

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) PROCUREMENT REVIEW PANEL
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IN RE: Appeal by DTZ, Inc.) ORDER
[DTZ, Inc., et al., Appellants,) Case No. 2015-3
v. South Carolina State University and the)
State of South Carolina, Respondents)
(Contract Controversy)])

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SC Court of Appeals

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on September 23, 2015, pursuant to a request for review by DTZ, Inc. (DTZ)¹ under sections 11-35-4230(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). DTZ sought review of the June 29, 2015, written determination of the Interim Chief Procurement Officer for Goods and Services (the CPO) dismissing for lack of jurisdiction the State of South Carolina (the State) as a party to a contract controversy involving facilities management services DTZ was providing to South Carolina State University (SCSU).² At the Panel’s hearing, John E. Schmidt, III, Esquire, and Melissa J. Copeland, Esquire, represented DTZ. Deputy Solicitor General J. Emory Smith of the South Carolina Attorney General’s Office represented the State. Craig E. Burgess, Esquire, represented SCSU. W. Dixon Robertson, III, Esquire, represented the CPO.

¹ DTZ’s appeal letter notes that DTZ, Inc. was “formerly known as UGL Services Unicco Operations Co. and formerly known as UNICCO Service Company.” Record at PRP47. For ease of reference, this order uses the name “DTZ.”

² The CPO’s June 29th written determination also granted DTZ’s motion for partial summary judgment against SCSU in the amount of five million three hundred ninety-nine thousand eight hundred ninety-five and 59/100 (\$5,399,895.59) dollars based on SCSU’s admission that it owed money to DTZ under the facilities management contract. The Panel notes that this portion of the CPO’s decision has not been appealed by any party and is not before the Panel for review. Therefore, the only issue to be decided by the Panel is whether the CPO and the Panel have jurisdiction over the State as a party in a contract controversy brought pursuant to section 11-35-4230 of the Procurement Code.

Solicitation Background

Acting on behalf of SCSU, the Materials Management Office (MMO) of the South Carolina Budget and Control Board (the Board) issued a Request for Proposals (RFP) on April 1, 2010, seeking to acquire facilities management services at SCSU's campus in Orangeburg, South Carolina.³ DTZ submitted a proposal in response to the RFP, and MMO posted a notice of Intent to Award the contract to DTZ on June 9, 2010. [Panel Attachment A]. The award became final on June 21, 2010. *Id.* As noted by the CPO, the contract consists of the RFP, as amended, together with DTZ's proposal, and the record of negotiations.

The RFP contains definitions for terms used within the solicitation documents. In particular, the RFP defines the term "STATE" to mean "the Using Governmental Unit(s) identified on the Cover Page." [Panel Attachment B, RFP at page 7.] Similarly, the "USING GOVERNMENTAL UNIT" is defined as "the unit(s) of government identified as such on the Cover Page." *Id.* The term "Cover Page" refers to the top page of the solicitation. *Id.* The cover page of the solicitation in question identifies SCSU as the "USING GOVERNMENTAL

³ MMO conducted this procurement on SCSU's behalf in accordance with the provisions of section 11-35-510 of the Procurement Code. The Panel notes that the RFP contained the following clause regarding the Board's authority and liability:

BOARD AS PROCUREMENT AGENT (JAN 2004)

(a) Authorized Agent. All authority regarding the conduct of this procurement is vested solely with the responsible Procurement Officer. Unless specifically delegated in writing, the Procurement Officer is the only government official authorized to bind the government with regard to this procurement. (b) Purchasing Liability. The Procurement Officer is an employee of the Board acting on behalf of the Using Governmental Unit(s) pursuant to the Consolidated Procurement Code. Any contracts awarded as a result of this procurement are between the Contractor and the Using Governmental Unit(s). The Board is not a party to such contracts, unless and to the extent that the board is a using governmental unit, and bears no liability for any party's losses arising out of or relating in any way to the contract.

Record at PRP38 (emphasis added). The Panel also takes note that as a result of the South Carolina Restructuring Act of 2014 (Act 121), MMO has been transferred and incorporated into the Procurement Services Division of the State Fiscal Accountability Authority. See <http://sfaa.sc.gov/divisions?p=6> (Website last accessed September 24, 2015). This change became effective on July 1, 2015.

UNIT.” Record at PRP37. Thus, the Panel finds that as the “using governmental unit,” SCSU is also the “State” with regard to the provisions of the RFP and resulting contract.

The RFP also provides that by submitting an offer, the offeror is “offering to enter into a contract with the Using Governmental Unit(s).” Record at PRP38, “BID/PROPOSAL AS OFFER TO CONTRACT (JAN 2004). Therefore, the Panel finds that the contract resulting from DTZ’s offer and the subsequent award was formed between DTZ and SCSU.

Contract Performance and Dispute

DTZ began performing services under the contract on July 1, 2010, and the contract was renewed on an annual basis. On February 20, 2015, DTZ filed a request for resolution of a contract controversy with the CPO pursuant to section 11-35-4230 of the Procurement Code. Record at PRP10 – PRP18. DTZ’s request named both SCSU and the State of South Carolina as parties to the contract controversy. Record at PRP10 – PRP11. In its request for review, DTZ alleged that although it had been performing services as set forth in the contract, SCSU had fallen behind in its payment and was currently indebted to DTZ in the amount of four million two hundred thousand dollars (\$4,200,000.00). Record at PRP13. DTZ also claimed that this amount continued to accrue at a monthly rate of four hundred one thousand nine hundred sixty-four dollars and thirty-four cents (\$401,964.34) as it continues to perform services for SCSU. Record at PRP13 – PRP14. DTZ asserted causes of action based on (1) breach of contract for non-payment; (2) breach of statutory duty of good faith and fair dealing; (3) quantum meruit, contract implied by law and quasi-contract; and (4) promissory estoppel. Record at PRP15 – PRP17.

SCSU answered DTZ’s claims and admitted an indebtedness of approximately three million five hundred thirty-three thousand and eighty-eight dollars (\$3,533,088.00), with

additional amounts accruing at an approximate monthly amount of \$402,000.00. Record at PRP19 – PRP23. As previously mentioned, the CPO entered a judgment against SCSU based on its admission of indebtedness in the amount of not less than five million three hundred ninety-nine thousand eight hundred ninety-five dollars and fifty-nine cents (\$5,399,895.59) as of June 16, 2015. Record at PRP7. This entry of judgment against SCSU is not before the Panel for review.

For its part, the State moved before the CPO to be dismissed as a party to the contract controversy for lack of jurisdiction. Record at PRP32 – PRP36. In support of its position, the State cited section 11-35-4230 of the Procurement Code (the contract controversy provision) and the definition of “governmental body” set forth in section 11-35-310(18). *Id.*; S.C. Code Ann. §§ 11-35-4230 and 11-35-310(18) (2011). In addition, the State relied on the fact that it is not in privity of contract with DTZ. Record at PRP35 – PRP36.

Considering the scope of his authority as established by section 11-35-4230 and the definition of “governmental body” set forth in section 11-35-310(18), the CPO found that he had jurisdiction over the State’s agencies, but not the State itself. Therefore, the CPO granted the State’s motion and “dismiss[ed] DTZ’s claims against the State for lack of jurisdiction.” Record at PRP6. DTZ timely appealed the CPO’s dismissal of the State as a party on July 8, 2015. Record at PRP47 – PRP53.

Discussion

In its appeal letter and argument before the Panel, DTZ urges the Panel to exercise jurisdiction over the State and hold it equally responsible for the debts incurred by SCSU under the contract in question. DTZ first argues that the State’s motion to dismiss for lack of jurisdiction was not made in writing and that, therefore, “DTZ was not given due notice of and

reasonable opportunity to be heard on that issue, as required by law.” Record at PRP49. Pursuant to section 11-35-4410(1)(a) of the Procurement Code, the Panel is charged with the responsibility of conducting a *de novo* review of a CPO’s written determinations. S.C. Code Ann. § 11-35-4410(1) (2011). To facilitate its review, the Panel set a scheduling order affording all parties the opportunity to file pre-hearing briefs. Although the State filed a timely brief with the Panel, DTZ did not, choosing to rely on the arguments presented in its appeal letter. In addition, the Panel heard and considered oral arguments from all parties. Therefore, even assuming for the sake of argument that DTZ did not understand that the State’s written motion for dismissal was based in part on the CPO’s lack of jurisdiction over the State, the Panel finds that any due process violation by the CPO has been “rendered harmless” by the Panel’s *de novo* review. See *Unisys Corp. v. South Carolina Budget and Control Bd., et al.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) (citing *Ross v. Med. Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (an adequate *de novo* review by the Panel “renders harmless a procedural due process violation based on the insufficiency of the lower administrative body.”)).

DTZ next argues that the language of section 11-35-40 grants the CPO and the Panel jurisdiction to consider claims against “the State” arising out of contracts entered into under the Procurement Code. Section 11-35-40(2) provides in pertinent part: “This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds” S.C. Code Ann. § 11-35-40(2) (2011). The Panel finds that this provision identifies the types of procurements and expenditures that must be solicited under the Procurement Code’s requirements and does not establish jurisdiction to resolve contract controversies. Indeed, jurisdiction over contract controversies is explicitly set forth in a different Procurement Code provision: section 11-35-

4230. Therefore, the Panel disagrees with DTZ's characterization of section 11-35-40(2) and finds that it does not give the CPO or the Panel any authority to take actions with regard to "the State."

DTZ also cites numerous cases from the South Carolina Supreme Court for the propositions that (1) the State is ultimately responsible for the actions of its agencies, *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008); and (2) the State authorized SCSU to enter into contracts and thus received goods and services through those contracts and is equally responsible for paying for those goods and services, *State ex rel. McKinlay v. Cardozo*, 8 S.C. 71 (1876); *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 430 (1873); *Walker v. State*, 12 S.C. 200 (1879); and *McCullough v. Brown*, 41 S.C. 220, 10 S.E. 458 (1894). The Panel finds that none of these cases were decided under the Procurement Code or address the question of whether an administrative body may exercise jurisdiction over the State as a party to a dispute involving one of the State's agencies or institutions. Therefore, the Panel finds them irrelevant to the case at hand.

Finally, DTZ reminds the Panel that section 11-35-4230 of the Procurement Code was enacted pursuant the General Assembly's authority to "direct, by law, in what manner claims against the State may be established and adjusted." S.C. Const. art. X, § 10; art. XVII, § 2. In addition, DTZ cites the case of *Unisys Corp. v. South Carolina Budget and Control Board, et al.*, 346 S.C. 158, 551 S.E.2d 263 (2001) for the proposition that section 11-35-4230 is the exclusive means of resolving disputes between the State⁴ and its contractors with regard to contracts solicited and awarded under the Procurement Code. DTZ argues that failing to join the State as a party to the instant contract controversy would result in all future contract controversy cases

⁴ In the *Unisys* decision, the South Carolina Supreme Court used the term "the State" to refer to all of the respondents in the case collectively. These parties included numerous state agencies and officials, but not the State as a corporate entity.

being brought before the Circuit Court rather than the CPO and the Panel as intended by section 11-35-4230. The Panel agrees that section 11-35-4230 was enacted pursuant the cited state constitutional articles and that *Unisys* discussed the CPO and Panel's jurisdiction over contract controversy claims. However, the Panel disagrees that failing to join the State as a party in the instant dispute would have the dire result predicted by DTZ and notes that the *Unisys* court did not consider the precise jurisdictional question currently before the Panel. Indeed, the Panel is mindful that the *Unisys* court also viewed section 11-35-4230 as a statute waiving the State's sovereign immunity that "must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute." *Id.* at 170, 551 S.E.2d at 270 (citation omitted). In other words, the Panel must consider the express language of section 11-35-4230.

Section 11-35-4230(1) provides:

This section applies to controversies between a **governmental body** and a contractor . . . which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The procedure set forth in this section constitutes the exclusive means of resolving a contract controversy between a **governmental body** and a contractor . . . concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code.

S.C. Code Ann. § 11-35-4230(1) (2011) (emphasis added). Thus, the clear language of this provision authorizes the Panel and the CPO to exercise jurisdiction over a governmental body and a contractor to resolve a controversy between them relating to a contract awarded under the Procurement Code. Furthermore, the Procurement Code defines the term "governmental body" as "a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch." S.C. Code Ann. § 11-35-310(18) (2011).

Although SCSU falls squarely within this definition, the State as a separate corporate entity or sovereign does not. As the CPO aptly observed, had the General Assembly wanted to give the CPO and the Panel jurisdiction over the State as well as its agencies in proceedings pursuant to the Procurement Code, it surely could have done so. While sympathetic to DTZ's situation, the Panel simply cannot exercise jurisdiction over the State in a contract controversy proceeding.⁵

Conclusion

Therefore, for the reasons stated herein, the Panel hereby upholds the decision of the CPO dismissing DTZ's claims against the State for lack of jurisdiction.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: *Willie D. Franks*
WILLIE D. FRANKS, VICE CHAIRMAN

This 12th day of October, 2015.

Columbia, South Carolina

⁵ The Panel is deeply troubled that the Procurement Code appears to offer no means of enforcing a judgment against an apparently insolvent governmental body and respectfully suggests that this is an issue to be addressed by the General Assembly in an amendment to the Procurement Code.