STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ABILITIES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2053
	)	
DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATIVE SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on November 22-23, 2004, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: E.A. "Seth" Mills, Jr., Esquire
Quinn Henderson, Esquire
Mills, Paskert, Divers, P.A.
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Tampa, Florida 33602

For Respondent: Lee Ann Gustafson, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner is owed $545,124.00 after Respondent required Petitioner to return that amount originally paid under two separate contracts.

PRELIMINARY STATEMENT

This case arises from two contracts between Petitioner Abilities of Florida, Inc. (Abilities), and Respondent Department of Education, Division of Vocational Rehabilitative Services (VRS), which agency also represents the now disbanded Occupational Access and Opportunity Commission (OAOC). The contracts were part of a series of demonstration projects created to privatize the delivery of core vocational rehabilitation services to disabled citizens in selected regions of Florida.

On December 18, 2003, the Department of Financial Services (DFS) made a formal, written demand upon Abilities to return $545,124.00, which Respondent had paid Abilities under the two contracts. Abilities returned the $545,124.00 on January 12, 2004, and in May 2004, Abilities filed its Petition to determine whether Abilities should receive back the refunded monies.

The matter was referred to the Division of Administrative Hearings on May 24, 2004.

Prior to the disputed-fact hearing, the undersigned repeatedly raised the issue of whether this was a contract

dispute over which Article V courts are granted exclusive jurisdiction. The parties consistently asserted that the original contracts and other agreements provided for a hearing before the Division, and the case proceeded to a merits hearing on November 22-23, 2004.

Petitioner, in its case-in-chief, presented the oral testimony of Carl Miller, Jr., Wayne Pierson, William Sandonato, Earnest S. Urassa, Richard A. Lee, Lauratta Adams, Janet Samuelson, and Peter Dunbar. Petitioner's Exhibits 3-12, 14-17, 21-22, 24-25, 29-30, 35-36, 44, and 47-48, were admitted in evidence as part of Petitioner's case-in-chief.

Respondent presented the oral testimony of William Sandonato, Richard Speer, Tom Vlasak, Linda Parnell, Joseph Knicely, and Peter Dunbar, and had Respondent's Exhibits 1-6 admitted in evidence.

In rebuttal, Petitioner had admitted in evidence two depositions of Respondent's representative, Joseph Knicely, as Petitioner's Exhibits 49 and 50.

At Respondent's request, and without objection by Petitioner (TR-38-39) official recognition was taken only of OMB Circulars A-87, A-110, and A-122,[1/] and Florida Comptroller's Memorandum No. 08(2001-2002), dated April 1, 2002. At Petitioner's request, official recognition was taken of

Respondent's written responses to Petitioner's interrogatories and request for admissions.

The parties' Pre-hearing Stipulation was admitted as Joint Exhibit A. It has been utilized in this Recommended Order as indicated.

A Transcript was filed on December 9, 2004. Each party timely filed a Proposed Recommended Order, which has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On April 3, 2000, OAOC contracted with Able Trust, Inc. to conduct procurement activities for privatized vocational rehabilitation services in Florida. (Stipulated Fact No. 1.)

2. OAOC, itself, was a privatized commission created by statute and subsequently repealed. The predecessor in interest of OAOC was the Florida Department of Labor, Division of Vocational Rehabilitation Services. The successor in interest of OAOC is the Florida Department of Education (FDOE), Division of Vocational Rehabilitative Services. (Stipulated Fact No. 2.)

3. At all times material, OAOC was responsible for developing policy governing vocational rehabilitative services, while VRS was responsible for administratively supporting OAOC's efforts.

4. Hereafter, unless the individual entity is indicated, the designation "VRS" will be used to mean OAOC and the Division

of Vocational Rehabilitation/Rehabilitative Services, wherever located and however named. (Stipulated Fact No. 2, amplified.)

5. At the time VRS was attempting to privatize vocational rehabilitative services, it was under scrutiny from the Rehabilitation Services Administration of the United States Department of Education (RSA).

6. Following a privatization project in Monroe County, Florida was deemed a "high risk" state by RSA.

7. Able Trust, Inc., prepared and published a request for proposals (RFP). (Stipulated Fact No. 3.)

8. According to the RFP, OAOC sought to enter into contracts with private providers for the delivery of vocational rehabilitation services in each of 24 regions of the state.

9. The RFP stated that any transition period and/or transition expenses would be negotiated separately from the award of the contract and the cost for service delivery. (Stipulated Fact No. 3.)

10. Petitioner Abilities is a private, non-profit corporation, not a state or local government, nor a federally-recognized Indian tribe.

11. Abilities submitted proposals to provide services in Regions Seven and Twenty. Florida Institute for WorkForce Innovation (FIWI) submitted a proposal for Region Nine. (Stipulated Fact No. 4.)

12. Abilities' proposals indicated that Abilities would "partner" or "team" with Lockheed Martin IMS n/k/a ACS State and Local Solutions, Inc., (ACS). (Stipulated Fact No. 5.) ACS is a private sector, for-profit corporation.

13. Abilities, with other proposers, attended a bidders' conference on or about April 24, 2000. (Stipulated Fact No. 6.)

14. At the bidders' conference, VRS stated that the time period needed for transition and any required start-up funds (hereinafter "transition expenses") would be negotiated separately from the award of the contract and the cost for service delivery. (Stipulated Fact No. 7.)

15. Proposers were instructed that transition expenses were not to be included as part of their RFP response.

16. Due to concerns raised by RSA, only three of the twenty-four regions of Florida were awarded contracts from the proposals. (Stipulated Fact No. 8.) The contracts were also re-designed to cover only one year with possible renewals for two years.

17. Two of these contracts were awarded to Abilities for Regions Seven and Twenty. A third contract was awarded to FIWI for Region Nine. (Stipulated Fact No. 9.)

18. Region Seven includes Columbia, Union, Gilchrist, and Dixie Counties. Region Twenty includes Indian River, St. Lucie, Martin, and Okeechobee Counties.

19. Funding for these contracts was provided through a federal grant from a Vocational Rehabilitation Title I, Section 110, Innovation and Expansion Program grant. (Stipulated Fact No. 10.) There was testimony that the "spread," as it were, was that the federal government put up four dollars (80%) for every dollar (20%) contributed by the State, but the contracts show that no state funds were used. Therefore, it is found that only federal funds were used for the prime contracts with Abilities.

20. OAOC was both the "designated state agency" (DSA) for receipt of federal funds and the "designated state unit" (DSU) for expenditures of federal and state funds under the State Plan for Vocational Rehabilitative Services. FDOE was never so-designated.

21. The contracts were initially intended to fund services for a twelve-month period from October 1, 2000 through September 30, 2001. (Stipulated Fact No. 11.)

22. VRS ultimately awarded fixed rate contracts to Abilities and FIWI only for the six-month period from April 1, 2001 through September 30, 2001. (Stipulated Fact No. 12, amplified.)

23. After notifying Abilities that it had been awarded the contracts for core services for Regions Seven and Twenty, OAOC delayed the contracts implementation date to April 1, 2001.

24. Award of a bid is not a guarantee that a contract will be awarded or executed with the successful proposer/bidder. Many unforecast events can intervene.[2/] Section 287.058(2), Florida Statutes, recognizes this concept, and provides, in part, that "the written agreement shall be signed by the agency head and the contractor prior to the rendering of any contractual service. . . ." Moreover, in the prime contracts finally signed between the parties, Attachment G.III.A. (page 31) states ". . . Except as may otherwise be expressly stated in this Agreement, OAOC/VRS shall not be obligated to pay any amount for expenses, services rendered, or goods provided prior to the effective date of this Agreement."

25. Although 12 months of funding had been allocated for the provision, throughout 12 months, of core vocational rehabilitative services, the delay in contract implementation meant that only six months' worth of funding would be consumed for the provision of the core vocational rehabilitative services over a time-span of six months, to begin on April 1, 2001.

26. On February 15 and 16, 2001, the parties held a meeting in Lake City, Florida, to discuss the transitional procedures and expenses in accordance with the terms of the RFP. (Stipulated Fact No. 13.)

27. As of the February 2001, meeting, the contracts had not been signed and Abilities had assumed none of the duties of

the contract. At that point, VRS employees were actually "doing the job." VRS's Bureau Chief of Field Services, Linda Parnell, was responsible for the management and supervision of state employee-VRS counselors and the program of service delivery to Florida's disabled citizens. She anticipated from the official discussions and written agreements reached in the main February 2001, meeting that once the contracts were signed, current State employees would be co-workers with the out-sourced providers for a transitional period of time and that the transitional period would start at the beginning of the contract period and continue for a minimum of one month (all of April 2001). The topics at the meeting between Bureau personnel and the successful bidders were aspects of service delivery; how the providers would receive clients from the State; how the providers would be housed in existing Division offices; and what duties the providers would assume.

28. At the same date and location, in a "side-meeting" with William Sandonato of Abilities and Dr. Bruce Waite of FIWI, Carl Miller, then-Director of VRS, offered to use the remaining six months' worth of unencumbered contract funds, which funds otherwise would not have been spent on core services, due to the shortened span of the contract, to pay the successful proposers'/providers' transition expenses. (Stipulated Fact No.

14, with additional clarifying language.) The remaining funds on Abilities' proposed contracts totaled $545,124.00.

29. William Sandonato previously had been a member of OAOC. At that time, he simultaneously had been president of Abilities. Like Mr. Sandonato, more than one-third of OAOC commissioners also were vocational rehabilitation providers. Mr. Sandonato testified that he played no part in the selection of Abilities pursuant to the RFP. The RFP was not drafted by OAOC, but by Able Trust, Inc., as an agent for OAOC. Mr. Sandonato recused himself from the RFP selection process. When Abilities had become the apparent successful bidder on the RFP, Mr. Sandonato resigned from OAOC. He later signed the VRS-Abilities contracts and two contract extensions as president of Abilities.

30. Mr. Sandonato's paid employment with Abilities ended on January 31, 2001, but he continued to represent Abilities, as its unpaid president, for an indeterminate period thereafter. Also, between January 31, 2001 and July 1, 2002, he was a paid employee of ACS, the for-profit subcontractor to Abilities for Abilities' two contracts with VRS.

31. At the February meeting, Mr. Miller was told that Abilities had hired staff, which already had been interacting with existing VRS state employees, regarding case loads during the period from July 1, 2000, to April 1, 2001.

32. Mr. Miller believed that Abilities was "working" before the contracts were even executed.

33. Mr. Miller erroneously concluded that the "transition" period under the VRS contracts with Abilities ran from July 1, 2000, the date the contracts were initially scheduled to be effective, to April 1, 2001, the actual start date of the contracts.

34. In fact, Mr. Miller did not sign the prime contracts for VRS with Mr. Sandonato, signing for Abilities, until March 29, 2001 (see infra.), and Abilities did not sign its subcontracts with ACS until May 2, 2001, with those subcontracts being retroactively effective from April 2, 2001 forward. Mr. Sandonato signed for Abilities on the subcontracts.

35. After the February 2001 meeting, Mr. Miller requested submission of proposed amounts of expected transition expenses. (Stipulated Fact No. 15.)

36. Abilities and FIWI submitted correspondence to VRS outlining the total proposed transition expenses. (Stipulated Fact No. 16.)

37. Mr. Sandonato testified that he had recognized that the sum Mr. Miller had offered, during their February 2001, meeting, for transitional expenses, would not cover the transitional expenses of Abilities/ACS, but would cover a significant portion thereof. He considered the six months'

funds amount to be a cap on what Abilities could request from VRS for transition expenses. He further testified that for that reason, Abilities just took the money amount that was available and "indicated [to VRS] that's the number we [Abilities] would like to have."

38. Further documentation of the expected transition expenses was requested by VRS from both Abilities and FIWI. (Stipulated Fact No. 17.)

39. Abilities and FIWI each submitted budgets to justify their respective projected transition expenses. (Stipulated Fact No. 18, amplified for clarity.) In Abilities' case, this amounted to exactly $545,124.00.

40. The proposed transition expenses were incorporated into the contract amounts for the fixed amount contracts for Regions Seven, Nine, and Twenty. (Stipulated Fact No. 19.)

41. Draft contracts for services were prepared by VRS staff and reviewed by various divisions, including legal, financial, and contract management. All VRS reviewers approved the final form and content of the contracts. (Stipulated Fact No. 20.)

42. VRS approved the final versions of these contracts, which were executed by VRS and Abilities. (Stipulated Fact No. 21.)

43. Abilities' contracts with VRS were numbered VH521 and VH531. (Stipulated Fact No. 22.) Mr. Miller, for VRS, executed them on March 29 and 30, 2001. Mr. Miller had both apparent and actual authority from OAOC to enter into the contracts and subsequent extensions. Mr. Sandonato signed for Abilities.

44. Abilities was acknowledged as a "vendor" of vocational rehabilitation services, as opposed to a "sub-recipient," within each of its contracts with VRS.

45. At the end of the initial contract period, VRS, FDOE, and Abilities entered into two 30-day extensions of contracts VH521 and VH531. (Stipulated Fact No. 23.) The extensions for October 2001, and November 2001, expressly incorporated the terms of the original contracts. Mr. Miller signed the contract extensions for VRS, and Mr. Sandonato signed for Abilities.

46. Abilities, and ACS through Abilities, was also paid separately for the two contract extensions at a rate of $30,626.00 per month for Region Seven and $70,485.00 per month for Region Twenty. These additional payments represented one-sixth of each contract amount, less the transition expenses.

47. ACS's subcontracts with Abilities essentially imposed the same duties upon ACS as the VRS contracts imposed upon Abilities. See infra.

48. Every dollar received by Abilities from VRS under the contracts was paid directly to ACS, under the subcontracts. It

is noted that, pursuant to Section 216.181 (16) (a) and (b), Florida Statutes, advance payments may only be paid by a state agency to other governmental agencies or to not-for-profit corporations. As a for-profit corporation, ACS could not have received advance payments directly from VRS, but nothing precluded ACS being paid by Abilities as a subcontractor, or precluded ACS from making a profit, provided all other legal requirements were met.

49. Abilities submitted monthly invoices to VRS for payment. (Stipulated Fact No. 24.) The invoices were submitted and paid at the front of the month in which the services were to be incurred, for each of the six months. Each invoice amounted to a calculated one-sixth of the total contract amount.

50. According to Mr. Sandonato, Abilities' process of billing VRS for transitional expenses was "passing everything right through, . . . one-invoice-in [from ACS to Abilities] and one-invoice-out [from Abilities to VRS]," without Abilities going behind any ACS invoice to verify how expenses were incurred or monies disbursed.

51. At hearing, Mr. Sandonato's personal knowledge of what constituted the transition expenses incurred by ACS was largely limited to the payment of his ACS salary, but he also vaguely knew something about office space and equipment either being moved or purchased.

52. VRS employees reviewed each monthly Abilities' invoice to determine if payment was proper and allowable, then forwarded the invoice, with additional supporting documentation, to DFS for processing and payment. (Stipulated Fact No. 25.)

53. Although in hindsight certain VRS and FDOE witnesses disavowed specific VRS and DOE signature and approval stamps as being affixed by themselves personally, the invoices/payment processing documents show on their face that DOE and VRS personnel affirmatively signed-off, for each Abilities' invoice, that the transactions were "in accordance with the Florida Statutes and all applicable laws and rules of the State of Florida," and that these costs "were allowable costs and in compliance with the grant budget."

54. After receiving the documents from VRS, DFS also reviewed each invoice to determine if the payments were allowable and if sufficient funds existed for payment. (Stipulated Fact No. 26.)

55. DFS approved the invoices and paid Abilities each of the invoiced amounts. (Stipulated Fact No. 27.)

56. Each invoice submitted by Abilities and each payment by VRS was in the amount set forth in contracts VH521 and VH531. (Stipulated Fact No. 28.)

57. In turn, Abilities paid the whole of the disputed transition expense funds to ACS, in the amount of $545,124.00.

Abilities did not retain any of the transition expense money itself. Abilities acted only as a "pass-through" conduit to its subcontractor.

58. Abilities relied on VRS's and DFS's approval of the invoices Abilities submitted to those agencies as constituting the agencies' determination of "reasonable and necessary expenses" and "allowable" expenses for Abilities, in turn, to pay ACS, pursuant to the subcontracts.

59. After all payments under the contracts and sub-contracts had been made, the Office of Program Policy and Government Accountability (OPPAGA) questioned VRS's methods of doing business on these contracts.

60. In 2002, the Auditor General of the State of Florida, an officer associated with the Legislature, issued a report on the federal award program for the fiscal year ending June 30, 2001. This report questioned in excess of $1,000,000 of the costs charged under the three VRS contracts assigned to Abilities and FIWI.

61. On January 24, 2002, the Inspector General of the FDOE issued Final Report No. 01-130, detailing an investigation of Abilities' contracts VH521 and VH531, as well as the contract awarded to FIWI. (Stipulated Fact No. 29.)

62. The FDOE Inspector General (IG) concluded that VRS had violated federal and state regulations by not conducting an

analysis to verify if an additional award of $545,124.00, to Abilities was reasonable or necessary, or more cost effective than services provided by the State. (Stipulated Fact No. 30.)

63. FDOE's IG also concluded that VRS' payment of the additional funds invalidated the bid process. (Stipulated Fact No. 31.) This determination rested on defining differences between "start up costs" and "ramp-up costs"; not allowing negotiation of the proposers' terms and conditions; and not resubmitting proposals for the transition expenses to OAOC.

64. VRS published a response to the DOE IG's report, objecting to the IG's findings.

65. Apparently, the overriding concern of OPAGGA, FDOE, and DFS was that VRS's failure to conduct an analysis to verify if an additional award was reasonable or necessary, or more cost-effective than services provided by state employees was "because it places the state at a substantial risk of the disallowance of all, or a portion, of the [total amount VRS paid to both Abilities and FIWI] which may have to be repaid from non-federal funds to the grantee." (See IG Report, page 5 of 16; bracketed material substituted for clarity.)

66. Regardless of the foregoing pronouncements within Florida's state government, neither the United States Department of Education, RSA, nor any other federal authority has ever disallowed any payments to VRS, to the "prime" (Abilities), or

to the "sub" (ACS), or issued any written request to FDOE or VRS for return of federal grant money in connection with any of the funds involved with these contracts.

67. The IG Report contained a series of recommendations, including but not limited to the recommendation that VRS seek an appropriate legal remedy to address the costs awarded to the vendors outside of the RFP process, i.e. the transition expenses.

68. In March 2002, FDOE assigned Joe Knicely, C. P. A., one of its educational finance specialists, to check into the perceived problem. He requested access to Abilities' records so that he could select a sample of disbursements to determine if they were allowable under the program and to determine if they seemed reasonable and necessary to the program. He received from Abilities a general ledger with many entries. This material was insufficient for him to conduct his review, because it did not contain the detailed disbursements for the Program. It only showed a transfer of funds from Abilities to ACS. He then sought out receipt and disbursement information from ACS, which ACS supplied, pursuant to the express terms of its subcontract with Abilities. Ultimately, he only got sketchy material with quite a lot of salary information on employees.

69. Mr. Knicely was able to determine that if all of ACS's records (mostly profit and loss statements) which he saw were

correct, then ACS did not expend $459,644.00 on its sub-contracts with Abilities. However, he was unable to complete an audit to determine whether ACS's records were accurate; whether the costs ACS listed on paper had actually been expended for the purposes listed; or whether the $459,644.00 figure could be accounted for as "profit".

70. Before Mr. Knicely could form any other conclusions, the FDOE IG asked him to stop his audit. He believes that this request came in July or August of 2002, but he was not certain of the date.

71. Obtaining the necessary information to commence an audit was a preliminary step to doing an audit. Because he was ordered to stand down, Mr. Knicely did not continue to request backup material from ACS or Abilities so that an audit could be performed. He also did not perform an audit within the parameters of "generally accepted accounting principles and standards," because at the time he was ordered to stop pursuing the information to conduct an audit, he did not have enough information to perform such an audit.

72. Mr. Knicely therefore formed no conclusions concerning the reasonableness, necessity, or allowability of the costs incurred by ACS in performing its subcontracts.

73. The total recorded expenses by ACS for Region Seven (contract VH531) for the period April 1, through September 2001,

which were placed in evidence at hearing, were $185,260. For Region Twenty (contract VH521), the total recorded expenses for the period April 1, through September 2001, which were placed in evidence, were $507,086.00. These amounts together total $692,346.00. Abilities had received $1,151,806.00, through its two VRS contracts for that period, which it passed through to ACS. There appears to be $459,460.00 paid by VRS to Abilities, which is unsupported by ACS's expense records in evidence. Abilities now claims this amount was a legally permissible "profit" to ACS.

74. At hearing, Mr. Knicely testified that the recorded $692,346.00 also is not backed up with other records of sufficient detail which would permit him to determine their appropriateness under the program.

75. Mr. Knicely was called off the audit when the DOE IG informed DFS of the IG's findings and the DOE IG coordinated activities with DFS to seek the return of the money from Abilities.

76. DFS also performed no audit on the situation, but assigned investigators.

77. On October 14, 2003, representatives of Abilities met with representatives of DFS, concerning the funds identified by the IG's Report. (Stipulated Fact No. 32.)

78. Peter Dunbar, attorney for Abilities October 2003-January 2004, was serving as General Counsel of DFS at the time of the disputed-fact hearing in November 2004. He did not accept the position with DFS until July 1, 2004.

79. Mr. Dunbar and Abilities' then-president, Janet Samuelson, testified credibly that they understood at the October 14, 2003, meeting with DFS personnel that if Abilities did not return all the money which VRS had paid Abilities for transition expenses, DFS would continue to investigate, not just the transition expenses, but all aspects of the two contracts in dispute; would delay other funds due on these contracts; and, possibly, would withhold funds on other VRS-Abilities contracts, pending the investigations.

80. At the October 14, 2003, meeting, Abilities' president and its legal counsel admitted no wrong-doing and disagreed with DFS's legal position that return of the funds was appropriate, required, or owed. The meeting concluded without a resolution of the dispute.

81. Abilities had received from VRS only the amount of payment authorized in the fixed price contracts, which it had already passed through to ACS.

82. At no time has Abilities or ACS ever refused the FDOE IG, VRS, or DFS access to its books or accounts, but Mr. Sandonato testified that since Abilities never verified any of

ACS's charges (one-sixth of the total amount per month for six months), there was nothing from Abilities for any reviewing authority to audit. Apparently, there are no further records to be obtained from ACS, either.

83. A demand for the return of the $545,124.00, which had been paid to Abilities as transition expenses under its two contracts, was made to Abilities in November 2003. (Stipulated Fact No. 33.)

84. Mr. Dunbar, on behalf of Abilities, and Richard E. Speer, DFS Law Enforcement Investigator II, negotiated the language in a demand letter sent by Mr. Speer on December 18, 2003, to Mr. Dunbar. That letter read, in pertinent part, as follows:

> This is to confirm that our investigation has determined that the Florida Department of Education, Division of Vocational and Rehabilitation Services has made unallowable payments in the amount of $545,124 to your client, Abilities, Inc. Said payments were inconsistent with procurement documents and with state and federal guidelines, and there was no documentation to justify the expenses as reasonable and necessary.
>
> We anticipate that the good faith evidenced by Abilities, Inc. at the October 14, 2003 meeting will result in the repayment of this sum by Abilities, Inc. This will resolve all of the remaining issues concerning the demonstration projects for region 7 and region 20.
>
> Please confirm your client's intention concerning this matter at your earliest

> convenience. If the matter cannot be successfully concluded as anticipated above by 1/12/04, it will be necessary for the State of Florida to consider the alternative action we have previously discussed.

85. The parties stipulated that Abilities returned the funds ($545,124.00) in December 2003, and the funds were ultimately delivered to VRS. (Stipulated Fact No. 34, modified.)

86. In fact, Abilities' check for $545,124.00 was sent to Mr. Speer, accompanied by a January 12, 2004, letter from Mr. Dunbar, Abilities' attorney, which stated, only:

> In accordance with your letter of December 18, 2003, enclosed is check #029022 in the amount of $545,124.00 payable to the State of Florida.
>
> I would appreciate you acknowledging receipt of the check in the signature block noted below. . . .

87. The check was dated January 9, 2004, and did not specify on its face the purpose of the payment.

88. Upon receiving the foregoing check from Abilities, DFS closed its case.

89. On January 15, 2004, Mr. Speer forwarded the check to FDOE/VRS.

90. It cannot be ascertained from this record when or how FDOE/VRS handled return to RSA of the federal grant monies. The best the undersigned can glean from the record and Mr. Knicely's

depositions is that, despite RSA making no demand or disallowance related to these contracts and subcontracts, FDOE/VRS at some point informally credited the funds back to the United States Department of Education by not "drawing down" as much as the state Agency would otherwise have been entitled to "draw down" from "the feds" from other grants or monies. This credit/debit system could have occurred before or after Abilities paid back the money to VRS via DFS.

91. Mr. Dunbar testified that at the time Abilities' check was tendered, he thought that all state agencies concerned had appreciated that Abilities was returning the money with the option to file the instant action. Mr. Speer testified that he understood that the return of the money was in exchange for the State ceasing its investigation of the transition expenses on Abilities' specific two contracts.

92. The parties stipulated that Abilities filed this administrative action pursuant to the dispute resolution provision of Contract Numbers VH521 and VH531, to contest the final agency action in demanding return of the contract payments. (Stipulated Fact No. 35. modified.) The Division's file reveals that the date of the mailed service of the Petition was February 4, 2004, and that it was filed at FDOE that day. The Petition recited that "All conditions precedent to filing this petition have occurred, been waived, or are now futile."

An Amended Petition was served by mail on May 12, 2004. FDOE referred the matter to the Division of Administrative Hearings on May 24, 2004.

93. The dispute resolution language of the contracts relied on by the parties, provides, at Attachment E, SPECIAL PROVISIONS, 3. (pages 15-16), for a series of informal and formal negotiation stages, totaling 81 days, and ends with:

> c. The action of the OAOC/VRS Director is final and binding unless one party wants to seek remedy through the Administrative hearing system.

94. There also is language at Attachment G.IV.G. (pages 34-35) of the prime contracts that provides:

> Remedies of OAOC/VRS Cumulative. In addition to all remedies available to OAOC/VRS, hereunder, in the event Provider breaches its obligation under this Agreement, OAOC/VRS shall be entitled to exercise any remedy available or provided under Florida law (all rights and remedies granted in this Agreement to OAOC/VRS available at law or equity shall be cumulative and not mutually exclusive).

95. Both prime contracts VH521 and VH531 are termed "AGREEMENTS," within themselves. Both require, at Attachment G.II.C. (pages 21-22), that the provider (Abilities) will:

> 1. . . . maintain (in accordance with generally accepted accounting procedures) and retain, during and for three (3) years after termination of this Agreement, books, records and all other documents relating to this Agreement which sufficiently and properly reflect all expenditures of funds

> provided by OAOC/VRS under this Agreement (collectively, the "Records"). If an audit has been initiated and audit findings have not been resolved at the end of such three (3) year period, provider shall retain the Records until resolution of the audit findings.
>
> * * *
>
> 6. To submit all invoices for payment for services or expenses in form acceptable to the OAOC/VRS and in detail sufficient for proper pre-audit and post-audit thereof.

96. Attachment G.II.C. 7-12 (pages 22-23) of the prime contracts specifies that some types of audits in compliance with OMB Circular A-133 may be ordered by the provider at the provider's expense and submitted by the provider, or the provider may pay the expenses of some audits if they are done by the Auditor General. Because of the limited nature of this case, and a pre-trial ruling eliminating OMB Circular A-133 as a federal requirement that Abilities may have been bound by for purposes of this case (See Preliminary Statement supra. and Endnote 1.), whatever OMB Circular A-133 required or did not require by way of audits may not be pursued here. However, the language employed at G.II. 7-12 of the prime contract is nonetheless significant, because it requires delivery of such reports and audits to OAOC/VRS by the "provider."

97. Then, at Attachment A.III 1-2 (pages 4-5) the prime contracts provide for audits and reporting packages by or on

behalf of the "recipients" to be submitted to, among others, OAOC. It also is specifically stated, at A.III.5 (page 5), that delivery is to be by the "recipients" to OAOC, as follows:

> 5. Recipients, when submitting audit reports to Occupational Access and Opportunity Commission/Vocational Rehabilitation Services for audits done in accordance with OMB Circular A-133, Florida Statutes, and Chapter 10.600, Rules of the Auditor General, should indicate the date that the audit report was delivered to the recipient in correspondence accompanying the audit report.

98. In this context, because OAOC cannot deliver an audit or report to itself, Abilities must also qualify under these contracts as both a "provider" and a "recipient," although "sub-recipient" might, to a layman, be more descriptive of the relationship. These common words, "provider," "recipient," and "sub-recipient," become "words of art" pursuant to law, and the parties disagree as to the effect of those legal definitions. (See Conclusions of Law))

99. The prime contracts between VRS and Abilities clearly provide, at Attachment D.1. (page 14), that they are "fixed rate" contracts, and neither party disputes that Abilities is both a "vendor" and a "provider" under express language throughout the contracts.

100. The parties disagree as to what is meant by the term, a "fixed rate contract". Petitioner's concept is that it means

that the vendor/provider, Abilities, shall get paid by the State, regardless of whether the work is justified by the vendor's/provider's expense itemization, provided the total amount of money fixed in the contract is never exceeded by the invoicing. VRS contends that Abilities' view is wholly inconsistent with the actions of the parties; the terms and express intent of the federal grant; the prime contracts; and the sub-contracts.

101. In fact, what constitute the instant fixed rate prime contracts in this case is specified within the terms of the contracts themselves. The AUTHORITY is found on page 1, thereof, and states:

> This contract is entered pursuant to the Rehabilitation Act of 1973 as amended [referred hereinafter as the "Act"] Florida Statutes, Chapter 413 (Part II), Public Law 93-112 as amended by Public Laws 93-516, 98-221, 99-506, 100-630-102-569,103-073, and 105, 220. Other applicable regulations include the Education Department of General Administrative Regulations (EDGAR),[3/] the State Plan and the State OAOC/VRS Program Regulations in 34 CFR Part 361.

102. See, also, Attachment G. (page 20) of the prime contract:

> II. The Provider Agrees:
>
> A. Contractual Services: To provide all the services it is obligated to provide as specified in the Agreement.
>
> B. Federal and State Laws and Regulations:

> 1. If this Agreement provides for payment, in whole or in part, with federal funds, to comply with the applicable provisions of 34 CFR, Parts 74 and 80, all applicable OMB Circulars, and other applicable regulations specified in this Agreement.
>
> * * *

103. Both contracts VH521 and VH531 provide, at Attachment E.9. (pages 17-18), for the return of overpayments by the provider, Abilities, for unearned funds,:

> 9. Return of Funds (Overpayments and interest penalty) (Provider agrees) to return to OAOC/VRS any overpayments due to unearned funds or funds disallowed pursuant to the terms of this contract that were disbursed to the provider by OAOC/VRS. In the event that the provider or its independent auditor discovers that an overpayment has been made, the provider shall repay said overpayment within forty (40) calendar days without prior notification from OAOC/VRS. In the event that OAOC/VRS first discovers an overpayment has been made, OAOC/VRS will notify the provider by letter of such a finding. Should repayment not be made in a timely manner, OAOC/VRS will charge interest of one (1) percent per month compounded on the outstanding balance after forty (40) calendar days after the date of notification. (Emphasis supplied)

104. Moreover, contracts VH521 and VH531 provide, at Attachment G.II.S.(page 28), that "program income" shall be used by OAOC/VRS to either reduce the contract award or fund additional services eligible for Federal funding.

> 1. . . . Program income shall be used, at

> the direction of the OAOC/VRS, to either reduce the contract award or fund additional services eligible for State and Federal funding. For purposes of this Agreement, "program income" shall mean gross income received by Provider directly generated by a grant supported activity, or earned as a result of this Agreement during the term of this Agreement. If any payment due under this Agreement results directly from a budget line item submitted by Provider and Provider's actual costs/expenditures during the Agreement term are less than the amount budgeted, the resulting excess payment shall be deemed, for the purposes of this Agreement, "program income."
>
> * * *

105. Attachment G.II.J. (pages 24-25) also contains a provider agreement:

> . . . To return to OAOC/VRS any overpayment of funds disallowed pursuant to the terms of this Agreement that were disbursed to the Provider by OAOC/VRS. . . .

106. 34 CFR § 74.2, defines "award," for purposes of that federal regulation, dealing with what the federal government pays out in grants, as:

> Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient. <u>The term does not include</u>--
>
> (1) Technical assistance, which provides services instead of money;
>
> (2) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;

> (3) Direct payments of any kind to individuals; and
>
> (4) Contracts which are required to be entered into and administered under procurement laws and regulations. (Emphasis supplied)

107. 34 CFR § 74.24(b), provides that program income earned during the project period must be retained by the program recipient (VRS) in this situation, (VRS) and, in accordance with United States Department of Education regulations or the terms or conditions of the award, must be used in one or more of the following ways:

* * *

> (3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

108. Abilities subcontracted with ACS after appropriate notice to VRS. Both contracts VH521 and VH531, at Attachment E.5.(page 16) permitted Abilities to subcontract with another party as follows:

> Subcontracts: The Provider may assign or delegate obligations under this Agreement to another party and may subcontract for any work contemplated under this Agreement with an OAOC/VRS approved vendor or, with the written approval of OAOC/VRS. . . . The Provider is solely liable for the performance of all obligations outlined in this Agreement which are not the exclusive responsibility of the OAOC/VRS. . . .
>
> In the event the Provider subcontracts all or any portion of its obligations under this

> Agreement, the subcontractor is bound by the terms of the Agreement and all applicable laws and regulations.
>
> After the execution of the contract, if a subcontract is found to be in violation of federal/state rules and regulations, the Provider will be considered to be in breach of contract.

109. Abilities expected that its subcontractor ACS would be bound by the same agreements by which Abilities was bound.

110. On or about May 2, 2001, Abilities and ACS, using some new words of art, entered into subcontracts providing that Abilities would pass through the federal grant funds to ACS for performing the services and obligations under State VRS contracts VH521 and VH531, by the following sub-contract language:

> PRIME CONTRACT
>
> Notwithstanding any other provision of this Agreement, this Agreement is a subcontract under the Prime Contract [VRS and Abilities] and each and every provision of the Prime Contract, as may be tailored herein, and any amendments thereto, as added to this Subcontract, shall extend to and be binding upon SUBCONTRACTOR [ACS]as part of this Agreement. With respect to any references in the Prime Contract to CONTRACTOR and CUSTOMER for purposes and applicability to this Subcontract, CONTRACTOR shall mean and include SUBCONTRACTOR and CUSTOMER shall mean and include CONTRACTOR. (Bracketed material added for clarity.)

111. Every dollar received by Abilities under the contracts was paid directly to its subcontractor ACS.

112. The subcontracts between Abilities and ACS also specifically provided at pages 4 and 5 of the subcontracts that Attachment E and Attachment G of prime contracts VH521 and VH531 apply to the subcontractor. Once again, different words of art were employed for the same entities. See the subcontracts:

> 7.0 SPECIAL PROVISIONS
>
> Attachment E, Special Provisions, of the Prime Contract shall apply to this Subcontract.
>
> 12.0 OAOC/VRS STANDARD TERMS AND CONDITIONS
>
> Attachment G of the Prime Contract, OAOC/VRS Standard Terms and Conditions Attachment shall apply to this Agreement, except that the following shall apply to SUBCONTRACTOR under the identified sections of the Standard Terms and Conditions:
> B. Federal and State Laws and Regulations SUBCONTRACTOR shall be subject to applicable OMB circulars for For-Profit organizations.
> C. Audits and Records Access to records for SUBCONTRACTOR shall be accommodated at Subcontractor's facility in Austin, Texas. Such access shall exclude information related to profit or business proprietary information.
> E. Indemnification Relative to indemnification to CUSTOMER, CONTRACTOR and

> SUBCONTRACTOR agree to cross indemnify each other relative to any cause of action brought by the CUSTOMER under this Agreement.

113. The expenditures claimed by Abilities and ACS would have to be examined in accordance with 34 CFR § 74.27, which provides, in part:

> (a) For each kind of recipient, there is a set of cost principles for determining allowable costs.
>
> Allowability of costs are determined in accordance with the cost principles applicable to the entity incurring the costs, as specified in the following chart.

For the cost of a-	Use the principle in-
Private nonprofit organization other than	OMB Circular A-122
(1) An institution of higher education; (2) a hospital; or (3) an organization named in OMB Circular A-122 as not subject to that circular	OMB Circular A-122.
Educational Institution	OMB Circular A-21
Hospital	Appendix E to 45 CFR part 74
Commercial for-profit organization other than a hospital and an educational institution	48 CFR part 31 Contract Costs Principles and Procedures or institution. Uniform and accounting standards that comply with cost principles acceptable to ED.

114. OMB Circular A-122 states that in order for costs to be allowable under an award, they must be "reasonable for the performance of the award and be allocable thereto under these principles."

115. ACS was a commercial for-profit organization, and pursuant to its subcontract with Abilities, ACS had to comply with 48 C.F.R. Part 31. Those provisions state, in part:

> 31.102 Fixed-price contracts.
>
> The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts whenever (a) cost analysis is performed, or (b) a fixed-price contract clause requires the determination or negotiation of costs. However, application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price. Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

116. 48 CFR 31.201-2 provides:

> 31.201-2 Determining allowability.
> (a) A cost is allowable only when the cost complies with all of the following requirements:
>
> (1) Reasonableness
> (2) Allocability
> (3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.
> (4) Terms of the contract.
> (5) Any limitations set forth in this subpart . . .

* * *

> (d) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported. (Emphasis supplied)

117. In the prime contract, at Attachment G.II.B., the provider, Abilities, agreed:

> 4. To comply with all applicable laws, statutes an regulations of the State of Florida and the United States, and to complete any forms required under such law, statutes, and regulations, whether or not such forms are referenced in this Agreement.

CONCLUSIONS OF LAW

118. The undersigned initially had reservations, as set out in the Preliminary Statement, whether, once Abilities returned the claimed money to the State, the Division of Administrative Hearings would have jurisdiction over the parties and subject matter of this case. Those reservations remain. (See Finding of Fact 94, with regard to other types of relief reserved to the State.) Given that the parties stipulated that Petitioner initiated this action via its February 4, 2004, Petition to challenge the State's demand as the "final agency action" (see Finding of Fact 92), and that the money had already been paid back, it would seem that the Division is without

jurisdiction, pursuant to Section 120.57(1), Florida Statutes, Assuming, arguendo, that the parties intended to refer to the demand for repayment as the "proposed final agency action," did the proposal not reach finality with the payment of the full amount demanded? If so, it still would seem that the Division is without jurisdiction, pursuant to Section 120.57(1), Florida Statutes, to determine any disputed facts.

119. Then there is the timeliness question. Section 120.57 (1), Florida Statutes, contemplates, and Florida Administrative Code Rule 28-106.111 (2)-(4), provides, for a request for a disputed-fact hearing to be filed with the party Agency within 21 days of the first window of opportunity, unless some other time limit applies. Counting from Mr. Speer's December 18, 2003, demand letter to the Petition herein, mailed on February 4, 2004, the time elapsed is 48 days. Counting from the date of tender of Abilities' check on January 12, 2004, the time elapsed is 23 days. None of the foregoing computations accounts for the 81 days provided for informal and formal negotiations, but the "conditions precedent" language of the Petition (See Finding of Fact 92) is vague, and neither party demonstrated herein that any negotiations ever occurred after January 12, 2004, so as to toll the time for filing the Petition.

120. However, the parties have stipulated that the Division has jurisdiction, and each party has represented that the Division's jurisdiction is specifically authorized by the terms of the contracts at issue. The contracts permit that any dispute between the parties that cannot be resolved informally may be resolved through the administrative process, including, if necessary, via a disputed-fact hearing before the Division. (See Finding of Fact 93.) For those reasons only, this Recommended Order will proceed to the merits of the case.

121. Petitioner Abilities asserts several legal theories based on construction of the contracts, sub-contracts, and federal regulations, as to why VRS has no claim on the $545,124.00. These theories are couched in terms that if the federal regulations consider VRS to be "the recipient" and if the federal grant money goes to "the recipient," VRS cannot pursue the federal grant monies VRS has disbursed to VRS's prime contractor and which the prime contractor has disbursed to its subcontractor without a preceding demand or disallowance by the United States Department of Education against the recipient, VRS. This construction requires reading several items together. (See Findings of Fact 103-105 and 107.) In greater detail, Petitioner first contends that there were no "unexpended funds," "unexpended sums," or "unexpended program income," because Abilities passed-through every cent to ACS, thus expending all

funds. Abilities next asserts that without either a "disallowance" by the United States Department of Education of VRS's expenditures or an "overpayment" (unearned funds), VRS was never entitled to recoup the $545,124.00, which VRS had paid to Abilities. Abilities further asserts that "a state procurement contract" cannot qualify as an "award" under 34 CFR § 74.2. (See Findings of Fact 103-107). The last proposition that it is a state procurement contract that is exempted is contrary to a clear reading, in context, of that portion of the federal regulations, and is rejected. All three of the foregoing propositions are also rejected for the following reasons.

122. The prime contracts between VRS and Abilities clearly contemplated that Abilities would maintain, retain, and produce adequate financial and performance records and that a post-payment audit would occur, even after the prime contract invoices were paid, if the State deemed such an audit was necessary. (See, among others, Findings of Fact 95, 96, 97, 98, and 117.) The subcontracts obligated ACS according to the prime contracts. Therefore, Abilities' claim that VRS and DFS cannot legally go behind Abilities' and ACS's invoices is without merit. On the same basis, Abilities' concept that VRS's and DFS's review, approval, and payment of Abilities' invoices in the course of the short (six months) of the contracts' run constitutes an "equitable estoppel" against the State to perform

a post-payment audit, and Abilities' theory that the two contract "amendments" [sic. the two one-month successive contract extensions for October and November 2001] "ratified" the State's prior six months' worth of payments, are likewise meritless.

123. The State contracts contemplate that the provider will maintain records pursuant to generally accepted accounting standards and principles. The contracts and federal laws and regulations contemplate that the State, as "recipient" of the federal grant money, will maintain the State's records and perform the State's audits of its contracts with providers in accord with generally accepted accounting standards and principles. The fact that insufficient records for the State's review and audit were maintained and submitted to the State by Abilities/ACS should not render the State helpless to seek return of grant monies from Abilities, which was a de facto sub-recipient of federal grant monies. (See, among others, Findings of Fact 19-20 and 95-117).

124. Herein, VRS did not act in a way to inspire public confidence in its contract drafting, bidding, letting, paying or auditing, and VRS should henceforth be more consistent and clear in drafting contracts incorporating federal statutes, regulations, circulars, and words of art, but it would be nonsensical to assume that because Abilities' and ACS's records

provided to Mr. Knicely were insufficient for an audit, that the State must suffer in silence.

125. OAOC was both the DSA and the DSU for federal and state funds. (See Finding of Fact 20.) VRS's funding from federal grants may have been at stake here. Awaiting a prior disqualification or demand from the federal grantor would not have preserved the State's or the United States Department of Education's opportunity for a meaningful audit. In Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985), the United States Supreme Court noted that "the State gave certain assurances as a condition for receiving the federal funds, and if those assurances were not complied with, the Federal Government is entitled to recover amounts spent contrary to the terms of the grant agreement." The opinion emphasizes that neither substantial compliance with the grant agreement, nor lack of bad faith absolves a state from liability for funds that are spent by it, contrary to the terms of the grant agreement. Relying on Bennett, supra., the Eleventh Circuit in Department of Education v. Bennett, 769 F. 2d 1501 (11th Cir. 1985), has held that even a slight variance in compliance with a grant agreement allows the Secretary of the United States Department of Education to demand a refund of all federal funds expended by a school board for the relevant period.

126. Petitioner Abilities' concept that the State's "fixed rate contract" means that a "provider," who has been designated a "vendor" (not a "recipient" or "sub-recipient") by that State contract is only limited by the "cap" of funds expressed in the State contract, is wholly inconsistent with the actions of the parties; the terms and express intent of the prime contracts (VHS521 and VHS531); and the terms of the subcontracts between Abilities and ACS.

127. The preliminary budgets submitted by Abilities were contrived to justify just "divvying-up" the six months of unallocated contract/grant monies, but the contracts clearly show that any subcontracts of Abilities also would be regulated by the provisions of the State contracts, and if the subcontractor were a for-profit organization, OMB Circulars and 48 CFR Part 31 would also apply.

128. Abilities indicated that it understood its continuing obligation to maintain documentation of costs pursuant to its contract with VRS by specifically including in its own subcontract that Abilities' subcontractor ACS "shall be subject to applicable OMB Circulars for For-Profit organizations." Abilities and ACS agreed to cross-indemnify each other if any cause of action was brought by VRS or OAOC. (See Finding of Fact 112.)

129. Accordingly, despite Abilities' position herein, the contracts and subcontracts must be construed to require that Abilities had to provide more than simply its own invoices to VRS and the invoices from ACS to Abilities in order to meet its cost documentation obligations.

130. The provisions of 48 CFR § 31.102, regarding fixed-price contracts, make the prime contracts, and derivatively the subcontracts, subject to the same cost principles as other contracts dealing with the same subject matter.

131. Abilities' invoices are not sufficient to show that federal funding for VRS services was spent on VRS services, and neither are the invoices and profit-loss statements, etc. provided by ACS.

132. Simply, the funds allegedly used for these services could not be verified or audited by VRS/DFS unless more detailed records were provided by ACS

133. Rather than requesting more information from Abilities, and, derivatively from ACS, about the transition expenses, the State attempted to resolve all money issues on the contracts by requesting that Abilities' return the total transition expenses figure. In doing so, a liquidated amount was demanded. DFS's investigator wrote, "We anticipate . . . the repayment of the sum by Abilities, Inc. This will resolve all of the remaining issues concerning the demonstration

projects for region 7 and region 20." (See Findings of Fact 79 and 84.) There was no haggling over a greater or lesser amount, and Abilities tendered the exact amount demanded, memorializing no reservations in writing. (See Findings of Fact 86-87.) As a result, VRS/DFS did not attempt to get more financial records from Abilities or ACS and did not pursue any legal action against Abilities, as they may have been permitted to do. There was no attempt by the State to further investigate any accounts concerning core rehabilitation charges associated with these contracts or to investigate or delay payment on any other Abilities' contracts. All of the foregoing, plus disqualification of Abilities from bidding on any other VRS contracts, could have been options for the State. (See Finding of Fact 94.)

134. Respondent rightfully claims that there has been an "accord and satisfaction." Generally speaking, in order for an accord and satisfaction to be of any legal effect, it must be supported by a new contract, express or implied, and any settlement must reflect the intent of the parties. Partial payment issues which cloud many "accord and satisfaction" cases do not cloud this one. The amount at issue was undisputed. Whether or not that entire debt was owed by Abilities to the State of Florida was the only issue between the parties, but payment of the whole, liquidated amount was tendered by the

alleged debtor to the alleged creditor by check. A majority of "accord and satisfaction" cases in Florida involve a scenario in which a debtor tenders a check that either on its face, or by a separate transmittal letter, states that the check settles all debts; the creditor cashes the check but later attempts to collect more money from the debtor on the pre-existing debt; and the debtor interposes the defense of "accord and satisfaction". When this has occurred, the courts have looked to the intent of the parties manifested in their written materials at the time the check was presented, and they have eschewed to release a debtor entirely when the release language on the check was ambiguous or where, for some reason, the creditor was being taken advantage-of. Herein, a liquidated amount was demanded and paid, without written reservations of rights. The creditor, VRS/DFS, refrained from the acts it could otherwise have taken if its demand had not been accepted by the debtor. The bargain was complete.

135. Petitioner's assertion of surprise or inequitable treatment by Respondent's raising, for the first time at the merits hearing, the defense of "accord and satisfaction" is rejected. There is no requirement of a mandatory Answer, let alone a requirement of timely notice of an affirmative defense, under the Administrative Procedure Act. See Fla. Admin. Code R. 28-106.203. Also, "accord and satisfaction" is an attorney work

product legal theory advanced by Respondent's lawyers. It is not an undisclosed witness or expert witness' opinion or an undisclosed exhibit, such as were the bases for relief upon grounds of "surprise" in the cases cited by Petitioner.

136. That said, since this case seems to be founded on the parties' agreement to a "do over," it should be observed that when Petitioner Abilities became the sword-wielder, by filing the Petition herein, it assumed the duty to go forward and the burden to prove, by a preponderance of the evidence, that it is entitled to the $545,124.00. Abilities has not met that burden by affirmative proof herein, because the expense records in evidence are insufficient to justify the amounts paid. The concept that any unaccounted-for or unsubstantiated funds constitute a reasonable profit by the subcontractor misconstrues the burden of proof. Adequate records possibly could result in such a determination, but inadequate records do not permit any determination.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Florida Department of Education, Division of Vocational Rehabilitative Services enter a final order dismissing the Petition and Amended Petition herein.

DONE AND ENTERED this 9th day of May, 2005, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of May, 2005.

ENDNOTES

[1/] In response to Abilities' Second Set of Interrogatories, VRS generally listed multiple statutes, rules, regulations, and federal circulars allegedly violated by Abilities. An Order was entered compelling a more specific response. In its more specific response, VRS failed to list OMB Circular A-133. After the filing of the Pre-hearing Stipulation and after all depositions had been taken, VRS attempted to add OMB Circular A-133 back into its list of offended "laws." Abilities claimed surprise, and VRS's request was denied. (TR 33-37) In retrospect, however, it may be noted that Abilities' allegation of surprise may have been disingenuous in that OMB Circular A-133 is prominently and repeatedly referred-to or incorporated in both prime contracts at issue.

[2/] Some examples might be loss of funding or a bid protest.

[3/] Pursuant to 34 CFR § 77.1, EDGAR means the Education Department General Administrative Regulations (34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 85, 86, 97, 98, and 99).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.