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IN THE SUPREME COURT OF THE STATE OF FLORIDA

GRW CORPORATION,

Defendant/Appellant

v.

Case No. 82,268

Lower Case No. 93-628-CAB

THE FLORIDA DEPARTMENT
OF CORRECTIONS

Plaintiff/Appellee

INITIAL BRIEF OF APPELLANT, GRW CORPORATION

On Appeal from the Circuit Court
in and for Gadsden County, Florida

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INTRODUCTORY STATEMENT

As used in this brief, the terms set forth below shall have the following meanings:

- "the Act" - Specific Appropriation 1934(c), Chapter 91-193, Laws of Florida
- "App. Doc." - Appendix Document
- "the County" - Gadsden County, Florida
- "the Department" - Plaintiff/Appellee, the Florida Department of Corrections
- "GRW" - Defendant/Appellant, GRW Corporation
- "USCC" - Defendant United States Corrections Corporation

STATEMENT OF THE FACTS

Pursuant to Laws of Florida Chapter 91-193, Specific Appropriation 1934 (c) of Section 2B of the 1991-1992 General Appropriations Act ("the Act"), the State of Florida delegated to the County the authority to select a private vendor to construct and operate a 600 to 896 bed correctional facility in Gadsden County to house minimum and medium custody inmates who are sentenced to or placed in the custody of the Department. (App. Doc. A at 3.) Pursuant to this Act, the County was required to prepare a request for proposals and to solicit qualified bids from private vendors interested in constructing and managing the prison for the Department. Id. at 4. The Department was directed to enter into a lease-purchase agreement and a management agreement with the private vendor selected by the procurement and agreed to by the Department. Id.

A request for proposals was issued by the County on October 1, 1991. Id. In response thereto, proposals were received by the County from GRW and from USCC. Members of a review team selected by the County evaluated these proposals and recommended that USCC be awarded the contracts. Id.

A written notice of protest was filed with the County by GRW on April 24, 1992 and a bid protest was filed with the County on May 4, 1992. Id. at 5. This protest was filed in accordance with the procedure outlined in the Request For Proposals and in compliance with Chapter 120, Florida Statutes, and the rules of the Department. The bid protest

was discussed by the County's Board of Commissioners at a May 5, 1992 meeting and determined to be without merit. Id. GRW filed an amended protest on August 18, 1992. Id. at 6. Unaware of the amended protest, the Board voted on August 18, 1992, to deny the protest of GRW and to reaffirm the award of the contract to USCC. Id. No further action was taken by the Board on GRW's protest. Id.

STATEMENT OF THE CASE

In June 1993, the Department filed a Complaint For Validation in the Circuit Court in and for Gadsden County, Florida. (App. Doc. B.) The validation action was predicated on Chapter 75 of the Florida Statutes. Id. at p.2. The complaint sought validation of a prison management contract and a lease-purchase agreement. Id.

The Circuit Court issued an Order to Show Cause setting a hearing for July 14, 1993. (App. Doc. C.) This order required its publication in both Leon and Gadsden Counties pursuant to Section 75.06, Florida Statutes. Id.

In response to the Department's Complaint, GRW filed a Motion to Dismiss, an Answer, a Motion To Abate and a Motion For More Definite Statement. The Motion For More Definite Statement alleged that the Complaint failed to set forth specific information required in a validation complaint pursuant to Section 75.04. The Motion To Abate alleged the lack of subject matter jurisdiction by the court because administrative remedies had not been exhausted. GRW was the only party Defendant to oppose validation. (App. Doc. B at 2.)

A final hearing was held on the matter on July 14, 1993 before the Honorable Sanders Sauls. At this hearing, the Department indicated that it would only be seeking validation of the lease purchase agreement and that validation of the management agreement would not be pursued. (App. Doc. E at

p.6.)

The Department offered in evidence proof of publication of the show cause order in the Gadsden Times on June 17 and 24, 1993, and in the Tallahassee Democrat on July 8 and 12, 1993. Testimony of three witnesses was presented by the Department--Mr. William M. Bishop of William M. Bishop, Consulting Engineers, who evaluated the proposals for the County, Hal Richmond, the County Attorney and Mr. Robert B. McQueen, President of USCC.

The Department asked the Court to validate merely a proposed lease-purchase agreement. (App. Doc. E at p.80; App. Doc. D.) The document presented to the Court for validation was marked as a draft, redlined, and incomplete; the proposed lease did not specify key terms such as the term of the lease or the amount of the lease payments. (App. Doc. D.) The lessor under this proposed agreement was identified as the U.S. Corrections Leasing Company. The proposed lessor was not in existence at the time of the final hearing. (App. Doc. E at 79-80) Nevertheless, USCC's president testified that it was USCC's intent to create a single purpose wholly-owned subsidiary to lease/purchase the private prison to the Department. Id. at 77-78.

A Final Judgment of Validation was signed on July 26, 1993, and filed on July 27, 1993. (App. Doc. A.) The Court validated and confirmed the lease-purchase agreement attached to the Complaint as Exhibit D. Id. at 8. In addition to validating said agreement, the Court made findings of fact

relating to GRW's bid protest. Id. at 5-6. It specifically held that GRW was barred from renewing any protest or challenge of the award and that GRW had no standing to challenge the vendor selection procedure of the County. Id. at 6-7. These issues were found not to be collateral to the proceeding. Id. at 7.

A Notice of Appeal from this judgment was timely filed on August 25, 1993.

SUMMARY OF ARGUMENT

The trial court erred in validating the proposed lease purchase agreement with U.S. Corrections Leasing Company, Inc. This yet to be created entity was not the private vendor selected by the procurement as required by the authorizing statute. The language of the Act implicitly required the existence of a viable entity at the time of the procurement process. The Department's attempt to contract with a non-existent entity not the successful vendor from the procurement process was beyond the scope of authority delegated to it by the Florida Legislature.

The Act set forth specific provisions to be included in and requirements for the lease purchase agreement to be executed by the Department. The Department has no authority to enter into the validated agreement because the agreement fails to contain the required provisions, i.e., provision of liability insurance, compliance with Department rules, indemnification of the State, etc. Moreover, some of the provisions in the agreement are contrary to the mandates of the Act, i.e., the Department instead of the bidder is to assume liability for the risk of loss.

The lease purchase agreement validated by the trial court was a draft document, was redlined and left numerous items blank. The omitted terms are significant as to the nature and extent of the obligation the Department is to incur. There are absolutely no dollar figures included, no lease term is

set and no facility or site is identified. Without such information, the trial court could not fulfill its judicial function to determine if the Department had the authority to incur the obligation. Validation of such an open-ended agreement is in effect to give the Department a blank check and to unlawfully delegate judicial authority to a nonjudicial entity.

The Final Judgment entered below went far beyond the narrow issues appropriate to a validation proceeding and determined collateral issues relating to an unsuccessful bidder. The focus of a validation proceeding should be on the governmental entity -- does it have the authority to incur the obligation? Is the purpose legal? Were the proceedings proper? Actions taken or not taken by an unsuccessful bidder are secondary matters not properly determined in a validation proceeding. To consider such matters serves only to delay the expeditious resolution contemplated by Chapter 75.

ARGUMENT

POINT I ON APPEAL

THE TRIAL COURT ERRED IN VALIDATING A PROPOSED LEASE
PURCHASE AGREEMENT WITH A LESSOR NOT MEETING THE
LEGAL REQUIREMENTS OF THE AUTHORIZING STATUTE

The trial court was asked to validate a proposed master lease purchase agreement which was attached as an exhibit to the Complaint for Validation. (See App. Doc. D.) The lessor identified in this proposed agreement was U.S. Corrections Leasing Company, Inc. Validation of such agreement was erroneous because the agreement was beyond the scope of authority delegated to the Department by the Florida Legislature.

Specific appropriation 1934(c) of the Laws of Florida, Chapter 91-193, provides in pertinent part:

The Department of Corrections shall enter into a lease purchase agreement and a separate management agreement, as provided herein, with the private vendor selected by the procurement and agreed to by the Department of Corrections. [Emphasis added.]

At the hearing on July 14, 1993, the Department presented the testimony of William M. Bishop of William M. Bishop, Consulting Engineers, who prepared the request for proposals and evaluated the proposals for the County. (Hearing transcript at p. 60.) The following exchange occurred on cross-examination:

Q...did you come to a determination as to who was the private vendor who should be selected? Did you make that--

A. Yes, we did, and we made the recommendation to the County.

Q. And who was that private vendor?

A. U.S. Corrections. USCC.

Q. That is U.S. Corrections Corporation, so that we

are clear?

A. Yes, sir. Id. at p. 67.

Nevertheless, the lessor identified in the proposed master lease/purchase agreement to be validated was not the private vendor selected; the designated lessor was the U.S. Corrections Leasing Company, Inc. not USCC. (App. Doc. D.)

The Department tried to get around this discrepancy based on the testimony of USCC's president. Robert B. McQueen, president of USCC, testified that the lessor would be a single purpose wholly-owned subsidiary of USCC. Id. at 78. However, the entity was not then in existence but was to be created in the future as a vehicle to obtain financing. Id. at 79-80.

The language of the specific appropriation by the Legislature as to this project expressly required that the Department enter into a lease purchase agreement with the "private vendor selected by the procurement." Certainly such language implicitly required the existence of a viable entity at the time of the procurement process. Deviation from this definitive requirement would be in violation of the limitations built into the specific appropriation itself. State v. Manatee County Port Authority, 171 So. 2d 169 (Fla. 1965). Since the lessor in the proposed lease purchase agreement was not in existence at that point in time, validation of said agreement was unjustified as the agreement was beyond the scope of authority delegated to the Department by the Florida Legislature.

POINT II ON APPEAL

THE TRIAL COURT ERRED IN VALIDATING THE LEASE-PURCHASE AGREEMENT BECAUSE ITS TERMS WERE NOT IN COMPLIANCE WITH THE MANDATES OF THE AUTHORIZING STATUTE

The Act sets forth certain mandatory requirements for the contracts the Department was to enter. The master lease-purchase agreement that was validated fails to include provisions required by the specific appropriation and includes terms contrary to the requirements of the specific appropriation.

A review of the requirements of the Act in comparison to the validated lease purchase agreement reveals the following discrepancies:

<u>Specific Appropriation Requirement</u>	<u>Validated Lease-Purchase Agreement Provision</u>
1. Construction/Operation of correctional facility	1. No identification of type of facility [App. Doc. D at section 1.1 and Exhibit A]
2. Facility to house minimum and medium custody inmates sentenced to or placed in custody of the Department.	2. No identification of occupants of facility.
3. Maximum capacity in bed size of 896.	3. No specification of maximum capacity.
4. Facility must be a model rehabilitative facility with innovative rehabilitative programs to reduce recidivist rate.	4. No provision on this point.
5. Shall enter separate management agreement for 5-year term with option to renew.	5. No separate management agreement validated. No provision for management in lease-purchase agreement.

- | | |
|--|--|
| <p>6. Contract must require compliance with Department rules, procedures, etc.</p> | <p>6. Only requires compliance with Department competitive bidding policies. [<u>Id.</u> at section 2.3.]</p> |
| <p>7. Successful bidder to indemnify and hold harmless the State to maximum extent permitted by law for liabilities, etc. as a result of bidder's performance.</p> | <p>7. Department assumes liability for risk of loss. [<u>Id.</u> at section 2.4.] Trustee is loss payee. [<u>Id.</u> at section 5.4.] Department indemnifies corporation and trustee. [<u>Id.</u> at section 5.8.] Department indemnifies corporation for quiet title actions and other legal expenses and damages. [<u>Id.</u> at section 5.16.] Mutual waiver of subrogation rights. [<u>Id.</u> at section 9.9.] Non-recourse obligation of corporation to lease payments only. [<u>Id.</u> at section 9.14.]</p> |
| <p>8. Successful bidder to provide liability insurance in an amount not less than \$5 million per occurrence.</p> | <p>8. Department to purchase property insurance in undetermined amount. [<u>Id.</u> at section 5.4.] Alternatively, Department can self-insure. [<u>Id.</u>]</p> |
| <p>9. Agreement must address remedies for violation for use of funds paid for lobbying services.</p> | <p>9. No provision for remedies for such violations.</p> |

Given this failure to comply with the express statutory requirements of the specific appropriation, the Department has no authority to enter into such an agreement. Judicial inquiry in a validation proceeding must focus on whether the public entity has the authority to incur the obligation. State v. City of Daytona Beach, 431 So. 2d 981 (Fla. 1983). Since the Department has no authority to enter the agreement as written, it was error for the trial court to validate the

agreement.

POINT III ON APPEAL

THE TRIAL COURT ERRED IN VALIDATING AN INCOMPLETE
LEASE-PURCHASE AGREEMENT

The proposed lease-purchase agreement sought to be validated was attached as an exhibit to the Department's complaint. A review of this agreement reveals that it is marked "DRAFT," is redlined,¹ and leaves numerous items blank. (App. Doc. D.) Given the incompleteness of the proposed agreement, it was error for the trial court to validate it.

The items left blank in the proposed agreement are not minor details. Significant information is omitted which is crucial to understanding the nature of the transaction proposed. For example, there is no specification of the lease term. (Id. at section 2.2.) The Trustee is not identified (Id. at p.43.) nor are the Trust Agreement and Supplemental Trust Agreement attached to the proposed agreement.² These latter documents govern how the certificates are to be issued (Id. at p.4), how the money for acquisition is to be disbursed (Id. at p.6), and how the Department is to make certain lease payments. (Id. at p.9.)

¹ The exhibit shows that changes have been made on twenty-seven of the fifty-five pages (exclusive of the exhibits) of the proposed agreement.

² These trust agreements were not submitted at the July 14, 1993 hearing either.

There is no indication even of what facilities and/or facility sites are the subject of the lease purchase agreement. No dollar figures whatsoever appear in the proposed agreement.

This lack of key terms in the proposed agreement attached to the complaint for validation fails to apprise either the court or the public of information necessary to evaluate the agreement. As the Florida courts have recognized, common sense compels the conclusion that information in the petition for validation should be sufficiently detailed to enable a member of the public and the State to determine whether the government entity had the authority to so act. State v. Suwanee County Development Authority, 122 So. 2d 190, 193 (Fla. 1960).

Judicial inquiry in a validation proceeding must be directed to whether the governmental entity has the authority to incur the obligation proposed. City of Daytona Beach, supra. Without significant terms such as the duration of the lease and the cost to the Department, it is impossible for the Court to ascertain from the proposed agreement exactly what the Department will be obligated to do; accordingly, the Court simply cannot determine whether the Department has the authority to incur the obligation.

For the Court to validate such an incomplete agreement is, in effect, to give the Department a blank check. There are no limitations, monetary or otherwise, imposed as to how the agreement will be completed. The potential amount of the Department's financial obligation is neither specified,

ascertainable nor capped. State v. City of Clearwater, 125 Fla. 73, 169 So. 602 (Fla. 1936); State v. State Board of Education, 67 So. 2d 627 (Fla. 1953.) To allow approval of an open-ended agreement is to obviate any need for judicial oversight in the first place.

Validation of the incomplete agreement also amounts to an unlawful delegation of judicial authority. Judicial inquiry in a validation proceeding, of course, goes to whether the government entity has the authority to incur the obligation. City of Daytona Beach, supra. By validating the agreement the trial court is in reality saying that the Department may complete the agreement as it sees fit; the Department and not the Court then, is actually determining what the Department has the authority to do.

Recent Florida case law has expressly recognized that a trial court may improperly delegate judicial responsibilities to the Department. Barron v. State, 598 So. 2d 181 (Fla. 2d DCA 1992) [Department cannot determine amount of restitution.] Chapter 75 of the Florida Statutes clearly contemplates that the judiciary bear the exclusive responsibility for determining the governmental entity's authority to incur the obligation the subject of the validation proceeding. This responsibility is unlawfully delegated³ to a nonjudicial

³ The proposed agreement even authorizes the Department to delegate its duties/obligations thereunder to an unknown, unspecified third party. [App. Doc. D at section 2.9.]

entity, i.e., the Department, by allowing the Department carte blanche to complete the proposed lease purchase agreement here. By determining how the agreement is to be completed, the Department effectively determines its authority to so obligate itself.

POINT IV ON APPEAL

THE TRIAL COURT ERRED IN HEARING AND DETERMINING ISSUES COLLATERAL TO THE VALIDATION OF THE LEASE- PURCHASE AGREEMENT

The trial court made various findings of fact in its eight-page Final Judgment of Validation. Findings #22 - #26 focused upon GRW's protest of the bid award; these findings included:

1. that GRW was barred from renewing any protest or challenge of the award;
2. that GRW's remedy to contest USCC's selection was to file an action in circuit court within thirty days of the adverse decision;
3. that GRW's failure to initiate such action resulted in their lack of standing to challenge the vendor selection process; and
4. that GRW was estopped to attack the vendor selection process even if it had standing since it had failed to pursue circuit court action. (App. Doc. A at pp. 6-7.)

Such action by the trial court was erroneous in that it concerned collateral issues which were not properly before the trial court.

The Florida Statutes do not contemplate that collateral issues or matters should be adjudicated in validation proceedings. Atlantic Coast Line R. Co. v. City of Lakeland,

130 Fla. 72, 177 So. 206, 215 (Fla. 1937). Such proceedings were never intended to be used for the purpose of deciding collateral issues. State v. City of Miami, 103 So. 2d 185, 188 (Fla. 1958). Accordingly, a trial court cannot consider collateral matters in a validation proceeding. Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 130 Fla. 379, 178 So. 143 (Fla. 1938).

Only narrow issues are appropriate to a validation proceeding. Warner Cable Communications, Inc. v. City of Niceville, 520 So. 2d 245 (Fla. 1988). Judicial inquiry is limited to:

1. whether the public body had the authority to incur the obligation;
2. whether the purpose of the obligation is legal; and
3. whether the proceedings authorizing the obligation were proper.
City of Daytona Beach, supra.

Other matters are collateral and will not be addressed in a validation proceeding. Warner Cable, supra.

Clearly the focus of a validation proceeding is upon the governmental entity itself; the trial court is to consider that entity's authority, purpose in acting, and proceedings. Case law establishes that the sole purpose of a validation proceeding is to determine whether the issuing body had the authority to act under the constitution and laws of the state and to ensure that it exercised that authority in accordance with the spirit and intent of the law. McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 352 (Fla. 1980). As the

Florida Supreme Court noted in Manatee County Port Authority,
supra:

"The function of a validation proceeding is merely to settle the basic validity of the securities and the power of the issuing agency to act in the premises."

In the present case the trial court went far afield from considering the basic validity of the lease-purchase agreement and the Department's authority to enter into it. The trial court concerned itself with determining the proper procedure for an unsuccessful bidder to follow in challenging the adverse decision and whether that unsuccessful bidder could take further action to protest or challenge the decision. Such issues simply do not go directly to the Department's authority or to the validity of the proposed agreement and are thus collateral.

Again the focus of the validation proceeding should be on the Department and not GRW. The trial court's concern is the action of the governmental entity since the function of the court in a validation proceeding is:

"to determine that the authorizing body has the power to act and that it exercised that power in accordance with the purpose and intent of the law."
State v. Sunrise Lakes Phase II Special Recreation Dist., 383 So. 2d 631 (Fla. 1980).

Whatever actions GRW may or may not have taken to contest USCC's selection are secondary and collateral matters not properly determined in the validation proceeding.

The trial court attempted to justify its determination of these issues relating to GRW in Finding #38 of the Final Judgment on the basis that the vendor selection process deals

directly with whether the proceedings authorizing the obligation were proper; for this reason, the trial court did not view the matter as collateral. (App. Doc. A at p. 7.) Nevertheless, it is not the proceedings which GRW challenges but the outcome thereof.

GRW has never disputed that the procedures required by the specific appropriation to be followed were indeed followed except as it relates to execution of a contract by the Department with an entity other than the successful private bidder. (See Argument as to Point I on Appeal.) A Request for Proposals was issued by the County, bids were submitted and evaluated, and a private vendor selected. The details of why USCC was determined to be the successful bidder as opposed to GRW is an administrative matter beyond the scope of the validation proceeding. Even the trial court recognized that the matter of the selection should have been addressed through the protest or circuit court action other than the validation proceeding. (App. Doc. A at p.5 - Finding of Fact #18.)

To accept the trial court's reasoning that the matter was not collateral because it affected whether the proceedings were proper would be to undermine the purpose of the validation proceedings. These proceedings are meant to provide a judicial vehicle with a limited scope of inquiry to approve governmental action so as to result in "the least possible delay." Florida Statutes, Section 75.07. To open up the details of the vendor selection process and the protest procedures to judicial scrutiny is to undeniably bog the

validation proceedings down and prevent an expeditious resolution.

Furthermore, just because some matters may not have been resolved yet which could impact upon the Department's action in entering the lease does not mean that these matters must be resolved in the validation proceeding. For example, in Zedeck v. Indian Trace Community Development Dist., 428 So. 2d 647 (Fla. 1983), the development district had divided itself into three areas and sought to issue \$9,500,000.00 in water and sewer system expansion bonds for one area. The district's water management plan was challenged in court; despite this pending litigation, the district sought validation of the bonds. Id. at 648. During the validation proceedings, Zedeck claimed that the district had abused its discretion by pursuing the bond validation prior to resolution of that litigation; such a matter was deemed collateral and not to be resolved in a validation proceeding. Id.

Certainly in Zedeck it might be said that should the district's plan be struck down in court that the legal basis for the bonds' issuance would vanish; thus, resolution of the matter impacted the authority to issue and was not collateral. The Florida Supreme Court, of course, saw it otherwise in that case. Apparently, then, the trial court's focus is on whether the basic procedures were followed by the governmental entity; if so, the integrity of said procedures is assumed. The court would assure that bids were solicited and evaluated, but would not, for example, revisit the specifics of the evaluations

made (i.e., technical and monetary concerns).

The Department may well argue that it is only by resolution of these issues as to GRW that the feasibility of the project can be preserved. The economic viability of the project is not the concern of the validating court. Manatee County Port Authority, supra. City of Daytona Beach, supra. The judicial concern is the authority to take the proposed action and not the wisdom of it. If the Department elects to try to obtain validation prior to full resolution of GRW's protest, then it has only itself to blame if that collateral matter clouds the economic viability of the project.

CONCLUSION

The trial court erred in validating the proposed lease purchase agreement because:

1. the agreement was not with the entity mandated by the Florida Legislature;
2. the agreement's terms were not in compliance with the requirements of the specification appropriation; and
3. the agreement was so incomplete that the Court could not ascertain the Department's authority to incur the obligation, effectively delegating this judicial responsibility to the Department.

Furthermore, the final judgment of validation went beyond the permissible scope of judicial inquiry in a validation proceeding by making determinations on collateral issues relating to an unsuccessful bidder. Accordingly, the judgment of validation should and must be reversed.

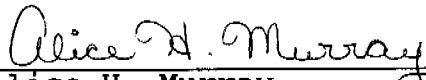
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Initial Brief of Appellant, GRW Corporation was served upon Steven S. Ferst, Esquire., Assistant General Counsel, Florida Department of Corrections, 2600 Blairstone Road, Tallahassee, Fl. 32399-2500, Hal Richmond, Esquire, County Attorney, Gadsden County, 227 E. Jefferson Street, Quincy, FL 32353; State Attorney Willie Meggs, Attn: Asst. State Attorney Phil Smith, Richard Combs, 14 West Washington Street, Quincy, FL 32353; and Kevin X. Crowley, Esquire, Attorney for USCC, Cobb, Cole & Bell, 131 N. Gadsden Street, Tallahassee, FL 31301, by regular U. S. Mail, postage prepaid, this 13th day of September, 1993.



Alice H. Murray