per the trial court's request, DynCorp submitted a list setting forth the discovery necessary to develop a full and fair record before summary judgment could be granted. {DynCorp Letter to the Court dated October 23, 2009; R. 158}. This list established that much discovery was still needed on this issue of exclusivity under the Subcontract. However, despite recognizing the fact that no discovery had occurred, the trial court granted partial summary judgment to Stevens on the issue of exclusivity under the Subcontract.

In granting the motion, the trial court ignored the fact that discovery had not been completed and considered the extrinsic evidence submitted by Stevens in granting partial summary judgment. Because DynCorp had not received any opportunity to develop the evidentiary record, the trial court could not consider any other evidence that would refute the contentions of Stevens.

Simply stated, the trial court based its decision to grant the partial summary judgment on affidavits and evidence submitted solely by Stevens. Further, the trial court failed to afford DynCorp any opportunity to conduct discovery and refute the extrinsic evidence. Failure to afford DynCorp this opportunity prior to granting Stevens' motion for partial summary judgment constitutes error. This Court should thus reverse the grant of partial summary judgment.

II. The trial court improperly granted partial summary judgment on grounds not before the court.

The trial court also improperly granted partial summary judgment on grounds never advanced by Stevens in its motion for partial summary judgment. The trial court based its grant of partial summary judgment on the ground that the Subcontract incorporated the Teaming Agreement and that the Subcontract, together with the Teaming Agreement, constituted a "requirements contract." Stevens did not present this ground as a basis for summary judgment, however. Therefore, the trial court improperly granted partial summary and this Court should reverse.

The South Carolina Rules of Civil Procedure require that motions shall be made in writing and "shall state with particularity the grounds therefore" Rule 7(b)(1), SCRPC. It is well-established that "the basic purpose of a notice of motion is to

apprise the opposing party of the relief sought and the grounds therefore.” Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). “By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.” Camp v. Camp, Op. No. 26775 (S.C. Sup. Ct. filed February 16, 2010) (Shearouse Adv. Sh. No. 7 at 76).⁵ As a result, it is the general rule that “a court may not grant relief beyond the limits or scope of such notice.” Id.; see also Friedberg v. Goudeau, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) (reversing an order of the circuit court granting summary judgment on ground not properly before the court). When a motion fails to comply with the particularity requirement of Rule 7(b)(1)), the court should ask “whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly.” Camp, at 79 (quoting 5 Wright & Miller, Federal Practice and Procedure § 1192, at 42).

In its order granting partial summary judgment, the trial court found that the Subcontract incorporated the Teaming Agreement as part of the Subcontract. {Order p. 3; R. 6}. However, Stevens never requested partial summary judgment on the grounds that the Subcontract incorporated the Teaming Agreement. {Stevens’ Motion for

⁵ DynCorp is cognizant of the Supreme Court’s recent application of Rule 7(b)(1) in Camp. There, the court stated that the particularity requirement of Rule 7(b)(1) “should not be applied in an overly technical fashion *when the purpose behind the rule is not jeopardized*.” Id. at 79 (emphasis added). Our courts, Camp included, recognize the purpose of the rule is to provide notice and prevent prejudice. Id.; see also Skinner v. Skinner, 257 S.C. at 549, 186 S.E.2d at 526. Here, DynCorp never had any notice that Stevens sought summary judgment on the basis that the Teaming Agreement was incorporated into the Subcontract. Stevens never raised this issue in its motion. The situation in Camp is clearly distinguishable. There, all parties and the court were able to comprehend the motion and respond accordingly. No party was prejudiced. The prejudice suffered by DynCorp in this action is discussed below.

Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009; R. 390-91}. In its motion, Stevens *only* argued that *if* the trial court found that the Subcontract was ambiguous (a point regarding which Stevens disagreed), then the trial court could rely on the Teaming Agreement as extrinsic evidence of the parties' intent regarding exclusivity to grant partial summary judgment. {Id.; R. 390-91}. DynCorp had no notice that the issue of whether the Teaming Agreement had been incorporated into the Subcontract would be addressed by the trial court as a ground for summary judgment. This lack of notice also prejudiced DynCorp. The deficient notice precluded DynCorp from having the opportunity to respond to this position with responsive legal authority, an opposing memorandum, affidavits, discovery, or other evidence.

As a result, the trial court erred in granting summary judgment on a ground not advanced by Stevens. This Court must therefore reverse the grant of partial summary judgment.

III. The circuit court erred in incorporating the Teaming Agreement into the Subcontract.

In its order granting partial summary judgment, the trial court found that the Subcontract incorporated the Teaming Agreement and was part of the Subcontract. {Order p.3; R. 6}. The trial court's reliance on the Teaming Agreement constitutes reversible error for several reasons. Again, no party moved for judgment based on this basis. In fact, Stevens, as a party to the Subcontract, referred to the Teaming Agreement as "extrinsic evidence." {Stevens' Motion for Judgment on the Pleadings or in the alternative for Partial Summary Judgment, R. 391, 385-86} The two parties

to the Subcontract were Stevens and DynCorp. DynCorp moved that it was entitled to judgment based on the Subcontract on its face. Stevens moved that it was entitled to judgment based on the Subcontract on its face, or failing that, as a result of looking at extrinsic evidence such as the Teaming Agreement as to what the Subcontract meant. Faced with these two positions by the contracting parties regarding their contract, the trial court rejected both and ruled that the parties actually entered into an unambiguous contract where the Teaming Agreement was not extrinsic evidence, but in fact a part of the Subcontract. Obviously, the trial court lacks the power to reform the parties' contract into something neither intended. See, e.g., C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (holding that the court was "without authority to alter a contract by construction or to make new contracts for the parties. . . . [Its] duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully."). The trial court's holding thus constituted error.

The Teaming Agreement should also not be incorporated into the Subcontract as a matter of law for several other reasons. First, the Teaming Agreement terminated upon execution of the Subcontract and could not be incorporated into the Subcontract. Second, the Subcontract's integration clauses specifically excluded the Teaming Agreement. Third, the Subcontract did not expressly incorporate the Teaming Agreement. As a result, the trial court erred in finding that the Subcontract incorporated the Teaming Agreement. This Court should reverse the grant of partial summary judgment by the trial court.

- a. **The Teaming Agreement had terminated and could not be incorporated into the Subcontract.**

The trial court erred in incorporating the Teaming Agreement into the Subcontract because the Teaming Agreement had expired. Therefore, the trial court's grant of partial summary judgment should be reversed.

Paragraph 2.02 of the Teaming Agreement provides 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 p.1, ¶ 2.02; R. 147}.⁶

The Teaming Agreement expired, by its own terms, upon execution of the Subcontract. Therefore, the Teaming Agreement could not be incorporated into the Subcontract. Accordingly, this Court must reverse the grant of partial summary judgment based on this error.

- b. **The Subcontract's integration clauses prohibited consideration of the Teaming Agreement.**

The trial court also erred in looking to the extrinsic evidence of the Teaming Agreement because the Subcontract constituted a fully integrated agreement. The Subcontract contained integration clauses that stated:

Whereas, this Subcontract supersedes all prior written or oral agreements between the parties, excluding the Proprietary Data Exchange Agreement executed on 16

⁶ 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}.

March, 2000, and constitutes the entire agreement between the parties hereto with respect to this Subcontract.

{Subcontract, Exhibit A to Complaint; R. 45}. Likewise:

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}. The Subcontract thus contained a fully integrated agreement that superseded all prior agreements of the parties. Finding to the contrary, the trial court conspicuously ignored the terms of the Subcontract expressly superseding the Teaming Agreement. Thus, the trial court erred in relying on extrinsic evidence. 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). Moreover, the Teaming Agreement was a prior agreement between Stevens and DynCorp about which the integration clauses referred. The integration clauses would 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); Hardee v. Hardee, 248 S.C. 84, 92, 558 S.E.2d 264, 267 (Ct. App. 2001) (stating the general rule that courts must consider a contract in its entirety so as to give effect to the whole instrument and to each of its various parts and provisions).

As a result, the trial court erred in looking to the extrinsic evidence of the Teaming Agreement because the Subcontract constituted a fully integrated agreement.

c. The Teaming Agreement was not incorporated into the Subcontract under controlling federal law.

In the order, the trial court found that the Subcontract incorporated the Teaming Agreement. The Subcontract only references the teaming Agreement one time in the entire document. The Subcontract never explicitly and expressly incorporated the Teaming Agreement. Thus, this Court must reverse the grant of partial summary judgment.

The trial court's holding ignores the federal common law—the law both parties admit controls the Subcontract's interpretation. Under federal common 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. Therefore, in order to incorporate any extrinsic materials, the controlling federal law required the Subcontract to do so explicitly and precisely as well as clearly communicate what material is being incorporated. Id.

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}. This reference in the preamble merely sets forth the historical background that led up to the formation of the Subcontract via the efforts of the parties. The Subcontract has no further reference to the Teaming Agreement. Also, the Subcontract takes no steps to expressly incorporate the terms of the Teaming Agreement. In fact, the very next clause of the Subcontract expressly contradicts the finding that the Teaming Agreement has been incorporated 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, p.3; R. 45}. Further, the Subcontract provides:-----

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.

{Id.; R. 45}. The parties would have excluded the Teaming Agreement from the integration clauses had that been necessary. The general, historical reference to the mere fact that the parties had previously entered into the Teaming Agreement is

insufficient to incorporate it into the Subcontract. See Northrop, 535 F.3d at 1345. As a result, the trial court erred in finding that the Teaming Agreement had been incorporated into the Subcontract. Accordingly, this Court must reverse the grant of partial summary judgment.

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

The trial court held that the Subcontract was a “requirements contract which obligated DynCorp to send/refer to Stevens all C-12, R-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}. The Subcontract does not constitute a “requirements contract.” Also, the Subcontract fails to establish an exclusive relationship between DynCorp and Stevens as a matter of law. As such, the trial court erred in granting partial summary judgment on this basis. This Court should reverse the grant of partial summary judgment.

a. The unambiguous Subcontract did not create an exclusive “requirements contract” between DynCorp and Stevens.

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 Pest Control, the Federal Circuit Court of Appeals 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 owned by the Department of Housing and Urban Development.”⁷ Id. at 1303. Noting that the contract entitled Coyle to provide all labor and services for only assigned properties, the court ruled the contract did not require HUD to assign properties to Coyle exclusively. Id. at 1305.

The same analysis applies here. Stevens’ arguments to the trial court completely ignored the Subcontract’s pricing schedule. The pricing schedule listed the supplies and services to be provided by Stevens under the Subcontract. {Subcontract, Exhibit A to Complaint; R. 59-63}. For each base/option year, the pricing schedule contains the applicable terms of sale. {Id.; R. 59-63}. Importantly, 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. {Id.; R. 59-63}. Indeed, under the unambiguous 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.

Just like in Coyle’s Pest Control, no exclusivity clause exists in the Subcontract.⁸ Moreover, the Subcontract contains neither the federal acquisition clauses usually found in either indefinite quantity contracts or requirements contracts

⁷ Stevens has focused its arguments on the word “all” as used in the Subcontract {Stevens’ Br. Supp. Mot. J. Pleadings p. 12-15; R. 376-79}. However, the word “all” has no bearing on the issue of exclusivity in this case. Just as the plaintiff in Coyle’s Pest Control, Stevens had the obligation to provide all services on the property provided to it, nothing more. The holding in Coyle’s Pest Control controls and the Subcontract is only enforceable for actual services ordered and provided.

⁸ Coyle’s Pest Control addresses this also. “[A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter to the contract exclusively from the seller.” Id. at 1305 (quoting Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 205 (Fed. Cir. 1992)). No such exclusivity provision exists in the Subcontract. Moreover, federal regulations in this area require parties to include specific language in a contract in order for it to be classified as a requirements contract. See FAR §§ 16.506(d), 52.216-21; R. 235, 237-38}. The Subcontract did not contain any of the specific language required by the regulations.

nor does it contain a “minimum quantity term.”⁹ 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. Accordingly, the lack of a minimum quantity term refutes Stevens’ exclusive construction of the Subcontract under the Coyle’s Pest Control decision.¹⁰ Finally, when the parties did negotiate a specific minimum quantity, the Subcontract actually designated a quantity. {Contract Modification, Ex. 1; R. 94}.¹¹ Conversely, when the parties did not intend to include a minimum quantity, the quantity and amount columns on the pricing schedule contain no minimum amounts. Here, the expression of a minimum amount in certain quantity terms implies no intended minimums when the parties omitted the same.¹²

The trial court disregarded the controlling precedent of Coyle’s Pest Control and instead relied on Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346

⁹ Federal regulations in this area require parties to include specific language in a contract in order for it to be classified as a requirements contract. See FAR §§ 16.506(d), 52.216-21; R. 235, 237-38}. The Subcontract did not contain any of the specific language required by the regulations.

¹⁰ This analysis accords with other cases applying the federal law of government contracts. See, e.g., 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”); Ralph Constr., Inc. v. United States, 4 Cl. Ct. 727, 733 (1984) (“[A contract] is valid only to the extent it was performed”).

¹¹ DynCorp would never agree to a minimum number of planes to be serviced, as that is determined solely by the U.S. Government, and not DynCorp.

¹² See also Smelser v. United States, 53 Fed. Cl. 530, 539 (2002); Kanehl v. United States, 40 Fed. Cl. 762, 768-69 (1998); Nicholson v. United States, 29 Fed. Cl. 180, 196 (1993); Design & Prod., Inc. v. United States, 18 Cl. Ct. 168, 198 (1989); Monroe M. Tapper & Assocs. v. United States, 602 F.2d 311, 314 (Ct. Cl. 1979); United Pac. Ins. Co. v. United States, 497 F.2d 1402, 1405 (Ct. Cl. 1974); J.W. Bateson Co. v. United States, 450 F.2d 896, 902 (Ct. Cl. 1971); Shimota v. United States, 21 Cl. Ct. 510, 526 (1990); Pub. Util. Dist. No. 1 v. United States, 20 Cl. Ct. 696, 700 (1990); A. Corbin, Corbin on Contracts § 552 (1960); E. Farnsworth, Farnsworth on Contracts § 7.11 (3d ed. 2004).

(1993). {Order p. 5 ("This court thus finds the analysis in Ceredo to be persuasive"); R. 8}.¹³ However, the Ceredo rationale is no longer applicable in this area of the law. The trial court relied upon Ceredo's rationale finding "implied exclusivity" in order to render the Subcontract as an enforceable requirements contract. {Order p. 6; R. 9}.

The rationale of "implied exclusivity" relied upon by the Ceredo court has been rejected. Ceredo relied upon the holding of Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982), in order to find implied exclusivity. Coyle's Pest Control specifically rejected this analysis from Torncello. 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 implied requirement contract.

Coyle's Pest Control, 154 F.3d at 1304 (emphasis added). As a consequence, the trial court's reliance upon Ceredo's holding is misplaced, and based on antiquated law. As a result, this Court should reverse.

b. DynCorp is entitled to a judgment as a matter of law based on the unambiguous Subcontract.

If this Court finds that the Teaming Agreement should not be incorporated into the Subcontract as a matter of law, then this Court should rule that the Subcontract was not exclusive as a matter of law. As is shown above, the Subcontract cannot create an exclusive relationship between DynCorp and Stevens. See Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998). Importantly, nowhere does the

¹³ The Trial Court's rationale is also internally flawed. The Trial Court stated in its order: "The Subcontract Agreement in this case contains per unit pricing, further evidencing the parties' intent that it be treated like a requirements contract." {Order at p. 7, R. 10}. There is no per unit pricing for UC-35 aircraft. Despite this fact, the Trial Court found that the Subcontract was a "requirements" contract as to UC-35 aircraft as well.

Subcontract identify Stevens as an exclusive or sole provider for repair and maintenance work for the aircraft under the Prime Contract.¹⁴

Throughout this litigation both parties have argued and admitted that the Subcontract standing alone is unambiguous. {Hearing Transcript p. 35-36; R. 129-30}. The Subcontract never uses the term exclusive. Nowhere does the Subcontract prevent DynCorp from using another subcontractor. Not once does the subcontract designate Stevens as a “sole source” or exclusive provider. Had the Parties intended the Subcontract as an exclusive agreement, the Subcontract would contain express language to that effect as required by the controlling federal law. Yet, no such language exists.¹⁵

Section B of the Subcontract contains the statement of work. {Subcontract, Exhibit A to Complaint; R. 57-64}. The statement of work lists the supplies and services to be provided by Stevens under the Subcontract. No where does the statement of work designate Stevens as the sole provider of maintenance and repair services for RC-12/C-12 aircraft. Critically, the statement of work allots no amount or quantity for any of the work items disputed set forth in the Subcontract. The

Subcontract set forth the pricing schedule and statement of work that controlled the work to be provided by Stevens. {Id. at ¶B.1-B.4, C.1; R. 57-64}. The pricing

¹⁴ Stevens has never disputed the fact that no exclusivity clause exists in the Subcontract. Stevens’ Motion for Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009; R. 390}.

¹⁵ DynCorp asks the Court to not only consider what the Subcontract says, but also what it does not say. Had the Parties intended for the Subcontract to constitute an exclusive agreement, the contract would be replete with provisions explaining how and when DynCorp could send airplanes to other providers when the exclusive provider could not complete assigned work. The term exclusive would appear in the agreement, and be defined. The amount of aircraft would be somehow established. Yet, none of these terms appear in the Subcontract, despite the fact that two, sophisticated commercial actors negotiated and executed the agreement.

schedule listed the supplies and services to be provided by Stevens under the Subcontract. {Subcontract, Exhibit A to Complaint; R. 59-63}. For each base/option year, the pricing schedule contains the applicable terms of sale. {Id.; R. 59-63}. Importantly, 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. Stevens could have, but did not, negotiate a minimum quantity and amount. {Id.; R. 59-63}. Indeed, under the unambiguous 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. Accordingly, the lack of a minimum quantity term negates a finding of exclusivity under the Subcontract.

Moreover, the contract specifically designated which aircraft Stevens was to service. The Subcontract limited the aircraft to C-12/R-12 planes alone. At no point does the Subcontract provide that Stevens was to service "all" C-12/R-12 aircraft. Moreover, the Subcontract never once establishes that Stevens was to perform work on any UC-35 aircraft. When the Subcontract generically uses the term "aircraft," the term relates to: "All Army RC/C-12 and UC-35 aircraft covered under the Prime Contract." {Subcontract, Exhibit A to Complaint p.6; R. 48}. Stevens fails to recognize the fact that the statement of work provisions never actually use the generic term "aircraft." Rather, the statement of work instead used specific references to "C-12/RC-12" airplanes. {Subcontract, Exhibit A to Complaint; R. 57-64}. 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

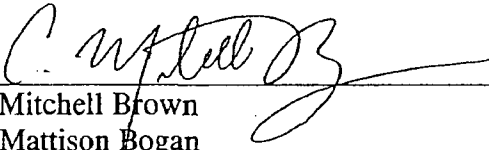
Work, actually refutes exclusivity since nowhere in the statement of work are UC-35 aircraft mentioned.

The Subcontract contains no exclusivity. In fact, the Subcontract establishes that no exclusivity exists as a matter of law. As a result, this Court should find that the unambiguous Subcontract failed to create an exclusive relationship between DynCorp and remand to the trial court to enter an order consistent with this ruling.

CONCLUSION

Based on the foregoing, this Court should reverse the order of the trial court granting partial summary judgment in favor of Stevens. Moreover, this Court should find that the Subcontract does not create an exclusive relationship between DynCorp and Stevens and remand to the trial court to enter an order consistent with this ruling.

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June 29th, 2010

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

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:

Pleadings:

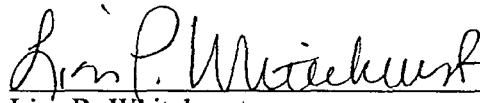
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International Corporation, ...

Of whom DynCorp International LLC is, ... Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
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TAB 2

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Honorable R. Lawton McIntosh, Circuit Judge

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Stevens Aviation, Inc., ... Respondent,

v.

DynCorp International LLC, and
Science Applications International Corporation, ... Defendants,

Of Whom DynCorp International LLC is, ... Appellant.

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court correctly found that the Teaming Agreement entered into by the parties was incorporated into their subsequently executed Subcontract Agreement.

STATEMENT OF THE CASE

This action was commenced on August 24, 2009, when Plaintiff/Respondent Stevens Aviation, Inc. (“Stevens”) filed its Complaint seeking both injunctive relief against, and damages from, Defendant/Appellant DynCorp International LLC (“DynCorp”). In its Complaint, Stevens alleges that DynCorp is liable under theories of breach of contract and breach of the duty of good faith and fair dealing.¹

On October 1, 2009, Stevens filed its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment, and on October 12, 2009, it filed its supporting memorandum. Stevens asked the trial court to interpret, as a matter of law, the Subcontract governing its relationship with DynCorp. Specifically, Stevens asked the trial court to find that the Subcontract unambiguously requires DynCorp to send to Stevens all RC-12, C-12, and UC-35 aircraft sent to DynCorp by the United States Army under government Contract DAAH23-00-C-0026 (“the Prime Contract”). DynCorp filed an opposition to Stevens’ Motion on October 16, 2009, and Stevens filed a reply to that opposition on October 19, 2009.

On October 21, 2009, the trial court heard argument on Stevens’ Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment. On November 17, 2009, the trial Court entered its “Order Granting Partial Summary Judgment in Favor of Plaintiff, Stevens Aviation, Inc.” In that

¹Stevens has also pleaded a claim for tortious interference with contract against Defendant Science Applications International Corporation. That claim is not at issue in this appeal.

Order, the trial court made essentially three findings: (1) a "Teaming Agreement" entered into by Stevens and DynCorp was incorporated into their subsequently executed Subcontract; (2) with the incorporation of the Teaming Agreement, the Subcontract is unambiguous and thus can be interpreted as a matter of law; and (3) the Subcontract unambiguously "obligates DynCorp to send to Stevens all [C-12, RC-12, and UC-35] aircraft submitted to DynCorp under the Prime Contract for the purpose of allowing Stevens to perform the aviation maintenance services specified in that Agreement."

In the trial court, DynCorp did not contest the fact that the Subcontract and Teaming Agreement, construed together, unambiguously obligates DynCorp to send to Stevens all C-12, RC-12, and UC-35 aircraft submitted to DynCorp under the Prime Contract for performance of the specified maintenance services. In its Brief in this Court, DynCorp acknowledges that the Subcontract is unambiguous, and asks for an interpretation contrary to that of the trial court only "if this Court finds that the Teaming Agreement should not be incorporated into the Subcontract as a matter of law." In other words, DynCorp has basically conceded that if the trial court was right on the incorporation issue, it was right on its interpretation of the Subcontract.

On December 3, 2009, DynCorp filed its Motion to Reconsider, asking the trial court to reconsider its grant of partial summary judgment in favor of Stevens. On December 28, 2009, the trial court denied DynCorp's Motion for Reconsideration. DynCorp served Stevens with its Notice of Appeal on January 11, 2010.

STATEMENT OF FACTS

A. The Teaming Agreement.

In March of 2000 DynCorp and Stevens executed a Teaming Agreement. (R. p. 31 at ¶ 5, R. p. 13 at ¶ 4²). The purpose of the Teaming Agreement, as stated therein, was “to cooperate in preparing and submitting one or more competitive proposals in response to the [Request for Proposal for Life Cycle Contractor Support for C-12/RC-12 and UC-35 Fixed Wing Aircraft]” issued by the United States Army “in an attempt to obtain the award of a contract for the Project.” (R. pp. 146, 403).³

The Teaming Agreement expressly provided that:

In the event that DynCorp is awarded the prime contract under the [Request for Proposal for Life Cycle Contractor Support for C-12/RC-12 and UC-35 Fixed Wing Aircraft], DynCorp *shall* award to STEVENS a subcontract thereunder to perform the work described in Paragraph 2.01 hereof.

(R. pp. 148, 405 (emphasis added)).

In Paragraph 2.01 of the Teaming Agreement, DynCorp and Stevens agreed that DynCorp would submit the “competitive proposal” to the U.S. Army, but that it would identify Stevens “as *the* subcontractor to provide the services” identified in Attachment B to the Teaming Agreement. (R. pp. 146, 403

²Stevens cites to the “Amended Answer of DynCorp International LLC” filed in the trial court on September 24, 2009. Subsequent to the entry of the order on appeal, DynCorp filed an Answer directed to the Complaint, as amended by interlineation. Stevens cites to the Amended Answer herein since it was before the trial court at the time the order on appeal was entered. Furthermore, in its subsequent Answer, DynCorp did not change any of the admissions which are relevant to this appeal.

³The Teaming Agreement was submitted to the trial court as Exhibit 2 to the Affidavit of Sheldon K. Early who verified its authenticity. (R. pp. 395-99 at ¶ 9). DynCorp has never contested the authenticity of that document.

(emphasis added)). In Attachment B, the parties agreed that Stevens "shall perform": "*all* ACIs" (*i.e.*, aircraft condition inspections); "strip and paint in accordance with the ACI strip and paint requirements"; "depot level maintenance for the C-12/RC-12 aircraft *fleet* that is above the capability or qualifications of DynCorp personnel"; and "other depot level tasks for the C-12/RC-12 aircraft *fleet* that are above the capability or qualifications of DynCorp personnel." (R. pp. 151-52, 408-09 (emphasis added)).

B. The Subcontract Agreement.

The Army awarded DynCorp the Prime Contract referenced in the Teaming Agreement. (R. p. 14 at ¶ 10). Subsequently, on March 20, 2001, DynCorp and Stevens entered into "Subcontract No. LCCS/SAI001" ("the Subcontract"), which forms the basis of the claims at issue in this litigation. (R. p. 32 at ¶ 11; R. p. 14 at ¶ 11). The Subcontract was executed specifically for the purposes of carrying out work subject to the Prime Contract. (R. pp. 45-46).⁴

The purposes of, and the intent of the parties in executing, the Subcontract were set forth in detail in its "PREAMBLE":

WHEREAS, *the 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 U.S. Army Contract DAAH23-00-C-0226 [];

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

⁴The Subcontract was attached to the Complaint. The parties both acknowledged its authenticity. (R. p. 32 at ¶ 11; R. p. 14 at ¶ 11).

constitutes the entire agreement between the parties hereto with respect to this Subcontract;

WHEREAS, the Prime Contract provides for the maintenance and repair of the Government's fleet of C-12/RC-12 and UC-35 Aircraft and related support equipment (hereinafter the "Life Cycle Contractor Support Program" or "LCCS Program");

WHEREAS, DYNCORP requires 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;

WHEREAS, Stevens⁵ is experienced in the management, provision, repair and support of C-12/RC-12 Aircraft in performance of government contracts;

WHEREAS, DYNCORP has requested and Stevens has agreed to provide Depot support in the form of management, provision, repair and support of C-12/RC-12 Aircraft throughout the world and perform such other services as primarily encompassed in the Prime Contract;

WHEREAS, The parties desire to enter into this Subcontract in furtherance of their objectives as stated in the TA [Teaming Agreement] for Stevens, as a subcontractor to DYNCORP, to provide Depot 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 and related support equipment under the Prime Contract;

(R. p. 45 (emphasis added)).

As expressly set forth in the Subcontract, its "term"/length coincides directly with the Prime Contract DynCorp entered into with the Government.

(R. p. 47). More specifically, "in each instance that the Government extends the

⁵ Stevens is actually referred to throughout the Subcontract as "SAI" (*i.e.*, "Stevens Aviation, Inc."). For consistency, "SAI" is replaced with "Stevens" in the context of this Brief.

Prime Contract with DynCorp,” DynCorp is automatically “deemed to have extended, and shall extend,” the Subcontract for that same period. Id.

Immediately after setting forth the purposes of the Subcontract and its term with respect to duration – and prior to describing the agreements of the parties and the actual work to be performed under it – the Subcontract sets forth the “DEFINITIONS AND PROCEDURES RELATED TO SUBCONTRACT.” (R. pp. 48-50). In this section, the term “Aircraft” is expressly defined as: “*All* Army RC/C-12 and UC-35 aircraft covered under the Prime Contract.” (R. p. 48 (emphasis added)).

After having defined the word “Aircraft” as including “*all*” RC/C-12 and UC-35 aircraft covered under the Prime Contract, the Subcontract sets forth a “STATEMENT OF REQUIREMENTS” which provides:

Stevens, as a Subcontractor to DYNACORP, shall provide items consisting of the management, parts and materials, repairs, skilled labor, facilities and engineering data for the maintenance and repair of the Government’s fleet of C-12/RC-12 *Aircraft* and related support equipment under the Prime Contract as specifically set forth in Section B.

DYNACORP is not required to purchase from the Subcontractor [Stevens] any requirement in excess of the total funding identified in Section G under this subcontract.

(R. p. 57 (capitalization in original) (emphasis added)).

In turn, Section G of the Subcontract refers to funds allocated for “contract line item numbers” commonly referred to in the government contracts world as a “CLIN.”⁶ (R. p. 70). Under Section G, Stevens is relieved from performing

⁶This is recognized in the Subcontract in that its “ABBREVIATIONS” section lists “CLIN” as “Contract Line Item Number.” (R. p. 54).

under the Subcontract, and DynCorp is relieved from its obligation to pay Stevens, to the extent that "DynCorp exhausts funds for any Prime Contract CLIN." Id.

In two separate places, the Subcontract expressly contemplates DynCorp's right to terminate it. In Section H.8, DynCorp is given the right to terminate the Subcontract "if delivery or performance is delayed or deficient under the specified requirements, and Stevens was in control of or responsible for the causal factor of the delay or deficiency." (R. p. 74).

Additional conditions under which termination can occur are then extensively set forth later in the Subcontract:

H.23 DEFAULT AND TERMINATION

A. Default by Stevens. The following events shall constitute Events of Default for Stevens (whether such events shall be voluntary or involuntary or arise or be affected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule, or regulation of any administrative or governmental body):

1. Stevens shall fail in the faithful performance of its obligations in accordance with the terms of this Subcontract and such failure shall continue for ten (10) days after receipt of written notice of such failure ("Cure Notice"); unless Stevens provides DYNCORP with adequate assurance of its ability to cure such failure within a reasonable time, and thereafter so cures.
2. Recurring problems or issues with the quality or work performed by Stevens, which result in the execution of the provisions of paragraph H.23-A, subparagraph 1 above (issuance of a Cure Notice), shall be grounds for the modification of the Term of this Subcontract as it pertains to renewal of Option Years. "Recurring" shall be defined as the issuance of more than three (3) Cure Notices in one

(1) Option Year, pursuant to paragraph H.23-A, subparagraph 1.

3. Any certification, representation or warranty made by Stevens in or pursuant to the Agreement shall have been incorrect in any material respect on the date made.
4. [If] Stevens shall suspend all or substantially all of its operations, temporarily or permanently discontinue business, sell or otherwise dispose of all or substantially all of its assets or cease to hold the permits, licenses, authorizations and certificates including any certificate of convenience and necessarily required for the conduct of its business, or the same are revoked or varied in a manner which materially adversely affects the financial situation of Stevens.
5. If a petition shall be filed against Stevens seeking any reorganization, composition, readjustment, liquidation or similar relief under any present or future statute, law or regulation of the United States and shall remain as non dismissed or unstayed for an aggregate of ninety (90) days (whether or not consecutive), or if any trustee, receiver or liquidator of Stevens is appointed, which appointment shall remain unvacated or unstayed for an aggregate of ninety (90) days (whether or not consecutive).
6. Stevens shall not be deemed in control of, or responsible for, the late delivery of parts that are supplied by a third party, (OEM, DynCorp, or the Government) if such late delivery is beyond Steven's control. Moreover, in such event, Stevens shall not be considered to have failed in the faithful performance of its obligations hereunder.

B. Default of DYNCORP. The following events shall constitute Events of Default for DYNCORP (whether such events shall be voluntary or involuntary or arise or be affected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule, or regulation of any administrative or governmental body):

1. If DYNCORP fails in its obligations hereunder to make timely payment and fails to cure such breach within sixty (60) days after written notification.

2. If DYNCORP shall suspend all or substantially all of its operations, temporarily or permanently discontinue business, sell or otherwise dispose of all or substantially all of its assets or cease to hold the permits, licenses, authorizations and certificates including any certificate of convenience and necessarily required for the conduct of its business, or the same are revoked or varied in a manner which materially adversely affects the financial situation of DYNCORP.

C. Remedies. Upon the occurrence of an Event of Default by either Party, the other Party shall be entitled to all remedies, minus consequential or incidental damages (actual damages only), under applicable laws in accordance with the Applicable Law and Disputes provision of this Subcontract in Section H. Upon the occurrence of an Event of Default by either Party, the other Party shall be entitled to terminate this Subcontract. Such termination shall not relieve the Parties of any prior obligations incurred under this Subcontract.

D. Termination. Notwithstanding the provisions above, DYNCORP shall have the right to terminate this Subcontract prior to the exercise of any Option, provided that the Government has terminated DYNCORP's Prime Contract for the services described herein, pursuant to FAR 52.249-2.

(R. pp. 83-84).

C. Proceedings On The Motion Seeking Partial Summary Judgment.

In early October 2009, Stevens filed its Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment in which it asked the trial court to interpret, as a matter of law, the Subcontract governing its relationship with DynCorp. (R. pp. 365-457). Stevens argued that the Subcontract is unambiguous on its face, and requires DynCorp to send to Stevens all RC-12, C-12, and UC-35 aircraft sent to DynCorp under the Prime Contract, *i.e.*, the Subcontract created a relationship of "exclusivity." (R. pp. 365-392). Stevens' argument that the Subcontract is unambiguous was based on number of

facts, including but not limited to the fact that the Teaming Agreement was incorporated into the Subcontract.⁷ (R. pp. 382-83).

On October 16, 2009, DynCorp filed its "Memorandum Opposing Plaintiff's Motion for Judgment on the Pleadings or Summary Judgment" (R. pp. 244-70). In its Memorandum, DynCorp argued that the Subcontract could not be interpreted to require it to send all aircraft to Stevens for several reasons, including but not limited to the purported fact that the Teaming Agreement was "superseded" and thus should not be considered by the trial court in interpreting the Subcontract. (R. pp. 257-58).

In opposing Stevens' dispositive motion in the trial court, DynCorp never offered any argument countering Stevens' contention that, in the event the court were to find that the Teaming Agreement was incorporated into the Subcontract, there was only one reasonable interpretation of it, *i.e.*, that DynCorp was contractually obligated to send to Stevens all C-12, RC-12, and UC-35 aircraft submitted to DynCorp under the Prime Contract for the specified maintenance services. (R. pp. 244-70).⁸

On October 21, 2009, the trial court heard argument on Stevens' Cross-Motion for Judgment on the Pleadings and Alternative Motion for Summary

⁷On the same date that Stevens filed its motion seeking judgment on the "exclusivity" issue, DynCorp filed its "Memorandum Supporting Motion for Judgment on the Pleadings." In that Memorandum, DynCorp set forth a relatively lengthy argument that the Teaming Agreement was not incorporated into the Subcontract, and thus should not be considered by the trial court in its interpretation. (R. pp. 305-07).

⁸In fact, in its Brief in this Court, while continuing to contend that the Subcontract is unambiguous, DynCorp urges an interpretation contrary to that of the trial court only "if this Court finds that the Teaming Agreement should not be incorporated into the Subcontract as a matter of law." *See* DynCorp's Brief, p. 19, 22.

Judgment. At the hearing, before raising the issue of the incorporation of the Teaming Agreement into the Subcontract, the trial court indicated that it had read the parties submissions. (R. p. 101, lines 11-19; *see also* R. p. 117, lines 12-14). The trial court then engaged in a lengthy discussion with counsel for DynCorp about the incorporation of the Teaming Agreement into the Subcontract. (R. p. 101, line 11 – p. 106, line 25). At no time during that discussion did counsel for DynCorp ever suggest that the trial court was raising an issue it was not prepared to address. Id. Nor did DynCorp ever tell the trial court that the issue of incorporation was not properly before it. Id.

At the hearing, counsel for DynCorp admitted that if the trial court found the Subcontract to be unambiguous it should interpret it as a matter of law. (R. p. 109, lines 15-19). He also admitted that if the trial court found the Subcontract to be unambiguous on the “exclusivity” issue before it, discovery would not be appropriate. (R. p. 140, lines 7-10; R. p. 141 line 21 – p. 142 line 3).⁹

D. The Trial Court’s Order Granting Partial Summary Judgment.

On November 17, 2009, the trial Court entered its “Order Granting Partial Summary Judgment in Favor of Plaintiff, Stevens Aviation, Inc.” (R. pp. 4-11). In that order, the trial court made three findings: (1) a “Teaming Agreement” entered into by Stevens and DynCorp was incorporated into their subsequently executed Subcontract; (2) with the incorporation of the Teaming Agreement, the

⁹The Transcript has been corrected since originally produced to reflect that counsel for DynCorp was the person speaking the transcribed words at the bottom of page 47 through the top of page 48, *i.e.*, R. p. 141, line 21 – p. 142, line 3.

Subcontract is unambiguous and thus can be interpreted as a matter of law; and (3) the Subcontract unambiguously “obligates DynCorp to send to Stevens all [C-12, RC-12, and UC-35] aircraft submitted to DynCorp under the Prime Contract for the purpose of allowing Stevens to perform the aviation maintenance services specified in that Agreement.” *Id.* DynCorp’s motion requesting reconsideration of that Order was denied.

ARGUMENT

It is axiomatic that an unambiguous contract is to be interpreted by the court as a matter of law. *See, e.g., Black v. Freeman*, 274 S.C. 272, 273, 262 S.E.2d 879, 880 (1980) (“Where the terms of a contract are clear and unambiguous as a matter of law, its construction is for the court”); *see also Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (“The interpretation of a contract is a question of law to be decided by the court”); *Gulf Insurance Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000) (“When the contract is worded so that it can be given a certain or definite legal meaning it is not ambiguous and the court will construe the contract as a matter of law”).¹⁰

This is exactly what the trial court did here, *i.e.*, it interpreted an unambiguous contract as a matter of law. Indeed, DynCorp never argued in the trial court that the Subcontract is anything other than unambiguous, and it does

¹⁰DynCorp erroneously states in its Brief that the parties admitted that “federal common law ... controls the Subcontract’s interpretation.” *See* DynCorp’s Brief, p. 17. In the trial court, Stevens noted that there are two differing choice of law provisions in the Subcontract, one of which would require application of Texas law. However, it was, and is, Stevens’ position that the choice-of-law issue does not have to be resolved at this point in the litigation because there is no outcome-determinative conflict among the laws which are arguably applicable.

not do so now. Nor did DynCorp ever argue in the trial court that, once the Teaming Agreement is incorporated into the Subcontract, it can be interpreted in any way other than as creating a relationship of “exclusivity” between DynCorp and Stevens. And, it makes no such argument now.

The trial court’s order is correct in all respects and should be affirmed.

I. The Trial Court Correctly Found That The Teaming Agreement Was Incorporated Into The Subcontract (Responds to DynCorp’s Argument III).

The trial court correctly found that the Teaming Agreement was incorporated into the Subcontract. DynCorp’s arguments to the contrary are both factually and legally flawed.

A. The Subcontract expressly incorporates the Teaming Agreement.

On the very first page containing substantive content, *as its very first item* (only after identifying the parties to it), the Subcontract states:

WHEREAS, the 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 U.S. Army Contract DAAH23-00-C-0226 [-];

(R. p. 45).

The language the parties chose to use in this very first paragraph of their Subcontract is noteworthy and cannot be ignored. They chose to use the present tense in referring to the Teaming Agreement, indicating that it “identifies” their respective roles and responsibilities. They described themselves as “Prime and Subcontractor” – statuses they did not have as parties to the Teaming Agreement.

They expressly and unequivocally rely on the terms of the Teaming Agreement to set the "roles and responsibilities" each is to fill in their "cooperative effort" to "perform the requirements of" the very specifically identified Prime Contract -- responsibilities, efforts, and requirements they did not have as parties to the Teaming Agreement.

In light of the words chosen by the parties, there is no reasonable interpretation of this provision other than that the parties incorporated the Teaming Agreement into the Subcontract. Indeed, why mention the Teaming Agreement at all if the purpose was anything other than incorporation?

Obviously, if the parties did not intend to incorporate the Teaming Agreement into the Subcontract they could have simply omitted all references to it. The fact that they did reference it by using words describing it as a current document can be indicative of nothing else other than incorporation. Certainly, if anything other than incorporation was intended they would have chosen to describe it in a historical context using such words as: "WHEREAS, the parties entered into a now-superseded Teaming Agreement which identified the roles and responsibilities they would occupy as Prime and Subcontractor *if* the Prime Contract was awarded to DynCorp." But, the parties chose to reference the Teaming Agreement as a current document applicable to their newly-created roles "as Prime and Subcontractor." Their intent to incorporate the Teaming Agreement is thus clear.

Furthermore, the incorporation of the Teaming Agreement into the Subcontract is fully supported by the court's opinion in Northrop Grumman

Information Technology, Inc. v. United States, 535 F.3d 1339 (Fed. Cir. 2008), a case relied on by DynCorp. *See* DynCorp’s Brief, pp. 16, 17. In Northrop, the court laid down the rules for when extraneous documents can be treated as part of a government contract for purposes of interpretation. 535 F.3d at 1343-46. The court expressly and unequivocally stated that no “‘magic words’ of reference or of incorporation” are needed, and held:

[T]o incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents identified. In other words, the incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.

Id. at 1344 (citation omitted) (emphasis in original).

The Subcontract here expressly and unequivocally refers to the Teaming Agreement *by title and date*, and expressly acknowledges that the Teaming Agreement “identifies the roles and responsibilities of the parties as Prime and Subcontractor in an effort to perform the requirements of [the Prime Contract].”

~~See R. p. 45.~~ This explicit and detailed reference to the Teaming Agreement makes clear that it was incorporated into the Subcontract. *See also* Gray & Co. Realtors, Inc. v. Atlantic Housing Foundation, Inc., 228 S.W.3d 431, 436 (Tex.App. 2007) (noting that, under Texas law, to incorporate a document into a contract “all that is required is that the incorporated document be referenced by name”).

The trial court's order finding that the Teaming Agreement was incorporated into the Subcontract was correct. The trial court's order granting partial summary judgment to Stevens should thus be affirmed in its entirety since DynCorp did not, and does not, contest the fact that the only reasonable interpretation of the Subcontract, *with its incorporated Teaming Agreement*, is that it created a relationship of "exclusivity."

B. DynCorp misconstrues the facts and misapplies the law in arguing that the trial court erred in incorporating the Teaming Agreement into the Subcontract.

DynCorp first attacks the trial court's finding that the Teaming Agreement was incorporated into the Subcontract by arguing that "no party moved for judgment based on this basis," (*i.e.*, that the Teaming Agreement was incorporated into the Subcontract). (DynCorp's Brief, p. 13). DynCorp is just plain wrong. In seeking judgment in its favor, Stevens expressly and unequivocally argued both in its motion papers, and at the trial court hearing, that the Teaming Agreement was incorporated into the Subcontract. (R. pp. 382-83; R. p. 111, line 25 – p. 112 line 15). And, remarkably, DynCorp itself injected the issue of incorporation of the Teaming Agreement into the Subcontract in its own motion papers in which it sought a judgment on the pleadings, papers which were filed simultaneously with the memorandum filed by Stevens in support of its motion for summary judgment. (R. pp. 305-07). In light of this, DynCorp's argument that the issue of incorporation was not properly before the trial court is simply preposterous. And, its other arguments are equally unavailing.

- (a) DynCorp's argument that no incorporation could occur because the Teaming Agreement terminated by its own self-executing provisions supports a finding of "exclusivity."

In a convoluted argument, DynCorp attacks the trial court's finding that the Teaming Agreement was incorporated into the Subcontract by arguing that no such incorporation could have occurred "because the Teaming Agreement had expired." See DynCorp's Brief, p. 15. In support of this argument, DynCorp cites the provision of the Teaming Agreement which indicates that its effectiveness ends upon the "[a]ward of a subcontract by DynCorp to Stevens for its designated portion of the project as set forth in Paragraph 2.01 hereof."¹¹ Id.

DynCorp's argument actually supports the fact that the Subcontract created a relationship of "exclusivity" between itself and Stevens. Effectively what DynCorp is saying is that the Teaming Agreement ended upon execution of the Subcontract because the Subcontract "award[ed] ... Stevens []its designated portion of the project as set forth in Paragraph 2.01 of the Teaming Agreement." It is indisputable that Stevens' "designated portion of the project as set forth in Paragraph 2.01" was for Stevens' to be "*the* subcontractor" for all the work listed on "Attachment B" to the Teaming Agreement, an Attachment which expressly and unequivocally indicates that Stevens "shall perform": "*all* ACIs" (*i.e.*, aircraft condition inspections); "strip and paint in accordance with the ACI strip and paint requirements"; "depot level maintenance for the C-12/RC-12 aircraft

¹¹In a footnote, DynCorp references a provision in the Teaming Agreement indicating it would "lapse" after 24 months, and asserts that "[t]he Teaming Agreement also terminated on March 16, 2002." See DynCorp's Brief, p. 15, fn.6. The Subcontract was executed long before March 2002, making this provision irrelevant to the argument DynCorp seems to be attempting to make.

fleet that is above the capability or qualifications of DynCorp personnel”; and “other depot level tasks for the C-12/RC-12 aircraft fleet that are above the capability or qualifications of DynCorp personnel.” (R. pp. 151-52, 408-09 (emphasis added)).

In any event, DynCorp’s argument that the Teaming Agreement could not have been incorporated into the Subcontract because it was, purportedly, “expired” underscores its sheer desperation to find some basis to attack the trial court’s order. The fact that an expired writing can be revived by incorporation into a current writing is a generally recognized legal concept. For example, the strict liability act in South Carolina incorporates the Second Restatement of Torts, even though it has been superseded by the Third Restatement. *See* S.C. Code Ann. § 15-73-30. Under DynCorp’s theory, the strict liability act would be invalid. So, too, would a revoked will which is incorporated and revived by a subsequent one – a proposition directly contrary to law. *See, e.g., In re Mitchell’s Will*, 285 N.C. 77, 79, 203 S.E.2d 48, 49-50 (1974).

Even assuming that DynCorp is correct that the Teaming Agreement was “expired” by the time the Subcontract was executed,¹² the law fully supports the trial court’s order that its terms were incorporated into the current and valid Subcontract. *See, e.g., Davies Precision Machining, Inc. v. United States*, 35 Fed.Cl. 651, 660 (Ct.Cl. 1996) (“Once purchase orders lapse, they can be revived

¹²The Teaming Agreement was actually not “expired” at the time the Subcontract was executed. It did not lapse until the Subcontract was executed, and by the time the Subcontract was executed the current/valid Teaming Agreement was already incorporated into it.

by words or conduct of the Government seeking or encouraging continued performance”); Hembree v. Johnson, 482 S.E.2d 407 (Ga.App. 1997) (finding exculpatory clause in expired membership agreement barred plaintiff’s claim because he signed a “membership addendum” for new membership which expressly referenced the terms of an expired agreement).

(b) “Integration clauses” do not negate incorporated documents.

DynCorp next points to two separate “integration clauses” in the Subcontract, and then declares that their mere inclusion in the Subcontract completely negates the incorporation of the Teaming Agreement. *See* DynCorp’s Brief, pp. 15-17. This argument is illogical, and based on an apparent misunderstanding of the purpose of an integration clause.

Contrary to what DynCorp seems to suggest, the use of an “integration clause” has nothing to do with whether any document has been incorporated into a final agreement. The purpose of an “integration clause” is merely to acknowledge that all prior and contemporaneous agreements on the same subject matter have been absorbed into a subsequent agreement, and that parol evidence may not be used to vary the terms of the final writing. *See, e.g., Gemini Electronics, Inc. v. United States*, 65 Fed.Cl. 55, 63 (Ct.Cl. 2005); Springs Window Fashions Division, Inc. v. Blind Maker, Inc., 184 S.W.3d 840, 869 (Tex.App. 2006); Wilson v. Landstrom, 381 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App. 1984).

If incorporated into a final agreement a prior writing is not “parol evidence,” the introduction of which an “integration clause” aims to prevent. To the contrary, such incorporated documents are part and parcel of the agreement itself to be considered in interpreting it. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 861-68 (1996) (giving effect to extrinsic documents incorporated into contract despite existence of integration clause); *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338-39 (Fed. Cir. 2006) (“[P]rior agreements and documents will be considered part of a contract when they are incorporated into the contract”).

In any event, one of the two “integration clauses” that DynCorp relies on expressly excepts prior incorporated agreements from its provisions. *See* DynCorp’s Brief, p. 16 (noting that Subcontract contains provision which indicates that it “supersedes all prior representations and agreements, *except for those specifically and expressly incorporated herein*” (emphasis added)). Thus, in essence, DynCorp is arguing that an “integration clause” which expressly indicates that it does not apply to documents incorporated into an agreement is determinative of whether a document is, in fact, so incorporated. This makes no sense. In relying on this provision, DynCorp puts the proverbial “cart before the horse.” To invoke the protections sought to be afforded by the “integration provision” cited by DynCorp, this Court would first have to find that the Teaming Agreement was not incorporated into the Subcontract.

And, notably, the other “integration clause” relied on by DynCorp comes only *after* the language incorporating the Teaming Agreement into the

Subcontract. *See* R. p. 45. In other words, by the time the Subcontract declares that it “supersedes all prior written or oral agreements between the parties,” the Teaming Agreement can no longer be classified in the designated “prior” category because it is already part of the Subcontract.¹³

The trial court correctly found that the Teaming Agreement was incorporated into the Subcontract. Its order granting partial summary judgment to Stevens should be affirmed because DynCorp has conceded the fact that if the trial court was right on the issue of incorporation, it was right on the issue of “exclusivity.”

(c) *Federal law supports the trial court’s finding that the Teaming Agreement was incorporated into the Subcontract.*

DynCorp’s final challenge to the trial court’s finding of incorporation is based on its contention that the order granting partial summary judgment “ignores the federal common law.” *See* DynCorp’s Brief, pp. 17-19. In support of its argument, DynCorp cites Northrop Grumman Information Technology, Inc. v. United States, 535 F.3d 1339 (Fed. Cir. 2008) and Carahsoft Technology Corp. v. United States, 86 Fed.Cl. 325 (Fed.Cl. 2009). Both cases are readily distinguishable.

¹³DynCorp makes the bald statement that “[t]he integration clauses would rendered [sic] meaningless if they did not apply to the Teaming Agreement.” *See* DynCorp’s Brief, p. 16. This statement has no basis unless one assumes that during the course of negotiations spanning over the course of more than 1 year (the Teaming Agreement was executed in March 2000 and the Subcontract in March 2001), there were no written or oral statements made by anyone representing either contracting party that might be construed to be an “agreement” or “representation” having some relevance to the Subcontract. Such a proposition defies common sense.

The Northrop court found that the extrinsic document at issue in that case (a "Letter of Essential Need") had not been incorporated into the contract agreement entered into by the parties only because the contract did "not refer to the Letter of Essential Need explicitly, as by title or date, or otherwise in any similarly clear, precise manner." 535 F.3d at 1346. Similarly, the Carahsoft court found that the extrinsic document at issue in that case (a bridge contract) was not referenced anywhere in the operative agreement entered into by the parties. 86 Fed.Cl. at 350-51.

This case stands in stark contrast to both Northrop and Carahsoft. The Teaming Agreement is referenced by name and date of execution, and it is described in this detailed manner in the very first substantive provision of the Subcontract. R. p. 45. Contrary to DynCorp's assertion that the Teaming Agreement is mentioned in the Subcontract "only" this "one time," it is actually referenced again, in a subsequent provision of the Preamble to the Subcontract wherein the parties indicate that they are entering into the Subcontract "in furtherance of their objectives as stated in the [Teaming Agreement]." Id. In light of these facts, DynCorp has no basis to charge that the trial court erred because it "ignore[d] the federal common law" or, more specifically, that it improperly ignored Northrop and Carahsoft.

DynCorp's attempt to pass off the Subcontract's very specific identification of the Teaming Agreement as nothing more than a "general, historical reference" does not pass muster. See DynCorp's Brief, p. 18. If the reference to the Teaming Agreement was intended to be nothing other than

“historical,” it would have had a historical context, *i.e.*, it would have been referred to as an agreement entered into by partners which outlined the joint effort they would undertake to secure a government contract related to the maintenance of aircraft. The Subcontract referenced the Teaming Agreement not in any historical context, but, rather, as the document which, in the present, “identifies” the “roles and responsibilities of the parties as Prime and Subcontractor in a cooperative effort to perform the requirements of [the Prime Contract].” (R. p. 45). There is simply nothing “historical” about such language.

As DynCorp expressly acknowledges, no “magic words” like “it is incorporated” are needed for parties to incorporate a document into a contract. *See* DynCorp’s Brief, p. 17; *see also Northrop*, 535 F.3d at 1344 (holding that no “‘magic words’ of reference or of incorporation” are needed). Here, short of using such “magic words,” the incorporation of the Teaming Agreement into the Subcontract could not be more clear. The trial court was correct in its finding that the Teaming Agreement was incorporated into the Subcontract. Its order granting partial summary judgment to Stevens should be affirmed because, as DynCorp has effectively conceded, if the trial court was correct on incorporation it was correct on the issue of “exclusivity.”

II. The Issue Of Whether The Teaming Agreement Was Incorporated Into The Subcontract Was Presented To The Court By Not Only Stevens, But DynCorp As Well (Responds to DynCorp’s Argument II).

In an argument that would not convince even the most credulous, DynCorp argues that the trial court’s order should be reversed because Stevens

did not seek judgment based on the incorporation of the Teaming Agreement into the Subcontract. *See* DynCorp's Brief, pp. 11-13. According to DynCorp, the trial court raised the issue of incorporation on its own, and, as a result, it has been prejudiced due to a lack of notice which "precluded [it] from having the opportunity to respond to this position." *Id.* This argument is based on complete fiction.¹⁴

The issue of the incorporation of the Teaming Agreement into the Subcontract was affirmatively raised by *both DynCorp and Stevens* in their motion papers, and was addressed multiple times by *both parties* in several different pleadings – submissions which the trial court made clear it had read prior to questioning the parties about the incorporation issue. (R. p. 101, lines 11-19; *see also* R. p. 117, lines 12-14). As the record makes clear, DynCorp addressed the incorporation issue *ad nauseam* before the trial court ever entered its order finding that the Teaming Agreement was incorporated into the Subcontract, and thus could be considered in interpreting the latter.

The incorporation issue was first raised in simultaneous filings made by Stevens and DynCorp in which they each sought judgment. Specifically, Stevens raised the incorporation issue in its motion seeking judgment, arguing that the Teaming Agreement was incorporated into the Subcontract. (R. pp. 382-83). At

¹⁴DynCorp never, at any time, argued in the trial court that the issue of whether the Teaming Agreement was incorporated into the Subcontract was not properly raised, or that it had inadequate notice that the trial court would consider it. Because DynCorp is raising this argument for the first time on appeal, it is not properly before this Court. *See, e.g., Morris v. Anderson Cty.*, 349 S.C. 607, 611 fn.4, 564 S.E.2d 649, 651 fn.4 (2002) ("It is well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal").

the same time, DynCorp also affirmatively raised that issue in its own separate motion papers seeking judgment. In those papers DynCorp expressly argued that the Teaming Agreement could not be considered by the trial court when interpreting the Subcontract because it did not meet the applicable legal standard for incorporation. (R. pp. 305-07).

After these initial filings raising the issue, DynCorp then addressed the issue of the incorporation of the Teaming Agreement into the Subcontract in two additional writings: when it filed its reply papers in support of its motion seeking judgment (R. p. 222, fn.6); and when it responded to Stevens' motion for summary judgment. (R. pp. 257-58).

Not only did DynCorp address the issue of whether the Teaming Agreement was incorporated into the Subcontract in multiple pleadings, it also did so orally, at the hearing held on both parties' dispositive motions. (R. p. 101, line 11 – p. 106, line 25). At no time during that hearing did counsel for DynCorp ever suggest that the trial court was raising an issue it was not prepared to address. Id. Nor did DynCorp ever tell the trial court that the issue of incorporation was not properly before it. Id.

DynCorp took a final opportunity to address the issue of the incorporation of the Teaming Agreement into the Subcontract when it filed its Motion to Reconsider. (R. pp. 203-06). In that motion, while addressing the incorporation issue, DynCorp did not argue that the issue was not properly before the court. Id. Likewise, DynCorp did not argue that it had been prejudiced by any purported lack of notice that the trial court would consider the issue. Id.

DynCorp's arguments in this Court that "Stevens never requested partial summary judgment on the grounds that the Subcontract incorporated the Teaming Agreement," and that it was "prejudiced" by a "lack of notice" that the trial court would consider this issue, are clearly refuted by the record. The trial court's order should be affirmed.

III. As DynCorp Admitted In The Trial Court, Discovery Was Irrelevant To The Issues On Appeal (Responds to DynCorp's Argument I).

DynCorp told the trial court that if it found the Subcontract to be unambiguous it should interpret it as a matter of law, and there would be no need for discovery. (R. p. 109, lines 15-19; R. p. 140, lines 7-10; R. p. 141, line 21 – p. 142, line 3). These pronouncements of DynCorp were entirely correct because the law clearly provides that an unambiguous contract must be interpreted without consideration of any extrinsic evidence. *See, e.g., City of Tacoma, Dept. of Public Utilities v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994); *Friendswood Development Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex. 1996).

----- Despite the admissions it made in the trial court, DynCorp now argues that -----
the trial court's order should be reversed because it did not have an opportunity to conduct discovery. But, the order on appeal is based on the trial court's express findings that, because the Subcontract is unambiguous, the court could (and did) interpret it as a matter of law by sticking to its "four corners." Discovery would produce nothing other than extrinsic evidence, which would be completely irrelevant to the trial court's interpretation of the Subcontract (as DynCorp

admitted to the trial court). DynCorp's argument that the trial court indicated something different than this is simply false. *See* DynCorp's Brief, p. 10. What the trial said is that it had "a tendency" to agree with DynCorp's assertion that if the trial court found the Subcontract to be ambiguous so that it had to go "beyond [its] four corners" to interpret it, such an interpretation may be premature. (R. p. 141, lines 14-20). In a similar vein, the trial court asked *DynCorp* (not Stevens) to file a written submission as to what information it believed it would find in discovery on the issue of intent, because the court wanted to assess whether such discovery would change its "thinking" that the Teaming Agreement was incorporated into the Subcontract and that "it was clearly the intention of these parties ... that Stevens do the work." (R. p. 140, line 11 – p. 141, line 1; R. p. 142, line 25 – p. 143, line 10).

In arguing for reversal, DynCorp erroneously assumes that "the trial court specifically considered extrinsic evidence regarding the parties' intent on the issue of exclusivity." *See* DynCorp's Brief, pp. 8-11. But, DynCorp never identifies any actual "extrinsic evidence" the trial court is purported to have considered.

And, the fact is that it considered none. Indeed, the trial court made clear that it was not relying on extrinsic evidence for its interpretation when, having noted that "[i]n the absence of an ambiguity" it could not consider extrinsic evidence, it found that "the Subcontract (together with the incorporated Teaming Agreement) is unambiguous[]" with respect to whether it created a relationship of "exclusivity" between Stevens and DynCorp. (R. p. 7-8).

To the extent that DynCorp is arguing that the Teaming Agreement was “extrinsic” evidence considered by the trial court, its position is legally insupportable. The trial court found the Teaming Agreement was incorporated into the Subcontract, and “[w]hen a document is ‘incorporated by reference’ into a host document ... the referenced document becomes effectively part of the host document as if it were explicitly contained therein.” Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1329 (Fed. Cir. 2001).

Even if the trial court had considered extrinsic evidence (which it did not), DynCorp’s argument that it needed discovery “regarding the parties’ intent on the issue of exclusivity” is unreasonable. Surely, no one knew better than DynCorp what its own intent was with respect to whether the Subcontract was meant to bestow a relationship of “exclusivity” between itself and Stevens. In light of the fact that DynCorp knew the Teaming Agreement was before the trial court, and it knew that the Teaming Agreement might be treated as extrinsic evidence if the trial court agreed with the position it (DynCorp) was espousing, it could have created a material issue of fact about the parties’ intent on “exclusivity” by submitting an affidavit from its own employees. DynCorp took the calculated risk of arguing for discovery in lieu of submitting an affidavit as to its own intent. Having made this choice, DynCorp should not be heard to complain now.

The record is clear that the trial court interpreted the Subcontract without reference to any extrinsic evidence. DynCorp’s argument that the trial erred in doing so without first allowing discovery to proceed is contrary to DynCorp’s admissions, as well as logic. The trial court’s order should be affirmed.

IV. The Trial Court's Order Finding The Subcontract Creates A Relationship of "Exclusivity" Is Correct And Should Be Affirmed (Responds to DynCorp's Argument IV).

A. The provisions of the Subcontract, read as a whole, have only one reasonable meaning.

The basic rules for interpreting a contract are the same regardless of which law this Court chooses to apply.

First, a court must interpret a contract "as a whole." United International Investigative Services v. United States, 109 F.3d 734, 737 (Fed. Cir. 1997); *see also Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 346 (Tex. 2006) ("[W]e examine and consider *the entire writing* ..." (emphasis in original)); Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (noting contract is to be interpreted based on the "entire document and not from any particular provision").

Second, a court must interpret a contract so as to give it a "*reasonable meaning*." United International, 109 F.3d at 737 (emphasis added); *see also Westwind Exploration, Inc. v. Homestate Savings Ass'n.*, 696 S.W.2d 378, 382 (Tex. 1985) ("[A] reasonable interpretation of an agreement will be preferred to one which is unreasonable"); Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co., 311 S.C. 275, 277 428 S.E.2d 734, 735 (Ct.App. 1993) ("[A] contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences" (citation omitted)).

Third, "an interpretation which gives a reasonable meaning to all of [a contract's] parts will be preferred to one which leaves a portion of it useless,

inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.” Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (citation omitted); *see also* Seagull Energy, 207 S.W.3d at 346 (noting that court’s task in interpreting a contract is to “harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless (emphasis in original)); Koon, 379 S.C. at 155, 666 S.E.2d at 233 (“Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed would make it reasonable, fair, and just, the latter construction prevails”).

The trial court, labeling the Subcontract a “requirements contract,”¹⁵ found that it “obligates DynCorp to send to Stevens all [C-12, RC-12, and UC-35 aircraft] submitted to DynCorp under the Prime Contract for the purpose of allowing Stevens to perform the aviation maintenance services specified in that

¹⁵A label of “requirements contract” has a generally recognized legal meaning, and is not unique to the federal common law of government contracts. *See, e.g., Black’s Law Dictionary* 324 (7th ed. 1999) (“requirements contract. A contract in which a seller promises to supply all the goods or services that a buyer needs during a specific period and at a set price, and in which the buyer promises[,] explicitly or implicitly[,] to obtain those goods or services exclusively from the seller. The quantity term is measured by the buyer’s requirements”); Essco Geometric v. Harvard Industries, 46 F.3d 718, 728 (8th Cir. 1995) (noting that under Missouri law, a “requirements contract” is one in which one party promises to supply all the specific goods or services which the other party may need during a certain period at an agreed price, and the other party promises that he will obtain his required goods or services from the first party *exclusively*” (internal quotation and citations omitted) (emphasis in original)); Zemco Manufacturing, Inc. v. Navistar International Transportation Corp., 186 F.3d 815, 817 (7th Cir. 1999) (noting that it is “not only Indiana law but the law of other American jurisdictions” that “[a] requirements contract is one in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser’s needs during the period of the contract”).

Agreement.” (R. p. 11). Considering the well-established rules for contract construction, this finding was clearly correct and should be affirmed.

While there are no provisions in the Subcontract which suggest that DynCorp has the freedom to send aircraft to a maintenance facility other than Stevens, there are several provisions which, read together, leave no doubt that DynCorp was required to send all aircraft to Stevens. The Subcontract defines the term “Aircraft” as: “*All* Army RC/C-12 and UC-35 aircraft covered under the Prime Contract.” See R. p. 48 (emphasis added). And, the word “Aircraft” in its capitalized format is then used throughout the Subcontract in describing its purposes, the parties’ obligations, and the work that Stevens is required to perform under its terms. See, e.g., R. pp. 45, 57, 67, 74, 75, 79, 80.

The parties’ decision to use the word “all” in defining which aircraft are subject to the provisions of the Subcontract has legal significance. For example, the court in National Steel & Shipbuilding Co. v. United States, 419 F.2d 863 (Cl.Ct. 1969), interpreting a provision which required the defendant government agency to “employ all reasonable effort and reasonable diligence to supply to the Contractor working plans” by the dates specified, stated:

The effort and diligence were, further, to be ‘all’ effort and diligence. ‘All’ is often used in writing intended to have legal effect as a preface to flexible or imprecise words, as in ‘all other property,’ ‘all the rest and residue,’ ‘all and every,’ ‘all speed,’ ‘all respect.’ Its purpose is to underscore that intended breadth is not to be narrowed. ‘All’ means the whole of that which it defines – not less than the entirety. ‘All’ means all and not substantially all. The prefatory word ‘all’ in the contract clause meant, then, that no available effort might be omitted.

Id. at 875; *see also* Hughes Aircraft Co. v. United States, 15 Cl.Ct. 550, 552-54 (Cl.Ct. 1988) (analyzing which claims were released in a settlement agreement extended “to all customers for and users of goods made or sold by Ford,” court stated: “Phrases such as ‘all customers’ and ‘all users’ could hardly be more clear cut and categorical. ‘All’ means ‘all’ without requiring the insertion of the names of any and all other persons. To read implied limitations into the release would require contortion of the release language”); Seville Construction, Inc. v. United States, 35 Fed.Cl. 242, 246 (Cl.Ct. 1996) (in dispute involving government contract for installation of dampers, court reasoned that “all means all” and held that defendant contractor could not use “fusible fire dampers” at any location on contract site since notations on drawings instructed that “smoke/fire dampers” were to be installed “at all locations”); Oxford American Dictionary 17 (1980) (defining “all” as “the whole amount or number or extent of”).

The Subcontract also uses mandatory language when describing Stevens’ duties to provide the maintenance described therein:

Stevens, as a Subcontractor to DYNCORP, ***shall*** provide items consisting of the management, parts and materials, repairs, skilled labor, facilities and engineering data for the maintenance and repair of the Government’s fleet of C-12/RC-12 Aircraft and related support equipment under the Prime Contract as specifically set forth in Section B.

See R. p. 57 (emphasis added). The use of such mandatory language supports the trial court’s order finding that DynCorp was required to send all aircraft to Stevens. *Cf. Appeal of – Trans Com Systems*, 2003 WL 2012889, *4 (A.S.B.C.A. May 1, 2003) (holding that language in government firm fixed price

requirements contract indicating that a contractor “shall provide all labor, materials, equipment, transportation, and supervision necessary to perform transcription services for all medical and radiological reports from the 95th Medical Group” was “clearly indicative of exclusivity” (emphasis omitted)).

The trial court’s order is also fully supported by the incorporated Teaming Agreement. The Teaming Agreement required DynCorp, when it made its proposal to the government, to integrate into it “the proposal data furnished by Stevens” and to identify Stevens in that government proposal “as *the* subcontractor to provide the services set forth in Attachment B.” (R. pp. 146, 403 (emphasis added)). “Attachment B” to the Teaming Agreement is entitled “STATEMENT OF WORK,” and it expressly and unequivocally indicates that Stevens’ role and responsibility upon an award of the Prime Contract will be to perform: “*all* ACIs” (*i.e.*, aircraft condition inspections); “strip and paint in accordance with the ACI strip and paint requirements”; “depot level maintenance for the C-12/RC-12 aircraft fleet that is above the capability or qualifications of DynCorp personnel”; and “other depot level tasks for the C-12/RC-12 aircraft fleet that are above the capability or qualifications of DynCorp personnel.” (R. pp. 151-52, 408-09 (emphasis added)).

The fact that the Teaming Agreement contemplated an “exclusive” arrangement between DynCorp and Stevens is further bolstered by its provisions requiring: Stevens to work exclusively with DynCorp in responding to the government’s request for proposal; and DynCorp to enter into a subcontract with Stevens upon award of the Prime Contract. *See* R. pp. 148, 405 (“In the event that

DynCorp is awarded the prime contract under the RFP, *DynCorp shall award to Stevens a subcontract* thereunder to perform the work described in Paragraph 2.01 hereof” (emphasis added)); *id.* (“The efforts of STEVENS relating to the RFP and the Project shall be exclusive to DynCorp, and STEVENS shall not pursue the RFP or Project either independently or in concert with any additional party”).

Furthermore, it is expressly acknowledged in the Preamble of the Subcontract that “the Prime Contract provides for the maintenance and repair of the Government’s fleet of C-12/RC-12 and UC-35 Aircraft” and that DynCorp needs Stevens’ experience to fulfill the Prime Contract. *See* R. p. 45 (emphasis added). The Preamble then acknowledges that DynCorp has requested, and Stevens has agreed, to “provide Depot 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 and related support equipment under the Prime Contract.” *Id.* (emphasis added). The repeated use of the words “fleet” and “Aircraft” (in its capitalized format) in describing the work that Stevens is entitled to perform under the terms of the Subcontract lends further support to the trial court’s interpretation of the Subcontract as imposing an obligation on DynCorp to send *all* C-12, RC-12 and UC-35 aircraft to Stevens.

In addition to the fact that there are multiple express provisions supporting the trial court’s order, it is evident that interpreting the Subcontract as leaving DynCorp free to send aircraft to entities other than Stevens at its own choosing would negate, and render completely meaningless, several of its provisions. For

example, DynCorp's proffered interpretation would render completely meaningless the lengthy and detailed provisions outlining specific "Events of Default for Stevens" which create DynCorp's "entitle[ment] to terminate this Subcontract." *See* R. pp. 83-84; *see also* R. p. 74.

If DynCorp could simply choose to send all aircraft to an entity other than Stevens at any point in time, a termination clause would not be needed. DynCorp could accomplish the same result as a termination would accomplish simply by its own unilateral act of sending no aircraft to Stevens. And, effectively, DynCorp would be free to terminate the Subcontract for no reason at all. This point is amply demonstrated by considering that part of the termination clause which indicates that issuance by DynCorp to Stevens of "more than (3) Cure Notices in one (1) Option Year" shall be grounds for DynCorp not renewing any of the Option Years. (R. pp. 83-84). Obviously, if DynCorp was not required to send any aircraft to Stevens, renewal of option years would have no meaning anyway. A termination clause granting DynCorp the right to terminate or modify the terms of the Subcontract based on non-performance or wrongful-performance by Stevens only makes sense, and has meaning, if DynCorp is, in the absence of such circumstances, required to send all aircraft to Stevens.

This same analysis applies to the provision in the Subcontract which indicates that DynCorp is not required to purchase from Stevens any services for contract line items if the payment for those items would exceed the funds DynCorp receives under the Prime Contract. *See* R. pp. 57, 70. If DynCorp had no obligation to send any aircraft to Stevens, it could just stop buying anything

from Stevens when its funds from the government ran out – it would not need the Subcontract to authorize such action. That is, if the Subcontract permits DynCorp to purchase aviation maintenance services from any entity at its choosing, this provision would be nonsensical and absolutely meaningless because the express limitation imposed on DynCorp’s “obligation” to purchase services from Stevens would actually be an express limitation on a non-existent obligation.

The automatic renewal provisions of the Subcontract would also be meaningless if the Subcontract did not impose on DynCorp any obligation to send aircraft to Stevens. An automatic renewal has meaning only if it actually imposes some obligation on DynCorp to send aircraft to Stevens; otherwise Stevens would be entitled to renewal of a contract that is meaningless because it effectively promises nothing to Stevens since DynCorp could choose to send aircraft elsewhere. Such an interpretation is simply unreasonable.

The trial court’s order is fully supported by the provisions of the Subcontract read as a whole. It should be affirmed.

B. DynCorp’s argument that no relationship of “exclusivity” was created by the Subcontract is based on a misinterpretation of the cases on which it relies.

- (a) The trial court’s finding that the Subcontract is a “requirements contract” is supported by the federal common law of government contracts.

DynCorp argues for reversal of the trial court’s order based on the erroneous propositions that the Subcontract “contains no quantity or total amount terms,” and thus is enforceable “only to the extent services are actually ordered and provided.” See DynCorp’s Brief, pp. 19-22. DynCorp asserts that this

argument is supported by the case of Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998). DynCorp's contention about "quantity" is factually wrong, and its interpretation of Coyle's is legally insupportable.

As a starting point, there *is* a "quantity" specified in the Subcontract, and that quantity is "*all*." But, even if there was no quantity, Coyle's does not support DynCorp's argument that the absence of a "quantity" term in a government contract, *ipso facto*, removes it from being classified as a "requirements contract." In fact, Coyle's actually supports Stevens' argument that the Subcontract, read as a whole, provides for "exclusivity". Despite the fact that the contract in Coyle's had no exclusivity clause and specified no quantity, the court went on to analyze whether exclusivity was mandated by its provisions, noting: "[T]he contract does include terms that suggest exclusivity. For instance, the contract obligates Coyle 'to furnish *all* labor, service, equipment, transportation, materials and supplies ...'" 154 F.3d at 1305-06 (emphasis in original). Obviously, if the absence of a "quantity" term and/or an "exclusivity clause" conclusively establishes that a contract cannot be a "requirements contract," the Coyle's court analysis would have stopped there.

Nor does the ultimate finding of the Coyle's court – that the contract before it was not a "requirements contract" – support reversal of the trial court's order here. A major distinction between the contract at issue in Coyle's and the Subcontract before this Court is that, after noting Coyle was "to furnish *all* labor, service, equipment, transportation, materials and supplies ..." the contract in that case indicated that "properties would be assigned [by HUD] on an *as-needed*

basis.” *Id.* at 1303 (emphasis in original). Not surprisingly, the Coyle’s court concluded that exclusivity did not exist solely because there was nothing in the contract which required HUD “to assign” any properties to Coyle. *Id.* at 1306.

The Subcontract here essentially mimics those terms of the contractual provision in Coyle’s which that court found to “suggest exclusivity.” But, unlike Coyle’s, there is nothing in the Subcontract which suggests that Stevens’ right to service *all* aircraft is contingent on some “assignment” by DynCorp.

DynCorp next argues that the trial court’s interpretation of the Subcontract is wrong because the parties purportedly “intentionally left blank” a quantity term on the “pricing schedule,” and specified no “minimum quantity term.”¹⁶ (DynCorp’s Brief, pp. 20-21). This argument makes no sense. The trial court did not find that the Subcontract can be interpreted so as to obligate DynCorp to send a specific number of aircraft to Stevens, or even a “minimum” number of aircraft to Stevens. The trial court found that the Subcontract obligates DynCorp to send to Stevens “all” C-12, RC-12 and UC-35 aircraft sent to DynCorp under the Prime Contract. Such an interpretation is fully consistent with the absence of a numerical or minimum quantity designation in the “pricing schedule.” Indeed, the “all” aircraft designation is not subject to numerical quantification because until and unless the government sends an aircraft to DynCorp under the Prime

¹⁶A “minimum quantity term” is not a term necessary to a “requirements contract,” not even in a government contract. In fact, the failure to include such a term makes it more likely that the contract is a requirements contract as a “minimum quantity” term is required only for “indefinite quantities contracts.” *See, e.g., Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed.Cl. 506, 517 (Fed.Cl. 1993) (rejecting government’s argument that contract was an indefinite quantity contract, and not a requirements contract, because, *inter alia*, contract did “not contain any minimum quantity provision necessary to enforce an indefinite quantity contract”).

Contract, DynCorp has no obligation to do anything with respect to Stevens. This is precisely why the “intentionally left blank” “quantity” columns exist.¹⁷

Equally unavailing is DynCorp’s argument that the trial court’s interpretation is wrong because the Subcontract “contains neither the federal acquisition clauses [sic] usually found in either indefinite quantity contracts or requirements contracts.” See DynCorp’s Brief, pp. 20-21. In making this argument, DynCorp is essentially asking this Court to hold that a private party contract must meet the mandates of a government contract. There is no law to support such a proposition.

Furthermore, and in any event, federal case law – including that relied on by DynCorp – overwhelmingly supports the fact that the absence of a “federal acquisition clause” (*i.e.*, a FAR clause) is not dispositive of whether a *government* contract should be characterized as a “requirements contract” or otherwise. See, *e.g.*, Coyle’s, 154 F.3d at 1305-06 (although noting that the absence of “the FAR requirements clause” makes it “more difficult to find the required exclusivity,” court went on to analyze whether contract was, nonetheless, a “requirements contract”); Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed.Cl. 506, 518 (Fed.Cl. 1993) (holding that “the absence of a requirements

¹⁷DynCorp’s reliance on a modification to the Subcontract that specified a numerical quantity for some work is misplaced. (DynCorp’s Brief, p. 21). The trial court rightfully ignored DynCorp’s proffer of the modification on which it based its argument because that modification was not part of the original Subcontract and thus evidences nothing with respect to the parties’ intent at the time of contracting. More importantly, the numerical quantifications in the modification (none of which can be found in the original Subcontract) are, by their express terms, for “*Elective* Improvements” not part of the original contract. In other words, they are for work to be done on specified aircraft that the government had already assigned to DynCorp under the Prime Contract.

clause in the contract [] does not inhibit the court from deeming the contract to be a requirements contract”); Appeal of – Trans Com Systems, 2003 WL 2012889, *4 (A.S.B.C.A. May 1, 2003) (“The absence of the FAR 52.216-21 REQUIREMENTS and 52.216-22 INDEFINITE QUANTITY clauses, and of a designated minimum quantity of supplies or services, from an instrument *does not end the inquiry* into the type of contract the parties intended. One must review the specified terms and conditions ...” (emphasis added)).¹⁸

Finally, DynCorp offers confusing rhetoric about the trial court having improperly relied on the court’s opinion in Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346 (Ct. Cl. 1993). DynCorp asserts that Ceredo was based on the holding of Torncello v. United States, 681 F.2d 756 (Ct.Cl. 1982), which was “rejected “ by Coyle’s. (DynCorp’s Brief, p. 22). But, Coyle’s did no such thing. The Coyle’s court merely rejected one party’s proffered interpretation of Torncello. That party asserted that Torncello *requires* a court to make a government contract “fit into one of three possible types of supply contract” and *requires* a court to choose a classification of “requirements contract” over “indefinite quantity” contract. 154 F.3d at 1304-05. The Coyle’s court said that Torncello does not stand for these propositions. Id. In any event, no matter how you interpret it, none of this dicta from Coyle’s has anything to do with the trial

¹⁸The Subcontract is *not* a government contract. Even if the inclusion of a “federal acquisition clause” was an absolute prerequisite to classifying a *government* contract as a “requirements contract” (as DynCorp erroneously argues), there is no law which suggests that a private party agreement (like the Subcontract) can be classified as a “requirements contract” only if it includes a reference to such a clause.

court's analysis or reasoning which led to its unequivocal conclusion that "the Subcontract is unambiguously a requirements contract."

DynCorp is wrong if what it meant to suggest in its strained and confusing analysis of Ceredo, Coyle's, and Torncello, is that unless a contract expressly uses the word "exclusive" in describing the relationship of the parties to that contract no exclusivity can be found (*i.e.*, what DynCorp labels as "implied exclusivity"). The cases simply do not support such a position. To the contrary, even though the contract in Coyle's did not use the word "exclusive" in describing the relationship of the parties, that court still went on to analyze whether exclusivity was mandated by its provisions. 154 F.3d at 1305-06. If DynCorp was correct, the Coyle's court would not have ended its inquiry after determining the word "exclusive" was nowhere to be found in the contract before it. There is simply no law which supports the notion that a contract can be characterized as a "requirements contract" only if it incorporates the word "exclusive." Such a proposition would violate the basic rule of contract construction requiring a court to interpret a contract by reading it as a whole.

(b) DynCorp's proffered interpretation of the Subcontract as providing for no exclusivity is not properly before this Court, and, in any event, is legally and factually insupportable.

DynCorp asks that, in the event "this Court finds that the Teaming Agreement should not be incorporated into the Subcontract," judgment be entered in its favor interpreting the Subcontract as not requiring "exclusivity." (DynCorp's Brief, p. 22). DynCorp's argument asking for judgment in its favor is

a backdoor attempt to appeal the unappealable order denying its motion for judgment on the pleadings. See Rose v. Thrash, 291 S.C. 459, 354 S.E.2d 378 (1987) (“We hold that the denial of a motion for judgment on the pleadings is not directly appealable under S.C. Code Ann. § 14-3-330 (1976), even if it raises only a question of law”).

Furthermore, the issue of whether the Subcontract unambiguously requires “exclusivity” *without consideration of the Teaming Agreement* was never decided by the trial court.¹⁹ DynCorp cites to no authority which suggests this Court has the jurisdiction to interpret a contract on appeal, when the trial court did not interpret it in the first instance.

Even 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. Throughout this litigation, and in its Brief in this Court, DynCorp has focused its arguments about why its proffered interpretation of the Subcontract is correct on one simple concept: the Subcontract has no

“exclusivity clause.” See DynCorp’s Brief, pp. 22-25. In other words, DynCorp asserts that because the Subcontract does not contain the word “exclusive” it cannot be interpreted as obligating DynCorp to send all C-12, RC-12, and UC-35

¹⁹The trial court did, without analysis, deny the parties’ cross-motions for judgment on the pleadings. In its cross-motion, DynCorp argued that the Subcontract, *without the incorporated Teaming Agreement*, should be interpreted to create a “non-exclusive” relationship between Stevens and DynCorp. The order denying the cross-motions is not before this Court. And, in any event, the trial court’s denial could simply have been based on its determination that it could not interpret the Subcontract without the Teaming Agreement since it was expressly incorporated into it.

aircraft to Stevens for the maintenance services specified therein. This argument is contrary to basic rules of contract interpretation, and the federal common law of government contracts.

For example, in Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed.Cl. 506, 518 (Fed.Cl. 1993), the court found that a government contract for laundry and dry cleaning services was a “requirements contract” obligating the government to use Crown “exclusively” even though there was “no clause in the contract which specifically set[] forth this proposition.” In Crown Laundry, the court identified one of the issues before it as “whether the subject contract was a requirements contract instead of an indefinite quantity contract.” 29 Fed.Cl. at 509; *see also id.* at 515. The court noted that the first page of the contract characterized it as a “Firm Fixed Price Indefinite Quantity contract,” and one of its provisions stated “[t]his is an indefinite-quantity contract.” *Id.* at 512. There was no “clause or other language” which stated that it was “a requirements contract” or which expressly provided for “exclusivity.” *Id.* at 512, 518. The contract contained neither the “the requirements clause specified in FAR,” nor any quantity term. *Id.* at 517.

Despite the absence of an “exclusivity clause,” a FAR “requirements clause,” any stated quantity, and any express indication that the contract was a “requirements contract,” the court in Crown Laundry concluded that the contract was, in fact, a “requirements contract.” *Id.* at 515-19. The court reasoned that “the determination of the type of contract the parties entered into is a matter of law and is not controlled by any label or contract provision.” *Id.* at 516. The

court indicated that it was “guided by three contract interpretation rules in particular”:

First, the court is not bound by the name or label given to a contract. Rather it must look beyond the first page of the contract to determine what were the legal rights for which the parties bargained, and only then characterize the contract. Second, an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous ... Third, because it must be assumed that the parties intended to form a binding contract, the court should favor an interpretation that saves the contract instead of voiding it. If a contract is susceptible of interpretation as either a requirements contract or an indefinite quantity contract, the court should uphold it as being a requirements contract.

Id. at 515-16 (citations omitted).

The court in Crown Laundry reasoned that, because the contract did not contain “any minimum quantity provision necessary to enforce an indefinite quantity contract,” characterizing it as “an indefinite quantity contract” would make it “illusory and unenforceable.” Id. at 517. Noting that “courts favor validating contracts, not invalidating them,” the court concluded that although the contract before it was susceptible of being interpreted as either an invalid “indefinite quantity contract” or a valid “requirements contract,” general rules of contract construction supported its classification as the latter. Id.

DynCorp’s position that the Subcontract cannot be classified as a “requirements contract” simply because it does not use the word “exclusive” in any of its provisions, and it did not specify a numerical “quantity” of aircraft, cannot be reconciled with the court’s opinion in Crown Laundry. Its request that this Court enter a judgment finding that the Subcontract is not a “requirements

contract” (in the event that “this Court finds that the Teaming Agreement should not be incorporated into the Subcontract”) should be denied. The trial court’s order is fully consistent with Crown Laundry. It should be affirmed.

V. **In The Event This Court Finds That The Teaming Agreement Is Not Incorporated Into The Subcontract, The Trial Court’s Order Should Be Affirmed Because The Record On Appeal Demonstrates That DynCorp Failed To Produce Evidence Sufficient To Create A Genuine Material Issue Of Fact Regarding The Parties’ Intent At The Time They Entered Into The Subcontract.**

This Court can affirm the trial court’s order “upon any ground(s) appearing in the Record on Appeal.” Rule 220(c) SCACR. In the event that this Court finds that the trial court erred by concluding that the Teaming Agreement was incorporated into the Subcontract, the order interpreting the Subcontract as requiring DynCorp to send all C-12, RC-12, and UC-35 aircraft to Stevens should be affirmed based on the record.

Once a party moves for summary judgment, an opponent must come forward with specific facts and evidence showing there is a genuine issue for trial. *See, e.g., Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App. 2004); *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct.App. 1985). DynCorp failed to produce any facts or evidence in response to Stevens’ Motion for Summary Judgment. Because it failed to do so, there was no genuine issue of material fact before the trial court with respect to how the Subcontract should be interpreted.

First, 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. DynCorp offered no evidence that the Subcontract's plain and unambiguous terms had been modified in any way, or that the parties intended anything different than the "exclusivity" inherent in its provisions. An interpretation of non-exclusivity cannot be reconciled with multiple provisions in the Subcontract, including but not limited to its lengthy and detailed termination clause. When there is only one reasonable interpretation of a contract, it controls. *See, e.g., Medlin Construction Group, Ltd. v. Harvey*, 449 F.3d 1195, 1200 (Fed. Cir. 2006) (adopting contractor's proffered interpretation of contract over the interpretation offer by the government based on finding it was "the only reasonable interpretation").

Second, to the extent the Subcontract could be deemed to have more than one reasonable interpretation, the applicable law, as well as the Subcontract itself, mandate that it should be interpreted based on an examination of the circumstances and the intent of the parties at the time the Subcontract was executed. *See* R. p. 56 ("Any ambiguity, discrepancy, inconsistency or conflict in or between any of the technical or contractual provisions hereof ... shall be resolved by applying the most *reasonable* interpretation under the circumstances, giving full consideration to the intentions of the parties *at the time of subcontracting*" (emphasis added)); *Cities of Burbank, Glendale and Pasadena, Cal. v. Bodman*, 464 F.3d 1280, 1284 (Fed. Cir. 2006) ("A principal objective in deciding what contractual language means is to discern the parties' intent at the time the contract was signed").

In seeking partial summary judgment, Stevens argued that, in the event the Teaming Agreement was not considered to be part of the Subcontract, the trial court could consider it as extrinsic evidence. (R. pp. 383-88). Stevens asserted that the Teaming Agreement *and other undisputed evidence it submitted* conclusively proved that the intent of the parties at the time of contracting was to create a relationship of “exclusivity” between Stevens and DynCorp. *Id.* Stevens argued that the undisputed evidence of this intent could lead to only one conclusion: that the Subcontract required DynCorp to send all C-12, RC-12, and UC-35 aircraft to Stevens for the specified maintenance services. *Id.*

DynCorp did not challenge the evidence offered by Stevens regarding the parties’ intent, either by offering contrary evidence of its own or disputing the authenticity of the evidence offered by Stevens. All that DynCorp did in response to Stevens’ motion was to argue that summary judgment was “premature” because discovery had not been completed. (R. pp. 254-56). Yet, DynCorp did not submit an affidavit which explained why it could not “present by affidavit facts essential to justify [its] opposition” to summary judgment, as required by the governing Rule. *See* SCRCP 56(f). Indeed, it would have been impossible for DynCorp to have done so in good faith because, as one of the two parties to the Subcontract, DynCorp could have opposed summary judgment by presenting evidence that its own intent was not “exclusivity” at the time the Subcontract was executed. DynCorp, however, did not do so. The only logical conclusion to draw from this failure is that DynCorp had no records or witnesses showing that its own intent was anything but exclusivity.

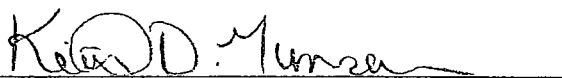
Because all of the evidence in the record – the Teaming Agreement, the affidavits, the verified documents – shows that the parties intent was one of “exclusivity” at the time the Subcontract was executed, the trial court’s order can be affirmed even if it erred in finding that the Teaming Agreement was incorporated into the Subcontract.

CONCLUSION

For the reasons outlined herein, this Court should affirm the trial court’s order granting partial summary judgment to Stevens.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Judge

Case No. 2009-CP-23-07229
Tracking No. 2010150029

Stevens Aviation, Inc., ... Respondent,

v.

DynCorp International LLC, and
Science Applications International Corporation, ... Defendants,

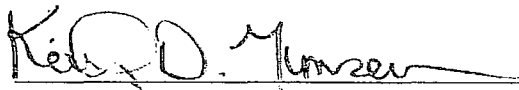
Of Whom DynCorp International LLC is, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies
with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

Respectfully submitted,

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Of Whom DynCorp International LLC is, ... Appellant.

PROOF OF SERVICE OF RESPONDENT'S FINAL BRIEF

The undersigned hereby certifies that on the 24th day of June, 2010,
Respondent's Final Brief was served by forwarding a copy via first class mail,

postage prepaid, to the following:

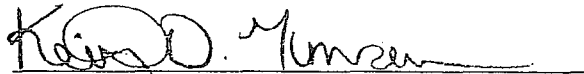
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TAB 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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R. Lawton McIntosh, Circuit Court Judge

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Stevens Aviation, Inc., ... Respondent,

v.

DynCorp International LLC and Science Applications Defendants,
International Corporation, ...

Of whom DynCorp International LLC is, ... Appellant.

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ARGUMENT

Stevens' arguments in its brief demand a reflection regarding the procedural posture in this matter. *No discovery* had occurred between the parties when the trial court ruled in this large commercial dispute. Each side moved for judgment on the *pleadings*, both of which motions were *denied*. The trial court then granted *summary judgment* to Stevens on a basis not included in Stevens' motion for summary judgment, and without granting DynCorp any discovery, despite DynCorp's requests for discovery, protests that *summary judgment* consideration was premature, and argument that the trial court had improperly considered extrinsic evidence while claiming not to have done so. That is the setting in which this appeal is taken, which setting must not be lost on this Court as it was with the trial court. Summary judgment is a drastic and exceptional ruling. The trial court misapprehended this and failed to adhere to the well-established jurisprudence of our appellate courts regarding when and how summary judgment should be considered. The trial court's order must be reversed.

I. The trial court erred in incorporating the Teaming Agreement into the Subcontract.

The trial court ruled as a matter of law that the Teaming Agreement was incorporated into the Subcontract. This is incorrect. First, Stevens improperly relies on a single provision in the Subcontract's preamble to support the incorporation of the entire Teaming Agreement while ignoring several other provisions that refute that preamble provision. Second, Stevens ignores the fact that the Subcontract's integration clauses specifically excluded the Teaming Agreement from incorporation. Third, Stevens ignores the fact that the Teaming Agreement terminated upon execution of the

Subcontract and thus could not be incorporated into the Subcontract. As a result, Stevens' reliance on a single preamble provision in support of incorporation of the Teaming Agreement into the Subcontract is meritless. This Court should reverse the grant of partial summary judgment by the trial court.

A. Stevens improperly relies on one section of the Subcontract's preamble to support its argument of incorporation.

Stevens erroneously relies on one paragraph of the Subcontract's preamble in order to support its argument that the Subcontract incorporates the Teaming Agreement. However, reading the Subcontract as a whole establishes that the Teaming Agreement was *not* incorporated into the Subcontract.

As Stevens properly acknowledges on page 29 of its brief, a court must construe a contract as "as a whole." United International Invest. Servs. V. United States, 109 F.3d 734, 737 (Fed. Cir. 1997); Seagull Energy E&P Inc. v. Eland energy, Inc., 207 S.W.3d 342, 346 (Tex. 2006) (holding that courts "examine and consider *the entire writing*"); Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (stating that a contract must be interpreted based on the "*entire document and not from any particular provision*") (emphasis added).

Despite this recognition, Stevens on appeal essentially asks this court to focus exclusively on one paragraph of the preamble in order to find that the Teaming Agreement was incorporated into the Subcontract. However, Stevens' position completely ignores the Subcontract's integration and termination clauses. These and other provisions within the Teaming Agreement cannot be harmonized with provisions in the Subcontract. An interpretation of a contract which would lead to an absurd result

should be avoided.¹ Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 4321, 434 (1975); see also Koon, 379 S.C. at 155, 666 S.E.2d at 233.² As set forth below, reading the integration and termination clauses together with the entire Subcontract refutes Stevens' position.

1. **Stevens asks this Court to improperly ignore the Subcontract's integration clauses that prohibit consideration of the Teaming Agreement.**

Stevens relies exclusively on paragraph 3 of the preamble to the Subcontract to support its belief that the Teaming Agreement was incorporated into the Subcontract.

{See Respondent's Initial Br. p. 13}. However, Stevens ignores the *very next* clause in the preamble. That clause 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}. Moreover, Stevens' position ignores the integration clause on page 51 of the Subcontract that states:

¹ For example, the Teaming Agreement never mentions UC-35 planes. If there were a true incorporation, the court would have to add a reference to UC-35 planes into every term of the Teaming Agreement despite the agreement specifically limiting itself to C-12/RC-12 planes. Section 4.01 of the Teaming Agreement references the scope of work in Attachment B to be performed by Stevens. The scope of work is limited to C-12/RC-12 planes *only*. The scope of work in Attachment B never mentions UC-35 planes. However, using Stevens' interpretation of the Subcontract, the definition of "Aircraft" includes UC-35. As a result, the scope of work and the Subcontract do not correspond and are incongruous.

² The trial court added UC-35 planes to the terms of the Subcontract despite the fact that the Subcontract never mentions UC-35 planes in the pricing schedule or in the statement of work. Moreover, the Teaming Agreement never mentions UC-35 planes at any point in the document. The scope of work never mentions UC-35 planes. In short, the trial court's holding regarding UC-35 planes cannot be justified with the documents the court used to support its reasoning. Accordingly, the trial court's ruling as practically applied would lead to an absurd reading of the Subcontract.

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. 93}.

The Subcontract was thus a fully integrated agreement that superseded all prior agreements of the parties. Palmetto State Sav. Bank of South Carolina v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (holding that extrinsic evidence is inadmissible to vary or contradict the terms of an integrated or merged agreement); 30 S.C. Jur. Contracts § 38 (setting forth the general rule that a written agreement between parties merges all prior talk and negotiations about the subject of the agreement, and it is not proper to receive parol evidence to vary or contradict the terms of such an agreement); 30 S.C. Jur. Evidence § 142 (reciting the general rule that extrinsic evidence is inadmissible to vary or contradict terms of an integrated agreement or merger clause under the parol evidence rule); see also 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). Accordingly, this Court should reject this argument and reverse the trial court's grant of partial summary judgment.

Moreover, Stevens misapprehends DynCorp's argument regarding the integration clauses. {Respondent's Initial Br. p. 19-21}. Stevens claims that "[i]n relying on this [integration] provision, DynCorp puts 'the proverbial cart before the horse'" as to whether the integration clauses bar the incorporation of the Teaming

Agreement. {Id. at 20-21}. In fact, it is Stevens' reasoning that is flawed. The flaw originates from Stevens' argument being premised on its mistaken belief that the Teaming Agreement was incorporated into the Subcontract. Stevens fails to understand that the issue of incorporation requires the court to review the contract as a whole, including the integration clauses, to determine if the Teaming Agreement has been incorporated into the Subcontract. Stevens asks this Court to determine incorporation first, *and then* look to the integration clauses in the Subcontract. That logic, in fact, puts "the proverbial cart before the horse" and is not supported by case law. The trial court and this Court are required to look to all contract terms, including the integration clauses, in conjunction with all other contract terms to determine whether the Teaming Agreement had been incorporated. 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); Hardee v. Hardee, 248 S.C. 84, 92, 558 S.E.2d 264, 267 (Ct. App. 2001) (stating the general rule that courts must consider a contract in its entirety so as to give effect to the whole instrument and to each of its various parts and provisions). Accordingly, this Court should reverse the trial court's grant of partial summary judgment.

Lastly, Stevens argues that because the integration clauses "comes only *after*" the preamble paragraph referencing the Teaming Agreement, then the clauses do not block incorporation of the Teaming Agreement. {Respondent's Initial Br. p. 21}. This is simply not the law. The order of the clauses does not impact the court's analysis on this issue. The applicable rules provide that a contract must be construed as a whole. See; e.g., Reynolds v. Alabama Dept. of Transp., 926 F. Supp. 1077

(M.D. Ala. 1996) (holding that a later clause can be used to modify an earlier clause in a contract); Sterman v. Ackerman, 184 A.2d 28 (Del. 1928) (stating that in construing contracts, disproportionate or undue weight or emphasis should not be placed on particular words, parts, or provisions to the neglect or determinant of others); 17A C.J.S Contracts § 314 (restating the rule that individual clauses, paragraphs, provisions, or phrases in an agreement must be considered in connection with the rest of the agreement); see, also, United International, 109 F.3d at 737; Seagull Energy, 207 S.W.3d at 346 (holding that courts "examine and consider *the entire writing . . .*"); Koon, 379 S.C. at 155, 666 S.E.2d at 233 (stating that a contract must be interpreted based on the "*entire document and not from any particular provision*") (emphasis added). Accordingly, this Court should reject this argument and reverse the trial court's grant of partial summary judgment.

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

Stevens likewise asks this Court to simply ignore the fact that the Teaming Agreement terminated upon execution of the Subcontract and thus could not be incorporated into the Subcontract. The Teaming Agreement expired, by its own terms, upon execution of the Subcontract, which occurred in March 2001. {Teaming Agreement p.1, ¶ 2.02(h); R. 147}. Moreover, even if the Subcontract had never been executed, the Teaming Agreement would self terminate upon the "[l]apse of 24 months from the effective date of this Agreement." {Teaming Agreement ¶2.02(e); R. 146}.³

³ Stevens argues in footnote 4, page 17, of its brief that the termination date of March 16, 2002, is irrelevant because "[t]he Subcontract was executed long before March 2002." DynCorp included the termination date contained in Section 2.02(e) to further illustrate the nonsensical position of Stevens'

As a result, the Teaming Agreement could not be incorporated into the Subcontract because it had expired. Again, Stevens asks this Court to determine incorporation first *and then* to simply ignore the termination clauses. That logic is not supported by case law. As stated, the trial court was required to look to all contract terms, including the termination clauses, in conjunction with all other contract terms to determine whether the Teaming Agreement had been incorporated.

Moreover, Stevens appears to argue—for the first time in this litigation—that even if the Teaming Agreement had expired, it could still be incorporated into the Subcontract based on revival. {Respondent's Initial Br. p. 18-19}. Such a position has never been advanced to the trial court or at any stage of this litigation.⁴ There is no evidence whatsoever that parties had revived the Teaming Agreement. See, e.g., Rubenstein v. Dr. Pepper Co., 228 F.2d 528 (8th Cir. 1955) (holding that after a contract has been terminated it can only be revived by mutual assent of the parties); Gillette v. Cashion, 91 A.2d 421 (N.J. App. 1952) (finding that failure to perform under a new agreement that extinguished a prior agreement does not revive the prior agreement). Moreover, the record does not support such a claim. See, e.g., I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) (setting forth the rule that an additional sustaining ground is based on grounds appearing in the record as set forth in Rule 208, SCACR); Rule 208(b)(2), SCACR

argument that the Teaming Agreement had been incorporated into the Subcontract despite the fact that it had expired in either March 2001 or, if the Subcontract had never been entered, on March 16, 2002.

⁴ In addition, the case of Davies Precision cited by Stevens on page 19 in support of its revival argument does not address revival of a contract. Rather, that case addressed the revival of a lapsed unilateral contract *offer* made by a party and the effect of substantial performance to revive a lapsed contract offer that was never accepted in writing. This is a much different concept than revival of the Teaming Agreement.

("Respondent's brief may also contain argument asking the court to affirm for any *ground appearing in the record*") (emphasis added). Accordingly, this Court should reverse the grant of partial summary judgment based on this error.

B. The Teaming Agreement was not incorporated into the Subcontract under controlling federal law.

In the order, the trial court found that the Subcontract incorporated the Teaming Agreement. The trial court based this ruling on the reference to the Teaming Agreement found in the preamble of the Subcontract. ~~However, the Subcontract never~~ explicitly or expressly incorporated the Teaming Agreement. Despite this fact, Stevens now alleges that since the Subcontract "expressly" *references* the Teaming Agreement "by title and date," such is sufficient to incorporate the Teaming Agreement into the Subcontract. {Respondent's Initial Br. p. 15}. This contention misconstrues the applicable law of incorporation. The incorporation must particularly mention the document, and the incorporation itself must be accomplished with explicit and precise language. Stated differently, the key to a finding of incorporation under the law is whether the *incorporation* language is explicit and precise. A clear *reference* to a prior agreement *alone*, without *explicit or precise language of incorporation*, is insufficient to incorporate the prior agreement. The Subcontract here contained no explicit and precise language indicating intent to incorporate the Teaming Agreement.

Under federal common 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).⁵ It is not sufficient to merely reference the prior agreement. Northrop, 535 F.3d at 1345. While "magic words" are not required, explicit, precise, and clear words of incorporation are needed. Id. Therefore, in order to incorporate any extrinsic materials, the controlling federal law required the Subcontract to explicitly and precisely identify what material is being incorporated. The mere reference of the title and date of the Teaming Agreement is not sufficient to incorporate it into the Subcontract.

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

WHEREAS, the 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}. This reference in the preamble merely sets forth the historical background of the roles of the parties that led up to the formation of the Subcontract and does not suffice to constitute an incorporation. See,

⁵ Stevens' reliance on Carahsoft is misplaced. {Respondent's Initial Br. p. 22}. Stevens attempts to distinguish that case on the basis that the court held incorporation was not proper because the contract sought to be incorporated was never referenced in the other controlling agreement. {Id.}. This, however, does not form the basis of the court's holding. The Carahsoft court analyzed the incorporation under the Northrop standard set forth above. The court, in that analysis, held that the controlling agreement failed to "purport to incorporate any of its terms," meaning the document the plaintiff sought to incorporate. Carahsoft, 86 Fed. Cl. at 351. The court in an attempt to illustrate the absurdity of plaintiff's argument on incorporation also noted that the contract trying to be incorporated was not even mentioned in the controlling agreement. Yet, this notation does not alter the fact that the Carahsoft court's focus, and basis for holding no incorporation, was the analysis set forth in Northrop, namely whether the document was explicitly and precisely identified and the controlling agreement clearly communicated that the purpose of the reference was to incorporate the referenced material. As such, Stevens' position is untenable.

e.g., 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); 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"); Devan Motors of Fairfield, Inc. v. Infiniti Div of Nissan North America, 579 F.Supp.2d 294 (Dist. Conn. 2008) (recognizing that a "whereas" clause cannot create any right beyond those arising from the operative terms of the contract); Microtel Franchise & Dev. Corp. v. County Inn Hotel, 923 F. Supp. 415 (W.D. New York 1996) (same).

Further, as stated in section 1A, *supra*, the Subcontract's integration, termination, and other clauses expressly *contradict* the finding that the Teaming Agreement had been incorporated into the Subcontract. {Subcontract, Exhibit A to Complaint, p.3; R. 45; Teaming Agreement p.1, ¶ 2.02(h), ¶ 2.02(e); R. 147, 146}. The termination clause of the Teaming Agreement ¶2.02 conflicts with the termination provision and renewal clauses of the Subcontract. The Teaming Agreement contains no renewal provisions and terminates pursuant to various events as set forth in ¶2.02. The Subcontract allows for 9 renewal terms, provided that Stevens is not in default under section H.23. The existence of the renewal provisions in the Subcontract is incompatible with the termination clause in the Teaming Agreement. Additionally, section H.23 of the Subcontract provides for termination for different reasons than the termination clause of the Teaming Agreement. Accordingly, the termination provisions are also in conflict. The merger clauses of the Teaming Agreement and the Subcontract

also directly conflict. Teaming Agreement ¶6.02 allows DynCorp to assign its rights, but it does not allow Stevens to assign its rights. Section H.3 of the Subcontract, however, allows both parties to assign rights to any corporate affiliate. Again, these are incompatible provisions. Likewise, the dispute resolution provisions of the contracts do not align. Teaming Agreement ¶6.11 allows disputes to be resolved only between company executives of Stevens and DynCorp. Yet, section H.5 of the Subcontract omits any reference to resolution between company executives, and rather, allows either party to pursue any "legal, equitable, or administrative remedy." Lastly, the notice provisions of the two documents cannot be read in harmony. Teaming Agreement ¶6.08 allows notice to be sent to the two signatories to the agreement only. Section G.3 of the Subcontract requires notice to be sent to the corporate representatives identified in sections G.3 and G.4. The parties in sections G.3 and G.4 of the Subcontract differ from the notice parties in the Teaming Agreement. Accordingly, the trial court erred in finding that the Teaming Agreement had been incorporated into the Subcontract.

Stevens' argument that "if the parties did not intend to incorporate the Teaming Agreement into the Subcontract they could have simply omitted all references to it" is likewise misplaced. {Respondent's Initial Br. p. 14}. Prior agreements are not included in a subsequent agreement unless specifically excluded. Rather, prior agreements are *excluded unless explicitly and precisely included* in the subsequent agreement. See Northrop, 535 F.3d at 1345; Carahsoft, 86 Fed. Cl. at 350. Merely mentioning or referencing a document does not incorporate it into a contract. If such were true, one could not even specify a document in a contract as terminated, since the

specification of the document would serve to incorporate it into the contract. This is why there must be precise and express words denoting actual *incorporation*—not just reference—of a document into a contract in order for finding of incorporation to be proper. Accordingly, this Court must reverse the grant of partial summary judgment.

II. Stevens did not request partial summary judgment based on the incorporation of the Teaming Agreement into the Subcontract.

The trial court based its grant of partial summary judgment on the ground that the Subcontract incorporated the Teaming Agreement and that the Subcontract, together with the Teaming Agreement, constituted a "requirements contract." Stevens did not present this ground as a basis for summary judgment in its motion to the trial court, however.⁶ Now, in its brief, Stevens claims it "raised the incorporation issue *in its motion* seeking judgment, arguing that the teaming Agreement was incorporated into the Subcontract." {Respondent's Initial Br. p. 25} (emphasis added).⁷ This is incorrect.

The rules require that motions shall be made in writing and "shall state with particularity the grounds therefore" Rule 7(b)(1), SCRCP. It is well-established

⁶ In its brief, Stevens suggests that DynCorp never informed the trial court at the hearing that this was an issue not properly before the court. {Respondent's Initial Br. p. 11}. Stevens' misconstrues the dialogue exchanged between DynCorp and the trial court. At the hearing, the trial court *sua sponte* raised this issue of incorporation of the Teaming Agreement. DynCorp objected to the trial court's consideration of the Teaming Agreement in this context, saying it was not part of the pleadings (which pleadings contained the Subcontract) {Hearing Transcript dated October 21, 2009 p.38; R. 132}. While DynCorp objected, counsel also endeavored to answer the questions posed by the trial court. Stevens seems to argue that DynCorp should have refused to answer the trial court's questions at all in order to preserve DynCorp's position regarding incorporation. This is not required. DynCorp sufficiently raised its objection, and answering questions raised by the court does not waive DynCorp's objection to the court considering the Teaming Agreement. Moreover, questions posed by the trial court on an issue the court raised itself cannot cure the fact that Stevens' partial summary failed to comply with Rule 7, SCRCP.

⁷ Stevens never cites to the *motion itself* to support its position that the issue of incorporation was properly before the trial court. Stevens fails to cite to the motion because the partial summary judgment motion does not contain any such ground. See {Stevens' Motion for Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009; R. 390}.

that "the basic purpose of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefore." Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." Camp v. Camp, Op. No. 26775 (S.C. Sup. Ct. filed February 16, 2010) (Shearouse Adv. Sh. No. 7 at 76). As a result, it is the general rule that "a court may not grant relief beyond the limits or scope of such notice." Id.; see also Friedberg v. Goudeau, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) (reversing an order of the circuit court granting summary judgment on ground not properly before the court). When a motion fails to comply with the particularity requirement of Rule 7(b)(1)), the court should ask "whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly." Camp, at 79 (quoting 5 Wright & Miller, Federal Practice and Procedure § 1192, at 42).

As stated in DynCorp's initial brief, the trial court granted partial summary judgment based on a finding that the Subcontract incorporated the Teaming Agreement as part of the Subcontract, while claiming it was not considering the Teaming Agreement as "extrinsic evidence." {Order p. 3; R. 6}. However, despite Stevens' numerous hyperbolic protests in its brief to the contrary, it never requested partial summary judgment on the grounds that the Subcontract incorporated the Teaming Agreement and that, as such, there was an unambiguous contract on which it should

prevail as a matter of law.⁸ {Stevens' Motion for Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009; R. 390-91}. In its motion, Stevens *only* argued that *if* the trial court found that the Subcontract *alone* was ambiguous (a point regarding which *both* Stevens and DynCorp disagreed), then the trial court could rely on the Teaming Agreement as extrinsic evidence of the parties' intent regarding exclusivity to grant partial summary judgment. {Id.; R. 390-91}. Stevens stated as follows in its motion:

In support of its motion under Rule 12(c), Stevens relies on the Complaint and Answer thereto, the Subcontract Agreement attached to the Complaint, applicable precedent, and any memorandum of law which may be filed prior to a hearing on this motion.

Alternatively, in the event that this Court finds the Subcontract Agreement to be ambiguous, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Stevens moves this Court to enter judgment in its favor In support of its motion under Rule 56, Stevens relies on the Complaint and Answer thereto, the Subcontract Agreement entered into by the parties, the Teaming Agreement entered into by the parties which predated the Subcontract Agreement

{Id.; R. 390-91} (emphasis added). This is also made clear in Stevens' supportive memorandum, viz:

D. MOTION FOR JUDGMENT UNDER RULE 56.

In the event that this Court finds that the Subcontract Agreement, read as a whole, is susceptible to more than one reasonable interpretation on the issue of whether DynCorp is obligated to send all C-12/RC-12 and UC-35 aircraft to Stevens, it should still enter judgment in favor of Stevens.... Any ambiguity in the Subcontract

⁸ On numerous occasions in its brief, Stevens also states that DynCorp has "conceded" somehow that if the incorporation of the Teaming Agreement into the Subcontract were upheld, Stevens prevails as a matter of law. DynCorp has made no such concession and disagrees completely.

Agreement which this Court finds to exist must be resolved by considering evidence....Indeed, there is clear and unequivocal written contemporaneous evidence of the parties' intent at the time the Subcontract was contemplated and executed. That evidence comes in the form of the legally binding pre-contract contract, i.e., the Teaming Agreement.

{Stevens' Brief in Support of Motion for Judgment on the Pleadings, or in the alternative, a Motion for Partial Summary Judgment dated October 1, 2009, at pp. 19-22; R. 383-86} (emphasis added).

DynCorp thus had no notice of any motion on the grounds that the Teaming Agreement was *not* evidence, but instead was fully incorporated into the Subcontract as a matter of law. Instead, as can be clearly seen from the above excerpts, Stevens argued the Teaming Agreement was *evidence* which the trial court should consider to help determine intent if the trial court found the Subcontract alone was ambiguous.

Our rules require that the grounds for the motion be set forth with particularity in the *motion itself*. Accordingly, the trial court improperly granted partial summary on this basis. This Court should reverse.⁹

III. The trial court prematurely granted partial summary judgment before the parties completed any discovery and were given the opportunity to present a full and complete record to the trial court.

⁹ Despite Stevens' contention, this matter was properly preserved for review. DynCorp filed a Rule 59(e) Motion to Reconsider, arguing, *inter alia*, (1) that the court erred in incorporating the Teaming Agreement into the Subcontract, (2) that the court erred in *sua sponte* finding the Subcontract constituted a requirements contract, (3) that the court erred in granting partial summary judgment prior to allowing the parties to conduct discovery, and (4) that the court erred in failing to find the Subcontract was not exclusive. DynCorp pointed out that the trial court had improperly "necessarily" considered extrinsic evidence by considering the Teaming Agreement and that it should reverse itself for improperly doing so without giving DynCorp the opportunity to defend itself. DynCorp specifically argued the Teaming Agreement was not part of the pleadings, and the trial court implicitly agreed, denying both parties' motions for judgment on the pleadings. However, the trial court erred in nevertheless considering the Teaming Agreement over the objection of DynCorp and granting summary judgment to Stevens based on incorporation of same. {DynCorp's Motion and Memorandum Supporting Motion to Reconsider; R. 197-212; Hearing Transcript; R. 140-43}.

The trial court also ignored well-settled law that summary judgment must not be granted until the opposing party has had a full opportunity to complete discovery. It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002).

Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); Jones ex. rel. Jones v. Enter. Leasing Co.-S.E., 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009). The trial court recognized that no discovery had taken place on the issue of the parties' intent as to the central issue of exclusivity. {Hearing Transcript p. 46-47; R. 140-41}. As a result, the trial court requested that the parties submit "an outline as specifically as you can the information you think you're going to find out about what the other party's intent was" {Id. at p.49; R. 143}. Per the trial court's request, DynCorp submitted a list setting forth the discovery necessary to develop a full and fair record before summary judgment could be granted. {DynCorp Letter to the Court dated October 23, 2009; R. 158}. This list established that much discovery was still needed on this issue of exclusivity under the Subcontract. However, despite recognizing the fact that no discovery had occurred, the trial court granted partial summary judgment to Stevens on the issue of exclusivity under the Subcontract. In granting the motion, the trial court ignored the fact that discovery had

not been completed and considered the extrinsic evidence submitted by Stevens—the Teaming Agreement and two affidavits—in granting partial summary judgment. Because DynCorp had not received any opportunity to develop the evidentiary record, the trial court could not consider any other evidence that would refute the contentions of Stevens. Therefore, the trial court prematurely granted partial summary judgment. This Court should reverse.

Stevens disingenuously contends that the trial court considered no extrinsic evidence and limited its ruling to the Subcontract. {Respondent's Initial Br. p. 28}.

However, the trial court did not limit its decision to only the Subcontract. The trial court went outside of the Subcontract and determined, *sua sponte*, that the extrinsic evidence of the Teaming Agreement had been incorporated into the Subcontract and that such together constituted a "requirements" contract.¹⁰ Despite its request to be able to do so, DynCorp was given no opportunity to present any evidence to counter the extrinsic evidence considered by the trial court. DynCorp was precluded from developing any offering any evidence as to the parties' intent on the issue of incorporation or other aspects of the parties' intent regarding exclusivity. Therefore, the trial court prematurely granted partial summary judgment.

Stevens alleges that discovery was irrelevant because "DynCorp told the trial court that if it found the Subcontract to be unambiguous . . . there would be no need for discovery." {Respondent's Initial Br. p. 26-27}. This statement ignores that the trial court went outside of the Subcontract in its considerations. DynCorp was not addressing the incorporation of the Teaming Agreement or the ambiguity of the

¹⁰ Stevens also submitted affidavits that addressed the issue surrounding exclusivity and the Teaming Agreement.

incorporation issue itself when it made those comments, which Stevens well knows. Rather, DynCorp's position was, and remains, that the unambiguous Subcontract *alone* does not create an exclusive relationship between the parties. The trial court did not find that the Subcontract *alone* entitled Stevens to partial summary judgment. Rather, the court found the Subcontract, together with an improperly incorporated Teaming Agreement, created an exclusive relationship.

Moreover, Stevens now alleges that the Teaming Agreement does not constitute extrinsic evidence. {Respondent's Initial Br. p. 28}. Yet, as set forth above, Stevens presented the Teaming Agreement to the trial court as extrinsic evidence to support its motion for partial summary judgment. DynCorp also argued the Teaming Agreement was evidence, not an incorporated part of the Subcontract. {Hearing Transcript dated October 21, 2009 p.38; R. 132}. Despite *both parties* to the contract relationships here saying the Subcontract *alone* was unambiguous, and despite *both parties* describing the Teaming Agreement as *evidence*, the trial court ruled that the agreement between the parties was the Subcontract and an incorporated Teaming Agreement. This is clear error, and this Court should reverse.

Finally, Stevens contends that DynCorp's failure to submit an affidavit under Rule 56(f) of the South Carolina Rules of Civil Procedure precludes DynCorp from arguing that the trial court improperly granted partial summary judgment prior to allowing DynCorp to conduct discovery. {Respondent's Initial Br. p. 28-29; 47-48}. This argument is without merit. Our Supreme Court has specifically rejected this Rule 56(f), SCRPC, argument when the "need for further discovery is otherwise made known to the trial court" via an unsworn letter that sets forth the need for further

discovery. Baughman v. AT&T, 306 S.C. 101, 112 n.4, 410 S.E.2d 537, 543 n.4 (1991) (rejecting an argument that an affidavit was required to oppose summary judgment on the grounds that further discovery was needed and holding that strict compliance with Rule 56(f) is not required where "the need for discovery is otherwise made known to the trial court"). DynCorp complied with the Baughman requirement. DynCorp argued summary judgment was premature and asked for discovery in the event the trial court decided not to rule on the pleadings. Also, per the trial court's request, it submitted a list setting forth the discovery necessary to develop a full and fair record before summary judgment could be considered. {DynCorp Letter to the Court dated October 23, 2009; R. 158}.

Simply stated, the trial court based its decision to grant the partial summary judgment on affidavits and extrinsic evidence, including the Teaming Agreement, submitted solely by Stevens. The trial court failed to afford DynCorp any opportunity to conduct discovery to refute the extrinsic evidence or to address the exclusivity and incorporation issues. Failure to afford DynCorp this opportunity prior to granting Stevens' motion for partial summary judgment constitutes error. This Court should thus reverse the grant of partial summary judgment.

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

A. The terms relied on by Stevens cannot establish exclusivity under the unambiguous Subcontract.

Stevens claims that various terms in the Subcontract show an exclusive relationship with DynCorp. {Respondent's Initial Br. p. 30-36}. However, none of these terms actually support Stevens' position. DynCorp will address each in turn.

First, Stevens claims that the Subcontract's definition of the term "Aircraft," in its capitalized form, requires DynCorp to send Stevens "all" C-12/RC-12 and UC-35 aircraft. {Respondent's Initial Br. p. 31}. By relying on this single term of "all" in the Subcontract's definition of "Aircraft," Stevens again fails to understand that the court reviews the contract as a whole to determine whether the Subcontract created an exclusive relationship between the parties. Price v. United States, 46 Fed. Cl. 640, 647 (2000); Hardee v. Hardee, 248 S.C. 84, 92, 558 S.E.2d 264, 267 (Ct. App. 2001). Stevens asks this Court ignore the other terms in the Subcontract that refute exclusivity. While the Subcontract does define the term "Aircraft," the Subcontract does *not* use the general term "Aircraft" in describing the *any of the work* to be performed by Stevens. 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.¹¹ See, e.g., U.S. 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).

¹¹ Section B of the Subcontract contains the statement of work. {Subcontract, Exhibit A to Complaint p.6; R. 57-64}. Critically, the statement of work allots no amount or quantity for any of the work items disputed set forth in the Subcontract. The Subcontract sets forth the pricing schedule and statement of work that controlled the work to be provided by Stevens. {Id. at ¶B.1-B.4, C.1; R. 57-63, 64}. The pricing schedule listed the supplies and services to be provided by Stevens under the Subcontract. {Subcontract, Exhibit A to Complaint; R. 57-63}. For each base/option year, the pricing schedule contains the applicable terms of sale. {Id.; R. 57-63}. Importantly, with respect to the quantity and amount columns, the parties intentionally left blank the specific quantity or amount for any of the work. {Id.; R. 57-63}. Indeed, under the unambiguous 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. This shows there was no exclusivity.

Moreover, Stevens' reliance on the usage of the word "Aircraft" in the Subcontract is unavailing.¹² {Respondent's Initial Br. p. 31; 34}. To adopt Stevens' position as to the usage of "Aircraft" would lead to absurd, repetitive terms in the Subcontract. For example, Stevens cites to the use of "Aircraft" on page 15 in section B.1.A. to support its position. That paragraph reads, in relevant part, that "[Stevens] as a Subcontractor to DynCorp, shall provide . . . maintenance and repair of the Government's fleet of C/12-RC-12 Aircraft . . . as specifically set forth in Section B."

~~{Subcontract p.15, Exhibit A to Complaint, R. 57}.~~ If this Court accepts Stevens' claim that the term "Aircraft" means "all Army RC/C-12 and UC-35 aircraft covered under the Prime Contract," at all times in the Subcontract, then that clause would actually read: "[Stevens] as a Subcontractor to DynCorp, shall provide . . . maintenance and repair of the Government's fleet of C/12-RC-12 all Army RC/C-12 and UC-35 aircraft covered under the Prime Contract . . . as specifically set forth in Section B." That sentence is nonsensical and illustrates Stevens' position is without merit. The Subcontract specifically limits which planes Stevens can work on when describing the work Stevens is to perform. In particular, the Statement of Work in section b of the Subcontract is specifically limited to C-12/RC-12 planes and does not mention UC-35 planes or the word "Aircraft." Those limitations and descriptions cannot be twisted into something unintended by the use of definitional terms as Stevens attempts.

Next, Stevens argues the Subcontract contains "mandatory language" that evidences the Subcontracts' exclusivity. {Respondent's Initial Br. p. 32}. The

¹² Importantly, none of the citations to the word "Aircraft" in the Subcontract on which Stevens relies are used in any part of the Subcontract that outlines the work to be performed by Stevens.

mandatory language relied on by Stevens does *not* relate to obligations that *DynCorp* has to perform. Rather, the language cited relates to the mandatory obligations that *Stevens* must perform under the Subcontract. {Id.}. If Stevens failed to perform the mandatory obligations then it would be in default under the Subcontract, but the existence of such obligations under a subcontract in no way speaks to any exclusivity arrangements between the parties. Exclusivity and obligation to perform subcontract requirements are two distinct principles.

Stevens also argues the cure provisions in the Subcontract's termination clause counters DynCorp's claim that no exclusivity exists. {Respondent's Initial Br. p. 35}. This argument is without merit. These cure provisions are in place to protect DynCorp from Stevens' default for work already sent to Stevens via a purchase order. Likewise, Stevens' argument that the Subcontract's automatic renewal provisions support exclusivity is flawed. {Id. at p. 36}. Stevens fails to realize that the automatic renewal provisions are in place to allow the Subcontract to self-renew provided Stevens is complying with its obligations under the contract. The Subcontract will continue to renew as long as Stevens is not in default for work sent to it by DynCorp for the extension terms as specified in the Subcontract. Lastly, Stevens contends the events of default in the Subcontract refute DynCorp's position. {Id. at p. 36}. The events of default also exist to address work being performed by Stevens pursuant to a purchase order sent by DynCorp. Therefore, these Subcontract provisions control the work being performed by Stevens pursuant to a purchase order and allow DynCorp to protect itself in the event that Stevens fails to comply with its obligations under the Subcontract.

B. The relevant federal common law precludes a finding of an exclusive requirements contract.

Stevens misunderstands Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998). Stevens claims Coyle's is distinguishable because there is nothing in the Subcontract that suggests Stevens' right to service aircraft "is contingent on some 'assignment' by DynCorp." {Respondent's Initial Br. p. 37}. However, under the Subcontract's pricing schedule a quantity only exists upon *issuance of a purchase order* to Stevens when it sends designated C-12/RC-12 planes for maintenance and repair. In addition, Stevens incorrectly argues that the Coyle's court held, and DynCorp espoused, that no exclusivity existed because the contract there lacked a quantity term. {Respondent's Initial Br. p. 37}. This again mischaracterizes DynCorp's argument regarding Coyle's and the holding there. In its initial brief, DynCorp argued that Coyle's was analogous because, as the court in Coyle's found, the issuance of the purchase order by DynCorp is the controlling determination. See DynCorp's Initial Br. p. 20. The Coyle's court did not find the contract lacked exclusivity based on the absence of the quantity term, as suggested by Stevens. Rather, the court found the contract lacked exclusivity because the quantity to be sent the plaintiff (in the position of Stevens here) was directly dependant on an assignment from HUD (in the position of DynCorp here). Coyle's Pest Control, 154 F.3d at 1305. This is the situation here. The quantity of planes to be sent to Stevens is directly dependant on the issuance of a purchase order by DynCorp. Just as the plaintiff in Coyle's, Stevens can only enforce the Subcontract "for services actually ordered [by DynCorp] and provided by Stevens." Therefore, Stevens' position is without merit

Stevens also argues that the trial court properly relied on Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346 (1993). {Respondent's Initial Br. p. 40}. The rationale of "implied exclusivity" relied upon by the Ceredo court has been rejected. Ceredo relied upon the holding of Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982), in order to find implied exclusivity. The court in Coyle's specifically rejected this concept, holding 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 implied requirement contract." Coyle's Pest Control, 154 F.3d at 1304. Stevens has recognized this holding. {See Respondent's Initial Br. p. 41 (stating that "[t]he Coyle's court said that Torncello does not stand for these propositions")}. Therefore, the trial court's reliance on the "implied exclusivity" rationale of Ceredo was improper. This Court should follow Coyle's and reverse.

Stevens also contends that DynCorp has suggested that a contract must expressly use the word "exclusive" or no exclusivity can be found. {Respondent's Initial Br. p. 41}. DynCorp advanced no such argument. Rather, DynCorp has consistently maintained the Subcontract, read alone and as a whole, contains no exclusivity, and its interpretation is controlled by Coyle's.

Stevens also argues that the Subcontract is not a government contract subject to the federal acquisition clauses. {Respondent's Initial Br. p. 40, n. 18}. This argument completely ignores the fact Stevens agreed in the section H.5 of the Subcontract that the "Subcontract will be construed and interpreted according to the federal common law of *government contracts*" {Subcontract p. 30, Exhibit A to Complaint; R.

72}. Due to length constraints applicable to this reply brief, DynCorp incorporates its argument on this issue as set forth in its initial brief.

V. The record does not support that Stevens is entitled to partial summary judgment even if the trial court erred in incorporating the Teaming Agreement into the Subcontract.

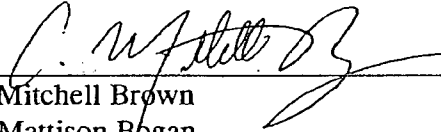
Lastly, Stevens sets forth an argument that seems to claim the entire record supports the trial court's grant of partial summary judgment even if the trial court improperly incorporated the Teaming Agreement into the Subcontract. {Respondent's Initial Br. p. 48}. The record does not support such a conclusion.

Stevens contends that DynCorp failed to produce any evidence with respect to how the Subcontract should be interpreted. {Respondent's Initial Br. p. 46}. This is a misrepresentation of what was argued to the trial court. DynCorp argued the unambiguous Subcontract alone established no exclusive relationship between the parties as a matter of law, and that it was entitled to judgment on the pleadings. This motion was denied. DynCorp was precluded from presenting any evidence as to the issue of exclusivity or to the issue of incorporation by the trial court's grant of partial summary judgment prior to allowing *any* such discovery to occur. Therefore, the record does not support such a conclusion, and in fact, supports reversal of the trial court's order.

CONCLUSION

Based on the foregoing, this Court should reverse the order of the trial court granting partial summary judgment in favor of Stevens. Moreover, this Court should find that the Subcontract does not create an exclusive relationship between DynCorp and Stevens and remand to the trial court to enter an order consistent with this ruling.

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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

Stevens Aviation, Inc., ... Respondent,

v.

DynCorp International LLC and Science Applications Defendants,
International Corporation, ...

Of whom DynCorp International LLC is, ... Appellant

PROOF OF SERVICE

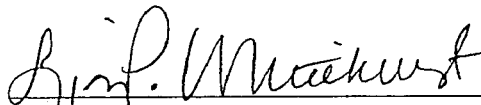
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for DynCorp International LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by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

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Lisa P. Whitehurst
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Dated: June 29, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-23-7229

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Of whom DynCorp International LLC is, ... Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

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TAB 4

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Stevens Aviation, Inc., Respondent,

v.

DynCorp International LLC, and Science
Applications International Corporation,
Defendants,

of whom DynCorp International LLC is,
Appellant.

Appeal from Greenville County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4857
Heard June 22, 2011 – Filed July 27, 2011

REVERSED

C. Mitchell Brown, A. Mattison Bogan, and
Michael J. Anzelmo, all of Columbia; and
William S. Brown, Lane W. Davis, and
Steven E. Buckingham, all of Greenville, for
Appellant.

Keith D. Munson and Catherine R. Atwood,
both of Greenville; and Linda L. Shapiro,
Kathy A. Wisniewski, and John W. Rogers,
all of St. Louis, MO, for Respondent.

THOMAS, J.: In this action, DynCorp International LLC (DynCorp) appeals a circuit court's grant of partial summary judgment to Stevens Aviation, Inc. (Stevens) on the interpretation of a contract between DynCorp and Stevens. DynCorp argues the circuit court erred in (1) granting partial summary judgment on grounds not before it; (2) incorporating a prior agreement between Stevens and DynCorp into a later agreement between them; (3) holding the later agreement was an enforceable requirements contract;

and (4) ruling on these issues without permitting DynCorp to conduct further discovery. We reverse.

FACTS & PROCEDURAL HISTORY

Sometime before March 2000, the United States federal government issued a request for bids on an aviation maintenance contract for C-12, RC-12, and UC-35 airplanes owned by the United States Army and Navy (the Prime Contract). The Prime Contract provides that the contractor shall conduct "strip and paint" services, "aircraft condition inspection" (ACI), "site organizational maintenance," and "over and above maintenance" of C-12s, RC-12s, and UC-35s.

On March 16, 2000, DynCorp and Stevens entered a "Teaming Agreement" that imposed certain duties on each party to coordinate a proposal to secure the Prime Contract, with DynCorp as the contractor and Stevens as the subcontractor. The Teaming Agreement also explicitly incorporated two attachments. First, it incorporated an attachment titled "Statement of Work," which provided that Stevens "shall be proposed to perform" ACIs, "strip and paint requirements," and "depot level maintenance for the C-12/RC-12 aircraft fleet" above DynCorp's capabilities. Second, it incorporated an attachment titled "Proprietary Data Provisions," which limited both parties' rights to disclose each other's proprietary business information.

DynCorp was subsequently awarded the Prime Contract, and on March 20, 2001, the parties entered a "Subcontract" that governs their relationship in performing the Prime Contract. Two provisions of the Subcontract's "Preamble" provide the following:

WHEREAS, the 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 U.S. Army Contract DAAH23-00-C-0226 ("Prime Contract");

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

.....

NOW THEREFORE, in consideration of the promises, mutual covenants and agreements contained herein, the parties hereto agree as follows:

Two pages later, the Subcontract defines "Aircraft" as "all Army RC/C-12 and UC-35 aircraft covered under the Prime Contract."

Section C of the Subcontract specifically addresses Stevens's duties regarding the work to be performed for DynCorp:

C.1 STATEMENT OF WORK/TECHNICAL

SPECIFICATION

A. The work shall be performed in accordance with the [Prime Contract's Statement of Work] (Contract DAAH23-00-C-0226; Attachment 1).

B. C-12/RC-12 STRIP AND PAINT. [Stevens] shall provide all labor, services, facilities, equipment, and direct and indirect parts and materials required to strip and completely repaint aircraft (for other than ACI requirements), at the direction of DynCorp. Such work will be performed in accordance with the [Prime Contract's Statement of Work], Section 4 (4.1.3)

C. AIRCRAFT CONDITION INSPECTION (ACI). [Stevens] shall provide all labor, services, equipment, tools, facilities, tooling, lubricants, excluding engine oil, direct and indirect parts and material, fuel, and strip and repaint services required to perform all the requirements of Appendix P [the Prime Contract's] Statement of Work Items found defective beyond those addressed by Appendix P will be handled on an Over-and-Above basis.

D. OVER AND ABOVE MAINTANENCE. [Stevens] shall perform both Depot and Non-Depot Maintenance in accordance with Sections 4.0 AND 5.0 of the [Prime Contract's Statement of Work]. DynCorp will reimburse [Stevens] for the labor required for:

.....

(3) Other over and above tasks, as directed by DynCorp.

.....

E. SITE ORGANIZATIONAL MAINTENANCE. As directed by DynCorp, [Stevens] shall accomplish work, at [Stevens]'s facility, that would normally be performed at the site by the site personnel.

In August 2009, Stevens filed a complaint against DynCorp, alleging DynCorp breached the Subcontract by diverting C-12s, RC-12s, and UC-35s to other businesses for maintenance work covered by the Subcontract. After the parties filed numerous motions, the circuit court granted partial-summary judgment to Stevens. The circuit court held the Subcontract incorporated the Teaming Agreement and constituted an enforceable requirements contract for specified maintenance of the C-12s, RC-12s, and UC-35s covered by the Prime Contract. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting partial summary judgment on grounds not before it?
2. Did the circuit court err in incorporating the Teaming Agreement into the Subcontract?
3. Did the circuit court err in finding the Subcontract created an enforceable requirements contract as a matter of law?

4. Did the circuit court err in granting partial summary judgment without permitting DynCorp to conduct discovery?

STANDARD OF REVIEW

When reviewing the grant of summary judgment, "this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Wallace v. Day, 390 S.C. 69, 73, 700 S.E.2d 446, 448 (Ct. App. 2010) (per curiam) (citations and internal quotation marks omitted).

A contract or provisions within it are unambiguous if they are not "susceptible to more than one reasonable interpretation" **[1] TEG-Paradigm Envtl., Inc. v. U.S.**, 465 F.3d 1329, 1338 (Fed. Cir. 2006). "When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." Id. (internal quotation marks omitted).

I. Grounds Not Before the Circuit Court

DynCorp asserts it lacked notice the circuit court would consider whether the Subcontract incorporated the Teaming Agreement. However, DynCorp did not make this argument in its Rule 59(e) motion or memorandum supporting that motion. Therefore, the issue is not preserved for our review. See In re Estate of Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the circuit court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.").

II. Incorporating the Teaming Agreement

DynCorp next argues the circuit court erred in incorporating the Teaming Agreement into the Subcontract. We agree.

To incorporate the terms of extrinsic material, a contract need not use "magic words." Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1346 (Fed. Cir. 2008) (internal quotation marks omitted). However, the contract "must 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 (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)." Id. at 1345.

Here, the Subcontract identifies the Teaming Agreement with sufficient particularity to incorporate the entire document, but it does not sufficiently communicate an intention to incorporate the Teaming Agreement as a whole. The provision is contained in one of the preamble's "whereas" clauses, and generally, "whereas" clauses "are not considered 'contractual' and cannot be permitted to control the express provisions of the contract" KMS Fusion v. United States, 36 Fed. Cl. 68, 77 (1996). Read in its entirety, moreover, the Subcontract reveals that the parties did not intend to incorporate the Teaming Agreement as a whole. Although incorporation does not require magic language, the Subcontract incorporated other items by using language with such clarity

that it is obvious the parties understood how to incorporate substantive provisions of the document into the Subcontract. First, the Subcontract explicitly provides that over fifty federal regulations were "hereby incorporated." Second, the integration clause in the Preamble immediately before the Teaming Agreement language provides that the Subcontract supersedes prior written agreements except for the "Proprietary Data Exchange Agreement executed by the parties on 16 March 2000." [2] See TEG-Paradigm Envtl., 465 F.3d at 1339 ("One common way to incorporate extrinsic evidence is through an integration clause that expressly incorporates the extrinsic evidence.").

If the Subcontract does not incorporate the entire Teaming Agreement, Stevens claims the Subcontract's reference to the Teaming Agreement merely incorporates the Teaming Agreement's provisions that establish the "roles and responsibilities" of the parties. Yet this contention must fail because it would require this court to handpick which duties to incorporate without guidance from the Subcontract. The Subcontract's reference to the "roles and responsibilities of the parties" established by the Teaming Agreement is hardly precise enough to identify which roles and responsibilities the Subcontract incorporates. The Teaming Agreement establishes various duties, many of which would be inapposite to the parties' relationship once the Subcontract was created. For example, the Teaming Agreement imposes a duty on DynCorp to submit a proposal for the Prime Contract, a duty on DynCorp to award the Subcontract to Stevens, and a duty on Stevens to help DynCorp develop the proposal for the Prime Contract. Consequently, the Subcontract does not clearly show the Teaming Agreement was intended to be relevant for more than background law or negotiating history. The circuit court erred in finding the Teaming Agreement was incorporated into the Subcontract.

III. Requirements Contract

For various reasons, DynCorp contends the circuit court erred in holding the Subcontract was an enforceable requirements contract for maintenance of C-12s, RC-12s, and UC-35s. In the interest of clarity, DynCorp's arguments condense to two points of interest: the Subcontract does not (1) apply to UC-35s or (2) create an exclusive relationship between the parties for all of the services covered. We agree with both contentions.

a. Applicability to UC-35s

First, DynCorp maintains the Subcontract does not apply to UC-35s. We agree. The Subcontract does not include per-unit pricing for UC-35s, and therefore, it cannot be construed as an enforceable requirements contract for that aircraft. Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346, 351 (1993) ("[P]er-unit pricing . . . is an essential element in a requirements contract showing that the supplier is bound to perform regardless of the quantity of work." (internal quotation marks omitted)). Consequently, the circuit court erred in finding the Subcontract was an enforceable requirements contract as to UC-35s governed by the Prime Contract.

b. Exclusivity of the Contractual Relationship

Second, DynCorp insists the Subcontract does not create an exclusive relationship between the parties regarding all of the services it addresses. [3] We agree.

To create an enforceable requirements contract under the applicable law, a contract need

not include the word "exclusive" or minimum quantity terms; rather, the seller merely must have "the exclusive right and legal obligation to fill all of the buyer's needs for the goods or services described in the contract. . . . [A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller." Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302, 1305 (Fed. Cir. 1998) (alterations in original) (internal quotation marks omitted). Terms that suggest exclusivity include language that the seller must "furnish all labor . . . and related services" to the buyer or the buyer must order services for "all its properties" from the seller. See id. at 1305. Even if a contract contains such language, however, the contract is not an exclusive requirements contract if the contract merely requires a party "to furnish all labor . . . and related services on assigned properties" Id. at 1305-06 (first emphasis omitted).

Here, the Subcontract includes language that at first glance suggests exclusivity. The Subcontract states Stevens "shall provide all . . . [ACI] required to perform Appendix P of the Prime Contract's Statement of Work." However, 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." Coyle's Pest Control, 154 F.3d at 1305 (internal quotation marks omitted). As to the strip and paint services, the Subcontract states that Stevens "shall provide all . . . services required to strip and completely repaint aircraft (for other than [ACI] requirements) at the direction of DynCorp." Similarly, the Subcontract provides Stevens would perform site organizational maintenance and over and above maintenance "as directed by DynCorp." Consequently, we reverse the circuit court's holding that the Subcontract is an enforceable requirements contract for C-12, RC-12, and UC-35 maintenance. [4] DynCorp must pay Stevens for the services under the Subcontract only to the extent that maintenance was performed. See id. at 1306 (holding that because a contract was "not enforceable as either a requirements contract or as an indefinite quantity contract[,] . . . Coyle [wa]s entitled to payment only for services actually ordered by HUD and provided by Coyle").

IV. Completion of Discovery

Lastly, DynCorp argues the circuit court erred in granting partial summary judgment because it considered extrinsic evidence introduced by Stevens without permitting DynCorp to conduct discovery to refute that evidence. Because the Teaming Agreement is not incorporated into the Subcontract, we agree the circuit court erroneously considered extrinsic evidence. Despite this mistake, however, we grant partial summary judgment without further discovery on the issues before us. Our holdings are a matter of law, and therefore, further discovery of extrinsic evidence to interpret the provisions relevant to this appeal is unnecessary. See TEG-Paradigm Envtl., 465 F.3d at 1338 ("When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." (internal quotation marks omitted)).

CONCLUSION

For the aforementioned reasons, the ruling of the circuit court is

REVERSED.

HUFF and WILLIAMS, JJ., concur.

[1] Both the Teaming Agreement and the Subcontract provide they are to be construed using the federal common law of government contracts and, if that law is not dispositive, the laws of Texas.

[2] In response to a question from the bench during oral argument, Stevens's answer suggested the Subcontract's mention of the "Proprietary Data Exchange Agreement executed on 16 March 2000" refers to a document titled "Proprietary Data Provisions," which is part of the Teaming Agreement and was executed on March 16, 2000. Thus, if the Teaming Agreement were incorporated in total, the incorporation of this proprietary business information agreement was unnecessary.

[3] DynCorp further emphasizes that the Subcontract fails to include certain language required by Federal Acquisition Regulations (FAR) to create an enforceable requirements contract. However, the FAR requiring that language does not apply to the Subcontract because it is a private contract. See 48 C.F.R. § 1.104 ("The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded."); 48 C.F.R. § 2.101 ("Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease"). In addition, the Subcontract did not incorporate the FAR despite incorporating fifty other FARs. See Northrop Grumman Info. Tech., 535 F.3d at 1344 ("[T]his court has been reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation." (internal quotation marks omitted)).

[4] Although the ACI provision does not include "at the direction" language, Stevens fails to argue the nonexclusive provisions—the provisions addressing strip and paint, site organizational, and over and above maintenance—are divisible from the remaining portions of the Subcontract such that the Subcontract could create an exclusive relationship. Therefore, we may not consider that argument to enforce the Subcontract. See l'On LLC v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief.").

TAB 5

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Please
For Greenville County
Honorable R. Lawton McIntosh, Circuit Judge
Civil Action No. 2009-CP-23-07229

SC Court of Appeals Case Tracking No. 2010150029

Stevens Aviation, Inc., Respondent,

v.

DynCorp International LLC,
and Science Applications
International Corporation, Defendants,

Of Whom DynCorp
International LLC Appellant.
is,

**RESPONDENT'S PETITION FOR REHEARING,
SUGGESTION OF REHEARING *EN BANC*,
AND MEMORANDUM IN SUPPORT**

Plaintiff/Respondent Stevens Aviation, Inc. ("Stevens"), pursuant to SCACR 221(a) and SCACR 219(a), respectfully petitions this Court for rehearing, and suggests that the rehearing should be *en banc*. Rehearing is appropriate because this Court overlooked and misapprehended both the law governing interpretation of contracts, as well as the status of the case below, when it focused on only seven words in two sentences of a lengthy

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contract and when it “granted” summary judgment to a party who had never moved for summary judgment in the court below. Rehearing *en banc* is necessary to maintain the uniformity of this Court’s decisions on contract interpretation, and, in addition, because the issues created by this Court’s opinion are of exceptional importance.

PARTICULAR POINTS OVERLOOKED OR MISAPPREHENDED

In “granting” Defendant/Appellant DynCorp International LLC (“DynCorp”) partial summary judgment this Court overlooked or misapprehended both the law and the facts. More specifically, this Court erred in the following ways:

- *By effectively rendering a subcontract – which had been governing the parties’ relationship for 10 years – a complete nullity based on its holding that the subcontract imposed no obligation on DynCorp to ever send even a single aircraft to Stevens.* This Court arrived at its conclusion that the subcontract created no obligation on DynCorp to send *any* aircraft to Stevens by focusing *exclusively on seven words found in two sentences* in the subcontract. This Court concluded that the words “at the direction of” and “as directed by” as used in these two sentences governed its entire interpretation. This finding ignores the law requiring that a contract be read as a whole, and the law prohibiting a contract interpretation which

unnecessarily renders some provisions superfluous and a complete nullity.

- *By erroneously holding that the teaming agreement entered into by the parties was not incorporated into their subsequently-executed subcontract.* This Court recognized that no "magic words" are needed to incorporate a document into a contract, and that the subcontract at issue identified the teaming agreement with "sufficient particularity to incorporate the entire document." Despite this, the Court went on to find that the teaming agreement was not incorporated into the subcontract because its identification was set forth only in a "whereas clause," and the Court could not sufficiently extract from the teaming agreement the "roles" the parties were to play as "prime contractor" and "subcontractor." In treating the "whereas clause" identifying the teaming agreement as completely non-consequential this Court ignored its own holdings as well as federal law. This Court compounded its error when it failed to consider the fact that the teaming agreement itself expressly and precisely sets out the roles the parties would occupy as "prime contractor" and "subcontractor" if and when they entered into a subcontract agreement.

- *By usurping the role of the trial court in granting summary judgment to DynCorp on a contract interpretation issue never considered below.* In its opinion, this Court declares: “we grant partial summary judgment” to DynCorp. But, the issue of whether DynCorp was entitled to partial summary judgment was not on appeal; indeed, DynCorp never even moved for summary judgment below. 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. This Court 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.

For these reasons, as more fully set forth below, rehearing should be

granted.

MEMORANDUM IN SUPPORT

I. BACKGROUND

This case centers on a subcontract agreement entered into by DynCorp and Stevens which was to govern their relationship for at least 10 years. Stevens contends the subcontract agreement required DynCorp to use Stevens as the exclusive provider of aviation maintenance services for

certain specified aircraft sent to DynCorp by the U.S. Army under Contract DAAH23-00-C-0026. Almost 9 years into the subcontract agreement, Stevens discovered that DynCorp had started diverting aircraft to other facilities for maintenance. This litigation ensued.

In the trial court, Stevens moved for partial judgment on the pleadings, or alternatively, for partial summary judgment, as to the issue of whether the subcontract required DynCorp to use it as the "exclusive" provider of maintenance services. Stevens argued that: (1) the subcontract incorporated a prior "teaming agreement" entered into by the parties; and (2) with or without the teaming agreement, the only reasonable interpretation of the subcontract was that such an "exclusive" relationship existed.

The trial court found that the teaming agreement was incorporated into the subcontract. It also found that, *with the incorporated teaming agreement*, the only reasonable interpretation of the subcontract was that it created an obligation on the part of DynCorp to send all the identified aircraft to Stevens for the specified maintenance services. It thus granted Stevens' motion seeking partial summary judgment. In doing so, the trial court made no findings as to how the subcontract should be interpreted without the teaming agreement.

DynCorp appealed the trial court's partial summary judgment order. In its appeal, DynCorp never contested the trial court's interpretation of the subcontract with the "incorporated" teaming agreement; rather, DynCorp argued only that the trial court wrongly concluded that the teaming agreement was incorporated into the subcontract. This Court entered its Opinion on July 27, 2011, in which it reversed the trial court's finding of incorporation. This court then announced that it was "granting" partial summary judgment to DynCorp because the subcontract imposed no obligation on DynCorp to ever send any aircraft to Stevens during its 10-year term. Stevens now petitions for rehearing.

II. ARGUMENT

A. This Court Misapprehended The Governing Law And Overlooked Numerous Contractual Provisions In Holding That The Subcontract Was Not A Requirements Contract And Thus DynCorp Had No Obligation To Send Even A Single Aircraft To Stevens During Its 10 Year Term.

In holding that the subcontract was not an enforceable "requirements contract" which obligated DynCorp to send all aircraft to Stevens for maintenance, this Court effectively found that it imposed no obligation on DynCorp to ever send even a single aircraft to Stevens during its 10-year term. Indeed, 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. By rejecting the former, this Court effectively found the latter. The result of this finding is that the subcontract is void in its entirety due to a lack of mutuality of obligation, *i.e.*, while it obligated Stevens to perform work at a certain price, it imposed no obligation on DynCorp to allow Stevens to do any work. *See, e.g., Torncello v. U.S.*, 231 Ct.Cl. 20, 761-762 (1982) (noting that supply contract that had no minimum quantity and that did not require buyer to turn to seller for all of the requirements would be "illusory" and "unenforceable").

In arriving at its conclusion that the subcontract is effectively void, this Court overlooked and misapprehended at least two fundamental and well-settled rules of contract interpretation. First, in interpreting a contract, a court must construe it "as a *whole* and in a manner which gives *reasonable* meaning to *all* of its parts." United International Investigative Services v. United States, 109 F.3d 734, 737 (Fed. Cir. 1997) (emphasis added). Second, and relatedly, a contract cannot be interpreted in a way that renders provisions meaningless or superfluous. *See Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

This Court did not consider the subcontract as a whole. Rather, this Court arrived at its contractual interpretation by focusing exclusively on two clauses in a single section of the subcontract (Section C.1). And, out of these two clauses, this Court cited to only seven words — “at the direction of” and “as directed by” — in support of its conclusion that the subcontract was not a requirements contract. *See* Opinion, p. 9. In doing so, this Court ignored the numerous provisions of the subcontract which support a finding of exclusivity, and it did so even though it expressly acknowledged that these provisions existed. *See* Opinion, p. 9 (“the Subcontract includes language that at first glance suggests exclusivity”). For example, this Court did not address in its opinion any of the following provisions in the subcontract, or any of the following arguments which Stevens offered about them:

- The parties chose to define the word “Aircraft” as used in the subcontract as “*All* Army RC/C-12 and UC-35 aircraft covered under the Prime Contract.” *See* R. p. 48. (emphasis added). “All” has a legal meaning which encompasses an entirety;
- The language in Section B.1 of the subcontract *mandates* that Stevens “shall” provide certain specified work and materials to DynCorp, and the expressed exception to that mandatory language — which excuses performance in the event government funding runs out — makes sense only if DynCorp is *required* to purchase *something* from Stevens in the first place. *See* R. p. 57;
- The lengthy termination provisions of the subcontract which expressly purport to create DynCorp’s right to end the

subcontract, and which detail with precision the prerequisites for DynCorp terminating its [now non-existent] obligations under the subcontract *See* R. pp. 83-84; *see also* R. p. 74. If, as this Court found, DynCorp had no obligation to send any aircraft to Stevens there would be no need for these clauses as DynCorp could simply unilaterally choose to send no aircraft to Stevens, and it would be free to terminate the subcontract for no reason at all;

- The automatic renewal provisions of the subcontract which purport to obligate DynCorp to extend the subcontract each time the underlying government contract is extended. These provisions have no meaning under the current interpretation afforded by this Court because they entitle Stevens to nothing other than a renewal of a contract that effectively promises nothing to Stevens since DynCorp never has to send it any work;
- The provisions of the subcontract's Preamble setting forth the intent of the parties, including the parties' express acknowledgement that "the Prime Contract provides for the maintenance and repair of the Government's *fleet* of C-12/RC-12 and UC-35 *Aircraft*" and that DynCorp needs Stevens' experience to fulfill the Prime Contract. *See* R. p. 45; and
- The fact that the Statement of Work for the underlying government contract — which makes clear that the aircraft subject to its provisions includes the entire "worldwide fleet" of C-12/RC-12 and U-35 aircraft — is expressly incorporated into the subcontract, and is referenced multiple times in describing the work that Stevens is to perform. *See* R. p. 64.

Even if this Court was correct in ignoring all of these provisions, and in focusing exclusively on Section C.1 of the subcontract to interpret the subcontract (as it did), it still overlooked and misapprehended the law and the facts in such a way that its findings are flawed. Reading Section C.1 in isolation could reasonably lead to only one of two alternatives: there was

an exclusive relationship between the parties for some work; or the subcontract is, at best, ambiguous on the issue of exclusivity.

Section C.1 of the subcontract – the sole basis for this Court’s holding – lists four *separate* items of work that Stevens is obligated to perform: (1) strip and paint; (2) aircraft condition inspections, *i.e.* “ACI”; (3) over and above maintenance; and (4) site organizational maintenance. *See R.*, p. 64. This Court found that three of these items – strip and paint, over and above, and site organizational maintenance – were modified by contract language indicating that Stevens was to perform them “at the direction of” or “as directed by” DynCorp. But a closer reading of Section C.1 reveals that such language is used in reference to only two of these items of work: (#1) strip and paint; and (#4) site organizational maintenance.¹ *Id.* Stevens’ right to perform two of the listed items of work under the subcontract – ACI (#2) and over and above maintenance (#3) – were not subject to any qualifying “at the direction of” or “as directed by” language. Thus, even applying this Court’s current analysis, DynCorp should have been deemed to be required to use Stevens as the exclusive provider of half of the work listed in the subcontract.

¹While the phrase “as directed by DynCorp” can be found in the provision addressing “over and above” maintenance work (#3), it is used only in the sentence addressing DynCorp’s reimbursement obligations, not in the sentence dictating what work Stevens “shall” perform. *Id.*

This Court seems to dismiss this conflicting language out-of-hand, reasoning that Stevens did not argue the provisions are "divisible." This analysis ignores the fact that DynCorp never raised an argument below that the "at the direction of" or "as directed by" language was the operative language which negated an exclusive relationship between the parties. More importantly, it ignores the fact that Stevens argued below that the subcontract created an exclusive relationship for *each and every one of the four items of work* set forth in the subcontract, and implicit in such an argument is, of course, that one or more of the items of work were subject to an exclusive relationship. There is simply nothing which supports the notion that a party must be entirely right in its position or it will be adjudged to lose completely.

Moreover, as this Court's opinion demonstrates, reading just the two sentences in which the "direction" language appears leaves the subcontract ambiguous, at best. This Court read these two sentences in isolation and interpreted them as giving DynCorp complete discretion on whether to send aircraft to Stevens, *i.e.*, it interpreted them to mean "for aircraft that DynCorp chooses to send to Stevens." However, the phrases "at the direction of" and "as directed by," as used in these sentences are equally, or more, susceptible to the reasonable interpretation that Stevens was to

perform *all* strip and paint work and *all* site organizational maintenance, but do so under the guidelines and instructions provided by DynCorp.²

In any event, how these two sentences might be read in isolation from the other provisions in the subcontract is irrelevant because the law is clear that the subcontract must be as a whole. Doing so makes clear that the “at the direction of” and “as directed by” language is not controlling. 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. This Court did not consider the subcontract as a whole, and its interpretation rendered numerous provisions of the subcontract meaningless and superfluous. Rehearing should be granted to correct these errors.

**B. The Court Misapprehended The Governing Law And
~~Overlooked Contractual Terms In Holding That The~~
Subcontract Did Not Incorporate The Teaming Agreement.**

In its opinion, this Court unequivocally acknowledged that a “teaming agreement” entered into by the parties prior to the execution of

²“Direction” is defined as “guidance or supervision of action, conduct or operation.” See Webster’s Third New International Dictionary (1981), p. 640. Similarly, “direct” is defined as “to show or point out the way for” and “to regulate the activities or course of”; “to guide and supervise.” *Id.*

their subcontract was identified with "sufficient particularity to incorporate the entire document" into the subcontract. *See* Opinion, p. 7. Yet, this Court went on to hold that it was not incorporated into the subcontract because: (1) the identification of the teaming agreement occurred in the "whereas clauses" of the subcontract and "whereas clauses ... cannot control the express provisions of the contract"; (2) contrary to other provisions of the subcontract, the paragraph identifying the teaming agreement did not use the word "incorporated"; and (3) the provision at issue did not "sufficiently communicate an intention to incorporate the teaming agreement as a whole." *See* Opinion, pp. 6-8. In holding that the teaming agreement was not incorporated into the subcontract, this Court misapprehended the governing law and overlooked the facts.

As an initial matter, DynCorp never asserted in the trial court or in its brief in this Court that the teaming agreement could not be deemed to be

~~incorporated into the subcontract simply because it was identified in a~~
"whereas clause" and such clauses cannot "control the express provisions of the contract." Because DynCorp did not raise this as an issue in the trial court or its brief, this Court should not have considered it as a grounds for reversal. *See In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998); *TEG-Paradigm Env'tl., Inc. v. U.S.*, 465 F.3d 1329, 1338 (Fed. Cir. 2006).

In any event, even the authority which this Court cites for the proposition that whereas clauses cannot “*control*” the provisions of a contract does not support its act of giving the whereas clause *no effect at all*. Indeed, the case law cited by this Court in its opinion expressly recognizes that whereas clauses should “be read in conjunction with the operative portions of a contract in order to ascertain the intentions of the parties.” See KMS Fusion, Inc. v. U.S., 36 Fed.Cl. 68, 77 (1996); see also Henderson County Drainage Dist. v. U.S., 53 Fed.Cl. 48, 54 (2002). This Court recently came to the very same conclusion, holding that a condition precedent set forth only in a “whereas clause” of a contract had to be given full effect because in reading the contract as a whole it was clear that was what the parties intended. M & M Group, Inc. v. Holmes, 379 S.C. 468, 475-76, 666 S.E.2d 262, 266 (Ct. App. 2008).

It is noteworthy that, while finding that the teaming agreement was effectively a complete nullity because it was identified only in a “whereas clause,” this Court gave substantive effect to the very next “whereas clause” in the subcontract (an integration clause that incorporated the Proprietary Data Exchange Agreement). In essence, what this Court did was find that one whereas clause could have no impact on the interpretation of the subcontract but a different whereas clause could control the

interpretation. This internal inconsistency in the Court's opinion makes clear that rehearing is warranted.

Rehearing is warranted for the additional reason that this Court erred when it concluded that no incorporation occurred because the paragraph identifying the teaming agreement did not contain the word "incorporated" while other provisions of the subcontract did use such wording. As this Court correctly recognized in its opinion, no "magic words" are needed to incorporate a document in a contract. *See* Opinion, p. 6 (quoting Northrop Grumman Info. Tech. Inc. v. U.S., 535 F.3d 1339, 1346 (Fed. Cir. 2008)). By concluding that the paragraph identifying the teaming agreement had to include the word "incorporated," this Court ignored the very law that it cited and relied on.

Finally, this Court overlooked the terms of the subcontract and misapprehended the governing law when it held that the subcontract did not evidence an intent to adopt the "roles and responsibilities" portion of the teaming agreement into the subcontract. (Opinion, pp. 7-8). To justify this conclusion, the Court pointed to several duties of the parties under the teaming agreement, and concluded that "such duties would be inapposite to the parties' relationship once the Subcontract was created." Id. These findings are factually erroneous.

Contrary to what this Court stated, the provision of the subcontract incorporating the teaming agreement does not reference the parties' "roles and responsibilities" *under the teaming agreement*; rather, it references the parties' roles and responsibilities *under the subcontract, as set forth in the teaming agreement*:

WHEREAS, the 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 U.S. Army Contract DAAH23-00-C-0226 [].

(R. p. 45). This Court found that this language was ineffective because it would require the Court to "handpick" which duties from the teaming agreement were incorporated and which were not. This Court apparently made this finding in isolation without looking at the teaming agreement itself. The "whereas clause" identifying the teaming agreement refers to the "roles" the parties have as "prime contractor" and "subcontractor." The parties occupied the status of "prime contractor" and "subcontractor" only as parties to the subcontract, not as parties to the teaming agreement. And, Attachment B to the teaming agreement sets forth with precision what "roles" the parties are to play as "prime contractor" and "subcontractor" once a contract is awarded to DynCorp by the government. *See* R. pp. 151-52, 408-09. Indeed, the work outlined in Exhibit B to the teaming agreement is labeled as "*contract* effort" and directs with precision the

specific tasks Stevens is to accomplish when and if it is ever placed in the "role" of being a "subcontractor." Id. It also sets forth with precision additional work DynCorp can, at its discretion, request from Stevens if and when it occupies the role of "prime contractor." Id. This language is precise, and this Court failed to acknowledge it in its Opinion. Rehearing should be granted to correct this error.

C. This Court Misapprehended The Governing Law In Addressing Issues On Appeal That Were Not Considered By The Trial Court.

At the end of its Opinion, this Court abruptly declares: "we grant partial summary judgment" to DynCorp. *See* Opinion, p. 11. As this language makes clear, this Court was neither affirming nor reversing an order of the trial court when it did so; rather, it was "granting" partial summary judgment to DynCorp in the first instance. The issue of whether DynCorp was entitled to partial summary judgment was not before this Court, and it was error to address this issue in the first instance on appeal.

The sole issue on appeal was whether the trial court correctly determined that the teaming agreement was incorporated into the subcontract. The trial court found that it was incorporated, and then properly concluded that the only reasonable interpretation of the subcontract, *with the incorporated teaming agreement*, was that DynCorp

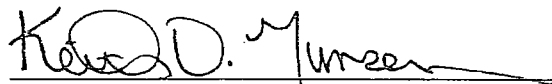
was required to send all of the specified aircraft to Stevens for maintenance work. In this Court, DynCorp effectively conceded that if the teaming agreement was incorporated into the subcontract, the trial court's conclusion that the subcontract unambiguously created an exclusive relationship between Stevens and DynCorp was correct. Thus, this Court should have either affirmed the trial court's findings on the incorporation issue (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 without the teaming agreement.

Instead, what this Court did was effectively consider a motion for summary judgment never actually presented. And, it did so without giving Stevens an opportunity to address the grounds for that motion or the issues raised by it. It was error for this Court to "grant" DynCorp summary judgment on appeal. *See, e.g., Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597 (2000) ("An appellate court cannot address an issue unless first raised by the appellant and ruled on by the trial judge."); *see also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) ("It is the general rule ... that a federal appellate court does not consider an issue not passed upon below).

III. CONCLUSION

FOR RELIEF Plaintiff/Respondent Stevens Aviation, Inc. respectfully requests that this Court rehearing, and suggests that the rehearing should be *en banc*.

Respectfully submitted,



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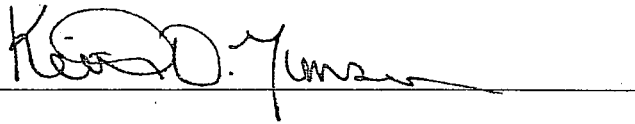
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of August, 2011,
Respondent's Petition for Rehearing, Suggestion of Rehearing *En Banc*, and
Memorandum in Support was served by electronic mail, and by hand delivery to:

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A handwritten signature in black ink, appearing to read "Keith D. Yum", is written over a horizontal line.

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TAB 6

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

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

**DynCorp's Return to Steven's Petition for Rehearing,
Suggestion of Rehearing *En Banc*, and Memorandum in Support**

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules, Appellant DynCorp International LLC ("DynCorp") hereby files this Return to Stevens' Petition for Rehearing, Suggestion of Rehearing *En Banc*, and Memorandum in Support. Stevens incorrectly claims the Panel overlooked or misapprehended certain arguments, facts, and law that require a grant of rehearing or rehearing *en banc*. For the following reasons, Stevens' Petition for Rehearing and Suggestion for Rehearing *En Banc* should be denied.

Argument

Stevens sets forth three points the Panel allegedly overlooked or misapplied to support its request for rehearing and suggestion for rehearing *en banc*. First, Stevens

alleges the Panel improperly granted partial summary judgment to DynCorp on the issues decided in the opinion. Second, Stevens claims the Panel did not consider the Subcontract as a whole. Third, Stevens argues the Panel misapprehended the controlling law and erred in finding the Subcontract did not incorporate the Teaming Agreement.

None of these arguments provide a basis for a grant of rehearing or rehearing *en banc* by this Court. First, the Panel had the authority to grant DynCorp partial summary judgment. Second, the Panel properly considered the Subcontract as a whole and determined it did not create an exclusive relationship between DynCorp and Stevens. Third, the Panel also did not misapprehend or misapply the controlling law to determine the Subcontract did not incorporate the Teaming Agreement. Therefore, this Panel should deny Stevens' petition for rehearing and suggestion for rehearing *en banc*.

I. The Panel acted within its authority to grant partial summary judgment to DynCorp.

In the opinion, the Panel granted partial summary judgment to DynCorp "on the issues before us." Stevens alleges in its petition that the Panel erred in granting this partial summary judgment in favor of DynCorp. {Stevens' Pet. for Rehearing at p. 17-18}. Specifically, Stevens claims the Panel considered a motion not presented and that the Court should remand to allow the trial court to interpret the Subcontract without the Teaming Agreement. {Id. at 18}. This argument is without merit. The Panel had the authority to grant partial summary judgment to DynCorp.

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. See, e.g.,

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 appellate courts have authority to enter summary judgment even if that party did not request such relief from the trial court). Further, an appellate court can grant such summary judgment to a non-moving party, (here DynCorp), when the reasoning for the grant of summary judgment has been addressed by the moving party (here Stevens), in the trial court. 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).

The Panel had full authority to enter partial summary judgment in favor of DynCorp in this matter under the circumstances here. The fact that DynCorp did not seek summary judgment in the trial court is irrelevant.¹ Stevens fully argued in the trial court and in this Court the issues that formed the basis for the Panel's grant of partial summary judgment – namely, whether the Subcontract created an exclusive relationship between DynCorp and Stevens. Stevens argued the Subcontract unambiguously established exclusivity between the parties. For instance, Stevens argued:

- “Here, the Subcontract Agreement, read as a whole, clearly reveals that the expectations of the parties were that Stevens would do the defined

¹ DynCorp did seek judgment on the pleadings as to the issue of exclusivity under the Subcontract.

work on *all* C-12/RC-12 and UC-35 aircraft submitted to DynCorp.”
{R.275 (emphasis in Stevens’ original)}.

- “Within 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 (emphasis in Stevens’ original)}.²

In addition, Stevens argued the Subcontract was unambiguous and created an exclusive relationship between the parties:

- “[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.’ See Stevens’ Br. p. 9.
- “Even 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.” See Stevens’ Br. p. 42.

Lastly, section V of Stevens’ brief to this Court is dedicated solely to establishing its entitlement to summary judgment, even if the Teaming Agreement is not incorporated into the Subcontract. See Stevens’ Br. p. 45-48.

Accordingly, there is no need to remand this matter to the trial court to interpret whether the Subcontract is ambiguous. Stevens fully argued to the trial court and this

² Stevens defines “not ambiguous” as “that is susceptible to only one reasonable interpretation....” {R.375}.

Court that the Subcontract was unambiguous and should be interpreted as a matter of law. Stevens fully debated and joined the issues with DynCorp respecting whether the Subcontract created exclusivity in favor of Stevens as a matter of law, or whether it did not as a matter of law. As a result, the finding by the Panel that the Subcontract was not exclusive finally determined the issue. There is nothing left for the lower court to determine. This Court has fully addressed and resolved the issues presented by Stevens. Thus, the Court of Appeals was within its authority to rule for DynCorp as a matter of law.

The Panel also had the ability to enter the partial summary judgment on the basis of judicial economy. Our appellate courts often address issues or rule on matters in the interest 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), the Supreme Court declined to remand an issue despite the fact the trial court did not rule on the issue, reasoning:

[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 the situation here. An adverse ruling to DynCorp on remand would force a second appeal on the precise issue that the parties

already briefed to this Court. A ruling favorable to DynCorp would accomplish the exact result reached in this opinion. Thus, remand would be a waste of judicial resources.

Therefore, the Panel was well within its power to enter partial summary judgment in favor of DynCorp. Once the Panel determined the Subcontract was not exclusive as a matter of law, there was nothing left to determine or argue. The Panel 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. In the interest of judicial economy, the Panel simply went ahead and granted the partial summary judgment. It is certainly empowered to do so.

II. The Panel correctly held that the Subcontract did not create an exclusive relationship between DynCorp and Stevens.

Stevens claims the Panel misapprehended the rules of contract interpretation and overlooked several provisions of the Subcontract in finding the Subcontract did not create an exclusive requirements contract between DynCorp and Stevens. {Stevens' Pet. for Rehearing at p. 6}. Stevens' claims are without merit as fully addressed below. -- Therefore, -- this Panel should deny Stevens' petition for rehearing and suggestion for rehearing *en banc*.

a. The Panel considered the Subcontract as a whole to find it did not create an exclusive relationship between DynCorp and Stevens.

Stevens alleges the Panel overlooked the maxim that a court must construe a contract as a whole. {Stevens' Pet. for Rehearing at p. 7-8}. In particular, Stevens claims the Panel "cited to only seven words . . . in support of its conclusion that the subcontract was not a requirements contract." {Id. at 8}. This contention misconstrues

and ignores the reasoning set forth in the opinion. The Panel properly considered the Subcontract as a whole and determined it could not create an exclusive relationship between DynCorp and Stevens.

The opinion indicates that the Panel considered the Subcontract as a whole. The Panel merely used specific examples to illustrate that the Subcontract did not create an exclusive relationship between the parties. Opinion No. 4857 at p. 88. For example, the Panel conducted a "thorough review" of the Statement of Work, the maintenance obligations set forth in the Subcontract, the strip and paint services, and the site organizational maintenance obligations in the Subcontract. Id. at 89. The Panel concluded that those provisions, which set forth the obligations of the parties under the Subcontract, did not "create the exclusive right and legal obligation to fill all of [DynCorp's] needs for the . . . services described in the contract." Id. (internal quotations omitted).

The Panel further recognized that the Subcontract created an invoice based pricing arrangement. Id. at 88. The Panel reasoned such a pricing arrangement precluded a finding of exclusivity. Id. ("DynCorp must pay Stevens for the services under the Subcontract only to the extent that maintenance was performed"). This is further evident from the Panel's reliance on Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998) to find the Subcontract did not create an exclusive relationship. The Panel noted that contracts that "furnish all labor . . . and related services on assigned properties" is "not an exclusive requirements contract" as recognized by the Coyle's Pest Control Court. Id. at 89 (emphasis in original). Lastly, the Panel reviewed the Subcontract, compared it to that of Coyle's Pest Control, and

found 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.³

Based on the above, the Panel did not rely on “only seven words” of the Subcontract as claimed by Stevens. The Panel conducted a review of the Subcontract as a whole and used specific examples to refute Stevens’ claims of an exclusive contractual relationship. Further, the Panel recognized the pricing structure of the Subcontract, which showed that the agreement did not create an exclusive relationship between DynCorp and Stevens.

- b. The Panel properly considered and rejected Stevens’ claim that certain isolated provisions of the Subcontract established an exclusive relationship between the parties.**

In further support of its claim, Stevens cited several provisions⁴ from the Subcontract that the Panel allegedly overlooked in rendering the opinion. {Stevens’ Pet. for Rehearing at p. 8-9}. None of these provisions support rehearing. Initially, the Panel should note that Stevens’ arguments relating to (1) the Subcontract’s definition of “Aircraft,” (2) the provisions setting forth Stevens’ mandatory performance obligations, (3) the Subcontract’s termination clause, (4) the Subcontract’s automatic renewal provisions, and (5) the preamble provision setting forth the purpose of the Prime Contract between DynCorp and the government were fully argued to the Panel in Stevens’ appellate brief and in oral argument. Stevens merely repeats its prior

³ This is consistent with the Subcontract’s default provisions. As noted during oral argument, 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}.

⁴ These provisions are set forth in Stevens’ petition in bullet point style and total six (6) items.

arguments in its petition. The Panel previously had the opportunity to review and weigh the merits of these arguments. Accordingly, these grounds cannot constitute a basis for rehearing because they were previously presented to this Court. The Supreme Court has held that a petition for rehearing cannot be used to present previously made appellate arguments. See Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (holding it is not "the purpose of a petition for rehearing to have the case tried in the appellate court a second time"). Further, Stevens' examples cannot support a claim for rehearing in any event. Each is addressed below seriatim.

First, Stevens claims that the Subcontract's definition of the term "Aircraft" establishes an exclusive contractual relationship. {Id. at 8}. As noted above, Stevens fully argued this position in its brief to this Court. See Stevens' Br. p. 31. Because this argument was presented to this Court, it cannot constitute a basis for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 (holding it is not "the purpose of a petition for rehearing to have the case tried in the appellate court a second time"). Moreover, this argument fails on its merits. The Subcontract does generally define the term "Aircraft." The Subcontract does not use the general term "Aircraft" in describing the work to be performed by Stevens. Instead, the Subcontract is more specific. None of the citations to the word "Aircraft" are used in any part of the Subcontract that outlines the work to be performed by Stevens. The work to be performed is limited to what is set forth in the statement of work and pricing schedule for the specifically enumerated C-12/RC-12 planes. See, e.g., U.S. 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). The Statement of Work of the Subcontract is specifically limited to C-12/RC-12 planes and does not mention UC-35 planes or the word "Aircraft." Therefore, reliance on the definitional term "Aircraft" cannot support a finding of an exclusive contractual relationship.

Second, Stevens argues the Subcontract contains mandatory language that evidences the Subcontracts' exclusivity. {Stevens' Pet. for Rehearing at p. 8}. Again, Stevens fully argued this position⁵ to the Panel and, as a result, cannot constitute a basis for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322. This argument also fails on its merits. The language relied on by Stevens does not impose obligations that DynCorp has to perform. Rather, the language relied on by Stevens relates to the mandatory obligations that Stevens must perform under the Subcontract. 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. Therefore, reliance on this language cannot support a finding of an exclusive contractual relationship in favor of Stevens, as it argues.

Stevens next alleges that the Subcontract's termination clauses and automatic renewal provisions support a finding of exclusivity.⁶ {Stevens' Pet. for Rehearing at p. 9}. Stevens again reiterates arguments previously made to this Court.⁷ Thus, these

⁵ See Stevens' Br. p. 32.

⁶ This paragraph addresses the third and fourth bullet points set forth in the petition.

⁷ See Stevens' Br. p. 35 and 36, respectively.

arguments cannot constitute a basis for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322. Moreover, Stevens' claim that the Subcontract's termination clause undermines the Panel's finding of no exclusivity is flawed. The Subcontract's termination provisions are in place to protect DynCorp from Stevens' default for work already sent to Stevens via a purchase order. These termination provisions are not rendered ineffective due to the Panels' finding that the Subcontract is not exclusive. DynCorp would still be able to terminate the Subcontract based on the services provided by Stevens under a purchase order. Likewise, the Subcontract's automatic renewal provisions do not support exclusivity. The automatic renewal provisions operate to allow the Subcontract to self-renew provided Stevens is complying with its obligations under the contract. The Subcontract will continue to renew as long as Stevens is not in default for work sent to it by DynCorp for the extension terms as specified in the Subcontract. In sum, these Subcontract provisions control the work being performed by Stevens pursuant to a purchase order and allow DynCorp to protect itself in the event that Stevens fails to comply with its obligations under the Subcontract and under specific purchase orders issued pursuant to the Subcontract. Such provisions cannot create an exclusive contractual relationship between DynCorp and Stevens.

Fifth, Stevens argues an isolated preamble provision that discusses the purpose of DynCorp's contract with the government supports a finding of exclusivity. {Stevens' Pet. for Rehearing at p. 9}. Stevens again sets forth arguments previously made to this court.⁸ Thus, these arguments cannot constitute a basis for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322. This "whereas" clause cannot create an

⁸ See Stevens' Br. p. 34.

exclusive relationship. See, e.g., 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 (Dist. Conn. 2008) (same). In this matter, the operative terms of the Subcontract refute a finding of exclusivity. The Statement of Work and pricing schedule establish that DynCorp must pay Stevens only for the services sent via purchase order and only to the extent that maintenance was performed. Thus, the Subcontract cannot be an exclusive requirements contract.

Lastly, Stevens argues the underlying Prime Contract entered into between DynCorp and the government supports a finding of exclusivity in the Subcontract at issue here. {Stevens’ Pet. for Rehearing at p. 9}. This argument is without merit for several reasons. First, Stevens was not a party to the Prime Contract, and its terms have no impact on the Subcontract. The scope of work Stevens is to provide is set forth exclusively under the Statement of Work and pricing schedules in the Subcontract. Moreover, the Prime Contract would be considered extrinsic evidence in this action.

Stevens has maintained throughout this litigation, both to the trial court and to this Court, that the Subcontract standing alone was unambiguous. The Panel likewise found the Subcontract to be unambiguous. Thus, extrinsic evidence cannot be used to contradict the unambiguous terms of the Subcontract. See, e.g., TEGParadigm Envtl., Inc. v. U.S., 465 F.3d 1329, 1338 (Fed. Cir. 2006) (“When the contract’s language is unambiguous it must be given its plain and ordinary meaning, and the court may not look to extrinsic evidence to interpret its provisions”); C.A.N Enters., Inc., v. South

Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988) (holding that when a contract is clear and unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms); Moser v. Gosnell, 334 S.C. 425, 513 S.E.2d 123 (Ct. App. 1999) (same).

None of the provisions upon which Stevens relies support a finding of exclusivity. Therefore, this Court should deny Stevens' petition for rehearing and suggestion for rehearing *en banc*.

c. The Panel's opinion does not render the Subcontract illusory.

Stevens contends that the Panel's opinion effectively renders the Subcontract an unenforceable "illusory" contract. {Stevens' Pet. for Rehearing at p. 7}. Stevens relied on Torncello v. U.S., 681 F.2d 756, 761 (Ct. Cl. 1982), to support this position. Reliance on Torncello is misplaced and cannot support Stevens' position. Stevens maintained in their briefing to this Court that Torncello requires a court to interpret a government contract based on a purchase order pricing structure (as is the case here) as an exclusive requirements contract rather than be deemed unenforceable. See Stevens' Br. p. 40. However, the Torncello logic was specifically rejected by the Coyle's Pest

Control court. 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 requirement contract.

Coyle's Pest Control, 154 F.3d at 1304. The court Coyle's Pest Control Court also reasoned that the 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 1305-1306 (emphasis added). The court there instead found, as the Court has found here, that “Coyle is entitled to payment only for services actually ordered by HUD and provided by Coyle.” Id. at 1306.

This Coyle’s Pest Control rationale applies to this situation. The Subcontract required DynCorp to pay Stevens for the completed services only upon issuance of a purchase order to Stevens. Therefore, the Subcontract is not illusory and is enforceable due to the purchase order pricing structure. When a purchase order is made under the Subcontract, various terms in the Subcontract apply to the work to be done and payments to be made. The Panel merely followed the rationale employed by other courts interpreting such contracts to conclude that the Subcontract did not create an exclusive relationship in favor of Stevens.

d. Stevens cannot argue that the Subcontract is ambiguous.

Stevens spends several pages of its petition arguing the Subcontract is now ambiguous.⁹ {Stevens’ Pet. for Rehearing at p. 9-12}. This contradicts the position that Stevens has taken throughout this litigation. Stevens has consistently maintained to both the trial court and this Court that the Subcontract is unambiguous.

In Clarendon County v. TYKAT, Inc., Op. No. 27025 (S.C. Sup. Ct. filed August 15, 2011) (Shearouse Adv. Sh. No. 27 at 28), the Supreme Court recognized that a party cannot argue one position on an issue and then subsequently take the

⁹ In support of this argument, Stevens sets forth several isolated provisions from section C.1 of the Subcontract’s Statement of Work to establish this ambiguity. Stevens now asks this Court to do exactly what it argued is improper. {Stevens’ Pet. for Rehearing at p. 7 (arguing the court must construe the Subcontract as a whole)}. Stevens wants this Panel to focus exclusively on isolated provisions on the Subcontract to find exclusivity rather than construe the Subcontract as a whole. This Panel construed the Subcontract as a whole and rejected Stevens’ arguments that these provisions establish exclusivity.

opposite position on the same issue. In that case, TYKAT moved for summary judgment in the trial court, arguing that no genuine issues of material fact existed. Id. at 32 n.2. The trial court denied TYKAT's motion. Id. at 29. On appeal, TYKAT argued that summary judgment was premature because discovery would have revealed a genuine issue of material fact. Id. at 32 n.2. The Supreme Court rejected this argument, finding TYKAT "cannot now be heard to assert summary judgment was premature." Id. The Supreme Court recognized that TYKAT was bound by its initial position on the issue and could not argue the converse. The same logic applies here to bar Stevens' argument.

In this matter, Stevens argued to the trial court that the Subcontract standing alone was unambiguous as a matter of law. As set forth in section 1, *supra*, Stevens argued to the trial court and in briefing to this Court that the Subcontract standing alone was unambiguous and entitled Stevens to a grant of summary judgment. However, after receiving an adverse ruling on its position from the Panel, Stevens now argues—for the first time—that the Subcontract is "ambiguous, at best." {Stevens' Pet. for Rehearing at p. 11}. Such a position is contrary to the rule announced in TYKAT by the Supreme Court. Therefore, Stevens cannot take the position that the Subcontract is now ambiguous.

III. The Panel correctly held that the Subcontract did not incorporate the Teaming Agreement.

The Panel held the Subcontract did not incorporate the Teaming Agreement. Opinion No. 4857 at p. 86. The Panel correctly set forth the law applicable to incorporation, stating:

To incorporate the terms of extrinsic material, a contract need not use “magic words.” Northrop Grumman Info. Tech., v. United States, 535 F.3d 1339, 1346 (Fed. Cir. 2008) (internal quotation marks omitted). However, the contract “must 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 (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).” Id. at 1345.

Opinion No. 4857 at p.86. Applying this standard, the Panel noted that while the Teaming Agreement was referenced in the Subcontract “it does not sufficiently communicate an intention to incorporate the Teaming Agreement as a whole.” Id. The Panel went on to hold 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). Stevens now asks to have the Panel ignore the fact that it construed the entire Subcontract to determine incorporation, and instead, uses isolated portions of the Subcontract taken out of context to allege error by the Panel.

Stevens first alleges the opinion is internally inconsistent because the Panel gave substantive effect to the integration clause in the Preamble over the “whereas” clause that merely reference the Teaming Agreement. {Stevens’ Pet. for Rehearing at p. 14}. This is a misrepresentation of the Panel’s reasoning. Rather, the Panel properly used that integration clause to demonstrate an example of how the parties incorporated other documents into the Subcontract when they so intended. The Panel contrasted the clear intent of the parties to incorporate the Proprietary Data Exchange Agreement with the mere reference to the Teaming Agreement in the other “whereas” provision. Such analysis does not indicate an internal inconsistency in the opinion. The analysis

bolsters the prior holding that the Subcontract did not incorporate the Teaming Agreement as required by Northrop.

Second, Stevens contends the Panel erred by concluding the Teaming Agreement could not be incorporated because "the paragraph identifying the Teaming Agreement did not contain the word "incorporated." {Stevens' Pet. for Rehearing at p. 15}. DynCorp cannot locate in the opinion where the Panel made such a finding. The Panel did not so hold. The Panel actually 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." Thus, the panel considered the Subcontract as a whole, as required by Northrop, and concluded the incorporation test was not met. As a result, rehearing is unwarranted.

Lastly, the Panel rejected Stevens' argument that if the entire Teaming Agreement was not incorporated, then the reference to the Teaming Agreement in the "whereas" clause was sufficient to incorporate the "roles and responsibilities" portion of the Teaming Agreement. Opinion No. 4857 at p.87. Stevens alleges this holding misapprehended the controlling law when the Panel "made this finding in isolation without looking at the Teaming Agreement itself" and that the reference to the Teaming Agreement was "precise" enough to allow incorporation. {Stevens' Pet. for Rehearing at p. 16-17}. This argument is without merit. The Panel reviewed the reference to the "roles and responsibilities" established by the Teaming Agreement and concluded such a reference was merely for "background law or negotiating history." That finding is correct. This reference in the preamble merely sets forth the historical background that led up to the formation of the Subcontract via the efforts of the parties. The

Subcontract has no further reference to the Teaming Agreement. The general, historical reference to the mere fact that the parties had previously entered into the Teaming Agreement is insufficient to incorporate the roles and responsibilities from the Teaming Agreement into the Subcontract. See Northrop, 535 F.3d at 1345. In addition, this determination was not made in isolation. The Panel reviewed the roles and responsibilities in the Teaming Agreement and found they could not be reconciled with the terms of the Subcontract. The Panel concluded that Stevens' position would require the court to "handpick which duties to incorporate without guidance from the Subcontract." Opinion No. 4857 at p. 87. Thus, this argument does not warrant rehearing or rehearing *en banc*.

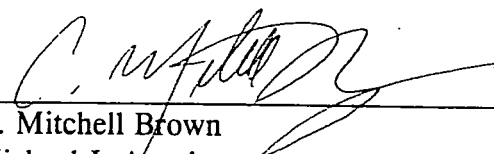
Based on the above, the Panel applied the controlling authority, considered the Subcontract in its entirety, and rejected Stevens' arguments that the Subcontract incorporated the Teaming Agreement. Rehearing and rehearing *en banc* is not warranted. The Panel should reject Stevens' petition¹⁰.

Conclusion

Based on the foregoing, Stevens' petition for rehearing and suggestion for rehearing *en banc* should be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

¹⁰ DynCorp also respectfully believes it preserved the appellate argument that it lacked notice the trial court would consider incorporation of the Teaming Agreement into the Subcontract as a single unambiguous contract. In its memorandum in support of its motion to reconsider, DynCorp noted the court "treated the TA as part of the Subcontract, but it was not so incorporated. As a result, the Order necessarily relied on extrinsic evidence—the TA—when construing the Subcontract." {R.206}. In this manner, DynCorp alerted the court it had considered and ruled on an argument not properly before it for consideration.

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August 29th, 2011

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

Stevens Aviation, Inc., ... Respondent,

v.

DynCorp International LLC and Science Applications Defendants,
International Corporation, ...

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:

Pleadings: DynCorp's Return to Steven's Petition for Rehearing,
Suggestion of Rehearing En Banc, and Memorandum in
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Dated: 8/29/11

TAB 7

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Please
For Greenville County
Honorable R. Lawton McIntosh, Circuit Judge
Civil Action No. 2009-CP-23-07229

SC Court of Appeals Case Tracking No. 2010150029

Stevens Aviation, Inc., Respondent,

v.

DynCorp International LLC,
and Science Applications
International Corporation, Defendants,

Of Whom DynCorp
International LLC is, Appellant.

RECEIVED
SEP 14 2011
SC Court of Appeals

**RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING AND
SUGGESTION OF REHEARING *EN BANC***

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INTRODUCTION

Plaintiff/Respondent Stevens Aviation, Inc. (“Stevens”) has petitioned this Court for rehearing, and has suggested that the rehearing should be *en banc*. Stevens asserts that rehearing is warranted because this Court misapprehended and overlooked certain facts of record and certain aspects of the law. These errors resulted in this Court improperly “grant[ing] partial summary judgment” to Defendant/Appellant DynCorp International LLC (“DynCorp”) even though DynCorp never moved for partial summary judgment below.

DynCorp has now filed its response to Stevens’ Petition.¹ DynCorp’s response reinvents some of Stevens’ arguments and ignores others. Stevens files this reply to address DynCorp’s arguments. To avoid confusion, Steven’s addresses DynCorp’s arguments in the order in which they are presented.

ARGUMENT

I. This Court Improperly Granted Summary Judgment To DynCorp (Responds To DynCorp’s Argument I).

In its Petition, Stevens argues that, for two separate reasons, is was improper for this Court to interpret the subcontract in the first instance and

¹See DynCorp’s Return to Steven’s Petition for Rehearing, Suggestions of Rehearing En Banc, and Memorandum in Support (“DynCorp’s Return”).

grant partial summary judgment to DynCorp: (1) DynCorp did not move for summary judgment below; and (2) the trial court did not have the opportunity to interpret the subcontract without the incorporated teaming agreement. DynCorp argues that it is "irrelevant" that it did not move for summary judgment because an appellate court has authority to grant relief never requested by a party and never considered by the trial court below. (DynCorp's Return, pp. 2-6). DynCorp relies heavily on law from foreign jurisdictions in making this argument. *Id.* at pp. 2-3. This law, of course, does not trump the law of this state which holds that appellate courts should not address issues that were not presented to, and ruled on, by the trial court. *See, e.g., Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) ("appellate courts ... do not answer questions they are not asked"); *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597 (2000) ("An appellate court cannot address an issue unless first raised by the appellant and ruled on by the trial judge").

DynCorp misses the mark when it asserts that the granting of summary judgment on appeal can be justified because Stevens argued below, and in this Court, that it was entitled to summary judgment even if the teaming agreement was not incorporated into the subcontract. (DynCorp's Return, pp. 3-4). While it is true that Stevens made such an argument, that fact does not equate with Stevens' having had an opportunity to defend against a motion made by DynCorp. Indeed, this

Court granted summary judgment to DynCorp on grounds never addressed by either party below, *i.e.*, that the identification of the teaming agreement was only in a “whereas clause,” and that use of the word “direction” in two sentences of the subcontract mandated that it was not an “enforceable requirements contract.” Because these grounds were never raised by DynCorp below, Stevens was deprived of any opportunity to address them.

None of the cases from South Carolina courts cited by DynCorp support its argument that an appellate court can grant a summary judgment on appeal to a party which never moved for such relief in the trial court. *See Hollins v. Richland Sch. Dist.*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993) (in reversing grant of directed verdict and remanding for a new trial, appellate court indicated that because the parties fully briefed the issue it could decide, in first instance, that evidence of record was sufficient to create jury question on issue of exercise of “slight care”); *S. Bell Tel & Tel. Co. v. Hamm*, 306 S.C. 70, 409 S.E.2d 775 (1991) (in *affirming* judgment entered by trial court and holding that trial court had properly considered alternative constitutional ground for judgment, appellate court noted in dicta that “in any event,” the constitutional ground was “fully briefed” and thus “judicial economy” weighed in favor of deciding the issue); *City of Aiken v. Cole*, 289 S.C. 239, 242, 345 S.E.2d 760, 762 (Ct. App. 1986) (*affirming* judgment on grounds not raised below because an appellate court can “affirm a judgment on any ground appearing in the record”).

When this Court granted summary judgment to DynCorp, it “answer[ed] questions [that it was] not asked.” See Kennedy, 349 S.C. at 533, 564 S.E.2d at 323. This error is both procedural and substantive. Rehearing is warranted to correct these errors.

II. This Court Erred In Rendering The Subcontract A Complete Nullity (Responds To DynCorp’s Argument II).

A. *The Court’s opinion is devoid of any evidence that it considered all the provisions in the subcontract, and its interpretation renders numerous provisions superfluous and meaningless (Responds to DynCorp’s Arguments II.a & II.b).*

In its Petition, Stevens showed how this Court’s interpretation of the subcontract violated fundamental rules of contract construction by failing to consider the subcontract “as a whole”, and by rendering numerous provisions completely meaningless and superfluous. DynCorp attempts to negate this showing by pointing out select wording in the Court’s opinion indicating that it considered *some* provisions. (DynCorp’s Return, pp. 6-8). Specifically, DynCorp points to language in which the Court noted that it had reviewed the Statement of Work in the subcontract, and had considered the pricing arrangements. Id. However, DynCorp does not dispute the fact that there is nothing in the opinion which suggests that the Court looked at many other provisions which support exclusivity, things such as the

termination clause, the definitions section, and the automatic renewal provisions. The Court's failure to address these provisions which the parties argued about at length in their briefs supports Stevens' argument that the Court overlooked them.

Apparently realizing this oversight, DynCorp argues in the alternative that this Court should not consider the fact that these significant provisions were ignored in the opinion because "a petition for rehearing cannot be used to present previously made appellate arguments." (DynCorp's Return, pp. 8-9). In support of this argument, DynCorp cites Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).² But, the Supreme Court's opinion in Kennedy does not stand for this proposition.

The very purpose of rehearing is for the Court to consider matters of law or fact that were "*overlooked*" by a court. See SCACR 221(a) (emphasis added). Of course, a matter cannot be "overlooked" by a court unless it was actually *presented* to it. And, this is exactly what the Kennedy court held. In Kennedy, the appellant petitioned for rehearing on a ground that was never argued or presented prior to rehearing. The Supreme Court held that rehearing was only appropriate for matters that were "overlooked or misapprehended" by the court, and that if an argument

²DynCorp repeats this blatant misstatement of the law (including its citation to Kennedy) four separate times in its brief.

was never presented, it could not be the basis for rehearing. Kennedy, 349 S.C. 531 at 532, 564 S.E.2d at 322. Thus, Kennedy holds exactly the opposite of what DynCorp claims in its response.

After misstating the procedural law, DynCorp then attempts to breathe life into the various provisions of the subcontract that are rendered completely meaningless by the Court's interpretation. (DynCorp's Return, pp. 9-13). This attempt fails. As an initial matter, each of DynCorp's arguments assumes that there is an enforceable contract. However, this Court's interpretation rendered the subcontract unenforceable due to a lack of consideration, and thus these provisions could have no meaning and cannot be enforced for any purpose. The fact that these provisions of the subcontract can have meaning only if the subcontract actually obligated DynCorp to send aircraft to Stevens makes clear that the provisions were overlooked by this Court in its interpretation. Rehearing should be granted to correct these errors.

B. Under this Court's interpretation the subcontract is illusory and thus a complete nullity (Responds to DynCorp's Argument II.c).

Stevens contends rehearing is appropriate because this Court's opinion renders the subcontract that had been governing the parties relationship for many years, and was to govern it for at least ten (10) years, a complete nullity. DynCorp contends that, under this Court's

interpretation, the subcontract is not "illusory" (and thus it is not a nullity); however, DynCorp never really explains how this is so. (DynCorp's Return, pp. 13-14). The law simply does not support DynCorp's position.

As has been repeatedly recognized, federal law (which DynCorp contends governs the subcontract) provides for three different types of contracts for supplies and services: those for a definite quantity; those for an indefinite quantity; and those for requirements. Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed.Cl. 506, 515 (1993); Torncello v. United States, 231 Ct.Cl. 20, 28, 681 F.2d 756, 761 (1982); Mason v. United States, 222 Ct.Cl. 436, 444, 615 F.2d 1343, 1347 (1980). There are differences in these three types of contracts:

With contracts for a definite quantity, the promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that courts require for enforceability. With indefinite quantities contracts, however, the buyer's promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term. Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts clearly are enforceable on that basis. The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated.

Torncello, 681 F.2d at 761-762 (citations omitted); *see also* A-Transport Northwest Co. v. United States, 27 Fed. Cl. 206, 214 (1993), aff'd, 36 F.3d 1576 (1994) (noting that "it is true" that a contract which does not require "any ascertainable quantity is unenforceable for lack of consideration and mutuality").

In other words, to be an enforceable definite or indefinite quantity contract there must be a numerical quantity term, and to be an enforceable requirements contract the parties agreement on quantity must be "all". But the subcontract, as interpreted by this Court, does not meet the criteria necessary for any of these contracts. As the parties readily acknowledge, there is no numerical "quantity" term in the subcontract. And, under this Court's interpretation, the subcontract does not provide for "all" either. Thus, there is nothing to enforce because the subcontract is illusory and lacks consideration. *See* Crown Laundry, 29 Fed.Cl. at 517; Torncello, 681 F.2d at 761-762; Mason, 222 Ct.Cl. at 443 n.5, 615 F.2d at 1346 n.5. Such an interpretation violates the cardinal rules of contract construction that: a court must favor an interpretation that the saves the contract instead of voiding it; and that the court should assume the parties intended that a binding contract be formed. *See, e.g.,* Crown Laundry, 29 Fed.Cl. at 515-517, Torncello, 681 F.2d at 761 (citations omitted); *see also* A-Transport, 27 Fed.Cl. at 214 ("[I]f a contract is susceptible of interpretation as either

an indefinite quantities without minimum agreement or as one for requirements, the court should uphold it as of the requirements type).

It is noteworthy that DynCorp admits that under this Court's interpretation of the subcontract, DynCorp would have to issue "a purchase order" to create any obligation on its part and for Stevens to have any rights whatsoever. (DynCorp's Return, p. 14). In other words, DynCorp admits that, under this Court's current interpretation, until and unless it chooses in its sole discretion to issue another contract (a purchase order) the subcontract entitles Stevens to nothing. This is the quintessential example of an illusory contract, *i.e.*, a contract that bestows no rights on one party and creates no obligations on the other. It is thus clear that this Court's opinion rendered the subcontract a complete nullity. Rehearing should be granted to correct this error.

*C. The provisions of the subcontract agreement relied on by
this Court do not support a finding of non-exclusivity
(Responds to DynCorp's Argument II.d).*

In its Petition, Stevens showed that even if one were to focus on only Section C.1 of the subcontract (which this Court seems to have done), that section would either create a relationship of exclusivity for some of the work, or, alternatively, render the subcontract ambiguous on the issue of exclusivity. DynCorp recreates this argument by casting it as one in which Stevens is asserting that "the Subcontract is now ambiguous." (DynCorp's

Return, pp. 14-15). DynCorp argues that this Court should ignore Stevens' argument because it "contradicts" its earlier stated position that the subcontract is not ambiguous. DynCorp's argument is meaningless because Stevens did not argue in its Petition that the subcontract was ambiguous; rather, it argued that Section C.1 of the subcontract, standing alone, cannot be interpreted as negating a relationship of exclusivity. However, the fact that DynCorp did not, and cannot, justify this Court's analysis of Section C.1 is noteworthy. Rehearing should be granted.

III. This Court Erred In Concluding That The Subcontract Did Not Incorporate the Teaming Agreement (Responds To DynCorp's Argument III).

In seeking rehearing, Stevens argues that this Court's finding that the teaming agreement was not incorporated into the subcontract is based on three, erroneous propositions: (1) because the teaming agreement was identified only in a "whereas clause" it cannot determine the rights of the parties; (2) the word "incorporated" was not used in reference to the teaming agreement; and (3) there was insufficient evidence of intent to incorporate the teaming agreement as a whole. In responding to these arguments, DynCorp does little more than reiterate this Court's findings. (DynCorp's Return, pp. 15-18).

DynCorp does correctly note that this Court used language suggesting that when “read in its entirety” the subcontract did not reveal an intention to incorporate the teaming agreement “*as a whole*”.³ *Id.* at pp. 16, 17. However, immediately after indicating such this Court went on to point out sections in the subcontract which used “magic words” of “incorporation” with reference to other documents. In other words, this Court used the absence of “magic words” in reference to the teaming agreement as the rationale for finding that the subcontract “read in its entirety” did not evidence an intent to incorporate the teaming agreement “*as a whole*.” This Court did so even while expressly acknowledging that the law requires no “magic words” for incorporation. *See* Opinion, p. 6 (quoting Northrop Grumman Info. Tech. Inc. v. U.S., 535 F.3d 1339, 1346 (Fed. Cir. 2008)). This internal inconsistency warrants rehearing.

Furthermore, DynCorp clearly miscomprehends this Court’s opinion when it suggests that the Court did not give substantive effect to the “whereas” clause governing the Proprietary Data Agreement while ignoring the incorporation of the teaming agreement in another “whereas” clause. (DynCorp’s Return, pp. 16-17). DynCorp asserts that this Court merely used the Proprietary Data Agreement clause as an “example of how the

³The Court did not indicate that it considered the subcontract “as a whole” in determining whether there was sufficient evidence of intent to incorporate the “roles and responsibilities” section of the teaming agreement into the subcontract.

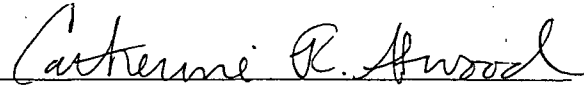
parties incorporated other documents into the Subcontract when they so intended.” Id. In effect, DynCorp’s own argument defeats the point it is trying to make. DynCorp admits that this Court viewed the “whereas” clause addressing the Proprietary Data Agreement as an effective incorporation provision; yet, this Court held that the provision addressing the teaming agreement was of no effect simply because it was contained in a “whereas” clause. As DynCorp’s own argument makes clear, this Court’s opinion is internally inconsistent.

Finally, DynCorp can point to nothing in this Court’s opinion which even suggests that the Court considered the fact that the teaming agreement set forth with precision the “roles and responsibilities” the parties would occupy *as prime contractor and subcontractor* if a contract was awarded to DynCorp. DynCorp argues to the contrary, but does not even cite to this Court’s opinion to support its argument. Because the teaming agreement set forth the contractor/subcontractor roles and responsibilities in clear and unequivocal language, this Court’s rationale for finding that the subcontract did not incorporate the “roles and responsibilities” set forth in the teaming agreement – *i.e.*, that the court would have to “handpick” duties from the teaming agreement to make them applicable to the subcontract – is faulty. Rehearing is necessary to correct this error.

CONCLUSION

For the reasons set forth in its Petition for Rehearing and above, Plaintiff/Respondent Stevens Aviation, Inc. respectfully requests that this Court grant rehearing, and suggests that the rehearing should be *en banc*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of September, 2011, Respondent's Reply Memorandum in Support of Petition for Rehearing and Suggestion of Rehearing *En Banc* was served by electronic mail, and by forwarding a copy by first class mail, postage prepaid, to:

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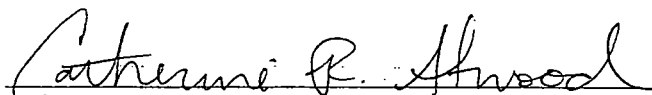
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TAB 8

The South Carolina Court of Appeals

Stevens Aviation, Inc.,

Respondent,

v.

DynCorp International LLC, and
Science Applications International
Corporation,

Defendants,

of whom DynCorp International LLC
is,

Appellant.

The Honorable R. Lawton McIntosh
Greenville County
Trial Court Case No. 2009-CP-23-07229

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and it is ordered that the Petition for Rehearing be denied.

Thomas E. Huff J.
H. B. W. J.
Paul C. Thomas J.

FILED

OCT 13 2011

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4857 (S.C. Ct. App. filed July 27, 2011)

Stevens Aviation, Inc.....Petitioner,

v.

DynCorp International LLC Respondent.

PROOF OF SERVICE

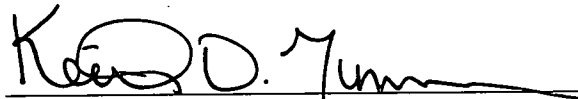
The undersigned hereby certifies that on November 10, 2011, a copy of the attached APPENDIX VOLUMES I, II, AND III were served on the following parties by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

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S.C. Supreme Court


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