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REGIONAL NEWS

Pa. Co. Recovers \$3.5 Mil. for Oregon's Failure to Pay Bills

Technology Firm Defeats Education Department's Claim of Contract Breach

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Of the Legal Staff

A Pennsylvania-based education technology company defeated breach of contract and good faith claims by the Oregon Department of Education and was awarded more than \$3.5 million for counterclaims against the department over its failure to fully pay the company.

Vantage Learning was hired to administer computerized testing software for standardized tests taken by Oregon elementary students and collect the data in order to keep Oregon in line with the requirements of the No Child Left Behind Act.

Vantage's extended contract was set to expire June 30, 2007, and the Department of Education informed Vantage Oct. 3, 2006, that its bid was not selected for the contract that would begin in July 2007, according to court documents in *State of Oregon v. Vantage Technologies Knowledge Assessment*.

According to the department's complaint filed in the Marion County Circuit Court in Oregon, shortly after hearing it hadn't won the contract, Vantage sent two separate invoices to the department for a total of \$4.7 million and the department sent a letter to the company disputing the charges.

In the coming months, Vantage began to provide fewer services until stopping altogether in March 2007, according to the complaint. The department then alleged that Vantage placed an error message on its Internet-based testing system so that



DEEB: INVOICES WERE LAST RESORT

whenever a student would log on to use the system, it would say the system was shut down because of the department's failure to pay its bills to Vantage.

The Department of Education filed for injunctive relief to have the message removed and ensure all tests and data were preserved. It also argued Vantage breached its contract by terminating the agreement over non-payment of disputed bills and alleged a claim for breach of implied covenant of good faith and fair dealing for Vantage's failure to provide adequate services.

In its response and counterclaim, Vantage said its contract with the Department of Education provided for a reassessment of

fees if the company provided services for more than 540,292 tests, or more than 110 percent of the base volume of tests in any one contract year.

According to its response, Vantage said the department failed to pay \$3.85 million in invoices as of March 2007. It also claimed the department refused to negotiate a new price, as required by the contract, for the services Vantage provided above the 110 percent. The company then instituted its own price structure without the input of the department, according to the response.

Vantage said it continued to provide services, despite its terminating the contract, but ultimately had to stop doing so in March because of the department's "willful refusal to acknowledge its outstanding invoices and enter into good faith negotiations to resolve the matter."

In its complaint, the Department of Education said it made significant efforts to negotiate a resolution to the payment disputes, including flying its deputy superintendent of public instruction to the East Coast to meet with Vantage representatives.

Vantage also alleged in its response that the Department of Education continued to use its proprietary software and a former Vantage employee was now working with the company that won the new contract for the department, giving the department the ability to easily use the software.

In its counterclaims, Vantage alleged claims of breach of contract, breach of duty of good faith and fair dealing, unjust enrichment, violation of the Oregon Uniform

Trade Secrets Act and injunctive relief.

The only claims to reach the jury from either side were the breach of contract and breach of good faith claims. The issues requiring injunctive relief were resolved by the parties before trial, according to Vantage's outside counsel, **Peter J. Deeb** of **Deeb Petrakis Blum & Murphy** in Philadelphia. Any other outstanding claims were withdrawn before trial, he said.

Deeb said it was a point of contention between the two sides as to whether the invoices Vantage sent to the department were done on the heels of the company finding out it hadn't won the next contract. He said it was Vantage's point of view that it had been trying to negotiate with the department for months, even years, before the bidding process concluded.

Because Vantage felt the two sides had a long-standing relationship, Vantage "allowed this to go forward probably longer than they should have," Deeb said. The invoices, he said, were a last resort.

Vantage had conceded they posted the

message about a failure of payment on the state's computer system and agreed to take it off as part of the resolution of the injunctive relief claims. Deeb said it was done to combat what he called a campaign by the department to leak rumors to the press that Vantage had performance issues.

According to the verdict sheet, the 12-member jury was unanimous in finding Vantage did not breach the contract or a duty of good faith, hence awarding the department nothing.

The jury, in an 11-to-1 finding, found the Department of Education breached the contract and found in a 10-to-2 decision that it breached the implied duty of good faith and fair dealing. The jury, voting 10-to-2, awarded Vantage \$3,521,435.19 Nov. 7. Vantage is now seeking about \$600,000 in prejudgment interest, Deeb said.

He said Oregon requires only nine of 12 jurors to agree, but those nine have to agree on all the same questions. He said one juror voted "no" for the damages award and another abstained. All of the other minority votes in the other questions were abstentions, he said.

The trial was held before Marion County Circuit Court Judge Thomas Hart and was run on a tight, one-week schedule that began Nov. 3. That made for long days and three hours of jury deliberations that went until 7:30 p.m. Nov. 7.

The Department of Education had agreed to a settlement conference about two weeks before trial, Deeb said. The conversations were not about what the department might offer Vantage, but what Vantage would be willing to pay the department, he said.

Deeb said there was no high-low agreement. Vantage was demanding a little more than what the verdict award came in at and the Department of Education was seeking \$1 million at the time of trial, he said.

No expert witnesses testified in the case.

John Clinton Geil and Seth T. Karpinski of Oregon's Attorney General's Office represented the Department of Education at trial. Jake Weigler, a spokesman for the office, said they are reviewing the decision and weighing their options as to whether they would appeal. •