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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
TIFFANY B. MCCORD, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JIM ZEIGLER, *et al.*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 03-CV-2016-900980
	)	
CLINTON CARTER, *etc., et al.*,	)	
	)	
Defendants.	)	

DEFENDANT CLINTON CARTER'S
MOTION TO STRIKE AND ALTERNATIVE
MOTION TO DISMISS THIRD AMENDED COMPLAINT

Defendant Clinton Carter, in his capacity as Finance Director for the State of Alabama (the "Finance Director"), hereby moves the Court to strike the Third Amended Complaint ("new pleading") filed by Plaintiff Jim Zeigler ("Zeigler"). The new pleading should be stricken because this Court lacks jurisdiction over the action, as filed originally, and an amended complaint cannot cure that problem. Moreover, the new pleading includes the same jurisdiction and timeliness flaws as the original complaint, and it makes allegations that statutes, for which Zeigler has no statutory right to sue, have been violated. Alternatively, the new pleading should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1), and for failure to state a claim upon which relief may be granted under Rule 12(b)(6), Ala. R. Civ. P.

For the Court's convenience, the Finance Director summarizes and restates, in this single document, the applicable arguments made in his Motion to Dismiss Zeigler's original complaint, Motion to Strike and Alternative Motion to Dismiss Second Amended Complaint, and Notice of Supplemental Filing. The Finance Director also brings to the attention of the

Court and Zeigler that as of April 28 the State and CGI have entered a termination of services agreement, which is explained in more detail below and attached hereto. That agreement may make moot all or some of this suit. As further grounds, the Finance Director states as follows:

Background

Zeigler filed this action in July 2016. (Doc. 2). Two official defendants –the Governor and the Attorney General – have been dismissed. Early motions to dismiss by the remaining defendants, the Finance Director and CGI Technology Solutions, Inc. ("CGI"), said that Zeigler lacked standing and statutory authorization to sue, that his claims had been filed too late, and that he had failed to state claims on which relief could be granted. (Docs. 49, 58, 60, *see also* 91, 96, 100). Those motions were heard in September 2016, but have not been ruled on. Zeigler recently filed a Third Amended Complaint. (Doc. 132).

In 2012, the State entered amendments and revisions to a 1982 public contract by which the State purchased computer software designed specifically for state governments. (*Id.*). Zeigler was not a party, officially or personally, to the contract amendments. In his original complaint, he did not assert status as a taxpayer. Nearly four years after the amendments were executed, and as they were being implemented across numerous agencies of State government, he filed this action asking to have the contract amendments declared void on grounds that they violate the competitive bid laws. (Doc. 2). Now, Zeigler alleges new claims for unjust enrichment and money had and received. (Doc. 132). Though he originally asked for a return to the State of payments made to CGI under the contract, he now

asks the Court to create a constructive trust for his benefit to hold State monies paid to CGI under the contract amendments. (Doc. 132).

The 1982 contract was competitively bid. (Doc. 132 at 4). As bid, the contract included provisions for updates, amendments, enhancements, and maintenance. Zeigler seeks to nullify a 2012 amendment ("Amendment 11"), as well as other amendments providing for updated software to modernize the State's accounting, procurement, personnel, payroll, budget, and reporting functions across all State agencies with a single solution built from software then being used by the State pursuant to the 1982 license from CGI's predecessor. The update to the software system developed under Amendment 11, and two later amendments, 12 and 13, became known as the State of Alabama Accounting and Resource System, or STAARS. The State contract with CGI and the renewal permits the parties to agree for CGI to provide enhancements and services for installation, implementation, and maintenance to the software system. (*Id.* at 5-7).

In the Third Amended Complaint, Zeigler alleges seven "counts": two seeking declaratory relief that the amendments violate statutes; three common-law equity claims seeking the constructive trust; and two seeking injunctive relief to prohibit performance of the contract terms.

Zeigler seeks relief as a taxpayer (*id.* at 1), but did not allege in his original or first amended pleadings that he pays taxes, that his tax funds had been used or would be used to pay for the CGI contract, or that he would have an increased tax liability as a result of the contract. (Docs. 2, 28). The new pleading identifies Zeigler "as a taxpayer." (Doc. 132 at 1).

By that status, he now claims to have "an equitable ownership interest" in the funds that were paid to CGI by the State for the software updates, enhancements, and services CGI provided the State under the contract amendments. Zeigler seeks to represent a class of all taxpayers whose taxes are funding payment of the contract. (*Id.* at 2-3). Zeigler is the State Auditor. (Doc. 2 at ¶ 1). But, he maintains this action solely in his individual capacity, (Doc. 28 at ¶ 3) purportedly "pursuant to § 41-16-31." (Doc. 132 at 1). That section permits a taxpayer to bring a civil action to enjoin the "execution of" a particular contract "entered into" in violation of the bid laws.[1]

Motion to Dismiss

I. The Complaint comes too late for the Court to grant injunctive relief, almost two years after performance was begun and almost four years after renewal of the disputed contract was entered.

The injunctive relief allowed by Ala. Code § 41-16-31 is not available because Zeigler seeks the relief too long after the amendments to the contract were entered and signed. Where performance on a contract has begun more than 18 months before injunctive relief is sought, the relief is due to be denied. *See Jenkins, Weber and Assoc. v. Hewitt*, 565 So. 2d 616, 618 n.1 (Ala. 1990)(amendment seeking injunctive relief on contract for computer processing system for department of human resources "came approximately 18 months after [the

[1]The disputed contract and its amendments are not attached to Zeigler's pleadings. Without agreeing that he describes the contract terms, as amended, accurately, the Finance Director shows that no relief is available even accepting the allegations as true. *See Lib. Nat. Life Ins. Co. v. Univ. of Ala. Health Servs. Fnd.,* 881 So. 2d 1013, 1017 (Ala. 2003).The Finance Director is aware that the Governor's Motion to Dismiss attached certain parts of the 1982 contract, as amended. However, the Finance Director does not believe it is necessary for the Court to consider any of these documents to grant the Finance Director's motion.

company] had begun work on the project and, therefore, too late to obtain injunctive relief"); *Anderson v. Fayette Cnty. Bd. of Educ.*, 738 So. 2d 854, 862 (Ala. 1999)(See, J., concurring in the result (because § 41-16-31 remedy is not available once performance has begun, author concurred in result denying relief to plaintiff who challenged contract for air conditioning equipment)).

Zeigler's latest amended complaint alleges that the disputed CGI contract amendment was entered on November 1, 2012– over four years ago. According to paragraph 22, it was signed by the Acting Finance Director and the Governor. Paragraph 22 alleges that the amendments to the contract provide for expiration to occur in 2027. Paragraph 25 says that the State began implementation of the CGI contract in December 2013. That was over thirty months before Zeigler filed suit and nearly forty months before he filed his third amended pleading. Under the *Hewitt* case, after over three years of implementation of the CGI contract, it is now too late for this Court to issue injunctive relief against "execution" of the contract under § 41-16-31. From the face of the complaint, performance began far too long ago.

II. The Complaint does not show any right recognized by statute to private injunctive or monetary relief.

A. The competitive bid statute provides only a right to sue to stop "execution" of a state contract, a relief not requested here.

Taxpayer enforcement of the bid law has been limited by the legislature in Ala. Code § 41-16-31. The statute provides only for a taxpayer "to enjoin execution of any contract entered into in violation of the provisions" of the bid law. There is thus no right in Zeigler

as a taxpayer to enjoin anything except "execution." *See*, *e.g.*, *Vinson v. Retirement Sys. of Ala.*, 836 So. 2d 807, 810 (Ala. 2002). Further, there are no "general equity principles . . . broader than that afforded by the statutes." *Id.* at 811 (no implied power to enjoin award to lowest bidder). To expand the court's remedial power beyond the limits set out in § 41-16-31 would render the statute meaningless. *Id.*

In his most recent complaint, Zeigler has abandoned relief which the Finance Director previously argued was not available to him under § 41-16-31 and Ala. Const. art. I, § 14.[2] However, Zeigler continues to seek relief that is not authorized by the statute. In the prayer for relief at the end of each count, he asks for a court-imposed constructive trust set up "for the benefit of taxpayer", i.e., for *his* benefit, albeit purportedly: "(and hence, the State of Alabama)."

Further, he asks that both CGI and the Finance Director pay into court the funds paid and due under the contract amendments. (Doc. 132 at 9-15). Nothing in § 41-16-31 authorizes a taxpayer to seek or receive these forms of relief. Section 41-16-31 still authorizes suit only to prevent execution of a non-complying contract – not "performance," not payment to CGI, and not the creation of a constructive trust as the new pleading seeks. (*Id.* at 14). *Compare Zeigler v. Baker*, 344 So. 2d 761, 764 (Ala. 1977) (reading federal taxpayer standing requirements not to include showing of direct or particular, concrete injury

[2](*Compare* Doc. 132 *with* Doc. 2 at Prayer for Relief ¶ 5 (injunction to prohibit Finance Director from collecting monies from State agencies); ¶ 6 (order directing Finance Director to rescind contract); and ¶ 7 (order that CGI pay "restitution to the State of Alabama"). Zeigler also has abandoned a claim under §§ 41-16-82 to 41-16-84 (*Compare* Doc. 132 *with* Doc. 84 at ¶¶ 25, 42-46).

in challenge to constitutional violation by pension statute); *with Beckerle v. Moore*, 909 So. 2d 185 (Ala. 2005) (no standing to recover funds; only to enjoin proposed unlawful expenditure). Whatever other statutes may authorize *the State* to seek restitution, this relief is not available to Zeigler under § 41-16-31. The omission from the statute for recovery of funds implies that individual taxpayers are not permitted to pursue judicial proceedings for the recovery of public money. *See Ex parte Wilcox County Bd. of Educ.*, 2016 WL 4585738 *5 (Ala. Sept. 2, 2016) (taxpayer who alleged school board president had used public funds wrongly to participate in election litigation "lacks standing to bring an action to *recover* funds that have been wrongfully expended."); *Beckerle v. Moore*, 909 So. 2d 185, 187-88 (Ala. 2005)(discussing *Powers v. US Fidelity & Guaranty Co.*, 182 So. 758 (Ala. 1938)).

Moreover, the statute authorizing declaratory judgments, Ala. Code § 6-6-223, does not supply a private right of action where none already exists. *See* § 6-6-223 (authorizing suit for persons "interested ... whose rights ... are affected); *Am. Auto. Ins. Co. v. McDonald*, 812 So. 2d 309, 312 (Ala. 2001)(finding no dispute affecting the present legal rights of parties where plaintiff rental-car customer had no private right to sue under insurance code). Zeigler, thus cannot rest on his allegations seeking declaratory relief to authorize the court to grant him relief where no right to obtain a judgment under § 41-16-31 already exists.

Throughout this action, Zeigler has made much of the difference between "execution" and "signing." In fact, § 41-16-31 grants taxpayers the right to file a civil action to enjoin "execution" of a contract "entered into" in violation of the competitive bid law. In the context of competitive bidding, a contract is "entered into" when the awarding authority announces

which bidder is the lowest responsible bidder. "Execution" of a contract comes later, when the contract is signed by the parties. The announcement of the lowest responsible bidder thus puts taxpayers on notice that under § 41-16-31, they have until the contract is subsequently executed to bring an action to enjoin execution of the contract. This interpretation of "execution" and "entered into" fixes a firm date for seeking an injunction, whereas to read "execution" as a synonym for "performance" could extend the time for multiple years, or even decades. Once a contract has been executed and performance has substantially begun, it is too late for the Court to award injunctive relief to prevent execution. *See Jenkins*, 565 So.2d at 618 n.1.

Here, the CGI contract was executed in 1982 after competitive bidding. The contract expressly contemplated and allowed amendments. *See* Exhibit B to Governor's Motion to Dismiss, etc. (Doc. 34) at 1, 2, 3, Ex. A. Even if Zeigler could persuade the Court to consider the amendments to the contract, he still has alleged that the action was filed 20 months after CGI began performing on those amendments, long after the parties executed them. *See* Complaint 26. It thus is too late for the Court to order that "execution" of the 1982 contract be enjoined under § 41-16-31.

B. The legislative review statute does not say anything about private suits.

Zeigler also claims that the amendments to the 1982 contract were not submitted to the Legislative Review Committee under § 29-2-41 and urges that the statute gives him a right to sue (Doc. 132 at 9-10). But the statute says nothing at all about suits by taxpayers or any private citizen, in contrast to § 41-16-31 ("Any taxpayer..."). *See, e.g., Am. Auto. Ins. Co.*

v. McDonald, 812 So. 2d 309, 312 (Ala. 2001) (insurance code silent about private right to sue). Zeigler alleges a justiciable controversy "between the Plaintiff and the defendants with regard to the parties' rights, duties and liabilities by virtue of § 29-2-41." (*Id.* at ¶ 41). However, nothing in § 29-2-41, by its terms, gives Plaintiff Zeigler any rights. Zeigler thus has not alleged that any part of § 29-2-41 actually creates in *him* or any other taxpayer, a right to claim relief. Notably, too, § 29-2-41 speaks of "contracts" and the "entering into a contract." It says nothing about amendments to or modifications of contracts after being entered– as those Zeigler challenges here. *Cf. Riley v. Kennedy*, 928 So. 2d 1013, 1016 (Ala. 2005) (statutes apply prospectively unless legislature clearly indicates they are to be applied retroactively).

If anything, § 29-2-41 gives a specific committee of the legislature the right to review contracts. But that right does not pass in silence to all citizens or silently vest them with authority to be enforcers. Such a construction would extend the judicial power into the realm of the executive or at least of the legislature, to which the "right" belongs and in which enforcement prerogative otherwise might rest. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)(citizens, as citizens, challenging failure of government entities to consult with each other creates separation of powers problems). Moreover, the authority to review granted the legislature under § 29-2-41 is not authority to "approve" a contract, because to do so would permit the legislature to usurp the executive authority. *See Op. of the Justices No. 380*, 892 So. 2d 332, 337-39 (Ala. 2004). Thus, the phrase "without prior review .... [the] contract shall be void *ab initio*," must be applied sparingly lest it become a mechanism to

effect unauthorized "approval." Indeed, to extend power to all taxpayers to have contracts declared void would effectively give them greater authority to "approve" contracts that the legislature itself cannot possess. Applying § 29-2-41 as Zeigler suggests, separation of powers problems abound.

C. The existence of a "void" contract does not create a right to sue.

Much of the relief Zeigler seeks is to have the amendments to the 1982 contract declared "void." But that designation *ipso facto* does not authorize a private action. As noted, no statute authorizes a private right to sue. Were the suit by a party to the contract, the statutory designation of the contract as "void" would not authorize relief. Rather, it implicitly bars judicial action. *State v. Am. Tobacco Co.*, 772 So. 2d 417 (Ala. 2000). Therefore, at most, the Court should leave the parties as it finds them. *Cf. id.* at 422-23 (allowing payments for work actually done, despite contract being "void"). It thus should not unwind the amendments and grant "restitution" at the behest of a stranger as requested by Zeigler. Such relief would injure both contracting parties. Even under notions of "equity" which Zeigler invokes, he has no right to the relief he seeks.

III. The plaintiff lacks standing to obtain any relief because he has alleged no particularized injury caused by the allegedly unlawful contract amendments, and because no relief he requests will redress any injury.

A. The Original Complaint

Zeigler's complaint failed to make allegations sufficient to reflect standing as a taxpayer necessary to establish the jurisdiction of this Court under § 142 of the Constitution. He did not allege that he had suffered a particularized, redressable injury because the

STAARS contract was not competitively bid. Thus, despite Zeigler's claims that the creation of the contract should be deemed "void" by Ala. Code § 41-16-77, he lacked standing because he did not allege that as a result of the CGI contract with the State the taxes he paid and will pay are required to replenish the public treasury.

Zeigler never alleged in a straightforward fashion that he paid taxes to the State, that he would do so in the future, or that his individual tax liability would be affected in any way by the State contract with CGI. The complaint alleged only that State departments and agencies will be required to pay for the CGI services. (Doc. 2 at ¶ 28). Those allegations did not state an injury to Zeigler as an individual. Zeigler did allege that he is the State Auditor, but that does not mean he actually pays taxes. Moreover, his first amendment to the Complaint dropped "all references to this action being brought . . . in his official capacity as State Auditor. . . . ." (Doc. 28 at ¶ 1). Zeigler thus came to the Court only "in his individual capacity as a taxpayer," purportedly on behalf of "a class of all other taxpayers of this [S]tate." (*Id.* at ¶ 3).

B. The Second Amended Complaint

Zeigler's second amended pleading did not cure the jurisdictional defects of the original complaint. To be sure, Zeigler alleged that he actually is a taxpayer (Doc. 84 at ¶ 1). But that is not enough and his allegations remained too generalized. Zeigler did not allege that he, himself, actually paid taxes which were disbursed on the STAARS contract. *Compare Goode v. Tyler*, 186 So. 129, 131 (1939)(taxpayer alleged payment of "the very taxes" challenged) *with Ex parte Alabama Educ. Television Comm'n*, 151 So. 3d 283 (Ala.

2013) ("APT") (seeking only "vindication of the rule of law" not enough for standing). Zeigler defined his proposed class as taxpayers "whose taxes are used to replenish the public treasury for the deficiency caused by the misappropriation of public funds used for the STAARS contract." (*Id.* at ¶ 7). But Zeigler nowhere alleged that there actually is a "deficiency" caused by the STAARS contract, or that taxpayer funds, and not funds received from fees, grants, or other sources, were used to pay CGI under the contract. Thus, Zeigler claimed standing to sue as a taxpayer. But he still did not identified any particularized, redressable injury on which his suit is based. He did not allege that he would be saved anything by the bid process. The arguments made in the Finance Director's original motion to dismiss and supporting memorandum continued to apply to the new pleading with equal force.

Moreover, the jurisdictional defects of this action could not be cured *nunc pro tunc* by Zeigler's amended pleading back to the date when the original complaint was filed. A pleading purporting to amend a complaint which was filed by a party without standing cannot relate back to the filing of the original complaint because there is nothing back to which to relate. *See Bernals, Inc. v. Kessler-Greystone, LLC*, 70 So. 3d 315, 319 (Ala. 2011); *Cadle Co. v. Shabani*, 4 So. 3d 460, 462-63 (Ala. 2008); *State of Alabama v. Property at 2018 Rainbow Drive*, 740 So.2d 1025 (Ala. 1999); *Ex parte Owens*, 533 So. 2d 617, 618 (Ala. 1988). Thus, the second amended pleading had no effect, and should have been stricken. Rule 12(f), Ala. R. Civ. P. (*See* Doc. 96).

C. The Third Amended Complaint

Likewise, in the third amended pleading, Zeigler fails to cure the jurisdictional defects. He alleges that he actually is a taxpayer (Doc. 132 at ¶ 1). But his allegations are still too generalized. Zeigler does not allege that he, himself, actually paid taxes which were disbursed on the STAARS contract. *Compare Goode v. Tyler*, 186 So. 129, 131 (1939) (taxpayer alleged payment of "the very taxes" challenged) *with Ex parte Alabama Educ. Television Comm'n*, 151 So. 3d 283 (Ala. 2013) ("APT") (seeking only "vindication of the rule of law" not enough for standing). Zeigler defines his proposed class as taxpayers "whose taxes are used to replenish the public treasury for the deficiency caused by the misappropriation of public funds used for the STAARS contract." (*id.* at ¶ 6). And now, he even states that he is liable to replenish the treasury. (*Id.* at ¶ 1). But, like the second amended pleading, Zeigler nowhere alleges in the third that there *actually is* a "deficiency" caused by the STAARS contract. Thus, he does not allege that the STAARS contract creates no net savings to the taxpayers. Further, again, he does not allege that taxpayer funds, and not funds received from fees, grants, or other sources, were used to pay CGI under the contract. Thus, Zeigler still claims standing to sue as a taxpayer. But he still does not identify any particularized, redressable injury on which his suit is based. And, though he now seeks a trust of funds for his own benefit, he does not allege that he would be saved anything by the bid process. The arguments made in the Finance Director's original motion to dismiss and supporting memorandum continue to apply to the newest pleading with equal force. And, for

the reasons stated in the motion to strike, below, Zeigler's attempt to fix the jurisdictional defects cannot relate back to the original pleading.

D. Plaintiff has never alleged a harm which the Court has power to redress.

In more detail, even assuming that Zeigler does pay taxes and expects to do so in the future, his allegations fail to provide the necessary linkage to a judicially cognizable injury as a taxpayer. Those departments and agencies to which the costs of CGI services are allocated have sources of funding distinct from the funds provided by taxpayers.[3] Thus, for all that is alleged, taxpayer funds may not have been used to pay for the STAARS contract. Zeigler's allegations simply do not state enough of a certain and direct taxpayer interest to provide him standing to sue. *See Jordan v. Siegelman*, 949 So. 2d 887, 892 (Ala. 2006) (challenging transfer to general fund of agency user fees); *Broxton v. Siegelman*, 861 So. 2d 376 (Ala. 2003)(federal funds used for challenged spending).

To establish the standing which confers jurisdiction, the plaintiff has the burden to allege the existence of an injury. *See Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1256-57 (Ala. 2004)("'injury will not be presumed'"). This burden exists at all stages and, in formulating the complaint, the plaintiff must at least allege an injury specific to him resulting from the defendants' conduct. *See Lujan v. Defs. of Wildlife*, 504

[3] *See, e.g.,* Ala. Code § 14-8-6 (Department of Corrections withholding of inmate work release earnings); *Russo v. Alabama Dep't of Corr.*, 149 So. 3d 1079, 1080 (Ala. 2014) (Department of Corrections charged processing fee for inmate money orders); *Ex parte Troy Univ.*, 961 So. 2d 105, 109 (Ala. 2006)(university received funds from federal grants, museum ticket sales, and private donations). *Broxton v. Siegelman*, 861 So. 2d 376, 378-79 (Ala. 2003)(receipt of federal grant by Alabama Historical Commission, State Department of Finance, and State Department of Transportation).

U.S. 555, 561 (1992). Because injury to the taxpayer by requiring replenishment of the public treasury will not be presumed, Zeigler's allegations fail to show the standing required by the Constitution– even though Zeigler's pleadings are taken as true. Nor can the conclusory statement that he "has an equitable ownership interest in the monies that were paid to Defendant CGI by the State" show an actual relationship between Zeigler as taxpayer and the specific funds paid which would create such an interest.

Further, the Complaint did not allege any harm particular to Zeigler. He merely alleges that he is "a resident of Alabama." (Doc. 2 at ¶ 1). The amended pleading spoke as if Zeigler had previously alleged that he pays taxes. (Doc. 28 at ¶ 3). And, in the newest complaint Zeigler alleges that "as a taxpayer" he has an equitable interest. In any of these scenarios, Zeigler's position in this action is no different from that of the general Alabama population. Without some direct, individual consequence from the CGI contract, however, the general public has no basis for a court to hear a complaint and grant a judgment about a government decision on the spending of government funds. That kind of generalized grievance is not susceptible to judicial resolution. *See Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) (without direct injury, taxpayer challenge to expenditure of federal government funds is "public and not of individual concern"); *Taub v. Kentucky*, 842 F.2d 912, 917 (6th Cir. 1988) (state officers spending state tax monies). Indeed, to allow generalized claims without some individual impact would lead to suits by a multitude of taxpayers with no real way to limit the competing litigation. *Compare Taub*, 842 F.2d at 917, *with Ex parte Town of Summerdale,* No. 1140793, 2016 WL 2842682, *8-9 (Ala. May 13, 2016)(town showed

imminent and tangible injury because statutory right to expand water services was impaired by expansion of county water authority's service area).

Moreover, the direct consequence Zeigler must show he suffers must be caused by the fact that the CGI contract renewal was not competitively bid. *See Cedar Bluff*, 904 So. 2d at 1257-58 (no injury suffered by voting on alcohol sales under allegedly unconstitutional statute and legislative identification of effects on public welfare, health, etc. from alcohol sales). *See also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013)(government information gathering does not cause injury to plaintiff); *Warth v. Seldin*, 422 U.S. 490, 503-07, 508-09 (1975)(resident of neighboring town unable to move to suitable house because of zoning). However, Zeigler has never alleged that the competitive bid process of Ala. Code § 41-16-20 would have resulted in a "lowest responsible bid" different from the CGI contract. Absent such an allegation, there is no basis for finding that some provider other than CGI would have received the contract through competitive bidding. *See Mobile Dodge, Inc. v. Mobile Cnty.*, 442 So. 2d 56 (Ala. 1983); *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121,128-29 (Ala. 1971)(specifications leading to only one possible bidder upheld on officials' discretion that specifications were needed). *See also White v. John*, 164 So. 3d 1106, 1119 (Ala. 2014) (citing 42 Am. Jur. 2d *Injunctions* § 23 (2010)). Nor is there any basis for finding that the CGI contract actually caused any actual taxpayer or Zeigler any harm.[4]

[4]When there is no allegation of bad faith, fraud or arbitrary decision-making, as here there is no jurisdiction for the court to act. *See Huddleston v. Humble Oil & Refining Co.,* 71 So. 2d 39, 43 (Ala. 1954)(award of oil lease after bid process).

Finally, there is no indication that any particular harm Zeigler has suffered will be redressed by the relief he seeks. Zeigler asks for declaratory relief that the CGI contract violates the competitive bid law and is void *ab initio*. But the contract was fully signed in 2013, and is twenty months into its implementation. (Complaint at ¶ 24). The declaration alone would not change the fact that the software and support services are now in place. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-08 (1998). Zeigler seeks an injunction, but without an allegation that some other contractor will save the State over CGI, the relief he seeks would not remedy any harm resulting from the failure to competitively bid. And, there has been no indication that Zeigler's tax liability does replenish any fund into which repayment of amounts expended under the contract might be made. *See Ex parte Alabama Educ. Television Comm'n*, 151 So. 3d 283 (Ala. 2013)(pleading does not show standing for "citizen" with statutory right to enforce civil penalty of Open Meeting Act); *id.* at 289, 292-93 (Murdock, J., concurring specially)(psychic satisfaction plaintiff receives that law breaker paid fine to State not enough to allow judicial action).[5]

Zeigler's citation of Ala. Code § 41-16-31 does not establish "standing" for him as a taxpayer to bring this action in his individual capacity. By its terms, § 41-16-31 does not confer standing. Rather, it merely gives a right to sue to one who has alleged that he suffers a particularized injury and thus otherwise establishes the standing required by the

[5]*See also Allen v. Wright*, 468 U.S. 737, 754-55 (1984) (challenge to government's administration of tax exemptions for private education; "asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction").

Constitution. The legislature cannot establish by statute the requirements for the exercise of judicial power set out in the Constitution. *See So. Express Co. v. Whittle*, 69 So. 652, 659 (Ala. 1915)("Courts must obey the Constitution rather than the lawmaking department of government."); *see also* Ala. Const., art. VI, § 142 (circuit court has jurisdiction over "cases"); *Marbury v. Madison,* 5 U.S. 137 (1803) (Congress cannot assign mandamus jurisdiction designated to be heard elsewhere by Article III of the Constitution).[6]

And, nothing in § 29-2-41 creates in Zeigler or any other taxpayer a right that has been injured. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("rights creating" language of statute authorizing regulations for anti-discrimination law was too far removed from ultimate beneficiaries did not confer private right to sue to challenge English only driver's license test). Nor has Zeigler alleged that any remedy the Court might apply– either requiring review by the Committee or declaring the contract "void"– would actually redress any injury of his. Without these fundamental allegations, the Court has no jurisdiction. *See APT*, 151 So. 3d 283.

Further, the statute Zeigler cites which allows for declaratory relief to "any person interested," Ala. Code § 6-6-223, has never been construed to permit judgments from judges for plaintiffs who lack standing, and thus on matters that are not justiciable. *See Jefferson Cnty. v. Johnson*, 168 So. 450, 451 (Ala. 1936)(imposes only "judicial" duties); *see also*

[6]For claims that conduct violates certain provisions of the Constitution, the Constitution itself may direct court intervention without regard for the presence of all forms of justiciability. Thus, § 105 explicitly directs that courts shall review claims that a statute is contrary to that provision. *See Working v. Jefferson County Election Comm'n*, 2 So. 3d 827, 834 n.8 (Ala. 2008).

Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928)((denying declaratory relief to construe contract). At bottom, Zeigler's pleadings allege only the moot point that the CGI contract was not let by competitive bid.

IV. The action may be moot because the contract is set to terminate and performance is almost complete.

Zeigler's claims challenging the STAARS contract amendments may now be moot. CGI will provide no further software to the State– without going through a competitive bid process as required–, and performance of the maintenance and other services due on the agreement is nearly complete and set to terminate in September 2017. There may, therefore, be nothing for the Court to enjoin and no ongoing contract to be declared void by the time a judgment can be reached. The Court will lack jurisdiction to decide a purely academic issue of whether the STAARS amendments violated the competitive bid laws.

By letter dated March 31, 2017, the State entered an agreement with CGI to terminate the STAARS contract amendments. A copy of the letter memorializing the State action is attached as Exhibit A hereto ("Disengagement Letter"). On page 2, the letter notes that "CGI has satisfied its contractual obligations with respect to the STAARS project and software and the services provided by CGI under the STAARS Contract." The State describes, and CGI acknowledges, the State's intent to "begin transition to an in-house delivery plan or to award a new contract for operation services and support ...." (Disengagement Letter at 1). Thus, the STAARS contract that Zeigler challenges in this action is set to conclude, except for a winding-down period necessary to "prevent disruption of critical State functions and services...." (*Id.*). The winding-down period is not indefinite; it will end no later than

September 30, 2017. (*Id.*). Further, the Disengagement Letter notes that "the State of Alabama will not further amend the 1982 Memorandum of Agreement, the amendments thereto, or any existing Statement of Work thereunder, nor restart work concluded by this agreement without executing a new contract competitively awarded pursuant to the provisions of Chapter 16 of Title 41, Code of Alabama 1975." (*Id.* at 2-3). The Disengagement letter was signed by the Acting Secretary of Information Technology and by the CGI Vice President, (*id.* at 3), and confirmed by Governor Kay Ivey on April 28, 2017, (*id* at 4).

The Court will need time to rule on the motions to dismiss. And, if the case is not dismissed, Carter will have the right to immediate appellate review of jurisdictional issues which, if exercised, will counsel in favor of a stay of proceedings. And even if he chooses not to pursue that route, the parties will need time to conduct discovery before filing any pretrial dispositive motions. It is unlikely, therefore, that these proceedings could come to a judgment before the subject contract amendments have been fully completed. After the STAARS amendments have been fully performed and are over, the question whether they were validly entered will be purely academic and not within the Court's authority to decide. *See Underwood v. Alabama State Bd. of Educ.*, 39 So.3d 120, 132 (Ala. 2009); *Masonry Arts, Inc. v. Mobile County Comm.,* 628 So. 2d 334 (Ala. 1993).

V. None of Plaintiffs' equitable claims allege fraud, injury, or an enforceable interest in State funds necessary to support a claim on which relief may be granted.

Zeigler's newest pleading –Third Amended Complaint– states claims for unjust enrichment and money had and received. He seeks restitution and the imposition of a

constructive trust in his benefit for State funds paid to CGI. However, Zeigler does not allege the facts necessary to justify the equitable relief he seeks. As to restitution, Zeigler asserts only the interest of a taxpayer. He makes no other claim to state funds. Any injury actually suffered as a taxpayer is not one which is personal direct or otherwise sufficient to actually recover State funds and sustain an order for restitution. *See Wilcox County Bd. of Educ.*, 2016 WL 4585738 *5 (taxpayer "lacks standing to bring an action to *recover* funds that have been wrongfully expended."); *Beckerle*, 909 So. 2d at 187-88.

As to the claim for a constructive trust, Zeigler has alleged no fraud in the transaction, no deliberate wrongdoing, and no reliance by himself on any action of the Defendants. Nor has he stated any actionable interest in State funds necessary to show that he rightfully holds title to them. Absent these allegations, no constructive trust can be granted on the claims. *See McClure v. Moore*, 565 So. 2d 8, 10-11 (Ala. 1990) (no constructive trust because no fraud or intent to deceive was present when woman agreed to give property to plaintiffs in her will, or later when she sold the property to a third party); *Knowles v. Canant*, 51 So. 2d 355, 257-58 (Ala. 1951) (constructive trust affirmed because legal title to property to be purchased for woman, but title taken in fiduciary's own name, was obtained through fraud using woman's funds). Indeed, Zeigler gains nothing by his generalized reference to the availability of a constructive trust where it is unconscionable for the holder of funds to retain them. The full premise of the equitable doctrine permitting the imposition of a constructive trust to take title from one party and grant it to another was stated in *Knowles* as requiring:

> "actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through *any*

> *other similar means or under any other similar circumstances which render it* unconscientious for the holder of the legal title to retain and enjoy the beneficial interest...."

(*Id.* (emphasis added)). "Any other similar" means or circumstances plainly does not mean any circumstance in which it may seem unfair for a defendant to retain his property. Instead, there must be some specific deception or egregious behavior on the part of the defendant directed toward and taking unfair advantage of the rightful holder's interest. Zeigler's tenuous claim to the "equitable" interest of a taxpayer simply cannot compare.

VI. The tax cases referenced in the complaint do not require that the challenged software and services contract amendments be let by competitive bid.

In an attempt to support his position, and argue that the software licensed to the State by CGI for use in all departments and agencies had to be renewed by competitive bid, Zeigler's pleadings cite Alabama cases regarding the status of software under sales tax statutes. (Doc. 132 at 4). But the cases set no general principles that apply to bid laws. And they do not even speak to software of the nature the State licensed from CGI. Certainly, none establish a principle upon which Zeigler may be granted relief.

Zeigler alleges that in 1996, *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290 (Ala. 1996), "overruled [*State v.*] *Central Computing Services*[*, Inc.*, 349 So. 2d 1160 (Ala. 1977),] and held that computer software was tangible personal property. ... Thus, after 1996, contracts for the purchase of computer software would be subject to the competitive bid law." (Doc. 132 at 4). It is true that in the *Wal-Mart Stores* case, the Alabama Supreme Court prospectively held that the sale of "canned" software constitutes a sale of tangible property for tax purposes. *Id.* at 291. However, that holding had a limited subject matter. First, the

Court did not address the status of software under Alabama's competitive bid laws. Second, by the Court's reasoning, only "canned" or off-the-shelf software of the type sold at the discount retail store at issue in the case was "tangible property" for purpose of the tax laws. Thus, specialized software was not affected by the decision. *See Russell Cnty. Cmty. Hosp. & Medhost of Tenn., Inc. v. State of Ala. Dep't of Rev.*, Docket No. S. 15-1683, 2016 WL 4091382, *2 (Ala. Dep't Rev. 2016)(*Wal-Mart Stores* decision limited; sale of custom software not taxable).

Software purchases do not become subject to the competitive bid law merely because the tax statutes have been construed to treat some software as tangible property. Indeed, were those constructions somehow instructive, the tangible feature of software, particularly the software at issue here, is incidental and only a small part of the value.[7] Accordingly, Zeigler's reliance on the tax status of the software does not demonstrate that the renewal of the contract at issue required competitive bidding.

Indeed, software systems often are exempt from the competitive bid laws. There may be a sole source responsible developer and maintenance provider for the particular system needed. Systems required for government entities may be highly specialized for particular purposes. And, because of the many users, the unique nature of the system, or simply the

[7]*See Weinstein v. Cnty. of Los Angeles*, 237 Ca. Rptr. 3d 557, 574 (Cal. App. 2015) (software and hardware components of administration of pharmacy network services did not take the contract out of the realm of personal services); *Nachtigall v. N.J. Turnpike Auth.*, 694 A.2d 1057, 1060, -63 (N.J. Super. Ct. 1997)(electronic toll collection system's hardware components did not remove professional services nature of contract); *In re 1983 Audit Report of Belcastro*, 595 A.2d 15, 21-22 (Pa. 1991)(purchase and servicing of data processing software and equipment exempt from competitive bid laws).

importance of the system to government functions, software system licenses often are intertwined with contracts for maintenance and support for the system because of the highly technical, professional, and personal nature of the maintenance. For those reasons, the Attorney General has issued over many years numerous opinions which construe the bid law not to require competitive bidding for software contracts.[8] Moreover, once performance has begun after execution and has continued for many months, government departments and agencies become dependent on the system such that termination quickly by injunction would impair government functions. Thus, the legislature's decision to limit the injunctive relief available under § 41-16-31 is apparent.

The parties to the original 1982 software contract contemplated maintenance, updates, and implementation services necessary to the State's integration and use of the software. The complaint does not give a full picture of the maintenance to be performed under the contract and its amendments, but given the lengthy fifteen-year term, technical maintenance services play an important part of CGI's performance for the State. Because of the complexity and breadth of the system CGI provided and its implementation across many State departments

[8] *See, e.g.,* §§ 41-16-21(a), -27(a), -51, -71, -74, -75; Ala. Op. Att'y Gen. No. 2016-015 (Dec. 8, 2015)(custom or modified software exempt from bid laws), No. 2015-044 (May 12, 2015)(custom software and maintenance intertwined and thus exempt), No. 2014-047 (Mar. 10, 2014)(software could fit exemption for security or safety of personnel), No. 2001-273 (Sept. 10, 2001)(contract with computer-assisted research vender within professional services exception), No. 00-00245 (July 12, 1999)(hardware and custom software components of contract considered separately), No. 99-00139 (Mar. 16, 1999)(substantial work to comply with unique specifications made software custom and exempt), No. 94-00023 (Oct. 21, 1993)(significant modifications to software made it custom for purposes of bid law), No. 90-00121 (Jan. 26, 1990)(computer engineers performing complex services), No. 79-00397 (Jun. 27, 1979)(computer software package only available from single source).

and agencies, those services would be performed by individuals with a high degree of specialized skill, knowledge, and experience whose qualifications and personalities are particularly relevant to the provision of services to the State. *See* § 41-16-71. As a result, at least those parts of the CGI contract and their associated payments would not be subject to the competitive bid law, *see* § 41-16-51(a)(3), and Zeigler has failed to state a claim on which relief can be granted.

Conclusion

Zeigler's complaint should be dismissed under Rule 12(b)(1) and (6), Ala. R. Civ. P. Zeigler's complaint is untimely; it comes twenty months after performance began on the CGI contract amendments. He has alleged no standing as a taxpayer or otherwise. His claims are barred by State immunity granted under § 14 and by the separation of powers doctrine of § 43 of the Alabama Constitution. No statute grants Zeigler a private right of action to receive the relief he seeks. And, the CGI software and maintenance package provided to the State are not subject to the competitive bid laws. Even if the package were subject to competitive bid, the State and CGI have agreed to terminate it. So this suit is likely to be moot, or about to become moot. It is plain from the complaint, therefore, that Zeigler cannot recover on his claims against the Finance Director, and the action should be dismissed.

Respectfully submitted on April 29, 2017.

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CERTIFICATE OF SERVICE

I certify that I have on this 29th day of April, served a copy of *Defendant Clinton Carter's Motion to Strike and Alternative Motion to Dismiss Third Amended Complaint* on all counsel by the Court's electronic filing system and/or by United States Mail, postage prepaid and addressed as follows:

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