

In its proposal, SGI identified AT&T as its subcontractor that would provide these telecommunication installation services for the Retail Sites. On October 25, 2001, a Notice of Intent to Award the contract to SGI was issued. GTECH did not file a protest. On October 30, 2001, SCEL and SGI entered into a contract for "Statewide On-line Gaming Systems and Services" (the "Contract"). The Contract, in accordance with the RFP, required the contractor, SGI, to be fully responsible for all work under the contract, including services, equipment or materials supplied by a subcontractor and to be the single point of contact with SCEL.

After execution of the Contract and SGI and AT&T had begun implementation of their respective tasks regarding the Online Lottery, AT&T informed SGI that it would not, in fact, be able to make the telecommunication installs at all of the education lottery Retail Sites prior to the lottery's commencement date of March 6, 2002. SGI proposed to hire BellSouth Corp. to cover the approximately 2100 education lottery Retail Sites that AT&T would not be able to cover by the Contract deadline. On or about February 12, 2002, SCEL and SGI executed an "Agreement for Providing Cover" (the "Cover Agreement") by which both parties to the agreement preserved their respective rights under the Contract and the "South Carolina Consolidated Procurement Code," S.C. Code Ann. §§ 11-35-10, et seq. (Supp. 2001) (the "Code"). The Cover Agreement did not change the scope of the Contract. The number of Retail Sites, the cost to SCEL of installation at the Retail Sites (SGI is responsible for additional costs), and the time for installation to be completed remained the same. The Cover Agreement further provided that SCEL did not object to SGI's contracting with an additional subcontractor, BellSouth, so that SGI could timely implement the Online Lottery since it could not timely complete the approximately 2100 Retail Site telecommunication installations required under the Contract with AT&T.

On February 19, 2002, pursuant to S.C. Code Ann. §§ 11-35-4310 and 11-35-4410(1)(b), GTECH filed a Petition¹ with the Panel, seeking direct Panel review and requesting that the Panel declare “SGI’s response to the RFP, as modified by the alternative solutions, non-responsive and non-compliant with the requirements of the RFP”. GTECH’s petition also sought GTECH’s proposal preparation costs (“Costs”). The Petition did not seek cancellation of the Contract between SGI and SCEL, re-award of the Contract to GTECH or re-solicitation of the Contract.

GTECH alleged that there were defects in the SGI proposal and/or that SGI knew or should have known, based upon the reservations AT&T expressed in its letter to SGI, at the time it submitted the proposal that AT&T could not make the telecommunication installations at the education lottery Retail Sites in a timely manner. GTECH also alleged that SGI deliberately misled SCEL by saying it could implement the lottery by February 20, 2002.

The AT&T letter was available to GTECH under the South Carolina Freedom of Information Act (“FOIA”) after the Notice of Intent to Award was posted².

On February 20, 2002, the Panel requested that GTECH submit a brief distinguishing its Petition from the case of Hitachi Data Systems Corporation v. Leatherman, 309 S.C. 174, 420, S.E.2d 843 (1993) and specifying what “written determination, decision, policy or procedure,” as specified in Section 11-35-4410(1)(b), GTECH was appealing. On April 1, 2002, GTECH submitted its “Memorandum in Support of Panel’s Statutory Authority to Review Petition for Administrative Review Filed Pursuant to S.C. Code Ann. § 11-35-

¹ There were four (4) exhibits attached to the Petition: Ex. A was the RFP; Ex. B was the Contract between SCEL and SGI; Ex. C was correspondence between SCEL & SGI regarding AT&T’s performance; and Ex. D was an excerpt from the RFP. GTECH provided the Panel with a copy of the Cover Agreement as an exhibit to its Memorandum in Support of Jurisdiction. The Panel notes that there were no objections to the exhibits and that exhibits may be filed in support or opposition to subject matter jurisdiction.

4410(1)(b)” (“Memorandum in Support”) to the Panel. GTECH’s Memorandum in Support asserted the Cover Agreement between SCEL and SGI that was executed on February 12, 2002, as the written determination or decision upon which its Petition was based. On April 3, 2002, the Panel notified SCEL and ITMO that each could submit reply briefs regarding the Panel’s jurisdiction. On April 18, 2002, SCEL submitted a memorandum in opposition to the Petition. Also on April 18, 2002, ITMO submitted correspondence indicating its position that the matter should be remanded to the CPO³. The hearing on the sole issue of the Panel’s jurisdiction to entertain GTECH’s Petition was set for argument on May 8, 2002.

On the late afternoon of May 7, 2002, GTECH served a Reply Brief by fax on SCEL and filed the same with the Panel on the morning of May 8, 2002 prior to the hearing. This Reply Brief raised allegations and issues not raised in the Petition. In the Petition, GTECH only alleged that AT&T was a subcontractor for SGI. In its Reply Brief, GTECH attempted to add a contradictory allegation that SGI and AT&T are parallel-prime contractors, not contractor and subcontractor. Absent any allegations in the Petition, GTECH argued in its Reply Brief that the Cover Agreement constitutes a new procurement on a de-facto sole source or emergency basis or that it constitutes a cardinal change to the Contract. Although it acknowledged that the Panel lacks jurisdiction to hear the issue, GTECH further argued in its Reply Brief that the Cover Agreement represents an unconstitutional pledge of the State’s resources to pay the debt of a private corporation. The Petition did not allege that AT&T was a prime contractor, that the cover Agreement was a new procurement because it was tantamount to an emergency or sole source contract, or that the Cover Agreement constituted a cardinal change from the Contract.

² The RFP puts a prospective offeror on notice of its right to protest and of the availability of FOIA.

³ The Panel concludes as a matter of law that having found that it does not have jurisdiction to hear the Petition, it necessarily does not have jurisdiction to remand.

CONCLUSIONS OF LAW

GTECH has sought to invoke the Panel's authority or original jurisdiction pursuant to S.C. Code Ann. §§ 11-35-4410(1)(b) and 11-35-4310 to review directly its Petition. GTECH has not cited any other statutory basis for the Panel to have jurisdiction or authority to review the Petition⁴. The Code is the comprehensive legislative scheme passed by the South Carolina General Assembly to govern and regulate the purchasing of goods and services by the State of South Carolina, by and through its agencies, boards and commissions. S.C. Code Ann. §§ 11-35-20 and 11-35-40 (Supp. 2001). See also Unisys Corporation v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E.2d 273 (2001).

The Code "provides legal and contractual remedies for parties aggrieved as a result of the procurement process." (Emphasis added).

Hitachi, 420 S.E.2d 843, 846. The Panel is a creature of statute and, as such, can only exercise that authority expressly delegated to it or delegated by necessary implication. E.g., Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 360 (1996). Under the clear terms of Section 11-35-4410(1)(b), the Panel has only been delegated the authority to and only has jurisdiction to hear, without prior review by the CPO, "requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction..." (emphasis added) that could not otherwise have been brought before a CPO under Sections 11-35-4210, 4220 or 4230.

The cardinal rule of statutory construction is that the legislative intent must be ascertained and it must prevail. Gardner v. Biggart, 208 S.C. 331, 417 S.E.2d 858 (1992). In

⁴ As noted below, Petitioner, in its Petition, sought administrative review pursuant to Section 11-35-4310(1). See Petition, p. 1. This section does not confer authority on the Panel to hear petitions for administrative review but is simply the Code section that sets forth the remedies available to either a Chief Procurement Officer ("CPO") or the Panel when a solicitation or award of a contract is made in violation of the law.

ascertaining the legislative intent of a statute, the courts look to the clear and unambiguous language of the statute. Defender Properties, Inc. v. Doby, 307 S.C. 336, 415 S.E.2d 383 (1992). It is black letter law that "[w]here a statute is clear and unambiguous, the terms of the statute must be given their literal meaning." Medlock v. 1985 Ford F-150 Pick Up, 308 S.C. 68, 417 S.E.2d 85, 87 (1992), citing Duke Power Co. v. South Carolina Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987); see also Hitachi, 420 S.E.2d 843; Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). "When such terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641, 644 (1992), citing Gunnells v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968).

Another cardinal rule of statutory construction is that the statutory provisions do not stand alone but must be read in the context of the Code as a whole. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Sutherland Statutory Construction, 5th Ed., § 46.05, p. 103 (1992). See also Keonig v. South Carolina Dept. of Public Safety, 325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996). Further, the statutory language in question must also "be read in a sense which harmonizes with its subject matter [the Code] and accords with its general purposes." Hitachi, 420 S.E.2d 846 citing Multi-Cinema, Ltd. v. S.C. Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987).

Based upon these principals of statutory interpretation and the clear and unambiguous language of the Code, the Panel concludes as follows:

ISSUE I: THE PANEL DOES NOT HAVE JURISDICTION UNDER S.C. CODE § 11-35-4410(1)(b) TO REVIEW THE ISSUES RAISED IN GTECH'S PETITION

Pursuant to S.C. Code § 11-35-4410(1), the Panel is charged with the responsibility to review and determine:

(a) requests for review of written determinations of the chief procurement officers under Sections 11-35-4210 (6), 11-35-4220 (5), and 11-35-4230 (6); and

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures. (Emphasis added.)

A. THE COVER AGREEMENT IS NOT A WRITTEN DETERMINATION OR DECISION UNDER SECTION 11-35-4410(1)(b).

S.C. Code Ann. § 11-35-4410(1)(a) gives the Panel the authority and responsibility to review written determinations of the CPOs under Sections 11-34-4210(6)⁵, 11-35-4220(5)⁶ and 11-35-4230(6)⁷. Each of these decisions is a unilateral decision. S.C. Code Ann. § 11-35-4410(1)(b) gives the Panel the authority and responsibility to review “other written determinations or decisions” (“Determination or Decision”) not reviewable by the CPO. GTECH argues that the Cover Agreement is such a Determination or Decision. The Panel disagrees.

⁵ Decision regarding a vendor protest of a solicitation or award of a contract.

⁶ Determination regarding a vendor debarment or suspension.

⁷ Decision regarding a contract controversy of a contract awarded under the Code.

While the Code does not expressly define Determination or Decision, the Panel finds the plain meaning of the words as well as their repeated use in the Code as a whole indicate that the Cover Agreement is not a Determination or a Decision. "Determination" is defined to mean "the decision of a court or administrative agency" (Black's Law Dictionary) or "the act of making or arriving at a decision" (The American Heritage College Dictionary, 3rd Edition (1993)). Decision is defined to mean "a determination arrived at after consideration of facts, and, in legal context, law" (Black's Law Dictionary) or "the passing of judgment on an issue under consideration" (The American Heritage College Dictionary, 3rd Edition (1993)). Determination and Decision each indicate by way of definition that upon considering the facts and/or law in support of and in opposition to a matter, a judicial or administrative body rendered a unilateral finding. Therefore, Determination and Decision do not refer to a mutual agreement by parties to a contract.

Legislative intent with respect to the use of the "determination" and "decision" throughout the Code is also instructive. The Code is replete with examples of the use of "determination" and "decision." S.C. Code Ann. § 11-35-2410 sets forth an exhaustive list, including Sections 11-35-4210, 11-35-4220, and 11-35-4230 cited above, of Code sections requiring written determinations or decisions under the Code. Each of these determinations or decisions is a unilateral determination or decision made by a State agency. Some of these determinations or decisions are not reviewable by the CPO. The only avenue for review of such determinations or decisions is under the provisions of S.C. Code § 11-35-4410(b)(1).

In arguing that the Panel has jurisdiction to hear its Petition, GTECH also relies on In re Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc., Case Nos. 96-4 and 96-5 to support its position that the Petition can be reviewed under S.C. Code Ann. § 11-35-4410(1)(b). In Three Rivers, the Panel was asked to review Three Rivers Solid Waste Authority's procurement policy. Three Rivers argued that, as a political subdivision, it was not subject to the Code, and that, in any event, the petition was untimely filed. In dismissing the protest, the Panel found:

Since the Panel lacks jurisdiction under the fifteen-day time limit, the issue of the Panel's review of a political subdivision's procurement policy is not addressed.

GTECH contends: "Implicit in this decision is the Panel's determination that it has jurisdiction to hear a petition filed directly with the Panel in its original jurisdiction under S.C. Code Ann. § 11-35-4410(1)(b)." Three Rivers does not stand for the proposition that the Panel has the authority to and must hold a merits hearing on a petition simply because a party files a petition with the Panel seeking review of a document the party has denominated as a Determination or Decision.

Under the clear and unambiguous language of Section 11-35-4410(1)(b) and based upon its usage throughout the Code, Determinations or Decisions are unilateral determinations and decisions made by administrative (executive) agencies of the State within the context of exercising their respective authorities under the auspice of the Code. Determination and Decision are each the result of unilateral action on the part of an administrative body, not a mutual agreement by parties to a contract.

The Cover Agreement in question is not a unilateral determination or decision of SCEL and it is not a Determination or Decision within the meaning of Section 11-35-4410(1)(b). The Cover Agreement is a mutual agreement between SGI and SCEL, the parties to the contract. The Cover Agreement preserved the legal rights of SGI and SCEL vis-a-vis any contract controversy issues that might arise from SGI's addition of BellSouth as a second subcontractor to complete the telecommunication installations at the Retail Sites.⁸ Further, S.C. Code Ann. § 11-35-4410(1)(b) expressly provides that the Panel only has jurisdiction to review those matters that could not have been brought before the CPOs in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230. As stated above in the Findings of Fact, "GTECH alleged that there were defects in the SGI proposal and/or that SGI knew or should have known, based upon the reservations AT&T expressed in its letter to SGI, at the time it submitted the proposal that AT&T could not make the telecommunication installations at the education lottery Retail Sites in a timely manner. The AT&T letter was available to GTECH under the South Carolina Freedom of Information Act ("FOIA") after the Notice of Intent to Award was posted." Clearly, these findings of fact refer to an issue which GTECH could have timely raised before the CPO within fifteen days of the date notification of award was posted in accordance with Section 11-35-4210 of the Code. The Panel lacks jurisdiction to hear GTECH's Petition under Section 11-35-4410(1)(b).

⁸ "The parties enter into this Agreement in the spirit of cooperation, without prejudice to the pre-existing rights and obligations among themselves and expressly intending to preserve all pre-existing rights and obligations among themselves. By entering into this Agreement, the parties hereto acknowledge and agree that none of the rights and obligations among the parties hereto with respect to the Education Lottery shall be altered, amended or affected except as specifically set forth herein." Cover Agreement, ¶ 4.

ISSUE II: THE PANEL HAS NO JURISDICTION UNDER SECTION 11-35-4310.

S.C. Code Ann. § 11-35-4310 provides, in pertinent part:

(1) Applicability. The provisions of this section apply where it is determined by either the appropriate chief procurement officer or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the appropriate chief procurement officer after review under Section 11-35-4210 or by the Procurement Review Panel after review under Section 11-35-4410(1).

...

(4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 11-35-4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs. (Emphasis added)

Section 11-35-4310 by its clear and express terms only sets forth the remedies available to an unsuccessful bidder where either the appropriate CPO or the Panel, after administrative review, has found that the solicitation or award of a contract is in violation of law. It does not provide a jurisdictional basis for either the Panel or a CPO to hear a petition filed pursuant to Section 11-35-4410(1)(b) since protests of the solicitation or award of a contract must be pursued under Section 11-35-4210 in the first instance.

GTECH has requested that the Panel award to it Costs. Based upon the allegations of the Petition, the Panel lacks authority to award Costs to GTECH. The only subpart of S.C. Code § 11-35-4310 that authorizes either the CPO or the Panel to award the “protesting bidder or offeror” reasonable reimbursement, including its bid preparation costs, is Section 11-35-4310(4). Under the clear and unambiguous language of this section, it only authorizes award of Costs to a successful protestant after a successful protest pursuant to S.C. Code § 11-35-4210. GTECH has made no such protest. There is no basis for the Panel to invoke jurisdiction under this statute.

ISSUE III. SEVERAL ALLEGATIONS OF GTECH'S REPLY BRIEF ARE NOT TIMELY

S.C. Code Ann. § 11-35-4410(1)(b) requires that any petition to the Panel from a written determination or decision must be filed within fifteen days of the written determination. GTECH contends that the Cover Agreement is the Determination or Decision from which it appeals. The Cover Agreement was executed on or about February 12, 2002. GTECH raised three new issues in its Reply Brief, filed with the Panel on May 8, 2002. Those issues are: (1) SGI and AT&T are parallel-prime contractors instead of being contractor and subcontractor respectively; (2) the Cover Agreement constituted a new procurement as either a de-facto sole source or emergency procurement or the Cover Agreement constitutes a cardinal change of the Contract; and (3) the Cover Agreement constitutes an unconstitutional pledge to pay the debt of a private corporation. Those issues were raised well beyond the fifteen day jurisdictional limitation and the Panel has no jurisdiction to entertain them.

CONCLUSION

For the foregoing reasons, the Petition for Administrative Review is dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

By: Patricia T. Smith
Patricia T. Smith, Chairperson

Columbia, South Carolina

May 7, 2002.

STATE OF SOUTH CAROLINA)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

COUNTY OF RICHLAND)

CASE NO. 2002-4

In re:)

Petition for Administrative Review)

ORDER

GTECH Corporation)

MOTIONS TO QUASH SUBPOENAS

vs.)

South Carolina Education Lottery)

This case involves a petition for administrative review of a matter involving the South Carolina Education Lottery ("SCEL") filed with the Procurement Review Panel ("Panel") by GTECH Corporation ("GTECH"). GTECH is represented by E. Wade Mullins, Esquire. SCEL is represented by M. Elizabeth Crum, Esquire. The recipients of subpoenas filed by GTECH on April 26, 2002 and executed by the Panel's attorney on April 29, 2002 filed Motions to Quash on May 1, 2002, May 2, 2002 and May 3, 2002. Dr. Mathew Dezee and Tom Fletcher are represented by Edwin E. Evans, Esquire. Scientific Games International, Inc. ("SGI") is represented by Daryl L. Williams, Esquire. This Order is issued on this third day of May, 2002 without conducting a hearing and decides only the issues raised in regards to the subpoenas issued on April 30, 2002.

FINDINGS OF FACT

The following facts are relevant to the motions to quash. On April 26, 2002, GTECH requested that the Panel issue the following subpoenas:

- Subpoena Duces Tecum - (1) Ernie Passailaigue, Executive Director, SCEL
(2) Tom Fletcher, Deputy Director, Office of Information Resources
(3) Dr. Matthew Dezee, Chief Information Officer
(4) William J. Huntley, President, Scientific Games
(5) William DiStefano, Vice-President, Scientific Games
- 30 (b) (6) Subpoena - (1) Scientific Games
(2) AT&T
- Hearing Subpoenas - (1-9) Ernie Passailaigue, C. B. Smith, Matthew Dezee, Tom Fletcher, Liz Mason, William Huntley, William DeStefano, Christopher Coker, and Ralph Garcia.

On May 1, 2002, SCEL submitted a Motion to Quash Petitioner's Subpoenas Duces Tecum and Hearing Subpoenas. On May 2, 2002, counsel for Matthew DeZee and Tom Fletcher submitted an Objection and Motion to Quash or for Protective Order in response to Petitioner's Deposition Subpoena Duces Tecum and Hearing Subpoena. On May 3, 2002, counsel for SGI submitted an Objection and Motion to Quash Petitioner's Subpoenas Duces Tecum and Hearing Subpoenas.

CONCLUSIONS OF LAW

S C Code §11-35-4410(4) provides in part the following:

Jurisdiction. Notwithstanding the provisions of Section 1-23-10, et seq. or any other provisions of law, the Procurement Review Panel shall be vested with the authority to: (a) establish its own rules and procedures for the conduct of its business and the holding of its hearings; (b) issue subpoenas...

Under the Protection of Persons Subject to Subpoenas adopted by the Panel the following is stated:

On timely, motion, the SC Procurement Review Panel, regarding a subpoena commanding production or inspection directed to a nonparty, will quash or modify the subpoena if it: (1) fails to allow reasonable time for compliance; or (4) subjects a person to undue burden ...

South Carolina Rules of Evidence Rule 102 provides:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

South Carolina Rules of Evidence Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

South Carolina Rules of Evidence Rule 402 provides in part:

Evidence which is not relevant is not admissible.

The Panel finds that the Subpoenas Duces Tecum to Tom Fletcher, Dr. Matthew Dezee, William J. Huntley, and William DiStefano are not relevant to the issue of jurisdiction to be decided by the Panel on May 8, 2002 and are hereby quashed.

The Panel finds the Subpoena Duces Tecum to Ernie Passailaigue is relevant to the Panel's hearing as modified, a copy of which is attached hereto.

The Panel finds that the 30 (b) (6) Subpoenas to Scientific Games and AT&T are not relevant to the issue of jurisdiction to be decided by the Panel and because these are nonparties to the hearing in question these subpoenas also pose an undue burden and are hereby quashed.

The Panel finds that the Hearing Subpoenas to Ernie Passailaigue, C. B. Smith, Matthew Dezee, Tom Fletcher, Liz Mason, William Huntley, William DeStefano, Christopher Coker, and Ralph Garcia are not relevant to the issue of jurisdiction to be decided by the Panel and are hereby quashed. Furthermore, the Panel will not here testimony on May 8, 2002 because all parties were extended an opportunity to provide briefs on the issue of jurisdiction and those memorandums that were submitted may properly be supplemented by argument on the issue of jurisdiction.

CONCLUSION

For the reasons stated above, the Panel hereby quashes the subpoenas issued on May 30, 2002, with the exception of one subpoena issued to Ernie Passailaigue in regards to the production of documents which may provide evidence related to the Cover Agreement which is the subject of GTECH's petition.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY *Patricia T. Smith*

Patricia T. Smith, Chairman

Columbia, South Carolina

May 3, 2002.