STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CW 2118R

CLIENT NETWORK SERVICES, INC.

VERSUS

STATE OF LOUISIANA; STATE, DEPARTMENT OF HEALTH AND HOSPITALS; KATHY H. KLIEBERT, IN HER CAPACITY AS INTERIM SECRETARY, DEPARTMENT OF HEALTH AND HOSPITALS; STATE, DIVISION OF ADMINISTRATION; STATE, DIVISION OF ADMINISTRATION, OFFICE OF STATE PURCHASING; KRISTY H. NICHOLS, IN HER CAPACITY AS COMMISSIONER OF ADMINISTRATION; SANDRA G. GILLEN, IN HER CAPACITY AS DIRECTOR OF STATE PURCHASING; THE HONORABLE BOBBY JINDAL, IN HIS CAPACITY AS GOVERNOR, STATE OF LOUISIANA

Judgment Rendered: APR 29 2015

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**On Application for Supervisory Review from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 621,271**

The Honorable Timothy E. Kelley, Judge Presiding

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as the Commissioner of
Administration, The State through
the Office of State Purchasing and**

Kelly J. agrees and assigns additional reasons.
Holdridge J. dissents and assigns additional reasons.
Endorsed — dissents and assigns written reasons attached.

Sandra Gillen, In her Capacity as Director of State Purchasing

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BEFORE: GUIDRY, MCDONALD, WELCH, DRAKE, AND HOLDRIDGE, JJ.

GUIDRY, J.

This writ application comes before us on remand from the Louisiana Supreme Court for briefing, argument, and full opinion. Two principal issues are raised by the application:

I. Whether the district court has original subject matter jurisdiction over a breach of contract suit where the underlying contract was entered into pursuant to the Louisiana Procurement Code; and

II. If the district court does possess original subject matter jurisdiction over the suit, whether the doctrine of primary jurisdiction nevertheless requires the plaintiff to first present its claim to the administrative agency, thereby rendering this suit premature.

Finding that the district court possesses original subject matter jurisdiction over this matter and additionally finding that the district court did not abuse its discretion in denying the exception of prematurity, we deny the defendants' writ application.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of the termination of a nearly $200 million contract between the Louisiana Department of Health and Hospitals ("DHH") and Client Network Services, Inc. ("CNSI"). The contract, entitled the Agreement for the Operation and Enhancement of the Louisiana Medicaid Management Information System through a Fiscal Intermediary Type Arrangement ("the LMMIS Agreement"), tasked CNSI with, *inter alia*, creating a replacement system that would process claims from Medicaid providers and issue payments to providers. The LMMIS Agreement also indicated that the Louisiana Procurement Code, La. R.S. 39:1551, *et seq*. ("the Procurement Code"), gave DHH the authority to enter into the contract.

The contract took effect on February 15, 2012, at which time CNSI began performing under the terms of the LMMIS Agreement. A little over a year later, on March 21, 2013, the Director of State Purchasing notified CNSI in a letter that

she was terminating the LMMIS Agreement immediately for cause; the letter did not cite any reasons for the termination. Shortly thereafter, the Commissioner of Administration was quoted in *The Advocate* as saying: "[b]ased on consultation with the Attorney General's Office, today I am terminating the state's contract with CNSI, effective immediately." In this manner, both the Director of State Purchasing and the Commissioner took credit for the decision to terminate the contract. The Commissioner was also quoted in *The Advocate* as saying that, "[w]e have zero tolerance for wrongdoing, and we will continue to cooperate fully with any investigation." Soon thereafter, the Division of Administration's General Counsel made a claim against CNSI's $6 million performance bond.

After the termination of the contract was announced, a meeting of the parties was arranged at CNSI's request, and the meeting was scheduled to take place on Monday, April 29, 2013. On the Friday before the meeting, the Director of State Purchasing sent a letter to CNSI's counsel setting forth for the first time specific reasons for the termination of the contract.[1] At the meeting, CNSI presented a settlement proposal. The proposal was later rejected by the State in a letter dated May 2, 2013. In that same letter, the State furthermore claimed it was entitled to reimbursement of a "significant portion" of the approximately $17 million the State had already paid CNSI.

After its settlement proposal was rejected, CNSI initiated this lawsuit against DHH, the Division of Administration (DOA), and the Office of State Purchasing, among other state entities and state officials (hereafter all collectively referred to as "the State Defendants") on May 6, 2013. In its petition, CNSI sought monetary

[1] The April 26th letter listed the following reasons for the termination: 1) improper contacts between former DHH Secretary Bruce Greenstein and CNSI management; 2) revision of the Solicitation For Proposal ("SFP") through Addendum No. 2, creating an unfair advantage for CNSI; 3) CNSI's failure to include a key component of the SFP in its bid, resulting in CNSI's unfair underbidding of the project; 4) financial status and performance bond issues; 5) proposed Amendment 2 to the agreement, which would have added approximately $40 million to the original amount of the agreement; and 6) failure to complete document and system deliverables in a timely and quality manner.

damages for bad faith breach of contract and also sought a judgment declaring that the defendants lacked valid grounds to terminate the LMMIS Agreement for cause.[2]

The State Defendants responded to the suit by filing the exceptions that are the subject of this opinion: a declinatory exception raising the objection of lack of subject matter jurisdiction and a dilatory exception raising the objection of prematurity. By the exceptions,[3] the State Defendants sought to have the suit dismissed on grounds that CNSI had improperly failed to complete the administrative procedure required by the Procurement Code and improperly failed to complete the dispute resolution procedure required by the LMMIS Agreement prior to filing its suit in the district court. After CNSI filed a memorandum in opposition to the exceptions, the State Defendants filed a motion to strike certain claims of CNSI, asserting that CNSI was improperly challenging the constitutionality of the Procurement Code.

The provisions of the Procurement Code that the State Defendants rely upon to contend the dispute should have been submitted to the DOA before filing suit in district court are set forth in La. R.S. 39:1673, La. R.S. 39:1685, and La. R.S. 39:1691(C), which provide in pertinent part that an aggrieved contractor must file a complaint with the chief procurement officer and appeal to the commissioner before the contractor may appeal to the district court:

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[2] CNSI also raised two alternative causes of action, one that sought an award of costs as provided for in the LMMIS Agreement if the court found that the State Defendants were entitled to terminate the LMMIS Agreement for convenience and the other that sought an award of actual expenses reasonably incurred pursuant to La. R.S. 39:1678(1)(b) if the court determined that the award of the contract to CNSI was in violation of law.

[3] The State Defendants also raised a peremptory exception raising the objection of no cause of action; however, the State Defendants did not request review of that ruling in their writ application. Accordingly, that ruling is not addressed herein.

§ 1673. Authority to resolve contract and breach of contract controversies other than professional, personal, consulting, and social services contracts

A. Applicability. This Section applies to controversies between the state and a contractor and which arise under or by virtue of a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. Any contractor who seeks a remedy with regard to such controversy shall file a complaint with the chief procurement officer.

....

C. Decision. If such a claim or controversy is not resolved by mutual agreement, the chief procurement officer or his designee shall promptly issue a decision in writing....

....

E. Finality of decision. The decision under Subsection C of this Section shall be final and conclusive unless one of the following applies:

(1) The decision is fraudulent.

(2) The contractor has timely appealed administratively to the commissioner in accordance with R.S. 39:1685.

§ 1685. Contract and breach of contract controversies

....

B. Time limitation on filing an appeal. The aggrieved contractor shall file its appeal with the commissioner within fourteen days of the receipt of the determination under R.S. 39:1673(C).

C. Decision. The commissioner shall decide within fourteen days the contract or breach of contract controversy. Any prior determination by the state chief procurement officer or his designee shall not be final or conclusive.

....

E. Finality of decision. A decision under Subsection C of this Section shall be final and conclusive unless one of the following applies:

(1) The decision is fraudulent.

(2) The contractor has timely appealed an adverse decision of the commissioner to the court in accordance with R.S. 39:1691(C).

> **§ 1691. Actions by or against the state in connection with contracts**
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> ....
>
> **C. Actions under contracts or for breach of contract.** The Nineteenth Judicial District Court shall have exclusive venue over an action between the state and a contractor who contracts with the state, for any cause of action which arises under or by virtue of the contract, whether the action is on the contract or for a breach of the contract or whether the action is for declaratory, injunctive, or other equitable relief.

The chief procurement officer is the Director of the Office of State Purchasing.

The provision of the LMMIS Agreement that the State Defendants rely upon to contend that the dispute should have been submitted to the DHH Secretary for a decision before filing suit in district court provides in pertinent part that the parties to the contract (DHH and CNSI) must submit the dispute to the DHH Secretary for a decision if the dispute between the parties is not resolved by agreement:

> H. Resolution of Disputes
>
> Any issues or provisions of the Contract in dispute between the Department and the Contractor which, in the judgment of either party to the Contract, may materially affect the performance of such party shall be reduced to writing and delivered to the other party. The Department and the Contractor shall promptly thereafter negotiate in good faith and use every reasonable effort to resolve such dispute in a mutually satisfactory manner. Those disputes not resolved by agreement shall be decided by the Secretary of the Department, who shall reduce his decision in writing and furnish a copy thereof to the Contractor.

The LMMIS Agreement also included a provision permitting, but not requiring, an aggrieved contractor to invoke the dispute resolution procedure contained in the Procurement Code after receiving the DHH Secretary's decision:

> The Contractor may file a complaint with the Division of Administration in accordance with Louisiana R.S. 39:1673 et seq. if it so chooses upon receipt of the Secretary's decision.

At the hearing on the exceptions and motion to strike, CNSI introduced into evidence all of the exhibits that were attached to its memorandum in opposition to the exceptions. At the conclusion of the hearing, the district court denied the State

Defendants' exceptions and motion to strike. The district court found that the court possessed subject matter jurisdiction over the suit because CNSI's petition sought to invoke the district court's original jurisdiction; did not involve an issue of public law; and was a contract claim within the court's original subject matter jurisdiction.

With respect to the exception raising the objection of prematurity, the district court found that CNSI had "substantially complied" with the LMMIS Agreement and found that CNSI was not required to go through the administrative process set forth by the Procurement Code, citing the following reasons:

> Now, prematurity I guess you know what I'm going to do there, obviously, I'm going to deny that. They don't have to go back there. There's nothing that requires them to go back there. To go back there would be a waste of judicial time, effort, statements – first and foremost, the agency that terminated the contract without cause, allegedly, without cause has got to make the decision on whether they did what they did, right or wrong. I wonder how that's going to turn out? Let's balance that, okay. Two, it may end up going to the commissioner of administration who by the way has made very public statements expressing what her position on the case is. I wonder how that's going to turn out? If you balance the need to go there versus the utility of going here, there is no utility of going there, there's none, whatsoever. Everyone, like I said before knows what the results going to be because it's already predetermined. You have a bias [sic] person to determine the facts in the case and to determine the matter. So to go there first, doesn't help anybody. So I deny prematurity.

A written judgment conforming to this ruling was signed by the district court on November 14, 2013.

Thereafter, the State Defendants filed an application for supervisory writs, and by an action dated April 7, 2014, this Court denied the writ.[4] The State Defendants then filed an application for supervisory writs with the Louisiana Supreme Court, and on August 25, 2014, the Louisiana Supreme Court granted the application and remanded the matter to this Court for briefing, argument, and full opinion.

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[4] Judge Drake dissented in part, stating that he would have granted the exception raising the objection of prematurity.

Meanwhile, the litigation has continued to proceed. Both the DOA and DHH have now asserted reconventional demands against CNSI through which they assert claims for more than $17 million. Discovery is also ongoing, despite multiple attempts by the State Defendants to stay all discovery.

DISCUSSION

I. *SUBJECT MATTER JURISDICTION*

The State Defendants first contend that the district court lacks original subject matter jurisdiction over this lawsuit because the Procurement Code, La. R.S. 39:1551, *et seq.*, states that contractors in a contract dispute with the State must present the dispute to the chief procurement officer and the commissioner of administration before filing an appeal in district court. See La. R.S. 39:1673, La. R.S. 39:1685, and La. R.S. 39:1691.[5] It is undisputed that the Procurement Code gives the administrative agency, i.e. the DOA, original subject matter jurisdiction over this breach of contract suit. The issue here is whether the district court also possesses original subject matter jurisdiction such that the district court and administrative agency possess concurrent jurisdiction over the matter.

Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based on the object of the demand, the amount in dispute, or the value of the right asserted. La. C.C.P. art. 2. Except as otherwise provided by the Louisiana Constitution, a district court shall have original jurisdiction of all civil and criminal matters. La. Const. art. V, § 16(A). When the original jurisdiction allocated to the various courts is circumscribed by the Louisiana Constitution, the Legislature may not alter such jurisdiction by statute. Moore v. Roemer, 567 So. 2d 75, 79 (La. 1990).

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[5] The term "original jurisdiction" refers to the adjudicative tribunal in which the initial adjudication is made. Paulsell v. State, Department of Transportation and Development, 12-0396, p. 5 (La. App. 1st Cir. 12/28/12), 112 So. 3d 856, 860, writ denied, 13-0274 (La. 3/15/13), 109 So. 3d 386.

It therefore follows that if this suit constitutes a civil matter within the meaning of La. Const. art. V, § 16(A), the district court cannot be held to lack subject matter jurisdiction over CNSI's claims in the absence of *constitutional* authority expressly granting exclusive jurisdiction to an administrative agency or other tribunal. See Paulsell v. State, Department of Transportation and Development, 12-0396, pp. 5-6 (La. App. 1st Cir. 12/28/12), 112 So. 3d 856, 861, writ denied, 13-0274 (La. 3/15/13), 109 So. 3d 386.

The State Defendants contend that the district court lacks original subject matter jurisdiction over this suit because it is not a civil matter and, even if it is, there is constitutional authority granting exclusive jurisdiction to the administrative agency. According to the State Defendants, this contract claim is not a civil matter within the meaning of Article V, § 16(A) because it is a matter of "public law." However, the State Defendants cannot cite to this Court any case where a Louisiana court determined that a case was not a civil matter because it was a public law matter. Neither the Louisiana Supreme Court nor the First Circuit has ever held that a claim was not a civil matter within the meaning of the constitution because it involved a matter of public law.[6]

Rather, Louisiana jurisprudence has consistently applied a historical analysis to determine whether a suit is a civil matter. See McGehee v. City/Parish of East Baton Rouge, 00-1058, pp. 3-4 (La. App. 1st Cir. 9/12/01), 809 So. 2d 258, 260-61. Under this approach, the courts look at whether a claim has traditionally been

[6] The State Defendants cite Moore in support of their argument that a "public law" matter may not constitute a civil matter. In Moore, the Supreme Court merely held that that the worker's compensation claim at issue therein was not a matter of public law and declined to address the defendants' argument that the Legislature could establish different procedures for adjudicating matters of public law on this basis. Moore, 567 So. 2d at 81. Furthermore, Louisiana courts in decisions rendered after Moore have relied exclusively on historical analysis to ascertain whether a claim is a civil matter. See Wooley v. State Farm Fire and Casualty Insurance Company, 04-0882, pp. 24-26 (La. 1/19/05), 893 So. 2d 746, 764-765; In re: American Waste & Pollution Control Co., 588 So. 2d 367, 371 (La. 1991); Clark v. State, 02-1936, pp. 6-7 (La. App. 1st Cir. 1/28/04), 873 So. 2d 32, 35-36, writ denied, 04-0452 (La. 4/23/04), 870 So.2d 300; Boeing Company v. Louisiana Department of Economic Development, 94-0971, pp. 8-12 (La. App. 1st Cir. 6/23/95), 657 So. 2d 652, 657-59.

adjudicated in district court and whether private citizens have historically had the independent right to bring the suit in district court, with a particular emphasis on whether the suit could be brought in the district court in 1974 when the current version of Article V, § 16(A) was enacted. Wooley v. State Farm Fire and Casualty Insurance Company, 04-0882, pp. 24-26 (La. 1/19/05), 893 So. 2d 746, 764-765. Because this is a contract claim and because district courts in Louisiana have always exercised original jurisdiction over contract claims, we find the suit does constitute a civil matter within the meaning of Article V, § 16(A). See A&L Energy, Inc. v. Pegasus Group, 00-3255, p. 12 (La. 6/29/01), 791 So. 2d 1266, 1275, cert. denied, 534 U.S. 1022, 122 S.Ct. 550, 151 L.Ed.2d 426 (2001); see also Levert v. University of Illinois at Urbana/Champaign Board of Trustees, 02-2679, p. 10 (La. App. 1st Cir. 9/26/03), 857 So. 2d 611, 618, writ denied, 03-2994 (La. 1/16/04), 864 So. 2d 635.

In light of the fact that this is a civil matter, the district court cannot be held to lack subject matter jurisdiction over CNSI's claims in the absence of constitutional authority expressly granting exclusive jurisdiction to an administrative agency or other tribunal. See Paulsell, 12-0396 at pp. 5-6, 112 So. 3d at 860-61.

The State Defendants contend that there are two constitutional provisions that divest the district court of its original jurisdiction over this suit. The first is La. Const. art. V, § 16(B), which provides that, "[a] district court shall have appellate jurisdiction as provided by law." According to the State Defendants, the district court is divested of its original subject matter jurisdiction because the constitution authorizes the Legislature to designate a district court's appellate jurisdiction and the Legislature, through the Procurement Code, gives the district court appellate jurisdiction over procurement disputes. See La. Const. art. V, § 16(B) and La. R.S. 39:1691(C). The State Defendants therefore contend that the

legislative grant of appellate jurisdiction to the district court, which is constitutionally authorized by Article V, § 16(B), has the corresponding effect of divesting the district court of its original jurisdiction.

However, this argument fails because the constitutional provision does not satisfy the requisite standard; stating that the Legislature *can* designate a district court's appellate jurisdiction cannot be construed as expressly granting exclusive jurisdiction to an administrative agency. See Paulsell, 12-0396 at pp. 6-7, 112 So. 3d at 861. District courts can possess both original and appellate jurisdiction.

The second constitutional provision cited by the State Defendants is La. Const. art. XII, § 10(C), which provides that, "the legislature...shall provide a procedure for suits against the state, a state agency, or a political subdivision." According to the State Defendants, the Procurement Code creates just such a "procedure" within the meaning of Article XII, § 10 by establishing the process by which state contractors may file breach of contract complaints against the State. Therefore, the State Defendants contend that the district court erred by not requiring CNSI to comply with this process. However, jurisdiction and procedure are two separate concepts and Article XII, § 10 does not address jurisdiction at all. Therefore, this provision clearly does not authorize the Legislature to vest exclusive original jurisdiction over suits against the State in an agency.

Finally, attempting to wholly sidestep the requirement of constitutional authority to divest a district court of its original jurisdiction over a civil matter, the State Defendants cite two cases out of context to contend that legislative intent to assign exclusive original subject matter jurisdiction to an administrative agency is sufficient to divest a court of its original subject matter jurisdiction over a civil matter. See Kelty v. Brumfield, 93-1142 (La. 2/25/94), 633 So. 2d 1210 (per curiam) and Willows v. State, Department of Health and Hospitals, 08-2357 (La. 5/5/09), 15 So. 3d 56.

In Kelty, the Supreme Court considered whether a district court had original subject matter jurisdiction to make the initial adjudication of a future medical care benefits claim under the Medical Malpractice Act in light of the fact that the Act included a set of procedures that called for initial review of the action in a state agency. Kelty, 633 So. 2d at 1215. If the district court lacked original jurisdiction, the case would not be res judicata and relief could be provided to the plaintiffs. In a split opinion, the court determined that the district court did not possess subject matter jurisdiction over the suit because the *statute* creating the plaintiffs' special remedial claim vested exclusive original subject matter jurisdiction of the initial disposition of that claim in the State agency. According to the court, the Legislature intended to eliminate all judicial power in initial decision making or supervision over medical and related care claims. The State Defendants contend that the Procurement Code likewise demonstrates legislative intent to eliminate all judicial power in the initial review of procurement disputes.

However, the Kelty court acknowledged that it was assuming jurisdiction without deciding the validity of the legislative limits upon the courts' constitutional jurisdiction because the parties had not presented any constitutional arguments. Kelty, 633 So.2d at 1216. In fact, there was no discussion of civil matters within the meaning of La. Const. art. V, § 16(A) in Kelty. We find Kelty distinguishable on this basis.

The other case cited by the State Defendants is Willows v. State, Department of Health and Hospitals, 08-2357 (La. 5/5/09), 15 So. 3d 56. The Willows case involved a disappointed bidder on a State contract. After its bid was rejected by the State, the disappointed bidder invoked the dispute resolution procedure set forth in the Procurement Code.

When the Willows case reached the Louisiana Supreme Court, the issue before the court was whether the First Circuit had jurisdiction to consider the

plaintiff's appeal. In its analysis of that issue, the court cited La. Const. art. V, § 16(B) for the proposition that judicial review of the decision of an administrative agency is an exercise of a court's appellate jurisdiction rather than a district court's original jurisdiction under La. Const. art. V, § 16(A). Willows, 08-2357 at p. 6, 15 So. 3d at 60. The State Defendants cite this statement as evidence that a district court cannot possess original subject matter jurisdiction over a contract claim involving the Procurement Code. However, the plaintiff in Willows never attempted to invoke the original jurisdiction of the district court; furthermore, the court was not addressing the issue of whether a contractor could ever invoke the district court's original jurisdiction. Therefore, this case cannot stand for the proposition that that the district court can never possess original subject matter jurisdiction over a contract claim involving the Procurement Code.

Because we find that this breach of contract suit is a civil matter within the meaning of La. Const. art. V, § 16(A), and we further find that no constitutional provision expressly grants exclusive jurisdiction over this suit to the DOA, we find the district court possesses original subject matter jurisdiction over this suit. We therefore find no error in the district court's decision to deny the exception raising the objection of lack of subject matter jurisdiction.

II. *PREMATURITY*

Having found that the district court possesses original subject matter jurisdiction over this matter, we next proceed to the question of whether CNSI's action was nevertheless premature because it did not exhaust the Procurement Code's administrative remedies before filing suit in district court. The doctrine of primary jurisdiction governs the prematurity analysis, because we have found that the district court and the administrative agency possess concurrent original

jurisdiction over this matter.[7] See Paulsell, 12-0396 at p. 6, 112 So. 3d at 861. The doctrine of primary jurisdiction is a determination of who shall make the initial finding where two potential jurisdictions exist. South-West Utilities, Inc. v. South Central Bell Telephone Company, 339 So. 2d 425, 427 (La. App. 1st Cir. 1976). In such cases, a court, at its discretion, may dismiss the claims before it and defer the matter to the agency that has been granted primary jurisdiction over the claims. Paulsell, 12-0396 at p. 6, 112 So. 3d at 861. In primary jurisdiction cases, the judicial process is suspended pending referral to the administrative agency of issues which under a regulatory scheme are within the agency's special competence. Daily Advertiser v. Trans-La, a Division of Atmos Energy Corporation, 612 So. 2d 7, 27 n.31 (La. 1993).

Under the doctrine of primary jurisdiction, courts generally weigh the reasons pulling in each direction and decide whether requiring exhaustion is

[7] In contrast, the exhaustion doctrine properly applies when exclusive jurisdiction exists in the administrative agency and the courts have only appellate, as opposed to original, jurisdiction to review the agency's decisions. Paulsell, 12-0396 at p. 6, 112 So. 3d at 861. In their original writ application, the State Defendants contended that the exhaustion doctrine governed the prematurity analysis in this case; however, the State Defendants correctly abandoned this argument in their remand brief. There does appear to be some confusion in Louisiana jurisprudence when it comes to determining which doctrine should apply; courts often apply the exhaustion doctrine without first ascertaining whether the administrative agency possesses exclusive jurisdiction. A case often cited for its discussion of the exhaustion doctrine is Steeg v. Lawyers Title Insurance Corp., 329 So. 2d 719 (La. 1976). We therefore note that, while the Louisiana Supreme Court in Steeg was not explicit about why it was applying the exhaustion doctrine, the subject matter of the suit was the legality of insurance rates, a matter that would not seem to be a civil matter within the meaning of La. Const. art. V, § 16(A). See Wooley v. State Farm Fire and Casualty Insurance Co., 04-0882 (La. 1/19/05), 893 So.2d 746. Two noteworthy decisions that cited exhaustion doctrine cases to find the matters before them were premature are Pacificorp Capital, Inc. v. State, Division of Administration, 604 So.2d 710 (La. App. 1st Cir. 1992) and State, Department of Social Services v. Baha Towers Limited Partnership, 04-0578 (La. App. 4th Cir. 12/1/04), 891 So. 2d 18. Both of these cases involved the Procurement Code, but we find them distinguishable because the courts therein did not analyze whether the subject matter of the suits before them were civil matters nor did they address whether the district court possessed concurrent jurisdiction with the administrative agency over the matter as we have in the present case.

desirable.[8] Magnolia Coal Terminal v. Phillips Oil, 576 So. 2d 475, 487 (La. 1991) (Dennis, J., concurring). The basis of the court's decision is mainly judicial discretion rather than law, because the factors pulling each way are usually plural; each is usually a variable, having differing degrees of strength or weakness, so that the court must weigh the combinations of degrees of factors pulling one way against those pulling the other way, and the judge is typically limited to deciding on the basis of preliminary impressions. Magnolia Coal, 576 So. 2d at 487-488. Yet the major factors that affect an exhaustion decision are identifiable. Magnolia Coal, 576 So. 2d at 488.

Pulling away from the requirement of exhaustion are a combination of such factors as irreparable injury to a party for pursuing the administrative remedy, clear absence of the agency jurisdiction, clear illegality of the agency's position, a dispositive question of law peculiarly within judicial competence, the futility of exhaustion, and expense and awkwardness of the administrative proceeding as compared with inexpensive and efficient judicial disposition of the controversy.

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[8] The State Defendants attempt to contend that this balancing test, also employed by the Louisiana Supreme Court in Daily Advertiser, should not apply to this case because there are factual distinctions between Daily Advertiser and the present case. See Daily Advertiser, 612 So. 2d 7. Yet the court in Daily Advertiser was presented with claims over which the district court and administrative agency possessed concurrent original jurisdiction, as in the present case. Daily Advertiser, 612 So. 2d at 26-27. Any distinction between the claims in Daily Advertiser and the present case are irrelevant because the balancing test applies in all cases where the district court and administrative agency possess concurrent jurisdiction over a matter. See Paulsell, 12-0396 at pp. 6-7, 112 So. 3d at 861. We further note that the test employed in Daily Advertiser did not originate in that case; rather, the Daily Advertiser court cited Justice Dennis' concurring opinion in Magnolia Coal as its source for the balancing test, a case that did not in any way involve rate matters or the Louisiana Public Service Commission. See Daily Advertiser, 612 So. 2d at 17; Magnolia Coal Terminal v. Phillips Oil, 576 So. 2d 475 (La. 1991). Moreover, the United States Supreme Court also has indicated that multiple factors go into the decision of whether to apply the doctrine of primary jurisdiction:

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

For these reasons, the balancing test set forth in Magnolia Coal and Daily Advertiser is properly applied to this case where the district court and administrative agency possess concurrent jurisdiction over the matter.

Magnolia Coal, 576 So. 2d at 488. Pulling toward exhaustion are a combination of such factors as the need for factual development, importance of reflecting the agency's expertise or policy preferences in the final result, probability that the agency will satisfactorily resolve the controversy without judicial review, protection of agency processes from impairment by avoidable interruption, conservation of judicial energy by avoiding piecemeal or interlocutory review, and providing the agency the opportunity to correct its own errors. Magnolia Coal, 576 So. 2d at 488.

This Court must therefore consider the foregoing factors to ascertain whether the district court abused its discretion when it declined to invoke the primary jurisdiction doctrine. See Daily Advertiser, 612 So. 2d at 20; see also Magnolia Coal, 576 So. 2d at 489 (per curiam on application for rehearing). As indicated above, the district court found that CNSI should not be required to submit its claim to the DOA, because it found that requiring CNSI to go through the administrative procedure in this case would be futile given evidence that the administrative decision makers would be biased against CNSI.

We find that, in light of the exceptionally unique circumstances of this case, the district court did not abuse its discretion in denying the exception raising the objection of prematurity. First, the district court's concerns about futility appear well-founded as the agency that would control the administrative process in this case, the DOA, is the same agency that dictated the very events that gave rise to this lawsuit. After all, the Chief Procurement Officer wrote the letter terminating the agreement and the Commissioner publicly took credit for the decision to terminate the agreement in a statement published in *The Advocate*. Additionally, CNSI is not only asking the DOA to correct an erroneous decision, it is also asserting a claim against the State for millions of dollars in damages. It is therefore difficult to foresee that the Chief Procurement Officer or the

Commissioner would find that their own respective actions were wrongful and subjected the State to millions of dollars in liability. Also, the DOA and DHH have sought in excess of $17 million from CNSI in their reconventional demands against CNSI.

An additional consideration is that the case has now been proceeding in district court for close to two years. To halt all proceedings in district court and require CNSI to go through the administrative procedure at this juncture, requiring untold proceedings to be rescheduled, would be a waste of judicial resources.

We also see no abuse of discretion in the district court's decision not to invoke the doctrine of primary jurisdiction because this breach of contract case requiring interpretation of the LMMIS Agreement and enforcement of its terms is neither beyond the conventional expertise of judges nor within the special competence of the DOA. See District of Columbia v. District of Columbia Public Service Commission, 963 A.2d 1144, 1154 (D.C. 2009).

The State Defendants attempt to convince this Court that the Procurement Code contains sufficient safeguards to protect State contractors like CNSI from bias because the procedure affords them multiple levels of review. However, the State Defendants fail to mention that the first two levels of review are decided by the very same personnel who personally took responsibility for terminating the LMMIS Agreement. We also note that if CNSI is required to submit to the Procurement Code's dispute resolution procedure, the decision of the Commissioner would be afforded deference. See GC Services Limited Partnership v. Board of Supervisors of Louisiana State University, 93-1948 (La. App. 1st Cir. 12/22/94), 648 So. 2d 1045, writ denied, 95-0211 (La. 4/7/95), 652 So. 2d 1345.

The State Defendants also assert that CNSI can raise concerns about bias while going through the administrative procedure by filing a motion to recuse or by alleging a due process violation on the basis of bias, citing Matter of Rollins

Environmental Services, Inc., 481 So. 2d 113 (La. 1985) (where a party filed a motion to recuse the Secretary of the Department of Environmental Quality from the administrative review process on grounds she had prejudged the adjudicative facts in dispute) and Hall v. State, Department of Public Safety and Corrections, 98-0726, pp. 9-11 (La. App. 1st Cir. 4/1/99), 729 So. 2d 772, 777-778 (where a party raised a due process challenge alleging bias when it appealed its decision to the First Circuit after going through the administrative process). However, neither Rollins nor Hall involved the situation presented herein where the district court and the administrative agency possessed concurrent original jurisdiction. Also, the mere fact that bias can be raised in an administrative proceeding does not constitute grounds to find the district court abused its discretion by allowing CNSI to bypass the administrative procedure.

Finally, we find that CNSI was not required by the terms of the LMMIS Agreement to submit the dispute to the DHH Secretary for a decision before filing suit because this provision of the contract only applied if there were any "issues or provisions of the Contract in dispute between the Department and the Contractor." Given the evidence that the DOA, not DHH, terminated the contract, and the absence of evidence that there were any issues or provisions of the LMMIS Agreement in dispute between DHH and CNSI, we find this provision inapplicable.

For all these reasons, we find the district court did not abuse its discretion in overruling the exception raising the objection of prematurity.

CONCLUSION

For the above and foregoing reasons, we deny the relief requested by the defendants/applicants, State of Louisiana; State, Department of Health and Hospitals; Kathy H. Kliebert, in her capacity as interim secretary, Department of Health and Hospitals; State, Division of Administration; State, Division of

Administration, Office of State Purchasing; Kristy H. Nichols, in her capacity as Commissioner of Administration; Sandra G. Gillen, in her capacity as Director of State Purchasing, and the Honorable Bobby Jindal, in his capacity as Governor, State of Louisiana, and we assess the defendants/applicants with the costs, in the amount of $10,988.50.

WRIT DENIED.

CLIENT NETWORK SERVICES, INC.
THOMAS GARRISON

VERSUS

STATE OF LOUSIANA, DEPARTMENT OF HEALTH AND HOSPITALS, ET AL.

NO. 2013 CW 2118R

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

WELCH, J., agreeing and assigning additional reasons.

While I agree with the thoughtful analysis and result reached by the majority, I write separately to caution that a departure from the administrative process (*i.e.*, pulling away from the requirement of exhaustion of administrative remedies) should only be permitted by district courts in unusual, extreme, or egregious circumstances. The fact that an agency will be required to review its own actions does not generally warrant a departure from the administrative process. However, in this case, the ultimate decision maker in the procurement code administrative process—the Commissioner of Administration—openly and publicly made statements against CNSI on issues that would have come before her during the administrative process and those statements clearly indicated her predisposition against CNSI with regard to the issues. Thus, requiring CNSI to go through the administrative process—or to exhaust its administrative remedies—would be a vain and useless act. Therefore, I believe that this case falls under the category of unusual, extreme, or egregious circumstances such that a departure from the administrative process is warranted.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CW 2118R

CLIENT NETWORK SERVICES, INC.

VERSUS

STATE OF LOUISIANA; STATE, DEPARTMENT OF HEALTH AND HOSPITALS; KATHY H. KLIEBERT, IN HER CAPACITY AS INTERIM SECRETARY, DEPARTMENT OF HEALTH AND HOSPITALS; STATE, DIVISION OF ADMINISTRATION; STATE, DIVISION OF ADMINISTRATION, OFFICE OF STATE PURCHASING; KRISTY H. NICHOLS, IN HER CAPACITY AS COMMISSIONER OF ADMINISTRATION; SANDRA G. GILLEN, IN HER CAPACITY AS DIRECTOR OF STATE PURCHASING; THE HONORABLE BOBBY JINDAL, IN HIS CAPACITY AS GOVERNOR, STATE OF LOUISIANA

DRAKE, J., dissents and assigns reasons.

I respectfully disagree with the majority opinion as it does not address the case of *Pacificorp Capital, Inc. v. State, Division of Administration,* 604 So.2d 710 (La. App. 1st Cir. 1992), which is not so dissimilar to the present case so as to be distinguishable. Secondly, La. Acts 1985, No. 52, §1 amended La. R.S. 39:1671 to provide that a person aggrieved by a solicitation or award of a contract **shall** protest to the chief procurement officer. Prior to the amendment, the statute said "may protest." Based on the statute and the *Pacificorp* case, I believe the Legislature intended any contract disputes to be brought before the chief procurement officer prior to the district court.

For these reasons, I respectfully dissent.

CLIENT NETWORK SERVICES, INC.
THOMAS GARRISON

VERSUS

STATE OF LOUSIANA, DEPARTMENT OF HEALTH AND HOSPITALS, ET AL.

NO. 2013 CW 2118R

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

HOLDRIDGE, J.,

I respectfully dissent. I believe that the district court erred in denying the dilatory exception raising the objection of prematurity. The mandatory language of La. R.S. 39:1673A clearly dictates that when there is a contractual dispute between a contractor and the state, the contractor "**shall** file a complaint with the chief procurement officer." Louisiana Revised Statute 39:1673B further authorizes the chief procurement officer, prior to the commencement of any action in court, to settle or resolve the matter, with the approval of the attorney general. If the matter is not settled by mutual consent, the contractor may timely appeal to the commissioner in accordance with La. R.S. 39:1685. Within fourteen days, the commissioner must render a decision, after which the parties may appeal the matter to the Nineteenth Judicial District Court.

In these statutes, the legislature has imposed a rather simple and speedy procedure for the parties to pursue to try to resolve or settle any of the matters existing between them before proceeding to the district court. I see no undue burden on the part of CNSI in following these procedures notwithstanding the facts of this case.

In addition, to presuppose, as the majority does, that the chief procurement officer would automatically be biased simply because the state is one of the parties involved in the contract dispute effectively renders La. R.S. 39:1673 superfluous, as the state is always a party. Moreover, I believe that the statements attributed to the commissioner (not the chief procurement officer) that are relied on by the

majority opinion are insufficient to bypass the legislatively-mandated procedure set forth in the Louisiana Procurement Code.

Finally, I note that the result reached by the majority opinion highlights an important issue. In **GC Services Limited Partnership v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College**, 93–1948 (La.App. 1 Cir. 12/22/94), 648 So.2d 1045, 1046, writ denied, 95–0211 (La.4/7/95), 652 So.2d 1345, this court concluded that an aggrieved party, such as CNSI, is not entitled to a de novo review in the district court of a commissioner's decision rendered pursuant to La. R.S. 39:1691, but rather is subject to the standard of review set forth in the Administrative Procedure Act.[1] I believe that the holding of **GC Services** is contrary to the provisions of the Louisiana Procurement Code, specifically La. R.S. 39:1691D, and should be overruled. In this case, if CNSI would have been entitled to a de novo review, this matter would not have been litigated.

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[1] In **GC Services** the court held that pursuant to La. R.S. 49:964G of the Administrative Procedure Act, the administrative tribunal's factual findings are subject to the manifest error standard of review while its conclusions are subject to the "arbitrary, capricious, or abuse of discretion" standard of review.