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S.C. Supreme Court

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.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

- I. IN-LIGHT OF THIS COURT'S LONGSTANDING JURISPRUDENCE THAT AN APPELLATE COURT SHOULD NOT ADDRESS AN ISSUE UNLESS FIRST RAISED IN, AND RULED ON, BY THE TRIAL JUDGE, DID THE COURT OF APPEALS ERR IN "GRANTING" DYNCORP PARTIAL SUMMARY JUDGMENT WHERE DYNCORP NEVER MOVED FOR SUMMARY JUDGMENT, THE TRIAL COURT NEVER CONSIDERED THE ISSUE, AND THE GROUNDS FOR THE COURT OF APPEALS' DECISION WERE NOT PRESENTED BY OR ADDRESSED BY EITHER PARTY?
- II. THIS COURT AND FEDERAL COURTS HAVE REPEATEDLY HELD THAT CONTRACT INTERPRETATION MUST BE BASED ON THE ENTIRE DOCUMENT AND NOT ON ANY PARTICULAR PROVISION, AND THUS WAS IT ERROR FOR THE COURT OF APPEALS TO INTERPRET THE SUBCONTRACT BY FOCUSING ALMOST EXCLUSIVELY ON SEVEN WORDS IN A SINGLE CONTRACT SECTION, PARTICULARLY WHEN THE COURT EXPRESSLY ACKNOWLEDGED THAT THERE WERE PROVISIONS WITHIN THE SUBCONTRACT WHICH SUPPORTED AN INTERPRETATION CONTRARY TO THAT SUGGESTED BY THOSE ISOLATED WORDS?
- III. COURTS IN THIS STATE AND FEDERAL COURTS HAVE EXPRESSLY RECOGNIZED THAT, WHEN INTERPRETING A CONTRACT, ITS WHEREAS CLAUSES SHOULD BE READ IN CONJUNCTION WITH ITS OPERATIVE PORTIONS TO ASCERTAIN THE TRUE INTENTION OF THE PARTIES. THUS, DID THE COURT OF APPEALS ERR IN HOLDING THAT A TEAMING AGREEMENT ENTERED INTO BY THE PARTIES HAD NO BEARING ON THE CONTRACT'S INTERPRETATION BECAUSE IT WAS REFERENCED IN A WHEREAS CLAUSE?

STATEMENT OF THE CASE

This action was commenced on August 24, 2009, when Plaintiff/Petitioner Stevens Aviation, Inc. ("Stevens") filed its Complaint seeking relief against Defendant/Respondent 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

In October 2009, Stevens moved for summary-judgment, asking 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' motion. On November 17, 2009, the trial Court entered its "Order Granting Partial Summary Judgment in Favor of Plaintiff, Stevens Aviation, Inc." In that 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

¹ Stevens 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.

under the Prime Contract for the purpose of allowing Stevens to perform the aviation maintenance services specified in that Agreement.”

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 to Reconsider. DynCorp served Stevens with its Notice of Appeal on January 11, 2010.

Following full briefing, the Court of Appeals heard oral arguments from the parties on June 22, 2011 and entered its opinion on July 27, 2011, Stevens Aviation, Inc. v. DynCorp International LLC, 394 S.C. 300, 715 S.E.2d 655, 659-60 (Ct. App. 2011) (Apdx. Vol. III, Tab 4). In its decision, the Court of Appeals reversed the trial court’s finding that the “Teaming Agreement” was incorporated into the subsequently executed Subcontract. The Court of Appeals then went further and declared 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 timely petitioned the Court of Appeals for rehearing, which was denied. Stevens then petitioned this Court for a writ of certiorari, which was granted by order dated February 7, 2013.

STATEMENT OF FACTS

A. The Teaming Agreement.

In March 2000, DynCorp and Stevens executed a Teaming Agreement. (Appendix ("Apx."), R. p. 31 at ¶ 5, p. 13 at ¶ 4).² The purpose of the Teaming Agreement 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." (Apx., R. pp. 146, 403). The Teaming Agreement expressly provided that, in the event DynCorp was awarded the prime contract, it "*shall*-award to STEVENS a subcontract thereunder to perform the work described" within that document, *i.e.*, "*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." (Apx., R. pp. 148, 151-52, 405, 408-09 (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. (Apx., R. pp. 146, 403 (emphasis added)). In Attachment B, the parties agreed that Stevens "shall perform": "*all* ACIs" (*i.e.*, aircraft

² The Appendix is in three (3) volumes. Volumes I & II coincide with the Record on Appeal before the Court of Appeals, so that Apx. R. p. 31 coincides with ROA_031. Volume III contains the items in the Appendix which were not in the Record on Appeal.

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.” (Apdx., R. pp. 151-52, 408-09 (emphasis added)).

The Army awarded DynCorp the prime contract referenced in the Teaming Agreement. (Apdx., R. p. 14 at ¶ 10).

B. The Subcontract Agreement.

On March 20, 2001, DynCorp and Stevens entered into “Subcontract No. LCCS/SAI001” (“the Subcontract”), which forms the primary basis of the claims at issue in this litigation. (Apdx., R. p. 32 at ¶ 11; R. p. 14 at ¶ 11). The Subcontract was executed specifically for the purposes of carrying out work that was subject to the Prime Contract. (Apdx., R. pp. 45-46). The purposes of, and the intent of the parties in executing, the Subcontract were set forth in detail therein:

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 [];

(Apdx., R. p. 45 (emphasis added)). In addition, the parties expressly provided in the Subcontract for resolving “[a]ny ambiguity, discrepancy, inconsistency or conflict . . . by applying the most reasonable interpretation under the circumstances, *giving full consideration to the intentions of the parties at the time of subcontracting.*” (Apdx., R. p. 56 (emphasis added)).

The term of the Subcontract coincided directly with the prime contract DynCorp entered into with the Government, in that it would be deemed to automatically extend

each time the term of the prime contract was extended. (Apdx., R. p. 47). The Subcontract defined the "Aircraft" subject to its terms as: "*All* Army RC/C-12 and UC-35 aircraft covered under the Prime Contract." (Apdx., R. p. 48 (emphasis added)). It then set forth a "STATEMENT OF REQUIREMENTS" which provides:

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.

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

(Apdx., R. p. 57 (capitalization in original) (emphasis added)). In turn, Section G refers to funds allocated for "contract line item numbers" (*i.e.*, "CLIN"). (Apdx., R. p. 70). Under Section G, Stevens is relieved from performing 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.

The Subcontract expressly addressed, and limited, DynCorp's right to terminate the obligations created thereunder in two separate places. The level of detail expressed in these provisions is wholly inconsistent with a conclusion that the Subcontract unambiguously creates no obligation to use Stevens' services. 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." (Apdx., R. p. 74). Section H.23, a section dedicated entirely to the issue of when the Subcontract could be terminated, outlined in great length and detail other circumstances under which DynCorp could

terminate the Subcontract. (Apdx., R. pp. 83-84). More specifically, the Subcontract indicated that DynCorp could terminate its obligations thereunder only in the event of certain, specified acts of "default" by Stevens which were enumerated therein. These "defaults" were: Stevens' failure to perform its obligations under the Subcontract for ten consecutive days after receipt of a "Cure Notice"; the issuance of three "Cure Notices" by DynCorp in one year; Stevens' provision of a materially incorrect certification or warranty; the suspension or discontinuation of Stevens' business or the loss of certifications necessary to conduct its business; Stevens' voluntary or involuntary reorganization or takeover by a receiver or liquidator; and the termination of the underlying Prime Contract by the government. Id. The Subcontract also outlined "default" events which would give rise to Stevens' right to terminate its obligations thereunder, which were: DynCorp's failure to make timely payment and cure that breach within sixty days; and the suspension or discontinuation of DynCorp's business or the loss of certifications necessary to conduct its business. Id.

C. The Trial Court's Grant of Partial Summary Judgment to Stevens.

In early October 2009, Stevens moved for summary judgment in which it asked the trial court to interpret, as a matter of law, the Subcontract governing its relationship with DynCorp. (Apdx., 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." (Apdx., R. pp. 365-92). 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. (Apdx., R. pp. 382-83).

In opposing Stevens' dispositive motion in the trial court, DynCorp argued that the Subcontract could not be interpreted to require it to send all aircraft to Stevens for several reasons, including the purported fact that the Teaming Agreement was "superseded" and thus should not be considered by the trial court in interpreting the Subcontract. (Apdx., R. pp. 257-58). Importantly, 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. (Apdx., R. pp. 244-70).³

On November 17, 2009, the trial court entered its "Order Granting Partial Summary Judgment in Favor of Plaintiff, Stevens Aviation, Inc." (Apdx., 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 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. (Apdx., R. p. 1).

³ In fact, in its Brief in the Court of Appeals, while continuing to contend that the Subcontract is unambiguous, DynCorp urged 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* Apdx. Vol. III, Tab 1, p. 19, 22.

D. The Court Of Appeal's Proceedings and Its *Sua Sponte* Grant of Summary Judgment to DynCorp.

DynCorp appealed the trial court's order granting summary judgment in favor of Stevens. In its appeal, DynCorp argued that the trial court erred in finding that the Teaming Agreement entered into by the parties was incorporated into the Subcontract, and that, *consequently*, its interpretation of the Subcontract as requiring DynCorp to send all-aircraft to Stevens was also erroneous. (Apdx. Vol. III, Tab 1). DynCorp did *not* argue that the trial court's interpretation of the Subcontract was wrong if, in fact, the Teaming Agreement was incorporated into it. Id.

The Court of Appeals first held that the trial court was wrong in its finding that the Teaming Agreement entered into by the parties was incorporated into the Subcontract. Stevens Aviation, Inc. v. DynCorp International LLC, 394 S.C. 300, 307-09, 715 S.E.2d 655, 659-60 (Ct. App. 2011) (Apdx. Vol. III, Tab 4). While acknowledging that no "magic words" are needed for incorporation, and that "the Subcontract identifies the Teaming Agreement with sufficient particularity to incorporate the entire document," the court found that the no incorporation occurred for two reasons: (1) the provision in the Subcontract identifying the Teaming Agreement was a "whereas clause" and such clauses "cannot be permitted to control the express provisions of the contract";⁴ and (2) the Subcontract did not "sufficiently communicate an intention to

⁴ Even the portion of the Subcontract that the Court of Appeals determined constituted "the contract" expressly required "giving full consideration to the intentions of the parties at the time of subcontracting" in reaching "the most reasonable interpretation" of any "ambiguity, discrepancy, inconsistency or conflict." (Apdx., R. p. 56).

incorporate the Teaming-Agreement as a whole,” and the court could not “handpick which duties to incorporate.” Id.

The Court of Appeals then went on to decide whether the trial court erred in holding that the Subcontract was an “enforceable requirements contract” so that DynCorp was obligated to send to Stevens all the specified aircraft that DynCorp received under the Prime Contract. Id. at 309-11, 715 S.E.2d at 660-61. The Court first concluded that the Subcontract did not apply at all to UC-35 aircraft.⁵ Id. at 309-10, 715 S.E.2d at 660. The resolution of this issue was unnecessary in light of the fact that the Court of Appeals went on to hold that DynCorp had no obligation under the Subcontract to send *any* aircraft to Stevens, at any time. Id. at 310-11, 715 S.E.2d at 660-61.

The Court of Appeals acknowledged that the Subcontract included language supporting a finding of “exclusivity,” but offered no explanation as to why such language was irrelevant when the Subcontract was considered as a whole. Id. Then, without any party having ever argued that any specific words in Section C.1 of the Subcontract controlled its interpretation, the Court of Appeals went on to focus exclusively *on seven words found in only two sentences* in Section C.1.⁶ Id. Specifically, the Court found that the words “at the direction of” and “as directed by” found in only two of the four

⁵ DynCorp never raised the UC-35 as an issue on appeal until its reply brief.

⁶ Section C.1 of the Subcontract 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* Apdx., R. p. 64.

items of work listed in Section C.1⁷ controlled the entire interpretation of the Subcontract. Id. at 311, 715 S.E.2d at 661. Relying exclusively on these seven words, the Court of Appeals concluded that “DynCorp must pay Stevens for the services under the Subcontract only to the extent that maintenance was performed,” and thus the Subcontract could not be enforced as a requirements contract. Id. The Court of Appeals dismissed out of hand the fact that some of the items of work in Section C.1 did not have such “direction” language, reasoning that Stevens did not argue the provision was “divisible.”⁸ Id. at 311, n. 4, 715 S.E.2d at 661, n. 4.

The Court of Appeals then announced: “[W]e grant partial summary judgment,” to DynCorp, and “the ruling of the circuit court is reversed.” Id. at 312, 715 S.E.2d at 661.

⁷ The Court of Appeals seemed to suggest that these words could be found in three of the four items of work listed in Section C.1. Although the phrase “as directed by DynCorp” can be found in the “third” provision (the one addressing “over and above” maintenance work), it is used in that provision only in the sentence addressing DynCorp’s reimbursement obligations, not in the sentence dictating what work Stevens “shall” perform. *See* Apdx., R. p. 64.

⁸ Of course, without notice that the Court of Appeals might *sua sponte* grant summary judgment, Stevens would have to have been omniscient to know to argue the divisibility issue at the trial court level in order to get the necessary evidence into the record, since the Court of Appeals is not an evidentiary forum.

ARGUMENT

I. THE COURT OF APPEALS' "GRANTING" OF SUMMARY JUDGMENT TO A PARTY THAT NEVER MOVED FOR SUMMARY JUDGMENT BELOW, ON GROUNDS NEVER PRESENTED TO OR CONSIDERED BY THE TRIAL COURT, -CONFLICTS WITH THIS COURT'S PRECEDENT AND CONSTITUTES A MANIFEST INJUSTICE.

The trial court never considered whether the use of the words "at the direction of" and "as directed by," as found in two sentences in one section of the Subcontract, governed or affected the interpretation of the Subcontract. In fact, no party ever argued that those provisions were conclusive, or that they even affected, the interpretation. Despite this, the Court of Appeals "granted" summary judgment to DynCorp on this exact basis. And, it did so, even though DynCorp had never moved for summary judgment.

The opinion of the Court of Appeals conflicts directly with decisions of this Court which make clear that appellate courts cannot address issues not presented below, and not raised by the parties. *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 speak unless spoken to and do not answer questions they are not asked"); *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2000) ("An appellate court cannot address an issue unless first raised by the appellant and ruled on by the trial judge"); *see also Fuller v. Blanchard*, 358 S.C. 536, 548, 595 S.E.2d 831, 837 (Ct. App. 2004) (Kittredge, J., concurring) (noting the refusal to grant summary judgment is not appealable, Justice Kittredge stated: "I believe we have neither the authority to reconsider the denial of Appellant's summary judgment motion nor the authority to grant him judgment as a matter of law").

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 the Court of Appeals, DynCorp 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, the Court of Appeals 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 incorporation of the Teaming Agreement.

Instead, what the Court of Appeals did was rule on a motion for summary judgment never actually presented,⁹ based on arguments never actually raised or addressed by either party in either the lower court proceedings or those before the Court of Appeals. And, in doing so, the Court of Appeals deprived Stevens of any opportunity to address those grounds for that (non-existent) motion or the issues raised by it.¹⁰ In

⁹ In fact, the trial court denied DynCorp's motion for judgment on the pleadings, which is not an appealable order. 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"); see also Fuller, 358 S.C. at 548, 595 S.E.2d at 837.

¹⁰ The Court of Appeals then went on to go a step further, acknowledging that some of the items of work did not have the "direction" language, but holding that it could "not consider the argument" because Stevens never argued that the items were "divisible." See Stevens Aviation at 311, n.4, 715 S.E.2d at 661, n.4. Stevens, of course,

conflict with prior decisions of this Court, the Court of Appeals effectively “answer[ed] questions not asked.” See Kennedy, 349 S.C. at 533, 564 S.E.2d at 323.

Underscoring the fact that the Court of Appeals committed error in granting summary judgment *sua sponte* is the fact that a trial court would not have that authority under the circumstances of this case. Rule 56 of the South Carolina Rules of Civil Procedure requires that an adverse party be given “at least 10 days” notice prior to the court hearing a motion for summary judgment. Rule 56(c), SCRPC. While a trial court may have the authority to enter summary judgment *sua sponte*, “that power is contingent on giving the losing party notice that it must come forward and defend its claim.” United States Dev. Corp. v. Peoples Federal Sav. & Loan Asso., 873 F.2d 731, 735 (4th Cir. 1989); see Bridgeway Corp. v. Citibank, 201 F.3d 134, 139 (2d Cir. 2000) (“If the [trial court] fails to give notice before *sua sponte* granting summary judgment and the moving party was, as a result, procedurally prejudiced, [the appellate court] must reverse.”). While “there are times when a [trial court] can issue a summary judgment order *sua sponte*, it cannot bypass the requirements of Rule 56” and must operate within the confines of the same, giving adequate notice to the nonmoving party. Donate-Romero v. Colorado, 856 F.2d 384, 387 (1st Cir. 1988).

Thus, the Court of Appeals’ granting of summary judgment to DynCorp should be reversed to ensure the consistency of the law in this State with respect to an appellate court’s jurisdiction.

never addressed the issue because DynCorp never argued the “direction” language controlled, either at the trial court level or on appeal.

II. THE COURT OF APPEALS IGNORED THIS COURT'S PRECEDENT AND FEDERAL LAW WHEN IT INTERPRETED THE SUBCONTRACT BY FOCUSING ALMOST EXCLUSIVELY ON SEVEN WORDS WITHIN A SINGLE CONTRACTUAL SECTION, PARTICULARLY IN LIGHT OF THE FACT THAT THE COURT EXPRESSLY ACKNOWLEDGED THERE WERE PROVISIONS WITHIN THE SUBCONTRACT WHICH SUPPORTED AN INTERPRETATION CONTRARY TO THAT SUGGESTED BY THOSE ISOLATED WORDS.

The law of this State and federal law¹¹ are clear: Contract interpretation requires exacting the intent of the parties by reading the contract "as a whole and in a manner which gives reasonable meaning to all of its parts," rather than focusing on a single clause. United International Investigative Services v. United States, 109 F.3d 734, 737 (Fed. Cir. 1997); *see* Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) ("The purpose of all rules of contract construction is to ascertain the intention of the parties to the contract. . . . [T]he parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."); J. B. Williams Co., Inc. v. United States, 450 F.2d 1379, 1388 (Ct. Cl. 1971). ("[I]t is a well-known principle of contract construction that an instrument must be viewed in its entirety and the language contained therein given that meaning which would be derived by a reasonably intelligent contractor acquainted with the contemporaneous circumstances."). Moreover, the parties *expressly* provided that "full consideration to the intentions of the parties at the time of subcontracting" guide the resolution of any discrepancy. (Apdx., R. p. 56)

The opinion of the Court of Appeals directly conflicts with this law and the parties' expressed intent. Indeed, the wording of its opinion makes clear that the Court arrived at its interpretation by considering only isolated words found in a single provision

¹¹ DynCorp has contended throughout this case that federal law applies.

of the Subcontract to the exclusion of other provisions which supported a contrary result. See Stevens Aviation at 310-11, 715 S.E.2d at 660-61 (acknowledging that some language of the Subcontract supports "exclusivity" but finding no "exclusivity" based solely on seven isolated words).

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 (Fed. Cl. 1993); Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982); Mason v. United States, 615 F.2d 1343, 1347 (Ct. Cl. 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 (Fed. Cl. 1992), *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.” By focusing exclusively on select words to the exclusion of others, however, the Court of Appeals’ interpretation of the Subcontract fails to meet the criteria necessary for *any* of these contracts.

As the parties readily acknowledge, there is no numerical “quantity” term in the subcontract. 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 that the contract was illusory and void because DynCorp had no obligation to ever send even a single aircraft to Stevens. *See, e.g., Torncello*), 681 F.2d at 761-762 (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”); A-Transport 27 Fed. Cl. at 214, (noting that “it is true” that a contract which does not require “any ascertainable quantity is unenforceable for lack of consideration and mutuality”).

The Court of Appeals’ interpretation that the contract is essentially illusory violates the cardinal rules of contract construction that a court must favor an interpretation that 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.”).

The error of the Court of Appeals is not only evident in its admitted focus on isolated words, but also in the fact that its interpretation rendered numerous provisions in the Subcontract meaningless and superfluous. A proper contract interpretation gives meaning to all its parts, and leaves none inexplicable, insignificant or inoperative. *See, e.g., Brady v. Brady*, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952) (indicating that in interpreting a lease contract, “where possible, all the language used should be given a reasonable meaning”); Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (“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”):

The Court of Appeals’ opinion fails to address what meaning many of the provisions of the Subcontract could have if its interpretation is correct. These provisions include:

- The express definition of the word “Aircraft” as “*All* Army RC/C-12 and UC-35 aircraft covered under the Prime Contract” (Apdx., R. p. 48 (emphasis added));
- The language in Section B.1 which *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 (Apdx., R. p. 57);

- The lengthy termination provisions 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 (Apdx., R. pp. 74, 83-84);
- The automatic renewal provisions which purport to obligate DynCorp to extend the Subcontract each time the underlying government contract is extended (Apdx., R. p. 47);
- The Preamble, 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 (Apdx., R. p. 45); and
- The Statement of Work for the underlying government contract, which is expressly incorporated into the Subcontract, and which makes clear that the aircraft subject to its provisions includes the entire "worldwide fleet" of C-12/RC-12 and U-35 (Apdx., R. p. 64).

Furthermore, and in any event, even if the Court of Appeals was correct in focusing exclusively on Section C.1 in interpreting the Subcontract (as it did), its findings still conflict with this Court's, and federal court's, precedent. This Court has made clear that when a contract is susceptible of two or more interpretations, it is ambiguous and its interpretation becomes a question of fact for a jury who can consider extrinsic evidence as to the intent of the contracting parties. *See, e.g., Miles v. Miles*, 393 S.C. 111, 117-18, 711 S.E.2d 880, 883 (2011); *see also TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006).

The Court of Appeals did not address, in any way, the law relating to contract ambiguities. It clearly should have done so in light of the fact that it recognized that only

some of the items of work prescribed to Stevens in Section C.1 were modified by the words which, in isolation, it found to destroy “exclusivity,” *i.e.*, the modifiers “at the direction of” or “as directed by” DynCorp were inserted as to only two of the four items of work listed in that section.¹² (Apdx., R. p. 64). And, while the Court defined the “direction” words to mean “for aircraft that DynCorp chooses to send to Stevens,” it is clear that the phrases “at the direction of” and “as directed by” 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.¹³ Thus, when Section C.1 is read in isolation (as the Court of Appeals read it), there are two reasonable outcomes: there was an exclusive relationship between the parties for some work; or the Subcontract is, at best, ambiguous on the issue of exclusivity.

The Court of Appeals dismissed this conflicting language out-of-hand, reasoning that Stevens did not argue that the provisions are “divisible.” This analysis ignores two

¹² The Court of Appeals found that three of the four items of work were modified by the “direction” language. 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. While 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. (Apdx., R. p. 64).

¹³ “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.*

key facts: DynCorp never argued at any time that the “at the direction of” or “as directed by” language was the operative language which negated an exclusive relationship between the parties; and the trial court never considered that language to be controlling or even relevant to the Subcontract’s interpretation. Thus, Stevens had no reason, or opportunity, to address whether Section C.1 was “divisible.”

The Court of Appeals arrived at its interpretation by focusing on isolated words in a single section of the Subcontract, and it failed to address even the potential that an ambiguity existed in the section. Its opinion conflicts with the precedent of this Court, as well as federal law, and should be reversed.

III. THE COURT OF APPEALS’ FAILURE TO GIVE ANY EFFECT TO THE PROVISION REFERENCING THE TEAMING AGREEMENT MERELY BECAUSE THAT PROVISION WAS A “WHEREAS CLAUSE” CONFLICTS WITH THE LAW IN THIS STATE AS WELL AS FEDERAL LAW.

Federal courts and the appellate courts in this state have held that “whereas clauses” are to be considered when interpreting a contract to ascertain the intention of the parties. *See, e.g., KMS Fusion, Inc. v. U.S.*, 36 Fed. Cl. 68, 77 (Fed. Cl. 1996) (noting that whereas clauses should “be read in conjunction with the operative portions of a contract in order to ascertain the intentions of the parties”); *Lion Assocs., LLC v. Swiftships Shipbuilders, LLC*, 475 Fed. Appx. 496, 502 (4th Cir. 2012) (taking “Purpose Clause” into consideration in interpreting contract meaning). In interpreting any contract, the focus is on giving effect to the parties’ intent. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468, 468 S.E.2d 292, 300 (1996) (“A meeting of minds is based upon the intent and purposes as shown by all the circumstances.”). In this case, one of these circumstances is the *express* requirement to fully consider “the intentions of the parties at the time of subcontracting” in interpreting any discrepancies in its provisions. (Apx., R.

p. 56). See South Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (internal citations omitted) (“The purpose of all rules of construction is to ascertain the intention of the parties to the contract.”); Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 261, 263, 199 S.E.2d 719, 721-22 (1973) (finding that language in “whereas clause” clearly set forth the agreement's nature as a modification); M & M Group, Inc. v. Holmes, 379 S.C. 468, 475-76, 666 S.E.2d 262, 266 (Ct. App. 2008) (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) Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (finding that definition in recital clause controlled scope of non-compete provision).

The opinion of the Court of Appeals conflicts with this law. Indeed, while acknowledging that the “Teaming Agreement” was identified with “sufficient particularity to incorporate the entire document” into the Subcontract, the Court of Appeals made clear that it would give the provision identifying the teaming *no effect at all* simply because it was set forth in a “whereas clause.”¹⁴ See Stevens Aviation at 307-09, 715 S.E.2d at 659-60. The failure to give the “whereas clause” identifying the

¹⁴ It is noteworthy that, while finding that the Teaming Agreement was effectively a complete nullity because it was identified in a “whereas clause,” the Court of Appeals gave substantive effect to the very next “whereas clause” in the Subcontract (an integration clause that incorporated the Proprietary Data Exchange Agreement). See Stevens Aviation at 307-09, 715 S.E.2d at 659-60. In essence, what the Court of Appeals 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 of Appeals’ opinion is clear error.

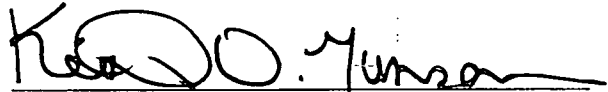
Teaming Agreement any effect at all directly conflicts with prior holdings of this Court and the Court of Appeals, as noted above, and should be reversed.

Moreover, the Court of Appeals' finding that the Subcontract did not "sufficiently communicate an intention to incorporate the Teaming Agreement as a whole" and it could not "handpick which duties to incorporate," ignores critical terms set forth in both the Subcontract and the Teaming Agreement. In making this finding, the Court of Appeals reasoned that several duties of the parties under the Teaming Agreement "would be inapposite to the parties' relationship once the Subcontract was created." See *id.* at 309, 715 S.E.2d at 660. But, 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*. (Apdx., R. p. 45). 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 Apdx., 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.* (emphasis added). 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.* Because this language is precise, there would be no need for any court to "handpick" certain provisions while ignoring others. Accordingly, the decision of the Court of Appeals is in error and should be reversed.

CONCLUSION

For the reasons outlined herein, Stevens respectfully requests that this Court reverse the opinion of the Court of Appeals reversing summary judgment in favor of Stevens and "granting" summary judgment to DynCorp, as set forth in Stevens Aviation, Inc. v. DynCorp International LLC, 394 S.C. 300, 715 S.E.2d 655 (Ct. App. 2011) (Apdx. Vol. III, Tab.4).

Respectfully submitted,



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April 9, 2013

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,

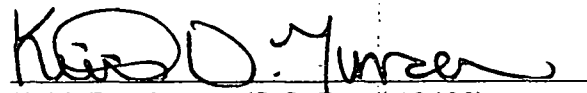
v.

DynCorp International LLC.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on April 9, 2013, a copy of the attached Brief of Petitioner along with the 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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