

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Pickens
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP- 39 - 1033

Ellis-Dow Const. Inc.

Clemson Univ.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____.
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2005 JAN 18 P 2:15

Dated at _____, South Carolina, this _____ day of _____, 20_____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20_____, and a copy mailed first class this 18 day of Jan., 2006 to attorneys of record or to parties (when appearing pro se) as follows:

Norman Lambert

James Logan Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

s/ Rejette H. Galloway
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)
)
EllisDon Construction, Inc.)
Petitioner/Appellant)
v.)
Clemson University)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Case No.: 2005-CP-39-1033

ORDER

2005 JAN 18 P 2:15

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

I. Introduction/Procedural Background

Ellis Don Construction, Inc. (Ellis Don) petitions this court for judicial review pursuant to §1-23-380 of the June 25, 2005 Order of Hearing Officer Mark W. Bakker. Respondent Clemson University (Clemson) answered the Petition. The State's Chief Procurement Officer (CPO) has moved to intervene in the Petition, and also moved to Dismiss the Petition. Both Clemson and Ellis Don oppose the motion to Dismiss.

The court heard oral argument on the motions. The pertinent procedural history is as follows. The case involves construction contract disputes between Clemson and Ellis Don regarding construction of the Agriculture Biotechnology/Molecular Biology Complex at the school. The case was heard by the CPO in February 2004, over a course of six days. Some eleven months later, the CPO ruled. Ellis Don appealed the ruling to the Procurement Review Panel, setting forth its specific grounds of appeal as required by S.C. Code § 11-35-4210(6). Clemson did not appeal.

The Procurement Review Panel designated panel member Mark W. Bakker, Esquire to serve as its designated hearing officer. Ellis Don moved before Bakker to limit the issues before the Panel to those issues specifically enumerated in its notice of appeal.

Bakker denied the request, but imposed a scheduling order and urged the parties to agree on what issues should comprise the appeal.

This Petition followed. Based on the evidence of record, the arguments of counsel, and the applicable law, this court makes the following findings of fact and conclusions of law.

II. Law/Analysis

The court grants the CPO's motion to intervene. Owen Steel Co. v. South Carolina Tax Commission, 281 S.C. 80, 313 S.E.2d 636 (1984); Dorman v. South Carolina Department of Health and Environmental Control, 350 S.C. 159, 565 S.E.2d 119 (Ct.App. 2002). Ellis Don's Petition, however, is dismissed as interlocutory. The Order of the Procurement Review Hearing Officer is not a final agency order, and consequently Ellis Don has not exhausted its administrative remedies. Garris v. Governing Board, 319 S.C. 388, 461 S.E.2d 819 (1995). Exhaustion of administrative remedies is typically required to prevent "premature interference with agency processes" and to compile an adequate record for judicial review. Video Gaming Consultants v. S.C. Dept. of Rev., 342 S.C. 23, 535 S.E.2d 642 (2000). The Officer's order deals with the scope of the final hearing, and affects neither the substantial rights of either party nor the mode of trial.

The court acknowledges that there is some conflict between S.C. Code § 11-35-4210(6) and § 11-35-4410. Specifically, the former section provides in pertinent part that appeals to the Procurement Review Panel of a decision of the Chief Procurement Officer "shall be in writing, setting forth the reason why the person disagrees with the decision..." Here, however, the Procurement Review Panel, via a Hearing Officer, has

ruled that once an appeal is filed by any party, either party may bring up any issue related to the case, regardless of whether that issue was listed as one of the reasons for appeal per §11-35-4210(6).

Moreover, § 11-35-4410 provides that the Panel's review shall be de novo. The statute does not define whether de novo means an entire new evidentiary trial, or simply a review of the issues raised on appeal based on the existing record (i.e., with no new evidence taken). Typically, de novo means "the whole case is tried as if no trial whatsoever had been had in the first instance." Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). In the context of administrative procedure, however, de novo can mean an essentially appellate review. Nat'l Health Corp. v. SCDHEC, 298 S.C. 373, 378 n.1, 380 S.E.2d 841 (Ct.App. 1989).

The only thing consistent about the decisions of the Panel on this issue is their inconsistency. Compare, e.g., Protest of Kodak & Xerox Corp., Case No. 1988-15, with Protest of McCrory Constr. Co., Case Nos. 1994-13 & 1995-7 with Protest of Volume Services, Case No. 1994-8. Together, these decisions provide a conflicting mass of confusion rather than certainty. One reads them in vain in an attempt to ascertain the scope of the panel's review on appeal.

The court is sympathetic to Ellis Don's plight. The parties have already spent six days trying their case before the Chief Procurement Officer, who then took nearly a year to issue his decision. Unfortunately, the doctrine of exhaustion of remedies prevents the court from extricating Ellis Don from the beauracritic morass in which it has found itself entangled. The doctrine is aptly named, for should Ellis Don have to endure an entire new trial before the panel, present the same evidence, make the same objections, deliver the

same arguments, then Ellis Don will have no doubt exhausted its resources and its patience with administrative “procedure.” The public is ill-served by such delay and duplication. The intent of the Procurement Code, after all, is to expedite (rather than exacerbate) the contract protest procedure. Cf. Marlboro Park Hosp. v. SCDHEC, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004) (noting DHEC Board failed to apply the appropriate standard of review of findings of Administrative Law Judge); Milliken & Co. v. S.C. Dept of Labor, 275 S.C. 264, 269 S.E.2d 763 (1980) (in context of agency review, “[f]undamental fairness would seem to indicate that there should be one basic fact-finding process, and review thereafter should be on the record made in that fact-finding process or procedure.”).

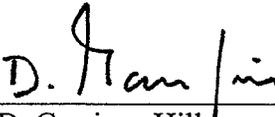
Nevertheless, the Procurement Code is clear that it is only the Panel’s decision after the de novo review that constitutes “final” agency action which may then be appealed to this court. See S.C. Code § 11-35-4410 (6)¹. Our Supreme Court has recently held that the procurement review process outlined in § 11-35-4410 is exclusive and satisfies due process. Unisys Corp. v. SC Budget and Control Board, 346 S.C. 158, 551 S.E.2d 263 (2001). Ellis Don’s remedy is convincing the legislature to change the law to clarify and streamline the procurement administrative review process, and this case certainly could serve as a glaring example of the need for such a reform.

¹ It is disturbing that it appears the Panel Hearing Officer is conducting an administrative review (replete with a briefing schedule) of the CPO’s decision, but that the Officer then issues no final decision, only a “report” that must then be reviewed by the entire Procurement Review Panel. S.C. Code §11-35-4410(5).

III. Conclusion

Because the Order of the Panel Hearing Officer is interlocutory and Ellis Don has not exhausted its administrative remedies, the CPO's Motion to Dismiss is Granted.

Pickens, South Carolina
January 12, 2006



D. Garrison Hill
Circuit Judge