[Cite as *Ohio Atty. Gen. v. Ventech Solutions, Inc.*, 2019-Ohio-5474.]

OHIO ATTORNEY GENERAL'S OFFICE Plaintiff/Counter Defendant v. VENTECH SOLUTIONS, INC. Defendant/Counter Plaintiff	Case No. 2017-00746PR Judge Dale A. Crawford INTERIM DECISION

{¶1} This is a matter in which a party spent $12.5 million and received nothing but promises in return.

{¶2} The Ohio Attorney General's Office (AGO) is charged by law with collecting Ohio's hundreds of millions of dollars of debt owed to the various agencies of the State. In 2011, the Internal Revenue Service conducted an audit of the AGO's debt collection system and determined that it's procedures for attaching debtor's federal income tax returns and obtaining debtor's tax information did not comply with the Tax Information Security Guidelines for Federal State and Local Agencies as set forth in IRS Publication 1075 (1075). As a result of the audit, the AGO commenced the process of replacing its computerized collection system (CUBS) with a software system that was 1075 compliant. In late 2011, the AGO developed a request for proposal (RFP) seeking bids on a new system. The RFP (Ex. A) sought "to solicit responses from companies with the ability to provide a Collections System" and "to obtain high quality computerized systems and services by utilizing the skills, creativity, experience, and knowledge of a company that specializes in Collections Systems." (Emphasis added.) *Id.* at Section 1.0, p. 6. Kimberly Murnieks, the prior Chief Operating Officer of the AGO, testified that 1075 compliance was a "core requirement" for embarking on the implementation of a new system and the RFP.

{¶3} Section 4.0 of the RFP is titled Scope of Work. It called for a "phased system development approach by functionality to complete the implementation of the

new Collections System" and set forth "milestones and deliverables [representing] all the work to be completed to successfully implement the New Collections System." (*Id*. at Section 4.0, p. 12). It prohibited any work being performed outside the state of Ohio and required the performance of "a detailed review and analysis of all the requirements provided in Supplements of the RFP [to] develop the detailed specifications required to construct and implement the new Collections System." (*Id*. at p. 15; 22). It further required that the chosen contractor and the system itself must comply with all requirements of 1075. *Id.* at p. 26; 72 Business Model Framework Document attached thereto, p. 2).

{¶4} Section 4.0 states, "[t]he migration of the new Collections System as a replacement to the current Collection System must be thoroughly explained and any constraints to the continuity of operation must be detailed." *Id.* at p. 27. Making clear that the AGO desired a working collections system, it also states:

> The objectives of the Development Task <u>are to modify, develop, and install a new Collections System</u> on the requisite hardware and software in the development environment. Establishing the hardware, software, and network environment, including connection to the AGO network and integration with other AGO applications, will be essential to the Contractor's success. It is the Contractor's responsibility to procure all the hardware, software, and necessary technical accessories required to accomplish the development task. (Emphasis added.) *Id.* at p. 28.

{¶5} Section 4.0 of the RFP called for an "operational readiness test" after the "successful completion of" user acceptance testing as well as a load/stress test "to document that the system will function within the normal work day, work week, and work month schedule of the AGO." *Id.* at p. 35-37. In addition, it states that the chosen contractor would be required to perform an operational readiness test "designed to ensure that the Contractor and AGO staff are ready to process all collection accounts

from AGO Clients" and "accounts can be processed by Third Party Vendors and Special Counsels." *Id.* at 37. It also states, as to "system-related problems," the chosen contractor would have to "develop a plan to resolve all such issues." *Id.* at p. 43.

{¶6} The chosen contractor would also be responsible for "data conversion requirements for the new Collections System" and had to "provide for conversion of all data elements in the current systems. *Id.* at p. 46. Section 4.0 specifies other significant responsibilities with regard to data conversion, making clear the responsibility for the same is the responsibility of the chosen contractor. This includes confirming data conversion "has been done correctly" and "certification that the 'new' data matches the 'old' data." *Id. at 46-51.*

{¶7} Section 4.0 of the RFP also states that the winning contractor would be responsible for training and onsite customer support. *Id.* at p. 51-61. It also states, "[f]or the first six months of production operations, the Contractor must ensure that the system is a reliable and dependable (sic) and meets the needs of the AGO and its stakeholders." *Id.* at p. 61. The chosen contractor had to "submit the system for acceptance" and Section 4.0 set forth significant responsibilities relative to maintaining, updating and repairing the system after final acceptance. *Id.* at p. 62; 66-70. It states that "[f]inal acceptance of the system will be based upon the successful completion of the performance periods * * * [t]he system must operate at full functionality within the performance requirements described in this RFP" and further that "the operation of the system * * * is necessary to the proper operation of programs * * * vital to the accurate and expeditious processing of accounts and payments to third parties." (Emphasis added.) Section 4.0 also provides that the chosen contractor "must ensure there will be no delay or interruptions in the operation of the system." *Id.* at p. 73.

{¶8} Section 5.0 of the RFP specifies that Ventech needed to respond to each specific requirement using one of seven different response codes. These codes

included options for indicating that the particular requirement would be fully met or partially met. *Id.* at Section 5.0, p. 75-76.

{¶9} Section 6.0 of the RFP states, "[t]he AGO is purchasing a new Collections System that performs according to the RFP requirements" and further that if "the system fails the performance period * * * the Contractor will be in default and the AGO may seek the remedies provided for in this contract and in law." (Emphasis added.) *Id.* at Section 6.0, p. 85. The RFP also outlines the submittal and approval process for deliverables and makes clear that the AGO"s acceptance of a particular deliverable does not "represent * * * that the AGO has accepted the system" and that acceptance of the system "is conditional upon successful performance periods on completion of the whole system." *Id.* at p. 86. Otherwise, "the Contractor will be in default and the AGO may apply the remedies available to it under the Contract." *Id.* at p. 86.

{¶10} Section 7.0 of the RFP states "[t]he RFP and the Contractor's Proposal * * * are a part of this Contract and describe the work * * * the Contractor will do and any materials the Contractor will deliver * * * under this Contract." (Emphasis added.) *Id*. at Section 7.0, p. 90. It also states that the project must be completed on time or "the contractor will be in default and the State may terminate this Contract under the termination provision." Per Section 7.0, the contract fee "is contingent on the complete and satisfactory performance of the Project." *Id.* at 92.

{¶11} In order to obtain an extension of milestone or deliverable deadlines, Section 7.0 states that the contractor must provide a "Notice of State Delay" through a "meaningful written notice of the State's failure to meet its obligations within five business days of the Contractor's realization that the State's delay may impact the Project." *Id.* at p. 91. As to fees already paid, the RFP provides if the AGO "later disputes the amount covered by the invoice and if the Contractor fails to correct the problem within 15 business days after written notice, the Contractor must reimburse the

AGO for that amount at the end of the 15 business days as a nonexclusive remedy for the AGO. *Id*. at p. 93.

Section 10.0 of the RFP provides:

> [t]he State may terminate this Contract if the Contractor defaults in meeting its obligations under this Contract and fails to cure its default within the time allowed by this Contract * * * [and] the termination will be for cause, and the State's rights and remedies will be those identified below for termination for cause.
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> * * *
>
> If the Contractor fails to cure the breach within 30 calendar days after written notice, or if the breach is not one that is curable, the State will have the right to terminate this Contract immediately on notice to the Contractor. *Id.* at Section 10.0, p. 101.

The notice of termination is "effective as soon as the Contractor receives it." As for remedies, it provides:

> If the State terminates this Contract for cause, it will be entitled to cover for the Project by using another Contractor on such commercially reasonable terms as the State and the covering contractor may agree. The Contractor will be liable to the State for all costs related to covering for the Project to the extent that such costs, when combined with payments already made to the Contractor for the Project before termination, exceed the costs that the State would have incurred under this Contract. The Contractor also will be liable for any other direct damages resulting from its breach of this Contract or other action leading to termination for cause. *Id.* at p. 102.

Section 12.0 of the RFP also contained a software warranty provision which states:

> [i]f this Contract involves software as a Deliverable, then, on acceptance and for one year after the date of acceptance * * * the Contractor warrants as to all software developed under this Contract that: (a) the software will operate on the computer(s) for which the software is intended in the manner described in the relevant software documentation, the Contractor's Proposal, and the RFP Documents [and] (b) the software will be free of any material defects. *Id.* at Section 12.0, p. 111.

The limitation of liability provision states:

> [n]either party will be liable for any indirect, incidental, or consequential loss or damage of the other party, including but not limited to lost profits, even if the parties have been advised, knew, or should have known of the possibility of such damages. Additionally, neither party will be liable to the other for direct or other damages in excess of four times the not-to-exceed fixed price of this Contract. *Id.* at p. 115.

{¶12} Plaintiff, Ventech Solutions, Inc. (Ventech), a relatively small application and design company, located in Columbus, Ohio, saw the RFP online and its President and CEO, Ravi Kunduru, decided to submit a bid. Mr. Kunduru testified that his company was not capable of doing the project without a "partner." Mr. Kunduru contacted FICO, a large national data analytics company, located in California, to see if it had a product that could be modified to meet the requirements of the RFP. After doing little or no research on the capabilities of FICO's debt management product (DM8), Ventech submitted its bid proposing to use FICO's DM8 product as well as two other FICO products, Placement Plus, and the FICO Network. Ventech represented in its cover letter that DM8 met and exceeded the needs of the AGO. However, its bid also indicated that its proposed solution only partially met several of the RFP's

requirements relative to 1075 compliance. At an August 2012 sales meeting between Ventech, FICO and the AGO, prior to the acceptance of any bids, Ventech made representations by way of a power point program that the DM8 product was 1075 compliant.

{¶13} Based upon the representations made at the sales meeting and the RFP, a contract to update the AGO's computerized collection system was entered between Ventech and the AGO (the Agreement). The new collections system Ventech attempted to develop became known as the CIMS system (CIMS).

Section I of the Agreement (Ex. D) states:

> (A) The AGO hereby engages Contractor as an independent contractor in a long-term, multi-stage project (the "Project") to develop and implement a custom high quality computerized collections system (the "System") for use by the AGO as described in the Scope of Work (as defined in Article II). (Emphasis added.) (Ex. D., Section I, p. 1).

Section 2.0 of the Agreement states:

> (A) As used herein, the "Scope of Work" shall refer to the description of the System set forth in (1) Section 4.0 of the February 2012 Request for Proposals issued by the AGO, attached hereto as Exhibit 1 ("RFP"), (2) as amended and supplemented by the addenda to the RFP, attached ·hereto as Exhibit 2 ("RFP Addenda"), (3) as further amended and supplemented by Contractor's proposal response, attached hereto as Exhibit 3 ("RFP Response"), (4) as further amended and supplemented by Contractor's Best and Final Offer presentation and related exhibits, attached hereto as Exhibit 4 ("BAFO"), as further amended and supplemented by the preliminary scope of work attached hereto as Exhibit 5. Collectively, the

> RFP, the RFP Addenda, the RFP Response, and the BAFO are referred to herein as the "RFP Documents." *Id.* at Section II, p.1.
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> (B) It is anticipated that the Scope of Work will be refined and further described by the parties through joint application design sessions ("JAD Sessions") to be held by the parties beginning promptly following the execution of this Agreement. During the course of such JAD Sessions, the Scope of Work will be supplemented to include AGO response times to inquires and review of deliverables and may be supplemented or amended to, among other things, change deliverables identified in the Scope of Work ("Deliverables"), milestones identified in the Scope of Work (the "Milestones") and anticipated delivery dates. Once the JAD Sessions are complete, the revised Scope of Work will be submitted to the ESC for review and approval. References to the Scope of Work herein shall, for all purposes, include any changes proposed in such JAD Sessions and approved by the ESC. *Id.* at p. 2.

{¶14} Section II(D) of the contract made Ventech "subject to the terms and conditions of State Term Schedule * * *. Incorporated herein as Exhibit 5." *Id.* Though not submitted as part of Exhibit D, Ventech's state term contract is contained in Exhibit B, its response to the RFP. It provides that Ventech cannot "provide any of its services outside of the United States" and also provides "[i]f Contractor or any of its subcontractors perform services under this contract outside of the United States, the performance of such services shall be treated as a material breach." As to such work, the state term contract provides, "the Contractor shall immediately return to the State all funds paid for those services." Ex. B, State Term Contract attached thereto p. 15-16.

{¶15} The Agreement sets forth an implementation period of 32 months, a commencement date of December 14, 2012, a conclusion date of June 30, 2016, and a

fee of $12,931,178.00. Ex. D at Section III and Section IV p. 2-3.[1] In addition to the completion date, the Agreement provides:

> [t]he Scope of Work may also have several dates for the delivery of Deliverables or reaching certain Milestones in the Project. Subject to the AGO's compliance with its obligations under this Agreement, including the AGO response times as set forth in the Scope of Work (Ventech points to nothing), and applicable cure periods, Contractor must deliver the Deliverables, meet those Milestones, and complete the Project within the times the Scope of Work requires. Subject to the foregoing, if Contractor repeatedly materially does not meet those dates, Contractor will be in default, and the AGO may terminate this Agreement under the termination provision as set forth in Article VIII. *Id.* at Section III, p. 3.

The Agreement sets forth the following payment schedule at Section IV, p. 4:

Fiscal Year	FICO Software License Bundle	Aspect Software License	Professional Services	Hold Back Paid	Total
2013	$3,750,000.00		$544,179.27		$4,294,179.27
2014	$2,479,962.00		$2,539,503.26		$5,019,465.26
2015		$251,684.00	$2,539,503.26	$624,798.18	$3,415,985.44
2016			$201,547.87		$201,547.87
Total	$6,229,962.00	$251,684.00	$5,824,733.66	$624,798.18	$12,931,177.84

The Agreement thereafter states:

> Contractor understands that the AGO's acceptance of a particular Deliverable does not represent or indicate that the AGO has accepted the completed System. The AGO's acceptance of the System *is* conditional

[1]As discussed more below, through amendment, the parties eventually extended the go-live date to October 31, 2016.

> upon successful completion of the Performance Period and Stabilization Period with respect to the System, as set forth in set forth in Article XXI. Upon the successful completion of the Stabilization Period, Contractor must present the System to the AGO for acceptance by submitting a system certification letter as described in set forth in Article XXI. (Emphasis added.) *Id.*

The Agreement also provides, "[t]he AGO seeks a complete Project" and also states, "[i]f Contractor has committed a material breach of the Agreement, the AGO may withhold payment otherwise due to Contractor." (Emphasis added.) *Id.* at p. 5-6.

Section VIII of the Agreement states:

> (A) The AGO may, at any time, prior to completion of the Project, terminate this Agreement, for any reason, with or without cause by giving ninety (90) days prior written notice to Contractor. *Id.* at p. 7.
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> (H) If upon completion the System fails the Performance Period or the Stabilization Period, Contractor will be in default and the AGO may seek the remedies provided for in this Agreement and in law. *Id.* at p. 9.
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> * * *
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> (I) The AGO also has certain obligations to meet related to this Agreement. Certain of those obligations relating to review of Deliverables and responding to inquiries in connection with the Project will also be included in the Scope of Work. If Contractor's failure to meet the Delivery, Milestone, or completion dates in the Scope of Work is due to the AGO's failure to meet its own obligations, then Contractor will not be in default, and the Delivery, Milestone, and completion dates affected by the AGO's failure to perform will be extended by the same amount of time as the AGO's delay. Contractor may not rely on this provision unless Contractor

> has in good faith attempted to avoid an extension and has given the AGO written notice of the AGO's failure to meet its obligations within five (5) business days of Contractor's realization that the AGO's delay may impact the Project. Contractor must deliver any such notice to both the Chief Information Officer and title the notice as a "Notice of State Delay." (Id.).

Section XV required that Ventech employ and replace, as necessary, key personnel during the project to develop the CIMS system including a data conversion lead, implementation lead, and transition lead. *Id.* at p. 15.

Section XVIII provides:

> (C) Contractor will not be liable for any indirect, incidental, or consequential loss or damage of the AGO, including but not limited to lost profits, even if the parties have been advised, knew, or should have known of the possibility of such damages. Additionally, Contractor will not be liable to the other for direct or other damages in excess of the Holdback plus two (2) times the greater of (1) the fees for Professional Services paid in the immediately preceding Fiscal Year and (2) the fees for Professional Services paid in the immediately preceding twelve (12) month period. The limitations in this Section XVIII(C) shall not apply to any obligations of Contractor to indemnify the AGO against claims made against it or for damages to the AGO caused by Contractor's gross negligence or other tortious conduct. *Id.* at p. 22.

Section XIX provides:

> (A) Contractor warrants that the recommendations, guidance, and performance of Contractor under the Contract Documents will * * * be in accordance with sound professional standards and the requirements of this Agreement and without any defects * * * Contractor also warrants that

* * * Contractor's work and the Deliverables and System resulting from that work will comply in all material respects to the specifications set forth in the Contract Documents. *Id.* at p. 21.

* * *

(C) On acceptance of the System by the AGO following the Stabilization Period in accordance with Alticle XXI and for one (1) year thereafter (the "Ventech Warranty Period"), Contractor warrants that: (a) the System will operate on the computer(s) for which the System is intended in accordance with the System specifications set forth in the Scope of Work; (b) the Custom Developed Software will be free of any Urgent, High or Medium Priority Defects. *Id.* at p. 22.

* * *

(F) In addition, for Commercial Software, Contractor will during the Ventech Warranty Period: (1) maintain or cause the third-party licensor to maintain the Commercial Software so that it operates in the manner described in the Scope of Work and relevant software documentation. *Id.* at p. 23.

Section XXI provides:

(B) Notwithstanding anything to the contrary in the RFP, there will not be any time frames or other service levels to correct Defects during testing prior to the Performance Period. There will be a period for performance testing upon submission of the completed System and placement of the completed System in production (the "Performance Period"). During the Peformance Period, the AGO, with the assistance of Contractor, will measure performance of the System. The Performance Period will last

ninety (90) calendar days, unless earlier terminated with the approval of the AGO, or until all Defects identified in the System have been corrected, whichever is later. The performance criteria in the Scope of Work may be amended by mutual agreement of the parties and will be supplemented with the relevant user manuals, technical materials, and related writings, to the extent that the specifications in those writings supplement and refine rather than contradict the performance criteria in the Scope of Work. (Emphasis added.) *Id.* at p. 25.

(C) Following the Performance Period, Contractor shall ensure that the System operates free from Urgent, High or Medium Priority Defects for at least thirty (30) consecutive calendar days (the "Stabilization Period") * * * If any Urgent, High or Medium Priority Defects are discovered in the System during the Stabilization Period, Contractor shall promptly correct such Defects and the Stabilization Period shall be extended until the System has operated without any Urgent, High or Medium Priority Defects for at least thirty (30) consecutive calendar days. If Contractor is unable to resolve all Urgent, High and Medium Priority Defects within one hundred fifty (150) days from the beginning of the Stabilization Period, the AGO may terminate this Agreement for default. *Id.* at p. 25-26.

(D) At the conclusion of the Stabilization Period, Contractor shall provide a written certification letter on a form provided by the AGO certifying that the Stabilization Period is complete and the System is ready for acceptance. Following a review of such certification letter and confirmation by the AGO, to its reasonable satisfaction, that the requirements for completion of the Stabilization Period have been satisfied, the AGO shall evidence its acceptance of the System by returning a countersigned copy of the certification letter to Contractor. The System shall not be deemed

> accepted unless and until all signatures required thereby have been obtained. Upon the AGO's acceptance of such certification letter, the System shall be deemed accepted, the Holdback shall be paid to Contractor, and the Ventech Warranty Period shall begin. *Id.* at 26.
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> * * *
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> (K) Contractor must keep the System in good operating condition during the Ventech Warranty Period. *Id.* at p. 27.

{¶16} Shortly into the project, the parties switched software and agreed to use Debt Manager 9 (DM9) in place of DM8. The project proceeded very slowly mainly because of poor planning and management by Ventech. Dale Caffall, Ventech's Program Manager from May 2015 until the AGO terminated Ventech on June 30, 2017, testified that Mark Hutton, Ventech's prior program manager made many mistakes in running the project. It was poorly planned and poorly developed from the beginning until he arrived in May 2015, at which time he felt the project had severely stalled. In fact, Ventech changed program managers at least 5 times. Mr. Caffall testified that in the first 2 ½ years on the project, Ventech completed less than 5% of the required work. Yet, Mr. Caffall testified that most of the money allocated to the project had already been spent. He further testified to Mr. Huttons's mistakes relative to data conversion, in that only 4,000 of 10,000,000 accounts had been converted to the new system by May of 2015. Ultimately, as Mr. Caffall testified, Ventech did not complete data conversion until August of 2016. Mr. Caffall admitted that the data conversion problems had a severe impact.

{¶17} As a result of the lack of progress on the project several Amendments covering scope of work and contract price were formulated. While earlier Amendments were approved, Amendment 10 is the most relevant Amendment which, combined with the original Agreement, defined the obligations of the parties. Through Amendment 10,

the parties abandoned Placement Plus and the FICO Network. Mr. Caffall testified that, in his opinion, once the parties decided that Placement Plus and the FICO Network would no longer be used, the project needed to be restarted as the project could not be completed on time. However, he never shared this opinion with the AGO.

{¶18} Amendment 10 (Exhibit N) provides that the parties "wish to revise Compensation, Time of Performance, Scope of Work, and certain other provisions of the Agreement." The AGO agreed to pay $200,000.00 "for FICO Debt Manager 9 (DM9) Maintenance" satisfying "the Attorney General's obligation for Maintenance with respect to DM9 until acceptance of the System." Amendment 10 also modified "Section II of the Agreement" in that it obligated Ventech, without increasing its fee, to "develop and implement a custom portal solution (the 'Custom Portal') as part of the System, in lieu of PlacementPlus, which was initially proposed to be part of the System in the RFP Documents." The new custom portal solution was also required to be 1075 compliant. *Id.* at p. 1. Amendment 10 also provides "[t]he Attorney General and the Contractor wish to ensure that the System is complete by the new Go Live Date" of October 1, 2016. It required Ventech to hire 25 additional employees who were to "devote their working time to the Project as necessary to meet the Go Live date" and obligated the AGO to pay an additional $250,000 which became "payable upon acceptance of the System." *Id.* at p. 2-3.

{¶19} Amendment 10 also changed section XVIII(C) of the Agreement "to provide that the Contractor's liability to the AGO is limited to the Holdback amount plus $200,000 plus two (2) times the greater of (1) the fees for Professional Services paid in the immediately preceding Fiscal Year or (2) the fees for Professional Services paid in the immediately preceding twelve (12) month period." It provided for a "revised total Fee for the Agreement [of] $17,958,354.44, which includes scope provided from beginning of the Agreement through Fiscal Year 2017." *Id.* at p. 4.

Paragraph 9 of Amendment 10 states:

> Section II(B) of the Agreement is hereby amended to replace the references to the "ESC" in the final two sentences of that Section with references to "AGO" and the parties hereby agree that the DSDs approved by the AGO in its approval of the Scope of Work in accordance with Section II(B) of the Agreement are the controlling documents for purposes of defining the Scope of Work. *Id.* at p. 5.

DSD is an acronym for design specification document. According to testimony at trial, DSDs for the CIMS project did not contain computer code and described what would be built but not how it would be built. Finally, Amendment 10 also states, "[a]ll other terms and conditions of the Agreement remain the same." *Id.* at p. 6.

{¶20} Thereafter, two additional amendments were executed before the AGO terminated Ventech. The parties executed the Eleventh Amendment (Exhibit O) to the Agreement on August 12, 2016, which pertained to the so-called "Dale Solution." For an additional $481,800, Ventech agreed to "develop and implement a custom solution for the handling of inbound client debt data" of five of the AGO's biggest clients. Ventech agreed to "plan, design, deliver, and implement" this custom software and IRS publication 1075 compliance was again required. *Id.* at p. 1. The Eleventh Amendment revised the total fee to "$18,165,386.09" but states that "[a]ll other terms and conditions * * * remain the same." *Id.* at p. 2. The parties last amendment, Amendment 12, (Exhibit P) changed he "Go-Live Date" to October 31, 2016.

{¶21} In addition to lack of leadership, lack of manpower allocated to the job by Ventech was a continuing problem – a problem that lasted until Ventech was terminated from the job. Despite the importance of data conversion and the contract's requirements regarding key personnel, Mr. Caffall testified that Ventech did not have a full-time data conversion lead, implementation lead, or transition lead when he came onto the project. Further, Lisa Freshly, a business analyst who worked on the key

components of the CIMS project did not begin on the project until January of 2016, just 9 months before the revised go-live date and over 3 years after the parties executed the Agreement. Ms. Freshly testified regarding the so-called "forward master," a set of business rules contained on an excel spreadsheet that contained the parameters for how debt was forwarded to third parties for collection. Ms. Freshly testified that the forward master contained conflicting rules which made it impossible to automate the process before the revised go-live date of October 31, 2016. Ms. Freshly further testified this problem was not discovered until October of 2016; Ms. Freshly offered no explanation for why such a critical problem went undiscovered until the month the CIMS system was supposed to go-live.

{¶22} Mr. Caffall further testified that he believed 45 people were needed on the project. Yet, Ventech assigned a substantial amount of work to a single coder who the parties identified only as MD. Ventech personnel had concerns about MD's workload which included not only completing data conversion but also building ETLs (extract, transform and load), tools used to retrieve data from a source and load it into a target such as DM9. At some point, Ventech hired, then fired, then rehired a company named Emprise to build these ETLs.

{¶23} Randy Hall, Ventech's deputy delivery manager for the CIMS project, stated unequivocally that he did not believe Vetnech had sufficient staffing to complete the project. He stated Ventech needed "experts" and that the employees assigned to the project were "fresh out of college, green, no experience." He indicated there was a period where these employees had to "get up to speed with how to write code," particularly code for DM9 and that the "ETL side was sparse." He also testified that, though the Agreement, required 25 developers, this level was not maintained through the life of the project.

{¶24} Deborah Burke, another Ventech employee and application lead, testified, "[b]ased on the workload * * * there weren't enough people [on staff] to get the job done"

especially as it related to "critical path" and "core functions" work. She further testified she quit the CIMS project because "she had raised concerns from the project perspective and felt no action was taken." She testified that specifications "were supposed to have been written" by the time she started but they were not so she "ultimately ended up stepping in and helping write some of them because of the staffing levels." She did this because "when you don't have staff to do the job and the dates don't move * * * it doesn't matter what your title is. You get in. You do your job."

{¶25} Further, the AGO's technical expert, Kevin Wohlever, opined that Ventech failed to provide adequate staff for data validation and testing. He further opined that Ventech's proposed time table for completing the Dale solution, which allotted just two weeks to develop code, was aggressive and risky and that it could only be achieved if significant resources were allocated to it. In his opinion, the chance of successful completion of the Dale solution was low. In particular, he was critical of the timing of data validation as it related to writing code. He also opined that Ventech should have done more to validate data. The Court finds Mr. Wohlever's testimony extremely credible.

{¶26} At an August 2016 meeting, Ventech assured the AGO that the CIMS system was good to go and it was safe to deactivate CUBS. However, CIMS did not go-live on October 31, 2016. It did not work and has never functioned. After the system failed to function, Ventech proposed a thirteenth amendment to the contract in which it proposed that it be paid an additional $1.9 million in order to undertake the work necessary for the system to "Go-Live." Ultimately, the AGO terminated Ventech on June 30, 2017.

{¶27} Mr. Kunduru testified that the payment and work set forth in Amendment 13 were the only way the AGO would get a working system. Mr. Kunduru's admission and other testimony established that the deliverables Ventech produced are useless to the

AGO. The AGO returned to using CUBS and still needs to replace its collection system which AGO witnesses testified could cost $8-10 million.

CLAIMS

{¶28} The parties tried this case, along with Case No. 2017-00628, to the Court on July 22-July 25, 2019. The cases involve the same parties, contract, claims, and set of facts. In Case No. 2017-00746, the AGO's amended complaint asserts two claims for breach of contract, one based primarily on Ventech's failure to deliver a working collections system and another based on Ventech's use of overseas employees to complete work under the contract. The AGO also asserts a claim for negligent misrepresentation based on Ventech's representations that the collections system would be ready to go live by October 31, 2016 as well as a fraudulent inducement claim based on Ventech's representations during the bidding process that its proposed solution would be 1075 compliant.

{¶29} Ventech's counterclaim asserts two claims, one for breach of contract based on several, specific alleged breaches and another for declaratory judgment which asks the Court to make various declarations regarding the parties' conduct during the contract's performance and which primarily seeks a declaration that the AG wrongfully terminated Ventech. Again, the parties' pleadings in Case No. 2017-00628 assert identical claims save for the AGO's additional breach of contract claim based on overseas work. The Court addresses the parties' claims individually below.

- **Fraudulent Inducement**

{¶30} The AGO bore the burden of proving its fraudulent inducement claim by clear and convincing evidence. *In re Dissolution of the Marriage of Wittman,* 10th Dist. No. 94 APF07-995, 1995 Ohio App. Lexis 1061 (March 21, 1995) at *6 citing *Cross v. Ledford,* 161 Ohio St. 469 (1954). As stated in *S.E.A., Inc. v. Dunning-Lathrop & Assoc.*, 10th Dist. No. 00AP-165, No. 00AP-178, 2000 Ohio App. LEXIS 6008, at *30 (Ct. App. Dec. 21, 2000):

> the elements for fraudulent inducement to enter into a contract are "(1) a false representation concerning a fact or, in the face of a duty to disclose, concealment of a fact, material to the transaction; (2) knowledge of the falsity of the representation or utter disregard for its truthfulness; (3) an intent to induce reliance on the representation; (4) justifiable reliance upon the representation under circumstances manifesting a right to rely; and (5) injury proximately caused by the reliance." (Internal cites omitted).

See also Lopez v. Quezada, 10th Dist. No. 13AP-389 and 13AP-664, 2014-Ohio-367, 2014 Ohio App. Lexis 359, ¶ 18, ("To prove fraud in the inducement, 'a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment.'" (Internal cites omitted). The AGO's fraudulent inducement claim is based on Ventech's representations during the bidding process that the FICO solution would be 1075 compliant. However, though the Court finds that Ventech made a material misrepresentation regarding 1075 compliance, it also finds that the AGO did not justifiably rely on Ventech's representation. Therefore, the Court finds that the AGO failed to prove its claim by clear and convincing evidence.

{¶31} The cover letter portion of Ventech's RFP response states that it "met and exceeded the requirements of the RFP using 'out of the box' software capabilities * * * [t]he FICO solution provides the AGO with IRS publication 1075 compliance." (Ex. B, p. 7). Likewise, during a meeting at the AGO's office in August of 2012, Ventech presented a slideshow in which it represented that its proposed solution was fully 1075 compliant. Quite simply, these statements were false; the proposed FICO solution was not 1075 compliant.

{¶32} The Court also finds that Ventech made these statements knowing they were false and/or with an utter disregard as to their truthfulness. Ventech collaborated with FICO and based its response to the RFP on information FICO provided. In fact,

Ventech relied exclusively on FICO's knowledge of its own products and FICO's representations related thereto regarding 1075 compliance. To the extent Ventech blames FICO for the false statements regarding 1075 compliance, the Court finds FICO's representations related to 1075 compliance are imputed to Ventech as is FICO's knowledge regarding its products capabilities. Thus, if FICO knowingly misrepresented its products, this knowledge is imputed to Ventech.

{¶33} Ventech, at the least, acted with utter disregard to the truthfulness of the statements regarding 1075 compliance. Ventech did nothing independently to verify FICO's representations. Instead, as Mr. Kunduru testified, Ventech asked FICO to review the RFP and determine whether the RFP's requirements were met or not. Knowing full-well the importance of 1075 compliance, Ventech nonetheless twice represented that its proposal fully complied with the RFP's requirements regarding 1075 compliance despite having never verified or even explored whether these statements were true.

{¶34} Further, while the business requirements section of Ventech's RFP response indicates its proposal only partially complied with several portions of the RFP's requirements regarding 1075 compliance. (Ex. B at p. 82, 88, 89-90, 103), this does not negate the falsity of the other statements. In addition, the August slideshow presentation occurred months after the RFP response and, during this presentation, Ventech again unequivocally represented full 1075 compliance. The Court finds Ventech's statements regarding full 1075 compliance constitute material misrepresentations.

{¶35} However, the Court finds that the AGO failed to prove that it justifiably relied on Ventech's misrepresentations regarding 1075 compliance. As mentioned, the RFP response was inconsistent regarding 1075 compliance. More importantly, the evidence established that the lack of 1075 compliance was known almost from the start of the project and that the AGO nonetheless proceeded with the project including

switching from DM8 to DM9 and executing multiple amendments despite that 1075 compliance was not assured. In short, the AGO proceeded despite its knowledge regarding the lack of compliance and, in the Court's view, did so unconcerned by the 1075 shortcomings until Ventech was terminated years after the project began.

{¶36} As such, the Court finds that the AGO failed to prove Ventech fraudulently induced it to enter into the Agreement by clear and convincing evidence and that Ventech is entitled to judgment in its favor on the AGO's fraudulent inducement claim.

- **Negligent Misrepresentation**

{¶37} The AGO's negligent misrepresentation claim is based on Ventech's representation that the system would be ready to "go live" on October 31, 2016 despite that there were defects in the system and/or the system was inoperable. The evidence established that, in August of 2016, Mr. Caffall and Mr. Kunduru both assured AGO personnel that CIMS was ready to go live and it was safe for the AGO to deactivate CUBS before CIMS ultimately failed to operate on October 31, 2016. However, as the Court previously found in its decision denying the AGO's Motion for Summary Judgment, the Court cannot find that these statements amount to more than promises to fulfill Ventech's contractual obligations as opposed to "false information" for which Ventech failed to "exercise reasonable care or competence in obtaining or communicating the information." *See Brothers v. Morrone-O'Keefe Dev. Co., LLC,* 10th Dist. No. 06AP-713, 2007-Ohio-1942, ¶ 44. In fact, the Court finds that the AGO's claim regarding the system's failure to "go live" by October 31, 2016 is simply another iteration of the AGO's breach of contract claims. Further, as it did during summary judgment, the Court finds the following reasoning set forth in *Telxon Corp. v. Smart Media of Del., Inc.,* 9th Dist. No. 22098 & 22099, 2005-Ohio-4931, ¶ 32-35, to be persuasive and appropriate for this case:

> All of these tort-based counterclaims are insupportable as a matter of law, based on the premise by which they were asserted. Each of these causes of action requires a common element: misrepresentation of material fact. This means past or existing facts, not promises or representations relating to future actions or conduct. On the other hand, "[a] contract is a promise -- and a promise necessarily implicates future conduct."
>
> Accordingly, "in Ohio, a breach of contract does not create a tort claim." "A tort claim based upon the same actions [as] those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed."
>
> To hold otherwise would be to convert every unfulfilled contractual promise, i.e., every alleged breach of a contract, into a tort claim.

The Court cannot find that Ventech's representations regarding the system's ability to "go live" are anything beyond representations regarding its intent to fulfill contractual obligations and/or representations relating to future actions or conduct. Thus, as a matter of law, the AGO cannot recover for negligent misrepresentation.

{¶38} Likewise, the Court finds that the amount of pecuniary loss, if any, resulting from CUBS being shut off is the same loss as that attributable to Ventech's breach in failing to produce a working system. The only testimony on consequential damages came from Lucas Ward who calculated the amount based on the difference between the average debt collected in the preceding 5 fiscal years and the debt collected in fiscal year 2017, the year during which CUBS was turned off when CIMS was activated. However, Mr. Ward admitted that he did not rule out any other contributing factors in reaching this figure, a difference of about $40 million. Most importantly, neither Mr. Ward nor any other witness offered testimony quantifying the amount of money

actually lost as opposed to the amount of debt which could still be collected but which was simply delayed when CUBS was shut off. In fact, the AGO conceded at trial that it is not seeking any consequential damages based on the inability to collect debt. Thus, the Court also finds that the AGO failed to prove "pecuniary loss caused * * * by [its] justifiable reliance" on Ventech's representations regarding the readiness of CIMS. Given the above, the Court finds that Ventech is entitled to judgment on the AGO's negligent misrepresentation claim.

- **Breach of Contract - State Term Contract**

{¶39} The AGO asserted a breach of contract claim, asserting Ventech performed work in India in violation of the State Term contract, which prohibited Ventech from performing work overseas. To prevail on its breach of contract claim, the AGO must prove the existence and terms of the contract, performance by the AGO, breach by Ventech, and damages. *O'Brien v. OSU,* 10th Dist. No. 06AP-946, 2007-Ohio-4833, ¶ 44. For the following reasons, the Court finds the AGO failed to prove, by a preponderance of the evidence, that work was performed in India and/or that it paid for any work performed in India and therefore failed to establish that Ventech breached the contract in this regard.

{¶40} The AGO presented no direct evidence that Ventech performed any work in India. Mr. Caffall unequivocally testified that Ventech performed no work on the AGO project in India no other witness testified to the contrary. Based on its first-hand observation of Mr. Caffall, the Court finds Mr. Caffall's testimony on this issue to be credible.

{¶41} Further, the Court finds the evidence that the AGO presented on this issue is circumstantial evidence of minimal weight which does not establish that Ventech performed work on the project in India. For example, the AGO offered exhibit AAAA, an email exchange among Ventech employees in which Ventech's widget factory is referenced. However, Mr. Caffall testified this email references Ventech's Columbus

based widget factory. Though he also testified that Ventech's India office supported the Columbus widget factory, this email did not establish that Ventech employees located in India performed work on the project.

{¶42} The AGO also presented exhibit NN, a July 23, 2015 email sent to a Ventech India employee which references the "SharePoint site" on which deliverables for the CIMS project were kept. However, Mr. Caffall testified that Ventech hired this employee to work on renewing Ventech's Software Engineering Institute (SEI) Level III certificate and did not perform any work on the CIMS project. The gap analysis referenced in this email was related to the SEI Level III renewal.

{¶43} Likewise, the AGO presented other emails at trial which, though sent to employees located in India, did not establish that work on the CIMS project was performed in India. Rather, the Court finds the evidence established that generic and tangentially related work occurred in India but not work on the project itself. As Mr. Caffall testified, it was Ventech's hope that the AGO project would not be its only one involving DM9 and Ventech hoped to develop generic functions and/or products that could be used in future DM9 projects. Employees in Ventech's India office worked on these generic items including ETL's that could be used for data conversion on future DM9 projects. In fact, Mr. Caffall testified that Ventech had explored working for the City of Cincinnati on a DM9 project.

{¶44} Responding to this circumstantial evidence, Mr. Caffall also testified, though the India office helped develop a demonstration of the custom vendor portal, it was to be a demonstration based on generic capabilities of the custom vendor portal. In working on the demonstration, employees in India did not work on the actual CIMS project or look at the AGO CIMS system. Ultimately, per Mr. Caffall, the demonstration itself was not presented to the AGO and all work performed on the AGO's vendor portal was performed in Columbus. Mr. Caffall also testified that he was Ventech's chief development officer and, therefore, he set up weekly meetings with employees in India

who were keeping him informed on DM9 related developments which could be used on other future projects. The Court also finds this portion of Mr. Caffall's testimony credible as Mr. Caffall offered consistent, non-evasive responses during both direct and cross-examination on these issues. Further, the AGO offered no evidence, other than the emails themselves, rebutting Mr. Caffall's assertions.

{¶45} The Court also finds the AGO failed to present evidence that it paid for work performed in India. Rather, the evidence established the AGO's payments, totaling $12.5 million were for deliverables which Ventech developed and tendered to the AGO here in Ohio.

{¶46} Thus, the evidence established Ventech had employees in India and also that a limited number of emails were sent to Ventech's office and/or employees in India which referenced the project but this evidence did not establish what, if any, work was actually performed in India. As such, the Court finds Ventech is entitled to judgment on the AGO's breach of contract claim based on violation of the state term contract.

- **Breach of Contract - Failure to Deliver a Working System**

{¶47} The AGO's last remaining claim is for breach of contract based on Ventech's failure to deliver a working system by the revised go-live date. Ventech argues that it met its contractual obligations in providing individual deliverables and that the contract did not obligate it to provide a working system but rather required it only to provide parts of the system as described in DSDs. The Court finds that the AGO proved, by a preponderance of the evidence, that Ventech breached the agreement by failing to deliver a working collections system.

{¶48} The Court finds Ventech's position that it did not have to produce a working system disingenuous. The Court finds the Agreement clearly required Ventech to produce a working collections system. The Court has already outlined the numerous contractual provisions which clearly exhibit the parties' intent that Ventech provide the AGO with a usable, working collections system. The Agreement's use of the word

system is legion. Section I states Ventech is being hired as part of a "multi-stage project to develop and implement a custom high quality computerized collections system." It also states that "the AGO's acceptance of a particular Deliverable does not represent * * * that the AGO has accepted the completed System" which instead is conditioned "upon successful completion of the Performance Period and Stabilization Period with respect to the System." Failing either of these periods results in the Contractor being in default. The Agreement states the AGO desires a "complete Project." The Agreement also states that performance testing would begin after the "completed System" was put into production. Further, Ventech agreed to warrant that the System would work in accordance with specifications for one year and be free of urgent, high and medium priority defects during this time.

{¶49} Ventech has offered no explanation regarding how, if it was not required to provide a complete and working system, it would nonetheless meet its warranty obligations to provide a working system free of significant defects for one year. Ventech failed to address the Agreement's language regarding a complete project or completed system. Ventech also fails to explain why, if it was not supposed to produce a working system, it made repeated assurances that the system was ready to go live on October 31, 2016. There is no evidence that, at any point, Ventech informed the AGO that it would be producing parts of a system which may not work. Most glaringly, Ventech completely ignores the Agreement's language that acceptance of a deliverable does not equate to acceptance of the system. There is no merit to Ventech's argument that it was not required to produce a complete and working system. Ventech would have this Court believe that it was only required to build stepping stones even though they only lead to a bottomless pit.

{¶50} Ventech relies solely on Amendment 10 in arguing that it only had to produce work in accordance with DSDs and did not have to provide a working system. Through Amendment 10, the parties modified section II(B) of the Agreement. However,

Section II(A) of the agreement, which the parties never amended, provides that the Scope of Work includes "Section 4.0 of the RFP * * * as further amended and supplemented by the Contractor's proposal response * * * as further amended and supplemented by the preliminary scope of work attached hereto as Exhibit 5." Amendment 10 did not change the essential quality of what Ventech agreed to provide, a complete and working system, as clearly set forth in both the contract and Section 4.0 of the RFP incorporated therein. Simply put, Amendment 10 changed the process through which the Scope of Work would be refined and further described by the parties, namely through DSDs. It did not obviate Ventech's essential contractual duty to provide a working system.

{¶51} There is no dispute that Ventech failed to deliver a working collection system by October 31, 2016. Further, the Court finds that the evidence established the parts Ventech delivered are essentially useless and that the AGO will have to start from scratch to develop a new collections system. Thus, the Court also finds that Ventech did not substantially perform its contractual obligations.

{¶52} Likewise, the Court finds Ventech's breach was not excused. Ventech provided evidence regarding why various parts of the system did not function and attempted to cast blame on the AGO for these failures. Yet, Ventech has not pointed to any provisions within the Agreement that the AGO violated in terms of supplying information or cooperation. Likewise, despite now blaming the AGO for its failures, Ventech did not issue a Notice of State Delay, as the contract requires, with regard to any of the issues it now claims prevented the System from operating. Ventech never informed the AGO that it was prevented from performing by any conduct of the AGO and, consequentially needed more time.

{¶53} The AGO retained Ventech for the very purpose of developing a new custom collections system that would work. The evidence established that Ventech had complete access to any needed technical information. Having been retained for their

expertise and/or ability as to software development, Ventech cannot absolve itself of its contractual obligations by pointing fingers at the AGO for failing to do what Ventech was hired to do, account for all aspects of developing the system, develop the new system, and ensure that it would function. Ventech was contractually obligated to produce a working system by October 31, 2016 but failed. In the end, the reasons underlying Ventech's failure are, to a large degree, immaterial.

{¶54} Nonetheless, the Court finds that the project failed due to Ventech's actions and mismanagement including problems with staffing and the failure to understand or appreciate the scope of the project. As the Court already outlined, Ventech went through several program managers and failed to employ key personnel required by the contract. Various Ventech personnel, including Mr. Hall and Ms. Burke, testified to the lack of adequate and experienced staff. Mr. Caffall admitted that mistakes of past program managers had stalled the project by the time he came onto the project in 2015, at which point only 5% of the project had been completed in 2 ½ years. In particular, Ventech had significant and chronic problems with the data conversion part of the project. Mr. Caffall testified that, out of 10,000,000 accounts, only 4,000 had been converted when he started. Despite having years to do so, the evidence established that Ventech did not finish data conversion until just a couple of months before the October 31, 2016 go-live date. The project also experienced a lot of staff turnover and, at least as far as the coder known as MD, staff were also overworked. In fact, Mr. Hall testified that, at some point, those working on the project realized that "this was not going to be as easy as it had appeared originally." In short, the project failed because of Ventech's shortcomings.

{¶55} Exemplifying the fault of Ventech during the project is the issue of the "RevQ" email and its import. Ventech has pointed to this email as the reason the Dale solution failed, claiming that the AGO provided incorrect information in this email regarding file formats. However, this single email is not part of the contract. Moreover,

Ventech did nothing to verify the information in this email despite that, as many witnesses acknowledged, that system documentation is often not kept up to date. Thus, Mr. Wohlever opined that Ventech understood there were issues with data and with system documentation and that it should have asked for more information pressed hard to verify the accuracy of information it did have in order to attain a better understanding of the legacy system it was attempting to replace. In Mr. Wohlever's view, Ventech's failures with regard to data validation negatively affected the entire project. As Ms. Burke testified, "you don't look at the spec first * * * you go look at the code first, because how often does the spec match the code? Right?"

{¶56} Given the above, the Court finds that Ventech breached the agreement when it failed to deliver a complete and working collections system by October 31, 2016 and that the AGO was justified in terminating Ventech.

- **Ventech's claims**

{¶57} For the same reasons underlying the Court's decision on the AGO's breach of contract claim, the Court finds that Ventech's claims fail. Ventech breached the agreement and did not substantially perform. It provided nothing of value to the AGO despite being paid $12.5 million. Having failed to perform and having been rightfully terminated, Ventech failed to prove its breach of contract claim and failed to prove that it is entitled to a declaratory judgment relative to the contract.

{¶58} The Court finds that the AGO is entitled to judgment on Ventech's claims.

DAMAGES AND ADDITIONAL BRIEFING

{¶59} Turning to damages, the Court finds that no evidence was presented establishing that the work needed to provide the AGO with a usable collections system could be accomplished at less than the contracted for amount set forth in the parties' Agreement, an amount eventually revised to $18,165,386.09. In addition, the AGO paid

$12.5 million and obtained nothing useable and Roy Bieber, the AGO's project manager for IT systems, estimated the new collections system could cost the AGO $8-10 million.

{¶60} Based upon the evidence, the AGO should be entitled to the entire amount it paid on a contract which produced nothing but cost $12.5 million. However, the Court must consider the damage limitations provisions contained in the Agreement and Amendment 10. The Court has concerns regarding various issues which the parties did not fully brief and which the Court finds prevent it from rendering a complete judgment at this time. In particular, the Court is concerned regarding: 1) the application of damages provisions contained in the RFP and the Agreement including Amendments, 2) which party bears the burden in relation to these provisions, and 3) the proper amount of damages based on the evidence presented at trial.

{¶61} To address these concerns, the Court ORDERS the parties to submit additional briefs only on the above-mentioned damages issues. The briefs shall comply with the Court's rules relative to page limitations. The AGO shall submit a brief within *30 days* of the date of this Decision and Judgment Entry, after which Ventech will have *14 days* to file a memorandum contra. The AGO will thereafter have *7 days* to file a reply. The Court will issue a decision on damages shortly thereafter.

DALE A. CRAWFORD
Judge

[Cite as *Ohio Atty. Gen. v. Ventech Solutions, Inc.*, 2019-Ohio-5474.]

OHIO ATTORNEY GENERAL'S OFFICE Plaintiff/Counter Defendant v. VENTECH SOLUTIONS, INC. Defendant/Counter Plaintiff	Case No. 2017-00746PR Judge Dale A. Crawford JUDGMENT ENTRY

{¶62} The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, the Court finds that Ventech Solutions, Inc. (Ventech) is entitled to judgment in its favor on Ohio Attorney General's Office's (AGO) fraudulent inducement claim, negligent misrepresentation claim, and breach of contract claim based on violation of the state term contract. The Court finds that AGO is entitled to judgment on its breach of contract claim based on Ventech's failure to deliver a working system and on Ventech's claims. The Court ORDERS further briefing as set forth in the decision.

DALE A. CRAWFORD
Judge

Filed November 18, 2019
Sent to S.C. Reporter 2/3/20