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CASENOTES

CONTRACT LAW—Local Governments Can Void Long Term Contracts.

Mariano & Associates, P.C. v. Board of County Commissioners,
737 P.2d 323 (Wyo. 1987).

In August 1984, the accounting firm of Mariano & Mortenson, P.C.¹ (Mariano) submitted to the Sublette County Board of Commissioners (the Board) a bid to perform its annual county audits for 1984 and 1985 fiscal years.² The Board accepted the firm's offer later that month.³

John Mortenson left the accounting firm⁴ and approached the Board to perform the 1985 audit.⁵ The Board issued a request for bids and subsequently accepted Mortenson's bid to perform the audit.⁶ Between the time the Board accepted Mariano's initial offer and its later acceptance of Mortenson's offer, a new term of the Board began.⁷

Mariano filed suit against the Board. The accounting firm claimed that by accepting Mortenson's bid, the Board breached its contract and caused Mariano \$12,925.00 in damages.⁸ The district court granted summary judgment in favor of the Board.⁹

The Wyoming Supreme Court affirmed the district court's decision. In so doing, the court expressly rejected the use of a governmental-proprietary distinction,¹⁰ a test many jurisdictions use as a tool to determine the validity of contracts that extend beyond the term of the governmental unit.¹¹ Instead, the court held that government entities could enter

1. Following the departure of John Mortenson in the spring of 1985, the firm changed its name to Mariano & Associates, P.C. Brief for Appellant at 8, *Mariano & Associates, P.C. v. Board of County Comm'rs*, 737 P.2d 323 (Wyo. 1987) (No. 86-206) [hereinafter Brief for Appellant]. Appellee accepted the facts as stated by the appellant. Brief for Appellee at 2, *Mariano & Associates, P.C. v. Board of County Comm'rs*, 737 P.2d 323 (Wyo. 1987) (No. 86-206) [hereinafter Brief for Appellee].

2. Brief for Appellant, *supra* note 1, at 6. WYO. STAT. § 16-4-121 (1977, Rev. 1982) states that:

(a) The governing body of each municipality shall cause to be made an annual audit of the financial affairs and transactions of all funds and activities of the municipality for each fiscal year. . . .

(b) The governing body shall make available all documents and records required to perform the audit upon request by the independent auditor.

WYO. STAT. § 16-4-102(a)(xiv)(B)(1977 & Cum. Supp. 1987) (includes counties in its definition of municipality).

3. Brief for Appellant, *supra* note 1, at 6.

4. *Id.* at 8.

5. *Id.* at 3. According to the Wyoming Supreme Court, Mortenson "uncharitably" approached the board. *Mariano*, 737 P.2d at 324.

6. Brief for Appellant, *supra* note 1, at 8.

7. *Id.* at 6.

8. *Id.* at 3.

9. *Id.* at 4.

10. The Wyoming Supreme Court labels this test the "proprietary-governmental differentiation" and the "governmental-proprietary differential." *Mariano*, 737 P.2d at 327. This casenote will use the terms "governmental-proprietary distinction" or "distinction" when referring to this test.

11. *E.g.* *Telford v. Clackamas County Hous. Auth.*, 710 F.2d 567, 570 (9th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984).

into voidable agreements extending beyond the term of office of the contracting authority.¹² However, if the non-government contracting party can prove that the contract is reasonably necessary or of a definable benefit to the government, that party can enforce the contract.¹³

This casenote will examine the operation of and the policies underlying the Wyoming Supreme Court's necessary-benefit test. It will also compare the governmental-proprietary distinction with the court's test, analyzing the relative value of each for determining the validity of long-term government contracts.

BACKGROUND

Most courts have refused to bind a governing body's successor to all of its predecessor's contracts.¹⁴ These courts have declared void certain contracts that extend beyond a government body's term.¹⁵ The courts have stated as a matter of public policy that the elected successors of a government body should be free to exercise their independent judgment in contracting.¹⁶ That policy has prompted jurisdictions to develop a number of distinct tests for determining the validity of such contracts.¹⁷ Among these tests is the governmental-proprietary distinction.

Under this test, a court will determine whether the contract serves a governmental or a proprietary purpose. Generally, a governmental contract is one undertaken because of a duty imposed by a governmental body for the welfare or protection of its citizens.¹⁸ A proprietary contract is one undertaken to perform a corporate-type function or one that generates fees.¹⁹ For example, a city's operation of a sewage disposal plant for the

12. *Mariano*, 737 P.2d at 331-32.

13. *Id.* at 332.

14. The one noted exception to this is California. That state ignores the term of the governmental board to determine the validity of long-term governmental contracts. *Denio v. City of Huntington Beach*, 22 Cal. 2d 580, 140 P.2d 392, 397 (1943), *overruled on other grounds*, *Fracasse v. Brent*, 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972). The California Supreme Court in *Denio* stated that a government council is a continuing body and is the same regardless of changes in personnel. *Denio*, 140 P.2d at 397.

That court held that:

[A] contract made by a council or other governing body of a municipality, which . . . appears to have been fair, just, and reasonable at the time of its execution, and prompted by the necessities of the situation or . . . advantageous to the municipality at the time it was entered into, is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of such body.

Id.

15. *Telford*, 710 F.2d at 570. See also 10 E. McQUILLIN, MUNICIPAL CORPORATIONS § 29.101 (3d. ed. 1981).

16. *E.g.*, *City of Powder Springs v. WMM Properties*, 253 Ga. 753, 325 S.E.2d 155, 157 (1985) (court cites legislation codifying court decisions). See also E. McQUILLIN, *supra* note 15, at § 29.101.

17. A test no longer used presumes all beyond the term contracts are void. See, *Robbins v. Hoover*, 50 Colo. 610, 115 P. 526, 528 (1911); *Millikin v. Edgar County*, 142 Ill. 528, 32 N.E. 493, 494 (1892); *Board of Comm'rs v. Taylor*, 123 Ind. 148, 23 N.E. 752, 753 (1890).

18. *Copper County Mobile Home v. City of Globe*, 131 Ariz. 329, 641 P.2d 243, 247 (Ct. App. 1982).

19. *Telford*, 710 F.2d at 571; *Biscar v. University of Wyo.*, 605 P.2d 374, 376 (Wyo. 1980).

benefit of its residents is a government function,²⁰ but the determination of the rates for use of that same plant by non-residents is a proprietary function.²¹ A court will void those long-term contracts that serve a government function but enforce contracts for proprietary functions.²²

The governmental-proprietary distinction has been widely applied. Characteristic of these applications, and with a fact situation similar to *Mariano*, is *Miles v. City of Baker*.²³ There, the Oregon Supreme Court found a contract to perform a city audit to be a government function.²⁴ The plaintiff, a certified public accountant, contracted with the defendant city to perform an audit.²⁵ Ten days after entering into the contract, the city's newly elected Board of Commissioners took office²⁶ and subsequently offered the audit contract to another accountant for a lower fee.²⁷ The court noted that the city charter required the audit,²⁸ making it a governmental function because the charter imposed a mandatory duty on the governmental body.²⁹ Thus, the contract was void because it purported to bind the contracting Board's successor.³⁰

Critics of the governmental-proprietary distinction contend that courts have not uniformly applied it.³¹ They reason that these varying results derive from the judicial failure to formulate a precise and principled dividing line between the two functions.³² For example, the services of an attorney for a government housing authority appeared to one court as serving a governmental function,³³ while the services of a manager for an identical agency appeared to another court as serving a proprietary function.³⁴

When first confronted with the issue in 1934, the Wyoming Supreme Court presumed void all government contracts purporting to have effect beyond the term of office of the contracting body.³⁵ However, the court later recognized the validity of such contracts under certain circumstances.³⁶

20. *Copper County Mobile Home*, 641 P.2d at 247.

21. *Id.*

22. *Telford*, 710 F.2d at 570.

23. 152 Or. 87, 51 P.2d 1047 (1935).

24. *Id.*, 51 P.2d at 1049-50.

25. *Id.*, 51 P.2d at 1047.

26. *Id.*

27. *Id.*, 51 P.2d at 1048.

28. *Id.*

29. *Id.*, 51 P.2d at 1049.

30. *Id.*, 51 P.2d at 1050.

31. *Valvano v. Board of Chosen Freeholders*, 75 N.J. Super. 448, 183 A.2d 450, 452 (App. Div. 1962).

32. *Mariano*, 737 P.2d at 327-28 (quoting *Daly v. Stokell*, 60 So. 2d 644, 645 (Fla. 1953)).

33. *Parent v. Woonsocket Hous. Auth.*, 87 R.I. 444, 143 A.2d 146, 148 (1958).

34. *Telford*, 710 F.2d at 571.

35. *Hyde v. Board of Comm'rs*, 47 Wyo. 101, 110, 31 P.2d 75, 78 (1934). The court in *Mariano* noted that other courts have never cited this case as authoritative precedent. *Mariano*, 737 P.2d at 325. For the Wyoming Supreme Court's treatment of other issues involving long-term government contracts see *MacDougall v. Board of Land Comm'rs*, 48 Wyo. 493, 49 P.2d 663 (1935)(contract void because it delegated away the duties of state officials) and *Police Protective Ass'n v. City of Casper*, 575 P.2d 1146 (Wyo. 1978)(collective bargaining agreement void because it ran in perpetuity).

36. *Mariano*, 737 P.2d at 328.

In 1934, the Wyoming court in *Hyde v. Board of County Commissioners*³⁷ held void a county extension agent's employment contract that extended beyond the term of the board of county commissioners.³⁸ Finding such contracts contrary to public policy, the court sought to avoid "tying the hands of the succeeding board and depriving the latter of their proper powers."³⁹ The court conceded that while necessity or advantage to the governmental body⁴⁰ may be reason for extending a contract beyond that body's term of office, the plaintiff who contracted with the governmental body has the burden of proving this necessity.⁴¹

In 1963, departing from the necessity or advantage language, the court considered applying the governmental-proprietary distinction to a long-term parking meter lease-purchase in *Town of Lovell v. Menhall*.⁴² However, the court there neither adopted nor rejected that test. From 1958 until 1972, the Wyoming Supreme Court's membership consisted of four justices.⁴³ An equally divided court, two justices for each side, decided *Menhall*, which, thus, has no precedential value.⁴⁴

Justice Gray, with whom Chief Justice Parker concurred, wanted to uphold the contract for the lessee.⁴⁵ Consequently, he down-played the governmental-proprietary distinction.⁴⁶ While admitting regulation of parking was a governmental function, Justice Gray maintained that the distinction was too rigid to apply.⁴⁷ Justice McIntyre, with whom Justice Harnsberger sided, applied the governmental-proprietary distinction and found the contract void.⁴⁸ Justice McIntyre considered the regulation of parking to be a governmental function within the scope of the city's police powers for the protection of the public health, safety, welfare and convenience.⁴⁹ He noted that the test was susceptible to inconsistent application.⁵⁰ However, he favored using the distinction in order to allow the successors of contracting governmental boards free discretion in decision making.⁵¹

Despite the perceived difficulty with the test,⁵² the court by 1980 had formulated a fairly precise distinction between governmental and proprie-

37. 47 Wyo. 101, 31 P.2d 75 (1934).

38. *Id.* at 116, 31 P.2d at 80.

39. *Id.* at 110, 31 P.2d at 78.

40. The court gave as an example a contract for coal through the winter season during which a new term of a governmental body begins. *Id.* at 113, 31 P.2d at 79.

41. *Id.*

42. 386 P.2d 109 (Wyo. 1963).

43. 3 WYOMING STATE ARCHIVES AND HISTORICAL DEPARTMENT, WYOMING BLUE BOOK 29 (1974).

44. *Menhall*, 386 P.2d at 110. "Disposition by an equally divided court [is not regarded] as establishing precedent or settling any principles of law." *Id.*

45. *Id.* at 116-17.

46. *Id.* at 115.

47. *Id.*

48. *Id.* at 120, 124.

49. *Id.* at 121.

50. *Id.* at 122.

51. *Id.* at 120.

52. *Mariano*, 737 P.2d at 328.

tary functions. It applied the distinction in *Biscar v. University of Wyoming*.⁵³ The issue there involved a tenure-track teaching contract,⁵⁴ a form of contract that extends beyond the term of the governmental unit. The court classified teaching as an activity or function which concerned the health and welfare of the public at large and therefore as governmental.⁵⁵ The court also classified as governmental those activities undertaken at the direction of the legislature or involving legislative or judicial discretion.⁵⁶ On the other hand, the court found that activities historically performed by private corporations are proprietary,⁵⁷ as are activities that generate fees.⁵⁸

When *Mariano* came up for review, the court had developed two separate methods of analysis for determining the validity of long-term government contracts. The court could have followed its precedent in *Hyde* and presumed all long-term government contracts to be void, or it could have resolved the conflict from *Menhall* over the governmental-proprietary test by applying the classifications it developed in *Biscar*. It did neither.

THE PRINCIPAL CASE

After reviewing Wyoming precedent,⁵⁹ the *Mariano* court noted that the Wyoming Legislature had the primary authority to define the scope of local government contracts and the power to alter the rule it formulated.⁶⁰ Finding "no precise dividing line between the two functions,"⁶¹ the court rejected the governmental-proprietary distinction as lacking logic or direction.⁶² The court concluded that the governmental-proprietary distinction had no application in modern government contract law.⁶³ The court adopted a different test, suggested in *Hyde*.⁶⁴ This test made an agreement extending beyond the term of the contracting authority⁶⁵ void-

53. 605 P.2d 374, 376 (Wyo. 1980).

54. *Id.* at 375.

55. *Id.* at 376.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Mariano*, 737 P.2d at 326-27.

60. *Id.* at 327. The legislature has eliminated the government-proprietary distinction only as it applies to state government in the Wyoming Governmental Claims Act. WYO. STAT. §§ 1-39-101 to -120 (1977 & Cum. Supp. 1987). WYO. STAT. § 1-39-102(b) (1977 & Cum. Supp. 1987) states in pertinent part: "In the case of the state, this act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions." WYO. STAT. § 1-39-103(a)(vi) (1977 & Cum. Supp. 1987) defines "State" as "the state of Wyoming or any of its branches, agencies, departments, boards, instrumentalities or institutions." For an application of the act, see *Hamlin v. Transcom Lines*, 701 P.2d 1139 (Wyo. 1985).

61. *Mariano*, 737 P.2d at 327-28 (quoting *Daly*, 63 So. 2d at 645).

62. *Mariano*, 737 P.2d at 327-28.

63. *Id.*

64. *Hyde*, 47 Wyo. at 110, 31 P.2d at 78.

65. Normally a new term of a governmental body begins on the first Monday of odd-numbered years. *Mariano*, 737 P.2d at 331.

able by the government⁶⁶ unless the agreement is reasonably necessary or of a definable advantage to the city or governmental body.⁶⁷

In adopting the necessary-benefit test for enforceable contracts, the court granted the government body, or its successor, the discretion which it asserted public policy demands be left unimpaired to invalidate certain contracts.⁶⁸ However, the court felt that voiding such contracts outright could overly restrict a government entity's operation.⁶⁹ Though neither party can enforce a void contract, one party has the enforcement right in a voidable contract.⁷⁰ The court gave the government the option to either enforce or avoid these contracts.⁷¹ The court reasoned that the government needed to preserve the benefits of its contracts but protect itself from the problems of void contracts.⁷² For example, the contracting party could challenge such a void contract if it found itself performing under a bid it later found unprofitable.⁷³

The option to void a contract is available only when the contract is not of necessity or benefit to the government.⁷⁴ Relying on *Hyde*,⁷⁵ the court placed the burden of proof to show this on the party challenging the invalidation.⁷⁶ It reasoned that placing the burden on the government would amount to an affirmative defense⁷⁷ and stated that, as a matter of policy, one attacking a governmental operation should bear the burden of proof.⁷⁸ It concluded that the plaintiff, *Mariano*, failed to meet this burden.⁷⁹

ANALYSIS

By rejecting the governmental-proprietary distinction in *Mariano*, the Wyoming Supreme Court ignored its own precedent. Instead, the court relied on inconsistent results from the test's application in other jurisdictions.⁸⁰ The only Wyoming case the court cites that mentions the governmental-proprietary distinction is *Menhall*, noted mainly for its failure to reach a decision because of the equally divided court.⁸¹

66. The court also held that such contracts may be void upon attack by a third party if the third party could prove that the contract was not necessary or beneficial to the government. *Id.* at 331-32.

67. *Id.*

68. *Id.* at 329 (quoting *Plant Food Co. v. Charlotte*, 214 N.C. 518, 199 S.E. 712, 714 (1938)).

69. *Id.*

70. *Id.* at 330.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 331.

80. *Id.* at 328.

81. *Id.* at 325.

Using harsh language to reject the governmental-proprietary distinction,⁸² the court may have overruled *Biscar sub silentio*. Yet, the precise distinction between the governmental and proprietary functions in *Biscar* avoided the pitfalls other jurisdictions made. Other courts blurred the difference between governmental and proprietary functions. These courts defined governmental functions only in terms of a duty of the government.⁸³ In any particular situation, a court controlled the decision whether such a duty existed. In contrast, Wyoming's definition in *Biscar* offered a bright line between the two types of functions. Government functions and activities fell into three precise categories: those involving public health and welfare, those undertaken due to legislative direction, and those involving discretion.⁸⁴

The *Mariano* opinion noted that the test has "no precise dividing line" between the two functions.⁸⁵ However, *Biscar* resolved this potential problem. For example, a university arguably serves a propriety function because it generates fees. However, the court found the university to serve a government function because its operation was undertaken at the direction of the legislature. Thus, where a contract or activity appears to serve both proprietary and governmental ends, the court considers the contract to be governmental.

If the court had applied its own distinction between governmental and proprietary functions, it would have found the *Mariano* contract invalid. Corporations historically have performed audits. That alone, however, would not make the audit a proprietary function. A county audit meets the requirement for a governmental function in two respects. The audit protects the public welfare by assuring government compliance with legal budgetary requirements and sound fiscal practices.⁸⁶ Second, the legislature requires the audit.⁸⁷ Thus, the use of the distinction would not have altered the court's holding that the *Mariano* contract was void.

The *Mariano* rule could give local governments great leeway in breaking contracts. It gives no clear indication as to when the long-term contract becomes voidable, whether from the inception of the contract, or only when the term of a new governmental body begins. If the rule allows governments to void contracts from their inception, this could destroy the bidding process. The government could void a bid accepted at an earlier meeting after receiving a more favorable bid a week later.

A contractor has assurance that the government will honor the contract only if the contract extends no longer than the end of the governing body's term. The contractor takes a great gamble for any longer period. Good faith dealing should require that the governmental unit inform the

82. *Id.* at 328. "[The] governmental-proprietary differential cannot serve reasonably as a result-oriented decision basis in this decade." *Id.*

83. *E.g., Copper County Mobile Home*, 641 P.2d at 247.

84. *Biscar*, 605 P.2d at 376.

85. *Mariano*, 737 P.2d at 327-28 (quoting *Daly*, 63 So. 2d at 645).

86. WYO. STAT. § 16-4-121(c) (1977, Rev. 1982).

87. WYO. STAT. § 16-4-121(a) (1977, Rev. 1982).

contractor of this possibility during the bargaining process. A local government could seek and enter into a long-term favorable contract, such as an office lease, and break it in the future when the terms appear less favorable. A local government could also bargain with a party seeking a contract to run for the term of the board for a more favorable price in exchange for a longer-term contract, only to break it and re-bargain at a later time for an even better price. One could conclude from the facts in *Mariano* that this is what happened in Sublette County. Mariano originally bid on only the 1984 audit, bidding on both audits following further negotiations with the Board.⁸⁸ The *Mariano* rule results in turning the question of whether the government will honor the contract into a guessing game. The contracting party has only the whims of the government to determine a contract's status. On the other hand, the governmental-proprietary distinction gives the contracting party at least some idea of what types of contracts are void.

If a contracting party fails to prove necessity or benefit, it could have no relief. The contractor could not seek damages from individual members because under state law these members are not individually liable for actions taken by the governmental body.⁸⁹

Guidelines for applying the necessity-benefit test could alleviate some of these potentially harsh consequences. The terms "necessity" and "benefit" receive no definition in *Mariano*. The only guidance for these terms is an outmoded example in *Hyde*. That opinion demonstrates necessity with a coal contract for a winter season during which a new government term begins.⁹⁰ The district courts have the burden to construe the meanings of these words. The potential exists for very broad or narrow meanings and broad or narrow enforcement of "beyond-the-term" contracts.

Courts should also consider applying the doctrines of laches and estoppel.⁹¹ These doctrines should apply against invalidating a contract when the government abuses its voidable privilege. Under these doctrines, the government could not void the contract unless it did so promptly. If the

88. Brief for Appellant, *supra* note 1, at 6.

89. WYO. STAT. § 1-23-107(a) (1977 & Cum. Supp. 1987) (No individual liability of members for acts, inactions or omissions by governmental boards, agencies and commissions notwithstanding any contrary provision in the Wyoming Governmental Claims Act, which can be found at WYO. STAT. §§ 1-39-101 to -120 (1977 & Cum. Supp. 1987)); WYO. STAT. § 1-39-104(b) (1977 & Cum. Supp. 1987) (Governmental entity shall save harmless and indemnify public employees against any judgement arising out of act or omission occurring within the scope of their duties.); WYO. STAT. § 1-39-103(a)(iv) (1977 & Cum. Supp. 1987) (Definition of public employees includes elected and appointed officials.).

90. *Hyde*, 47 Wyo. at 113, 31 P.2d at 79.

91. Laches is applied when a delay in enforcing one's rights works to the disadvantage of another. *Big Piney Oil & Gas Co. v. Wyoming Oil & Gas Conservation Comm'n*, 715 P.2d 557, 561 (Wyo. 1986). Estoppel bars action by a party when another to his detriment relies in good faith on the voluntary conduct of that party. *Vogel v. Shaw*, 42 Wyo. 333, 340, 294 P. 687, 689 (1930)(quoting 2 POMEROY, EQUITY JURISPRUDENCE § 804).

government honors the long-term contract for most of the contract period or delays voiding it, the court should enforce the contract.⁹²

CONCLUSION

The court in *Mariano* ignored its own precedent by rejecting the governmental-proprietary distinction. It relied on decisions from other jurisdictions to criticize the distinction's application to long-term government contracts. The Wyoming Supreme Court in *Biscar* carefully defined the distinction between governmental and proprietary functions. The distinction's application in *Mariano* would have achieved the same result without creating the potential problems of the necessity-benefit test. Whether the *Mariano* court overruled *Biscar* and the distinction remains good law in Wyoming are open questions.

Allowing local governments to enter into voidable long-term contracts opens the door to some abusive practices. Local governments might bargain in bad faith and get away with it. Even when the government units bargain in good faith, they do not bind themselves to anything. If the concept of voidable contracts is to work, the court or the legislature must lay down some guidelines to avoid local governments duping their contractors. The *Mariano* rule makes entering into a beyond-the-term contract with the government a very uncertain venture.

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92. See *City of Sheridan v. Montana-Dakota Utilities Co.*, 157 F. Supp. 664 (D. Wyo. 1958). In that case, the city was estopped from questioning the validity of an utility ordinance because of the utility's reliance on the ordinance. *Id.* at 670-71.