

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT OFFICER**

**IN THE MATTER OF CONTRACT  
CONTROVERSY**

**DECISION**

**CORPORATE EVENTS AND CATERED  
AFFAIRS, LLC,**

**CASE NO. 2014-125**

**vs.**

**PATRIOT'S POINT DEVELOPMENT  
AUTHORITY**

**POSTING DATE: July 28, 2014**

**MAILING DATE: July 28, 2014**

**PATRIOT'S POINT FOOD AND VENDING  
SERVICES, SOLICITATION NO. 5400000461**

This matter is before the Acting<sup>1</sup> Chief Procurement Officer (“CPO”) pursuant to a request from Corporate Events and Catered Affairs, LLC (CECA) under the provisions of S.C. Code Ann. § 11-35-4230 (2011) for resolution of a contract controversy with Patriot’s Point Development Authority (PPDA), regarding a contract for food and vending services (hereinafter “contract”). Pursuant to this request, the CPO commenced an administrative review as provided for in Code Section 11-35-4230(4). As a part of his administrative review, the CPO conducted a hearing on July 9, 2014. At the hearing, attorney Karen M. DeJong represented CECA, attorney William E. Craver, III, represented PPDA, and John R. Stevens, State Procurement Officer, represented the State Procurement Office. Christina W. Jordan, owner and President of CECA, and Geneva S. Gunnels, were present as witnesses for CECA; R. Mac Burdette, Executive Director of PPDA, was present as a witness for PPDA; and Anthony R. Cromartie, Procurement Manager, was present as a witness but did not testify for the State Procurement Office (SPO). Before conducting the hearing, the CPO explored the potential for settlement of this matter pursuant to Code Section 11-35-4230(3).

During the hearing, the parties submitted into evidence exhibits 1 through 13 and both CECA and PPDA presented their witnesses. At the conclusion of the hearing, the CPO held the administrative review

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<sup>1</sup> Pursuant to SC Code Ann. § 11-35-840, the Chief Procurement Officer, Mr. R. Voight Shealy, delegated this matter to the Chief Procurement Officer for Construction. *See, generally, Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 173, 551 S.E.2d 263, 272 (2001) (“Mr. Moore has in fact recused himself and has designated Voight Shealy, the Assistant Director of the Office of General Services, to serve as acting CPO in this matter. Unisys complains this substitution is unauthorized. We disagree.”).

open to permit CECA to submit a reply brief to a brief filed by PPDA the night before the hearing. On July 16, 2014, the CPO closed his administrative review.

### RELEVANT FACTS

1. On August 18, 2008, SPO solicited proposals to provide food and vending services at Patriots Point Naval and Maritime Museum. [Ex. 1, p. MMO-01<sup>2</sup>] This solicitation provided that the maximum contract period would run approximately from January 1, 2009 through December 31, 2014, depending on the actual begin date specified in the notice of award. [Ex. 1, p. MMO-05]

2. On September 29, 2008, SPO received a proposal from CECA wherein, CECA proposed to provide services in accordance with the terms and conditions of the solicitation. [Ex. 3, p. MMO-47]

3. On November 3, 2008, SPO posted a notice of Intent to Award a contract to CECA. [Ex. 4, p. MMO-58] This notice stated that the Maximum Contract Period was January 1, 2009 through December 31, 2014.

4. On October 8, 2013, Mr. Stevens sent Ms. Jordan an email wherein Mr. Stevens advised Ms. Jordan that PPDA wanted to renew the contract for its final term on its renewal date of December 31, 2013, but wanted to amend the contract to provide for a shortened final term ending on March 15, 2013. [Ex. 7, p. MMO-64] Mr. Stevens further advised Ms. Jordan that if CECA did not agree to amend the contract to provide for a shortened final term, PPDA was providing the required 30-day notice that PPDA was not going to renew the contract for the calendar year 2014 and the contract would terminate at the end of the day on December 31, 2013.

5. On October 21, 2013, CECA's attorney, Ms. DeJong, replied to Mr. Stevens' email. Her message stated in part that "due to...the fact that the State will move to terminate the contract by December 31, 2013 if Corporate Events and Catered Affairs does not accept the March 15, 2014 termination date, Corporate Events and Catered Affairs, LLC hereby accepts the State's and Patriots Point's offers [*sic*] to extend the current contract date to March 15, 2014." [Ex. 8, p. MMO-66] Ms. DeJong's letter further advised Mr. Stevens that CECA would be submitting a "termination claim regarding compensation for the termination of this contract."

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<sup>2</sup> The exhibits were submitted without pagination. To facilitate references in this decision, the CPO had the exhibits paginated starting with the first page of Exhibit 1 as page MMO-01 and sequentially page by page to the last page of Exhibit 13.

6. On November 19, 2013, Ms. Jordan executed Change Order Number 2 on behalf of CECA. [Ex. 6, p. MMO-62 and Ex. 10, pp. MMO-71 and 74] This change order changed the end date of the final contract renewal period from December 31, 2014, to March 15, 2014. [Ex. 6, p. MMO-61]

7. On April 2, 2014, CECA sent Mr. Cromartie a letter making a claim for damages pursuant to the termination for convenience clause in the contract.

8. On May 15, 2014, CECA sent the CPO a request for resolution of CECA's dispute with PPDA regarding the contract termination and CECA's damage claim.

### NATURE OF THE CONTROVERSY

CECA's asserts the following claims:

1. Under the terms of the contract, the contract was for a single term of six years with a termination date of December 31, 2014.
2. Change order number 2 is not a valid contract modification because CECA signed it under duress.
3. On March 15, 2014, PPDA terminated the contract for its convenience.
4. CECA is entitled to termination damages in the amount of \$198,791.96.<sup>3</sup>

As the claimant, the burden of proof is on CECA and CECA must prove its claims upon a preponderance of the evidence. *E.g., Appeal by Hass Construction Company, Inc., Order on Remand, Panel Case No. 1997-16(II), reversed on other grounds, Case No. 1997-16C(V); EllisDon Construction, Inc. v. Clemson University, Panel Case No. 2005-2(VIII), reversed on other grounds, 391 S.C. 552, 707 S.E.2d 399 (2011).*

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<sup>3</sup> In a brief submitted the day before the hearing and during the hearing, PPDA argued that the CPO should not consider CECA's claim for relief. The basis of this argument was that on June 12, 2014, the CPO sent CECA an email requiring CECA to supplement its request for resolution of a controversy by setting forth "the specific relief requested with enough particularity to give notice of every issue to be decided" on or before June 16, 2014. CECA did not respond to this email until June 18, 2014. However, CECA's response was to provide a copy of the claim for damages it had provided to Mr. Cromartie on April 2, 2014. Until receipt of this document from CECA, the CPO was unaware that the state already had a request for relief in its possession. During the hearing, PPDA further objected to CECA submitting a revised request for relief reducing its damage claim from \$1,234,914.53 to \$198,791.96. The CPO finds that PPDA was not prejudiced by either the delayed submission of the damage claim to the CPO or the revised claim submitted at the hearing.

## DISCUSSION

### THE CONTRACT TERM

“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). “When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.” *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). “[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct.App.2002).

In this case, the contract consists of the solicitation, as amended (also known as the Request for Proposal and hereinafter called the “RFP”), CECA’s offer, the Intent to Award statement, and contract modifications agreed to by the parties subsequent to contract formation. [Ex. 1, pp. MMO-26 and MMO-29] Of these documents, the RFP, Intent to Award, and Change Order Number 2 contain provisions regarding the term of the contract. The RFP contains a provision titled “MAXIMUM CONTRACT PERIOD – ESTIMATED.” This term states:

Start Date: 01/01/2009 – End date: 12/31/2014. Dates provided are estimates only. Any resulting contract will begin on the date specified in the notice of award. **See clause entitled “Term of Contract – Effective Date/Initial Contract Period.”**

[emphasis added] [Ex. 1, p. MMO-05] The RFP provision titled “TERM OF CONTRACT – EFFECTIVE DATE/INITIAL CONTRACT PERIOD,” states:

The effective date of this contract is the first day of the Maximum Contract Period as specified on the final statement of award. **The initial term of this agreement is 1 year(s), 0 month(s), 0 day(s) from the effective date.** Regardless, this contract expires no later than the last date stated on the final statement of award.

[emphasis added] [Ex. 1, p. MMO-033] Immediately beneath this provision is a provision titled “TERM OF CONTRACT - OPTION TO RENEW.” This provision states:

At the end of the initial term, and at the end of each renewal term, this contract shall automatically renew for a period of 1 year(s), 0 month(s), and 0 day(s), unless contractor receives notice that the state elects not to renew the contract at least thirty (30) days prior to the date of renewal. Regardless, this contract expires no later than the last date stated on the final statement of award.

[Hearing Ex. 1, p. MMO-33] Under the terms of these clauses, it is clear that the contract is not for a single term of six years. Instead, the contract is a one-year contract renewable annually for an additional five years. Moreover, the contract provides that PPDA can elect not to renew the contract for subsequent on-year terms by providing notice of non-renewal to CECA.

Until Change Order Number 2, the only other contract document addressing the contract term was the Intent to Award statement. The Intent to Award states: “Maximum Contract Period: January 01, 2009 through December 31, 2014.” [Ex. 4, p. MMO-58] This clause complements the provisions in the RFP discussed above, by establishing the first day of the first one-year term as January 1, 2009 and, provided PPDA allowed the contract to automatically renew for each renewal term, the last day of the last one-year term as December 31, 2014.

CECA concedes that the language of each applicable clause is clear and unambiguous. [See CECA’s Response dated July 16, 2014] However, CECA argues that they are in direct conflict with one another. CECA argues that due to this alleged conflict, the CPO should enforce the RFP clause titled “MAXIMUM CONTRACT PERIOD – ESTIMATED” and the Intent to Award clause regarding the “Maximum Contract Period” and not enforce the RFP clauses titled “TERM OF CONTRACT – EFFECTIVE DATE/INITIAL CONTRACT PERIOD” and “TERM OF CONTRACT - OPTION TO RENEW.”

CECA’s approach to contract interpretation renders some terms of the contract meaningless in order to argue for a strained interpretation of other clauses. Such an approach to contract interpretation is neither warranted nor necessary. *Bolt v. Ligon*, 142 S.E. 504 (SC 1928) (“Every word in the instrument must be taken to have been used for a purpose, and no word should be rejected as mere surplusage.”); *Stevens Aviation, Inc. v. DynCorp International LLC*, Appellate Case No. 2011-202686, No. 27369 (S.C. 2014) citing *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed.Cl. 506, 515 (1993) (“An interpretation that gives meaning to all parts of a contract is preferable to one which renders provisions in the contract meaningless or superfluous.”) The contract clauses describing the contract term do not conflict but are interdependent and complimentary.

The RFP clause titled “MAXIMUM CONTRACT PERIOD – ESTIMATED,” specifically refers to the RFP clause titled “TERM OF CONTRACT – EFFECTIVE DATE/INITIAL CONTRACT PERIOD.” From this, it is clear that one must read these two terms together. The first term provides a maximum possible term for the contract. The word “maximum” means “the greatest possible quantity, degree, or number. An upper limit stipulated by law or other authority.” *The American Heritage Dictionary*, Second College Edition (1985). See also *Black’s Law Dictionary*, Sixth Edition (1990) (“Maximum. The highest or greatest amount, quality, value, or degree.”). Therefore, the terms setting forth a maximum contract period are setting an upper limit on the length of the contract. The setting of an upper limit implies the potential or even likelihood of some shorter period. This potential is explicitly set forth in the clause titled “TERM OF CONTRACT – EFFECTIVE DATE/INITIAL CONTRACT PERIOD.” This clause provides that the contract is in fact a one-year contract. Finally, the clause titled

“TERM OF CONTRACT - OPTION TO RENEW” provides that this one-year contract automatically renews for an additional year unless PPDA provided notice of non-renewal. This automatic renewal occurs annually for a maximum of five times. If the contract renews annually without notice of nonrenewal from PPDA, the contract ends on the last day of the last one-year term, December 31, 2014, in accordance with the clause titled “MAXIMUM CONTRACT PERIOD – ESTIMATED,”. On the other hand, if PPDA exercises its right not to renew, the contract ends on the last day of the one-year term during which PPDA provides notice of non-renewal.

On October 8, 2014, SPO notified CECA that PPDA elected to not renew the contract for the last renewal term unless CECA agreed to a contract modification shortening the last renewal term from a one-year term to a two month and fifteen day term. [Ex. 7, p. MMO-64] This notice was more than 30 days before the then current contract term expiration date of December 31, 2013. CECA subsequently agreed to a contract modification whereby on December 31, 2013, the contract renewed for a term of two months and fifteen days. [Ex. 6, p. MMO-62, Ex. 8, p. MMO-66, and Ex. 10, pp. MMO-71 and 74] Therefore, under the terms of the contract the last day of the last contract term was March 15, 2014.

At the hearing, CECA presented a unilateral mistake argument. In this regard, CECA claims that it mistakenly believed it was bidding on a six year contract and would not have submitted a proposal that the contract had an initial term of one year with the potential but no guarantee of five additional one-year terms. Though CECA did not flesh out this argument, the gist of CECA’s position seems to be that the CPO should reform the contract due to CECA’s unilateral mistake.

“[A] contract may be avoided or reformed on the ground of mutual mistake of fact where the mistake is common to both parties and, by reason of it, each has done what neither intended.” *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 339 (Ct. App. 1992). However, were a mistake is unilateral and at the time of contract formation the non-mistaken party is unaware of the mistaken parties error, the subsequent contract is enforceable by the non-mistaken party according its terms. *L-J, Inc. v. South Carolina State Highway Department*, 270 S.C. 413, 242 S.E.2d 656 (1978).

Ms. Jordan testified that CECA’s mistake was a direct result of her failure to read the RFP in its entirety before submitting a proposal. However, there is no evidence that SPO or PPDA knew or should have known that Ms. Jordan failed to read the RFP. Therefore, CECA’s unilateral mistake does not provide a basis for reforming the contract.

#### DURESS

CECA claims that it only agreed to Change Order Number 2 under duress. To determine whether CECA acted under duress, the CPO must determine “whether, considering all the surrounding

circumstances, one party to the transaction was prevented from exercising his free will by threats or **the wrongful conduct of another.**" [emphasis added] *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 (Ct.App. 2009). Here, there is no evidence of wrongful conduct. Under the terms of the contract, PPDA had a right to notify CECA that it did not want to renew the contract for the final one-year term. Having no obligation to renew the contract, PPDA was well within its rights to offer to renew the contract only on the condition that CECA agreed modify the contract by reducing the last renewal term to term lasting two months and fifteen days. The fact that this offer presented CECA with a choice that PPDA was not obligated to offer did not somehow convert PPDA's lawful action into a wrongful action.

#### TERMINATION FOR CONVENIENCE

CECA's argument that PPDA terminated the contract for its own convenience depends on CECA's arguments that the contract was for a single term of six years ending on December 31, 2014 and that CECA executed Change Order Number 2 under duress. Having determined that the contract was a one-year contract renewable annually for up to five additional years, and that Change Order Number 2 was not executed under duress, the CPO finds that the contract ended in accordance with its own terms and that PPDA did not terminate the contract for its convenience or otherwise.

#### TERMINATION DAMAGES

Having determined that the contract ended in accordance with its own terms and was not terminated by PPDA, the CPOC finds that CECA is not entitled to termination damages.

#### **DECISION**

For the reasons stated herein, the claims of Corporate Affairs and Catered Events, LLC's set forth in its request for resolution of a contract controversy are DENIED.



John St. C. White

Chief Procurement Officer



Date

Columbia, South Carolina

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised June 2013)*

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, “[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing.” PLEASE MAKE YOUR CHECK PAYABLE TO THE “SC PROCUREMENT REVIEW PANEL.”

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

1. What is your/your company's monthly income? \_\_\_\_\_

2. What are your/your company's monthly expenses? \_\_\_\_\_

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

For official use only: \_\_\_\_\_ Fee Waived \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

**NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.**