THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2011-CP-05-00160

Dr. Robert W. Denton and Dr. John May, D/B/A Edusystems, a general partnership,.....Appellants,

v.

Denmark Technical College,.....Respondent,

v.

Dr. John K. Waddell,.....Third-Party Defendant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to Defendant/Respondent, Denmark Technical College (hereinafter "DTC" or "the College"), on the complaint of Plaintiffs/Appellants, Dr. Robert W. Denton and Dr. John P. May, doing business as Edusystems, a general partnership (individually hereinafter "Denton" and "May," collectively "Edusystems"). This contract action was filed by Edusystems on March 26, 2010. (R. p. 13, Complaint). It asserts that DTC breached a consulting agreement with Edusystems by terminating its relationship with the partnership and refusing to pay its invoices for fees for the balance of the contract term, four months, in the amount of $42,000. On May 20, 2010, the College filed its answer and counterclaim, seeking recovery of consulting fees paid to Edusystems in the amount of $130,000. (R. p. 27, Answer and Counterclaim). On June 18, 2010, Edusystems filed its Reply to DTC's counterclaim. (R. p. 45, Reply). On January 5, 2011, the College filed a third-party complaint against Dr. John K. Waddell, the former President of the College, who entered into the consulting relationship with Denton and May d/b/a Edusystems. (R. p. 50, Third-Party Complaint). In its responsive pleading and third-party complaint, DTC alleged that Denton and May, in combination with Waddell, conspired to enter into a contract with the College in knowing disregard of applicable procurement requirements.

On May 6, 2011, Edusystems filed a motion for summary judgment on its complaint. (R. p. 67, Plaintiffs' Motion for Summary Judgment). On October 26, 2011, DTC filed a cross motion for summary judgment addressing Edusystems' complaint, but not the College's counterclaim. (R. p. 73, Defendant's Motion for Summary Judgment).

By order entered December 13, 2011, the circuit court denied Edusystems' summary judgment motion and granted DTC's cross motion for summary judgment. (R. p. 3, Order 12/13/11). The court concluded, as a matter of law, that the consulting agreement on which Edusystems sued was not a valid sole source procurement and that Edusystems may not recover fees under an unauthorized procurement and award of contract. On January 17, 2012, the circuit court denied Edusystems' motion to alter or amend the court's December 13, 2011, order. (R. p. 12, Order 1/17/12). On February 13, 2012, Edusystems served its notice of appeal.

STATEMENT OF THE FACTS

In the summer of 2009, Dr. John Waddell was terminated as President of Denmark Technical College, for reasons that are not a matter of record and which are not immediately relevant to the issues on appeal. In July 2009, after Waddell's termination, Dr. Walt Tobin was appointed Interim President of DTC. (R. p. 119, Affidavit of Dr. Walt Tobin ¶2). Upon discovering that the College was paying Denton and May d/b/a Edusystems $10,500 a month for consulting services, the value and necessity of which were not clear to Tobin and others, Tobin looked into the business dealings between the College and Edusystems. (R. p. 120, Tobin Aff. ¶4). Tobin was able to locate two letters of agreement between Edusystems and DTC. The first letter agreement bore the date May 1, 2008, and covered the period May 15 through September 30, 2008. (R. pp. 120, 126, Tobin Aff. ¶6 & Exh. A). The agreement called for the payment of a professional fee to Edusystems of $10,500 per month, covering services described in the document. The letter agreement was unsigned either by Waddell, at the time President of the College, or by Denton or May on behalf of Edusystems.

Tobin found a second letter agreement, also dated May 1, 2008, covering the period October 1, 2008, to September 30, 2009 (R. pp. 121, 129, Tobin Aff. ¶7 & Exh. B). The second contract was not signed by Waddell, Denton, or May, in the month of May, but rather was executed on October 13, 2008, by the three individuals. It called for a fee to Edusystems of $10,500 a month, for a total payment over the 12-month period of $126,000.

Upon further investigation, Tobin located several additional documents, including invoices from Edusystems, pay requests and paychecks, certain incomplete and

apparently after-the-fact "sole source" documents, and consultant request/approval and contract forms. (R. pp. 121, 133-148, Tobin Aff. ¶8; Exh. C at 1-16). Tobin determined that Waddell and Edusystems attempted on September 19, 2008, to use a sole source procurement justification for services that were rendered starting in May 2008 under the initial letter agreement, and that Waddell and Edusystems sought to have the first sole source justification also cover the second, 12-month contract for services supposedly not beginning until October 1, 2008.

Through examination of the sole source and related consultant request documents, Tobin determined not only that the sole source justification for the contract was after-the-fact, but also that the documentation itself was incomplete in important respects. (R. pp. 121-122, 134-136, Tobin Aff. ¶9; Exh. C at 2-4). None of the four options of the "Sole Source Checklist" at the top of the "Justification for a Sole Source Procurement" form, which identified the particular reason relied upon for a sole source procurement, were filled in. The form identified "Edusystems" as the sole source provider, stating only that Edusystems was being retained to provide "Facilitation of the College's Strategic Planning [sic], Workforce Development, Allied Health, and Leadership Objectives." The only other marking on the form was Waddell's undated signature.

The only attachments to the Justification form were two sheets, one entitled "Approval/Request for Consultant Services" and the other entitled "Consultant Contract." (R. pp. 121-122, 135-136, Tobin Aff. ¶9 & Exh. C at 3, 4). Neither of those documents contained any information justifying the hiring of Edusystems as a sole source procurement based on uniqueness or availability of service only from one source. The

form stated only that Edusystems is a "Professional firm that specializes in developing and implementing high quality products and services. The firm assists with comprehensive strategic planning to exploit the unique strengths and program opportunities for institutions."

Further search of the College's files produced documentation related to an earlier contractual arrangement between Waddell and Edusystems, apparently entered into in February 2008, which Waddell and Edusystems sought to claim as a sole source procurement but which again lacked complete and proper written justification for the procurement. (R. pp. 122, 149, Tobin Aff. ¶11 & Exh. D). An email exchange between Waddell and Denton concerning the February 2008 business arrangement contains a statement from Waddell to Denton to the effect that the "grants person" at the College has "issues with the sole source for Allied Health," to which Denton replied: "OH JOHN . . . I feel we did a credible job in justifying EDUSYSTEMS as SS [sole source] provider." (R. pp. 303-304, Waddell Depo. Tr., Exh. 4 at 2-3).[1]

Reviewing the types of services described in the 12-month letter agreement, Tobin determined that the services as described amounted to standard, run-of-the-mill consultant services in areas such as strategic planning, workforce development, and program development. (R. pp. 122-123, Tobin Aff. ¶12). Tobin believed that the educational services of the nature and type that Denton and May were to provide under

[1] The email exchange is reproduced in a document that is Exhibit 4 to the transcript of the deposition of John Waddell. As explained more fully at page 15 below, the Waddell deposition transcript is not part of the record, and should not be considered by the Court. If the Court decides to disregard Waddell's deposition testimony and related exhibits, as requested, the content of this email exchange between Waddell and Denton, as an exhibit to the testimony, should not be considered. Should the Court, however, decide to consider Waddell's deposition testimony, the exhibit containing the email exchange also may be considered.

the agreement were not unique or special. Tobin knew of several consulting firms which offered the same kind of consultant services as Edusystems provided DTC.

Tobin discussed the circumstances of the relationship between Denton and May d/b/a Edusystems and the College with DTC's governing body, the Denmark Technical College Area Commission ("Area Commission"). (R. p. 124, Tobin Aff. ¶15). A decision was made that the agreement between Edusystems and the College was improper, and that Denton and May had not provided the services for which DTC had contracted. In mid-July 2009, Denton and May were advised that their services were no longer needed and that they were not to return to the College.

At the time of termination, Denton and May d/b/a Edusystems had been paid their monthly fee of $10,500 through the end of May 2009. Edusystems agrees that it performed no services in June or July 2009, and any "services" it claims it performed in August and September 2009 consisted only of a meeting with Tobin in August and a letter in September related to Edusystems' attempt to explain its services to Tobin. (R. pp. 15, 124-125, Complaint ¶12; Tobin Aff. ¶17).

ARGUMENT

THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DENMARK TECHNICAL COLLEGE, AND AGAINST EDUSYSTEMS, REGARDING EDUSYSTEMS' COMPLAINT.

1. The Circuit Court Properly Granted Summary Judgment In Favor Of Denmark Technical College On Edusystems' Complaint Because There Are No Genuine Issues Of Material Fact, And The College Is Entitled To Judgment As A Matter Of Law.

This Court reviews the granting of a summary judgment motion under the same standard as the trial court pursuant to Rule 56(c) SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sloan v. Dep't of Transp., 379 S.C. 16, 666 S.E.2d 236, 239 (2008). The circuit court concluded that no reasonable juror could reach any finding other than that the agreement on which Edusystems sues was procured in violation of State and College procurement requirements and that, as a matter of law, Edusystems cannot recover for unpaid fees under an unlawful procurement or contract award. (R. p. 10, Order 12/9/11 at 8). See Shuler v. Tuomy Reg'l Med. Ctr., 313 S.C. 225, 437 S.E.2d 128, 130 (Ct. App. 1993) ("Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist in which reasonable minds cannot differ.")

Citing portions of DTC's memorandum in support of its motion for summary judgment, (see R. pp. 292, 296, 298, Defendant Denmark Technical College's Memorandum of Law in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 3, 7, 9), Edusystems attempts to argue that the College has conceded that there is an issue of fact, which prevents award of

summary judgment in its favor. Brief of Appellants, page 6. Edusystems misperceives DTC's position at the stage of cross motions for summary judgment. As a secondary argument – after the primary argument that Edusystems' contract was invalid – as to why Edusystems was not entitled to summary judgment on its motion, DTC asserted that, even if Edusystems had a valid contract, denial of summary judgment was required because a genuine issue existed as to Edusystems' performance of the contract, which DTC found wholly lacking. DTC has in no way conceded that there is an issue of fact as to the invalidity of the agreement at the time of contract *formation.* "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Shuler, 437 S.E.2d at 130.

2. Edusystems' Contention That The Consulting Agreement On Which It Sues Is Valid As An Emergency Procurement Is Not Properly Before This Court.

Throughout the proceedings, including the circuit court's grant of summary judgment to DTC, Edusystems has taken the position that the 12-month agreement on which it sues is valid as a proper sole source procurement. Only in its motion to alter or amend the lower court's order granting summary judgment to the College did Edusystems assert, for the first time, that the agreement could be justified as an emergency procurement. (R. p. 176, Motion to Alter or Amend Rule 59(a) SCRCP at 4). Accordingly, Edusystems has waived any contention that its agreement is proper as an emergency procurement. Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n., 359 S.C. 105, 597 S.E.2d 145, 149 (2004); Dixon v. Dixon, 262 S.C. 388, 608 S.E.2d 849, 854 (2005) (a party cannot use a motion to reconsider, alter or amend an order to present an issue that could have been raised prior to the order but was not). Edusystems has offered no reason why it could not have presented its emergency procurement argument prior to

the circuit court's December 9, 2011, ruling. It is noted that in an affidavit filed by Waddell on November 18, 2011, in opposition to DTC's summary judgment motion, which Waddell's counsel served on Edusystems' attorneys and counsel for DTC on the same date, Waddell raised the matter of emergency procurement. Edusystems, however, never presented any argument on that ground in its opposition to summary judgment.[2]

3. If Edusystems' Contention Regarding Emergency Procurement Is Properly Before The Court, The Consulting Agreement Should Be Determined Not To Be A Valid Emergency Procurement.

Should the Court conclude that Edusystems' argument concerning emergency procurement is properly before it, the Court must hold that the consulting agreement on which Edusystems sues is not a valid emergency procurement.

In its brief on appeal, Edusystems offers a limited argument regarding its emergency procurement contention. Brief of Appellants, page 7. Relying on the affidavit of Waddell, Edusystems notes that Waddell stated that he felt there were problems that would have prevented the timely filing of the College's audit report for fiscal year 2007-08 and that he was unable to get any assistance from the State Technical College Board. Supposedly, these circumstances created an emergency situation and justified Waddell in seeking help on an emergency basis from outside the College. For elaboration on the claimed urgency of the situation and Edusystems' unique capabilities, Edusystems' brief invites the Court to peruse the entirety of Waddell's deposition testimony. (Appellants' brief, p. 7.)

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[2] Edusystems' newly conceived theory, echoing Waddell's wholly unsupported assertion to the same effect, that the contract can be validated as an emergency procurement raises questions about the sincerity of Edusystems' argument and the credibility of Denton and May, as well as Waddell. As discussed more fully below at pages 19-20, in addition to the ex post facto nature of Edusystems' emergency procurement contention, all documentation related to the contract creation or award points to an attempted *sole source* procurement.

There are several problems with the evidentiary basis for Edusystems' position. First, as to Waddell's deposition testimony, although Edusystems had the opportunity to do so, it never entered such evidence into the record or presented it to the court below.[3] Accordingly, Waddell's deposition testimony cannot be considered on appeal because it is not part of the record of the proceedings below. Rule 210(c), SCACR; see Read v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (pursuant to SCACR, matter would not be given substantive consideration if it is not presented to trial judge.). Furthermore, any attempt now by Edusystems to supplement the record with Waddell's deposition testimony must be rejected. See Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (motion to supplement record on appeal with deposition testimony was denied where matters were not presented to trial judge.)

Although Waddell's affidavit is included in the record, his testimony regarding the purported emergency situation is, in critical respects, based on hearsay and thus cannot be considered. See Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (client's deposition testimony concerning what a third party told him about settlement negotiations in civil case was hearsay that was inadmissible to refute summary judgment motion). In his affidavit, Waddell states that he directed DTC's Vice President of Business to determine the proper procurement procedures for retaining Edusystems. (R. p. 169, Waddell Aff. ¶8). Waddell further states that he was instructed by the Vice President of Business that, to properly hire Edusystems, the Area Commission would

[3] Waddell's deposition was taken on December 16, 2011, shortly after the circuit court's ruling in favor of DTC on summary judgment. Although Edusystems' motion for reconsideration, dated December 21, 2011, refers to Waddell's deposition testimony regarding the alleged emergency circumstances, Edusystems never filed the transcript of the deposition with the lower court, nor made any specific argument utilizing the testimony, prior to the court's January 17, 2012, denial of the reconsideration motion.

merely "need to vote for an emergency procurement" and "adjust the institution's companion rulebook accordingly.'"[4] (R. p. 169, Waddell Aff. ¶10). Such testimony, based on what the Vice President for Business supposedly said to Waddell, is clearly hearsay evidence. It cannot be used to create an issue of fact in opposition to DTC's summary judgment motion. See Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440, 447 (Ct. App. 2006) (hearsay evidence presented in response to summary judgment motion did not create a genuine issue of material fact because "[o]ur appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be admissible in evidence"), citing Hall, 561 S.E.2d at 657.

Moreover, Waddell's assertion about what he was told by the Vice President for Business concerning the hiring of Edusystems through an emergency procurement is specifically denied by the Vice President for Business in his affidavit. The Vice President for Business at the time was Clarence F. Bonnette. He testified that he never had any discussions with Waddell concerning how Edusystems could properly be hired. (R. pp. 170-171, Affidavit of Clarence F. Bonnette ¶4). Bonnette states further that he never instructed Waddell or the Area Commission that Edusystems could be retained through an emergency procurement and that, since emergency procurements require that an immediate threat to public health, welfare, or safety exists, retaining a consulting firm, like Edusystems, for on-going consulting services cannot be justified on an emergency basis. (R. pp. 170-171, Bonnette Aff. ¶4).

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[4] DTC has no idea what Waddell means when he states "adjust the institution's companion rule book accordingly." Clearly, if Waddell is suggesting that the College's purchasing policies could be amended ("adjust") to permit an otherwise invalid emergency procurement based on Waddell's approval and a favorable vote by the Area Commission, Waddell is sorely mistaken.

It is clear as a matter of law that the engagement of Edusystems, supposedly because of concerns that the audit report might be late, for a 12-month period beginning in October (or May?) 2008, cannot be considered a valid emergency procurement. To start, assistance in the financial area to complete the annual audit is not even mentioned in the scope of services contained in the contract. (See letter agreement dated May 1, 2008, executed October 13, 2008, pages 1-4; R. pp. 23-26 (setting forth four segments of service including Strategic Initiatives, Nursing and Allied Health, Review Analysis of Opportunities for Academic Performance and Advancement, and Identifying and Assisting Workforce Development Efforts, but not "assistance with completion of audit")).

Equally important, Edusystems' 12-month hiring cannot be considered a valid emergency procurement under the requirements of DTC's purchasing policies and procedures and the South Carolina Consolidated Procurement Code. The College's policy on emergency procurement states:

> The determination for an emergency procurement is made in writing and authorized by the President. Emergency procurements are permitted only when there exist [sic] an immediate threat to the public health, welfare, or safety, such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by the President.

(R. p. 159, Tobin Aff.Exh. E at 5). DTC's policy is consistent with the requirements for emergency procurement under the State Consolidated Procurement Code, to which the College must adhere. See State Procurement Code, S.C. Code Ann. § 11-35-1570 (Supp. 2007). The State Procurement Code's regulations provide further definitional content regarding an immediate threat to public health, welfare, or safety, such as through floods,

epidemics, etc., language from which DTC's policy specifically draws. See S.C. Code Ann. Regs. § 19-445.2110 (Supp. 2007)

In Sloan v. Dep't of Transp., 379 S.C. 160, 666 S.E.2d 236 (2008), the Supreme Court had occasion to consider an emergency procurement by the Transportation Department under the procurement policy of that agency and looked to the language of §11-35-1570 for guidance. The Court stated that "[a]n emergency is, by its very nature, a sudden, unexpected onset of a serious condition." 666 S.E.2d at 243, citing The American Heritage Dictionary 448 (2nd College ed. 1982), and Black's Law Dictionary 361 (6th ed. 1991). See also Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (discussing the same stringent requirements under § 11-35-1570 for an emergency procurement, but deciding only that a taxpayer had standing to challenge the validity of an alleged emergency contract). Clearly, concerns, even if urgent, about the timely completion of the College's audit report for 2007-08 did not constitute an immediate threat to public health, welfare, or safety; nor can it reasonably be said that the concern arose suddenly or unexpectedly. Furthermore, an emergency procurement must be limited to that which is necessary only to meet the emergency. Reg. 19-445. 2110(C). A 12-month engagement of Edusystems, beginning October 1, 2008, and running to September 30, 2009, far exceeds any time frame needed to assist in the preparation of the 2007-08 audit report.

Moreover, in a procedural sense, Edusystems' contract is defective as an emergency procurement. Most fundamentally, an emergency procurement must be supported by a *prior* written determination by the head of the purchasing agency, stating the basis for the emergency procurement. See DTC Policy (R. p. 338; § 11-35-1570;

Reg. § 19-445.2110(F)). Nowhere in the record is there any evidence that Waddell, as President, made a written determination of the basis for conducting an emergency procurement of Edusystems' services. The only evidence in the record related to the procurement of such services seeks to justify the contract as a sole source procurement. (R. pp. 134, 140, Tobin Aff. Exh. C at 2, 8). The regulation requires that the written determination set forth sufficient factual grounds and reasoning to provide an informed, objective explanation of the decision to procure on an emergency basis. Reg. § 19-445.2110 (F). In addition, the written determination must explain the basis for selection of the particular contractor, since the statute and the regulation require that emergency procurements be made with as much competition as is practicable, and normally more than one contractor should be considered. None of these requirements for a proper emergency procurement are satisfied in the present case.

4. The Circuit Court Correctly Held, As A Matter Of Law, That The Consulting Agreement On Which Edusystems Sues Was Not A Valid Sole Source Procurement.

In its brief on appeal, Edusystems appears to abandon its initial contention that its agreement with DTC can be justified as a sole source contract. Given that, on appeal, Edusystems advances a position based on emergency procurement, it is not surprising that Edusystems foregoes its original argument, since it is unlikely, and no contention is made, that a procurement can be substantiated on both exceptions to normal competitive hiring procedures.

The circuit court found, as a matter of law, that Edusystems' contract cannot be upheld as a sole source procurement under DTC's purchasing policies and the State Procurement Code. (R. pp. 6-7, Order 12/9/11 at 4-5). As the court noted, a sole source procurement may be justified only when an item or service is available from one

supplier or where the item is one of a kind. See S.C. Code Ann. Regs. § 19-445.2105(B). In addition, as with emergency procurements, a written determination demonstrating the existence of these special factors must be made.

Nothing in the record demonstrates that the consulting services under Edusystems' agreement were either unique or available from only one source of supply. Moreover, as the court below noted, the documentation related to the contract coming into existence, prepared or executed by Waddell himself, does not support the hiring of Edusystems through a sole source procurement. (R. p. 8, Order 12/9/11 at 6). That documentation, incomplete in several critical respects, establishes at most that Edusystems is a professional firm experienced in developing and implementing high quality products and services.

As the lower court also noted, Edusystems never actually offered an argument that their services were unique or available only through Denton and May. (R. p. 7, Order 12/9/11 at 5). Rather, Edusystems merely referred to a provision of the College's purchasing policies as the basis for its argument that the validity of a sole source procurement rests solely within the discretion of the College President. See purchasing policy language: "To obtain approval for a sole source procurement . . . [a sole source procurement form must] be forwarded to the college president for *final determination and approval.*" (R. p. 161, Tobin Aff.Exh. E at 7) (emphasis added). As the circuit court correctly concluded, such language cannot be interpreted to mean that the College President, in his discretion, can approve a sole source procurement which does not meet the requirements for such a procurement under College policy and state

law. To the extent Edusystems offers any argument on appeal concerning sole source procurement, the reasoning and conclusion of the circuit court should be upheld.

5. The Circuit Court Properly Concluded That Edusystems, In Doing Business With The State, Is Held To Have Notice Of Procurement Requirements And The Extent Of Waddell's Power When A Type Of Procurement Is Not Properly Within His Authority.

Edusystems appears to argue that, even if the entering upon of the consulting agreement failed to comply with procurement requirements, it is not responsible for such non-compliance and should not be barred from recovery. See Appellants' Brief, page 6 ("The Trial Court Erred In Using The Consolidated Procurement Code To Unjustly Injure The Appellants"). The circuit court rejected this argument.

Edusystems cites a portion of the purposes and policies section of the State Procurement Code in support of its argument that the Procurement Code's intention is to hold only government officials responsible for compliance with the Code. See § 11-35-20(h) (one of the purposes of the Code is "to develop an efficient and effective means of delegating roles and responsibilities to the various government procurement officers."). Edusystems, however, ignores other underlying purposes and policies of the Code, such as "to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing value of funds . . ."; "to foster effective broad-based competition for public procurement . . ."; and "to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement . . ." § 11-35-20(a), (b), and (f).

Edusystems' argument that it is not accountable for any failure by DTC to make certain that procurement requirements were followed is contrary to well-settled principles that govern those who do business with the state. As early as 1901, our State Supreme Court held:

> The state can only act under its constitution and through its legislative enactments pursuant thereto, and can only ratify in the manner in which it could originally authorize; . . . . All men are bound to take notice of the special authority of the state's officers, and when dealing with them outside their authority, they assume the peril with their eyes open, and cannot be heard to say they place reliance upon the State.

Carolina Nat. Bank v. State, 60 S.C. 465, 38 S.E. 629, 633 (1901); see also Federal Crop Ins. Corp. v. Merrill, 322 U.S. 380, 68 S. Ct. 1 (1947) (anyone entering contract with federal government takes the risk of aggregately ascertaining limit of government agent's authority as defined by legislation). This principle from Carolina Nat. Bank has been recognized and consistently applied by our appellate courts. See Baker v. State Highway Dep't, 166 S.C. 481, 165 S.E. 197, 201 (1932) ("A public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at his peril."); Service Mgm't, Inc. v. State Health and Human Services Fin. Comm., 298 S.C. 234, 379 S.E.2d 442, 444 (Ct. App. 1989) (". . . parties entering into agreements with the state assume the risk of ascertaining that he who purports to act for the state stays within the bounds of his authority."); Aherns v. State, 392 S.C. 340, 709 S.E.2d 54, 60-61 (2011) (quoting same sentence above from Baker).

Furthermore, Edusystems is not an innocent or naïve vendor, caught unaware of procurement requirements. Robert Denton is or was a state employee, and both he and May worked as consultants for Allen University, when Waddell was

employed at Allen. (R. p. 68, Denton Aff. at 1). Presumably, Denton and May have some awareness of state procurement requirements. Furthermore, there is evidence that Edusystems, or at least Denton, was complicit with Waddell in attempting to pay lip service to procurement requirements, while in fact skirting those requirements, to establish a business relationship with the College. In February 2008, several months before the agreement in which Edusystems sues came into existence, Denton responded to an email from Waddell conveying concerns raised about the sustainability of a sole source justification by stating that he felt they did a "credible job" in justifying Edusystems as a sole source provider. (R. p. 303, Waddell Depo. Tr., Exh. 4 at 2).[5]

6. The Issue In This Case Is Not Whether Waddell, As A General Matter, Has The Authority To Contract On Behalf Of The College, But Rather Whether He Is Authorized To Enter Into A Contract That Is Procured In Violation Of Legal Procurement Requirements.

It is not DTC's position that Waddell, as President of the College, was not authorized in general to enter into contracts on DTC's behalf. Rather, it is the College's position that Waddell had no authority to enter an agreement which was unlawfully procured. Entering such a contract is an unauthorized procurement. Edusystems' reliance on the decisions in HH Hunt Corp, v. Town of Lexington, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010), and Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976), demonstrates that it fails to grasp this distinction. In Townes, the Supreme Court held that the City of Grenville was estopped to deny an otherwise proper contract for architectural services when the officer executing the contract, i.e., the City Manager, was the proper person and had the authority to enter into the contract on behalf of the City. 221 S.E.2d at 776. Relying on Townes, this Court in HH Hunt stated the

[5] See footnote 1 above.

principle as follows: "Where the officers or agents of a governmental body act within the proper scope of their authority, a municipality cannot escape liability on a contract within its power to make, on the grounds that the officer executing it on its behalf was not technically authorized to do so, where he was the proper person to enter into such a contract." 699 S.E.2d at 638. Again, DTC is not saying that Waddell, as President, was not a proper person with the authority generally to enter into a consulting agreement on behalf of the College – *if* the consulting contract came about in a manner that complied with DTC's purchasing policies and state law. Here, it clearly did not.

7. The Circuit Court Correctly Held That Edusystems Cannot Recover Fees For The Contract Balance, Which Might Have Been After Its Termination, Under Its Improperly Procured And Invalid Agreement.

The circuit court concluded that Edusystems cannot recover for unpaid fees under a procurement and award of contract that violated DTC's policies and State Procurement Code. The lower court was correct, as a matter of law.[6]

" '[O]nce a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed . . . without showing that the municipality suffered any alleged injury'." Sloan v. School Dist. of Greenville County, 537 S.E.2d at 303-04 (citations omitted). By such reasoning, public funds already have been wasted by virtue of Edusystems' contract, procured without competition and unsubstantiated as either an emergency or a sole source contract. The consequences for Edusystems' claim based on such a contract are clear – "this Court will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public

[6] As a factual matter, regarding its claim for recovery of fees at the rate of $10,500 a month, for the four months remaining under the contract (June – September 2009) following its termination, Edusystems concedes that it rendered no services in June or July, and its only activity in August and September dealt with correspondence relating to questions that arose after its termination.

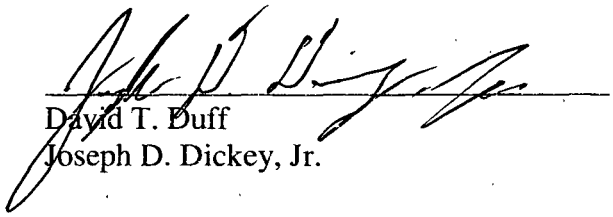
policy." Ward v. West Oil Co., Inc., 387 S.C. 268, 692 S.E.2d 516, 519 (2010) (emphasis added). Furthermore, as this Court stated in its decision in Service Mgmt., "[a] private party has no right to public funds received as a result of the unauthorized conduct of a government employee." 379 S.E.2d at 444 (emphasis added). The Court's statement in Service Mgmt. has important implications for DTC's counterclaim, which seeks recovery of monies already paid, but it also makes clear that Edusystems is not entitled to receive any more fees. Waddell, a government employee, had no authority to enter into an agreement with Edusystems that violated procurement requirements. Therefore, Edusystems, the private party, has no right to public funds received -- or those it would like to receive – under an unlawful agreement that resulted from the unauthorized conduct of a government official.[7]

CONCLUSION

For the foregoing reasons, the circuit court correctly held, as a matter of law, that the consulting agreement under which Denton and May d/b/a Edusystems sues was procured, in combination with Waddell, in violation of DTC's purchasing policies and the State Procurement Code, and that, accordingly, Edusystems cannot recover fees for the balance of the contract subsequent to its termination. DTC respectfully submits that the Court should affirm the lower court's grant of summary judgment to the College on Edusystems' complaint.

[7] The circuit court also cited S.C. Code Reg. § 19-445.2015, dealing with unauthorized procurements, which essentially codifies the common law principle that a contract issued in violation of public procurement requirements is a nullity and cannot be the basis for a claim for fees not paid once the contract is terminated.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2011-CP-05-00160

Dr. Robert W. Denton and Dr. John May, D/B/A Edusystems, a general partnership,.....Appellants,

v.

Denmark Technical College,.....Respondent,

v.

Dr. John K. Waddell,.....Third-Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with the South Carolina Supreme Court order of August 13, 2007.

October 30, 2012

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

November 20, 2012

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Appellants and Third-Party Defendant by causing a copy of same to be hand delivered to their attorneys of record, respectively, Timothy G. Quinn, Esquire, Law Offices of Quinn & Quinn, 2309 Devine Street, Suite A, Columbia, SC 29205, and James M. Griffin, Esquire, Lewis Babcock Griffin, LLC, 1513 Hampton Street, Columbia, SC 29211, on October 30, 2012.

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