

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 EllisDon Construction, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Clemson University, S.C. Procurement)
 Review Panel and Chief Procurement)
 Officer,)
)
 Defendants,)
)
 _____)

COURT OF COMMON PLEAS
 C.A. NO: 07-CP-39-1181
 C.A. NO: 07-CP-39-1224

ORDER

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This matter is on appeal from the South Carolina Procurement Review Panel ("Panel") pursuant to S.C. Code Ann. §11-35-4410(6). The only issue presented to this Court is the Panel's award of interest to Plaintiff EllisDon Construction, Inc. under S.C. Code Ann. §34-31-20, which the Court hereby REVERSES.

PROCEDURAL HISTORY

This case involved numerous disputes concerning the contract between EllisDon Construction (EllisDon) and Clemson University (Clemson) for the construction of the Agriculture Biotechnology/Molecular Biology Complex. Section 11-35-4230 of the South Carolina Consolidated Procurement Code ("Procurement Code") provides the exclusive means to resolve a controversy between the State and a contractor concerning a contract solicited and awarded under the Procurement Code. As provided by the Procurement Code, the matter was first decided by Michael M. Thomas, State Engineer and Chief Procurement Officer for Construction ("CPOC").



Both EllisDon and Clemson University appealed the CPOC's Order to the South Carolina Procurement Review Panel ("Panel"). Philip J. Hodges, Jr., Chairman of the Panel, issued the Panel's Order on July 5, 2007. It is this Order from which Clemson appeals herein. While the Panel's Order addressed and decided many issues, the ONLY issue that is the subject of this appeal is the Panel's award of interest to EllisDon under SC Code Ann. §34-31-20.

With regard to the interest issue, EllisDon argued before the CPOC and the Panel that, pursuant to the express terms of the Contract, it was entitled to interest under SC Code Ann. §29-6-50.¹ EllisDon also argued that, even if it was not entitled to interest under §29-6-50, it was entitled to interest as provided for in SC Code Ann. §34-31-20.² Both the CPOC and the Panel rejected EllisDon's request for interest under §29-6-50, finding that the statutory requirements had not been met and that EllisDon was therefore not entitled to the higher interest allowed by such statute.

The CPOC denied EllisDon's claim for interest under §34-31-20. However, the Panel awarded EllisDon interest under §34-31-20. It is this issue that is the subject of Clemson's appeal herein.

¹ Section 29-6-50 allows for interest at the rate of 1% per month if certain requirements are met.

² Section 34-31-20 is the general interest statute and provides for prejudgment interest at the rate of 8 ¾ % per annum.



STANDARD OF REVIEW

The South Carolina Consolidated Procurement Code provides that "the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court." S.C. Code Ann. §11-35-4410(6). See also S.C. Code Ann. §1-23-600(D) ("[A]n appeal from the Procurement Review Panel is to the circuit court as provided in Section 11-35-4410 . . ."). In such appeals, "[t]he standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act." S.C. Code Ann. §11-35-4410(6). Generally, the South Carolina Administrative Procedures Act ("APA"), S.C. Code Ann. §1-23-310 *et seq.*, governs judicial review of a decision of an administrative agency. Clark v. Aiken County Government, 366 S.C. 102, 620 S.E.2d 99 (Ct.App.2005).

Specifically, Section 1-23-380(5) provides the standard of review. Turner v. South Carolina Dept. of Health and Environmental Control, 377 S.C. 540, 661 S.E.2d 118 (Ct.App.2008). See, generally, Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987) (applying the standard of review provided in section 1-23-380); William C. Logan & Assoc. v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (1986). Section 1-23-380(5)(d) provides, in relevant part, as follows:

(5) ... The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(d) affected by other error of law.



Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law. See Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App.2006). “In reviewing a final decision of an administrative agency under §1-23-380, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency.” Kiawah Resort Assocs. v. S.C. Tax Comm’n, 318 S.C. 502, 458 S.E.2d 542 (1995).

LEGAL ANALYSIS

Applying the above standard of review, it is clear that the Panel committed an error of law by awarding EllisDon interest under §34-31-20 and that Clemson is, therefore, entitled to a reversal of such award. Section 34-31-20 is the general interest statute and provides for prejudgment interest at the rate of 8¾% per annum. However, “the statute does not automatically apply in every case. The statute does not apply, for example, to judgments when the parties have contracted for a different rate.” Sears v. Fowler, 293 S.C. 43, 358 S.E.2d 574 (1987) (citing Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)). In other words, “[t]he statutory interest rate on accounts stated prescribed by Section 34-31-20 is applicable only in the absence of a written agreement between the parties fixing a different rate of interest.” Burnett Dubose Co. Inc. v. J.G. Starnes, 284 S.C. 196, 324 S.E.2d 651 (Ct.App.1984) (Emphasis added.) See *also* Barrett Kays & Associates, P.A. v. Colonial Bldg. Co., Inc. of Raleigh, 129 N.C.App. 525, 500 S.E.2d 108 (1998) (interest is to be assessed at the legal rate unless the parties have provided otherwise by agreement, in which event the agreement shall prevail).

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The Panel specifically found that “the parties contracted for a higher rate of interest pursuant to S.C. Code Ann. §29-6-50.” However, both the CPOC and the Panel rejected EllisDon’s request for interest under §29-6-50, finding that the statutory requirements had not been met. This finding was not appealed and is, therefore, the law of the case. Because the parties contracted, by the execution of a written agreement, for a different rate of interest under §29-6-50, the general interest statute (§34-31-20) does NOT apply, and the Panel’s award of interest under §34-31-20 was an error of law which must be reversed.

In its Order, the Panel stated that it was “sympathetic with EllisDon’s request for interest” and that it seemed “inequitable ... that EllisDon could not collect pre-judgment interest.” This Court is also sympathetic with EllisDon. However, equitable relief is generally available only where there is no adequate remedy at law. See Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). Here, EllisDon had an adequate remedy at law: had it met the statutory requirements of §29-6-50, for which it contracted, it would have been entitled to interest at the rate of 1% per month. This Court cannot ignore the clear rule of law stated in the cases cited hereinabove that interest CANNOT be awarded under §34-31-20 where the parties have a written agreement fixing a different rate.

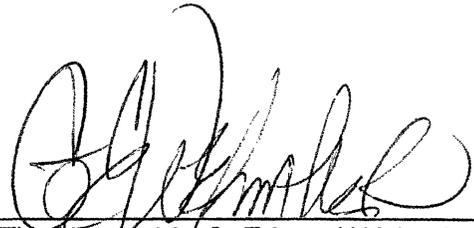
In light of the basis of this decision and the Court’s reversal of the Panel’s award of interest, the Court need not and will not address the other arguments raised by Clemson and/or by the Chief Procurement Officer in support of Clemson’s appeal.

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CONCLUSION

Based on the above, the S.C. Procurement Review Panel's award of interest to EllisDon under §34-31-20 is hereby REVERSED.

AND IT IS SO ORDERED.



The Honorable G. Edward Welmaker
Judge for Thirteenth Judicial Circuit

Pickens, South Carolina

Dated: January 15, 2009

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP3901181

2007CP3901224

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Ellis Don Construction vs. Clemson University

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:

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

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

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