

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

STATE OF FLORIDA,
DEPARTMENT OF ECONOMIC OPPORTUNITY,

Plaintiff,

v.

Case No.: 2017 CA 000004

PALM COAST DATA, LLC,
a State of Florida Limited Liability Company,

Defendant.

_____ /

COMPLAINT

Plaintiff, the STATE OF FLORIDA, DEPARTMENT OF ECONOMIC OPPORTUNITY (“DEO”), by and through its undersigned counsel, sues Defendant, PALM COAST DATA, LLC, and alleges the following:

I.
INTRODUCTION

The Florida Legislature created the Quick Action Closing Fund (the “Program”) in 1999 in an effort to elevate the State of Florida’s stature in the highly competitive contest to attract high-impact businesses. The Program provides cash incentives to attract, retain, and grow high-impact businesses in Florida. *See* section 288.1088, Florida Statutes.

Absent any statutorily authorized waivers, the Program provides financial assistance for businesses in key industries to support job-creating projects that will meet the strict requirement of providing at least a 5-to-1 return on investment. Financial assistance is only provided when it serves to induce the project’s occurrence in Florida and only if the business invests a significant

amount of capital into the project from other sources. Additionally, there must be local support for the project and the business must pay its employees an above-average wage. *Id.*

At all relevant times, the approval process for all projects required initial review by Enterprise Florida, Inc. (“EFI”). EFI would then provide a recommendation to the Office of Tourism Trade and Economic Development (“OTTED”), which would then conduct its own review and make a recommendation to the Governor, who would approve or deny the project. If approved, OTTED and the business would enter into a contract providing for the payment of cash incentives in exchange for an agreed-upon number of new Florida jobs at an above-average wage and the investment of a specified amount of capital.

Prior to 2011, OTTED simply advanced the entire cash payment to the business before the majority of its job creation and capital investment commitments to the state were fulfilled. This is in stark contrast to the pay-for-performance policy implemented by Governor Scott—which ensures that state funds are not distributed until strict requirements have been met and verified. This is to ensure that no tax dollars are misused.

II. THE DEAL

In 2008, Flagler County, one of Florida’s 32 rural counties, had the highest unemployment rate in the state. Approximately 8% of the County’s workforce was unemployed. At the same time, Defendant operated an 186,000 square foot facility in the City of Palm Coast, and employed around 1,000 people, which was approximately 1% of the County’s entire population. Defendant was, in fact, the largest private employer in Flagler County.

Defendant, recognizing its position as a mainstay of private employment for the City of Palm Coast, sought to leverage that reputation and receive Program funds. So, in June of 2008, Defendant submitted an application promising to maintain the 1,000 jobs that already existed, to

create 700 more jobs, and to inject more than \$27,000,000.00 in capital investment into Flagler County. Defendant further promised that its employees' annual average wage would be \$29,530.00, excluding an estimated \$10,000 in benefits per job.

As part of this overall proposal, in its General Project Overview (the "Application") submitted to OTTED, Defendant proposed to relocate and consolidate all of its other business operations – from another location in Florida, and from facilities in Colorado, Illinois, and Ohio – into one, sprawling, 550,000 square foot facility in the City of Palm Coast. That facility was to become the national headquarters of Defendant's business enterprise. In addition to providing much needed capital investment into Flagler County, Defendant's proposed renovation and new construction was estimated to create an additional 362 construction jobs.

Ultimately, Defendant's proposal persuaded then-Governor Crist to approve the incentive package, which he did on or about August 6, 2008. The Defendant entered into a six-year contract with OTTED shortly thereafter on October 8, 2008 (hereinafter, "the Contract").

III. PALM COAST'S CONTRACT

In order to receive its up-front award of \$3,000,000.00, Defendant was required to: 1) execute the Contract with OTTED; 2) publicly announce its intention to remain in Flagler County while also expanding its facilities there; 3) provide documentation of the retention of at least 1,000 full time equivalent ("FTE") jobs in the City of Palm Coast; 4) create 50 new FTE jobs by March 30, 2009; and 5) execute the purchase or lease of a facility within the City of Palm Coast and also execute a separate contract for the renovation of that same facility.

Defendant met those requirements and received the \$3,000,000.00 award on June 5, 2009. To retain that money, Defendant had to meet four main requirements. Per the Contract, Defendant was required to: 1) maintain its existing 1,000 FTE jobs until December 3, 2011; 2) maintain an

average annual wage of \$29,530.00, excluding an additional \$10,000.00 in benefits; 3) invest \$27,300,000.00 of capital investment in facilities and equipment by December 31, 2011; and 4) create and sustain a cumulative total of 700 new FTE jobs by December 31, 2011.

The Contract also mandated that Defendant submit annual certifications of employment and average annual wage payments by January 31 of each year. Such reports were to be submitted annually through January 31, 2014.

IV.
AMENDMENT OF THE CONTRACT AND
DEFENDANT'S PERFORMANCE

Less than two years into the Contract, however, Defendant began encountering problems meeting its job creation and capital investment benchmarks. In February 2010, Defendant requested approval to exercise a provision in the Contract (Paragraph 5.0(d)) giving it a one-time option to extend both the job creation and capital investment benchmarks by one year.

Wanting to see Defendant ultimately succeed and bring the much needed jobs and promised capital investment to Flagler County, OTTED approved the extension on or about March 4, 2010. In a letter that same day, OTTED confirmed that each of the outstanding performance deadlines were extended by one year. Overall, this meant the existing 1,000 FTE jobs and new 700 FTE jobs were to be maintained until at least December 31, 2014. Furthermore, OTTED confirmed in the letter that Defendant's obligation to invest \$27,300,000.00 of capital investment into Flagler County was extended to December 31, 2012. That capital investment was to be maintained in Flagler County for at least two years beyond that date.

These new deadlines were memorialized in an amendment to the Contract entered into on or about May 5, 2010. The amendment also required the Defendant to meet additional separate, annual benchmarks. Specifically, Defendant had to create: 150 additional new FTE jobs by

December 31, 2009; 300 additional new FTE jobs by December 31, 2010; and 200 additional new FTE jobs by December 31, 2011. If Defendant reached those benchmarks, including the 50 new jobs already created, it would have created a total of 700 new FTE jobs. Additionally, this amendment extended the term of the Contract until June 30, 2016, and extended Defendant's annual reporting requirement, too, by one year, to January 31, 2015.

Despite the extension of the original Contract's deadlines and subsequent amendment of the original Contract, Defendant failed to create 300 additional new FTE jobs by December 31, 2010. Defendant also failed to create 200 additional new FTE jobs by December 31, 2011. Moreover, Defendant failed to comply with its reporting requirements for the periods of 2011-2012 and 2012-2013.

Based on Defendant's failure to comply with the amended Contract's extended deadlines and reporting requirements, on or about May 16, 2012, DEO sent the first of what would become a series of letters imposing sanctions pursuant to Paragraphs 10.0(d), 10.0(e), 10.0(f), and 10.0(g) of the Contract. In this first letter, mailed March 4, 2010, DEO informed Defendant that it had failed to meet not only its new FTE job creation requirements for the past two years, but its reporting requirements for fiscal years 2011-2012 and 2012-2013. Due to these failures, DEO demanded duly authorized sanctions of \$600,000.00, plus \$12,327.00 in interest, for Defendant's failures in fiscal year 2011-2012, and another demand for sanctions of \$600,000.00, plus \$13,704.60 in interest, for Defendant's failures in fiscal year 2012-2013, for a total sanction of \$1,226,031.60.

Over the course of the three days following its receipt of the first letter, Defendant, by and through counsel, submitted additional information to DEO in an attempt to show its compliance with the amended Contract and to convince DEO to withdraw the demand for authorized sanctions.

Defendant sent DEO three letters and ten spreadsheets containing data regarding jobs, annual average wages, and capital investment.

In an effort to find a comprehensive approach to the existing deficiencies in Defendant's performance, DEO ultimately decided to withdraw its first demand for sanctions. DEO notified Defendant of the agency's decision in a letter dated June 7, 2012.

Nevertheless, by December 31, 2012, Defendant had again failed to meet its contractual requirements. Defendant failed to create a cumulative total of 700 new FTE jobs for Florida workers. In fact, by then Defendant employed a total of only 801 FTE jobs. This meant Defendant failed to not only create 700 new FTE jobs for Florida workers, but failed to even maintain, as promised, the approximately 1,000 workers it had employed when the Contract was originally signed. Defendant also failed to make the required investment of \$27,300,000.00 in capital. Flagler County never saw more than \$9,000,000.00 of capital investment from Defendant.

By March 7, 2013, Defendant's continued failure to perform forced DEO to send a second duly authorized demand for sanctions totaling \$1,305,480.73. Even so, DEO remained hopeful that Defendant would sustain as many jobs as possible. While seeking the return of its award, DEO also sent Defendant a series of letters seeking viable alternatives and extending the deadline for payment of the duly authorized sanctions.

Ultimately, however, DEO's overtures failed to elicit an adequate response from Defendant. As a result, in a letter dated October 11, 2013, DEO demanded payment as set forth in its previous sanction letter dated August 29, 2013. Defendant was to pay the duly authorized sanctions on or before October 21, 2013. Defendant never made any such payment either in whole or in part.

Simply put, after Defendant received the \$3,000,000.00 award, it failed to live up to its end of the bargain --- at the expense of the Florida taxpayers.

V.
THE PARTIES

1. Plaintiff, STATE OF FLORIDA, DEPARTMENT OF ECONOMIC OPPORTUNITY (“DEO”), is an agency of the Executive Branch of the State of Florida and was created pursuant to section 20.60, Florida Statutes. DEO’s principal office is located at 107 East Madison Street, Caldwell Building, Tallahassee, Florida 32399.

2. Pursuant to Chapter 2011-142, Laws of Florida, DEO is the successor in interest to the OTTED and is lawfully permitted to pursue all claims and assessments owed to OTTED. *See* Ch. 2011-142, Laws of Florida, at §4(3) (providing that “binding contracts” entered into by OTTED “shall continue as a binding contract” with DEO).

3. Defendant, PALM COAST DATA, LLC (“Defendant”), is a State of Florida limited liability company located at 11 Commerce Boulevard, City of Palm Coast, Florida 32164.

VI.
JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter given that Plaintiff seeks to recover damages in excess of \$15,000.00, exclusive of attorneys’ fees and costs.

5. This Court has subject matter jurisdiction pursuant to article V, section 5(b), Florida Constitution.

6. This Court has personal jurisdiction over the Defendant under section 48.193, Florida Statutes, due to Defendant’s operating, conducting, engaging in, and carrying on a business or business venture within this state; due to Defendant breaching a contract by failing to perform acts

required by contract to be performed in this state; and due to Defendant's engagement in substantial and not isolated activity within this state.

7. Venue is appropriate in Leon County, Florida, pursuant to Paragraph 12(a) of the Quick Action Closing Fund Agreement (the "Contract") entered into between OTTED and Defendant on or about October 8, 2008.

8. All conditions precedent have occurred, been performed, and/or been waived or excused by the acts and/or omissions of Defendant.

VII.
FACTS

9. Defendant entered into the Contract with OTTED on or about October 8, 2008. A true and correct copy of the Contract is attached as **Exhibit A**.

10. The Contract was amended on or about May 5, 2010. A true and correct copy of the amendment is attached as **Exhibit B**.

11. Prior to receiving its \$3,000,000.00 award, Defendant was required, pursuant to Paragraph 5.0(b) of the Contract, to complete the following award conditions:

- a. Make a public announcement of Defendant's intent to remain and expand in Palm Coast;
- b. Provide documentation of the retention of at least 1,000 FTE jobs in the City of Palm Coast;
- c. Provide documentation of the creation of at least 50 new FTE jobs; and
- d. Close on the purchase of land and facilities, or execution of a facility lease, for project facilities.

12. On or about June 5, 2009, OTTED paid Defendant \$3,000,000.00. A true and correct copy of the check is attached as **Exhibit C**.

13. In order to retain the \$3,000,000.00 advance payment, Defendant was required to perform the obligations described in Paragraph 5.0(c) of the Contract.

14. Paragraph 5.0(c)(1) of the Contract, as amended, required Defendant to create at least 700 full-time equivalent, net new to Florida jobs by December 31, 2012. *See Exhibit B*, page 2.

15. Defendant failed to create 700 new FTE Florida jobs by December 31, 2012, as required by Paragraph 5.0(c)(1) of the Contract, as amended.

16. Paragraph 5.0(c)(3) of the Contract, as amended, required Defendant to pay an annual wage of project jobs as specified in Paragraph 5.0(c)(1) of the Contract of at least \$29,530.00, excluding benefit. *See Exhibit B*, page 3.

17. Defendant failed to pay the annual wage, as required in Paragraph 5.0(c)(3) of the Contract, as amended.

18. Paragraph 5.0(c)(4) of the Contract, as amended, required Defendant to “invest a cumulative total of at least \$27,300,000” in a new manufacturing facility by December 31, 2012. *See Exhibit B*, page 3.

19. Defendant failed to make the required capital investment, as specified in paragraph 5.0(c)(4) of the Contract, as amended.

20. Paragraph 7.0(c) of the Contract, as amended, required Defendant to “submit annual certification of its employment and annual average wage payment [...] every State of Florida fiscal year by January 31 of said year.” *See Exhibit B*, page 4.

21. Defendant failed to meet the reporting requirements, as specified in paragraph 7.0(c) of the Contract, as amended.

22. Paragraph 7.0(d) of the Contract, as amended, required Defendant to “certify and submit documentation that at least 80 percent of the total investment specified in Paragraph

5.0(c)(4) has been made in the facility in Flagler County, Florida as of December 31, 2012, and continues to be located in Flagler County, Florida as of December 31, 2014.” See **Exhibit B**, page 4.

23. Defendant failed to meet the requirements as specified in paragraph 7.0(d) of the Contract as amended.

24. Paragraph 10.0(i) of the Contract, as amended, provides that “any required repayment, interest and/or penalty, is due to OTTED within sixty (60) days of receipt of written notice from OTTED.” See **Exhibit A**, page 9.

25. Defendant ultimately failed to render payment upon demand by Plaintiff within the sixty days as specified in Paragraph 10.0(i) of the Contract.

VIII.
PLAINTIFF’S BREACH OF CONTRACT CLAIM

26. Plaintiff incorporates and re-alleges the allegations set forth in paragraphs 1 through 25 as though fully restated herein.

27. As set forth above, Plaintiff entered into the Contract with the Defendant on or about October 8, 2008.

28. Plaintiff did all, or substantially all, of the essential things which the Contract required Plaintiff to do.

29. All conditions required by the Contract for the Defendant’s performance occurred.

30. The Defendant failed to perform the following requirements, all of which are material and essential to the Contract:

- a. Paragraphs 5.0(c)(1), 5.0(c)(3), and 5.0(c)(4) of the Contract created specific conditions that Defendant had to satisfy to retain the \$3,000,000.00 award it received from OTTED;

- b. Paragraph 7.0(c) of the Contract required Defendant to submit annual reports detailing its efforts in job creation, average annual wage, and to certify capital investment;
- c. Paragraphs 10.0(d)-(g) of the Contract provided sanctions if Defendant failed to satisfy the Contract's conditions. Pursuant to Paragraph 10.0(i), Plaintiff demanded principal repayment of, and interest accrued on, awarded funds, which Defendant was obligated under the Contract to repay within 60 days.

31. Defendant breached the Contract as amended by failing to comply with and meet the Contract's essential conditions.

32. Despite its failure to comply with these conditions, Defendant has retained the entire \$3,000,000.00 award without satisfying its obligations, and Plaintiff has been harmed by that failure.

33. As a result, Plaintiff is entitled to recover the \$3,000,000.00 payment, as well as any interest owed pursuant to the Contract.

IX.
NATURE OF RELIEF SOUGHT

WHEREFORE, the State of Florida, Department of Economic Opportunity, requests this Court:

- a. Enter a judgment against Defendant for breach of contract and award damages to Plaintiff for the unauthorized retention of the Contract payment in the sum of \$3,000,000.00, along with all interest as required by the Contract;

- b. Award Plaintiff costs and expenses incurred in this action to recover taxpayer funds, as provided in section 57.041, Florida Statutes, and reasonable attorneys' fees if lawfully permitted; and
- c. Grant any such further relief as the Court deems just and proper.

X.
DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues triable by jury.

Respectfully submitted,

/s/ Ross Marshman

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