

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Xerox Corporation,)
)
Plaintiff,)
)
v.)
)
South Carolina State University,)
Andrew Hugine, Jr., individually,)
Joseph M. Pearman, Jr., individually,)
and Mary L. Sims, individually, and)
the State of South Carolina Budget)
and Control Board,)
)
Defendants.)

Civil Action No. 06-CP-40-5478

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

This matter comes before me on Motions to Dismiss by Defendant South Carolina State University ("SCSU") pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6), SCRCP; by the individual defendants Andrew Hugine, Jr., Joseph M. Pearman, Jr., and Mary L. Sims (collectively, "Individual Defendants") pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6); and by the State of South Carolina Budget and Control Board ("Board") pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6). Collectively, SCSU, the Individual Defendants and the Board are referred to as Defendants.

BACKGROUND

As set forth in the Complaint, this matter arises out of a contract dispute between Plaintiff Xerox Corporation ("Plaintiff" or "Xerox") and SCSU regarding a contract entered into by the parties in April 2004 ("Xerox Contract"). Xerox is a corporation doing business in South Carolina. SCSU is an institution of higher education located in the City of Orangeburg, Orangeburg County, South Carolina created pursuant to S.C. Code Ann. §§ 59-127-10 (Rev.

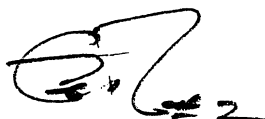
2004). Defendants Dr. Hugine, Mr. Pearman, and Ms. Sims are the President, the Assistant Vice President of Financial Affairs, and Director of Procurement, respectively, for SCSU. The Budget and Control Board (“Board”) is a state agency created pursuant to S.C. Code Ann. §§ 1-11-10, et seq. (Rev. 2005). SCSU and the Board are each a governmental body as defined in the South Carolina Consolidated Procurement Code (“Code”). See: S.C.¹ Code Ann. § 11-35-310(18) (Supp. 2006.)

Xerox has alleged the following in its Complaint:

- In the fall of 2003, SCSU solicited proposals to reduce the cost of its document management services from Xerox and other vendors and while it believes that SCSU received proposals from other vendors, SCSU ultimately selected Xerox and the Xerox Contract was entered into.
- The parties signed the Xerox Contract in April 2004.
- In July 2005, SCSU informed Xerox that the Xerox Contract was “illegal” because SCSU had not conducted the proper competitive process.
- In August 2005, SCSU sought advice from the Board about whether SCSU would have to pay penalties if it terminated the Xerox Contract (there is no allegation that any such advice was given).
- On November 2, 2005, SCSU wrote a letter to Xerox terminating the Xerox Contract.
- At all times relevant to this action, the Individual Defendants were serving as President, Assistant Vice President for Financial Affairs and Director of Procurement for SCSU.
- SCSU made partial payment to Xerox for work performed under the Xerox Contract.

In support of their respective Motions to Dismiss, SCSU and the Board requested that I take judicial notice² of the fact that Xerox filed a request for a contract dispute resolution under S.C. Code Ann. § 11-35-4230 (Supp. 2005) with the Chief Procurement Officer for Information Technology (“CPO”) in December 2005 and in September 2006 withdrew the request “without

¹ This definition was not amended by 2006 Act 376 (effective June 13, 2006).



prejudice to reinstate” if this Court determined it did not have jurisdiction to hear the Complaint.

DISCUSSION

In evaluating a motion to dismiss, the Court must base its decision solely upon the allegations set forth in the complaint. Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998). “That is, the motion must be granted if the facts alleged in the complaint and the inferences reasonably deducted therefrom do not entitle the Plaintiff to relief on any theory of the case.” Id. See also FOC Lawshe Ltd. P’ship v. Int’l Paper Co., 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002) (quoting Rule 12(b)(6), SCRPC). As such, “[t]he question to be considered is whether in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief.” Holy Loch Distrib., Inc. v. Hitchcock, 332 S.C. 247, 252, 503 S.E.2d 787, 790 (Ct. App. 1998). See also Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (citation omitted). “The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.” Id. “All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings.” FOC Lawshe Ltd. P’ship v. Int’l Paper Co., 352 S.C. at 413, 574 S.E.2d at 230.

Xerox contends that the Defendants breached the Xerox Contract and contends that it is owed monetary damages under the theories of 1) breach of contract, 2) quantum meruit, 3) promissory estoppel, 4) statutory damages under S.C. Code Ann § 11-35-4310(3)(b); 5) breach of contract accompanied by fraudulent acts; and 6) constructive fraud.

Defendants have moved to dismiss Xerox’s Complaint on numerous grounds. I find that

² I find that it is appropriate to take judicial notice of this contract dispute resolution request filed in the CPO’s administrative, quasi-judicial forum.

for the reasons set forth below, the Motions to Dismiss should be granted.

1. The Complaint Should Be Dismissed Pursuant To Rule 12(B)(1) And (6), SCRCF, Because Original Exclusive Jurisdiction Of This Matter Properly Lies Before The Chief Procurement Officer For Information Technology, Office Of The Chief Information Officer, South Carolina Budget And Control Board. (SCSU's Motion to Dismiss, ¶ 1; Individual Defendants' Motion to Dismiss, ¶ 1; and Board's Motion to Dismiss, ¶ 1)

Defendants argue that the Procurement Code and its exclusive contract controversy dispute resolution provision are applicable to the Xerox Contract. Xerox argues that because § 11-35-4230 provides that the Legislature has "specifically limited jurisdiction to those contracts solicited or awarded under the provisions of the procurement code" and that "in every section that provides a remedy under the procurement code, the legislature has specifically limited jurisdiction to those contracts solicited or awarded under the provisions of the procurement code." In essence, Xerox's argument is that because the Defendants did not follow the statutorily mandated solicitation processes (Methods of Source Selection set forth in Subarticle 3 of Article 5 of the Procurement Code, S.C. Code Ann. §§ 11-35-1520, et seq.), the contract controversy dispute resolution provision, S.C. Code Ann. §§ 11-35-4230, is not applicable and Xerox has original access to this Court's jurisdiction. Xerox has misapprehended the meaning and intent of the phrase "solicited or awarded under the provisions of the procurement code" and the very applicability of the Procurement Code to the Xerox Contract.

S.C. Code Ann. § 11-35-40³ establishes the applicability of the Procurement Code. In April 2004, when the Xerox Contract was signed, it provided:

³ Effective June 13, 2006, the South Carolina General Assembly amended the Procurement Code, including § 11-35-40. See 2006 Act 376. Section 11-35-40 (Supp. 2006) was amended to read, in pertinent part: "This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in



- (1) This Code applies only to contracts solicited or entered into after the effective date⁴ of this code unless the parties agree to its application to a contract entered into prior to its effective date.
- (2) This code shall apply to every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in § 11-35-40(3) (Compliance with Federal requirements) The provisions of this code shall apply to all procurements of information technology elements by any governmental body, irrespective of the source funds whether appropriated or not.

(Emphasis added). SCSU and the Board are both governmental bodies as defined in the Procurement Code and as pled in the Complaint. S.C. Code Ann. § 11-35-310(18) (Supp. 2006).⁵ In its Complaint, Xerox did not identify whether it is relying on the Procurement Code in place when the Xerox Contract was entered into or relying on the Code provisions as amended. However, whether the section in affect in 2004 or as amended in 2006 governs, I find that under it's clear and plain language, the Procurement Code is applicable to any procurement of goods and services by SCSU.⁶

Legislative acts are to be read as a whole. In Hitachi Data Systems Corporation v. Leatherman, a case involving a statutory interpretation of the Procurement Code, the Supreme Court of South Carolina found:

[i]n construing statutes, we seek to effectuate legislative intent. The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operations. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Hitachi, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (citations omitted). "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent.

Section 11-35-40(3) (Compliance with Federal Requirements)" (Emphasis added). S.C. Code Ann. § 11-35-40(2) (Supp. 2006).

⁴ The Act became effective in 1981. See 1981 Act No. 148 § 1.

⁵ The 2006 amendments did not change the quoted portion of the definition of "Governmental Body."

⁶ Section 11-35-710 of the Procurement Code expressly allows the Board to exempt certain solicitations from the purchasing provisions to the Code. There is no allegation that an exemption was granted in this matter.

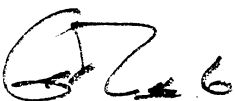
Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” Sutherland Statutory Construction, 5th Ed., § 46.05, p. 103 (1992). See also Keonig v. South Carolina Dept. of Public Safety, 325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996).

In enacting the Procurement Code, the Legislature established a comprehensive, exclusive scheme for regulating public purchasing. Cf: Unisys Corporation v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E.2d 263 (2001) (holding that actions under the Procurement Code were exempt from the SC Unfair Trade Practices Act because state government procurement met the regulated industries exception of SCUTPA.)

It is a well established principal of statutory construction that the construction should be rational and reasonable and not lead to an absurd result. Bolton v. Doe, 266 S.C. 344, 223 S.E.2d 187 (1976). Singletary v. SC Dep’t of Education, 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994) Plaintiff’s contention that the Procurement Code only regulates those contracts that are “properly” solicited and awarded in accordance to the provisions of the Procurement Code leads to an illogical result. Namely, any South Carolina governmental body can avoid the requirements and limitations of the Procurement Code simply by failing to follow the statutorily mandated solicitation procedure.

To find that a governmental body could avoid the applicability of the Procurement Code simply by its failure to follow the requirements of the Procurement Code⁷ would lead to an absurd result. It is unquestioned that the Procurement Code was enacted primarily for the benefit and protection of the public general public. See S.C. Code Ann. § 11-35-20 (Supp. 2006). See also Sloan v. The Sch. Dist. of Greenville County, 342 S.C. 525, 537 S.E.2d 304 (Ct. App. 2000)

⁷ This discussion is taken in the light most favorable to the Plaintiff and is no way is intended to be a finding as to the legality or illegality of SCSU’s procurement actions.



(“competitive sealed bidding requirements are principally for the benefit of taxpayers to ensure their money is spent wisely”). For the taxpayers and the government to lose the protections set forth in the Procurement Code because a State agency failed to follow the procurement process could not be the intent of the Legislature.

Reviewing the § 11-35-4230(1) phrase “solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code” in context of the Procurement Code, I find that this phrase means § 11-35-4230 is applicable any time the Code is applicable to a governmental purchase, not just when the governmental body follows the proper purchasing procedures.

The Procurement Code establishes the exclusive original means of resolving contract controversies between contractors and a governmental body. S.C. Code Ann § 11-34-4220 provides, in pertinent part:

This section applies to controversies between a governmental body and a contractor ... which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor ... concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code.

In Unisys Corporation v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E.2d 263 (2001), the Supreme Court found § 11-35-4230 constituted the exclusive means of resolving a contract controversy dispute for a governmental contract for the procurement of goods or services. Id., 346 S.C. 170, 551 S.E.2d 270 (“exclusive means” is strictly construed to limit suits on contract with the State to the CPO forum pursuant to § 11-35-4230).

Xerox argues that Hitachi and not Unisys is controlling because the Unisys contract was properly solicited and awarded under the provisions of the Procurement Code and thereafter the



controversy arose. In Hitachi the Procurement Review Panel, (“Panel”)⁸, in response to the federal and state criminal investigations regarding “Operation Lost Trust” *sua sponte* sought to conduct its own investigation regarding the award of a contract. The case involved neither a protest of the contract award pursuant to § 11-35-4210 or § 11-35-4410 or a contract controversy dispute pursuant to § 11-35-4230 or § 11-35-4410. Hitachi stands for the proposition that the Panel only has the authority to conduct administrative reviews of matters initiated by protest or request for review such as a contract controversy. Hitachi, 309 S.C. 174, 179, 420 S.E.2d 843, 846 (“we affirm the ruling of the circuit court and hold that the scope of the Panel's authority is limited to appellate review of written determinations, decisions, policies and procedures governed by the Procurement Code when such review is initiated by protest or application as provided by the statute.”)

I find that the Procurement Code is applicable to the Xerox Contract and that the exclusive means of resolving a contract controversy dispute between a private vendor of goods and services and a governmental body is S.C. Code Ann. § 11-35-4230 (Supp. 2006).

2. The Complaint Should Be Dismissed Pursuant To Rule 12(B)(6), SCRCF, Because The Plaintiff Has Failed To Exhaust Its Administrative Remedies. (SCSU’s Motion to Dismiss, ¶ 2; Individual Defendants’ Motion to Dismiss, ¶ 2; and Board’s Motion to Dismiss, ¶ 1)

Xerox has not exhausted its administrative remedies as required by the Procurement Code. Xerox was clearly aware of that administrative remedy when it filed its December 22, 2005 request for a contract controversy dispute hearing before the CPO.

The exhaustion of remedies doctrine precludes Xerox from seeking relief from this Court unless and until it has exhausted its administrative remedy. Southern Ry. Co. v. Order of Ry.

⁸ The Panel is created and authorized pursuant to § 11-35-4410 (Supp. 2006) and its powers and duties are set forth

Conductors, 210 S.C. 121, 41 S.E.2d 774 (1947). As the South Carolina Supreme Court stated in Lominick v. City of Aiken, 244 S.C. 32, 135 S.E. 2d 305 (1964):

It is well settled in this state, as well as in most other jurisdictions, that generally the exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts. Stanley v. Gary, 237 S.C. 237, 116 S.E.2d 843; Pullman Company v. Public Service Commission, 234 S.C. 365, 108 S.E.2d 571; DePass v. City of Spartanburg, 234 S.C. 198, 107 S.E.2d 350; Isgett v. Atlantic Coast Line R. Co., 223 S.C. 56, 74 S.E.2d 220; Dunbar v. City of Spartanburg, 226 S.C. 360, 85 S.E.2d 281.

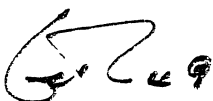
Id. 244 S.C. at 44, 135 S.E.2d at 310 (1964).

This is particularly true where, as with the Procurement Code, the express statutory language provides that the administrative remedy is the exclusive means of addressing the contract controversy. As the Supreme Court stated in Unisys (“Since [Xerox] is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper.”) Unisys, 346 S.C. at 177, 551 S.E.2d at 273 (emphasis added). I find that the Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to exhaust administrative remedies.

3. The Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCPP, because sovereign immunity for suits brought against the State or its agencies arising out of a commercial transaction by and between a State agency and a private company has only been waived pursuant to the requirements of S.C. Code Ann. § 11-35-4230 (§ 55, Act 376, June 13, 2006). (SCSU’s Motion to Dismiss, ¶ 3; Individual Defendants’ Motion to Dismiss, ¶ 3; and Board’s Motion to Dismiss, ¶ 3)

The Complaint fails to state a cause of action because sovereign immunity for suits brought against the State or its agencies arising out of a commercial transaction by and between a State agency and a private company has only been waived pursuant to the requirements of S.C.

therein.

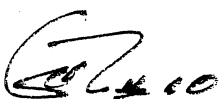


Code Ann. § 11-35-4230. In Unisys, the Supreme Court found that any statute waiving the State's immunity from suit must be strictly construed. Id. 346 S.C. 167, 551 S.E. 2d 268. The waiver of sovereign immunity for a governmental body acting under contract in procuring goods or services is only found in the Procurement Code and only in a contract controversy dispute before CPO.

Plaintiff relies on the cases of Hutchinson and Kinsey. Kinsey was expressly overruled by Unisys. ("We find the decision in Kinsey conflicts with the basic principle that a statute waiving the State's immunity from suit, being in derogation of sovereignty, must be strictly construed. ... Accordingly, we now overrule Kinsey and reaffirm Harrison's interpretation of § 15-77-50 as a venue statute.") Unisys, 346 S.C. 167, 551 S.E.2d 268-269. Since Hutchinson relied upon Kinsey for its holding that the doctrine of sovereign immunity does not apply to contract actions, the holding of Hutchinson is no longer good law and this Court refuses to rely on it. The Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a cause of action.

4. The Complaint Should Be Dismissed Against The Individual Defendants Pursuant To Rule 12(B)(6), SCRCF, Because Under The South Carolina Tort Claims Act, The Individual Defendants Are Immune From Suit. (Individual Defendants, Motion to Dismiss, ¶ 7)

The Complaint should be dismissed against the Individual Defendants pursuant to the South Carolina Tort Claims Act as the Individual Defendants are immune from any action. The South Carolina Tort Claims Act is the exclusive means of seeking redress for torts committed by an employee of a governmental entity while acting within the scope of the employee's official duty.



Notwithstanding any provision of law, this chapter, the “South Carolina Tort Claims Act”, is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

S.C. Code Ann. § 15-78-200. Plaintiff’s Complaint alleges that SCSU is a governmental entity.

Complaint ¶ 5. Plaintiff’s Complaint further alleges that each of the Individual Defendants were employees of SCSU, a governmental entity, “at all times relevant to this action.” Complaint ¶ 2-

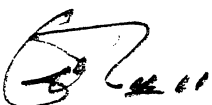
4. While the Complaint alleges that torts were committed, it does not allege any of the Individual Defendants acted in any manner other than “within the scope of the employee’s official duty.” Plaintiff has ignored the process provided in the South Carolina Tort Claims Act and had failed to file a verified claim for damages pursuant to S.C. Code Ann. § 15-78-80.

In passing the South Carolina Tort Claims Act the General Assembly intended to:

grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in Section 15-78-70(b).

S.C. Code Ann. § 15-78-20(b)(Supp. 2006). Because the remedy provided under the South Carolina Tort Claims Act is the exclusive civil remedy available for any tort committed by the Individual Defendants, Plaintiff’s Complaint should be dismissed.

5. The Complaint Should Be Dismissed Against The Individual Defendants Pursuant To Rule 12(B)(6), SCRPC, Because The Complaint Fails To State Facts Sufficient to State a Cause of Action. (Individual Defendants, Motion to Dismiss, ¶ 8)



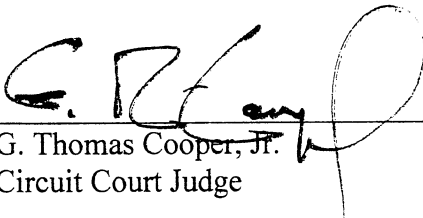
The Complaint fails to state facts sufficient to state a cause of action against any of the Individual Defendants. Any breach of contract claims against agents acting for a disclosed principal must be dismissed. First Citizens Bank & Trust Co. v. Strable, 292 S.C. 146, 335 S.E. 2d 278 (Ct. App. 1987) (citing Green v. Industrial Life & Health Ins. Co., 199 S.C. 262, 18 S.E. 2d 873 (1942)); Holder v. Haskett, 283 S.C. 247, 321 S.E. 2d 192 (Ct. App. 1984). Each of the six causes of action in the Complaint stem from an alleged breach of a contract between Xerox and SCSU. The Xerox Contract itself clearly shows that any agreement was made between Xerox and the principal, SCSU, rather than any of the Individual Defendants. The Complaint does not allege that SCSU was not a disclosed principal. Therefore, the Individual Defendants are hereby dismissed as they acted as agents of SCSU, a disclosed principal.

ORDER

I find that the Procurement Code is applicable to the Xerox Contract even if SCSU did not properly follow the Code requirements in soliciting the contract. The exclusive means of resolving the contract dispute between Xerox and the State is through a contract controversy dispute hearing before the CPO and sovereign immunity for suit in contract against the State has only been waived under the Procurement Code; Plaintiff has failed to exhaust its administrative remedies; Therefore, this Court does not have jurisdiction to hear this matter in its original jurisdiction.

IT IS THEREFORE ORDERED that this case be **DISMISSED** as to all Defendants.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Court Judge

March 28, 2007
Columbia, South Carolina