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SEEING WHAT STICKS: JUDICIAL REVIEW OF DOAS PROTEST DECISIONS

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The Georgia Department of Administrative Services' ("DOAS") protest rules are fairly straight forward. Unfortunately, the rules for appealing those decisions are just the opposite. In fact, a fair reading of the relevant cases would suggest that none of the usual procedures for obtaining review of agency decisions are applicable. The appropriate form of review depends upon factors such as whether the final protest decision is deemed administrative or quasi-judicial, the justiciability of the dispute, the specific relief being sought, and, most importantly, whether sovereign immunity applies.

The goal of this paper is to analyze all of the potential forms of judicial review in light of these factors. Because sovereign immunity tends to drive this analysis, Section I will contain a summary discussion of the origin and purpose of sovereign immunity and the recognized waivers of immunity. Section II will outline the various means of obtaining judicial review and the potential obstacles the petitioner is likely to encounter. Section III takes a step back to analyze whether an aggrieved bidder even has a right to judicial review. Finally, Section IV offers some modest legislative and administrative proposals to bring some clarity to this area of the law.

I. Sovereign Immunity

Sovereign immunity traces its roots back to English common law, but it attained constitutional status in 1974 with an amendment to the Georgia Constitution of 1945 that allowed the General Assembly to waive sovereign immunity. Gilbert v. Richardson, 264 Ga. 744, 745, n.2, 452 S.E.2d 476 (1994). The State remained absolutely immune from all suits until 1983, when the voters approved a constitutional amendment waiving sovereign immunity to the extent of liability insurance. Id. at 746. In 1991, the voters approved a superseding amendment that remains the law today. The amendment authorizes the General Assembly to "waive the

state's sovereign immunity from suit by enacting a State Tort Claims Act," but also by any separate enactment "which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." Ga. Const. of 1983, Art. I, Sec. II, Para. IX. The amendment also provides that the State has no immunity for claims asserting breach of contract. Id.

The General Assembly passed the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, *et seq.*, in 1992. The Act waives immunity for the torts of state officers and employees acting within the scope of their employment, but then excepts certain types of claims from state liability. O.C.G.A. §§ 50-21-23; 50-21-24. At least two of those exceptions could apply to a disappointed bidder's claims:

> (1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid; and
>
> (2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;….

O.C.G.A. § 50-21-24.

A common misconception about sovereign immunity is that it only shields the State from monetary damage awards. While it is true that, "a primary purpose of the doctrine of sovereign immunity is the protection of the public purse," DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 639, n.16, 734 S.E.2d 466 (2012), another purpose is to "allow government to go about the business of governing without the harassment of lawsuits which would unnecessarily impede the process of governing." Thomas v. Hosp. Auth. of Clarke Cnty., 264 Ga. 40, 42, 440 S.E.2d 195, 197 (1994), overruled on other grounds, Kyle v. Ga. Lottery Corp., 290 Ga. 87, 91, 718 S.E.2d 801 (2011). Thus, it is frequently stated that "sovereign immunity is an immunity from suit,

rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to go to trial." Bd. of Regents v. Canas, 295 Ga. App. 505, 507, 672 S.E.2d 471 (2009).

II. Judicial Review Options

Since a DOAS bid protest decision is an administrative decision, the most logical starting point would be the Administrative Procedures Act (the "APA"), O.C.G.A. § 50-13-1, *et seq.*, which provides for judicial review of administrative decisions. Oddly, DOAS is expressly exempted from the APA. O.C.G.A. § 50-13-2(1). Thus, practitioners must look to other sources, including: (1) complaint for declaratory judgment and interlocutory injunctive relief against DOAS; (2) complaint for the same relief against the DOAS Commissioner, individually; (3) petition for writ of certiorari to the superior court; and (4) petition for writ of mandamus. Each is discussed in more detail below.

A. Declaratory Judgment/Injunctive Relief

At one time, bidders aggrieved by DOAS protest decisions typically filed a complaint seeking declaratory judgment that the agency had violated bidding rules and an interlocutory injunction barring performance of the contract by the winning bidder. See, e.g., Amdahl Corp. v. DOAS, 260 Ga. 690, 692, 398 S.E.2d 540 (1990). An interlocutory injunction was necessary to prevent the challenge from becoming moot. Citizens to Save Paulding County v. City of Atlanta, 236 Ga. 125, 125, 223 S.E.2d 101 (1976) ("When injunctive relief is denied at the trial level, and injunctive relief pending appeal is not allowed by either the trial court or the Supreme Court, ... there is no legal prohibition against the consummation of the act or transaction. And once the act or transaction has been consummated, an appeal from the judgment that denied injunctive relief becomes moot.").

While some courts have allowed the parties to conduct discovery and present evidence to

the superior court, the separation of powers doctrine likely limits the scope of the court's review to whether the agency acted *ultra vires*, abused its discretion, or acted in an arbitrary or capricious manner. Bentley v. Chastain, 242 Ga. 348, 352, 249 S.E.2d 38, 41 (1978) ("Since the agency is exercising neither judicial nor legislative, but administrative powers, the separation of powers doctrine along with this policy of respect must play a role in determining the nature of the review of agency decisions by the courts.")

A frustrated bidder seeking declaratory and injunctive relief will have to deal with sovereign immunity and justiciability challenges. Both are discussed in detail below.

1. Sovereign Immunity

A suit for declaratory judgment and injunctive relief had always been a viable option for parties seeking review of a DOAS protest decision because it made an end-run around the State's sovereign immunity. Until recently, the rule has been that declaratory and injunctive relief claims are not barred by sovereign immunity. See, e.g., Undercofler v. Seaboard Air Line R. Co., 222 Ga. 822, 827, 152 S.E.2d 878 (1966) (state agency not immune from suit seeking injunctive relief to prevent state officer from exceeding his legal authority). See also Chilivis v. Nat'l Distrib. Co., Inc., 239 Ga. 651, 654, 238 S.E.2d 431 (1977) (while sovereign immunity does not bar declaratory judgment and injunctive relief claims against State Revenue Commissioner, declaratory judgment count dismissed as non-justiciable); Intl. Bus. Machines Corp. v. Evans, 265 Ga. 215, 453 S.E.2d 706 (1995) (injunctive relief complaint allowed to proceed against DOAS).

The rationale for allowing declaratory and injunctive relief actions against the State has evolved over time. As explained in Intl. Bus. Machines Corp. ("IBM"), the decision in Undercofler was based upon the "legal fiction that such a suit is not a suit against the state, but

against an errant official, even though the purpose of the suit is to control state action through state employees." 265 Ga. at 216. The IBM Court went on to reject the legal fiction as confusing, concluding that "a suit for injunctive relief to restrain an illegal act as an exception to sovereign immunity will permit a more logical analysis." Id.

Recent decisions have dramatically changed the landscape in this area. In 2014, a unanimous Supreme Court overruled IBM, and held that the state is immune from claims for injunctive relief. Ga. Dept. of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 596, 755 S.E.2d 184 (2014). The Court reasoned that IBM's judicially-created "exception" to sovereign immunity was, in reality, a non-legislative waiver of immunity that is barred by the 1991 amendment to the Georgia Constitution. Id. The Court also reasoned that IBM had improperly relied upon a number of holdings that predated the 1974 amendment that constitutionalized sovereign immunity. Id. at 601. Strangely, the Court refrained from overruling Chilivis, which, like IBM, also post-dated the 1974 amendment, though it noted that Chilivis "did not consider the effect of the amendment or discuss the constitutional text," thus ushering in "an entirely new ball game." Id.

Second, Georgia's appellate courts have been steadily chipping away at older decisions that allowed suits for declaratory judgment to proceed against state entities. For example, in Live Oak Consulting, Inc. v. Department of Community Health, the issue was whether the petitioner could challenge the Department's interpretation of its own rule under O.C.G.A. § 9-4-7 of the Declaratory Judgment Act or, as the Department contended, whether petitioner was required to bring the action under O.C.G.A. § 50-13-10 of the APA.[1] 281 Ga. App. 791, 637

[1] O.C.G.A. § 50-13-10(a) provides: "The validity of any [agency] rule, waiver, or variance may be determined in an action for declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner."

S.E.2d 455 (2006). The Court of Appeals held that the APA was the exclusive means by which Live Oak could obtain the declaratory judgment it was seeking. Id. While the precise holding of Live Oak is that a challenge to an agency rule or interpretation must proceed through the APA, the Court of Appeals has since cited it for the broader proposition that, "Our Constitution and statutes do not provide for a blanket waiver of sovereign immunity in declaratory judgment actions; and this Court has found that 'sovereign immunity is applicable to protect state agencies in declaratory judgment actions.'" DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 637, n.16, 734 S.E.2d 466 (2012).

In Gold, the plaintiffs were teachers who sought a declaration that the school district had underfunded their pension plan. They also sought to recoup those underpayments. The issue was whether the district was immune from the declaratory judgment claim. The Court of Appeals distinguished IBM (which was then still good law) because it involved a suit to restrain an unlawful act which was an exception to sovereign immunity, whereas the teachers were using the declaratory judgment as a mechanism to recover damages and to "bind the District's fiscal discretion going forward." Id. at 638-39. "In light of the nature of the relief sought, and given that Gold cannot point to a specific waiver of the State's sovereign immunity as to her declaratory judgment action," the court held that the declaratory judgment action was barred by sovereign immunity. Id. at 640.

Although Center for a Sustainable Coast did not expressly overrule Chilivis as it did IBM, it did so by implication. The holding Chilivis was that declaratory judgments are exceptions to sovereign immunity. 239 Ga. at 654. The holding in Center for a Sustainable Coast was that injunctions are barred by sovereign immunity, but the Court clearly stated that if the courts "were to create exceptions to sovereign immunity, the exceptions could swallow the

rule permitting only the General Assembly to do so." 294 Ga. at 599. This is strong evidence that the judicially- created exception for declaratory judgments is no more.

2. Case or Controversy

Another potential hurdle for a disappointed bidder seeking a declaratory judgment is the requirement of a justiciable controversy. The purpose of a declaratory judgment is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. See also State Highway Dep't v. C. F. Williams Lumber Co., 222 Ga. 23, 24, 148 S.E.2d 426, 427 (1966) (petitioner must show the need to have "the lights turned on before stepping into the darkness.") No declaratory judgment may be obtained if it is merely advisory, fruitless, or if it answers a moot or abstract question. Baker v. City of Marietta, 271 Ga. 210, 214, 518 S.E.2d 879 (1999).

Timing is critical in a declaratory judgment action because courts may not declare rights before a dispute arises or after the parties have already assumed their positions. Town of Thunderbolt v. River Crossing Apartments, LTD, 189 Ga. App. 607, 608, 377 S.E.2d 12 (1988) ("The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.") See also Baker v. City of Marietta, 271 Ga. 210, 214, 518 S.E.2d 879, 884 (1999) ("Where the rights of the parties have already accrued and the party seeking the declaratory judgment does not risk taking future undirected action, a declaratory judgment would be 'advisory.'").

In keeping with this premise, the Court of Appeals has refused to allow declaratory relief when the petitioner "is not seeking guidance with respect to actions it might take" but instead "seeks a declaration that past actions taken by the Respondents were *ultra vires*." Center for a Sustainable Coast, Inc. v. Ga. Dept. of Nat. Resources, 319 Ga. App. 205, 208, 734 S.E.2d 206,

208 (2012), reversed on other grounds, 294 Ga. 593, 755 S.E.2d 184 (2014). Applying that principle, once the DOAS Commissioner renders a final decision on a bid protest, an argument can be made that the rights of the parties have already accrued and the bidder is no longer in a position of uncertainty. In this context, the viability of a declaratory judgment may well depend upon the status of the underlying contract. If the contract has already been awarded, then the court may rule that the rights of the parties have already accrued. If, on the other hand, the State stays the award of the contract pending the conclusion of the litigation, there may still be enough uncertainty to support a declaratory judgment.

B. Injunctive Relief against Public Officer, Individually

Center for a Sustainable Coast, Inc. has closed the door on injunctions against the State, but it may have opened the door for injunctions against a state officer in his or her individual capacity. The court offered:

> Our decision today does not mean that citizens aggrieved by the unlawful conduct of public officers are without recourse. It means only that they must seek relief against such officers in their individual capacities. In some cases, qualified official immunity may limit the availability of such relief, but sovereign immunity generally will pose no bar.

Center for a Sustainable Coast, 294 Ga. at 603. (citing IBM, 265 Ga. at 220-22 (Benham, P.J., concurring in part and dissenting in part)).

In light of this holding, it is theoretically possible for an aggrieved bidder to enjoin the DOAS Commissioner, instead of DOAS itself, from awarding a contract. As the Supreme Court noted, the bidder may still have to contend with qualified immunity even in a purely equitable claim. Id. To date, no Georgia appellate court has ever addressed that issue, but if it is now the law, a plaintiff seeking to enjoin a government action will have to show not only that it is unlawful, but also that the public officer acted with actual malice (i.e., deliberate intention to do

wrong) or with actual intent to harm the plaintiff. See Ga. Const. of 1983, Art. I, Sec. II, Para. IX.

C. Petition for Writ of Certiorari to Superior Court

O.C.G.A. § 5-4-1, *et seq.*, sets up an antiquated – and confusing – appellate procedure that allows a party to obtain superior court certiorari review "for the correction of errors committed by any inferior judicatory or any person exercising judicial powers." O.C.G.A. § 5-4-1(a). The petitioner must name the decision maker as the respondent, and the agency the decision maker represents as the defendant in certiorari. The decision maker must file an answer and submit the complete record to the superior court, and the petitioner or the defendant in certiorari may traverse the answer. O.C.G.A. §§ 5-4-7; 5-4-9.

Because this is an appellate proceeding, the superior court may not receive evidence but is instead limited to the record developed below except to the extent that a traverse of the respondent's answer creates a question of fact. O.C.G.A. §§ 5-4-1; 5-4-12. The petitioner must enumerate all the errors below or they are waived, and the superior court's scope of review "shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence." O.C.G.A. § 5-4-12(b). While "substantial evidence" would seem to indicate the superior court must weigh the evidence, the appellate courts have clarified that the superior court must accept factual findings if supported by "any evidence." City of Atlanta v. Harper, 276 Ga. App. 460, 461, 623 S.E.2d 553 (2005).

Importantly, a writ of certiorari acts as a *supersedeas* of the judgment below, so there is no need to seek injunctive relief to stay the performance of the contract pending resolution of the appeal. O.C.G.A. § 5-4-19. This is very important in light of the 2014 decision in Center for a Sustainable Coast, Inc. that sovereign immunity shields the State even from actions seeking

injunctive relief. 294 Ga. at 596. Because the *supersedeas* in O.C.G.A. § 5-4-19 creates a right against the State that would otherwise be barred by sovereign immunity, it must be considered an express waiver of sovereign immunity for such a claim. See, e.g., Colon v. Fulton Cnty., 294 Ga. 93, 95-96, 751 S.E.2d 307 (2013) ("Indeed, where, as here, the Legislature has specifically created a right of action against the government that would otherwise be barred by sovereign immunity, and has further expressly stated that an aggrieved party is entitled to collect money damages from the government in connection with a successful claim under the statute, there can be no doubt that the Legislature intended for sovereign immunity to be waived with respect to the specific claim authorized under the statute.")

Because a writ of certiorari is a tool for the correction of errors committed by those exercising judicial functions, it "will not be issued to review the exercise by a public officer of administrative or executive functions." What It Is, Inc. v. Jackson, 146 Ga. App. 574, 575, 246 S.E.2d 693 (1978). Determining which functions are judicial is no easy task. It is the "character and nature of the authorized function" that governs. Mack II v. City of Atlanta, 227 Ga. App. 305, 307, 489 S.E.2d 357 (1997). As the Georgia Court of Appeals explained in Mack II,

> The basic distinction between an administrative and a judicial act by officers other than judges is that a quasi-judicial action, contrary to an administrative function, is one in which all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure; and that no one deprived of such rights is bound by the action taken. ***The test is whether the parties at interest had a right under the law to demand a trial in accordance with judicial procedure.***

Id. (quoting South View Cemetery Assn. v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945) (emphasis added).

The DOAS protest process probably fails to meet the above test for a judicial proceeding.

DOAS established the protest process when it promulgated the *Georgia Procurement Manual*, which contains the DOAS "administrative" regulations. See, e.g., *Georgia Procurement Manual* §§ I.1; I.1.1; I.2.1; I.2.4; 8.1.1. Section 6.5 requires the protestor to raise all issues in a written protest that will be decided by the DOAS Deputy Commissioner without a hearing. The party unhappy with that decision may request formal review by the Commissioner, who "in his/her sole discretion, may allow the party requesting formal review to make an oral presentation and may solicit whatever other information he/she deems appropriate." *Georgia Procurement Manual*, § 6.5.8. Because that party has no "right under the law to demand a trial in accordance with judicial procedure," it cannot be said that the DOAS Commissioner exercises a judicial function when he decides a protest. Mack II, 227 Ga. App. at 307.

The fact that the Commissioner ***chooses*** to allow an oral presentation does not mean he or she is exercising judicial power. In What It Is, Inc., for example, a city license review board revoked a restaurant's liquor license following a hearing and the restaurant sought certiorari review of that decision. 146 Ga. App. at 574. The Court of Appeals ruled that the board's decision was not judicial in nature because: (1) while the board chose to hold a hearing, the owner was not entitled to the hearing as a matter of right; (2) the board was not authorized to make a judgment, but could only make non-binding recommendations to the mayor; and (3) the mayor could only accept or reject the recommendations and the owner was not entitled to demand a judicial hearing before him. Id. at 694-95.

Additionally, while it is clear that strict adherence to the rules of evidence is not necessary for a judicial hearing, the process must, at a minimum, provide notice and an opportunity to be heard to all affected parties. Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995) (holding that a variance hearing complied with due process because property

owners were permitted to explain their positions and present evidence, a detailed account of the proceedings was maintained, and the board explained the reasons for its decision and subsequently sent a written denial). It is unclear whether judicial procedure requires that the parties be given the right to present sworn testimony and to cross-examine witnesses. The court in Jackson side-stepped that issue by ruling that since no party had demanded those rights, they could not claim a deprivation on appeal. Id. See also Foxy Lady, Inc. v. City of Atlanta, 347 F.3d 1232, 1237 (11th Cir. 2003) (upholding an administrative process that allowed a licensee to request the mayor to issue witness subpoenas for a hearing because allowing parties unfettered subpoena powers could frustrate the revocation process).

In summary, because the DOAS Commissioner is not required to provide a hearing on a protest, there is a strong argument that a petition for certiorari to the superior court is not the appropriate means of obtaining review of that decision.

D. Petition for Writ of Mandamus

Frustrated bidders seeking a public contract have not had much success convincing courts to compel a public official to award them a contract through a writ of mandamus. Because sovereign immunity does not apply to mandamus actions, Stanley v. Sims, 185 Ga. 518, 526, 195 S.E. 439 (1938), recent decisions expanding upon the State's sovereign immunity may tempt bidders to reacquaint themselves with mandamus law. They are not likely to be rewarded for their efforts.

Mandamus is an extraordinary remedy requiring a showing of (1) no adequate remedy at law and (2) either a clear legal duty on the part of the public official or a gross abuse of discretion, if the public official has discretion to act. O.C.G.A. § 9-6-20. See also South View Cemetery Assn. v. Hailey, 199 Ga. 478, 483, 4 S.E. 2d 863 (1945).

There are at least three reasons why mandamus may not be the appropriate mechanism in procurement cases. First, mandamus is only available in the absence of an adequate legal remedy, so the petitioner would have to show that the other forms of review (discussed above) are unavailable. O.C.G.A. § 9-6-20. See also Barber Fertilizer Co. v. Chason, 265 Ga. 497, 458 S.E.2d 631 (1995) (mandamus not available if there are other means of obtaining judicial review). Second, while mandamus can compel a public officer to engage in some statutorily-created review process, it is error to dictate the result of that process by directing the officer to reach a particular conclusion. Bibb Cnty. v. Monroe Cnty., 294 Ga. 730, 768-69, 755 S.E.2d 760 (2014).

Third, mandamus only lies to compel a public official to discharge his or her legal duty; it will not lie to void the official's past actions. This premise is best demonstrated in the decision of Hilton Construction Co. v. Rockdale County. Board of Education, 245 Ga. 533, 540, 266 S.E.2d 157 (1979). The Board rejected Hilton's responsive, low bid because Hilton was "unknown" and the selected bidder was "known." Acknowledging that the RFP did not require the Board to award the contract to the low bidder, the Supreme Court nevertheless ruled that the Board's rejection of Hilton's bid was unlawful. Id. at 538. Still, the court refused to grant mandamus relief to Hilton because "[m]andamus is the remedy for inaction of a public official… [it] is not the proper remedy to compel 'the undoing of acts already done or the correction of wrongs already perpetrated, and … this is so, even though the action taken was clearly illegal.'" Id. at 540.

Thus, mandamus is probably not a proper vehicle for appealing a final DOAS protest decision. Nor is it available to force a decision by the agency on whose behalf DOAS solicited the goods or services. While a frustrated bidder might, for example, be able to show a clear legal

duty or a gross abuse of discretion in the evaluation team's refusal to disqualify the winning bidder for failing to meet mandatory RFP requirements, the existence of a protest process is an adequate remedy at law that will preclude mandamus relief. Speedway Grading Corp. v. Barrow County Bd. of Commrs., 258 Ga. 693, 695, 373 S.E.2d 205 (1988). To avoid this requirement, the bidder would have to show that the DOAS protest remedy is "futile" because it does not afford complete relief. See, e.g., Hilton Constr., 245 Ga. at 539 (board's administrative process deemed futile because the board lacked the authority to cancel the contract under protest and award it to Hilton). Because the DOAS protest remedy is capable of providing complete relief to the protestor – namely the contract itself – it is an administrative remedy that must be exhausted before the protestor can seek equitable relief.

In summary, a frustrated bidder is not likely to obtain mandamus relief – even if there are no other available legal remedies – because of the discretion afforded to agency officials in procurement matters and because mandamus cannot compel the undoing of completed acts. Because mandamus is a remedy of last resort, however, bidders are still urged to plead a mandamus count at least until the appellate courts rule that one of the other forms of judicial review is more appropriate.

III. Whether a Right to Judicial Review Exists

The preceding discussion is predicated upon the assumption that an aggrieved party has some right to judicial review of an adverse DOAS bid protest decision. Is that a false assumption? The Supreme Court seems to have made the same assumption with respect to DOAS actions, generally. In Amdahl, the court ruled that an aggrieved bidder had standing to sue DOAS for violations of state procurement laws and, thus, allowed the bidder's declaratory

and injunctive relief claims to proceed.[2] 260 Ga. at 696. The Supreme Court remanded to the superior court to consider the bidder's claims without providing explicit direction on the standard of review. Id. at 697.

The appropriate standard of review was probably set forth years earlier in Bentley v. Chastain, supra. That case involved an appeal to superior court of a county zoning board of appeals' decision to grant a variance. 242 Ga. at 348. The appellants, neighbors opposed to the variance, demanded a de novo jury trial as provided by state statute and local ordinance. Id. The Supreme Court ruled that the de novo trial provided by law violated the separation of powers doctrine because it impermissibly burdened the judicial branch with administrative functions. Id. 351-52. Of particular relevance to this discussion, however, is the Court's finding that it had inherent, but limited, authority to review the board's decision to grant a variance:

> Therefore, the only review authorized is that inherent in the power of the judiciary: whether the agency acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights.

242 Ga. at 352

These decisions stand for the proposition that even when there is no statutory grant of judicial review – such as O.C.G.A. §§ 50-13-19 or 5-4-1 – the superior courts have the inherent power to review whether an agency exceeded its statutory powers, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights.

IV. Proposed Remedies

The Supreme Court's recent sovereign immunity decisions (discussed in Section II.1, supra), make it nearly impossible to obtain judicial review of DOAS protest decisions. This does

[2] The Amdahl Court did not decide whether sovereign immunity would bar the bidder's claim for injunctive relief because DOAS had failed to raise that issue below. Id. at 698, n.9.

not have to be the case. There are several simple legislative and regulatory solutions to ensure a clearer path to judicial review.

First, DOAS could amend its protest rules to give the protestor a hearing as a matter of right, with the express rights to present evidence and witness testimony and permit cross-examination of adverse witnesses. This would ensure the protestor would be entitled to appeal a protest decision through a petition for certiorari to the superior court.

Second, the General Assembly could amend the APA to include DOAS as a covered agency so an aggrieved bidder can obtain judicial review under O.C.G.A. § 50-13-19.

Third, the General Assembly could legislatively overrule the Supreme Court's Center for a Sustainable Coast, Inc., Live Oak Consulting and Gold decisions by amending the Georgia Tort Claims Act to expressly declare that the State has no sovereign immunity in suits seeking only declaratory and injunctive relief. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) (cited with approval in Perdue v. Baker, 277 Ga. 1, 14, 586 S.E.2d 606 (2003). These recent Supreme Court decisions on sovereign immunity unduly interfere with the courts' duty to say what the law is.

V. Conclusion

There is a great deal of doubt about the means by which a frustrated bidder can obtain judicial review of a DOAS bid protest decision. There is no doubt, however, that a frustrated bidder is entitled to some measure of judicial review. Otherwise, there would be no check on DOAS's authority. Given the risks and benefits of each form of judicial review, the party aggrieved by a DOAS protest decision should pursue all review options in a single proceeding and let the appellate courts decide which one will stick.