Decision Contract Controversy

Matter of:	Carolina Advanced Digital, Inc.
File No.:	2025-204
Posting Date:	July 21, 2025
Contracting Entity:	South Carolina Department of Corrections
Solicitation No.:	5400023232
Description:	HPE Network Hardware

DIGEST

Claim for right to return conforming goods in return for reimbursement of purchase price granted where contract contains clause allowing the State to return such goods without the vendor assessing a restocking fee.

AUTHORITY

Per S.C. Code Ann. § 11-35-4230, the Chief Procurement Officer (CPO) conducted an administrative review of a request for resolution of a contract controversy filed by South Carolina Department of Corrections (the Department) making a claim against Carolina Advanced Digital, Inc. (CAD). The Department's request and brief in support of its position, sans exhibits, are attached as CPO Exhibit A.[1] CAD's responses to the Department's request and brief, sans exhibits, are attached and CPO Exhibit B. This decision is based on the documentary evidence and applicable law and precedents.

BACKGROUND

On July 6, 2023, the State awarded a term contract to CAD for HPE networking products and services. [CAD Record 0004 – 0052 and CPO Exhibit C] On May 23, 2024, Jay Daniel, Network Administrator with the

[1] CAD submitted an extensive record with its Brief. Any reference in this decision to "CAD Record" followed by a page number is a reference to a document in this record.

Department, requested CAD to provide a quote for specific HPE products identified by Mr. Daniel. [CAD Record 0077 - 0078] A series of email communications between Mr. Daniel and CAD ensued. [CAD Record 0073 - 0077] During these communications, CAD provided an original quote and two updated quotes (quote numbers 28706, 28706-1, 28706-2 respectively). [CAD Record 0126-0127, 0133-0127, 0141-0142] The first updated quote reflected an added manufacturer's discount secured by CAD and the second updated quote reflected the Department's request for a slight reduction in the quantity of transceivers. [CAD Record 0121, 0128, and 0135] Each quote included the following statement: "Due to MFR Policies, we cannot accept returns on Hardware/Software." On June 7, 2023, the Department issued a purchase order to CAD for $839,697 worth of HPE equipment. [CAD Record 0080-0082] The purchase order referenced CAD's final quote number 28706-2. Per CAD's invoice, all items were shipped on June 18, 2025. [CAD Record 0089-0099] The Department took delivery of the equipment June 19 through June 21, 2024. [CAD Record 0083-0084] On July 5, 2024, the Department paid CAD the invoice amount of $906,872.76 ($839,697 + $67,872.76 sales tax) electronically via the Automated Clearing House.

On July 10, 2024, Mr. Daniel called CAD requesting to return the entire order. [CAD Record 0100-0103] CAD understood the reason for the return to be an issue with "connecting the new CX switches to their [the Departments] existing Juniper core." [Id.] CAD advised the Department that it could not accept a return of the equipment and offered assistance to resolve any connectivity issues. [Id.]

On July 12, 2024, Sandee Sprang, Division Director of Technology for the Department, emailed CAD stating that according to her staff there were "less than desirable issues with the recent HPE Aruba hardware order." [CAD Record 0107-0108] Ms. Sprang asserted that per the State contract, the Department could return the equipment within thirty days of receipt at no charge. [Id.] CAD contested this conclusion and a series of email exchanges over the issue ensued. [CAD Record 0105-0107] The Division of Procurement Services also sought return of the equipment on behalf of the Department. [CAD Record 0104, 0113-0117, 0158-0159] Finally, On September 12, 2024, the Department filed a request for resolution of a contract controversy with the CPO.

ISSUES

In this case, the Department prepared a bill of materials and requested a quote on that bill of materials. CAD provided the requested quote, and the Department issued a purchase order based on that quote, which in turn was based on the bill of materials prepared by the Department. CAD supplied the equipment ordered by the Department. While the Department claims it never accepted the equipment, it has not identified any nonconformity in CAD's performance. In other words, the Department does not claim the equipment was not what it ordered. Moreover, in an affidavit submitted to the CPO the Department's Senior Network Engineer

states, “I’m not sure I can say anything is wrong with the Aruba-CX series switch as switches exactly.” [CPO Exhibit D] At most, the Department’s issues with the equipment were a result of its prior experience with similar and identical equipment. This was information the Department knew about before it ordered the equipment in this case. The facts of this case make it clear that the Department did not reject or seek to reject the equipment as nonconforming with the requirements of the contract. See S.C. Code Ann. § 36-2-106(2). Moreover, absent a term in the contract to the contrary, there is no right of return of conforming goods in a commercial contract for the sale of goods. *See* Title 36, Chapter 2 generally. Therefore, the ultimate issue in this dispute is whether the contract allows the Department to return the conforming equipment for any reason or no reason.

ANALYSIS

"The cardinal rule of contract interpretations is to ascertain and give legal effect to the parties intention as determined by the contract language." *Schulymeyer v State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999). "Terms in a contract provision must be construed using their plain, ordinary and popular meaning." *Beach Co. v. Twillman. Ltd*, 351 S.C. 56, 566 S.E.2d 863 (Ct.App. 2002).

The Department argues that the contract with CAD clearly allows the State to return conforming goods for any reason at any time. In support of this argument, the Department points to a clause in the solicitation which states:

> ***Restocking Fee***
>
> If a product is returned to the Contractor within thirty workdays after Acceptance, no restocking fee will be charged. If products are returned to the Contractor after thirty workdays of Acceptance, then a restocking fee of up to but not exceeding ten percent of the unit cost may be charged.
>
> [CPO Exhibit C, p. 19]

CAD responds that this “language does *not* state or even imply that returns are permitted.” However, this Restocking Fee clause, while poorly drafted, unambiguously contemplates the return of goods by the State and limits the seller’s ability to charge a restocking fee upon such return.[2] Even so, something appears to be

[2] This interpretation is bolstered by Vendor Question and Answers. In Vendor Question #6, a vendor asked to amend the restocking fee because HPE’s authorized distribution partners “only allow for 30 day return” and worried that resellers would be at risk of “holding the cost.” Id., p. 46. In Vendor Question #14, another vendor asked to amend the restocking fees because “Restocking fees (and/or product returns) are determined by distribution and/or manufacturers and not by

missing. One reading this clause expects to find proceeding language addressing the conditions under which the State could return an item, but there is none.[3] However, as discussed below, there are limitations to this clause.

CAD next argues that interpreting the Restocking Fee Clause to allow returns for any reason yields an absurd result when applied to the second sentence of the clause. By its language, this sentence has no limit on the time during which the State may make a return. And if one interpreted it, for example, to allow a return for any reason ten years after acceptance the result would indeed be absurd. However, the Uniform Commercial Code states:

> The time for shipment or delivery or any other action under contract if not provided in this chapter or agreed upon shall be a reasonable time.
>
> S.C. Code Ann. §36-2-309(1)

Therefore, one returning an item after thirty days must do so within a reasonable time. The determination of what is a reasonable time will depend "on the nature, purpose and circumstances of such action." S.C. Code Ann. §36-1-204. It will also turn on good faith. S.C. Code Ann. §§ 36-1-203, 36-2-103(1)(b), and 11-35-30.

While the CPO finds that the Restocking Fee clause allows the Department to return the goods for any reason, it would be more accurate to say any reason provided it is made in good faith. The Uniform Commercial Code states:

> Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.
>
> S.C. Code Ann. §36-1-203
>
> *"Good Faith"* … means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
>
> S.C. Code Ann. §33-2-103

Moreover, the Procurement Code states:

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contractors." Id., p. 47. The State answered by amending the original 90 days to 30 days. Vendors were on notice that returns were permitted under the contract.

[3] Examples of similar restocking fee clauses the CPO found in GSA contracts were immediately proceeded by a returns clause setting forth the conditions under which the government could return an item with limitations on the seller's ability to charge a restocking fee. The two previous solicitations for HPE Network Hardware include the same clause used here with only variations on the number of days a return could be made without a restocking fee and variation on where the clause is located in the solicitation. Like this clause, those two previous versions did not have language setting forth conditions under which the State could return an item.

> Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.
>
> S.C. Code Ann. §11-35-30

Therefore, the Department cannot return the goods based on a bad faith reason.

CAD tries to paint a picture that the Department is acting in bad faith. CAD claims the Department "offered ten shifting reasons for a return." CAD further asserts the "reasons are inconsistent and change based on the time and maker." The reasons identified in CAD's response were

Reason #	**Date**	**Person**	**Reason**
1	7/10/2024	Jay Daniel	Department had issues connecting the Aruba switches to other equipment on Department's network including the 'Juniper Network' product line (Juniper)
2	7/12/2024	Sandee Sprang	"there are some less than desirable issues with the recent HPE Aruba hardware order"
3	7/15/2024	Sandee Sprang	"lack of consistency: 1) in the product lines model to model"
4	7/15/2024	Sandee Sprang	lack of consistency: "2) in the local management of the hardware,"
5	7/15/2024	Sandee Sprang	lack of consistency: "3) in the centralized management of the hardware, and"
6	7/15/2024	Sandee Sprang	lack of consistency: "4) in the recommendations from the vendors and HP/Aruba for the products."
7	7/15/2024	Sandee Sprang	Claimant is "beginning to develop a new standard in our switching environment."
8	7/24/2024	Stephen Taylor	The purchase order was made in error
9	7/29/2024	Stephen Taylor	"SC DOC's chief network engineer was not aware of the purchase order, and the order was not thoroughly reviewed to be deemed as acceptable for SC DOC's standards."
10	7/29/2024	Stephen Taylor	Due to staff constraints and the current hiring freeze, the order would not be feasible and manageable during this time.

The CPO finds that there are ten differently stated reasons based on the maker but that they are not contradictory. None of these reasons negate any other reason. They can all be true at the same time. Moreover, reasons one through six seem to be the same reason worded differently, some in more detail than others. In fact, reasons three through six are all contained within the same message and simply expand on reasons one and two. Reasons seven through nine are all reasons that could naturally flow out of the first six reasons. The only reason that is not of the same character and does not necessarily follow the other reasons, is the last. But the last reason does not contradict the other reasons, it is simply an additional reason.[4] In short, this list of reasons does not support a conclusion the Department acted in bad faith. There is no evidence that these statements were both false and made knowing they were false.

CAD also points to the circumstances of the order to suggest the possibility of bad faith. The record shows that the Department was using federal COVID grant funds to buy the equipment and needed to spend the money by July 31, 2024. CAD questions whether the Department made the order to spend the money with the intent of returning the equipment and receiving a refund, thus enabling the Department to keep these funds beyond the federal deadline. However, there is insufficient evidence in the record to support a finding that this was the Department's motivation. Certainly, the record supports the conclusion that the Department was rushed. but this does not prove that it was acting in bad faith.

CAD also argues that the Department's purchase order is "integrated into the Solicitation, and the Purchase Order expressly refers to the Final Quote, which expressly prohibits returns." This argument ignores the "Contract Documents and Order of Precedence" clause in the solicitation. This clause states:

> (a) Any contract resulting from this solicitation shall consist of the following documents: (1) a Record of Negotiations, if any, executed by you and the Procurement Officer, (2) the solicitation, as amended, (3) documentation of clarifications [11-35-1520(8)] or discussions [11-35-1530(6)] of an offer, if applicable, (4) your offer, (5) any statement reflecting the State's final acceptance (a/k/a "award"), and (6) purchase orders. These documents shall be read to be consistent and complimentary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above. (b) The terms and conditions of documents (1) through (5) above shall apply notwithstanding any additional or different terms and conditions in any other document, including without limitation, (i) a purchase order or other instrument submitted by the State, (ii) any invoice or other document submitted by Contractor, or (iii) any privacy policy, terms of use, or end user agreement. Except as otherwise allowed herein, the terms and conditions of all such documents shall be void and of no effect. (c) No contract, license, or other agreement

[4] Steven Taylor, who made the last three statements, is not an employee of the Department. At all times pertinent to this dispute, he was an employee of the Department of Procurement Services. As such, his statements were simply restating reasons given to him by the Department.

> containing contractual terms and conditions will be signed by any Using Governmental Unit. Any document signed or otherwise agreed to by persons other than the Procurement Officer shall be void and of no effect.

While this clause does incorporate the purchase order it also provides that:

1. Documents (1) through (5) take precedence over the purchase order in the event of conflict,
2. The terms and conditions of documents (1) through (5) apply notwithstanding any additional or different terms and conditions in the purchase order or any document submitted by the vendor, and
3. Any terms and conditions in the purchase order or any document submitted by the vendor are void and of no effect.

Therefore, any terms in the purchase order, CAD's quotes, or its invoice prohibiting returns is of no effect. The solicitation governs.

CAD next argues that if the CPO finds that the solicitation permits returns, then it does not permit returns in the situation presented here where the Department has failed to identify a nonconformity. In support of this contention, CAD argues that the context of the Restocking Fee clause makes it clear that it is a component of CAD's warranty support obligations. CAD argues there is no reason to include language in the solicitation requiring CAD to provide warranty support if the State may return goods for any reason. The CPO disagrees. The warranty requirements and the Restocking Fee clause provide the State options. The State can choose to exercise its warranty rights, or it may choose to return the goods. Nor does this mean that to return the goods, the goods must be nonconforming. Under the UCC, the State can return nonconforming goods at the seller's expense. Therefore, the Restocking Fee is unnecessary when it comes to nonconforming goods. Moreover, the clause does not have such limiting language.

CAD lastly argues that if the CPO finds that the Restocking Fee clause allows return of goods in this situation, the Department has no damages. In this regard, CAD first asserts that it would not be appropriate to award the Department the damages requested without a "commensurate promise to satisfy the judgment by selling the Equipment or returning the equipment to Claimant." If this were accurate, the CPO would agree. To the contrary, the Department has sought to return the goods, and CAD has refused the return. CAD next asserts that the Department has no damages because the only "cognizable claim that can be alleged by Claimant is a breach of warranty claim." CAD argues that because the Department does not claim the goods are nonconforming or make a warranty claim, the Department has no damages. However, this argument ignores the presence of the Restocking Fee clause and the returns permitted thereunder. If CAD must accept the return of the goods without charging a restocking fee, it necessarily follows that CAD must also reimburse the State the price of the goods. This right to reimbursement can be illustrated by looking to the second sentence of the clause which allows the vendor to charge a restocking fee if goods are returned after thirty days of acceptance. It would be absurd for

the State to place a clause in its contracts to allow a return for the benefit of only receiving a reduced restocking fee charge and not receiving a reimbursement as well. This would be equivalent to the State bargaining for the right to pay the vendor to return goods.

DECISION

Based on the foregoing, the CPOC finds that the Department is entitled to return the goods that are the subject of this dispute and CAD is obligated to accept the return of such goods and reimburse the Department the purchase price of the goods. And because the Department attempted to return the goods within 30 working days after acceptance, CAD is not entitled to a restocking fee.

John St. C. White, PE
Chief Procurement Officer for Construction

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Contract Controversy Appeal Notice (Revised July 2025)

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.

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 2025 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
1105 Pendleton Street, Suite 209, Columbia, SC 29201

_____ _____
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: _____

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.

CPO Exhibit A

MICHAEL C. TANNER, L. L. C.
ATTORNEYS AT LAW
Post Office Box 1061
392 Second Street
Bamberg, South Carolina
29003

803-245-9153

Michael C. Tanner

Morgan R. Long*
Emre Ersoy
*Of Counsel

September 12, 2024

Via Email and US Mail: Jswhite@mmo.sc.gov

SFAA, The Division of Procurment Services
John St. C. White, MMO
1201 Main Street
Columbia, S.C. 29201

RE: South Carolina Department of Corrections/ Carolina Advanced Digital Inc.
Solicitation No.: 5400023232

Dear Mr. White:

I represent the South Carolina Department of Corrections in the above matter. SCDC is respectfully requesting Resolution of this matter pursuant to S.C. Code of Laws. Ann. Section 11-35-4230. Enclosed, please find a Contract Controversy for filing.

I am providing a copy of this communication and Contract Controversy to Carolina Advanced Digital Inc's Executive Vice-President Susan Jabbusch. I am also providing a copy of this to Manton Grier, Esquire.

Yours truly,

Michael C. Tanner

MCT/lh
cc: Susan Jabbusch, Executive VP
Via Email and U.S. Mail: susan@cadinc.com

Manton Grier, Esq.
Via Email mgrier@ogc.sc.gov

Kensey Evans, Esq.
Via Email:evans.kensey@doc.sc.gov

IN THE MATTER OF:	)	BEFORE THE CPO
	)	
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,	)	Solicitation No.: 5400023232
Claimant,	)	
	)	Contract Controversy
v.	)	S.C. Code of Laws Section 11-35-4230
	)	
CAROLINA ADVANCED DIGITAL, INC.	)	
Respondent,	)	
	)	
	)	

The South Carolina Department of Corrections, upon information and belief, asserts as follows:

1) SFAA Procurement Services, received bids for HPE Network Hardware and Services. This solicitation was identified as Solicitation number 5400023232 and was dated April 19, 2022.

2) . According to Solicitation Number 5400023232, Section III - Scope of Work Specifications, Subsection I. - Standard Support, paragraph - *"Restocking Fee"* allows the UGU (in this case, the South Carolina Department of Corrections) to return items to the vendor/offeror within ninety (90) workdays without incurring a restocking fee. This Solicitation, attached as Exhibit A, is incorporated herein verbatim.

3) The Solicitation specifies in Section III, Scope of Work/Specifications, Part I, Standard Support, Restocking Fee, that "If a product is returned to the contractor within ninety work days after Acceptance, no restocking fee will be charged."

4) Vendor "Questions and Answers" were conducted between May 5, 2022, and May 25, 2022, and posted on the SFAA procurement website.

5) The "Restocking Fee" was amended in Amendment 3 in the Bid Process, dated May 5, 2022, from ninety days to thirty (30) work days after Acceptance. (Exhibit B)

6) Carolina Advanced Digital, Inc., (hereafter known as CAD) made an offer to SFAA dated May, 4, 2023, which included signing the cover page to the Solicitation agreeing to be bound by the terms of the Solicitation. The Solicitation is the controlling document regarding the terms and conditions surrounding a return of items and Restocking, along with any Restocking Fees.

7) An Intent to Award for a portion of the items described in Solicitation number 5400023232 was issued by the State of South Carolina, SFAA Division of Procurement Services by posting date July 6, 2023, for a final Statement of Award effective July 18, 2023, to Carolina Advanced Digital, Inc. (7000049733), 1010 High House Road, Suite 300, Cary, North Carolina 27513.

8) SCDC requested and received a quote from CAD, quote #28706-2 for HPE equipment on May 23, 2024, for $906,872.76, including taxes.

9) SCDC created a Purchase Order 4601008121 for CAD for the list of equipment provided on that quote.

10) Invoice #IN28706-1 was created by CAD on June 18, 2024, with a due date of July 18, 2024.

11) The items were received by SCDC in several different deliveries, beginning June 19, 2024, as well as being delivered to SCDC on June 20 and June 21, 2024.

12) Prior to July 10, 2024, SCDC through its employee Jay Daniel, advised CAD via telephone call to Julie Allen, Director of Operations for CAD, SCDC requested to return the equipment delivered by CAD in Solicitation 5400023232 to CAD as there was a lack of consistency between the product line's models. The items were delivered to SCDC, but not accepted for use by SCDC. This communication was within the thirty (30) workdays contemplated by the Restocking Fee provisions as set forth in the Solicitations.

13) CAD, in writing to SCDC, refused to accept the returned items described in Solicitation 5400023232.

14) An additional request was made by SCDC in writing dated July 12, 2025, by SCDC employee Sandee Sprang, Division Director of Technology. (Exhibit C).

15) CAD responded in writing the same date, July 12, 2022, Exhibit D, effectively stating it would not accept the items in return based upon language in its Quotation dated May 23, 2024, after the Solicitation was finalized. SCDC asserts this language of CAD in its Quotation is void and has no force and effect and does not alter the terms and conditions of the Solicitation.

16) CAD was actually notified in writing by the SCDC within *thirty* work days, so thirty or ninety work days is immaterial as CAD received notice that items from SCDC were to be returned even within their incorrectly-defined limitation.

17) An additional written request was made on July 29, 2024, by the SFAA Division of Procurement Services Procurement Manager, Stephen Taylor to CAD. (Exhibit E attached)

18) Upon information and belief, CAD continues to refuse to accept the returned items described in the Solicitation above.

19) CAD has breached their contract and the terms and conditions of the Solicitation in failing to accept returns from SCDC within the contractual time limit.

20) CAD has improperly disputed the time allowed, and the terms of the Solicitation and thereby has refused to accept the returns.

21) Therefore, SCDC respectfully asks the Chief Procurement Officer to award SCDC judgement in the amount of $906,872.76 for the items described in Solicitation 5400023232 against CAD for failing to comply with the terms and conditions of the Solicitation.

WHEREFORE, Plaintiff prays for Judgement against the Defendant for actual damages in the amount of $906,872.76, together with interest pursuant to the terms of the contract, and such other further relief may be just and proper.

Michael C. Tanner, LLC

By:_____

Michael C. Tanner
PO Box 1061
Bamberg, SC 29003
803-245-9153
Michaelctannerllc@Bellsouth.net
Attorney for SCDC

September 11, 2024

Bamberg, SC

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29003

803-245-9153

Michael C. Tanner

Morgan R. Long*
Emre Ersoy
*Of Counsel

February 28, 2025

Via Email and US Mail: Jswhite@mmo.sc.gov
SFAA, The Division of Procurment Services
John St. C. White, MMO
1201 Main Street
Columbia, S.C. 29201

RE: South Carolina Department of Corrections/ Carolina Advanced Digital Inc.
Solicitation No.: 5400023232

Dear Mr. White:

I represent the South Carolina Department of Corrections in the above matter. Pursuant to your scheduling order, enclosed please find the following:

1. Brief of SCDC;
2. Affidavit of Sandee Sprang, and
3. Affidavit of Chad Sebree

I am providing a copy of this communication and Contract Controversy to Carolina Advanced Digital Inc's counsel, R. Taylor Speer. I am also providing a copy of this to Manton Grier, Esquire.

Yours truly,

Michael C. Tanner

MCT/ha
cc: R. Taylor Speer, Esq., via email t speer@foxrothschild.com
Manton Grier, Esq., via email mgrier@ogc.sc.gov
Kensey Evans, Esq., via email:evans.kensey@doc.sc.gov

IN THE MATTER OF:	)	BEFORE THE CPO
	)	
	)	File no: 2025-204
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v.	)	S.C. Code of Laws Section 11-35-4230
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5) The "Restocking Fee" was amended in Amendment 3 in the Bid Process, dated May 5, 2022, from ninety days to thirty (30) work days after Acceptance. (Exhibit B to the Contract Controversy)

6) Carolina Advanced Digital, Inc., (hereafter known as CAD) made an offer to SFAA dated May, 4, 2023, which included signing the cover page to the Solicitation agreeing to be bound by the terms of the Solicitation. The Solicitation is the controlling document regarding the terms and conditions surrounding a return of items and Restocking, along with any Restocking Fees.

7) An Intent to Award for a portion of the items described in Solicitation number 5400023232 was issued by the State of South Carolina, SFAA Division of Procurement Services by posting date July 6, 2023, for a final Statement of Award effective July 18, 2023, to Carolina Advanced Digital, Inc. (7000049733), 1010 High House Road, Suite 300, Cary, North Carolina 27513.

8) SCDC requested and received a quote from CAD, quote #28706-2 for HPE equipment on May 23, 2024, for $906,872.76, including taxes.

9) SCDC created a Purchase Order 4601008121 for CAD for the list of equipment provided on that quote.

10) Invoice #IN28706-1 was created by CAD on June 18, 2024, with a due date of July 18, 2024.

11) The items were received by SCDC in several different deliveries, beginning June 19, 2024, as well as being delivered to SCDC on June 20 and June 21, 2024.

12) Prior to July 10, 2024, SCDC through its employee Jay Daniel, advised CAD via telephone call to Julie Allen, Director of Operations for CAD, SCDC requested to return the equipment delivered by CAD in Solicitation 5400023232 to CAD as there was a lack of consistency between the product line's models. The items were delivered to SCDC, but not accepted for use by SCDC. This communication was within the thirty (30) workdays contemplated by the Restocking Fee provisions as set forth in the Solicitations.

13) CAD, in writing to SCDC, refused to accept the returned items described in Solicitation 5400023232.

14) An additional request was made by SCDC in writing dated July 12, 2024, by SCDC employee Sandee Sprang, Division Director of Technology. (Exhibit C to Contract Controversy).

15) CAD responded in writing the same date, July 12, 2024, Exhibit D, effectively stating it would not accept the items in return based upon language in its Quotation dated May 23, 2024, after the Solicitation was finalized. SCDC asserts this language

of CAD in its Quotation is void and has no force and effect and does not alter the terms and conditions of the Solicitation.

16) CAD was actually notified in writing by the SCDC within *thirty* work days, so thirty or ninety work days is immaterial as CAD received notice that items from SCDC were to be returned even within their incorrectly-defined limitation.

17) An additional written request was made on July 29, 2024, by the SFAA Division of Procurement Services Procurement Manager, Stephen Taylor to CAD. (Exhibit E to Contract Controversy)

18) Upon information and belief, CAD continues to refuse to accept the returned items described in the Solicitation above.

19) CAD has breached their contract and the terms and conditions of the Solicitation in failing to accept returns from SCDC within the contractual time limit.

20) CAD has improperly disputed the time allowed, and the terms of the Solicitation and thereby has refused to accept the returns.

21) The affidavit of Sandee Sprang reflects which hardware/software and other equipment was physically opened after delivery due to CAD not labeling some boxes in one of the six pallets. None of this equipment has been used by SCDC.

22) Therefore, SCDC respectfully asks the Chief Procurement Officer to award SCDC judgement in the amount of $906,872.76 for the items described in

Solicitation 5400023232 against CAD for failing to comply with the terms and conditions of the Solicitation.

ARGUMENT

A. A chief procurement office has the sole authority to resolve contract and breach of contract controversies between contractors or subcontractors and state agencies. S.C. Code of Laws Ann. Section 11-35-4230(1) and Hass Construction Co. v. Thomas, 183 F.Supp. 2d 800 (D.S.C. 2001). The South Carolina Supreme Court has noted many times that, the" cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Systmes Corp. v. Leatherman, 420 S.E.2d 843 (S.C. 1992) and Hass Construction, supra.

"The cardinal rule of contract interpretations is to ascertain and give legal effect to the parties intention as determined by the contract language." Schulymeyer v State Farm Fire and Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999). "Terms in a contract provision must be construed using their plain, ordinary ands popular meaning." Beach Co. v. Twillman, Ltd, 351 S.C. 56, 566 S.E.2d 863 (Ct.App. 2002).

"The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.' " *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 406, 581 S.E.2d 161, 166.

The elements for a breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *492 *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). " The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.*

B. In this matter, the contract language is clear, unambiguous and explicit. The solicitation allows any Using Governmental Unit, in this case SCDC, to return products from this contract for any reason. This provision is plain, clear and unambiguous. There is no language preventing the return of any contract items in the solicitation. The "Restocking Fee" was amended in Amendment 3 in the Bid Process, dated May 5, 2022, from ninety days to thirty (30) work days after Acceptance. (Exhibit B to the Contract Controversy) In Attachment 3, Vendor Questions & Answers on the SFAA website, a copy of which is attached, in item 6 states as follows:

Vendor Question: P.18- restocking Fee- HPE's authorized distribution partners only allow for a 30 day return. Please amend to read no restocking within 30

days. Otherwise, you out the Reseller at risk if disallowance of a return and holding the cost.

State's response: Change. See Section III. Subsection I. Subparagraph "Restocking Fee."

This language in final form was changed in the solicitation to continue to allow a return and restocking and stated, "If a product is returned to the Contractor within thirty workdays after Acceptance, no restocking fee will be charged. If products are returned to the Contractor after thirty days of Acceptance, then a restocking fee of up to but not exceeding ten percent of the unit cost may be charged." This plainly contemplates these items could be returned to the Seller, CAD at anytime. It also plainly reveals depending on the date of the return, there may be a fee of up to ten percent if after thirty days. The only time difference would be rather or not a restocking fee would be charged.

C. The request in this procurement was made by SCDC well within thirty workdays days of the date of delivery, June 19-21, 2024, so no restocking fee should be due. This was communicated by SCDC to CAD telephonically on July 10, 2024, by Jay Daniel of SCDC and in writing, via email, by Sandee Sprang of SCDC on July 12, 2024. Both of these requests were within the thirty day time period contained in the Solicitation, Amendment #3.

D. In the procurement setting, the solicitation and its terms and conditions have precedence over any other documents. The solicitation, specifically states in the

section titled "Contract Documents and Order of Precedence (Feb 2015)" the following:

> (a) Any contract resulting from this solicitation shall consist of the following documents: (1) a Record if Negotiations, if any executed by you and the Procurement Officer; (2) the solicitation, as amended, ... and (6) purchases orders. ... (b) The terms and conditions of documents (1) through (5) above shall apply notwithstanding any additional or different terms and conditions in any other document, including without limitation, (I) a purchase order or other instrument submitted by the State, (ii) any invoice or other document submitted by Contractor...

The solicitation plainly states in Amendment 3, Exhibit B to Controversy, "If a product is returned to the Contractor within thirty workdays after Acceptance, no restocking fee will be charged. This is exactly what occurred in this matter, although CAD refused to accept the returned items. This plain language takes precedence over any language of CAD in its purchase orders or other documents outside the solicitation. As set forth above, " (b) The terms and conditions of documents

> (1) through (5) above shall apply notwithstanding any additional or different terms and conditions in any other document, including without limitation, (I) a purchase order or other instrument submitted by the State, (ii) any invoice or other document submitted by Contractor...

(emphasis added). This language clearly contemplates a return by the state entity and given the time frame of less than thirty (30) workdays, this should have been accepted by CAD. CAD signed the cover page to the solicitation with its offer dated May 4, 2023, which bound CAD to the return of the products for any reason within this time period.

While a written contract may be modified by a subsequent agreement of the parties, the subsequent agreement must contain all the requisition of a valid contract. Florence City - County Airport Commission v Air Terminal Parking Co., 283 S.C. 337, 406 S.E. 2d 471 (ct. app. 1984) Here CAD did not obtain a subsequent mutual agreement of the parties, but rather attempted to unilaterally modify the restocking fee provision by adding different language in its quotation. The additional language did not form a new agreement between the parties and is not afforded precedence over the solicitation.

E. "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003). This mandates that neither the CPO or the court may rewrite the parties written contract, such as we have in this matter. "If a contract's language is plain, unambiguous and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." Blakeley v. Rabon, 266 S.C. 68, 221 S.E2d 767 (1976). This allows the CPO to hold the solicitation and its plain and unambiguous language to have precedence over any document of CAD outside of the solicitation in conflict with the terms of the solicitation.

F. As set forth in the technical Affidavit of Chad Sebree, SCDC needed to return the Aruba equipment as it was essentially not compatible with its pre-existing equipment, given changes to the products switch models and management platforms over the years. This was clearly provided to SCDC as a remedy in the Solicitation, as contained herein, with the plain language allowing for returns of the products from the contract for any reason by SCDC.

CONCLUSION

SCDC respectfully asserts it is entitled to an award of $906,872.76 against CAD is has wrongfully refused to accept the returned items,, plus any applicable pre-judgment interest

Michael C. Tanner, LLC

By:_____
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Attorney for SCDC

February 27, 2025
Bamberg, SC

CPO Exhibit B

STATE OF SOUTH CAROLINA State Fiscal Accountability Authority	BEFORE THE CHIEF PROCUREMENT OFFICER Solicitation Number 5400023232
South Carolina Department of Corrections, Claimant, v. Carolina Advanced Digital, Inc. Respondent.	**ANSWER AND DEFENSES**

PREFATORY STATEMENT

This purported controversy is the state's case of buyer's remorse on a near one-million-dollar transaction with Respondent Carolina Advanced Digital, Inc. ("*CAD*")—an organization Claimant South Carolina Department of Corrections ("*Claimant*") correctly recognized in its own pleading is "respected" and "value[d]" by the state and that "holds several statewide term contracts providing Information Technology services." Despite over a decade's worth of successful transactions between Claimant and CAD, despite CAD working deliberately and thoroughly with Claimant to work through its procurement needs prior to procuring and delivering the equipment at issue, despite Claimant previously ordering from CAD and installing the same or nearly the same equipment for its purposes, and despite CAD complying with all material terms of the solicitation at issue here, the state, now, attempts to make CAD the bearer of a near one-million-dollar error—that CAD did not participate in making and is not responsible for today. The Chief Procurement Officer should not permit such an unjust circumstance, and it should reject the state's purported contract controversy alleged in the instant case because it is not consistent with the solicitation nor the law.

ANSWER

Respondent Carolina Advanced Digital, Inc. ("*CAD*") answers and interposes defenses to the contract controversy alleged by Claimant South Carolina Department of Corrections ("*Claimant*"), dated September 11, 2024 ("*Controversy*"), as follows.

1. CAD admits: the State Fiscal Accountability Authority ("*SFAA*") received a bid for Hewlett Packard Enterprise ("*HPE*") Networking hardware and related services from CAD; the solicitation was identified by SFAA as number '5400023232' ("*Solicitation*"); and that the Solicitation was dated April 19, 2022. CAD denies the remainder of paragraph ("¶") 1.

2. CAD denies the allegations in ¶ 2.

3. CAD admits Exhibit A to the Controversy states, "If a product is returned to the contractor within ninety work days after Acceptance, no restocking fee will be charged." CAD denies the remainder of paragraph ¶ 3.

4. CAD admits the allegations of ¶ 4.

5. CAD denies the allegation of ¶ 5.

6. CAD denies the allegation of ¶ 6.

7. CAD admits the allegations of ¶ 7

8. CAD denies the allegations of ¶ 8 because quote #28706-2 was delivered to Claimant on June 4, 2024.

9. CAD admits the allegations of ¶ 9. The equipment requested by Claimant on 'Purchase Order 4601008121' is hereinafter, the "*Equipment*," and 'Purchase Order 4601008121' is hereafter, the "*Purchase Order*."

10. CAD admits the allegations of ¶ 10.

11. CAD admits it delivered the Equipment but denies the remaining allegations in ¶ 11 because it is without knowledge of the same.

12. CAD admits, on July 10, 2024, Claimant, through its employee Jay Daniel ("Mr. Daniel"), inquired with CAD about whether there were options to return the Equipment and stated that Claimant, allegedly, experienced a compatibility issue relative to Claimant's core Juniper switch and the CX switches. On the same day, CAD, in writing, offered to assist Claimant with integration of the Equipment. The remainder of the allegations in ¶ 12 are denied.

13. CAD admits it, in writing, rejected Claimant's unjustified and shifting justification for returning the Equipment. CAD denies the remaining allegations of ¶ 13.

14. CAD admits Exhibit C to the Controversy is a copy of a communication received by CAD and that, in Exhibit C, Claimant provides a purported and shifting justification for returning the Equipment. CAD denies the remaining allegations of ¶ 14.

15. CAD admits Exhibit D to the Controversy is a copy of a written response from CAD but denies the remaining allegations of ¶ 15.

16. CAD denies the allegations of ¶ 16.

17. CAD admits Exhibit E to the Controversy is a copy of a communication received by CAD and that, in Exhibit E, Claimant provides a purported and shifting justification for returning the Equipment. CAD denies the remaining allegations of ¶ 17.

18. CAD admits it refused to accept return of the Equipment but denies the remaining allegations in ¶ 18.

19. CAD denies the allegations of ¶ 19.

20. CAD denies the allegations of ¶ 20.

21. CAD denies the allegations of ¶ 21 and states Claimant is not entitled to any relief.

DEFENSES

1. *Rules 12(b)(1) and 12(b)(2)*. The Chief Procurement Officer lacks jurisdiction over the subject matter of the instant case and lacks jurisdiction over CAD because, among other reasons, the Solicitation is ambiguous and does not address the relevant legal and factual issues. Instead, it is the terms and conditions agreed upon by both parties that control this proceeding, including, among others, those on CAD's invoicing, which prohibits returns. CAD's invoicing is attached hereto as Exhibit 1, which states the following.

- "Please check your shipment for any issues with quantity, damage or other discrepancies within 24 hours."
- "Please Note: Due to Mfr Policies, we cannot accept returns on Hardware/Software."

Therefore, Title 11, Chapter 35 of the Code of Laws of South Carolina—i.e., the South Carolina Consolidated Procurement Code—and, specifically, S.C. Code Ann. § 11-35-4230, do not apply to this proceeding, and the Chief Procurement Officer has no authority hereunder.

In further support thereof, CAD notes Claimant's pleading alleges it did not have capacity to contract. *See* SCRCP 10(c) [RULE 10. FORM OF PLEADINGS] ("A copy of any . . . document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."). Specifically, in Exhibit E to the Controversy, Claimant states, "SC DOC's chief network engineer was not aware of the purchase order, and the order was not thoroughly reviewed to be deemed as acceptable for SC DOC's standards." This is purely a contract law claim, and not one that can be raised in the instant Controversy.

In further support thereof, CAD notes Claimant is attempting to void the Solicitation, which it has no authority to do, and which is not a remedy available to Claimant under the South Carolina Consolidated Procurement Code.

These facts further support that Claimant is improperly attempting to state a claim under the South Carolina Consolidated Procurement Code while, in fact, Claimant is stating a contract claim subject to the courts of the state of South Carolina. Claimant cannot have it both ways, s*ee* S.C. Code Ann. Regs. 19-445.2143 [Contract clauses and administration.], and claimant cannot avail itself of S.C. Code Ann. Regs. 19-445.2015 [Unauthorized or Illegal Procurements.] because it ratified the parties' agreement.

2. *Rule 12(b)(6)*. The Controversy fails to state facts sufficient to constitute a cause of action because, among other reasons, those stated in defense number 1 above.

3. *Substantial and Material Performance*. CAD's purported breach of the Solicitation is excused because CAD substantially and materially complied with the terms and conditions agreed upon by both parties.

4. *Conformance with Contract Terms*. CAD's procurement and sale of the Equipment was conducted in full compliance with the terms and conditions agreed upon by both parties, which did not include a provision for return of the Equipment.

5. *Acceptance of Goods and Failure of Notice*. Claimant accepted the Equipment without objection and failed to notify CAD of any alleged non-conformity within a reasonable time, thereby waiving any right to reject or return the Equipment.

6. *Ratification*. Claimant ratified the agreement between the parties.

7. *Waiver and Estoppel*. Claimant, by its actions and conduct, waived any right to return the goods and is estopped from asserting such a claim.

8. *Unclean Hands*. Claimant, by its actions and conduct, is before the Chief Procurement Officer with unclean hands and, therefore, waived any right to return the goods and is estopped from asserting such a claim.

9. *Statute of Limitations*. The claim is barred by the applicable statute of limitations for returning goods.

10. *Unjust Enrichment*. Allowing return of the Equipment would result in unjust enrichment to Claimant, as Claimant already benefitted from CAD's procurement and delivery of the same.

11. *Failure to Mitigate Damages*. Claimant failed to take reasonable steps to mitigate any alleged damages resulting from the transaction including, among other things, refusing to avail itself of CAD's gratuitous offers for training and technical assistance.

12. *Contractual Ambiguity*. The Solicitation, which Claimant alleges govern the instant proceeding, is ambiguous, and the ambiguity should be resolved in CAD's favor because it was not drafted by CAD.

13. *Course of performance, course of dealing, and usage of trade*. CAD and the state of South Carolina have transacted business for over a decade. CAD has previously procured and delivered to Claimant the same or nearly the same equipment for its purposes with no objection.

14. *Reservation of Rights*: CAD reserves the right to assert additional defenses as may be appropriate based on further investigation and discovery.

CAD respectfully requests that the Chief Procurement Officer dismiss the Controversy with prejudice, award CAD costs and attorney's fees, and grant such other and further relief as deemed just and proper.

Respectfully submitted,

October 11, 2024

Greenville, South Carolina

163608219.3

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Attorneys for Respondent Carolina Advanced Digital, Inc.

CERTIFICATE OF SERVICE

I certify that, on October 11, 2024, a true and correct copy of the foregoing was served via Federal Express overnight delivery and electronic mail on:

SFAA, The Division of Procurement Services
John St. C. White, MMO
1201 Main Street, Suite 600
Columbia, South Carolina 29201
jswhite@mmo.sc.gov,

and via electronic mail upon:

Michael C. Tanner
michaelctannerllc@bellsouth.net

Manton Grier
mgrier@ogc.sc.gov.

R. Taylor Speer
South Carolina Bar Number 100455

STATE OF SOUTH CAROLINA	BEFORE THE CHIEF PROCUREMENT OFFICER
State Fiscal Accountability Authority	File No. 2025-204
South Carolina Department of Corrections, Claimant, v. Carolina Advanced Digital, Inc. Respondent.	**BRIEF OF RESPONDENT**

INTRODUCTION

This purported controversy is the state's case of "buyer's remorse" on a near one-million-dollar transaction with Respondent Carolina Advanced Digital, Inc. (*CAD*).

CAD is an organization that Claimant South Carolina Department of Corrections (*Claimant*) acknowledged is "respected" and "value[d]" by the state—with "several statewide term contracts providing Information Technology services." Despite over a decade's worth of successful transactions between Claimant and CAD, despite Claimant previously ordering from CAD and installing the same or nearly the same equipment it attempts to return here, and despite CAD procuring for Claimant the exact equipment Claimant requested in writing, the state, now, attempts to make CAD the bearer of a near one-million-dollar "order in error"—that CAD did not participate in making and is not responsible for.

Here, there is no controversy to resolve. The parties' agreement is unambiguous and does not permit returns. And, even if the CPO disagreed, extrinsic evidence shows the parties intended to *not* require a return when it is based on merely buyer's remorse—after CAD complied with the parties' agreement. Moreover, Claimant cannot sue for damages because it affirmatively prohibited CAD from curing the vague and unspecified issues with the equipment it ordered, which are *not* nonconformities or a cognizable warranty claim. Finally, it appears Claimant wants its cake—and to eat it. Claimant asks the CPO for a judgment exceeding $900,000 with no commensurate promise to satisfy the judgment by selling the purchased equipment or returning it to CAD. This is an unlawful measure of damages as Claimant would be unjustly enriched by the value of the equipment.

On the other hand, the evidence shows Claimant made the instant purchase from CAD, hastily, to meet a deadline to spend a "COVID grant." It is possible Claimant placed its order with CAD intending to return it, so Claimant would comply with the spending terms of the grant.

CAD is simply not contractually or legally required to suffer the financial loss that will occur from a return of the purchased equipment or judgment thereon, especially given it is occasioned by Claimant's buyer's remorse—on the same products it has previously purchased from CAD and still uses today.

For these reasons, the Chief Procurement Officer should deny relief to Claimant.

TABLE OF CONTENTS

CAD'S RECORD

CAD supports this brief with four affidavits and the documents appended to them, which comprise CAD's record. For ease of citation and reference, the supporting affidavits and documents appended to them are embossed with a footer styled, "Record [number.]"[1]

Three of the affidavits are made by CAD's key personnel for the instant transaction:

- Julie Allen, CAD's 'Director of Operations' (Rec. 160, Allen Aff. ¶ 4),
- Susan Jabbusch, CAD's 'Executive VP' (Rec. 172, Jabb. Aff. ¶ 4), and
- BreAnn Verreen, CAD's 'Account Manager' (Rec. 167, Verr. Aff. ¶ 4).[2]

The fourth affidavit is made by CAD's records custodian, Jennifer Minella. Ms. Minella is CAD's 'Chief Information Security Officer.' (Rec. 1, Min. Aff. ¶ 6.)[3] Records appended to her affidavit are true and correct copies of 1) documents maintained by CAD in the normal course of business or 2) documents produced by Claimant responsive to a request for public records under the South Carolina Freedom of Information Act. (Rec. 2, Min. Aff. ¶¶ 7-9.)

[1] The Record is cited throughout as "Rec. [x]."

[2] Respectively, these affidavits are cited throughout as "Allen Aff. ¶ [x]," "Jabb. Aff. ¶ [x]," and "Verr. Aff. ¶ [x]."

[3] Ms. Minella's affidavit is cited throughout as "Min. Aff. ¶ [x]."

BACKGROUND

A. CAD

CAD is family-owned business that has provided information technology (*IT*) goods and services in the marketplace for over forty years. The company is a federally certified Service Disabled Veteran-Owned Small Business and HUBZone business by the Small Business Administration. At times relevant to the instant transaction, CAD held nearly forty technical certifications related to the sale and support of IT goods and services. (Rec. 173, Jabb. Aff. ¶ 5.)

The company has considerable experience negotiating and performing contracts with public entities including large ones. CAD's first public procurement contract with the state of North Carolina was nearly twenty-five years ago. Its first General Services Administration contract with the United States of America was over twenty years ago. And its first contract with the state of South Carolina was more than ten years ago. CAD's vendor number with the state of South Carolina is '7000049733.' (*Id.* ¶¶ 7-8.)

At times relevant to the instant transaction with Claimant, CAD provided IT goods and services to thousands of public entities inclusive of their subdivisions and organizations. Recently, CAD was one of several awardees of a $50 million contract for IT goods and services with the state of North Carolina. In its history, CAD never had a suspension or debarment from a public procurement program. (*Id.* ¶¶ 8-9.)

B. HISTORY WITH CLAIMANT

Claimant is a longtime customer of CAD. The company's first transaction with Claimant was over ten years ago, during November 2013. (Rec. 174, Jabb. Aff. ¶ 12.)

Since that time, CAD has performed nearly 70 individual transactions with Claimant for IT goods and services, with a contract value exceeding $2,100,000. (Rec. 161, Allen. Aff. ¶ 7.)

Claimant has never complained about the quality CAD's products or services, nor the competency or integrity of CAD's personnel. Tom Barrett, Claimant's 'Asst. Division Director, Division of Resource & Information Management,' has previously said, "CAD INC has been a great provider with excellent customer service with placing orders, tracking, billing question, etc. I would highly recommend them to be continued on the state contract for network products." (Rec. 59; Rec. 174, Jabb. Aff. ¶ 13.)

Claimant's own pleading in this case stated, CAD is "respected" and "value[d]" by the state—with "several statewide term contracts providing Information Technology services." (Compl. Ex. E.)[4]

C. HPE ARUBA

For its network, Claimant uses, among other things, 'Aruba' equipment (*Aruba*). The Aruba product line is manufactured by Hewlett Packard Enterprise (*HPE*). Aruba's products and services feature enterprise-grade networking switches, wireless access points, routers, and gateways, and 'Central'—a cloud-based network management platform for users. Claimant's Aruba products are the physical equipment that allows users to access Claimant's network, including services for email, Internet, files, and printers, etc. (Rec. 161, Allen Aff. ¶ 8.)

[4] Claimant's 'contract controversy' was served on the CPO on September 12, 2024 and is cited throughout as "Compl. ¶ [x]."

CAD has been an authorized reseller of HPE networking products for nearly thirty years. At times relevant to the instant transaction, the company held over ten technical certifications for Aruba HPE products and support. (Rec. 174, Jabb. Aff. ¶ 14.)

To date, Claimant has purchased nearly $2,000,000 worth of HPE networking equipment from CAD. Over half of that contract value preceded the instant transaction and was for the purchase of Aruba switching gear. In 2021, HPE updated its Aruba product line and began marketing the company's Aruba 'CX' switches. Since that time, Claimant has been purchasing mostly Aruba 'CX' switches from CAD, and that is what Claimant purchased in the instant transaction. (Rec. 162, Allen. Aff. ¶ 9.)

D. SOLICITATION, AWARD, AND INITIAL TRANSACTIONS

On April 19, 2022, the State Fiscal Accountability Authority, Division of Procurement Services, Information Technology Management Office (*DPS*) issued the instant solicitation/bid invitation, assigning number 5400023232. (*See* Solicitation Page.)[5] The solicitation called for a statewide term contract for HPE networking products and services. The solicitation was amended three times during May 2022, and bids were submitted on or before May 30, 2022. The third and final amended solicitation was issued on May 25, 2022 and is hereinafter referred to as the "*Solicitation*." (*Id.*; Rec. 162, Allen. Aff. ¶ 10.)

[5] SFAA Procurement Services, Contract Search https://apps.sceis.sc.gov/SCSolicitationWeb/solicitationAttachment.do?solicitnumber=5400023232, last visited on March 10, 2025 (*Solicitation Page*).

In pertinent part, the Solicitation required bidders to:

- offer a "not to exceed" price, represented as a minimum discount off 'manufacturer's suggested retail price' (*Minimum Discount*);
- offer thirty-five (35) percent Minimum Discount for products;
- "facilitate all warranty transactions on behalf of [Claimant;]" and
- "provide full-time sales, repair, and warranty staff and twenty-four-hour Help Desk Services[,]" including "on-site response anywhere within the State of South Carolina within four business hours."

(Rec. 20-21.)

On or about May 4, 2023, CAD responded to the Solicitation by signing and uploading it to the 'SC Enterprise Information System' portal,[6] along with a written response and a weighted bid schedule. (Rec. 4; Rec. 162, Allen Aff. ¶ 11.)

On July 6, 2023, DPS issued its intent to award to CAD—effective July 18, 2023. (*See* Solicitation Page; Rec. 162, Allen Aff. ¶ 13.) Since then, Claimant issued a total of four purchase orders under the Solicitation: 1) one issued on February, 22, 2024, 2) one on April 16, 2024, 3) one on April 17, 2024, and 4) the instant purchase order issued on June 7, 2024. The contract value of these four purchase orders totals nearly $977,000, and all the equipment purchased was Aruba 'CX' switches and related goods and services. Those purchase orders were negotiated on Claimant's behalf by Jay Daniel. (Rec. 162-3, Allen. Aff. ¶¶ 13-14.) At material times, Mr. Daniel was represented as Claimant's 'Network Administrator, Division of Resource and Information Management.' (*E.g.*, Rec. 75.)

[6] The portal is the same one administered by the South Carolina Department of Administration.

E. THE INSTANT TRANSACTION

1. The Bill of Materials

On May 23, 2024, Mr. Daniel called CAD to discuss a new order that would become the instant transaction (*Transaction*). Initially, he left a voicemail. On the recording, Mr. Daniel says that Claimant is looking to fill:

> . . . that same order we did back in January for those 6100 switches. We're needing something as soon as possible for budgetary purposes. We're trying to see if we can get the money approved. I didn't know if you could look at this and shoot me back something [kind of] quick. It's the exact same items, as I said, back from January.[7]

(Rec. 168, Verr. Aff. ¶ 5.)

Mr. Daniel followed the voicemail with an email to CAD, on the same day, requesting a quote for Aruba switching equipment. The email stated, "Please quote the following for budgetary purposes. I need this back as soon as possible[,]" and it included a bill of materials (the "*BOM*"). The BOM identified the specific manufacturer, manufacturer part number, and quantity and description of goods—that Claimant requested to purchase from CAD. (Rec. 147-8.) CAD did not participate in developing the BOM. (Rec. 168, Verr. Aff. ¶ 6.) The document is reproduced below.

[7] Disfluencies were removed for brevity, clarity, and respect for the speaker. In this instance, those included "so," "you know," "like," and "um."

Figure 1: BOM

Item	Mfg	Part #	Qty	Description
1	HEWLETT PACKARD ENTERPRISE	JL658A	12	Aruba 6300M 24-port SFP+ and 4-port SFP56 Switch - 24 Ports - Manageable - 3 Layer Supported - Modular - 85 W Power Consumption - Optical Fiber - 1U High - Rack-mountable - Lifetime Limited Warranty
2	HEWLETT PACKARD ENTERPRISE	JL085A#B2E	24	HPE Aruba X371 12VDC 250W 100-240VAC Power Supply - 120 V AC, 230 V AC
3	HEWLETT PACKARD ENTERPRISE	J9151E	250	Aruba 10G SFP+ LC LR 10km SMF Transceiver - For Data Networking, Optical Network - 1 x LC 10GBaseLR Network - Optical Fiber - Single-mode - 10 Gigabit Ethernet - 10GBase-LR
4	HEWLETT PACKARD ENTERPRISE	?	40	RJ45 SFP Transceiver Speed?
5	HEWLETT PACKARD ENTERPRISE	JL677A#ABA	70	Aruba 6100 24G Class4 PoE 4SFP+ 370W Switch - 24 Ports - Manageable - 3 Layer Supported - Modular - 32.70 W Power Consumption - 370 W PoE Budget - Twisted Pair, Optical Fiber - PoE Ports - 1U High – Rack-mountable, Wall Mountable - Lifetime Limited Warran
6	HEWLETT PACKARD ENTERPRISE	JL679A#ABA	20	Aruba 6100 Ethernet Switch - 12 Ports - Manageable - 2 Layer Supported - Modular - 21.90 W Power Consumption - 139 W PoE Budget - Optical Fiber, Twisted Pair - PoE Ports - 1U High - Wall Mountable, Rack-mountable, Surface Mount - Lifetime Limited Warranty
7	HEWLETT PACKARD ENTERPRISE	JL675A#ABA	75	Aruba 6100 48G Class4 PoE 4SFP+ 370W Switch - 48 Ports - Manageable - 3 Layer Supported - Modular - 30.60 W Power Consumption - 370 W PoE Budget - Twisted Pair, Optical Fiber - PoE Ports - 1U High – Rack-mountable, Wall Mountable - Lifetime Limited Warranty

(Rec. 147-8.)

2. The Quotes

On May 23, 2024, CAD emailed Mr. Daniel a written quote for the BOM. The email was authored by Julie Allen, CAD's 'Director of Operations.'' In the email, Ms. Allen indicated another quote would be forthcoming—to include additional discounts CAD was seeking on Claimant's behalf. (Rec. 121.) The attached quote was identified as

number '28706.' (Rec. 121, 126-7.) It stated CAD prohibited returns and would not accept them. The relevant excerpt from the quote prohibiting returns is reproduced below.

Figure 2: Quote Excerpt

> Please Note: Due to Mfr Policies, we cannot accept returns on Hardware/Software. Invoices bear interest at 1.5% per month commencing upon date payment is due.
> ALL CISCO, APPLE CTO, AND JUNIPER/MIST ORDERS ARE NON-CANCELLABLE AND NON-RETURNABLE.

(Rec. 127.)

On May 28, 2024, CAD emailed Mr. Daniel an updated quote for the BOM, identified as quote number '28706-1.' The email was authored by BreAnn Verreen, CAD's 'Account Manager.' (Rec. 128, 133-4.) This subsequent quote was issued to account for an *additional* eleven percent manufacturer's discount that CAD secured for Claimant and to resolve an inquiry made by Mr. Daniel by telephone, on May 23, 2024. (Rec. 168, Verr. Aff. ¶¶ 7-8.)[8] This subsequent quote repeated the prohibition on returns in the same form as **'Figure 2: Quote Excerpt.'[9] (Rec. 134.)

On June 4, 2024, Mr. Daniel called CAD, leaving Ms. Verreen another voicemail. In the voice message, Mr. Daniel requested a change to this subsequent quote and, again, emphasized haste, inquiring "how fast [she] could turn that around." (Rec. 169, Verr. Aff. ¶ 9.) Later that day, Mr. Daniel emailed CAD, requesting a decrease in quantity of

[8] Mr. Daniel's inquiry was relative to relative to whether transceivers or cables were necessary to accommodate connections of other equipment on the BOM. This inquiry is noted on the BOM by the "?" notation in line item "4." (*Id.*)

[9] For ease of reference, any item in this brief with the prefix '**' is a hyperlink to another portion of the document. The hyperlinked content may be accessed by mouse clicking the hyperlink while holding the 'control' keyboard button.

two items identified in the subsequent quote. In his email, Mr. Daniel stated, "[Claimant was] having a budget meeting in the morning to discuss this." (Rec. 143.)

In response, on the same day, Ms. Allen delivered Mr. Daniel an email attaching a final, third quote identified as '28706-2' and reflecting the reduced quantity of transceivers (the *Final Quote*). (Rec. 135, 141-2; *see also* Rec. 163, Allen Aff. ¶ 16.)

The Final Quote contained the same prohibition on returns as contained in **'Figure 2: Quote Excerpt.' (Rec. 142.) Mr. Daniel replied via email, on the same day, confirming that the Final Quote was "good" (Rec. 73), thereby assenting to the prohibition on returns.

3. The Purchase Order

On June 7, 2024, Claimant issued a purchase order for the Aruba equipment that is at issue in the instant controversy (the *PO* or *Purchase Order*). (Rec. 80-82.) The PO was created by JoHanne Sullivan. At material times, Ms. Sullivan was represented as Claimant's 'Procurement Manager II,' as a 'Certified Public Procurement Officer,' and as a 'Certified Professional Public Buyer.' On June 11, 2024, Ms. Sullivan emailed the PO to CAD, care of Ms. Verreen. (Rec. 79.)

The PO incorporated all data from the Final Quote. (*Compare* Rec. 149 *with* Rec. 80-82.) And it expressly referenced the Final Quote, which included the prohibition on returns contained in **'Figure 2: Quote Excerpt,' as shown in the excerpt reproduced below:

Figure 3: PO Excerpt

INSTRUCTIONS TO VENDOR
{Attn: Brandi Miller/Paul Marriott (Division of Technology)}
Send invoices to accountspayable@doc.sc.gov
bre@cadinc.com
Quote # 28706-2

(Rec. 80.)

4. The Invoice, Delivery, and Payment

The Equipment was shipped, and on June 18, 2024, CAD issued and emailed its invoice to Mr. Daniel (the *Invoice*). (Rec. 88-99.) The Invoice reflected the equipment and prices from the PO and added taxes—for a total Invoice price of $906,872.76. (Rec. 163, Allen Aff. ¶ 17.)

The Invoice identified all (531) products sold by CAD to Claimant with specificity (collectively, the *Equipment*). (Rec. 89-99.) For each product comprising the Equipment, the Invoice identified the ship date, the manufacturer, the part number, the serial number, and tracking information—as shown in the excerpt from the Invoice reproduced below.

Figure 4: Invoice Excerpt

Shipping Detail

Ship Date	Manufacturer	Part Number	Serial Number	Tracking
6/18/2024	Hewlett Packard Enterprise	J9151E	[redacted]	276012995237
6/18/2024	Hewlett Packard Enterprise	J9151E		276012995237
6/18/2024	Hewlett Packard Enterprise	J9151E		276012995237
6/18/2024	Hewlett Packard Enterprise	J9151E		276012995237

(Rec. 89.) The Invoice repeated the prohibition on returns in the same form as **'Figure 2: Quote Excerpt.' (Rec. 99.)

The Equipment was delivered, and on June 25, 2024, Mr. Daniel delivered an email to CAD confirming receipt of the same. (Rec. 83.) On July 5, 2024, Claimant paid the $906,872.76 Invoice electronically via ACH. (Rec. 163, Allen Aff. ¶ 18.)

5. Claimant's Shifting Explanations

– i –

On July 10, 2024, Mr. Daniel called Ms. Verreen and requested return of all the Equipment that Claimant purchased. The reason given was Claimant had issues connecting the Aruba switches to other equipment on Claimant's network including the 'Juniper Network' product line (*Juniper*) that Claimant used. (Rec. 169, Verr. Aff. ¶¶ 10-13; Rec. 100 (call notes).) This was *reason number one*; Claimant will offer more. This section of the brief describes all ten of them.

During the call, Mr. Daniel said a team member working with him on the project preferred the 'Meraki' product line of switch gear manufactured by Cisco (*Meraki*). The team member referred to by Mr. Daniel is Henry Dingle, an employee of Claimant. During the call, Claimant explained Mr. Dingle was out of town when Claimant consummated the instant transaction. Mr. Dingle joined the call and asked whether Claimant would exchange or return the Equipment for Meraki products. Ms. Verreen responded that buying Meraki equipment would not justify a return or exchange with HPE. The call lasted nineteen (19) minutes. (*Id.*)

Finally, Mr. Daniel emphasized haste again, saying there would need to be a quick turnaround on resolving the return—because Claimant used grant funding to purchase the Equipment from CAD, and the money needed to be spent by July 31, 2024. Ms. Verreen said the company does not accept returns but would inquire if an exception could be made. (*Id.*) These efforts are described *infra* § **'F.'

On the same day, Ms. Allen emailed Mr. Daniel. In the email, Ms. Allen restated CAD's policy of not permitting returns, referencing the same **'Figure 2: Quote Excerpt' language present in the quotes and the Invoice. Ms. Allen stated she confirmed with a third-party that Aruba and Juniper were interoperable, and she requested specificity from Mr. Daniel regarding the Aruba/Juniper interconnection issues Claimant experienced, so they could be troubleshot. Finally, Ms. Allen stated, "Our team feels that this is something that can be remediated with the assistance of Juniper and/or Aruba technical support. . . . please let us know how we can help." (Rec. 103.)

The next day, on July 11, 2024, Mr. Daniel sent an email to Ms. Allen. Mr. Daniel stated he would "get back to [her] for some assistance [regarding] Juniper and Aruba configurations." (Rec. 102.) CAD's 'Executive VP,' Susan Jabbusch, followed shortly thereafter with an email ensuring that CAD would assist with any issues. (Rec. 106-7.)

Mr. Daniel never followed up with CAD. At no material time—nor since—has Claimant identified a specific problem between the Equipment and Claimant's existing network infrastructure. (Rec. 164, Allen Aff. ¶ 20.) Nor, at any time, has Claimant attempted to avail itself of CAD's offers of support. (*Id.*)

– ii –

On July 12, 2024, Yolanda Cohen called Ms. Allen on behalf of DPS. (Rec. 164, Allen Aff. ¶ 21-22.) At material times, Ms. Cohen represented herself as DPS's 'Procurement Manager II - Information Technology.'[10] During the telephone call, Ms.

[10] LINKEDIN, https://www.linkedin.com/in/yolanda-cohen-mba-b67528124/, last visited on March 10, 2025.

Allen repeated CAD's return policy, as stated in **'Figure 2: Quote Excerpt' on the quotes and the Invoice, and she reiterated that CAD offered to send technicians to troubleshoot. Ms. Cohen agreed there is no particular provision in the Solicitation permitting returns. (Rec. 164, Allen Aff. ¶ 21-22; Rec. 104 (call notes).)

On the same day, Sandee Spring emailed CAD. At material times, Ms. Sprang was represented as Claimant's 'Division Director of Technology.' In her email, Ms. Sprang levied Claimant's *second* reason for a return—that she learned "there are some less than desirable issues with the recent [Equipment] order . . . ." Ms. Sprang further expressed her opinion that the Solicitation permitted returns and that the prohibition on returns in CAD's quotes did not control. (Rec. 107-8.)

Ms. Jabbusch responded by email on the same day, expressing CAD's read of the Solicitation—i.e., that it is "not meant as a blanket approval to return all orders without a specific reason." Ms. Jabbusch stated additional relevant facts including that:

- Claimant provided the original Bill of Materials[;]"
- Claimant was "a consistent user of Aruba networking equipment for the last ten years[;]"
- CAD worked directly with Aruba's sales representatives to get the Equipment delivered timely to meet Claimant's demands;
- Claimant had not informed CAD "exactly what the issue might be[;]"
- CAD was informed the Equipment is compatible with Juniper; and
- "the OEM will not accept opened product to be returned."

Finally, Jabbusch reiterated CAD would be pleased to cause Juniper and Aruba engineers to go onsite and examine the issue Claimant was purportedly experiencing. (Rec. 107.)

Having not heard back from Claimant by July 15, 2024, CAD emailed Claimant again. In this email, Ms. Verreen noted she left Mr. Daniel a voicemail. She asked for availability "this week" to present on Claimant's site to "talk through a solution[;]" and stated she would "like to make it a priority to come visit this week . . . so, please let me know." (Rec. 102.) Mr. Daniel responded, "we can schedule a meeting." (Rec. 101.) To repeat, Claimant never scheduled a meeting with CAD, Aruba, or Juniper to resolve the purported interoperability issue. (Rec. 164, Allen Aff. ¶¶ 20,23.)

– iii-vii –

On July 15, 2024, Ms. Sprang emailed CAD again, offering Claimant's *third, fourth, fifth, sixth, and seventh* reason for a return.

> For clarification, my justification for the return is based on feedback from my team. While we only have a few of these specific devices in the field, we've had issues with them and still have a few challenges to overcome. However, the bigger issue, is the lack of consistency: 1) in the product lines model to model (and we have a LOT of HP devices), 2)in the local management of the hardware, 3) in the centralized management of the hardware, and 4) in the recommendations from the vendors and HP/Aruba for the products. These challenges were only discovered, by me, post receipt of the order.

In the same email, Ms. Sprang also said Claimant is "beginning to develop a new standard in our switching environment."[11] (Rec. 106.) This is Claimant's *seventh* reason for a return. And she acknowledged the truth of the Transaction and the instant controversy—that Claimant made a large order with CAD and returning it will cause

[11] Perhaps Ms. Sprang referred to Mr. Dingle's interest in Meraki. (*Supra* p. 14.)

CAD significant hardship. In that regard, Ms. Sprang said, "This is a large purchase and for CAD, that makes the return painful." (*Id.*)

On July 17, 2024, Ms. Jabbusch responded for CAD. Ms. Jabbusch's email repeated CAD's commitment to resolving any purported issues with the Equipment, offering to "provide the engineering and training resources needed for [Claimant] to continue with the deployment of the HPE Aruba switches already purchased." Specifically, Ms. Jabbusch offered to provide "*at no expense*:"

- CX workshop for your team, either virtually, or in-person
- OEM sponsored training for 1-2 of your network engineers
- Pro Services assistance with CAD engineers and/or OEM engineers for a specified time
- [assistance] on Aruba Central and help with discounted licensing, if needed.
- . . . NetEdit licensing to help with configurations and provide a CAD engineer to assist for a specified time.

Finally, Ms. Jabbusch highlighted that Claimant "has been purchasing this general equipment for close to ten years, with the same CX switches since 2022," and noting CAD is "confident that any perception of issues is likely due to unintended changes made on the network." (Rec. 105.)

– viii –

On July 24, 2024, Stephen Taylor, Randy Barr, and Ms. Allen presented for a telephone conference. (Rec. 164-5, Allen Aff. ¶¶ 24-26; Rec. 113 (call notes).) At material times, Mr. Taylor was represented as DPS's 'Procurement Manager II' (Rec. 159) and Mr. Barr was represented as DPS's 'Procurement Manager' and a 'Certified Public Procurement Officer.' During the call, Mr. Taylor said the Equipment is operable but not

up to Claimant's standards and, apparently, **the Purchase Order was an "order in error."** (Rec. 164-5, Allen Aff. ¶¶ 24-26; Rec. 113 (call notes)) (emphasis added). This represents Claimant's <u>*eighth*</u> reason for a return.

Dubiously, Mr. Taylor said the Solicitation provided for returns *for any reason*. For her part, Ms. Allen: 1) said she confirmed with CAD's Juniper and Aruba resources that the Equipment is interoperable with Claimant's network and 2) repeated a) that CAD remained uninformed on what, specifically, the issue is with the Equipment and b) that Claimant had not filed any support tickets with CAD. (*Id.*)

– iv-v –

On July 29, 2024, Mr. Taylor emailed CAD a letter, proffering entirely different reasons for Claimant's request. (Rec. 118.) Mr. Taylor stated, "[Claimant]'s chief network engineer was not aware of the purchase order, and the order was not thoroughly reviewed to be deemed as acceptable for [Claimant]'s standards." (Rec. 119.) This was Claimant's <u>*ninth*</u> purported reason for a return. Finally, Mr. Taylor offered a final and <u>*tenth*</u> reason for a return—"Due to staff constraints and the current hiring freeze, the order would not be feasible and manageable during this time." (*Id.*)

CAD responded to Mr. Taylor via email on August 1, 2024. In the email, Ms. Jabbusch restated CAD's "agree[ment] to provide reasonable professional services in lieu of a return, at no expense to [Claimant]." (Rec. 114.)

In sum, Claimant offered ten shifting reasons for a return. The reasons are inconsistent and change based on the time and maker. In response, CAD continuously offered support, as required by the parties' agreement—only to be rebuffed by Claimant.

F. CAD ATTEMPTS TO FACILITATE A RETURN

During the email and telephone conversations identified above, CAD was also attempting to broker a return of the Equipment with HPE.

On July 13, 2024, after Ms. Jabbusch received Mr. Sprang's first email, Ms. Allen emailed Ron Gomez. At material times, Mr. Gomez represented himself as 'Inside Account Executive' for CAD's distributor of HPE and Aruba, TD Synnex. The purpose of Ms. Allen's email to Mr. Gomez was to determine whether TD Synnex would accept a return of the Equipment. Via email, Mr. Gomez responded, "I highly doubt we will be able to accept a return . . . . " (Rec. 110.)

On July 16, 2024, Mses. Allen and Verreen called HPE directly and discussed a potential return with Culver Choate, Jr. (Rec. 165, Allen Aff. ¶ 27.) At material times, Mr. Choate represented himself as 'Territory Sales Manager' for HPE Aruba.[12] HPE Aruba, of course, is the original equipment manufacturer of the Equipment. Mr. Choate said Claimant has not reached out to him or HPE to request a return or report any issues; he was not aware of any problems (until reported by CAD during the call); and, during the call, he confirmed HPE had no recent and/or open support tickets relative to Claimant. (Rec. 165, Allen Aff. ¶ 27.)

Mr. Choate said, bluntly, HPE Aruba will not take the Equipment back and will not approve a return. (Rec. 165, Allen Aff. ¶ 28.)

[12] LINKEDIN, https://www.linkedin.com/in/culver-choate-jr-6588325/, last visited on March 10, 2025.

CAD requested that Mr. Choate issue an affidavit averring these facts. But Mr. Choate refused without citing a reason or disputing the truth of the matter asserted. (Rec. 175, Jabb. Aff. ¶¶ 17-18.)

G. CONTRACT CONTROVERSY

1. Initial Pleading

Claimant served the CPO and CAD with its initial pleading on September 12, 2024 (*Complaint*). The Complaint alleged:

- the Solicitation allowed Claimant to "return items to the vendor/offeror within (90) workdays without incurring a restocking fee[,]" (Compl. ¶ 2);
- "there was a lack of consistency between the product line's models[,]" (*id.* ¶ 12);
- the "items were delivered to [Claimant], but not accepted for use by [Claimant] []" (*id.*); and
- the quotes' and Invoice's prohibition of returns "is void and has no force and effect and does not alter the terms and conditions of the Solicitation []" (*id.* ¶ 15).

The Complaint argued these facts constitute a breach of the contract and the terms of the Solicitation. (*Id.* ¶ 19). Consequently, the Complaint requested the CPO issue judgment against CAD in the amount of $906,872.76, representing the full amount of the contract value. (Claim. Br. § 'Conclusion') The Complaint fails to allege Claimant's nine other shifting explanations for a return.

2. Answer

CAD served the CPO and Claimant with its initial pleading on October 11, 2024 (*Answer*). The Answer denied dispositive allegations in the Complaint and defended on grounds, among others, that:

- "CAD substantially and materially complied with the terms and conditions agreed upon by both parties . . . . [W]hich did not include a provision for return of the Equipment." (Ans. p. 5 ¶¶ 2, 4);
- Claimant failed to mitigate by, "among other things, refusing to avail itself of CAD's gratuitous offers for training and technical assistance []" (*Id.* 6 ¶ 11);
- "CAD has previously procured and delivered to Claimant the same or nearly the same equipment for its purposes with no objection []" (*Id.* ¶ 13).

On these grounds (and others), CAD requested the CPO dismiss the Controversy with prejudice, awarding CAD costs and attorneys' fees, and grant any other just relief. (*Id.* p. 6.)

3. Claimant's Brief

Claimant filed its brief on the merits on February 28, 2025 along with affidavits of Sandee Sprang and Chad Sebree (*Claimant's Brief*).[13] In its brief, Claimant incorrectly argues that the Solicitation permits returns of goods purchased under the Solicitation. (Claim. Br. ¶ B.) In support thereof, Claimant relies exclusively on the following language in the Solicitation, which is hereinafter referred to as the "*Restocking Fee Section*."

Figure 5: Solicitation Excerpt – Restocking Fee Section

> ***Restocking Fee***
> If a product is returned to the Contractor within thirty workdays after Acceptance, no restocking fee will be charged. If products are returned to the Contractor after thirty workdays of Acceptance, then a restocking fee of up to but not exceeding ten percent of the unit cost may be charged.

(Claim. B. ¶¶ 5, B.)

[13] Claimant's Brief is cited throughout as "Claim. Br. ¶ [x]."

The brief further argued:

- "The Solicitation is the controlling document regarding the terms and conditions surrounding a return of items . . . []" (Claim. Br. ¶ 6);
- "[The Solicitation] plainly contemplates . . . items could be returned to the Seller, CAD <u>*at anytime*</u>[]" (*Id.* at ¶ B) (emphasis added); and
- "[T]he plain language [of the Solicitation] allow[s] for returns of the products from the contract <u>*for any reason*</u> by [Claimant]" (*Id.* at ¶ F).

In sum, Claimant's dubious position in this proceeding is it can return any equipment purchased under the language of the Solicitation "at anytime . . . for any reason." This is absurd. Claimant asks the CPO for a construction of the parties' agreement permitting it to install and use equipment purchased under the Solicitation for ten years and then seek a return from the vendor.

Additionally, Claimant is now tightlipped on its reason for a needing a return (and for requiring CAD to hold the bag on a near-million-dollar transaction). Despite previously providing ten shifting reasons for a return, now, for the CPO, Claimant can only muster one—i.e., "SCDC needed to return the Aruba equipment as it was *essentially* not compatible with its pre-existing equipment, given changes to the products switch models and management platforms over the years." (Claim. Br. ¶ F) (emphasis added). Claimant's Brief does not explain *how* the Equipment purchased is not compatible.

Claimant's affidavits accompanying its brief suffer from similar vagueness. Ms. Sprang avers, merely, "there was a lack of consistency between the product line's

models." (Sprang Aff. ¶ 5.)[14] And Mr. Sebree admits there was *nothing* wrong with Claimant's order. He averred, "I'm not sure I can say anything is wrong with the Aruba-CX series switch as switches exactly." (Sebree Aff. ¶ 2.)

Here's what Claimant's filings do *not* address or plead:

- That Claimant was rushed to procure the Equipment—to meet a deadline to spend a "COVID grant;"
- That Claimant issued the Bill of Materials and the Purchase Order, and that CAD merely complied with the Purchase Order;
- That there was no nonconformity with respect to CAD's performance;
- That Claimant knew or should have known there was an alleged lack of consistency *before* issuing the Purchase Order because it has been using the exact same equipment since 2022;
- That Claimant has never taken CAD up on its offer for professional services—that are required by the Solicitation—to assist Claimant with the unspecific "essentially" incompatibility; and
- That Claimant will return or sell the Equipment in the event the CPO issues judgment.

As discussed below, Claimant's failure on this score is fatal.

4. FOIA Request

On December 24, 2024, CAD served Claimant with a request for public records under the Freedom of Information Act and S.C. Code Ann. § 30-4-30 (*FOIA Request*). Claimant served its response on March 3, 2025 along with responsive public records (*FOIA Response*). (*See, generally,* Min. Aff. ¶ 9.) The content of some responsive documents is at odds with Claimant's pleading. Contrary to the argument that the plain

[14] Ms. Sprang's affidavit is cited throughout as "Sprang Aff. ¶ [x]." And Mr. Sebree's affidavit is cited throughout as "Sebree Aff. ¶ [x]."

language of the Solicitation allows for returns (Claim. Br. ¶ F), in an email dated August 6, 2024, Stephen Taylor states there is "ambiguity surrounding the language regarding to [sic] the return policy and restocking fee subsection . . . ." (Rec. 151). Mr. Taylor represents himself as 'Procurement Manager II' for SFAA. (*Id.*) Claimant can't have it both ways.

Additionally, it was discovered that Claimant purchased the Equipment on a "COVID grant." (Rec. 156-7.) This is consistent with Mr. Daniel informing CAD, during the July 10, 2024 telephone call, that there would need to be a quick turnaround on resolving the return—because Claimant used grant funding to purchase the Equipment from CAD, and the money needed to be spent by July 31, 2024. (Rec. 169, Verr. Aff. ¶¶ 10-13; Rec. 100 (call notes).) Given it is undisputed that Claimant purchased equipment it had experience with on its network (*e.g.*, Sebree Aff. § 5), given Claimant was time pressured to spend the COVID grant money, and given the inexplicable attempt to return the Equipment days after it was delivered – one could infer Claimant ordered the Equipment from CAD *intending to return it*.

Further, there is no dispute CAD complied with the Purchase Order. On July 25, 2024, Mr. Daniel sent an email stating: "I've inventoried and have accounted for all 531 pieces of equipment for [the Purchase Order]. All equipment serial numbers match . . . ." (Rec. 152.) Ms. Allen concurred. (Rec. 163, Allen Aff. ¶ 17.)

H. FACTS SUBSEQUENT TO COMPLAINT

Claimant may be retaliating against CAD following the instant transaction. Since November 2016, Claimant has maintained an annual renewal with CAD for software support related to network access control. Since filing the contract controversy complaint, Claimant

renewed that support through another reseller who did not have price protection from the OEM, as CAD did. (Rec. 175, Jabb. Aff. ¶ 19.)

STANDARD

The instant case is a contract controversy submitted for CPO review pursuant to the South Carolina Consolidated Procurement Code, S.C. Code Ann. §§ 11-35-10, *et seq.* (the *Code*), and, specifically, S.C. Code Ann. § 11-35-4230 [Authority to resolve contract and breach of contract controversies.]. The purpose of the Code is to ensure "fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement" and "to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules . . . . " S.C. Code Ann. § 11-35-20.

Claimant bears the burden of proof. *See Unisys Corporation v. South Carolina Budget and Control Board, Et Al.*, Opinion No. 25342, 2001 WL 34058928, at *7 (S.C. Procure. Rev. Panel 2001) ("The complaining party presents its case first and bears the burden of proof.")

The CPO must issue an opinion—that states the reasons for the action taken—within ten days of completion of its administrative review. S.C. Code Ann. § 11-35-4230(4). And it "may award such relief as is necessary to resolve the controversy *as allowed by the terms of the contract or by applicable law*." S.C. Code Ann. § 11-35-4320 (emphasis added).

ANALYSIS

The CPO should deny Claimant any relief as there is no controversy. CAD complied with the parties' agreement for the following reasons. First, the agreement is unambiguous and does not permit returns. Second and alternatively, the agreement is unambiguous and does not require returns in these "buyer's remorse" circumstances where Claimant failed to identify a nonconformity. Third and alternatively, if the agreement is ambiguous, extrinsic evidence shows the parties' agreement did not require returns. Fourth, even if the CPO disagrees, Claimant is not entitled to damages because it refused to allow CAD to attempt to cure any (wrongfully) alleged nonconformity or warranty claim. And finally and alternatively, Claimant has no damages, and its measure of damages constitutes double recovery.

I. CLAIMANT COMPLIED WITH THE PARTIES' AGREEMENT BECAUSE IT UNAMBIGUOUSLY DOES *NOT* PERMIT RETURNS.

Claimant argues the agreement between the parties comprises the Solicitation, exclusively, and that the Solicitation permits returns. (Claim. Br. ¶ D.) Yet Claimant failed to direct the CPO to *any* language in the Solicitation requiring CAD to accept a return. That's because the Solicitation unambiguously does *not* permit returns. This construction is supported by 1) the plain meaning of the Solicitation, 2) absurd results from a contrary construction of the Solicitation, and 3) the language of the Purchase Order and Final Quote. For these reasons, the CPO should summarily dismiss the Complaint as a matter of law and without a hearing.

A. PLAIN MEANING OF THE SOLICITATION

The CPO's primarily consideration in resolving the alleged controversy before it is "ascertain[ing] and giv[ing] effect to the intention of the parties." *Wallace v. Day*, 390 S.C. 69, 74 (S.C. Ct. App. 2010) (internal quotations omitted).

> To determine the intention of the parties, the court 'must first look at the language of the contract....' When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. Whether an ambiguity exists in the language of a contract is also a question of law.

Id. at 74–75.

In other words, to assess Claimant's claim, the CPO must first look at the language of the contract. If the CPO finds "the language . . . clear and unambiguous[,]" then the CPO can rule on the merits without an evidentiary hearing. *See Charlotte, C. & A.R. Co. v. Gibbes*, 23 S.C. 370, 372 (S.C. 1885) ("the only issue presented was an issue of law which must be tried by the court") (internal quotations omitted).

However, restraint is required. *See Dobyns v. S.C. Dep't of Parks, Recreation & Tourism*, 325 S.C. 97 (S.C. 1997). "A contract is interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569 (S.C. Ct. App. 2015) (internal quotations omitted). "Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity." *Gamble, Givens & Moody by Gamble v. Moise*, 288 S.C. 210, 215 (S.C. Ct. App. 1986). And the CPO cannot, as Claimant requests, "re-write or distort, under the guise of judicial construction,

the terms of an unambiguous contract." *Dobyns*, 325 S.C. at 103 (refusing to impose a "reasonableness requirement" that was no written in a commercial lease).

In the instant contract controversy, there is simply no language permitting returns. And, here, the Equipment was rightfully not returned for the following reasons, among others:

- Claimant failed to justify a return;
- HPE would not permit a return (even if Claimant had justified it) (Rec. 165, Allen Aff. ¶¶ 27-28);
- Claimant did not and cannot identify a nonconformity in CAD's performance—because it is undisputed that CAD delivered the very equipment Claimant identified on the Purchase Order (that Claimant prepared) (Rec. 152; *see also* Rec. 163, Allen Aff. ¶ 17);
- it is undisputed a return would cause significant economic harm to CAD (*See* Rec. 106, in which Claimant's affiant, Ms. Sprang, states, "This is a large purchase and for CAD, that makes the return painful.").

And despite Claimant's claims, neither the Restocking Fee Section nor Claimant's response to vendor questions permit returns or change the legal analysis.

<u>*Restocking Fee Section.*</u> The Restocking Fee Section provides, "[i]f a product is returned . . . *then*[,]" the Contractor may or may not charge a restocking fee. (Rec. 22) (emphasis added). That's it. The language does *not* state or even imply that returns are permitted or state that the Contractor "shall" accept returns. To the contrary, it dictates what the Contractor can elect to do *in the event* "a product is returned." Moreover, Claimant states it did "not accept" the Equipment. (Claim. Br. ¶ 12.) This is an admission that Claimant cannot avail itself of the Restocking Fee Section. That is because a condition precedent of the Restocking Fee Section is returning the goods "after Acceptance[.]" (Rec.

22.) *See Alexander's Land Co., L.L.C. v. M & M & K Corp.*, 390 S.C. 582, 596 (S.C. 2010) ("A condition precedent is an act which must occur before performance by the other party is due."). In any event, Claimant accepted the Equipment because 1) it paid for the Equipment, *Cf.* S.C. Code Ann. § 36-2-512 (payment is not acceptance for contracts requiring payment before inspection, which is not the case here), and 2) it didn't rightfully or otherwise reject the Equipment, *see* S.C. Code Ann. § 36-2-606(1)(b). A detailed discussion of Claimant's failure to reject the Equipment is provided *infra* section **II.

Vendor Questions. Claimant claims its response to a vendor question—i.e., its response to '14. Vendor Question' (Rec. 50)—"plainly contemplates these items could be returned to Seller, CAD at anytime[]" (Claim. Br. ¶ B). This is wrong. To the contrary, the Solicitation states that vendor questions are *not* relevant to the CPO's analysis and are expressly excluded from the parties' agreement. *To wit*:

> **THE 'STATE'S RESPONSE' SHOULD BE READ WITHOUT REFERENCE TO THE QUESTIONS.** THE QUESTIONS ARE INCLUDED SOLELY TO PROVIDE A CROSS-REFERENCE TO THE POTENTIAL OFFEROR THAT SUBMITTED THE QUESTION. **QUESTIONS DO NOT FORM A PART OF THE CONTRACT; THE 'STATE'S RESPONSE' DOES.**

(Rec. 49.) (emphasis in original and added).

Given this edict, the only portion that might be relevant to the analysis is the state's response – i.e., "Change. Contractor must adhere to Section III. Subsection I. Subparagraph "Restocking Fee" guidelines." (Rec. 50.) But that language merely

shortens the time period within which the Contractor can assess a restocking fee. This just affirms CAD's read that the Restocking Fee Section does not permit returns.

Claimant's argument that the parties' agreement requires returns is wrong because the plain language of the Solicitation does not permit returns. And this read is consistent with Ms. Cohen's statement that there is no particular provision in the Solicitation permitting returns. (Rec. 164, Allen Aff. ¶ 21-22; Rec. 104 (call notes).)

B. ABSURD RESULTS

Additionally, a construction of the Solicitation that requires returns – as requested by Claimant – creates absurd results. This requires the CPO to find against Claimant.

The South Carolina Supreme Court requires that "[a]ll contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results." *Bruce v. Blalock*, 241 S.C. 155, 161 (S.C. 1962); *Charleston & W. C. Ry. Co. v. Joyce*, 231 S.C. 493, 506 (S.C. 1957) (upholding the trial court's construction of a contract because "it would have been an absurdity" to hold differently).

> Common sense and good faith are the leading touchstones of the inquiry. Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. An interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided.

Farr v. Duke Power Co., 265 S.C. 356, 362 (S.C. 1975).

Contrary to this authority, if the CPO read-in a return provision into the Solicitation, it would mean that a state agency could return purchased goods *for any*

reason . . . at any time . . . notwithstanding the condition or age of the goods. This argument is *not* a Hail Mary. It's Claimant's actual position in the proceeding. (Claim. Br. ¶ B, "items could be returned to the Seller, CAD at anytime[;]" ¶ F, the Solicitation "allow[s] for returns of the products from the contract for any reason[.]") Nonetheless, it would be a clear "absurdity" to allow Claimant (or any other state agency), for example, to use the Equipment (or other purchased goods) for ten years—likely beyond its useful life—and then allow a return to the seller. *Joyce*, 231 S.C. at 506. This incorrect read does not coexist with "a sensible and reasonable construction" of the Solicitation. *Blalock*, 241 S.C. at 161.

C. THE PURCHASE ORDER AND FINAL QUOTE

Finally, the parties' agreement unambiguously does not require returns because the Purchase Order is integrated into the Solicitation, and the Purchase Order expressly refers to the Final Quote, which expressly prohibits returns.

The Solicitation states, "Any contract resulting from this solicitation shall consist of . . . purchase orders[,]" among other things. (Rec. 29.) This is undisputed. (Claim. Br. ¶ D.) Thus, the Purchase Order is integrated into the parties' agreement. In turn, the Purchase Order expressly references the Final Quote, *see* **'Figure 3: PO Excerpt,' which contains the same prohibition on returns as provided in **'Figure 2: Quote Excerpt.' Thus, the Final Quote's prohibition on returns is integrated into the parties' agreement. And this is consistent with CAD's policy and belief:

> It is CAD's policy to not accept returns on hardware and software sold by CAD. This was the policy when CAD signed and responded to the Solicitation and during all material times related to the facts and circumstances giving rise to the instant dispute with Claimant.
>
> . . .

> At the time of signing the Solicitation and when subsequently dealing with Claimant, [CAD had] no belief or expectation that the Solicitation, nor the parties' agreement, permitted returns of equipment . . . .

(Rec. 161-2, Allen Aff. ¶¶ 5, 12; Rec. 173-5, Jabb. Aff. ¶¶ 10, 16.) (

* * *

In sum, Claimant alleged that the Solicitation is controlling, but it fails, entirely, to produce language permitting returns. And the CPO cannot write a return provision into the parties' agreement. *Dobyns*, 325 S.C. at 103. This is fatal. *See In Re: Appeal By Miracle Hill Ministries*, 2015 WL 1692038, at *1 (S.C. Procure. Rev. Panel 2015) (noting the CPO denied contract claims because the complainant "failed to identify any contract obligation the State has failed to honor"). Thus, the CPO should summarily dismiss the Complaint—without a hearing—under authority of *Gibbes*, 23 S.C. at 372.

II. ALTERNATIVELY, CLAIMANT COMPLIED WITH THE PARTIES' AGREEMENT BECAUSE IT UNAMBIGUOUSLY DOES *NOT* REQUIRE RETURNS IN THESE CIRCUMSTANCES WHERE THERE IS NO NONCONFORMITY.

Even if the CPO determined that the Solicitation permits returns, then such a finding does *not* require a return in these circumstances—i.e., a buyer's remorse "order in error" (Rec. 164-5, Allen Aff. ¶¶ 24-26; Rec. 113 (call notes))—where Claimant has not identified a nonconformity and, because of this, never attempted to avail itself of the Solicitation's warranty and "Standard Support" obligations.

A. SOLICITATION IN CONTEXT

A contextual read of the Solicitation supports this construction, and this context is relevant to the CPO's analysis of whether the Solicitation is ambiguous. *See Farr v. Duke*

Power Co., 265 S.C. 356, 362 (S.C. 1975) (finding "no ambiguity in the contract," in part, because "[w]hether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract."); *see also McGill v. Moore*, 381 S.C. 179, 185 (S.C. 2009) ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.").

Here, the Solicitation requires the Contractor to provide the manufacturer's standard written warranty and to warrant that the manufacturer will honor the warranty. (Rec. 21-22.) Additionally, the Solicitation requires the Contractor to provide "certified technicians to perform all networking installation, maintenance, support, and other services offered" and "standard contract support services." (Rec. 20-21.) The latter includes "full time sales, repair, and warranty staff and twenty-four-hour Help Desk Services" and requires the Contractor to identify "HPE authorized repair centers and HPE authorized warranty centers . . . that could be utilized in support of the execution of this contract." (*Id.*) Finally, the Solicitation identifies "approved categories" of "Contractor-provided Professional Services related to an in-scope Network Product" to include "integration" of these network products. (*Id.* ("integration services").)

There is no reason to include this language in the Solicitation if the state agency can return goods "for any reason . . . at any time" as Claimant suggests. (Claim. Br. ¶¶ B, F.) This language indicates, at bottom, that a return must result from a nonconformity—e.g., a noncompliance with the state agency's purchase order such as delivering the wrong equipment or delivering damaged or inoperable equipment. In

other words, under *Farr* and *McGill*, this language means the parties' agreement is *not* ambiguous and does *not* require returns under the circumstances presented here.

Moreover, one of Claimant's legally and factually insufficient complaints relative to interoperability of the Equipment (Claim. Br. ¶ F ("*essentially* not compatible with its pre-existing equipment") is expressly rejected by this contextual read of the Solicitation. In response to vendor questions, Claimant amended the Solicitation (Rec. 49-50) to expressly include Aruba Central's:

> cloud-managed networking solution that provides a single point of control to oversee every aspect of network switches and access points across the environment allowing UGUs to more easily manage their environments and quickly troubleshoot network issues . . . .

(Rec. 20). It is confounding Claimant would amend the Solicitation to include this language, and then complain it doesn't like, want, or can't use the Equipment's interoperability features like Aruba Central. Even though it is undisputed that Claimant has bought nearly $2,000,000 worth of HPE networking equipment from CAD and has also bought these very Aruba CX switches from CAD since 2021. (Rec. 161-2, Allen Aff. ¶¶ 7-9.) This is classic "buyer's remorse" with no legal recourse under the parties' agreement or South Carolina law. Moreover, Claimant had weeks between its initial request for a quote and its issuance of the Purchase Order to back out. Instead, during that time, Claimant was pleased with Aruba products.

B. UCC

CAD's contextual read of the Solicitation is supported by the Uniform Commercial Code—Sales, S.C. Code Ann. § 36-2-101, *et seq.* (UCC). UCC provides for "Buyer's rights

on improper delivery" and states, "if the goods or the tender of delivery fail in any respect *to conform* to the contract, the buyer may (a) reject the whole; or (b) accept the whole; (c) accept any commercial unit or units and reject the rest." S.C. Code Ann. § 36-2-601 (emphasis added). The South Carolina Supreme instructed that "[a] buyer's first recourse is to reject *the non-conforming goods*." *Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 170 (S.C. 2005) (emphasis added) (citing S.C. Code Ann. § 36-2-601). In other words, UCC does not have a "buyer's remorse" provision and does not provide recourse *without a nonconformity*.

In the instant case, Claimant has not identified—much less pled—a nonconformity. It cannot because Claimant issued the Purchase Order, and it is undisputed that CAD complied with the Purchase Order. Mr. Daniel confirmed in his July 25, 2024 email that he "inventoried and . . . accounted for all 531 pieces of equipment for [the Purchase Order] []" and that, "All equipment serial numbers match . . . . " (Rec. 152; *see also* Rec. 163, Allen Aff. ¶ 17.)

Nor has Claimant offered any other reason that is supported by the parties' agreement. While Claimant fumbled ten shifting explanations for a return, CAD repeatedly attempted to offer "Standard Support" under the Solicitation. (*Supra* **'§ 1(a)(i)5).') The company offered technical assistance to Claimant via email on July 11, 2024, July 12, 2024, July 15, 2024, and "at no expense" on July 17, 2024 and August 1, 2024. (*Id.*) Claimant rebuffed CAD every time (*id.*) and *still*—to this day—cannot identify a nonconformity or other legally or factually sufficient reason for a return.

Claimant's Brief states, "the Aruba equipment . . . was *essentially* not compatible with its pre-existing equipment." (Claim. Br. ¶ F) (emphasis added). And Mr. Sabree avers:

> **I'm not sure that I can say anything is wrong with the Aruba-CX series switch as switches exactly**." . . . The issue I have for [Claimant] continuing down the HP/Aruba path is the history of changes to both the switch models and the management platforms every couple of years.

(Sabree Aff. ¶¶ 2, 4.) **These are *not* nonconformities. They are vague and unsupported non-issues that that Claimant knew or should have known existed *before* it used a "COVID grant" to pay for and cause CAD to deliver the Equipment.** It is undisputed that the Equipment is the same that Claimant previously purchased from CAD. (*E.g.*, Rec. 162-3, Allen. Aff. ¶¶ 13-14 (CAD purchased $977,000 worth of Aruba switches); (Rec. 168, Verr. Aff. ¶ 5 (Claimant is looking to fill ". . . that same order we did back in January for those 6100 switches. . . . It's the exact same items, as I said, back from January.").) And these apparent problems (if any) could be resolved by use of Aruba Central, which is expressly contemplated by the Solicitation (Rec. 20), and which CAD offered support on (*supra* **'§ 1(a)(i)5).')

* * *

In sum, the Solicitation gives context to the parties' intent with respect to returns, and it shows returns are not required unless there is a nonconformity, which Claimant has not and cannot demonstrate. This is consistent with UCC and fatal. *See Wilson v. Style Crest Prods., Inc.*, 367 S.C. 653, 658 (S.C. 2006) (affirming summary judgment on warranty and concealment claims because "the [plaintiff] Homeowners need to show that

the product delivered was not, in fact, what was promised and they have not shown that[;]" instead, "the defective products the plaintiffs had purchased had performed satisfactorily . . . . "). The CPO should summarily dismiss the Complaint—without a hearing under *Gibbes*.

III. ALTERNATIVELY, IF THE AGREEMENT IS AMBIGUOUS, EXTRINSIC EVIDENCE SHOWS THE PARTIES DID NOT INTEND TO REQUIRE RETURNS.

The parties do not dispute that their agreement is unambiguous. (Claim. Br. ¶ B.) The CPO should agree with that conclusion and find for CAD based on the previous arguments. However, if the CPO believes the parties' agreement is ambiguous, it should look to extrinsic evidence to resolve the ambiguity. Here, this evidence demonstrates returns are not permitted.

"Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554 (S.C. Ct. App. 2015) (internal citation omitted); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318 (S.C. Ct. App. 1988) (internal citations omitted) ("parol evidence may be admitted in order to supply a deficiency in the language of the contract and to establish the true intent and meaning of the parties.").

However, again, restraint is cautioned. Parol evidence "cannot be inconsistent with and contradictory of the writing [and it] cannot be admitted to add another term . . . even though the writing is silent as to the particular term[.]" *Id.* (internal citations omitted).

In the instant case, if there is any doubt that the parties' agreement did not permit returns, it is resolved by the prohibition on returns described in **'Figure 2: Quote Excerpt.' This language was present in the May 23, 2024 quote, the May 28, 2024 quote, the Final Quote, and the Invoice. (Rec. 99, 127, 134, 142.) At no time did Claimant inquire about or object to this language. To the contrary, in a June 4, 2024 email, Mr. Daniel agreed to this term, replying that the Final Quote was "good." (Rec. 73.) Mr. Daniel's email is conclusive that Claimant agreed to the prohibition on returns in writing prior to issuance of the Purchase Order, which is undisputedly a part of the parties' agreement, and prior to Claimant shipping the Equipment.

IV. ALTERNATIVELY, CLAIMANT IS NOT ENTITLED TO DAMAGES BECAUSE IT REFUSED TO ALLOW CAD TO CURE.

Claimant is barred from a damage award in the instant contract controversy because Claimant prohibited CAD from curing any alleged nonconformity in CAD's performance or warranty claim.

UCC and the parties' agreement required Claimant to allow CAD an opportunity to cure a nonconformity. As to UCC, it requires that a seller be provided an opportunity to "make a conforming delivery"—in other words, to cure—when the buyer rejects a "nonconforming" delivery and the time for seller's performance has not expired. *See* S.C. Code Ann. § 36-2-508; *see also Cannon v. Pulliam Motor Co.*, 230 S.C. 131, 138 (S.C. 1956) (holding it was a question of fact for the jury regarding whether a car buyer unreasonably refused to permit the seller to disassemble the engine).

UCC is consistent with the parties' agreement in this contract controversy. The Solicitation also required Claimant to give CAD an opportunity to cure a nonconformity. (*See supra* **§ II (discussing that the Solicitation requires CAD to provide "certified technicians to perform all networking installation, maintenance, support, and other services offered" and "standard contract support services[]" comprising "full time sales, repair, and warranty staff and twenty-four-hour Help Desk Services")).

As applied here, even if there was a nonconformity in CAD's performance (there wasn't), Claimant did not allow CAD to cure. CAD repeatedly attempted to offer "Standard Support" under the Solicitation in the form of technical assistance via email on July 11, 2024, July 12, 2024, July 15, 2024, and "at no expense" on July 17, 2024 and August 1, 2024. (Rec. 101, 103, 105, 107, 114.) Yet Claimant rebuffed CAD every time (*supra* **'§ 1(a)(i)5)'), and, thus, cannot now seek contract damages based on its own failures to comply with UCC and the Solicitation. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652 (S.C. Ct. App. 2015) (internal citations omitted) (discussing elements of breach of contract but noting "one who seeks to recover damages for breach of a contract *must demonstrate that he has performed his part of the contract*, or at least that he was, at the appropriate time, able, ready, and willing to perform it) (emphasis added); *see also I-XL E. Furniture Co. v. Holly Hill Lumber Co.*, 251 F.2d 228 (4th Cir. 1958) (holding a *seller was entitled to damages*, in part, *because it "was prevented from making up the shortages and replacing the defective materials by [buyer's] arbitrary cancellation of the contracts*") (emphasis added).

Claimant elected damages in this case (Claim. Br. § 'Conclusion') and is stuck with that election. *See Brown v. Felkel*, 320 S.C. 292, 294 (S.C. Ct. App. 1995) ("The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication."). But Claimant is not entitled to damages for its refusal to allow CAD to cure.

V. ALTERNATIVELY, CLAIMANT HAS NO DAMAGES, AND ITS INCORRECT CALCULATION OF DAMAGES IS PROHIBITED DOUBLE RECOVERY.

Claimant greedily requests the CPO issue a judgment for the full amount of the Invoice and makes no mention of what it will do with the near-million dollars' worth of Equipment it retains. In this case, the value of the Invoice is an incorrect measure of damages and amounts to prohibited double recovery. The correct measure shows Claimant has no damages.

A. DOUBLE RECOVERY

Claimant asks the CPO for a judgment exceeding $900,000 with no commensurate promise to satisfy the judgment by selling the Equipment or returning the equipment to Claimant. (Claim. Br. § Conclusion.) This is not permissible under South Carolina law as it would unjustly enrich Claimant by the value of the Equipment—i.e., $900,000. *See Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Devs.*, LLC, 420 S.C. 424, 437 (S.C. Ct. App. 2017) (internal quotations omitted) ("it is almost universally held that there can be only one satisfaction for an injury or wrong"); *see also Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 135 (S.C. 2021) (S.C. Code

Ann. § 15-38-20 [Right of contribution.] applies to setoff under contract."). It also means Claimant failed to mitigate its damages by failing to offer the Equipment for sale and seeking the difference in damages. *See Rathborne, Hair & Ridgway Co. v. Williams*, 59 F. Supp. 1, 4 (E.D. S.C. 1945).

B. NO DAMAGES

With no nonconformity in CAD's performance under the parties' agreement, the only cognizable claim that can be alleged by Claimant is a breach of warranty claim. But the measure of damages for a breach of warranty claim is not the contract price. Instead, it "is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." S.C. Code Ann. § 36-2-714. In other words, if a good is repairable, the value of a breach of warranty claim is the expense to bring the goods into the warranted conditioned. Moreover, "[t]he absence of proof of one of these values normally bars recovery and warrants the granting of a new trial." *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89–90 (S.C. Ct. App. 2005).

As applied here, there's no nonconformity and no warranty claim because it is undisputed that CAD delivered the Equipment in working condition consistent with the requirements of the Purchase Order. (Rec. 152; *see also* Rec. 163; Allen Aff. ¶ 17.) In any event, pursuant to the foregoing, Claimant's has no damages and, therefore, cannot meet an element of its proof.

CONCLUSION

For the foregoing reasons, the CPO should refuse to grant Claimant any relief in this proceeding.

REQUEST FOR HEARING

CAD argues the CPO can resolve this case on its merits without a hearing. However, CAD requests a hearing, if the CPO determines a hearing will assist the CPO to more fully develop the facts and applicable legal analysis.

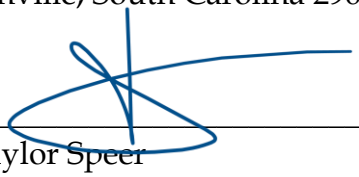
Respectfully submitted,

March 14, 2025

Greenville, South Carolina

FOX ROTHSCHILD LLP

2 West Washington Street
Greenville, South Carolina 29607



R. Taylor Speer
South Carolina Bar Number 100455
864-751-7665
tspeer@foxrothschild.com

Attorneys for Respondent Carolina Advanced Digital, Inc.

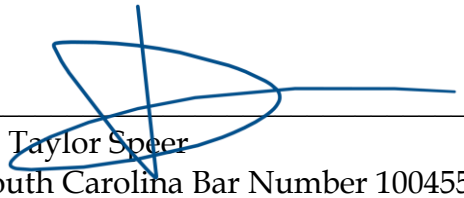
CERTIFICATE OF SERVICE

I certify that, on March 14, 2025, a true and correct copy of the foregoing was served via electronic mail as follows and by FTP at the following link [https://files.foxrothschild.com/w/f-09d9cbf4-de3d-4015-9c44-f35625f9e3db]:

SFAA, The Division of Procurement Services
John St. C. White, MMO
jswhite@mmo.sc.gov,

Michael C. Tanner
michaelctannerllc@bellsouth.net

Manton Grier
mgrier@ogc.sc.gov.



R. Taylor Speer
South Carolina Bar Number 100455

169005967.15

CPO Exhibit C

STATE OF SOUTH CAROLINA
SFAA, DIV. OF PROCUREMENT SERVICES
1201 MAIN STREET, SUITE 600
COLUMBIA SC 29201

Intent to Award
Posting Date: July 06, 2023

Solicitation: **5400023232**
Description: **HPE NETWORKING PRODUCTS & SERVICES**
Agency: **Statewide Term Contract**

The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective **July 18, 2023.** Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

If you are aggrieved in connection with the award of the contract, you may be entitled to protest, but only as provided in Section 11-35-4210. To protest an award, you must (i) submit notice of your intent to protest within seven business days of the date the award notice is posted, and (ii) submit your actual protest within fifteen days of the date the award notice is posted. Days are calculated as provided in Section 11-35-310(13). Both protests and notices of intent to protest must be in writing and must be received by the appropriate Chief Procurement Officer within the time provided. See clause entitled "Protest-CPO". The grounds of the protest and the relief requested must be set forth with enough particularity to give notice of the issues to be decided.

PROTEST - CPO ADDRESS - ITMO: Any protest must be addressed to the Chief Procurement Officer, Information Technology Management Office, and submitted in writing
(a) by email to protest-itmo@itmo.sc.gov , or
(b) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Contract Number: 4400032370
Awarded To: CAROLINA ADVANCED DIGITAL INC (7000049733)
1010 HIGH HOUSE ROAD SUITE 300
CARY NC 27513

Total Potential Value: $ 7,000,000.00
Maximum Contract Period: July 18, 2023 through June 30, 2027

Note: As an indefinite delivery, indefinite quantity contract the total potential value is an estimated amount and may be adjusted as needed. This award statement does not guarantee the Contractor will receive any amount of work under this contract.

Product Category	Minimum Discount
HPE Network Products	35%
HPE Network Services	20%
HPE Network L1 Volume Discount	2%
HPE Networking L2 Volume Discount	3%
HPE Networking L3 Volume Discount	4%

Position Type (Contractor Provided Professional Services)	Maximum Hourly Rate
General Technician Hourly Rate	$150.00
Senior Technician/Engineer Hourly Rate	$225.00

Procurement Officer
ALICIA PEARSON

CPO Exhibit D

STATE OF SOUTH CAROLINA	)	BEFORE THE CHIEF PROCUREMENT OFFICER
State Fiscal Accountability Authority	)	
South Carolina Department of Corrections, Claimant,	)	Solicitation Number 5400023232
v.	)	**AFFIDAVIT OF**
Carolina Advanced Digital, Inc. Respondent.	)	**Chad Sebree**

PERSONALLY, appeared me before me, Chad Sebree, who being duly sworn, states as follows:

1. I am the Senior Network Engineer for SCDC. This affidavit addresses issues the agency has with Aruba switches.

2. I'm not sure that I can say anything is wrong with the Aruba-CX series switch as switches exactly. We've overcome a few challenges and still have a few to work through. I can say there is a higher learning curve and some different features sets than what we are used to. We currently don't have very many of these in the field.

3. I could sum up some of the bigger issues by saying that there hasn't been a consistency in the HP/Aruba product lines model to model, in the local management of the hardware, in the centralized management of the hardware, and in the recommendations from the vendors and HP/Aruba for the products.

4. The issue I have for SCDC continuing down the HP/Aruba path is the history of changes to both the switch models and the management platforms every couple of years. It makes the management and interoperability of the hardware more challenging than it should be. I'm mostly referring to completely different operating systems and methods of configuring the switches as well as completely different centralized management platforms recommended by the vendors

and HP/Aruba every few years. HP has recently purchased Juniper Networks as well so I would not be surprised if a complete change up is around the corner again.

5. A little background on the different switch models and management platforms:

- HP 1810 series:

  Quite a few of these in the field.

  No CLI or console interface.

  Web-Gui management only. Kind of clunky.

  No SNMP write. Read only.

  No way for centralized management.

  Doesn't work with our FortiNAC/Bradford NAC solution. We were originally told by the vendor that these switches would work with the NAC and we based the purchase of the NAC on that.

  Not a fan of the 1810.

  End of Life

- HP 1900 Series:

  Very few of these in the field.

  Very clunky CLI.

  Very clunky Web-Gui.

  No centralized management.

  Not a fan of the 1900.

  End of Life.

- HP Aruba 2530/2540 series:

  Quite a few of these in the field.

ArubaOS-Switch (aka Aruba OS-S or AOS-S).

Decent CLI interface.

Web-Gui management available.

AirWave centralized management.

Grew to be comfortable with and like these ok.

End of Life

- Aruba-CX Series (6100,6300 etc...)

  Very few of these in the field.

  ArubaOS-CX (aka AOS-CX).

  CLI management.

  Web-Gui management.

  Aruba Central Cloud management.

  Very different OS and feature set than previous series (2530/2540 AOS-S).

  Not a lot of experience with these yet but have had some issues.

6. SCDC had previously been using the AOS-S switches (2530/2540 series). These switches were previously part of the HP Procurve line that they started re-branding as Aruba after HP purchased Aruba in May of 2015. I believe we had been purchasing these for a little while before HP bought Aruba. After having these for a while and seeking a centralized management platform, the vendor recommended HP IMC. It would allow some management of the AOS-S switches and ping for up/down checks of the older 1810 switches. We tried that for a bit and were looking to purchase something when the vendor told us that they now recommend Aruba AirWave for the centralized management. AirWave works with 2530/2540 switches much better than IMC did and still allows pings to the older 1810s. When ready to purchase AirWave they tell us that the new centralized management recommendation was Aruba Central which is cloud

based. They said Aruba Central would be the way forward with the Aruba-CX series but at that time they said it wouldn't work with our existing AOS-S (2530/2540) switches or the 1810 switches. At that time we only had two AOS-CX switches on the network at the purchasing building and no plans to order more so we choose to move forward with AirWave since it would handle 99% of the existing network. I do believe that the AOS-S switches will work with Aruba Central cloud now with licensing.

7. The above I believe was in about a 2-3 year period (not certain of the timeline). They recommended 3 different hp products to manage our hp switches each time indicating the last thing they recommended wasn't the way to go anymore. That just didn't leave me with much confidence.

8. There doesn't seem to be much future planning in the product lines. I don't know if it's because of acquisitions or what but it makes it hard to deal with as a customer trying to do our best for our customers /end-users. Granted, a lot of our hardware is old, and I don't expect everything to remain the same. Innovation will happen and is good, but it would be nice to have some backwards compatibility in management platforms or updates supplied to older hardware to allow integrations with newer management consoles. I do understand why some of that can't happen, but some of it certainly can if the decision makers allow.

Chad Sebree
SCDC Senior Network Engineer

Sworn to before me on this 25th
day of February, 2025

Notary Public for South Carolina

Kensey Evans
Printed Name of Notary

My Commission Expires: 5/26/2030