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## Decision

**Matter of:** Request for Resolution of a Contract Controversy by South Carolina Worker's Compensation Commission

**Case No.:** 2020-213

**Posting Date:** February 14, 2024

**Contracting Entity:** South Carolina Worker's Compensation Commission

**Description:** IT Legacy System Modernization Project (Small Applications Development)

## AUTHORITY

This matter is before the Chief Procurement Officer pursuant to a request for resolution of a contract controversy by the South Carolina Workers' Compensation Commission (WCC) arising from a contract with Intellectual Capital, Inc. (ICAP) to develop an administrative software system.

Section 11-35-4230(4) of the South Carolina Consolidated Procurement Code provides:

Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer or his designee promptly shall conduct an administrative review and issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

WCC originally requested resolution of a contract controversy between the parties and debarment of ICAP, its principals, and other entities on March 16, 2020. On March 31, 2020, WCC requested a pause in the resolution process so the parties could attempt to resolve their differences. On December 16, 2020, WCC amended its request for resolution including exhibits.

On January 19, 2021, ICAP filed a motion to dismiss WCC's claims, without any supporting documentation, while also alleging the CPO lacked authority to hear this matter on constitutional grounds. WCC filed a second amended request for resolution on February 12, 2021. WCC responded to ICAP's motions on April 23, 2021. ICAP offered additional information on June 2, 2021. The CPO was notified on October 15, 2021, that the parties were unable to resolve the matter. ICAP also pursued its constitutional claim in circuit court. The court dismissed that matter on January 23, 2022. ICAP appealed the court's decision, and this matter is pending before the South Carolina Supreme Court. ICAP filed a second motion to dismiss on April 3, 2022. The CPO held a settlement conference on December 8<sup>th</sup> and 9<sup>th</sup> 2022. The Workers' Compensation Commission was represented by Michael H. Montgomery of Montgomery Willard, LLC, and Keith Roberts, Esq., and Kristen McRee, Esq. of the Workers' Compensation Commission. Intellectual Capitol was represented by John Schmidt and Melissa Copeland of Schmidt & Copeland, LLC. The parties were unable to resolve their differences during this conference giving rise to this administrative review and decision.

## **MOTIONS**

WCC's requests for resolution allege a breach of the contract; unjust enrichment; promissory estoppel; and breach of the implied covenant of good faith and fair dealing in the performance of its obligations under the contract. The original request for resolution identified the following individuals and entities as defendants: Intellectual Capitol, Inc.; Intellectual Capitol; Intellectual Capital; ICAP Solutions; Capitol Software; Ruck & Maul, LLC; Traci Newkirk, individually; Traci Newkirk d/b/a Intellectual Capitol; Traci Newkirk d/b/a ICAP Solutions; Barry Newkirk, individually; Barry Newkirk, d/b/a Intellectual Capitol; Barry Newkirk, d/b/a ICAP Solutions; Barry Newkirk d/b/a ICAP-Capitol Software; and Neil Richards, d/b/a Intellectual Capital.

ICAP moved to dismiss the claims against these entities and individuals on the grounds that the CPO "lacks power, jurisdiction and authority to decide any claims, at law or in equity, *by the State* or any governmental body as against a contractor or other person for the recovery of monetary relief for breach of contract or otherwise;" and other grounds. Specifically, ICAP argued that Section 11-35-4230 violates the Constitution's separation of powers doctrine to the extent it authorizes claims by the State. The motion to dismiss for lack of jurisdiction on a

constitutional basis is denied as the CPO lacks authority to determine the constitutionality of any statute.<sup>1</sup>

At the outset of the CPO hearing, WCC agreed to the dismissal of all parties except for ICAP and all claims except for the breach of contract claim.

## COMPLAINT

WCC alleges a breach of contract by ICAP accompanied by fraud, misrepresentation, violation of the covenant of good faith and fair dealing, and unjust enrichment. WCC also requests a financial audit of the contract and preservation of all artifacts and tools related to the project.

WCC summarized its allegations in its second amended request for resolution as follows:

The Defendants contracted to provide the Commission an electronic filing and case management system which was named “KERMIT”. The Commission and Defendants created a set of specifications which included twenty-two specific performance requirements. The Defendants agreed to develop and deliver the system by November 2019. The Defendants were unable to provide a workable system that met the performance requirements and tried to scale back the system for a partial delivery in January 2020. This scaled back system was referred to as Version 1.5 and was to provide only minimal functionality of 12 of the 22 performance requirements in a working fashion as a bridge to complete the KERMIT project. This included the removal of the seven refactored items as well as three additional requirements that were so faulty that they could not be fixed in time. When this was delivered it was inoperable and not functional. The Commission continued to try and work with Defendants to resolve the issues and complete the project. On February 14, 2020, Defendants abandoned the project and thereafter have worked to hold the project hostage while seeking additional monies and time for completion. The Commission worked with Defendants until December 2020 attempting to develop a path forward to complete the project. Defendants have stalled, stonewalled, and refused to fulfill their contractual obligations. The Commission fully performed its obligations under the agreement and paid Defendants \$2,346,118.06 for the worthless and non-functioning KERMIT system provided.

WCC also alleges a breach of a second contract for a Business Intelligence Project:

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<sup>1</sup> While the CPO cannot determine the constitutionality of a statute, he can apply the law as written. The CPO notes that the Supreme Court has already upheld the constitutionality of Section 11-35-4230 in *Unisys v. S.C. Budget & Ctrl. Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001).

The Commission paid the Defendants an additional \$104,000.00 for the first milestone of a subsequent contract, the Business Intelligence Project, (Exhibit 9). Defendants did not perform any work on this contract and breached this second contract by their express termination and nonperformance. Moreover, the Business Intelligence Project could not be implemented unless and until the KERMIT system was operating with the MMFS.

[Second Amended Request for Resolution, Paragraph 93] (emphasis added)

ICAP argues that it completed the work required for the price stated, to the approval and satisfaction of WCC by October 11, 2019, and alleges breach of the contract by WCC:

... if WCC had complied with its precedent and concurrent contractual obligations, WCC would have had a system with the functionality that they desired and specified in the Agile process they chose to undertake. Instead, due to WCC's breach of contract and failure to perform its precedent and concurrent contractual obligations, ICAP remained on the job well beyond the contracted and expected period of performance, performing work above and beyond its contractual milestone requirements without commensurate pay, for another four months until WCC offered ICAP the option to end its participation, and ICAP accepted that invitation.

## **DISCUSSION**

The WCC and ICAP entered into three contracts through the Small Software Applications Development (SSAD) statewide term contract to replace a 28-year-old legacy software system and automate / incorporate associated manual processes used to administer, review, adjudicate, and process workers' compensation insurance and injured workers' claims. The system was referred to as the Key Element Reporting Management & Incident Tracking System or KERMIT. The scope of the KERMIT project was described in SSAD state term contract Job Order Request (JOR) 193:

The Workers' Compensation Commission serves the needs and interests of employers and employees in South Carolina through the just administration of the SC Workers' Compensation Act, found in Title 42 of the SC Code of Laws. The Commission works closely with the Governor, the General Assembly, and our many constituents to make certain the state's workers' compensation system is fair, equitable, and responsive to the needs of the citizens of South Carolina. The Commission's mission is to ensure injured workers receive timely and equitable compensation for their injury and to enforce the insurance compliance regulations on all qualified employers in our state.

The Commission is ready to engage in a legacy modernization project that will transform our agency's business systems and processes. Our existing computer system was designed and implemented over 28 years ago. While small improvements have been made to this system throughout the years, the capability and functionality have never undergone major system enhancements. The design basics of our system have not been periodically reviewed and updated to accommodate the evolutionary changes in the insurance and legal industries. As a result, our agency relies on a decades-old system with obsolete technology to support its mission critical programs, essential functions, and daily operations. Because of these limitations, we are challenged to provide a secure environment, functional improvements to the system and stakeholder access to our information. We want to apply a holistic review of all layers of the legacy system including database, application, environment and interfaces. Modernizing onto newer technologies will help the agency improve its services to our citizens, enhance government operations, and strengthen cybersecurity.

In this project, we will create a system to meet the requirements as defined in the scope of work section of this document.

This purpose of this JOR request is to solicit proposals from vendors to develop the solution as defined in this document and supporting documentation, to meet the needs of the Commission. The vendor is required to provide a response which will detail complete development project cost, milestones and approach to deliver the identified solution in this JOR. The following deliverables from JOR 168 contain supporting material to this document and are included by reference.

[SSAD Job Order Request (JOR) 193, Page 1]

These three contracts were established under the SSAD statewide term contract (5400010665) in effect at the time.<sup>2</sup> The SSAD state term contract was designed to provide agencies with an abridged procurement process to acquire small software applications and modifications. SSAD contracts follow a basic pattern that requires agencies to divide each project into modules or milestones. The objectives for each module or milestone are tailored to the particular project and dependent on work performed in the previous module. SSAD projects are administered by a Vendor Manager (VM). Payment was authorized upon successful completion and acceptance of the objectives for each milestone:

6.1 Upon the completion of a deliverable as set forth in a Job Order, JOC<sup>3</sup> will use the

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<sup>2</sup> This contract was replaced effective May 16, 2021

<sup>3</sup> Job Order Contractor. In this case, ICAP is the Job Order Contractor (JOC)

VM Software to notify the VM that a deliverable has been completed (“Completed Deliverable”). The VM will notify the applicable UGU<sup>4</sup> of the Completed Deliverable electronically via the VM Software and will submit a request to the appropriate manager, or other approving authority of the UGU, for approval thereof. The UGU will confirm completion of the Completed Deliverable (the “Confirmed Completed Deliverable”) to the VM using the VM Software or will notify the VM that it does not consider the Completed Deliverable to be complete. The VM will notify the JOC whether the Completed Deliverable has been approved. After approval, a JOC may submit an invoice to the VM. All invoices for work performed by a JOC pursuant to a Job Order will be submitted on-line through the VM Software. All work will be invoiced by deliverable and for the amount allocated in the Job Order for that deliverable.

- 6.2 For each Confirmed Completed Deliverable approved during a week, a weekly electronic invoice file (“Electronic Invoice”) will be generated at the end of that week by the VM Software and will be made accessible for download to the VM, ITMO, and each UGU (as applicable), and emailed by the VM to each applicable UGU of the State. The Electronic Invoice will be payable by the UGU to the VM. For reimbursable expenses, JOCs shall invoice the applicable UGU through an electronic expense report feature of the VM Software along with original receipts, if and only to the extent that such expenses are permitted and approved pursuant to the Small Apps Contract. These expense reports will be electronically routed via the VM Software to the appropriate hiring manager or other approving authority of the UGU for approval. Access to the submitted expense reports will be available to JOC via the VM Software and may be downloaded.
- 6.3 The VM will pay JOC amounts due under the Small Apps Contract for Confirmed Completed Deliverables and/or (if applicable) expenses within three (3) business days of the VM’s receipt of the State’s payment of an Electronic Invoice, to the extent that such payment includes amounts for such Confirmed Completed Deliverables and/or expenses and net of the fees described in Section 6.4 below. Payments disbursed to Supplier by the VM hereunder will be via electronic funds transfers unless otherwise requested by Supplier. Payment by the State to the VM for an invoice shall satisfy the State's obligation to the JOC for that invoice.

[Solicitation, Page 22] (emphasis added)

As discussed below, WCC abandoned this fundamental process of payment for completion of deliverables and the meeting of milestones during this project.

### **The KERMIT Project**

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<sup>4</sup> In this case the WCC is the Using Governmental Unit (UGU)

KERMIT was to be developed in three phases. The first phase began with the issuance of SSAD Job Order Request (JOR) 168 on December 12, 2017. This contract proceeded in accordance with the SSAD prescribed process. The objectives and deliverables included in the SOW for this phase of the project were:

Objectives:

- 1) Evaluate our legacy claims management system to determine its efficiencies and deficits so that we may harvest the effective components of this system,
- 2) Review business processes agency-wide to radically rethink and redefine our work to ensure operational efficiencies,
- 3) Automate manual processes to create self-service systems whereby stakeholders can process simple claims with little to no intervention from staff, and
- 4) Design inherent security components into the system such that information and applications are protected.

Deliverables:

The documentation deliverables provided will encompass:

- The vendor will deliver functional, system design and architecture documentation for sprint delivered components.
- As part of this phase the vendor is to deliver documentation to support the Commission publishing the statement of work required for next phase of the project.

(emphasis added)

Three Offerors responded to this SOW, and the contract was awarded to ICAP in February 2018 for \$185,261.48. This phase of the project was completed in June 2018, and is not contested.

## **KERMIT Phase 2**

Phase 2 of this project began with the issuance of SSAD JOR 193 in July 2018. The SOW included documentation developed by ICAP under the previous contract, a list of deliverables that included a Minimal Marketable Feature Set (MMFS), and a list of assumptions. The SOW mandated that the software be developed using a sprint based, agile development methodology and that the project be delivered within a milestone-based approach:

### **Agile Approach**

The Commission is looking to address this project in an agile manner with regular deliverables and refactoring of the backlog based on the Commission's feedback and learning....

### **I. Approach**

The vendor will work with the Commission, using agile approaches, to implement the needs and priorities of the organization identified in the output of JOR 168 and stated in Section 7, Minimal Marketable Feature Set. By working with the product owner and business stakeholders, the vendor will develop and establish the system release for the project in an agile manner that continues to support the current business and implement new technology and processes.

### **II. Sprint Based Development & Development Deliverables**

The vendor will design and plan, using a sprint-based approach, the solution based on the needs of the business. The vendor will use market leading enterprise strength technologies supported by the State in the delivery of the developed solution. The solution will be client platform independent.

The vendor will deliver within a milestone-based approach with agreed upon goals documentation.

[JOR 193 Statement of Work, Page 21] (emphasis added)

An agile development methodology is described by Wikipedia as:

Most agile development methods break product development work into small increments that minimize the amount of up-front planning and design. Iterations, or sprints, are short time frames (timeboxes)<sup>[26]</sup> that typically last from one to four weeks.<sup>[27]:20</sup> Each iteration involves a cross-functional team working in all functions: planning, analysis, design, coding, unit testing, and acceptance testing. At the end of the iteration a working product is demonstrated to stakeholders. This minimizes overall risk and allows the product to adapt to changes quickly.<sup>[28][29]</sup> An iteration might not add enough functionality to warrant a market release, but the goal is to have an available release (with minimal bugs) at the end of each iteration.<sup>[30]</sup> Through incremental development, products have room to "fail often and early" throughout each iterative phase instead of drastically on a final release date.<sup>[31]</sup> Multiple iterations might be required to release a product or new features. Working software is the primary measure of progress.<sup>[25]</sup>

([https://en.wikipedia.org/wiki/Agile\\_software\\_development](https://en.wikipedia.org/wiki/Agile_software_development), last viewed on 6/15/2023)

The deliverables listed in the SOW included:



- The vendor will deliver working code in “done done”<sup>5</sup> status for sprint delivered components from the agreed sprint backlog.
- The vendor will work with the Commission continually to refactor the project backlog to support the delivery of the solution.
- The vendor will support the Commission in UAT testing.
- The vendor will deploy tested working project code to the appropriate UAT and Production environments as part of the deployment process.
- Code delivered to the Commission will be commented code and documented.
- The Vendor will support throughout the project the Commission’s communication of the Modernization to the Stakeholder Community.

[JOR 193 Statement of Work, Page 21] (emphasis added)

The SOW deliverables included the MMFS,<sup>6</sup> a list of 22 functions that were to be incorporated into WCC business processes:

- a. External data access: DEW, NCCI, SOS, South Carolina AIS. The system will provide interface connectivity to receive and send data as needed to external agencies or organizations.
- b. Auto-population of data when creating and submitting a claims form. The system will provide the ability for the collected claims data to pre-populate screens as part of the processes.
- c. Online payments. The system will support the ability to receive payments online for fees, fines, etc., using a variety of methods supported by the commission.
- d. Reminders, ticklers, notifications of case activity. The system will provide the ability to track, remind, notify, and provide an audit trail of activities for cases.
- e. Auto-population of data when creating documents. The system will enable templated documents to be auto populated based on the information required by the document.
- f. Online filing. The system will provide a secure portal to enable online submission of required documents, forms and data related to a claim. All documents/forms and data could be submitted through the portal including EDI.
- g. Ability to activate claims. The system will provide the ability to activate a claim once reviewed.

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<sup>5</sup> The contract defines “done, done” as: Done, Done: work performed in sprint is complete; potentially deliverable. [ICAP proposal, Page 8]

<sup>6</sup> WCC claims that the MMFS was not delivered.

- h. Improved contact information management. The system will provide the ability for stakeholders to self-manage and keep up to date contact information on users from their organization.
- i. Claim information view will contain all research criteria for disputes. The system will provide the ability to present information from different sources in the process of managing a medical bill dispute.
- j. Schedule Management. The system will provide the ability to dynamically schedule hearings and appeals based on the constraints for stakeholders. This will include Hearings, Informal Conferences and Appeals and all of these must interface to consider attorney protection calendars as a part of the scheduling process.
- k. The system should include customizable “easy button” functions – compilation of hearing docs/ communication with parties. The system will provide simplified processes to easily compile the necessary documents and methods to communicate quickly and efficiently with stakeholders.
- l. The system will allow parties to serve and receive documents electronically including orders, forms, evidence, and the like. The system will enable and provide the ability for the commission to implement process serving in a more effective manner with the stakeholders.
- m. Venue Scheduling. The system will provide the ability to integrate the venue scheduling into the hearing and appeals scheduling process.
- n. Workflow Assignment – routing of work items to the correct employee. The system will implement workflows and supporting business rules to route work items to the appropriate parties throughout the claim process.
- o. Stakeholder access to portal – claim status / contact management. The system should provide an internal and external portal for all stakeholders.
- p. Catastrophic claim notification based on injury type. The system should provide the ability to identify claims that could exceed a threshold potential based on claim type.
- q. Fund member management via the portal. The system should provide the ability for the self-insured fund programs to self-manage their membership via the portal.
- r. Payment plan process. The system should provide the ability to establish negotiated payment plans as well as track and report progress.
- s. Connecting x-files with associated WCC files being created after the fact. The system should enable association and link of Commission investigation files (x-files) and WCC case files without the need to re-key or re-enter data.
- t. Dispute process. The system will provide process to manage submitted disputes so that parties involved can submit and review status online.
- u. Medical bill reviewer approval process. The system will provide a streamlined process to manage the entities approved to provide medical bill review services within South Carolina.
- v. NCCI reporting. The system will enable NCCI reporting without the need to re-key or re-enter data.

The SOW also required that the system accommodate data integration from outside agencies and other systems:

Since data from several external sources is a part of WCC's business, integration with outside agencies or other systems will be required during this process. The vendor will be required to provide solutions to meet these interface needs as identified during the project.

[JOR 193 Statement of Work, Page 21]

Historically, the migration of data from a legacy system to a new system is a major issue, and this project was no exception. Typically, data in legacy system are incomplete, in varying formats, and in multiple locations making migration a challenge. This contract required ICAP to provide interfaces with external data sources and integrate that data into KERMIT. However, there is nothing in the SOW or the ICAP proposal to indicate that ICAP was responsible for cleansing external or legacy-system data.<sup>7</sup>

Problems with the legacy data for this project became apparent in the first months of the project. On September 25, 2018, a change request was initiated for a data migration architect, to plan, map data elements, test and migrate data from the legacy SQL databases and an OnBase document storage system into the new data architecture. These were just two of the external data sources for KERMIT. This person was on board for 12 sprints starting with Sprint 6 and completing at the end of Sprint 17, at a total cost of \$127,914.00. There was no anticipated impact on the overall project schedule. The change request was approved on October 23, 2018.

This was followed by a second change order that was approved on June 11, 2018, to add two data architects to the project to adjust for industry changes in xml standards at a cost of \$315,000. There was also no anticipated impact on the overall project schedule.

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<sup>7</sup> **Data cleansing** or **data cleaning** is the process of detecting and correcting (or removing) corrupt or inaccurate [records](#) from a record set, [table](#), or [database](#) and refers to identifying incomplete, incorrect, inaccurate or irrelevant parts of the data and then replacing, modifying, or deleting the [dirty](#) or coarse data.<sup>[1]</sup>

[https://en.wikipedia.org/wiki/Data\\_cleansing](https://en.wikipedia.org/wiki/Data_cleansing), last viewed 2/14/2024

Despite the awareness of potential problems with external data, unforeseen problems were still encountered when KERMIT went live. One was a problem with data from an external data source, the Attorney Information System (AIS), and another dealt with missing attorney bar numbers in the legacy systems. For reasons that are discussed below, these problems were not detected and addressed, prior to public deployment.

The SOW also included the following assumptions:

**Key Assumptions:**

- The vendor will provide a team-based approach to meet the needs of the project milestones.
- The Commission will provide the necessary resources to support the project team needs.
- The Commission will provide vendor with the workspace necessary to plan and implement the SOW/project as needed.
- The Commission will provide all software and hardware necessary for the project in a timely manner so that scheduled work proceeds as planned.
- The Commission will provide access to subject matter experts as needed by the vendor team to develop the solution.
- The Commission will provide access to the stakeholders on a defined review process to support the milestone delivery.

[JOR 193 Statement of Work, Page 22] (emphasis added)

As discussed below, WCC failed to provide required hardware and software in a timely manner, which had a direct impact on the success of this project.

**One Proposal Received**

ICAP was the only vendor to respond to this SOW. ICAP proposed to complete this project through 14 milestones comprised of 27 two-week sprints with a milestone at the end of every second sprint and the last milestone comprised of a single sprint. ICAP's proposal included a list of milestones with deliverables and payments for each milestone:

Milestone Billing Schedule & Planned Deliverables			
Milestone	Milestone Planned Deliverables	Inclusive of	Costs

<b>Milestone 1:</b>	Project set up, (incl. dev server, UAT server configuration, infrastructure connectivity) JITR for upcoming sprints. Backlog refactoring.	Sprints 1 & 2	\$140,978.08
<b>Milestone 2:</b>	Code deliveries for legacy functionality for user testing and review. JITR for upcoming sprints. Backlog refactoring.	Sprints 3 & 4	\$140,978.08
<b>Milestone 3:</b>	Release of Done Done Code base for initial legacy Functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 5 & 6	\$140,978.08
<b>Milestone 4:</b>	Code deliveries for rules and workflow functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 7 & 8	\$140,978.08
<b>Milestone 5:</b>	Code deliveries for rules and workflow functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 9 & 10	\$140,978.08
<b>Milestone 6:</b>	Release of Done Done Code base for Rules and Workflow Engine functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 11 & 12	\$140,978.08
<b>Milestone 7:</b>	Code deliveries for initial external functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 13 & 14	\$140,978.08
<b>Milestone 8:</b>	Code deliveries for initial external functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 15 & 16	\$140,978.08
<b>Milestone 9:</b>	Release of Done Done Code base for initial legacy External functionality. JITR for upcoming sprints. Backlog refactoring. Code deliveries for initial Electronic Payment, Interface & additional functionality.	Sprints 17 & 18	\$140,978.08
<b>Milestone 10:</b>	Code deliveries for initial Electronic Payment, Interface & additional functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 19 & 20	\$140,978.08
<b>Milestone 11:</b>	Release of Done Done Code base for initial Electronic Payment, Interface & additional functionality. JITR for upcoming sprints Backlog refactoring.	Sprints 21 & 22	\$140,978.08

<b>Milestone 12:</b>	Code deliveries for external interfaces, validation and testing. JITR for upcoming sprints. Backlog refactoring.	Sprints 23 & 24	\$140,978.08
<b>Milestone 13:</b>	Code deliveries for enhanced functionality. JITR for upcoming sprints. Backlog refactoring.	Sprints 25 & 26	\$140,978.08
<b>Milestone 14:</b>	Done Done deliverables and finalized documentation for project deliverables.	Sprint 27	\$70,489.04
			\$1,903,204.08

(ICAP proposal, page 25)

ICAP proposed an agile development methodology as required by the SOW. (ICAP Proposal, Page 6) The ICAP agile process starts with “stories” that are an informal, natural language description of features of the software system. They are written from the perspective of an end user or user of the system—*e.g.*, “As a judicial analyst, I can set the informal conference docket more efficiently.”

The stories help to create a simplified description of a requirement. Once a backlog of stories has been compiled, they are prioritized. Then during two-week periods called “Sprints,” the stories are refined to provide enough detail and documentation to deliver the required functionality while incorporating the applicable MMFS functions.

(ICAP proposal, Page 11) (emphasis added)

For example, one of the MMFS features is a venue-scheduling process:

The system will provide the ability to integrate the venue scheduling with the hearing and appeals scheduling process.

During the sprint, software would be developed that would provide venue scheduling that would integrate with the hearing and appeals scheduling process.

The ICAP proposal also included the following deliverables:

- The deliverables for the project will include:
1. Scenario creation for MMF stories
  2. Code & solution developed for MMF
  3. Sprint Planning for project work effort
  4. Product Backlog continually refactored to meet WCC needs
  5. Integration to external data sources

As with any agile project, the deliverables will continue to be refined on a sprint by sprint approach as the ICAP and client team continue to learn. The deliverables will be considered "living" artifacts and will continue to be enhanced throughout this project. The product backlog will also continue to be managed and prioritized by the product owner throughout this process working with the stakeholders.

### **Details of Deliverables**

The following deliverables are identified as key in the project to enable successful later phases:

#### **5.1.1 Minimal Marketable Feature Set**

The JITR<sup>8</sup> will occur throughout the sprints as the identified requirements are refined to provide enough detail and documentation to support the needed development and configuration to deliver the MMF requirements. Based on this the development will deliver in "Done Done" status.

- Production Release Code
- User Interface functionality for internal and external stakeholders
- The identified stories below to meet the MMF:

The ICAP proposal established the following criteria for completion of a Sprint:

#### **3.1.4 Sprint Completions**

The project is made up of a number of sprints and these are typically complete when the following have been completed:

1. The time-boxed period is completed (ICAP uses 2-week sprints)
2. Sprint Review & Retrospectives have been completed and the product owner has accepted the work product
3. The sprint stories are completed to DONE, DONE status
4. The functionality within the sprint work product has been tested and accepted by the users/stakeholders

The completion of the phase, specifically this project phase, includes the completion and documentation of analysis, per the deliverables and supporting artifacts.

[ICAP Proposal, Page 9] (emphasis added)

ICAP defined "Done, Done" status for this project as follows:

- Issue is code complete
- Issue had been Code Reviewed and signed off by another developer as reviewed
- Issue is unit tested
- Issue is integration tested
- Code is documented to the ICAP Code Comment Standards

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<sup>8</sup> JITR: Just In Time Requirements

- Product Documentation for specific issue has been completed and published for QA
- Scenario testing is completed and successful

[ICAP Exhibits, page 402]

The contract was awarded to ICAP on July 17, 2018, for \$1,903,204.08. The SOW and the ICAP proposal read together establish the contractual requirements for this project. Including Phase I and the two subsequent change orders, the total cost of the project was \$2,513,379.56.

### **The Project Begins**

The project began on August 1, 2018, and was scheduled to be completed by October 31, 2019. During the Sprints, ICAP gathered information about specific workers' compensation functions, translated that information into functional software that was to provide those functions, including the MMFS, on hardware and software designated as the development environment. Normally, once the software attains done, done status, it is transferred to another set of hardware and software designated as the test environment. This allows for end-user testing without introducing test data into the development environment and otherwise delaying development. Any deficiencies or new functionality identified during the testing and review are sent back to the programmers to be addressed, or "refactored," during the next sprint.

ICAP was contractually responsible for the development and staging environments. WCC was responsible for the hardware and software necessary to establish the test and production environments:

- The Commission will provide all software and hardware necessary for the project in a timely manner so that scheduled work proceeds as planned.

[SOW, Page 22] (emphasis added)

This was confirmed in an email from the WCC Director of Technology on May 9, 2019:

Intellectual Capital has the responsibility to build the development and staging environment. Our agency staff are responsible for the testing and since that involves 20+ users then we have the responsibility for the testing environment. Obviously we will own the production environment as well. Our testing is scheduled to begin June 1 with a go live date of late October.

[ICAP Ex., Page 00122] (emphasis added)



The award for the software necessary for the test environment was posted on June 14, 2019. (Solicitation – 5400018041, Contract – 4400021746) Delivery, installation, and configuration added additional time before the testing environment was available for use. In the interim, WCC reviewed illustrations, demonstrations, and documentation of the work developed during a Sprint, but it did not test the Sprint developed software as required by the contract. The Sprint deliverables were also included as objectives for each Milestone. However, for the first eleven months of this fifteen-month project WCC lacked the ability to conduct end-user testing. Milestones were accepted and paid for without the required testing.

In its pleadings and during the CPO hearing, WCC maintained that the Milestone Review sessions were only to look at the scope of design and development within the 4-week period, not to test the functionality. WCC also maintained that it was following an industry standard practice of making progress payments at each milestone that were not contingent on testing or acceptance of the functionality developed during the Sprints or as part of delivery of milestone objectives:

57. Defendants provided Milestone Reviews throughout the project lifecycle presenting design concepts and development of various modules in the system. The purpose of these sessions was to provide a forum for the project team to review the functional design considerations, the application features developed within the current Sprint and allow the Commission to provide feedback such that design and development issues were caught sooner than later. Defendants illustrated work was being done on the independent modules but when the modules were assembled, they system did not function. Milestone Review sessions were only to look at the scope of design and development within the 4-week period, not to test the functionality. Therefore, the Commission continued to rely on the promises of Defendants that they would deliver functionality at "go live".

[Amended Request for Resolution]

118. Defendants illustrated work was being done on the independent modules but when the modules were assembled, the system did not function. Milestone Review sessions were only to look at the scope of design and development within the four-week period, not to test the functionality. Therefore, the Commission continued to rely on the promises of Defendants that they would deliver functionality at "go live".

[Second Amended Request for Resolution] (emphasis added)

In its pleadings, WCC even states that some Milestone payments were made even though some of the listed milestone deliverables were not functional at the milestone reviews:

56. Standard review meetings between the Commission and Defendants were held throughout the project in accordance with the terms of the SOW and the Proposal. These included bi-weekly reviews called Sprints and monthly reviews of milestones accomplishments, which were associated with payments to Defendants. At milestone reviews, not all deliverables listed for the milestones were functional. Defendants promised that the deliverables were in development and would be provided at a later date, relying on the "continuous integration" and "refactoring" concepts of the "Agile" approach as an excuse for their continuing failure to deliver. The Commission continued to make good faith payments in accordance with the schedule in the Contract, relying on the promises by Defendants that additional follow-up would address the incomplete deliverables. The work has not been completed, yet Defendants have not returned any of the unearned funds paid to it by the Commission.

[Amended Request for Resolution] (emphasis added)

During the milestone reviews, ICAP demonstrated deliverables from the Sprints and accepted feedback from WCC staff. Initially, functionality was presented as independent modules; as the project progressed and the modules began to be assembled, inconsistencies and functional deficiencies were recognized and reported to ICAP. The WCC team's feedback to ICAP provided both affirmations and concerns regarding user interface design, data validation, data presentation and functionality crucial to the agency's ability to process claims. ICAP acknowledged the concerns and affirmed they would be addressed through a standard iterative Agile approach. ICAP continued to assure the WCC additional follow-up would address the inconsistencies and the more detailed processing requirements identified in the Just in Time Requirements (JITR) documentation. WCC staff accepted this planned approach in good-faith because WCC staff had no indication ICAP would not follow-up.

[Request for Resolution, Page 2] (emphasis added)

There was no written modification to the contract changing the Milestone delivery and payment requirements to exclude testing and acceptance as prerequisites for payment. The contract indicates that when WCC made every milestone payment it accepted the milestone deliverables that included the software delivered during the associated Sprints.

Testing began sometime after June 14, 2019. As the user of the system, WCC was responsible for developing end user test scenarios to simulate system operation. Apparently, these test scenarios were never developed:

The WCC team did plan to develop a comprehensive test plan which would combine all of the release notes, test scenarios, and would include details from JITR's as well as negative testing components, The building of this plan was scheduled after modular tests were successfully completed (You can't build a test plan for something until you know how it's supposed to work.) Since we were never able to achieve enough acceptable results through the modular testing, *this plan*, several steps down the project plan, *was not built*.

[July 1, 2020, email at ICAP 268] (emphases added)

Even without the required test scenarios, WCC's testing apparently revealed some serious concerns about KERMIT:

During testing, the WCC staff also expressed the inconsistencies and functional issues in the application and reported them to ICAP as bugs. On several occasions, WCC expressed concerns over the quality of ICAP's testing, because the product being developed by ICAP continued to have problems and bugs that should have been discovered and corrected prior to being released to WCC. ICAP essentially relied on the WCC's testing efforts to report problems with the most basic of issues and ICAP's negative testing was minimal at best. As the project completion date approached, when the iterative test cycles were most critical, WCC saw no consistent improvement in the quality of the application. Many times key functionality was accepted, but in a future test cycle, the same functionality would not work. Throughout the project, testing for WCC was challenging for many reasons. The lack of insight and access to data for WCC staff prevented the WCC staff from testing independently. WCC testers were forced to rely on ICAP's staffs assertions as ICAP's staff were the only users who had access to the data and could confirm the result of certain actions. In addition, legacy data was migrated in stages and a complete set of data was not migrated from Progress to the new system until the week prior to "go-live"-- December 4, 2019. This prohibited WCC staff from testing processes on active migrated claims and system features. Yet, ICAP continuously assured the WCC ICAP would resolve these issues.

[Original Request for Resolution] (emphasis added)

In August of 2019, WCC states that testing revealed that core-system functions were either not fully developed, still pending development, or had critical bugs. The go live date was moved from October 31, 2019, to December 4, 2019, to allow for more development and testing:

In August of 2019, the project implementation was delayed from October 31 until December 4 in order to provide additional time for development, integration testing, data conversion and training. Testing revealed core system functions were either not fully developed, still pending development, or had critical bugs. ...

This was a critical date because it provided all WCC staff the time to test the system during November. The testing plan included 10 days of dual data entry in both Progress and the new system and was designed to be the final testing and verification of data. This date was also critical because it provided time for ICAP to resolve any critical issues identified through final testing in preparation of the launch date of December 4....

[Original Request for Resolution] (emphasis added)

By September 11, 2019, apparently test results began to improve:

The development team has completed 24 Sprints with development focusing on motion and order processing. We are actively testing our 3.1 XML validation rules with several EDI vendors. The data cleansing and migration work are still major priorities with Liz and Duane wholly committed to these objectives. Our Azure environment is built and fully operational; we have completed our initial data migration run and have 27,000 test claims in the new system.

We are building a comprehensive spreadsheet related to all go-live tasks and will execute the sequence of tasks several times prior to November. All training.

(emphasis added)

By October 11, 2019, apparently test results had improved sufficiently for WCC to pay for the last Sprint and final Milestone. (Payment ledger, WCC733). At that point WCC had paid ICAP the full contract amount of \$2,513,379.56.<sup>9</sup> This final payment was made twenty days prior to the original go-live date and fifty-four days prior to the actual go-live date. While ICAP continued to work on the project until February 14, 2020, WCC made no additional payments under this contract.

However, there were indications that KERMIT was not ready as the date for deployment approached. WCC did not acquire the five new internet domain names and SSL certifications needed for use with the new system until October 31, 2019, twenty days after final payment.

Problems continued to be identified during October and November:

- October 3, 2019, ICAP realized that inactive carrier information needed to be migrated across due to there still being active claims with inactive carriers.

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<sup>9</sup> Section 11-35-45(A) states: All vouchers for payment of purchases of services, supplies, or information technology must be delivered to the Comptroller General's office within thirty work days from acceptance of the goods or services and proper invoice. (emphasis added)

- November 3, 2019, WCC met on a Sunday night to prioritize the 257 known bugs and backlog items after ICAP had asked us to give each items level, 1, 2 or 3 with 1 being critical.
- November 5, 2019, Email with the 124 WCC classified Severity 1 bugs that had been reported at that time.
- November 12, 2019, Email from ICap regarding issue with mapping POC data and policy numbers.
- November 15, 2019, Email from ICap in response to a request for a bug list and a list of test users.
- November 17, 2019, Email from ICap with most recent bug fixes and releases
- November 18, 2019, Email from ICap with extraction of all current bugs and statuses.
- November 20, 2019, Email from ICap containing complete bug list.
- November 22, 2019, All data in the Legacy System at the time of go-live provided to ICap
- December 2, 2019, OnBase Form 18s, First document type ready to be mapped
- December 4, 2019, Registration demo, WCC met with ICap and Albert Ard (MGC) to see Attorney/Law Firm registration for 1st time prior to going live that afternoon.

(Compiled from WCC Exhibit 7) (emphasis added)

During the CPO hearing WCC indicated that training sessions for clients, attorneys, and insurance companies were conducted using diagrams and PowerPoint presentations in lieu of an operational testing or training system.

Industry standard practice and common sense dictate that complete end-to-end testing is performed as the last step in the development process prior to putting any mission critical software system into production. End-to-end testing, or E2E testing, is the process of evaluating software functions by reviewing the entire application workflow from start to finish. Successful end-to-end testing mimics how the software operates in real life by running common user scenarios and identifying any errors or other malfunctions and is one of the final steps for testing software applications because it combines all the individual coding elements and software functions into a single test. For whatever reason, WCC decided to forgo this step and on November 23, 2019, it shut down its legacy systems:

The commission's new system "KERMIT" will go live December 4. The current system will go off-line November 23. Get all system updates including critical deadlines as <https://www.sc.gov/it-kermit-system-updates> .

[November 25, 2019, email, ICAP 00582]

In preparation of the launch on December 4, WCC suspended all functionality of the legacy system on November 25, effectively ceasing all WCC business processes.

[Request for Resolution, Page 2]

KERMIT was put into production on December 4, 2019. While many parts of KERMIT worked as expected, this ultimate end-to-end test revealed numerous problems:

The majority of stakeholders were unable to register and access the system; there were infrastructure issues with the cloud environment; issues establishing user roles; and issues linking users to the claims to which they were a party. There were also online payment issues with filing fees not being charged and other filing fees being charged twice.

[Request for Resolution, Cover Letter]

WCC's post implementation analysis identified some specific issues:

- Prod environment different than QA for budget reasons- Unpredictable
- When user roles were assigned, they were sometimes lost because the TCP A/D issue.
- Piece of code not deployed.
- Data issues: AIS leading zeroes issue, "*name redacted*" returning a different attorney profile.
- Coverage data for Self-Insured data missing.
- Some users onboarding and working, others not.
- WCC staff unable to discern if bug, user education or what - we had not experienced this in any of our testing.
- Data and Infrastructure issues impact ability to register, create data validity issues.
- Rewrite of AIS validation.
- Data integrity issues resulting in External users getting spinning wheel - can see claims.
- but roles not right) and orphaned attorneys.
- Multiple employers on a claim showing as 2 claims - didn't happen in testing.
- Deadline to submit filings - must allow paper (it will be hard to stop)

- Orphaned attorneys not all fixed; each situation is unique (Example - user registered with work email nor bar id then registered again with bar id but on login doesn't pass AIS validation because AIS email different - security reasons for having all of these)
- Will not see claims if you are not a party to the claim and have the proper role (notifications will not go through, Certificate of service will not work, filings will not appear) as planned.

Incremental and end-to-end testing should have identified many of these problems before KERMIT was put into production. However, after two weeks of problems, KERMIT operations were suspended, and the legacy systems were brought back online on December 17, 2019.

WCC claims that KERMIT was developed in modules that worked individually but did not work when all they were fully integrated into the system and that it was relying on assurances from ICAP that KERMIT was fully operational when it decided to go live on December 4, 2019.

On December 23, 2019, the parties allegedly agreed to the delivery of an abbreviated version of KERMIT, referred to as "Release 1.5," by January 31, 2020. This agreement was not memorialized in a change order or any other modification to the contract and there were no additional payments involved.

ICAP began work on KERMIT 1.5. Notes from WCC Exhibit 7 indicate that some of the issues addressed during this period probably should have been identified and addressed earlier during the Sprints:

12/28/2019 - Fixed missing BAR IDs Attorney data that was migrated to KERMIT did not all include BAR IDs due to old data, WCC was not made aware this would be an issue with registration until after go-live. During the pause, WCC was able to complete the missing data in order for Attorneys to be able to log in correctly.

1/2/2020 - Change Order #3 Requested - Form 50 TTD/PPD - \$8,893.02. The change order was requested to correct the Form 50 wizard and allow for a multi select option regarding selection of disability types.

1/2/2020 - Change Order #4 Requested - First Named Employer - \$996.10. The change order was requested to correct a word in the GUI from "Primary Employer" to "First Named Employer".

1/28/2020 - Duplicate records reported Duplicate records in Benefit data extract reported by ICAP.

On February 3, 2020, WCC began testing KERMIT 1.5. On February 10, 2020, WCC provided ICAP a list of problems with KERMIT 1.5.

Only 73 of 105 bugs ready to test on Monday. Several critical bugs STILL not working including Round Robin.  
Team would continue to raise issues through FreshDesk that would be migrated to DevOps.  
Told to rate items Level 1 through Level 4

[WCC Exhibit 7]

The Chairman of the Commission expressed his frustration with the situation in a letter to ICAP on February 11, 2020:

Since the first release on December 4, 2019 and the decision to "pause" the release to our users on December 17, 2019 WCC staff has logged hundreds of hours diligently testing and working with the ICAP team to identify the deficiencies in the processes and individual bugs in the system. It has been disheartening and frustrating to staff to report the deficiencies and bugs to ICAP then have ICAP report the bugs were fixed for WCC staff to test the "fixed" bugs only to discover they were not fixed, and additional bugs were created as a result of the fix. In the spirit of working with ICAP to achieve a common goal of system functionality, we conceded lower level priority items and were willing to accept working functionality for the priority Level 1 and 2 bugs. Even with the reduced list, many of the priority Level 1 and 2 items were not satisfied.

[WCC Exhibit 5]

The Chairman included the following closing request:

In order for us to make plans for the completion of the project, I respectfully request you inform me by close of business on February 14, 2020, of your interest in completing the requirements set forth in the 1.5 Release which is necessary for us to proceed with the work in Phase II.

On February 14, 2020, ICAP responded:

This letter is in response to your letter of February 11th, 2020.

ICAP is terminating our involvement In this project.

We certainly appreciate the opportunity to work with each of you and each of your team and stakeholders over the last 24 months.



Unfortunately, we have reached a grave impasse and after repeated attempts to collaborate and solve the Issues before us, it is clear that an amenable and fair solution is not available.

This is certainly a regrettable outcome for all parties. Please know that our entire team has been fully committed to the successful deployment, as agreed, of the Kermit system. Our entire team, individually and collectively, wish each of you and the entire South Carolina Workers' Compensation Commission great success in your efforts in the days and weeks to come.

On the next few pages below, you will see the details and descriptions of all the documentation and code.

If we can be of any further assistance, please contact me directly.

WCC characterized this termination by ICAP as being “done without cause, in bad faith, without commercially reasonable notice, and left the Commission without any of the deliverables called for in the contract. However, WCC had already accepted and paid for the KERMIT project as defined by the contract. Version 1.5 was never incorporated into the contract by modification or change order and no consideration was associated with work on Version 1.5. Consequently, ICAP’s decision to terminate participation in Version 1.5 was not a breach of contract.

Subsequently, WCC enlisted the services of the Microsoft Corporation<sup>10</sup> to perform a gap analysis of the KERMIT system to determine the extent to which KERMIT failed to meet the requirements of the contract. In a preliminary report, Microsoft indicates that with enough time and money certain functionality could be repaired while other functionality should be redesigned but, on whole, the project should be scrapped and restarted. Microsoft advised that it was only able to perform a high-level analysis because it could not access the original environment and all the necessary data. WCC and ICAP attribute Microsoft’s lack of access to acts by the other party. There is no indication that Microsoft finalized its findings.

### **The Third Contract**

On December 4, 2019, the same day KERMIT went live, WCC entered into a separate contract with ICAP for a Business Intelligence Project. WCC claims that it paid \$104,000 for the first

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<sup>10</sup> The Microsoft employees who performed the gap analysis had previously been consulted by ICAP and WCC about technical issues during development of KERMIT system.

milestone of this project, alleging that ICAP had performed no work on the project and acknowledging that it could not be implemented unless and until the KERMIT system was operating with the MMFS:

93. The Commission paid the Defendants an additional \$104,000.00 for the first milestone of a subsequent contract, the Business Intelligence Project, (Exhibit 9). Defendants did not perform any work on this contract and breached this second contract by their express termination and nonperformance. Moreover, the Business Intelligence Project could not be implemented unless and until the KERMIT system was operating with the MMFS.

[Second Request for Contract Resolution]

WCC authorized this payment on December 17, 2019, and it was actually paid on January 3, 2020. December 17, 2019, is the same day it suspended KERMIT operations because of significant issues that would lead to termination of the project. WCC claims that ICAP “unjustly enriched themselves by accepting money for work they have not completed, terminating their involvement in the projects, and not making any arrangements to return the unearned funds to the Commission.” (Amended Request for Resolution, Paragraph 52)

## **DECISION**

This contract required the software be developed within an agile development framework with milestones, deliverables, and payments associated with each milestone. The agile development process is designed to develop and test the software in increments in order to identify problems and missing functionality throughout the project rather than, as in a waterfall development process, waiting until the end of the project to find out that the software does not work. This contract required ICAP to deliver software in “done, done” status that was to incorporate the MMFS. These software deliveries were to be tested and accepted by WCC as part of Sprint acceptance. The contract also required WCC to provide the hardware and software necessary for end user testing and production in a timely manner. WCC did not acquire the hardware and software necessary to conduct end user testing until eleven months into this fifteen-month project. Consequently, WCC was unable to, and did not, conduct the contractually required testing of the Sprint delivered software. The Sprint deliverables were also included in the Milestone deliverables. WCC acknowledges that it did not test the Milestone deliverables. As a

result of WCC's failure to conduct the contractually required incremental testing, critical issues with the software were not discovered until the product was put into production, by which time the problems were so deeply imbedded in the system that Microsoft recommended the project be restarted. The failure to acquire the required hardware and software to establish a test environment in a timely manner and to test the Sprint deliverables constitutes a failure of a condition precedent, a prior breach of contract, or both by WCC.

Even after WCC established a test environment, the quality of that testing is questionable based on the number of critical errors that surfaced after KERMIT was put into production. WCC explains that the software was developed as individual modules and it was only when the modules were assembled at go-live that WCC realized that the system did not function. This ignores the fact that WCC never prepared a comprehensive test plan and choose not to conduct end-to-end testing of the system prior to shelving the legacy systems and putting KERMIT into production.

In the end, because WCC failed to test the system as required, it is impossible to determine to what extent, if any, ICAP breached its obligations under the contract. Under South Carolina law, "one who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract." *Champion v. Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404, 406 (Ct. App. 1984). WCC is precluded from any recovery against ICAP on this claim.

Further, the contract established milestones with deliverables and associated payments conditioned upon acceptance of the milestone deliverables. WCC paid for every milestone in accordance with the agreed-upon schedule. WCC claims that, rather than signifying acceptance of the milestone deliverables, the payments only acknowledged the passage of time or progress

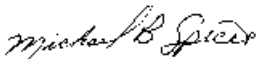
payments, consistent with industry practice. However, this position is not memorialized and is not supported by the plain language of the contract.<sup>11</sup>

In any event, WCC accepted and fully paid for all milestone deliverables by October 11, 2019, weeks before it was originally scheduled for delivery and nearly two months before the system was actually put into production. WCC's multiple failures to test the system as required and acceptance of all deliverables preclude any recovery of the funds paid to ICAP for Phase II of the project.

Finally, WCC also seeks to recover a \$104,000 payment for the first milestone of a Business Intelligence Project. WCC claims that it paid \$104,000 for the first milestone of this project, alleging that could not be implemented unless and until the KERMIT system was operating with the MMFS, and that ICAP had performed no work on the project.

WCC authorized this payment on December 17, 2019, the same day KERMIT was taken off-line, and the payment was actually made on January 3, 2020. Although the CPO is concerned that the WCC entered this contract and authorized payment for this project on the same day it took KERMIT offline and reactivated the legacy systems, ICAP presented no evidence that it ever began performance on this contract. The CPO finds that both law and equity disfavors forfeitures. *Ducworth v. Neely*, 319 S.C. 158, 162, 458 S.E.2d 896, 899 (Ct. App. 1995). The CPO, therefore, determines that WCC is entitled to a return of the \$104,000 first milestone payment of the Business Intelligence Project.

For the Information Technology Management Office



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Michael B. Spicer  
Chief Procurement Officer

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<sup>11</sup> There were other alleged changes to this contract that were not memorialized in a change order or contract modification such as the change of go-live from October 31, 2019, to December 4, 2019, or the agreement to deliver a truncated Version 1.5 by January 31, 2020.

*State of South Carolina*

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MMO OFFICE  
MAR 16 2020 16:19

*Workers' Compensation Commission*

March 16, 2020

Mr. Michael Spicer  
Chief Procurement Officer  
State Fiscal Accountability Authority  
1201 Main Street, Suite 600  
Columbia, SC 29201

RE: Procurement Dispute Resolution

Dear Mr. Spicer,

Please find enclosed the South Carolina Workers' Compensation Commission's (WCC) Request for Resolution from vendor(s), Intellectual Capitol (ICAP), et. al, for breach of contract. The following is a brief overview and summary of the project objectives and chronological events.

Project Summary:

In June of 2018, the Commission submitted a Statement of Work (SOW) to the SC Materials and Management Office (MMO) to procure a vendor through the Small Application Development (Small App Dev) contract to design and develop the Commission's IT Legacy System Modernization Project. The SOW identified the requirements for the project which would replace the agency's 30-year old legacy claims system (Progress). The new system would be designed with improved functionality including electronic filing processes for all forms and online payment options for fees/fines. Further, the new system would be designed to build a foundation upon which additional modules and functionality could be added in the future.

The SOW was approved by MMO and published through TAPFIN's Beeline system as a Job Order Request. The Commission received bids from three vendors and accepted ICAP's proposal for the new system, and executed a contract in July 2018 with ICAP for a total cost of \$1,903,204. The project was initiated on August 1, 2018; the project plan called for the use of an "Agile" methodology approach to build the system with the minimal marketable features consisting of twenty-two items. The proposal also included fourteen scheduled milestones with Milestone Planned Deliverables and associated payments. The projected completion date based on the last milestone with deliverables was October 11, 2019.

There were two Change Orders approved by the WCC during the project's lifecycle increasing the total cost of the project to \$2,346,118. Change Order 1, executed on October 23, 2018 with a cost of \$127,914 was requested by ICAP to plan, map data elements, test and migrate SQL data from the legacy system and import OnBase documents with relevant metadata to the Azure cloud environment. Change Order 2 was requested by ICAP in May 2019 when issues arose between the owner (IAIABC) of the national standard for Electronic Data Interface (EDI) and the national

organization (ACORD) responsible for developing and maintaining the EDI system over the new standard EDI 3.1 XML. The Commission approved Change Order 2 on June 11, 2019 to develop an alternate XML format and assimilate the two standards. The cost of Change Order 2 was \$315,000.

Standard review meetings between ICAP and WCC staff were held throughout the project. These included bi-weekly reviews called Sprints and monthly reviews of milestones accomplishments which were associated with payments to ICAP.

During the milestone reviews, ICAP demonstrated deliverables from the Sprints and accepted feedback from WCC staff. Initially, functionality was presented as independent modules; as the project progressed and the modules began to be assembled, inconsistencies and functional deficiencies were recognized and reported to ICAP. The WCC team's feedback to ICAP provided both affirmations and concerns regarding user interface design, data validation, data presentation and functionality crucial to the agency's ability to process claims. ICAP acknowledged the concerns and affirmed they would be addressed through a standard iterative Agile approach. ICAP continued to assure the WCC additional follow-up would address the inconsistencies and the more detailed processing requirements identified in the Just in Time Requirements (JITR) documentation. WCC staff accepted this planned approach in good-faith because WCC staff had no indication ICAP would not follow-up.

During testing, the WCC staff also expressed the inconsistencies and functional issues in the application and reported them to ICAP as bugs. On several occasions, WCC expressed concerns over the quality of ICAP's testing, because the product being developed by ICAP continued to have problems and bugs that should have been discovered and corrected prior to being released to WCC. ICAP essentially relied on the WCC's testing efforts to report problems with the most basic of issues and ICAP's negative testing was minimal at best. As the project completion date approached, when the iterative test cycles were most critical, WCC saw no consistent improvement in the quality of the application. Many times key functionality was accepted, but in a future test cycle, the same functionality would not work. Throughout the project, testing for WCC was challenging for many reasons. The lack of insight and access to data for WCC staff prevented the WCC staff from testing independently. WCC testers were forced to rely on ICAP's staff's assertions as ICAP's staff were the only users who had access to the data and could confirm the result of certain actions. In addition, legacy data was migrated in stages and a complete set of data was not migrated from Progress to the new system until the week prior to "go-live"-- December 4, 2019. This prohibited WCC staff from testing processes on active migrated claims and system features. Yet, ICAP continuously assured the WCC ICAP would resolve these issues.

In August of 2019, the project implementation was delayed from October 31 until December 4 in order to provide additional time for development, integration testing, data conversion and training. Testing revealed core system functions were either not fully developed, still pending development, or had critical bugs. ICAP assured WCC that all development of the project's original functionality would be complete by October 31, 2019. This was a critical date because it provided all WCC staff the time to test the system during November. The testing plan included 10 days of dual data entry in both Progress and the new system and was designed to be the final testing and verification of data. This date was also critical because it provided time for ICAP to resolve any critical issues identified through final testing in preparation of the launch date of December 4. Ultimately, ICAP failed to meet the deadline. The coding was not completed, which failure prevented WCC staff from testing and verifying data through the dual data entry process. At the request of ICAP, WCC identified requirements of many of the modules which could be changed or reduced to allow ICAP's development team the ability to meet the scheduled launch date of December 4.

In October 2019, ICAP requested WCC approve the delayed implementation of the EDI module until January. WCC agreed to ICAP's request in order for ICAP to focus on perfecting the functionality of the other modules in order to meet the scheduled implementation date. In preparation of the launch on December 4, WCC suspended all functionality of the legacy system on November 25, effectively ceasing all WCC business processes.

The new system launched on December 4, 2019, largely unsuccessful due to myriad problems with ICAP's product. The majority of stakeholders were unable to register and access the system; there were infrastructure issues with the cloud environment; issues establishing user roles; and issues linking users to the claims to which they were a party. There were also online payment issues with filing fees not being charged and other filing fees being charged twice. After the WCC's extreme efforts to overcome these issues and ICAP not providing a clear path forward for resolving the issues in a timely fashion, WCC temporarily suspended the release on December 17, 2019. The suspension required the legacy system, Progress, to be brought back online to allow the WCC to resume business operations which had been on hold since November 25, 2019.

As a result of the disastrous initial launch, WCC assessed the status of ICAP's product and determined, for a successful re-launch, it was necessary for WCC to further reduce the requirements of the application modules and functionality from the initial version. The reduction in functionality of parts of the new system required WCC to split the business processes between the old legacy system, Progress, and the new system for the agency to function and stakeholders to conduct business.

In January 2020, ICAP requested additional funding to sustain the work of their project team. The WCC agreed to consider additional funding, provided that ICAP deliver a highly functioning version of the reduced functionality on February 3, 2020. On February 3, ICAP submitted a test plan for the WCC and the delivered documentation identified several critical bugs still not resolved. Despite the outstanding critical issues, the WCC proceeded with testing the reduced functionality. The WCC's testing produced another significant list of inconsistencies and bugs provided to ICAP on February 9, 2020. As a result of the numerous unresolved issues and bugs, WCC denied ICAP's request for additional payment.

On February 14, 2020, ICAP formally notified the WCC via email they were terminating the project contract with WCC. The notification included a document titled "Information for Access to the SC Azure Portal Environment within the QA & Production Cloud Tenant". The document contained directions to access secure documentation and code, and secure passwords. It must be noted that ICAP provided the "secure" information via an email, in a completely non-secure manner.

The attached documents show ICAP failed to complete the terms of the contract by its failure to deliver minimal marketable feature sets as set forth in the contract. As a remedy, the WCC is requests relief as specified in the attached documentation.

Thank you for your attention and assistance with this matter. The WCC is fully prepared to respond to any inquiries and provide further documentation. WCC seeks to obtain full restitution in order to complete the project for the stakeholders of the Workers' Compensation system and the taxpayers of South Carolina who funded the project.

Sincerely,



T. Scott Beck  
Chairman  
South Carolina Workers' Compensation Commission

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Contract Controversy Appeal Notice (Revised June 2019)*

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILING FEE: Pursuant to Proviso 111.1 of the 2019 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.



**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

- 
1. What is your/your company's monthly income? \_\_\_\_\_
  2. What are your/your company's monthly expenses? \_\_\_\_\_
  3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

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For official use only: \_\_\_\_\_ Fee Waived      \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

**NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.**