STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

INFORMATION SYSTEMS
INTELLIGENCE, LLC,

Plaintiff/Counter-Defendant

v

COUNTY OF MUSKEGON,

Defendant/Counter-Plaintiff,

v

HEATH KAPLAN,

Counter-Defendant.
_____/

No. 16-694-CB

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At a session of said Court held in Lansing, Ingham County, Michigan, on October 28, 2019.

PRESENT: Honorable Joyce Draganchuk
Ingham County Circuit Judge,
Sitting by assignment as
Muskegon County Circuit Judge

This is a dispute involving several different contracts Plaintiff (ISI) had with the County of Muskegon (County). The County's counter-claim was dismissed in its entirety on ISI's motion for summary disposition. Heath Kaplan was dismissed on his motion for summary disposition. ISI's motion for summary disposition as to liability was granted. As to Ct. I of ISI's complaint for account stated, there was no genuine issue of material fact as to the amount of damages and judgment was entered. On the remaining Counts II, III,

IV, and V, a bench trial was held on the amount of damages. The last submission following trial was ISI's post-trial reply brief filed on September 25, 2019.

Also before the Court is ISI's motion for sanctions that was heard on oral argument in April, 2019. With the impending damages trial at the time, the Court deferred ruling on sanctions until such time as all damages were being considered.

The Court has considered all the briefing and arguments of counsel, as well as the witnesses presented at trial and the exhibits admitted into evidence. The burden of proof by a preponderance of the evidence is applied to ISI.

**Undisputed facts**

Ryan Leestma was the founder and sole owner of ISI, which he began in 2002. In approximately 2010, ISI began work to rebuild the infrastructure of the County's entire IT system. This was costing the County about $145,000 per month.

In the late summer of 2013, the County put out a Request for Proposal (RFP) looking for a vendor to work with the County's IT Department on a broad range of functions. ISI responded to the RFP and was ultimately awarded the contract. The contract was executed on September 24, 2013 and is known as the Managed Services Agreement (MSA).

The MSA had a term of 5 years at a set monthly rate of $66,000, to be increased 1% yearly. It also contained a termination provision in ¶ 18:

> 18. TERMINATION. This paragraph supersedes and is intended to replace Paragraph 39 of the August 1, 2013 Agreement for proposals.
>
> A. By County. County may, by a thirty (30) day written notice to Contractor, terminate this Agreement in whole or in part at any time because of the failure of Contractor to fulfill the obligations herein, i.e., "for cause."

> Contractor shall immediately discontinue all services (unless the notice directs otherwise), and deliver to County all data estimates, graphs, summaries, reports, and all other records, documents or papers as may have been accumulated or produced by Contractor in performing this Agreement, whether completed or in process.
>
> B. Notwithstanding any other payment provision of this Agreement, County shall pay Contractor for services performed to the date of termination to include a prorated amount of compensation due hereunder less payments, if any, previously made. In no event shall Contractor be paid an amount in excess of the full price under this Agreement, nor for profit on unperformed portions of service. Contractor shall furnish to County such financial information as in the judgment of County is necessary to determine the reasonable value of the services rendered by Contractor, the decision of County shall be final. The foregoing is cumulative and shall not affect any right or remedy which County may have in law or equity.
>
> C. For Cause. Should Contractor default in the performance of this Agreement or materially breach any of its provisions, County may, at County's sole option, terminate this Agreement by written notice, which shall be effective thirty (30) days after receipt by Contractor if the Contractor has not cured the default. The parties to this Agreement may extend the time to cure by signing a letter of understanding that addresses the details concerning the goals that must be accomplished during the cure period. Under no circumstances shall the opportunity to cure last for more than thirty (30) additional days.
>
> D. By Contractor. Should County fail to pay Contractor all or any part of the payment set forth in Exhibit B, Contractor may, at Contractor's option, terminate this Agreement if such failure is not remedied by County within thirty (30) days of written notice to County of such late payment.

In February 2014, ISI began charging the County $8,000 in addition to the MSA payment. This would have increased the monthly charge under the MSA from $66,000 to $74,000. About 4 months after the increased billing began, Heath Kaplan, the County's Finance and Management Services Director at the time, executed Change Order 005 for $8,000 representing "staffing change & additions." At no time did the County ever pay the additional $8,000. Kaplan left County employment a short time later

and Change Order 005 never received final approval by the Board of Commissioners. ISI stopped invoicing the County for the additional $8,000 in August 2014.

Kaplan also signed Change Orders 006 and 007 shortly before he left. These also never received further approval. Change Orders 006 and 007, known as the ECM Change Orders, called for ISI to provide two additional employees (Phil Shoemaker and Katrina Cooper) to complete ECM (Electronic Contract Management) work. The cost to the County was to be a fixed monthly amount of $51,200.

About 6 months after the ECM change orders, ISI and the County entered into a new agreement to provide ECM work. This became known as the ECM Agreement. The ECM Agreement provided that ISI would charge the County $100 per hour for the work of Katrina Cooper and Bryan Buchan. The term was to begin on Monday, October 13, 2014, and end "upon completion, unless otherwise directed by County or unless earlier terminated."

In May, 2013, four months before the MSA Agreement was made, the County paid ISI a lump sum advance payment of $288,000 for a SQL Agreement (Structured Query Language). The SQL Agreement was pre-paid but the work under the contract would have ended in May, 2018, according to its 5-year term.

On April 23, 2015, Leestma was called to a meeting with Doug Hughes and was handed a letter saying that the MSA "was materially breached" and it was terminated immediately. Leestma and his staff left County offices that day. The MSA had 42 months before it terminated by its own terms. The SQL Agreement had been paid in full up front, but it also had 37 months before its term was up. No further work was performed on any of the contracts by ISI after the April 23, 2015 termination. ISI's employee, Katrina

Cooper, who was working under the ECM Agreement, was immediately hired by the County.

## Findings of Fact and Conclusions of Law

### I. Breach of the MSA

#### A. Contract damages

ISI presented the testimony of damages expert Eric Larson. Larson calculated the net loss to ISI at $2,080,996. This amount is comprised of 42 months of lost labor revenue at $66,000 per month, plus the 1% annual contract price increase. ISI realized some cost savings from the breach, which have been deducted to arrive at the net loss figure. The County agrees that ISI "likely met its burden to establish these damages." ISI did meet its burden and is entitled to lost profit damages under the MSA in the amount of $2,080,996.

#### B. Change Order 005

For seven months in 2014, ISI began billing the County an additional $8,000 per month for the work under the MSA. A change order was signed by Kaplan, but not until July, 2014. The change order was approved by two people in the County's accounting department, Carson Lehigh and Dwight Avery, but it made it no further along in the approval process and was never approved by the Board of Commissioners. ISI calculates the change order as part of its lost profit damages under the MSA. The County contests that on the grounds that Kaplan lacked authority to contract for the additional amount.

The MSA provides:

> 1. DESIGNATED REPRESENTATIVE. Heath Kaplan, Finance and Management Services Director, at phone number 231-724-6397 is the

representative of County and will administer this Agreement for and on behalf of County. Ryan Leestma, President and CEO, at phone number 616-940-5105 is the authorized representative for Contractor. Changes in designated representatives shall be made only after advance written notice to the other party.

2. NOTICES. Any notice of consent required or permitted to be given under this Agreement shall be given to the representative in writing, by first class mail, postage prepaid, or otherwise delivered as follows:

To County: Heath Kaplan, Finance and Management Services Director
[Address]

To Contractor: Ryan Leestma, President and CEO
[Address]

The MSA was fully approved by the Board of Commissioners and was signed by Kenneth Mahoney, Chairperson of the County Board of Commissioners.

The County asserts that Kaplan lacked authority to modify the MSA by increasing the monthly payment by $8,000 and change order 005 is therefore unenforceable. The County cites authority that protects municipal corporations against unauthorized acts of its own employees and agents by placing the burden on the other party to the transaction to ascertain the limits of the municipal employee's authority. If there was no authority for the employee to act, the municipal corporation is not bound.

The cases cited by the County are not applicable here. Change order 005 cannot be viewed in isolation. It came about as a modification of the fully approved and executed MSA. Put simply, the employees in the cases cited by the County acted without any authority but Kaplan had explicit authority that the County contracted for in the MSA. Kaplan was the designated representative for the County who was given authority to administer the MSA. If the onus is on the other contracting party to explore the authority

of the agent, then ISI did that and relied on the express, actual grant of authority given to Kaplan in the MSA.

Furthermore, without rehashing the ruling on ISI's motion for summary disposition, there was evidence that ISI increased staffing at the County, which justified the additional billing under the terms of the MSA. The County presented no evidence to create a genuine issue of material fact on that point, and that was why, in part, ISI was granted summary disposition as to liability.

Larson calculated the damages from the additional $8,000 per month, including the MSA's 1% yearly escalator, to be $345,216. ISI is entitled to additional contract damages in the amount of $345,216.

**C. Lost profits from equipment and software sales**

ISI is claiming lost profits from equipment and software sales that it would have made to the County in the amount of $2,923,740. The County argues that the MSA imposes no obligation to make these purchases through ISI and ISI should be awarded no damages for lost profits.

The MSA provides in ¶ 3, that ISI will provide services in accordance with an attached Exhibit B. The attached Exhibit B is ISI's response to the RFP. § 3.2 required ISI to "[r]esearch and recommend new services or systems that will enhance IT services and support the County's strategic roles and objectives, assist the County with budget recommendations, identify hardware and software needs, recommend equipment and software upgrades and new or revised services." It also provided in § 3.3 that ISI will "[c]onduct purchasing process for county upon request."

In a breach of contract action, a party may recover damages that "arise naturally from the breach of those that were in contemplation of the parties at the time the contract was made." *Kewin* v. *Massachusetts Mut Life Ins Co*, 409 Mich 401, 414, 415, 295 NW2d 50 (1980). This principle limits damages to the monetary value of the contract had the breaching party fully performed under it. *Id*. The measure of damages is to award the non-breaching party the benefit of its bargain (i.e., the non-breaching party's expectation interest). *Ferguson* v *Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). Expectation damages are meant to place the non-breaching party in as good a position as it would have been in had the promised performance been rendered. *Jim-Bob, Inc* v *Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989).

Leestma explained at trial that ISI was a certified information technology vendor. That allowed ISI to "register" a sale with the manufacturer. So if the County wanted to purchase some specific hardware or software, ISI could register that sale with the manufacturer to obtain a preferred pricing discount, which could be as much as 50% below the cost of any other vendor. This provided an unbeatable pricing advantage.

Prior to the MSA, ISI made all equipment purchases for the County between 2010 and 2013. These purchases were done at the cost savings obtained through registering the sale.

During the MSA, Leestma purchased all hardware and software for the County. Neither Mark Eisenbarth, the County Administrator since 2014, nor Mark Hansen, the IT Manager since 2012, could remember any registered product or equipment the County did not purchase through Leestma.

The County maintains that cost is not the only factor that determines how an item is purchased and it is far from certain that the County would have inevitably purchased products from ISI. However, the Court finds that given the pre-MSA history between ISI and the County, as well as the language in the MSA, it is more likely than not that the parties contemplated that ISI would continue to purchase hardware and software at a huge cost savings to the County. The question is how much can be attributed to these expectation damages.

Leestma prepared an extensive exhibit (Ex. 11) that detailed what he expected to purchase for the County over the life of the MSA. He made his calculations by looking at all purchases the County made after the MSA was breached using the same expenditure fund that the County used during the MSA. Leestma acknowledged that his methodology provided some room for error. While Leestma's methodology was adequate for a person outside the County looking in, it is clear that it had far more than "some" room for error.

Hansen testified that many of the expenditures listed on ISI's Exhibit 11were actually purchases that occurred after the MSA would have expired on its own terms or purchases made that were unrelated to the MSA. Hansen pointed out specific items for waste management, underground cable, accommodation taxes, cell phone bills, and dues that were from the same fund as MSA expenditures but were unrelated to the MSA. Hansen concluded that all but $500,000 of expenditures on Exhibit 11 were MSA-related.

The County argues that when Leestma took the stand to offer rebuttal testimony, he should have gone through Exhibit 11 "vendor by vendor, service by service, and, potentially, fund by fund and description by description to explain how ISI would have made each sale to the County." In light of Hansen's testimony that $500,000 of

expenditures *were* MSA-related, the Court imposes no such burden on ISI. Hansen was in a far better position to know what the actual expenditures were for and the Court accepts his testimony that many were unrelated to IT work under the MSA. However, $500,000 of the expenditures were related to the MSA work and the Court finds that ISI is entitled to that amount in lost profits from equipment and software sales.

**D. Interest**

ISI is claiming the following components of interest:

1. Contractual late fee of 1% per month starting from the date the MSA was breached (April 23, 2015) and accruing every month until the County pays the judgment that will issue.

2. Common law interest of 5% from the date the MSA was breached to the filing of the Complaint.

3. Pre-judgment statutory interest from the date of filing the Complaint until the judgment is paid.

The County's sole objection to the late fee is based on MCL 438.32, the usury statute, which provides that interest rates may not exceed 5% per year. Usury is an affirmative defense that is waived if not raised in a party's responsive pleading. *Shaw Inv Co* v *Rollert*, 159 Mich App 575, 580, 407 NW2d 40 (1987). See also MCR 2.111(F)(3)(a). The County did not assert usury in its responsive pleading or any time thereafter until its post-trial brief. The Court would have to bend the rules beyond breaking in order to consider the County's usury argument. The usury argument is waived.

An award of pre-complaint interest is generally within the discretion of the trier of fact. *Capital Mortgage Corp* v *Coopers & Lybrand*, 142 Mich App 531, 537; 369 NW2d 922 (1985). Interest is compensation for the loss of money by one who is entitled to its

use. *Michigan Pipe & Valve-Lansing, Inc* v *Hebeler Enterprises, Inc*, 292 Mich App 479, 808 NW2d 323 (2011).

The Court sees no distinction between the contractual late fee of 1% per month and an interest charge. To impose the common law interest rate of 5% on top of the late fee is unjustified. The parties contracted for a 1% late fee; that is, the parties agreed that if ISI lost money to which it was entitled, it would be compensated for the loss at 1% per month. The parties' contractual agreement should be respected and the Court will not impose the pre-complaint common law interest on top of the contractual interest.

ISI should receive post-complaint interest as set by statute. MCL 600.6013(8) provides for interest equal to 1% plus the average six month yield of a five-year treasury bill. This interest rate is calculated on the entire amount of the money judgment, including attorney fees and other costs. Accordingly, ISI should receive 1% per month late fees from April 23, 2015 to the date of filing the Complaint and the statutory interest rate of MCL 600.6013(8) from the date of filing the Complaint until the date of satisfaction of the judgment.

## II. Breach of Electronic Content Management (ECM) Agreement

Count III of the Amended Complaint asserts damages for breach of the ECM Agreement. The ECM Agreement has quite a different termination provision than the MSA. The termination provision in the ECM Agreement provides:

> 18. TERMINATION
>
> A. By County. County may, by written notice to Contractor, terminate this Agreement in whole or in part at any time, whether for County's convenience or because of the failure of Contractor to fulfill the obligations herein. Upon receipt of this notice, Contractor shall immediately

discontinue all services (unless the notice directs otherwise), and deliver to County all data estimates, graphs, summaries, reports, and all other records, documents or papers as may have been accumulated or produced by Contractor in performing this Agreement, whether completed or in process.

i. For Convenience. County may terminate this Agreement by written notice, which shall be effective upon receipt by Contractor. Following notice of such termination, Contractor shall promptly cease work and notify County as to the status of its performance.

Nothwithstanding any other payment provisions of this Agreement, County shall pay Contractor for services performed to the date of termination to include a prorated amount of compensation due hereunder less payments, if any, previously made. In no event shall Contractor be paid an amount in excess of the full price under this Agreement, nor for profit on unperformed portions of service. Contractor shall furnish to County such financial information as in the judgment of County is necessary to determine the reasonable value of the services rendered by Contractor. In the event of a dispute as to the reasonable value of the services rendered by Contractor, the decision of County shall be final. The foregoing is cumulative and shall not affect any right or remedy which County may have in law or equity.

ii. For Cause. Should Contractor default in the performance of this Agreement or materially breach any of its provisions, County may, at County's sole option, terminate this Agreement by written notice, which shall be effective upon receipt by Contractor.

B. By Contractor. Should County fail to pay Contractor all or any part of the payment set forth in this Agreement, Contractor may, at Contractor's option, terminate this Agreement if such failure is not remedied by County within thirty (30) days of written notice to County of such late payment. Further, Contractor may terminate this Agreement by written notice, which shall be effective upon receipt by County.

ISI and the County differ over what the claimed breach of the ECM Agreement is. ISI has, at times, appeared to claim that it is the hiring of its employee, Katrina Cooper, which the County did as soon as it terminated ISI. ISI has also claimed that the breach is the County's failure to provide written notice to ISI.

Nevertheless, ISI argues that the Court has already granted its motion for summary disposition as to liability and the issue of damages is all that remains. That is correct but the Court can find no adequate proof of any damages as a consequence of hiring Katrina Cooper or failing to give written notice of termination. There is no adequate proof as to any damages from any breach at all of the ECM Agreement. There is no doubt that when the County terminated ISI on April 23, 2015 and walked its employees off the premises, the relationship was over. There is no basis to claim that ISI would have continued to perform the ECM work or any work for the County. Unlike the MSA, the ECM Agreement was terminable at any time for any reason. All that is required is written notice and the failure to give written notice has caused no damage to be suffered by ISI.

**III. Consequential damages: loss of enterprise value**

ISI claims consequential damages exceeding $9,000,000. There are two components to the amount claimed. First, ISI claims the County should pay the fair market value of ISI at the time of the breach of the MSA because the breach resulted in ISI's financial ruin. Second, ISI claims damages for a $912,000 cash infusion made by Leestma to cover an outstanding bank loan once the business shut down.

Financial ruin is usually not a consequence arising naturally from a breach of a contract. Held Constr Co v Mich Nat'l Bank, 124 Mich App 472, 477; 335 NW2d 8 (1983). It may be compensated, however, if the risk of insolvency was within the actual contemplation of the parties at the time the contract was made. *Id.*

ISI has not met its burden of proof to show that the risk of insolvency was within the actual contemplation of the parties at the time the MSA was made. This is so for two

reasons: (1) the lack of credibility of Leestma on this issue in particular, and (2) the lack of other supporting evidence.

Leestma adamantly claimed that during the interview process for the County's RFP on the MSA right through to the Board of Commissioners' vote to award the MSA to ISI, he repeatedly insisted that the MSA had to run for a term of 5 years and that any breach would result in financial ruin to ISI. There is no support for this in the Ways and Means Committee meeting minutes or in the minutes of the Board of Commissioners meetings. Likewise, there is no evidence, other than Leestma's, that the issue was ever raised or negotiated with the interview committee when the RFP responders were being interviewed.

Moreover, when Leestma submitted ISI's response to the County RFP, he offered to enter into a contract for 1, 3, 5 or 10 years. Leestma testified that he had to provide those options because the RFP called for it and he risked losing out if he did not make those proposals. However, the RFP also called for an at-will contract and Leestma negotiated the "for cause" termination provision. If he had to have a 5-year term and nothing less would do, then he would not have responded to the RFP the way he did. His willingness to propose a 1, 3, 5 or 10 year term shows that he was willing to *accept* a 1, 3, 5 or 10 year term and undermines completely his claim that he was adamant from the start that the MSA would have to be for a term of 5 years.

Leestma repeatedly evaded answering questions and argued with attorneys during his testimony. He contradicted himself on many points as well. He testified adamantly on some points and then when other testimony contradicted him, he altered his testimony. The Court must make credibility determinations as part of its fact-finding function and

Leestma's overall demeanor and inconsistent testimony hurt his credibility. That said, he was truthful about many things. But the issue of informing the County that he would be financially ruined if they terminated the MSA before five years is a significant issue that represents potentially millions of dollars in damages. His testimony was not credible and it was contradicted by other evidence.

The court cannot find more likely than not that the parties entered into the MSA reasonably knowing that a breach before the 5-year term would destroy ISI. Accordingly, the Court does not award any of the consequential damages requested by ISI.

## IV. SQL offset

The County asserted the affirmative defense of setoff for amounts it prepaid to ISI for the SQL (structured query language) agreement. The County had prepaid ISI for SQL work for five years, but the SQL work ceased when the County terminated ISI on April 23, 2015.

Setoff (or recoupment) may be used to decrease a plaintiff's recovery by any damages a defendant may have arising out of the same contract or transaction. *McCoig Materials, LLC* v *Galui Const, Inc*, 295 Mich App 684, 696; 818 NW2d 410 (2012), citing *Baker* v *Morehouse*, 48 Mich 335, 339; 12 NW 170 (1882). The purpose is to avoid a multiplicity of suits. *Id.* The claim for recoupment by the defendant must be premised on the same transaction raised in the plaintiff's complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment. *McCoig*, citing *Oakland Metal Stamping Co* v *Forest Indus, Inc.,* 352 Mich 119, 125, 89 N.W.2d 503.

Setting aside the fact that the SQL agreement was a contract separate from the MSA, the County's claim for setoff fails. The reason the claim fails is that ISI was not in breach of the MSA *or* the SQL. The County, and only the County, breached the MSA by terminating ISI without cause and without notice and an opportunity to cure. On the same day the County terminated the MSA, ISI was removed from the premises. Thus, the SQL work was never completed because the County prevented its completion and not because ISI failed to perform. The County is not entitled to the setoff it claims in the amount of $177,600.

## V. Duty to mitigate

The County claims that any damages to ISI should be reduced for its failure to mitigate. The County says that ISI voluntarily went out of business instead of rebuilding and that Leestma transferred assets to employees for no consideration.

Failure to mitigate damages is an affirmative defense. *Fothergill* v *McKay Press*, 374 Mich 138, 140, 132 NW2d 144 (1965). The defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages. *Morris* v *Clawson Tank Co*, 459 Mich 256, 266, 587 NW2d 253 (1998).

Leestma testified that he went out of business because he lost all his customers. He waited six months after the County terminated ISI and tried to rebuild, but nobody wanted to do business with him. He said that he did transfer assets to employees with no further explanation other than "I gave what little I had left to them and wished them luck." It is unknown what assets he transferred or what the value of those assets was. It is unknown what the circumstances were that caused him to transfer assets to

employees, such as whether it was to satisfy an indebtedness. The County has not met its burden of proving that ISI failed to make reasonable efforts to mitigate damages.

**Sanctions**

ISI maintains that the County should be sanctioned for its opposition to ISI's motion for summary disposition brought in October 2016. ISI's motion was for summary disposition on Count II only, which would have determined that the County breached the MSA. The County opposed the motion generally on two separate grounds:

(1) ISI breached the MSA by invoicing the County $74,000 per month, which was in excess of the stated monthly rate of $64,000.

- This was in violation of the County's Purchasing Policy, which required prior Board approval
- ISI employees did not work an additional 50 hours per week to support the billing
- ISI conspired with Kaplan to produce a change order purportedly authorizing the $74,000 monthly billing
- There could be no contract overages because the MSA was for a flat monthly sum
- ISI breached the "conflicts of interest" provision of the MSA before there was any County breach

(2) The MSA is a voidable contract entered into through fraud.

- The party who has the power to avoid a contract owes no duty of performance. Fraud makes a contract voidable at the instance of the innocent party
- ISI led the County to believe it was in compliance with the County's Purchasing Policy and Personnel Rules
- After Kaplan left, the County discovered expenditures not authorized
- "The County could no longer continue a relationship with a vendor that had committed such fraud upon the County, which is why the County acted to void and terminate the MSA."

With regard to point (1) above, the County was forthright in stating that it never paid the additional $8,000 per month. However, to this very day the County has never

explained how billing $8,000 more per month when the invoices were never paid could possibly constitute a breach of the MSA. Furthermore, there *could* be contract overages because the MSA was for a flat monthly sum, but it also provided:

> Additional services which include, but are not limited to, the following will be provided at additional cost as quoted and defined in a Scope of Work in an additional contract award or contract amendment. All rates subject to a 1% annual increase.

| Role | Description | Estimated Charges |
|---|---|---|
| Project Engineer | Work that requires skilled/certified project engineer which typically exceeds 30 hours per week | $180.00/hour |
| Support Engineer | Work that requires engineers that are less experienced than project engineers | $120.00/hour |
| ECM Developer 1 | Expert Level ECM Developer | $160.00/hour |
| ECM Developer 2 | Intermediate Level ECM Developer | $140.00/hour |
| ECM Developer 3 | Beginner Level ECM Developer | $120.00/hour |
| | Expert Level Programmer | $160.00/hour |
| Programmer 2 | Intermediate Level Programmer | $140.00/hour |
| Programmer 3 | Beginner Level Programmer | $120.00/hour |
| Project Manager | Project Manager | $120.00/hour |
| Cabling/Facilities | Any work that requires the use of ISI's BICSI certified cablers | $90.00/hour |

To this very day, the County has never produced any evidence that would support the allegation that ISI was billing for work not performed. To the contrary, when ISI brought its second motion for summary disposition in 2018, it offered deposition testimony of Mark Hansen. Hansen verified that ISI's managers initially worked at the County 3 days a week, but after the County requested additional managerial support, they began working 5 days a week. Hansen also said that ISI was only paid for work it actually performed. ISI also offered the unrefuted testimony of Bonnie Hammersley, the County Administrator, who testified that ISI was not paid for any hours not worked.

The points that refute (1) above are not advocacy -- they are facts. Not only are they facts, but they are facts that came from the mouths of County employees. It is difficult, at best, to discern how the County could state these matters to be true (or even as disputed issues of fact) when, after 2 years of discovery, the matters were shown to be false.

Even more troubling is the analysis of point (2) above. What has turned out to be unrefuted is that on April 23, 2015 the MSA was terminated without notice and without an opportunity to cure. But the County escaped an early summary disposition ruling because it stated that after Kaplan left, numerous unauthorized expenditures were identified. The County also detailed a number of personal transactions between Kaplan and Leestma that were undoubtedly conflicts of interest between a county official and a county vendor. Without giving any time frame as to when the County learned of these personal transactions, the County justified terminating the MSA by saying that "[t]he County could no longer continue a relationship with a vendor that had committed such fraud upon the County, *which is why the County acted to void and terminate the MSA."* (Emphasis added).

That is not why the County terminated the MSA and the County knows that and knew it from day one. After Kaplan left in August 2014, Jim Elwell asked Mark Hansen to come to his office to review the IT operations and the amount of money that was being spent on IT. Hansen began looking at the amount of money the County was paying ISI and determined that it was too much – not too much as in fraudulent but too much as in more money than the County wanted to pay. Hansen testified in his deposition:

> Q. So why did you want to end the contract with ISI early? What was your motivation then for doing that?

A. It was, I thought, somewhat overpriced. We're expending a lot of money. Starting in the fall of 2014, some of their staff started to quit that had been working for us and were not being replaced, so they were not providing enough staff to fulfill the contract.

Q. Okay. Other than the fact that you thought the contract was too expensive and you didn't think they were staffing it properly, were there any other reasons you felt that the County would be justified in trying to get out of the contract?

A. I did not feel – with the change in staffing, I did not feel that they were providing the level of service that was required.

Q. Okay. We talked about that a minute ago. You felt that the staffing levels under the contract weren't being met, right?

A. Correct.

Q. And you thought 66,000 a month, I'm presuming, you thought was too expensive, right?

A. Yes.

So Doug Hughes, the County's attorney, got an idea. He knew Eric Ringelberg as a friend and fellow parishioner and he knew Ringelberg not only worked in IT, but his company Next-IT was also an unsuccessful bidder for the MSA. So on February 15, 2015, Hughes wrote an email to Ringelberg. Hughes explained in his deposition:

Q. Well, what information in particular did he have that you didn't have that you were looking for?

A. Well, at the time, the plan that was developing was to come up with a – a bulletproof plan to change vendors virtually overnight successfully.

Q. Okay. And let me ask you this question. At this point, you didn't know that NeXt-IT – you knew that they had submitted a bid, but you didn't know they were the lowest-ranked –

A. No.

Q. – vendor?

A. At that point, it didn't matter to me. Eric was a friend. I said "Eric, I need help figuring this problem out."

Eric helped. He put together a "solution" and "crunched some numbers" in the weeks following.

Next, there was a meeting with ISI on March 23, 2015. But it was not a meeting in which the County gave notice of any problems under the MSA and gave an opportunity to cure those problems. Hansen described the meeting:

Q. Okay. Do you – do you recall in any way giving notice to ISI that the County planned to terminate the contract?

A. No.

Q. That never came up, did it?

A. Not during that meeting, no.

Q. Why didn't it come up during that meeting?

A. They wanted the meeting, I think, to talk to Mark about the invoices that were still not paid.

Q. Meaning ISI asked for a meeting because they had – they had grievances that they weren't getting paid on time, right?

A. I believe – I believe that's the case.

On April 2, 2015, presentations were made to the County Ways and Means Committee. Beth Dick presented a spreadsheet she had prepared that made a comparison of dollar amounts expended to ISI from 2011 to 2015 compared to dollar amounts the Board had authorized. That sounds suspicious and it isn't. First, the amounts in her spreadsheet were amounts paid to ISI for work prior to or separate from the MSA. Second, all of the payments were ultimately approved by the Board. She explained that when there is already a contract in place, an invoice will be paid without

waiting for Board approval of the accounts payable. Therefore, the spreadsheet showed that the County paid ISI a lot of money for non-MSA work. That is about all it showed.

Hansen was right that the County had paid a lot of money to ISI. And at the same April 2, 2015 Ways and Means Committee meeting another presentation was made. Hughes wrote about it to Ringelberg:

> Eric: After our presentation to the County Board the County Administrator has authorized me to tell you that the County Muskegon will agree to sign an agreement for the balance of the current ISI term for the services that you recently outlined for the amounts that you mentioned. Please proceed accordingly. You tell me when you are ready to start. We will terminate our contract w/ ISI the day before you start. Congrats!

That day came on April 23, 2015. Hughes explained it all to the Commissioners:

> This morning Terry Sabo, the Administrator and I met with representatives of ISI to terminate the contract. I gave them a written notice and it put in place – negotiated with NextIT with an agreement that will provide the same level of service with half the cost. NextIT has already manned up and has employees necessary and needed to make this a very seamless transition. The representative from NextIT left this morning about 9:15 there was no discussion we simply told them what we were going to do and left the room. That part is over and I think that with the encouragement of the administrator you're going to make a big step forward to provide more efficient cost effective IT services in the future that is going to be more responsive – we had to put an opinion together . . . when we go back into open session you will have a motion already at your table to go with NextIT – it's a done deal the change has been made . . . I'll keep you posted, see what happens.

Congratulations went around the room, especially to Hughes for orchestrating a seamless transition and saving the taxpayers money. One Commissioner asked about Ryan [Leestma] and it was reported that he had "no clue" and was like "a deer in the headlights" when he was told of the termination.

Nobody mentioned Heath Kaplan. Nobody mentioned that for several months in the year prior, ISI had billed for an additional $8,000 per month for the MSA. Nobody mentioned a conspiracy to create a change order. Nobody mentioned the Purchasing

Policy. Nobody mentioned that "[t]he County could no longer continue a relationship with a vendor that had committed such fraud upon the County, *which is why the County acted to void and terminate the MSA."* And nobody mentioned the personal conflict-of-interest dealings between Leestma and Kaplan. That is because, in the words of the County's own motion for summary disposition, it was all **"Evidence Discovered After the April 23, 2015 Termination of the MSA."**

The MSA was terminated without cause, without notice, and without an opportunity to cure. The MSA was terminated because all of the work that ISI had done for the County over the years had added up to just too much and the County wanted to go forward and save a lot of money. After the MSA was terminated, the County began learning about the personal transactions between Leestma and Kaplan. Kaplan surely acted contrary to the County Personnel Policy, but the County has never explained how it can terminate a contract with no cause and then after the fact claim that the contract was voidable anyway based on the misfeasance of its *own* employee.

But that is not even the most compelling question before the Court for purposes of the motion for sanctions. What is most compelling is the question of how the County could make the following statement when opposing ISI's motion for summary disposition: "[t]he County could no longer continue a relationship with a vendor that had committed such fraud upon the County, *which is why the County acted to void and terminate the MSA."* (Emphasis added). It took ISI two years of discovery to show this Court the abject falsehood of that statement and to show why their motion for summary disposition should have been granted as to Count II in 2016.

MCR 1.109(E)(5) provides:

> Effect of signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a document is signed in violation of MCR 1.109(E)(5), the court shall impose an appropriate sanction, which may include an order to pay to the other party the reasonable attorney fees incurred because of the filing of the document. The sanction may be imposed on the person who signed the document, the represented party, or both.

The County's brief in opposition to ISI's motion for summary disposition on Count II only was signed in violation of MCR 1.109(E)(5). Not only was it based on a false statement of fact, but the Court concludes that it was made to cause unnecessary delay in this litigation. There is no question but that it needlessly increased the cost of this litigation. When counsel for the County signed the document, the true facts were known to the County officials involved in the termination of the MSA and the true facts should have been known to counsel. The sanction, limited to reasonable attorney fees incurred because of the opposition to the 2016 motion for summary disposition, should be imposed on both.

A hearing is required under *Smith* v *Khouri*, 481 Mich 519, 751 NW2d 472 (2008). ISI is directed to file within 30 days and at the same time to schedule with the court a motion to determine reasonable attorney fees. The motion should contain enough specificity to allow the County to respond to the issues of whether the hourly rate is

reasonable and whether the number of hours is reasonable and necessitated by the County's opposition to the 2016 motion. Any attorney fees not adequately supported will be denied. Any objection that is not specific to the reasonableness of the rate or number of hours or necessity of the hours will be overruled. The motion and response should be scheduled as any motion would under MCR 2.119. At the hearing on the motion, the Court will consider any party's argument that there is a factual dispute sufficient to warrant an evidentiary hearing.

A judgment will enter for ISI in accordance with the Court's findings above and after a reasonable attorney fee has been determined.

/S/

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Joyce Draganchuk (P39417)
Circuit Judge

**PROOF OF SERVICE**

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on October 28, 2019.

/S/

_____
Michael Lewycky
Law Clerk/Court Officer