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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

AMENDED REPLY 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 - filed with Initial Brief
"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

SUMMARY OF ARGUMENT

The Act expressly requires the lessor under the lease purchase agreement to be the private vendor selected by the procurement. This language is clear and unambiguous; its plain meaning is binding upon the court. Therefore, no resort to rules of statutory construction is justified.

The Act expressly requires certain terms be included in the agreement such as indemnification of the State and provision of liability insurance. Failure to include such terms means that the State is obligating itself in a way in which it is not authorized to do.

GRW does not contend that an absolute and final agreement be submitted for validation. Nevertheless, the Department's authority to enter the proposed agreement cannot be ascertained without at least the basic framework of the agreement to which it will obligate itself. Where critical elements such as the maximum monetary obligation are unknown, it is simply impossible to pass on the Department's authority to so obligate itself.

GRW has not contended that the Department has no authority to enter the proposed contract because GRW, and not USCC, should have been the successful bidder. GRW contends that, given USCC's selection, the agreement as proposed is beyond the authority of the Department. Whether GRW is entitled to a bid protest hearing and if GRW's bid was non-responsive are collateral issues beyond the scope of a validation proceeding.

ARGUMENT

[Note: Arguments I - IV of the Answer Brief do not correspond to Points I - IV on Appeal identified in the Initial Brief. GRW will attempt to respond to the Answer Brief as it relates to the Points on Appeal it has raised.]

Point I on Appeal

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

In response to GRW's Point I on Appeal, the Department argues in its Argument III at pp. 15-19 of the Answer Brief that the lessor identified in the Lease Purchase Agreement, although not the successful vendor as required by the Act, was "one and the same" for purposes of the Act. Such a position defies well-established rules of statutory construction.

The Act expressly provides that the Department is to enter into a lease purchase agreement and a separate management agreement with "the private vendor selected by the procurement." [App.Doc.G.] While USCC was the successful private vendor, the lessor in the validated agreement was identified as U.S. Corrections Leasing Company, Inc.

The Department blithely dismisses this discrepancy as to the lessor's identity by urging the Court to construe the Act to achieve its stated purpose. Nevertheless, a court is bound by the unambiguous terms of a statute. Cassady v. Consolidated Naval Stores Co., 119 So. 2d 35 (Fla. 1960). There simply is nothing ambiguous about the requirement that the lessor be the "private vendor selected by the procurement." When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of

statutory construction and interpretation. Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

The Department's reliance on Weiss v. Leonardy, 36 So. 2d 184, 160 Fla. 570 (Fla. 1948) and Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918), for the proposition that the Act must be construed to achieve its stated purpose is misplaced. In both cases, statutory construction was called for because the language in issue was unclear or ambiguous. In fact, the Florida Supreme Court stated in Van Pelt:

> But if a word has no definite or generally accepted popular meaning, or in the connection in which it is used is ambiguous, then the court must construe such word and give to it such meaning as is reasonable and will carry out the legislative intent. The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. [Id. at 694; Emphasis supplied.]

In effect, the Department is asking this court to read the Act to say that the Department may enter into a lease purchase agreement with the private vendor selected by the procurement or a wholly owned subsidiary of that vendor. This interpretation is justified, according to the Department, to facilitate financing. Again, there is no ambiguity in the language of the Act as to the identity of the lessor; where the statutory language used is unambiguous, a departure from its plain meaning is not justified by any consideration of its consequences or of public policy. McDonald v. Roland, 65 So. 2d 12 (Fla. 1953). Moreover, even if the statutory language is construed, it is not unreasonable, absurd or ridiculous to conclude that the Legislature wanted some advance and objective oversight and evaluation through the procurement process of a specific

existing entity as the proposed lessor.

That a contract is to be entered into with an existing entity is bolstered by F.S. Section 944.712 entitled "Bidder and Private Vendor Qualifications." This statute expressly requires a private vendor to have the qualifications and experience to carry out the terms of the contract. A newly created corporation has neither a proven track record nor any experience on which to draw.

State v. Brevard County, 539 So. 2d 461 (Fla. 1989) and State v. School Board of Sarasota County, 561 So. 2d 549 (Fla. 1990), provide absolutely no authority for the proposition that there is prior court consideration and approval of use of a sole purpose corporation to limit liability in a lease-purchase agreement. In Brevard, the use of this arrangement was merely set forth in the facts of the case; the financing technique was discussed in the recitation of the county's contention as to the reason for using this arrangement. Use of the technique was not in issue either in Brevard or Sarasota County.

GRW's reliance on State v. Manatee County Port Authority, 171 So. 2d 109 (Fla. 1965) is not erroneous. The case was not cited for its factual similarity as it does not even involve a lease purchase agreement. This decision's importance is the court's recognition that the authorizing legislation language governs and any deviation from the specific requirements set forth therein is violative thereof. Id. at 171. Here the Act states that the Department is to enter into a lease purchase agreement with the vendor selected through procurement; having a

proposed lessor other than the successful private vendor is a deviation from the Act and violative thereof.

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

Argument IV of the Answer Brief at pp. 19 - 24 attempts to respond to GRW's Point II on Appeal. The Department mounts a threefold attack arguing in order that:

- GRW's contentions conflict with the Act's language;

- that the required terms do not have to be in the lease purchase agreement; and

- if the omitted terms were required, GRW cannot now raise them for the first time on appeal. (Answer Brief at p. 19.)

None of these arguments are well taken.

The Act is quite clear as to what terms are required. For example, it states that:

> The successful bidder shall be required to indemnify and hold harmless the State of Florida to the maximum extent permitted by law, for all liabilities, damages, costs and expenses incurred by the State as a result of the performance of the agreements by the successful bidder.

Nevertheless, not only does the lessor not indemnify the State in the lease purchase agreement, but the Department assumes liability for certain risks and even indemnifies the corporation and trustee. [App. Doc. D at sections 2.4, 5.8 and 5.16.] Failure to include the required indemnification provision and providing for indemnification of the lessor means that the State is obligating itself in a manner the Legislature has not authorized.

The Department urges that the agreement was written in the manner necessary to attract investors. While practical concerns are important, the primary concern in this validation proceeding is whether the proposed arrangement is authorized by the Act.

The Department's fallback position is that, if a term is required by the Act, it does not necessarily have to be in the lease purchase agreement. The bootstrap logic is to the effect that the Act requires a separate management agreement; therefore, terms which go in the management agreement do not have to go in the lease-purchase agreement. Thus, if a term is omitted from the lease purchase agreement, it can be put in the management agreement or another agreement. The flaw in this logic is that the management agreement and other agreements were not before the Court. [T. at p.58.] Is the Court simply to accept the Department's assurance that some type of provision in some agreement not in the record will comply with the Act's requirements?

The Department urges that the required terms the Department allegedly omitted are now being raised for the first time on appeal. This is not the case on the issue of liability insurance. GRW's counsel apprised the trial court that:

> The law [the Act] specifically says what are the terms of the insurance provisions. Those insurance provisions are not included in this document. [T. at 87-88]

This particular issue, then, may be addressed on appeal.

The Act states in pertinent part:

> The successful bidder shall also be required to provide a liability insurance policy, or the equivalent protection, in an amount no less that $5

> million per each occurrence not to total more than $12 million aggregate pursuant to section 944.713. [App. Doc. G.]

The Department asserts that this provision is "specifically applicable" to the management agreement; however, the legislative language does not so expressly provide. In fact, both the preceding and following sentence in the Act to the quoted language speak in terms of what the successful bidder "shall" do "in the agreements." Since the Act refers expressly to a lease purchase agreement and a management agreement only, it is logical to conclude that these requirements set forth must be in both agreements.

Furthermore, the Act's reference to F.S. Section 944.713 does not compel the conclusion that it intends inclusion only in the management agreement. F.S. Section 944.713 requires a "bidder" to provide an adequate plan of insurance against liability. A bidder is statutorily defined at Section 944.710(1) to include a corporation proposing to construct or lease a private correctional facility.

There is no limitation of the liability addressed by F.S. Section 944.713 to negligence claims and inmate civil rights claims. Subsection (1) merely requires an adequate plan of insurance against liability "including liability for violations of an inmate's civil rights." That language broadens, not restricts, the liability addressed by the statute.

A fundamental purpose of the validation proceeding is to determine the Department's authority to obligate itself to the lease purchase agreement. State v. City of Daytona Beach, 431

So. 2d 981 (Fla. 1983). The Act gave the Department authority to enter such an agreement if adequate provision was made for liability insurance. Without the inclusion of such term in the agreement, the Department has no authority to obligate itself to the agreement.

Point III on Appeal

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

GRW takes the position that it was error for the trial court to validate the proposed agreement given its incompleteness. The Department addresses this argument by minimizing the significance of the omissions identified. GRW is not suggesting that only "an absolute and final agreement" be submitted for validation. Nevertheless, it defies logic to say that the Department's authority to enter into an agreement can be determined from an agreement incomplete in significant details.

The Department boldly suggests that the redlined, draft agreement which was validated is not incomplete even with numerous items blank; the rationale is that the items are established somewhere in the record without giving any record citations or any specific examples. (Id. at p. 25.) That the validating court was able to glean this information on its own from the voluminous paperwork presented to it is not very likely.

The Department apparently views a ceiling on the obligation which could be incurred as a minor detail since this item is not contained in the validated agreement. If this is not a significant detail, it is difficult to imagine what is. The

only reference as to the maximum amount of the obligation on this point is the allegation of the Complaint For Validation at paragraph eight that the Department will be obligated to pay $2,010,628.30 per annum; no supporting evidence on this point is provided. Even the opinion in Jackson Lumber Co. v. Walton County, 116 So. 771 (Fla. 1928), noted that a maximum rate had to be set which could not be exceeded. Ergo, no definite amount of the Department's obligation needs to be set as long as a ceiling is identified and within the limits prescribed by the Legislature. Here no ceiling has been established.

The Department's view of the validation process is illogical and overly simplistic. In its view, the bottom line is that the Act authorized the construction of a private prison, the lease-purchase agreement accomplishes that goal, so the Department is authorized to incur the obligation. If this were truly the case, a validation hearing serves merely to rubberstamp the Department's plan. Clearly the case law requires a more in-depth review by the Circuit Court. State v. City of Daytona Beach, 431 So. 2d 981 (Fla. 1983). To make these determinations, the basic framework of the proposed transaction must be presented for review.

GRW agrees that the case of State v. Suwanee County Development Authority, 122 So. 2d 190 (Fla. 1960) does not require absolute finality in the agreement in order for it to be validated. Nevertheless, Suwanee County makes clear that the goal of a validation proceeding is to provide notice to citizens of what the government entity is proposing to do so its

authority to take the proposed action may be evaluated. Suwanee County, supra, at p. 193. This goal is not achieved where critical elements of a transaction such as a ceiling on monetary obligation are unknown. The "reasonable detail" required by Suwanee County is missing in the present case.

Without any judicial review of the details of the agreement to be validated and approved, the Department simply has no accountability. The Department basically is urging here that it can decide on its own how much money to obligate itself for and in what manner. To accept the proposition that the Department "knows best" requires the rejection of a need for judicial oversight -- the very premise behind Chapter 75 of the Florida Statutes.

Point IV on Appeal

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

In Arguments I and II of the Answer Brief, the Department takes the position that all the matters ruled on in the Final Judgment relate to the Department's ability to incur the indebtedness evidenced by the lease purchase agreement. While certain issues may relate to the validation, they are collateral to and beyond the scope of a validation proceeding.

The Department makes much of the fact that no other party to the validation proceeding except GRW, the losing bidder, objected to the validation of the proposed agreement. The identity of an objecting party in no way relates to whether or not the Department has the authority to enter the lease purchase agreement. Even if no party objected to the validation does not

mean ipso facto that the Department had the authority.

The Department misperceives the objections raised by GRW. The integrity of the bid award being presumed for purposes of argument,[1] GRW merely asserted in the validation proceeding that the Department had no authority to enter the particular agreement before the court.

How or if GRW could mount a bid protest at this point does not bear directly on whether the Department has the authority to obligate itself under the lease purchase agreement. These issues are beyond the narrow scope of issues appropriate in a validation proceeding. Warner Cable Communications, Inc. v. City of Niceville, 520 So. 2d 245 (Fla. 1988).

The Department's reasoning here is that a bid protest is not collateral because Section 75.02 allows determination of the legality of "all proceedings" in connection therewith. When read in the context of the statutory language, it becomes clear that this language does not extend to bid award or protest procedures.

> Any...political district or subdivision of this state...may determine its authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith....

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[1] Serious questions exist as to whether the required procedure as set forth in the Act was followed. The Act required the Department to approve or object in writing within 30 days to responsive bids forwarded from the County. No evidence was ever submitted to the court below to show that the Department ever complied with this requirement. Had written approval been given by the Department, GRW would have been afforded a point of entry to object to this final agency action. The Department's failure to do so results in its being placed in the unenviable position of having a validated agreement with the protest of an unsuccessful bidder still unresolved.

This language focuses on the incurring of debt and the proceedings undertaken in connection with implementing the obligation.

The case of People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373 (Fla. 1991), provides ample authority for GRW's position. Therein it was determined that the validity of a bond referendum was appropriately addressed in a validation proceeding; the bond referendum at issue authorized the sales tax to finance the bonds. Clearly, then, the legality of the proceedings implementing the obligation to be incurred is not a collateral issue. Moreover, Sec. 75.02 expressly states that the bond validation proceeding may consider the legality of the assessment of taxes levied or to be levied.

The Department's confusion as to the role of a validation proceeding is apparent; it asserts that:

> ...if GRW is entitled to the award then the obligation between USCC and the Department is invalid and unauthorized. (Answer Brief at p.6.)

The question before the lower court was not who should have been awarded the contract; the question was whether the Department could enter into the proposed agreement once the bid was awarded. Whether or not GRW should have been awarded the contract and if and how it could pursue a bid protest have no bearing on the Department's authority to obligate itself as set forth in the proposed agreement.

The Department then alleges that even if the protest issue was collateral, GRW made it an issue by raising the point in its Motion To Abate. (Answer Brief at p.8.) What GRW did or did

not raise cannot alter the judicial function in a validation proceeding. Its focus is narrow and limited to determing authority to incur obligation, legality of purpose, and propriety or proceedings. City of Daytona Beach, supra. Further, the protest issue was not tried by consent at the final hearing; GRW's counsel stated to the court:

> So we take the position that this portion that deals with whether there is, in fact, a valid protest or there was not a valid protest is not properly before this court on a validation proceedings (sic), but should be heard separately and apart on separate proceedings. ...this is solely a collateral issue. (T. at p.29.)

Accordingly, the court below had neither the authority of Chapter 75 nor the consent of the parties to determine this issue.

The Department goes on to assert that:

> even if this Court rules that GRW still had a right to a bid protest hearing, and was not time barred, GRW could never win that hearing since its bid was non-responsive. (Answer Brief at p.10.)

Whether or not GRW has a right to a bid protest hearing or if its bid was non-responsive is simply beyond the scope of a validation proceeding. The Department's authority to enter into the proposed lease purchase agreement is the narrow focus of the proceeding.

The Department urges that GRW is attempting by these proceedings to delay execution of the lease purchase agreement. GRW's motives for challenging the Department's authority to execute the proposed agreement are irrelevant. The concern in the validation proceeding is whether the Department has the authority to do what it is proposing; either the Department does

have the authority or it does not. If no authority exists, then the court simply cannot validate the agreement regardless of GRW's motives.

Significantly, in this appeal GRW has never made the claim that validation is unjustified because the agreement should have been with GRW. In fact, GRW's Points on Appeal clearly indicate the concern with the Department's authority given the lessor identified in the agreement, the incompleteness of the agreement and the terms included in the agreement in light of the requirements of the Act.

The attempt to factually distinguish the case law on collateral issues cited in the Answer Brief is not well-taken. [Answer Brief at p.13.] These cases were not cited by GRW for their factual similarity to the case at hand. In fact neither party has cited a case directly on point because one does not exist. Accordingly, the parties are left to argue the general law set forth in opinions on Chapter 75 proceedings rendered in the bond validation context. Clearly, the authority of the governmental entity in each case will be a fact-sensitive determination. Therefore, the fact that in all but one of the cases cited by GRW the bonds were validated and that decision affirmed on appeal adds nothing to the present controversy.

The quandry in which the Department finds itself is this; if GRW is entitled to a bid protest and is successful in that endeavor, what effect will this have on the lease purchase agreement it is proposing to execute? The Department has put itself in this position by electing to go forward with a

validation proceeding before resolution of the bid protest issue.[2]

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[2] At an August 18, 1992, meeting the County Board of Commissioners unanimously voted to deny GRW;'s original protest. The Board was unaware of the amended protest and there is no record evidence to show any final action whatsoever on that amended protest. [App. Doc. A at p.6.]

CONCLUSION

The trial court erred in validating the proposed lease purchase agreement because the Department did not have the authority to execute the agreement. No authority existed because:

1. the agreement was not with the entity mandated by the Florida Legislature, i.e., the successful vendor through the procurement process; and

2. the agreement's terms were not in compliance with the requirements of the Act, i.e., no provision for liability insurance.

Validation was also erroneous in that 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 Amended Reply 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 2ND day of November, 1993.

Bert Moore

Bert Moore