

LEGAL ASPECTS OF PROCUREMENT  
"SKINNY"

- I. Contract Formation
  - A. Offer & Acceptance in Government Procurement
    - 1. How it happens - IFB/RFP - Bid/Proposal - Award
      - a. MacKinnon-Parker, Inc. v. Lucas Metropolitan Housing Authority
    - 2. Memorializing the Deal
      - a. What documents form the contract?
        - (1) Solicitation
        - (2) Bid/Proposal
        - (3) Award Statement
        - (4) ~~Vendor's Separate Contract Form~~
      - b. Separately signed contracts?
        - (1) Who Signs: Indiana National Bank v. Department of Human Services
        - (2) Legal-Consideration
          - (a) Rabon v. State Finance Corporation
          - (b) UCC 2-209
  - B. Changing the Deal: Solicitation Amendments, Contract Change Orders, and Negotiations
    - 1. How do these three differ
    - 2. Making Changes Before Award (solicitation amendments & negotiations)
      - a. Must be responsive to negotiate
      - b. Scope of negotiations
        - (1) 11-35-1530
      - c. Advertisement
    - 3. Making Changes After Award - Negotiations & Change Orders
      - a. Cardinal Change - Limits on Degree of Change
        - (1) Kenai Lumber Co. v. LeResche
        - (2) Matter of LDDS WorldCom
        - (3) Protest of Eldeco, Inc.
      - b. Limit of Good Faith: 11-35-30 & UCC 2-209 Cmt. 2
      - c. Necessity of Consideration
        - (1) Rabon v. State Finance Corporation
        - (2) UCC 2-209, Cmt 2.
- II. Protests & Protest Issues
  - A. The Automatic Stay - 11-35-4210(7)
    - 1. restrictions on "solicitation" or "award," not contract performance
    - 2. the ten day gap
    - 3. lifting the stay
    - 4. Ramifications for Remedies Available
  - B. Remedies Available
    - 1. 11-35-4310

- 2. Protest of GTECH
- C. Types of Protests
  - 1. Responsiveness - disqualified vendor and unsuccessful
  - 2. Responsibility - disqualified vendor and unsuccessful
  - 3. Resident Vendor Preferences
  - 4. "my proposal is better" or "my product is better"
- D. Protest Hearings
  - 1. CPO Brochure
  - 2. Panel Cases
- E. Panel's Special Jurisdiction
  - 1. 11-35-4410(1)(b)
  - 2. Protest of GTECH
- F. Settlement of Protests
  - 1. Lottery
  - 2. Citadel
  - 3. Exit Interviews
  - 4. No Substitute for Common Courtesy & Massaging the relationship; we need them as bad as they need us
- G. Minor Informalities
  - 1. What are they
    - a. 11-35-1520(13)
    - b. Panel Cases
  - 2. To Waive or Not to Waive, or to demand correction
    - a. example: claims of confidentiality; can you think of others?
  - 3. Memorializing the Decisions
- H. Taxpayer Standing
  - 1. Sloan v. Greenville County
- III. Contract Administration
  - A. Authority of agency procurement officer v. board procurement officer
    - 1. 11-35-310 - procurement officer
    - 2. 11-35-310 - procurement
    - 3. 11-35-510
    - 4. State Procurement Office - Standard Operating Procedures
  - B. Ending the Contract
    - 1. Types of "Breach"
      - a. Breach Defined: "Breach of Contract. Failure, without legal excuse, to perform any promise which forms the whole or part of a contract." Black's Law Dictionary
      - b. Substantial Performance
        - (1) Contract Administration Manual excerpt
      - c. Strict or "Perfect" Performance
        - (1) By Contract, e.g., "time is of the essence"
        - (2) Contracts for Sale of Goods: UCC § 36-2-601
      - d. *De minimis non curat lex* - "The law does not concern itself about trifles. - a/k/a the "de minimis" rule
    - 2. Divisible or Installment Contracts

- a. Common Law - Excepts from *Williston on Contracts*
- b. Installment Contracts for Sale of Goods & UCC § 36-2-612
- 3. Types of “Termination” or “Cancellation” (select your words **carefully**)
  - a. Common Law “termination” & “cancellation” - **not terms of art**
  - b. UCC “termination” & “cancellation” - UCC § 36-2-106
  - c. Terminations Under Contract Clauses
    - (1) Termination for Breach / Termination for Default
    - (2) Termination for Convenience
      - (a) expensive
      - (b) pay for unamortized, reasonably incurred, nonrecurring costs
    - (3) Termination for Non-Appropriations
      - (a) required by § 11-35-2030(3)
      - (b) forms part of contract - Unisys
      - (c) contractor recovers “unamortized, reasonably incurred, nonrecurring costs. R.19-445.2135(e)(7)

#### IV. Contract Controversies

- A. Jurisdiction and 11-35-4230(1)
  - 1. Exclusive Jurisdiction - 4230: second sentence
    - a. Unisys v. Budget & Control Board
  - 2. Permissive Jurisdiction - 4230 first sentence
  - 3. Scope of Jurisdiction
    - a. Breach of Contract, Warranty, Fraud, etc; not other torts
    - b. Unisys
    - c. Tort Claims Act
  - 4. Remedies Available - 11-35-4320
- B. Who Files the Case
  - 1. 11-35-4230(2) - contracting agency, using agency, purchasing agency
  - 2. SPO SOP - the MMO manual
- C. Statute of Limitations - 11-35-4230
  - 1. One Year
  - 2. Knew or Should Have Known
    - a. Dean v. Ruscon

#### V. Contract Clauses

- A. Clauses Implied by Law
  - 1. Authority: Unisys v. Budget & Control Board
  - 2. Examples
    - a. Termination for Lack of Appropriations; 11-35-2030
    - b. Payment Provision & 11-35-45
    - c. Standard Equipment Agreement; R. 19-445.2152(B)(1)
- B. Indemnification
  - 1. What is indemnification? Indemnification vs Insurance

2. State indemnifies Contractor - not legal
  - a. S.C. Att'y Gen. Op. of October 6, 1980, 1980 WL 120913.
  - b. S.C. Op. Atty. Gen. No. 89-43, 1989 WL 406133
3. Contractor indemnifies state
  - a. personal injury - example
  - b. no limit on liability
4. Issues
  - a. **Indemnification:** contractor indemnifies state for damages incurred by state; state must pay damages first; indemnity agreement only as good as contractor's pocketbook
  - b. **Indemnification & Insurance:** contractor acquires insurance to cover that contractual obligations (not part of standard CGL); no duty to defend; gives a deep pocket to fund liability created by indemnification clause
  - c. **Additional Named Insured:** contractor has liability insurance (CGL) and carrier names state as additional named insured; carrier pays state, carrier has duty to defend state

C. Liquidated Damages

1. What are liquidated damages?
2. Limits on when the state can agree to pay liquidated damages.
3. Can the state forgive liquidated damages due from the contractor?
4. Is your liquidated damages clause unenforceable as a penalty?
  - a. Moser v. Gosnell
  - b. UCC 2-718(1)
5. Exclusive Remedy?
  - a. Bannon v. Knauss
  - b. UCC 2-719(1)(b)