

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

ENTERPRISE RESOURCE PLANNING BOARD - CONTRACT WITH ISG

Legislative Auditor: Aaron Allred
Post Audit Director: Denny Rhodes



JOINT COMMITTEE ON
GOVERNMENT & FINANCE

Note: On Monday, February 6, 2017, the Legislative Manager/ Legislative Auditor's wife, Elizabeth Summit, began employment as the Governor's Deputy Chief Counsel. Most or all the actions discussed and work performed in this report occurred after this date. However, the Governor's Deputy Chief Counsel was not involved in the subject matter of this report, nor did the audit team have any communications with her regarding the report. As Deputy Chief Counsel, the Legislative Auditor's wife is not in a policy making position within the Executive Branch. Therefore, the Post Audit Division does not believe there are any threats to independence with regard to this report as defined in A3.06.a and A3.06.b of the Generally Accepted Government Auditing Standards. Furthermore, the Legislative Auditor has instructed the Director of the Post Audit Division to document and discuss any issues he believes are a threat to the division's independence with the President of the Senate and the Speaker of the House due to Ms. Summit's position.

OFFICE OF THE
LEGISLATIVE AUDITOR
Legislative Manager & Legislative Auditor, Aaron Allred



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NOVEMBER 12, 2017
LEGISLATIVE AUDIT REPORT

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The ERP Board’s Contracts with Information Services Group (ISG) From May 2012 to May 2017 Were Not Executed According to the Statutory Framework of the Board and May Therefore Be Invalid and Void. These Contracts Were Signed by a Staff Member Who Did Not Have Legal Authority to Enter into Such Multi-Year, Multi-Million Dollar Contracts on Behalf of the ERP Board. Further, No Record in the ERP Board Meeting Minutes Indicates Such Authorization Was Granted nor Was There Record these Contracts Were Reviewed or Ratified by the Board.

Background

The Post Audit Division is continuing its review of the wvOASIS project. In the June 2017 report released by our office, the Legislative Auditor questioned whether the State’s contract with Information Services Group (ISG)¹, formerly Salvaggio Teal & Associates (STA), constituted a properly executed and legally binding agreement. This question was derived from the fact that beginning in May 2012, the contracts with ISG were signed by the Former Project manager Todd Childers or the Controller of the ERP Board, and not the actual ERP Board members.

In 2010, the Department of Administration (DOA) contracted with STA (currently ISG) to acquire an ERP vendor and oversee the ERP vendor’s implementation of the ERP system, providing the State technical expertise and oversight for the project. The 2010 contract was for one year with the option to renew/extend the contract for five additional years. ISG assisted the State in selecting the eventual software vendor, and the State contracted with CGI Technologies and Solutions Inc. (CGI) to provide the ERP solution we now know as wvOASIS. Ultimately, the ISG consulting work spanned most of the lifecycle of the ERP project (until the contract was not renewed in May 2017) including planning, selection of the eventual software vendor, implementation, and support. However, the initial intent of the contract with STA in 2010 was to aid the State in the selection of an ERP vendor and specifically prohibited it from performing any implementation services. In the “Technical Questions and Answers” section of the Expression of Interest for this service, it was clarified in regard to the language contained therein:

This Expression of Interest does not include implementation services. The successful firm shall be further prohibited from consulting with or advising any potential ERP vendor on any procurement solicitation issued to develop and/or procure the ERP solution for the State.

Yet, as the contracts with STA/ISG continued through 2017, implementation services became a major part of the work being performed which STA was initially prohibited from performing.

¹ Information Services Group (ISG) was initially registered with the WV Secretary of State’s Office as International Consulting Acquisition Corporation “ICAC”

In regard to these facts, the Legislative Auditor sought answers to the following questions:

- 1. Did the ERP Board enter into valid contracts with ISG when none of ISG's contracts with the ERP Board were signed, executed, or ratified unanimously by ERP Board members?**
- 2. If any or all of the contracts were unauthorized and not executed by ERP Board members, should the State have complied, or continue to comply, with the terms of those unauthorized contracts formed outside of the ERP Board's statutory framework?**

To answer these questions, the Legislative Auditor sought the legal opinion of Legislative Services. Based on that legal analysis and the contract documentation, the Legislative Auditor has the following conclusions.

ISG Contracts, beginning in May 2012, Were Signed by the Controller of the ERP Board Who Did Not Have Authority to Enter Into, Renew, or Extend Such Multi-Million Dollar Contracts on Behalf of the Board.

The ERP Board was established by Acts of the Legislature in 2011 to develop, implement, and manage an ERP system. The Board members include the Governor, State Auditor, and State Treasurer, and at its establishment these members were Governor Earl Ray Tomblin, State Auditor Glen Gainer III, and State Treasurer John Purdue. To that end, W.Va. Code §12-6D-2(3) and §12-6D-3(d) provide the Board the authority to enter into contracts. However, all decisions of the Board must be unanimous, and a quorum requires the presence of all three Board members. (W.Va. Code §12-6D-3(c) and §12-6D-3(f)) The ERP statutes do not grant any other entity or individual the ability to contract for services related to the ERP system.

The ERP Board held its first meeting on June 23, 2011. In that meeting, the Board adopted a resolution (Appendix C – Board Resolution 3) which would provide the State Auditor with the day-to-day administrative authority to act on behalf of the Board,

...keeping in mind that actions concerning budget issues, etc. will come back before the Board. (Emphasis Added)

During a later board meeting on November 17, 2011, the Board addressed the authority granted the State Auditor through Resolution 3. The meeting minutes reflect that State Auditor Gainer suggested a new resolution, Board Resolution 6, that would give the Project Management Office operating under the State Auditor authority to sign and execute the initial contract with the ERP solution vendor CGI. The Board decided against that suggestion and determined that the three board members would sign the contract, not the Project Management Office staff. Further, the ERP Board made clear that,

...any subsequent change orders would be signed by the board members as well.
(Emphasis Added)

However, subsequent ISG contracts and change orders were signed by the Controller² of the ERP Board and not the ERP Board members.

The Board did not delegate this contractual authority to the Auditor, the Controller, or anyone else. Under the Board’s Resolution 3, the Auditor had limited administrative authority to effectuate the acquisition and further the implementation of the ERP system.

Resolution 3 provides, in pertinent part, as follows:

Be it RESOLVED that: The State Auditor shall be empowered with administrative authority to do all things necessary to effectuate the acquisition and further the implementation of the system, West Virginia (“Oasis”) subject to ratification by the Board. Such administrative authority shall include, but not be limited to, signature authority to draw down funds and make payments on behalf of the Board, authority to contract for office space, and make any and all other daily decisions required in the interim between meetings. (Emphasis added)

Notably, that authority was limited to administrative functions only, such as a “contract for office space[.]” The Board was clear when it adopted Resolution 3 that this authority was limited to “day-to-day administrative duties on behalf of the Board, keeping in mind that actions concerning budget issues, etc., will come back before the Board for approval.” Further, Resolution 3 provided that the Auditor’s actions were “subject to ratification by the Board.” The multi-year multi-million-dollar contracts with ISG were not “day-to-day administrative duties[.]” Therefore, based on the legal opinion of Legislative Services, the Legislative Auditor believes these contracts fall outside of the authority delegated to the Auditor under Resolution 3.

The Department of Administration Contract with STA (currently ISG) was Cancelled and Reissued Under the ERP Board in May 2012 Without Explicit Board Member Signature or Authority and Signed by Former Project Director Todd Childers and ERP Board Controller.

In 2012, upon the statutory creation of the Board, ISG’s contract with DOA was canceled and reissued (effectively assigned) to the ERP Board. However, the Board did not execute, or even discuss, this 2012 contract cancellation/reissuance at any of its Board meetings, and none of the Board members signed any such contract. Indeed, **the Board did not unanimously sign, execute, or ratify any of the multi-million-dollar contracts reported to be made between ISG and the Board from 2012 to 2016.**

To date, **the State has paid ISG approximately \$18.3 million for contracts signed by the Controller of the ERP Board and Former wvOASIS Project Director who did not have the**

² The Controller of the ERP Board is an employee of the State Auditor’s Office (SAO) and also serves as the Controller/Procurement Office for the SAO.

authority to enter into these contracts on behalf of the ERP Board. The table below shows the amounts paid for each contract year term from May of 2012 to May of 2017.

Table 1 - Total Payments to ISG May 2012 to May 2017		
Contract Period	Contract #	Amount Paid
5/10/2012 -5/9/2013	ERP120016/ERP120016CO#01	\$3,221,195.50
5/10/2013 -5/9/2014	ERP120016CO#02	\$3,998,551.00
5/10/2014 -5/9/2015	ERP120016CO#03/ERP120016CO#04	\$4,401,270.00
5/10/2015 -5/9/2016	ERP120016CO#05	\$4,407,159.25
5/10/2016 -5/9/2017	ERP1600000001	\$2,296,516.75
Total Amount Paid		\$18,324,692.50

Even if Resolution 3 did in fact apply to the ISG contracts, the Board would still have had to ratify them. Based on all available information, no such ratification appears in writing or in the Board’s meeting minutes. According to W.Va. Code §12-6D-3(c) and §12-6D-3(f), a decision to ratify these contracts would have required unanimity among all three Board members. Contrary to ratifying these contracts, the Board expressed concern on at least two occasions over its staff entering or changing contracts without the Board’s approval. The meetings where the Board expressed its concerns were in 2011 and 2012. Notably, Former wvOASIS Project Director Todd Childers, a staff member who later executed a contract with ISG, was present at both meetings. A representative from ISG, Randy Meek, was also present at one of those meetings.

November 17, 2011 ERP Board Meeting

During this meeting, the Board addressed the Auditor’s limitations under Resolution 3 with regard to whether a staff member had the authority to execute a contract with the ERP vendor—CGI Technologies and Solutions. The Board unequivocally found that Board members would sign the CGI contract, not staff members, and “*any subsequent change orders would be signed by the board members as well.*”

September 24, 2012 ERP Board Meeting

Similarly, in this meeting Mr. Childers suggested to the Board that the Project Management Office (PMO) and the Board’s Steering Committee could make changes to the contract with CGI. One of the Board members expressed concern at the suggestion, and, after some discussion, the Board determined that “*all [contract] changes must be submitted to the Board[.]*”

Despite the statutes and facts noted above, the Board’s staff—not the Board’s members—signed and allegedly executed seven (7) of the ISG contracts and change orders. The first such execution was in 2012 when the Board—by two staff members only—agree to the cancellation/reissuance of the ISG contract with DOA. The letter agreeing to the Board’s acceptance of the DOA contract is on the Auditor’s letterhead, but is signed only by Mr. Childers

and the Board's Controller. Similarly, all other contracts and change orders were signed by Mr. Childers or by the Controller.

In addition to not executing the contracts, there also is no evidence that the Board ratified the contracts. There is no discussion of the contracts or their execution at any of the Board's open meetings. There are references in the Board's meeting minutes to contractual discussions during closed, executive sessions. But assuming these references were to ISG contracts, the relevant minutes provide the following statement: "*no action was taken during the Executive Session.*" Therefore, no execution or ratification of these contracts could have occurred in those executive sessions. For those reasons, **ISG's contracts with the Board were unauthorized and executed outside of the framework set forth for Board contracts/decisions in West Virginia Code §12-6D-2 and §12-6D-3.**

Because the ISG Contracts Were Unauthorized and Formed Outside of the ERP Board's Statutory Framework, based on Advice of His Attorneys the Legislative Auditor Believes They Are Void, Unenforceable Against the ERP Board, and Not Subject to the Doctrines of Estoppel, Apparent Authority, or Ratification. Therefore, the State has No Obligation to Abide by the Terms of the Contracts, nor to Make Any Payment Under Those Terms.

The West Virginia Supreme Court has explained as follows:

An unauthorized or illegal contract executed by a public corporation, is incapable of enforcement. It is absolutely void, and neither the doctrine of estoppel nor ratification can be invoked to maintain it.

Further, case law states:

*One dealing with a public officer must know that such officer has authority to do the thing he undertakes to do at the time he does it. One dealing with a public officer without full knowledge of the extent of his authority does so at his peril. The public will be bound only to the extent that such officer has authority, no matter what his assumed or apparent authority may be.*³

Also,

*The state is not bound by the unauthorized or illegal acts of its officers... ..and all persons who deal with such officers do so at their peril, in all matters wherein such officers exceed their legitimate powers.*⁴

³ Ref. State ex rel City of South Charleston v. Partlow, 133 W.Va. 139, 170, 55 S.E.2d 401, 416 (1949) (Judge Haymond, concurring) (emphasis added); Capehart v. Board of Educ., 82 W. Va. 217, 223, 95 S.E. 838 (1918)

⁴ Ref. Point 3 Syllabus, Totten v. Nighbert, 41 W.Va. 800.

*Acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws.*⁵

*A state is not bound by the unauthorized acts of public officers. Their misconduct is no estoppel against the state.*⁶

Based on these precedents, the legal opinion of Legislative Services is that **ISG’s contracts with the ERP Board are unauthorized and were illegally formed outside of the Board’s statutory framework. They are thus void, unenforceable, and not subject to the aforementioned legal doctrines.**

All available information shows that no actual authority existed for the Board’s Controller, Project Manager, or any other staff members to execute any multi-year, multi-million-dollar contracts for ERP system services. Board Resolution 3 did not apply to give the Auditor or any staff the authority to contract for such significant services because they were not “day-to-day administrative duties.” Also, if Resolution 3 had applied, no ratification occurred to legally execute the contracts and bind the Board to them. By statute, the authority to enter or ratify such contracts rested solely with the Board, which did not execute or ratify any of ISG’s contracts.

Due to the ISG Contracts Being Invalid, Approximately \$1.26 Million in Outstanding Invoices from ISG Should Not Be Paid and \$599,689 Collected from the Department of Transportation Should Be Returned Immediately.

As previously mentioned, the State has paid approximately \$18.3 million to ISG for contracts that were invalid. Since taking office in January 2017, the current State Auditor has not paid ISG invoices from December 2016 through May 2017. Currently, the ERP Board has unpaid invoices from ISG for services rendered under these invalid contracts totaling \$1,260,012. Approximately \$600,000 of this amount was collected from the Department of Transportation for wvOASIS project implementation associated with that agency that has not been paid to ISG and is being held by the ERP Board.

⁵ Ref. Point 4 Syllabus, *State v. Chilton*, 49 W.Va. 453.

⁶ Ref. Point 5 Syllabus, *State v. Chilton*, 49 W.Va. 453.

Outstanding ISG Invoices and Amounts Collected from DOT		
Month of Service	Amount Due	Collected from DOT
December 2016	\$222,060.00	\$99,000.00
January 2017	\$249,010.50	\$133,004.00
February 2017	\$229,462.00	\$103,050.00
March 2017	\$240,516.50	\$104,608.00
April 2017	\$248,017.00	\$127,610.00
May 2017	\$70,946.50	\$32,417.00
TOTAL	\$1,260,012.50	\$599,689.00

As the Legislative Auditor, based on the advice of his attorneys, has concluded that the contracts with ISG that resulted in these payments and still outstanding invoices were invalid, it is also concluded that the State and the ERP Board has no duty or obligation to make payment on any outstanding invoices.

These conclusions are supported further in the legal analysis performed by Legislative Services contained in Appendix D of this report.

Audit Conclusions and Recommendations

Based on the advice of his attorneys, the Legislative Auditor has concluded that all contracts and change orders with ISG starting in May 2012 are invalid, void, and unenforceable. These contracts and change orders were entered into and signed without the explicit consent or signature authority of the ERP Board and were not ratified unanimously by the Board members as required by statute. This includes the contract effective May 10, 2012 and through the final contract closed on May 9, 2017. As a result, the Legislative Auditor does not believe the State, nor the ERP Board, has any obligation to comply with any terms of the agreements under those contracts, nor is there any obligation to submit payment for any outstanding invoices from ISG. Due to this fact, it is also concluded that all monies collected by the ERP Board from the Department of Transportation for any outstanding ISG invoices should be remitted back to the agency immediately.

Based on our conclusions, the Legislative Auditor makes the following recommendations:

- 1. The Legislative Auditor recommends the ERP Board seek the legal counsel of the West Virginia Attorney General's Office to determine the validity of these contracts with ISG and the potential to seek reimbursement of the \$18.3 million paid to ISG for contracts that may not be valid as identified by this report.*
- 2. The Legislative Auditor recommends that the ERP Board withhold payment of the \$1.26 million in outstanding invoices from ISG, pending the outcome of the Board's consultation with the Attorney General.*
- 3. The Legislative Auditor recommends the ERP Board remit back to the Department of Transportation, the \$599,689 collected pertaining to those outstanding invoices, plus any applicable interest lost on those funds due to them being held by the ERP Board, pending the outcome of the Board's consultation with the Attorney General.*

Appendices

Appendix A: Objectives, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this review as authorized by W.Va. Code §4-2-5, as amended.

Objectives

The objective of this review was to determine the validity of all contracts between the ERP Board and ISG based on the question raised (Issue 2) in the June 2017 Post Audit Report as to whether the State's contract with Information Services Group (ISG) constituted a properly-executed, legally-binding agreement, due to those contracts being signed by the Controller of the ERP Board and not the actual Board members.

Scope

The scope of this review involves analysis of all contracts between the ERP Board and ISG for contracts between May 2012 and May 2017, ERP Board Meeting Minutes, and relevant W.Va. Code and case law pertaining to the issue of contracts entered into by the State.

Methodology

To achieve the objective of answering the two questions posed in this report, we reviewed all ERP Board Meeting Minutes, all contracts between the State (Department of Administration and ERP Board) and Information Services Group (ISG) and between the State and CGI, as well as the applicable W.Va. Code sections that govern the ERP Board. Further, this review involved the assistance of Legislative Services attorneys to provide the legal opinion concerning these contracts and to provide answers to the posed questions with regard to validity of those contracts based on applicable law and WV Supreme Court rulings.

Appendix B: Previous Reports by the Legislative Auditor

Legislative Post Audit Report, wvOASIS (June 2017)

http://www.legis.state.wv.us/legisdocs/reports/agency/PA/PA_2017_611.pdf

Legislative Post Audit Report, wvOASIS – Payment for Knowledge Transfer That Didn't Occur (October 2017)

http://www.legis.state.wv.us/legisdocs/reports/agency/PA/PA_2017_621.pdf

Appendix C: Enterprise Resource Planning Board Resolution 3

From the June 23, 2011 ERP Board Meeting Minutes:

V. Administrative Support - Board Resolution No.3

Auditor Gainer briefed the Board on the next agenda item, proposed Board Resolution NO.3. This Resolution proposes that the State Auditor be empowered with administrative authority to do all things necessary to effectuate the acquisition and further implementation of WV OASIS. He explained the legislation provides that the State Auditor's Office act somewhat as a secretariat for the Board, however the funding accounts have not been established since no one has been authorized to sign the documents. This Resolution will allow the State Auditor to perform the day-to-day administrative duties on behalf of the Board, keeping in mind that actions concerning budget issues, etc., will come back before the Board for approval. Treasurer Perdue moved to approve Board Resolution No.3. Auditor Gainer seconded the motion. The motion carried unanimously to adopt Resolution No.3 as presented to the Board.

Appendix D: Legal Analysis of Legislative Services

QUESTIONS PRESENTED

1. Did the ERP Board enter into valid contracts with ISG—a wvOasis vendor also known as ICAC—when none of ISG’s “contracts”⁷ with the ERP Board were signed, executed, or ratified unanimously by ERP Board members?
2. If any or all of the “contracts” were unauthorized and not executed by ERP Board members, should the State have complied, or continue to comply, with the terms of those unauthorized “contracts” formed outside of the statutory framework for the ERP Board?

SHORT ANSWERS

1. The ERP Board did not enter into valid contracts with ISG because the ERP Board did not unanimously sign, execute, or ratify those “contracts.”
2. Because the “contracts” at issue were unauthorized and formed outside of the ERP Board’s statutory framework, they are void, unenforceable against the ERP Board, and not subject to the doctrines of estoppel, apparent authority, or ratification. Therefore, the State has no obligation to abide by the terms of the “contracts.”

DISCUSSION

QUESTION ONE – Did the ERP Board enter into valid contracts with ISG—a wvOasis vendor also known as ICAC—when none of ISG’s “contracts” with the ERP Board were signed, executed, or ratified unanimously by ERP Board members?

The ERP Board (Board) was established by Acts of the Legislature in 2011 to develop, implement, and manage an ERP system. To that end, West Virginia Code §§ 12-6D-2(3) and -3(d) provide the Board the authority to enter into contracts. However, all decisions of the Board must be unanimous, and a quorum requires the presence of all three Board members. *Id.* at §§ 12-6D-3(c) and -3(f). The ERP statutes do not grant any other entity or individual the ability to contract for services related to the ERP system. In 2010, the Department of Administration (DOA) contracted with ISG (then STA) to acquire an ERP vendor and oversee the ERP vendor’s implementation of the ERP system. The 2010 contract was for one year with the option to

⁷As used in this memorandum, the terms “contract” or “contracts” when in quotation marks refer to one or all of the alleged agreements between ISG and the Board. These alleged agreements include the initial cancelation/reissuance in 2012; three annual renewals (2012-2015); one annual extension (2015-2016); one stand-alone, one-year “contract” (2016-2017); and the other relevant change orders. Because ISG’s first two contract periods were with DOA, only five of ISG’s seven annual “contracts” were allegedly between ISG and the Board.

renew/extend the contract for five additional years. In 2012, upon the statutory creation of the Board, ISG's contract with DOA was canceled as to DOA and reissued (effectively assigned) to the Board. However, the Board did not execute, or even discuss, this 2012 contract cancellation/reissuance at any of its Board meetings, and none of the Board members signed any such "contract." Indeed, the Board did not unanimously sign, execute, or ratify any of the multi-million-dollar "contracts" reported to be made between ISG and the Board from 2012 to 2017. While ISG made its presence known to the Board at meetings, if not elsewhere, it is unclear whether the Board knew these "contracts" existed.

The Board did not delegate this contractual authority to the Auditor or anyone else. Under the Board's Resolution 3, the Auditor had the administrative authority to acquire and implement the ERP system.⁸ Notably, however, that authority was limited to administrative functions only, such as a "contract for office space[.]" The Board was clear when it adopted Resolution 3 that this authority was limited to "day-to-day administrative duties on behalf of the Board, keeping in mind that actions concerning budget issues, etc., will come back before the Board for approval." Further, the final version of Resolution 3 provided that the Auditor's actions were "subject to ratification by the Board." The multi-million-dollar "contracts" between ISG and the Board were not "day-to-day administrative duties[.]" Therefore, these "contracts" fall outside of the authority delegated to the Auditor under Resolution 3.

Moreover, assuming that Resolution 3 applied to the "contracts," the Board had to ratify them. Based on all available information, no such ratification appears in writing or in the Board's meeting minutes. And, as noted above, by statute, a decision to ratify these "contracts" would have required unanimity among the Board members.

Contrary to ratifying these "contracts," the Board expressed its concern on at least two occasions over its staff entering or changing contracts without the Board's approval. The meeting where the Board expressed its concerns were in 2011 and 2012. Notably, Todd Childers, a staff member who later allegedly executed a "contract" with ISG, was present at both meetings. A representative from ISG, Randy Meek, was also present at one of those meetings.

At its November 17, 2011, meeting, the Board addressed the Auditor's limitations under Resolution 3 with regard to whether a staff member had the authority to execute a contract with the ERP vendor—CGI Technologies and Solutions. The Board unequivocally found that Board members would sign the CGI contract, not staff members, and "any subsequent change orders would be signed by the board members as well."

⁸Resolution 3 provides, in pertinent part, as follows:

"Be it RESOLVED that: The State Auditor shall be empowered with administrative authority to do all things necessary to effectuate the acquisition and further the implementation of the system, West Virginia ("Oasis") *subject to ratification by the Board*. Such administrative authority shall include, but not be limited to, signature authority to draw down funds and make payments on behalf of the Board, authority to contract for office space, and make any and all other daily decisions required in the interim between meetings." (Emphasis added.)

Similarly, at a meeting held on September 24, 2012, Mr. Childers suggested to the Board that the Project Management Office (PMO) and the Board's Steering Committee could make changes to the contract with CGI. One of the Board members expressed concern at the suggestion, and, after some discussion, the Board determined that "all [contract] changes must be submitted to the Board[.]"

Despite the statutes and facts noted above, the Board's staff—not the Board's members—signed and allegedly executed all of the ISG "contracts" with the Board. The first such execution was in 2012 when the Board—by two staff members only—agree to the cancelation/reissuance of the ISG contract with DOA. The letter agreeing to the Board's acceptance of the DOA contract is on the Auditor's letterhead, but is signed only by Mr. Childers and the Board's controller, Mike Withrow. Similarly, all of the other "contracts" were signed or generated by the project manager's office or by Mr. Withrow.

In addition to not executing the "contracts," there is no evidence that the Board ratified the "contracts" either. There is no discussion of the "contracts" or their execution at any of the Board's open meetings. There are references in the Board's meeting minutes to contractual discussions during closed, executive sessions. But assuming these references were to ISG "contracts," the relevant minutes provide the following statement: "no action was taken during the Executive Session." Therefore, no execution or ratification of these "contracts" could have occurred in those executive sessions. For those reasons, ISG's "contracts" with the Board were unauthorized and executed outside of the framework set forth for Board contracts/decisions in West Virginia Code § 12-6D-2 and -3.

Because the "contracts" were unauthorized and outside of the statutory framework for the Board, ISG's "contracts" are void ab initio, unenforceable, and not subject to the legal doctrines of estoppel, apparent authority, or ratification. The West Virginia Supreme Court has explained as follows:

"An unauthorized or illegal contract executed by a public corporation, is incapable of enforcement. It is absolutely void, and neither the doctrine of estoppel nor ratification can be invoked to maintain it." *Herald v. Board of Education*, 65 W. Va. 765, 65 S.E. 102, 31 L. R. A. (N.S.) 588. *See Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779; *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781; *Poling v. Board of Education of Philippi Independent District*, 56 W. Va. 251, 49 S.E. 148; *Raleigh County Bank v. Bank of Wyoming*, 100 W. Va. 342, 130 S.E. 476; *Colbert v. Ashland Construction Company*, 176 Va. 500, 11 S.E.2d 612; *American LaFrance and Foamite Industries v. Arlington County*, 164 Va. 1, 178 S.E. 783.

State ex rel City of South Charleston v. Partlow, 133 W.Va. 139, 170, 55 S.E.2d 401, 416 (1949) (Judge Haymond, concurring) (emphasis added); *Capehart v. Board of Educ.*, 82 W. Va. 217, 223, 95 S.E. 838 (1918) ("**One dealing with a public officer must know that such officer has authority to do the thing he undertakes to do at the time he does it. One dealing with a public officer without full knowledge of the extent of his authority does so at his peril. The public**

will be bound only to the extent that such officer has authority, no matter what his assumed or apparent authority may be.”) (Emphasis added).

In *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970), the Court dealt with an unauthorized contract between a state agency and a coal company. In that case, the Director of the Department of Natural Resources (DNR) entered into a lease with the coal company. The lease permitted the coal company to mine certain State lands for a royalty of fifteen-cents per ton of coal payable to the DNR. When a subsequent Director of the DNR assumed that office, he filed a declaratory judgment action to invalidate the lease with the coal company. The new Director argued that the former Director lacked the authority to enter into the leasing contract. In its answer to the declaratory judgment action, the coal company argued that “it entered into the lease in good faith, relying on its opinion that the Land Corporation held title to the land and that . . . the defendant and its contractors have expended more than \$ 500,000 [in mining operations] and have paid \$ 119,595.39 in royalties to the Department of Natural Resources.” The trial court granted judgment to the new Director. In its order, the trial court found that the former Director lacked actual authority to enter into the leasing contract and that the State was not subject to the doctrine of estoppel.

The coal company appealed the trial court’s order. In affirming the trial court’s order, the Court held that

1. **“The state is not bound by the unauthorized or illegal acts of its officers**, nor can its title to a tract of land be transferred, divested, or affected, in any manner or to any extent, by such unauthorized or illegal acts; **and all persons who deal with such officers do so at their peril, in all matters wherein such officers exceed their legitimate powers.**” Point 3 Syllabus, *Totten v. Nighbert*, 41 W.Va. 800.

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4. “Acts of a private agent may bind the principal where they are within the apparent scope of his authority; **but not so with a public officer, as the State is bound only by authority actually vested in the officer**, and his powers are limited and defined by its laws.” Point 4 Syllabus, *State v. Chilton*, 49 W.Va. 453.

5. **“A state is not bound by the unauthorized acts of public officers. Their misconduct is no estoppel against the state.”** Point 5 Syllabus, *State v. Chilton*, 49 W.Va. 453.

Syl. Pts. 1, 4, and 5, *Samsell* at 48, 174 S.E.2d at 318 (emphasis added). The Court noted that its decision would cause the coal company to lose more than one-half million dollars (in 1960s dollars), but that fact did not alter the Court’s decision. See *Ruble v. Office of the Sec. of State*, 192 W.Va. 134, 138 n.8, 451 S.E.2d 435, 439 n.8 (1994) (noting that State was not bound to repay person who spent money for investigator’s license at school he attended based on representations of State employee but which was unaccredited because employee was without authority to so bind State); Syl. Pt. 1, *W.Va. Public Emp. Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985) (“**A state or one of its political subdivisions is not bound by the legally**

unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority' *Cunningham v. County Court*, 148 W. Va. 303, 309-10, 134 S.E.2d 725, 729 (1964)”) (emphasis added).

More recently, the West Virginia Supreme Court has explained as follows:

[a]lthough contract law recognizes a “legitimate claim of entitlement” to individuals who act with reasonable reliance on the assertions of others, the plaintiff cannot use that doctrine in this case to create a property interest out of the statements made to him by Mr. Dixon prior to plaintiff's investment in the property. Though Mr. Dixon's communication may well have seemed to be reasonable and authorized at the time, the upshot of the web of legal rules requiring proof of a state actor's actual authority is that **apparent authority cannot serve as a means of holding a state, county or municipal sovereign to a contract**. This means that if the state actor did not possess actual authority to make a commitment, the legitimate claim of entitlement fails. *See Federal Corp Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 3, 92 L. Ed. 10 (1947) (“**anyone entering into an arrangement with the Government takes the risk of having ascertained that he who purports to act for the Government stays within the bounds of his authority**”). So it is here.

If more is needed - and we doubt that it is - policy rationales for this rule can be extrapolated from the closely related theory that equitable estoppel is generally inapplicable to the state governmental units when its employees indu[c]e reliance by their unauthorized actions or comments. Thus, while the equities of those circumstances obviously, and rightly, influenced the perceptions of several of the City's council members, see n.3, supra, they are no help to the plaintiff because there is no estoppel against the government, and such an estoppel argument cannot, therefore, be used to create a property interest for due process purposes. *See Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985) (“The general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity.”). Judicial enforcement of these authorized comments by Mr. Dixon would expand the power of certain municipal officials beyond specific legislative limits, thereby raising serious separation of powers concern. Furthermore, enforcing such agreements or understanding would put the public purse at substantial and undue risk.

Hutchison v. City of Huntington, 198 W. Va. 139, 154 n.20, 479 S.E.2d 649, 664 n.20 (1996) (emphasis added).

Turning to ISG's “contracts” with the Board, all available information shows that no actual authority existed for the Board's controller, project manager, or any other staff members to execute any multi-million-dollar contracts for ERP system services. Resolution 3 did not apply to give the Auditor or any staff the authority to contract for such significance services because they were not “day-to-day administrative duties.” And if Resolution 3 had applied, no ratification occurred to

legally execute the contracts and bind the Board to them. By statute, the authority to enter or ratify such contracts rested solely with the Board, which did not execute or ratify any of ISG's "contracts." Therefore, ISG's "contracts" with the Board are unauthorized and illegally formed outside of statutory framework. They are thus void, unenforceable, and not subject to the aforementioned legal doctrines. Although it is unclear whether it applies to the ISG "contracts," West Virginia Code § 5A-3-17 holds spending officers personally liable if they knowingly and willfully contract for services in violation of the purchasing laws, rules, and regulations of this State.

QUESTION TWO – If any or all of the “contracts” were unauthorized and not executed by ERP Board members, should the State have complied, or continue to comply, with the terms of those unauthorized “contracts” formed outside of the statutory framework for the ERP Board?

Generally, courts in this jurisdiction do not assist parties with the enforcement of unauthorized contracts, illegal contracts, or contracts made in contravention of established public policies. Therefore, payment, recovery, or damages under those contracts is generally unavailable for either party. *See Shonk Land Co. v. Joachim*, 96 W. Va. 708, 718-719, 123 S.E. 444, 448 (1924) (“Generally, where a contract is void as . . . the making of which is prohibited by statute, the courts will refuse to afford relief to either party. They will be left where they are found, without change in the status.”); *Rich v. Simoni*, 235 W. Va. 142, 772 S.E.2d 327 (2015) (in answering certified question from federal court, Court held that fee-sharing arrangement between lawyer and non-lawyer violated public policy established in ethical rules, which carried same weight as statutory public policy; thus, non-lawyer would be precluded from enforcement and recovery on claims of quantum meruit, unjust enrichment, and breach of implied contract).

The Court has, in at least one instance, denied a petition for writ of mandamus against the State Auditor where he refused to make payment under an unauthorized contract. *State ex rel. Board of Governors v. Sims*, 133 W. Va. 239, 251, 55 S.E.2d 505, 512 (1949) (“Being of the opinion that the Board of Governors of West Virginia University, . . . was without power to adopt Order No. 218, or to expend public money on the basis thereof . . . any expenditure of public funds thereunder is without authority of law; and that the Auditor of West Virginia was without authority of law to honor the requisition made upon him, to effect such expenditures, the writ of mandamus prayed for will be denied.”).

While a party to a private contract may recover for services rendered even where the contract is void, a party to an unauthorized, illegal contract with the State is not entitled to recovery for services/materials rendered. To the contrary, the Court has refused to hold that even a windfall or hardship to the parties will breathe validity into an otherwise unauthorized or illegal contract. Such contracts are unenforceable. Instead, the Court has held, or noted with favor other courts that have held, that the judiciary will not render assistance to any party to such a contract. *See Samsell, supra; Rich, supra; Gaddy Engineering Co. v. Bowles Rice McDavid*, 231 W.Va. 577, 746 S.E.2d 568 (2013) (“[t]he fact that one party may benefit from an illegal fee-sharing agreement does not tip the proverbial scales of justice in favor of enforcement.”); *Martello v. Santana*, 713 F.3d 309 (6th Cir. 2013) (“Martello asserts that voiding these contracts would create a windfall for Santana at Martello's expense. This argument, while possibly true, is unpersuasive.”); *Trotter v. Nelson*,

684 N.E.2d 1150, 1155 (Ind.1997), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007) (“[W]hen a court determines that a contract must be declared void as against public policy, it does so on the grounds that the good of the public as a whole must take precedence over the circumstances of the individual, no matter the hardship or inequities that may result.”); *Infante v. Gottesman*, 233 N.J. Super. 310, 558 A.2d 1338, 1344 (1989) (“While we recognize that our decision may unjustly enrich defendant to the extent that he has received the benefit of any investigative and paralegal services performed by plaintiff, the pervasive proscriptions against such agreements require that we not render any assistance to these parties.”).

It should also be noted that Under Article VI, § 38 of the Constitution of the State of West Virginia provides that the legislature shall not “authorize the payment of any claim or part thereof . . . under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void.” Finally, West Virginia Code § 5A-3-17 states that spending officers may be held personally liable if they knowingly and willfully contract for services in violation of the purchasing laws, rules, and regulations of this State.

CONCLUSION

These “contracts” were not signed, executed, or ratified by the Board. They clearly fall outside of the scope of Resolution 3, and no actual authority existed with those who allegedly executed the “contracts.” Because these “contracts” were unauthorized and not legally formed as permitted by statute, they are void, unenforceable, and not subject to the legal doctrines of estoppel, apparent authority, or ratification. As such, the State is not bound to perform, or pay for services rendered, under them. The ERP Board may seek the advice of the Attorney General’s Office as to the legality of pursuing, and whether to pursue, recovery of all payments made to ISG under these “contracts.” As in *Samsell* and *Rich*, the fact that ISG may undergo hardship as a result of this conclusion does not alter the conclusion.

Appendix E: Agency Response

A draft of this report was provided on November 6, 2017 to the Enterprise Resource Planning Board along with a request to provide a written response to the report, if so desired. The Board did not provide a response.



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