

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: State of South Carolina v.	)	
New Venue Technologies, Inc.	)	Case No. 2013-11
(Contract Controversy)	)	
	)	
New Venue Technologies' Motion for	)	
Sanctions Pursuant to South Carolina	)	
Code Section 11-35-4330	)	
	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a Motion for Sanctions under section 11-35-4330 of the Consolidated Procurement Code (the Procurement Code). New Venue Technologies, Inc. (New Venue) sought sanctions against the State of South Carolina for filing and subsequently withdrawing a request for the resolution of a contract controversy with New Venue. The State moved for dismissal of New Venue's motion for sanctions on the grounds that the Panel lacked jurisdiction to consider New Venue's claims. New Venue was afforded an opportunity to file a written brief in response to the State's motion to dismiss with the Panel and did so on December 23, 2013. The Panel conducted a hearing on the State's motion to dismiss by telephone conference call on January 6, 2014. John E. Schmidt, III, Esquire; Geoffrey K. Chambers, Esquire; and Melissa J. Copeland, Esquire, represented New Venue during the conference call. Michael H. Montgomery represented the State. Shawn L. DeJames, Esquire, and Amber B. Carter, Esquire, representing the Chief Procurement Officer for the Information Technology Management Office, were present on the call, but did not participate in the argument.

## Background

On September 30, 2013, representatives of the Information Technology Management Office (ITMO) and the South Carolina Budget and Control Board (the Board)<sup>1</sup> signed and filed with the CPO for ITMO a request for resolution that alleged New Venue had breached its Software Acquisition Manager (SAM) contract with the State in various particulars. Record at PRP12 – PRP21. The CPO apparently set a hearing date on the matter for October 31, 2013, but continued the hearing indefinitely at the State’s request on October 28, 2013. Record at PRP11. The notice granting the continuance notes that “[t]he hearing of this matter will be rescheduled in the near future.” *Id.* Thereafter, on November 7, 2013, one of the Board’s attorneys, Frank S. Potts, sent an e-mail to the CPO indicating the State’s intention to “withdraw its request . . . for resolution of a contract controversy, without prejudice.” Record at PRP10.<sup>2</sup>

On November 22, 2013, New Venue filed its motion for sanctions with the Panel. Contending that the State’s September 30th request for resolution was “frivolous and unfounded,” New Venue argued that the State had breached the SAM contract well before any alleged breach by New Venue and that the State’s allegations that New Venue’s software solution did not exist were false. Record at PRP4 – PRP5. In addition, New Venue asserted that the State’s withdrawal of its request for resolution “denied New Venue Technologies the opportunity to litigate and show the falsity of allegations of vaporware and falsity of allegations

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<sup>1</sup> ITMO and the Board are referred to collectively herein as “the State.”

<sup>2</sup> The Panel notes that the contract between the State and New Venue is the subject of more than one proceeding before the CPO. In addition to the State’s request for resolution on September 30th, noted as Case No. 2014-205 on the State’s Procurement Services website, the State also filed a request for the suspension of New Venue, noted as Case No. 2014-204, on October 8th. *See* “Pending Protests” at <http://www.mmo.sc.gov/PS/legal/PS-legal-decisions-it.phtml> (last accessed January 8, 2014). New Venue filed its own request for resolution of a contract controversy, also noted as Case No. 2014-5, on November 14th. *Id.* The suspension case had been scheduled for a hearing on November 25th, but an October 25th e-mail from the CPO, submitted to the Panel by New Venue, suggests that the CPO did not intend to hear the suspension matter until the contract controversy had been resolved. Thus, the CPO sought to “repurpose” the November 25th hearing to address the contract controversy. Then, on November 18th, the CPO indefinitely postponed the November 25th hearing. The CPO’s e-mail and hearing notice are attached to this order as Panel Attachment A.

of breach of contract contained in the State's Request for Resolution, all of which remains falsely published on the State's official procurement website, to [New Venue's] serious detriment." Record at PRP6.

### **The State's Motion to Dismiss**

The State moved for the dismissal of New Venue's motion for sanctions on December 9, 2013, on the grounds that the Panel lacked jurisdiction to hear the matter because the statutory prerequisites of Procurement Code section 11-35-4330(3) have not been met. Specifically, the State argued subsection (3) precludes New Venue from filing a motion for sanctions in the absence of a "final decision" from the CPO. Because the CPO has not filed a "final decision" with regard to the State's request for resolution, the State argues the Panel lacks jurisdiction to hear New Venue's motion. In addition, the State urged the importance of policy considerations behind the "final decision" requirement, particularly "to avoid any rulings [by the Panel] on the merits – or any part thereof – before the CPO has had an opportunity to fulfill his statutory obligations regarding the matter."

New Venue opposed the State's motion to dismiss on several grounds. First, New Venue argued that the State's November 7th e-mail withdrawing its request for resolution was "a final action on [the September 30th] document and no further prosecution of this matter can occur." New Venue also argued that by posting the withdrawal e-mail on its website where procurement decisions are commonly posted, the State "provided notice of the fate and final outcome of the State's Request for Resolution." Second, New Venue argued that the CPO's November 18th notice indefinitely postponing the scheduled November 25th hearing, which was "repurposed" to address the contract controversy case instead of the suspension case, is a "final order and acknowledgement of the State's retraction of the Request for Resolution." Third, New Venue

argued that the statute does not require a final order to trigger the filing of a motion for sanctions because it “states one possible trigger *may be* the filing of a frivolous document or an order related to the document that is the subject of the motion for sanctions.” Finally, New Venue argued that its motion for sanctions was timely because it was filed within fifteen days of not only the November 7th e-mail withdrawing the State’s request, but also the November 18th hearing postponement notice, which New Venue contends was the “last and final action” related to the State’s request for resolution.

### **Conclusions of Law**

Sanctions for the frivolous filing of documents under the Procurement Code are governed by section 11-35-4330. S.C. Code Ann. § 11-35-4330 (2011). Subsection (1) of this provision establishes that an attorney’s or party’s signature on “a request for review, protest, motion, or other document” certifies that the signer “has read the document” and determined that “it 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.” S.C. Code Ann. § 11-35-4330(1) (2011). In addition, by signing the document in question, the signer certifies that “it is not interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.” *Id.*

The Panel’s responsibility for considering motions for sanctions is established by subsection (2), which provides that if a document is signed in violation of subsection (1) and filed with either the CPO or the Panel, then the Panel, “upon motion or upon its own initiative, may impose . . . an appropriate sanction that may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the protest, pleading,

motion, or other paper, including a reasonable attorney's fee." S.C. Code Ann. § 11-35-4330(2) (2011).

Subsection (3) of the frivolous protest statute, which is at issue with regard to the State's motion to dismiss New Venue's motion for sanctions, provides:

*(3) Filing. A motion regarding a matter that is not otherwise before the panel may not be filed until after a final decision has been issued by the appropriate chief procurement officer. A motion for sanctions pursuant to this section must be filed with the panel no later than fifteen days after the later of either the filing of a request for review, protest, motion, or other document signed in violation of this section, or the issuance of an order that addresses the request for review, protest, motion, or other document that is the subject of the motion for sanctions.*

S.C. Code Ann. § 11-35-4330(3) (2011) (emphasis added). New Venue's motion for sanctions falls squarely within the limitation of the first sentence of subsection (3) because it regards a matter – that is, the State's request for the resolution of a contract controversy – that is not otherwise before the Panel. In other words, New Venue's request for the imposition of sanctions is before the Panel solely on New Venue's motion and is not connected to any appeal currently pending before the Panel. Therefore, pursuant to this subsection, New Venue may not file a motion for sanctions until the CPO has filed a final decision. Thus, the question of the Panel's jurisdiction in this case turns upon whether New Venue's motion for sanctions was filed after the issuance of a final decision by the CPO.

The Panel has not previously considered what constitutes a "final decision" with regard to the frivolous protest statute. However, the Panel notes that the term "final decision" has been defined as

One which settles rights of parties respecting the subject-matter of the suit and which concludes them until it is reversed or set aside. "Final decision" which may be appealed is one that ends litigation on merits and leaves nothing for courts to do but execute judgment.

*Black's Law Dictionary* 322 (Abridged 5th ed. 1983); *see also Bone v. U.S. Food Serv.*, 404 S.C. 67, 73 – 74, 744 S.E.2d 552, 556 (2013) (wherein the supreme court observed “[a]n agency decision which does not decide the merits of a contested case . . . is not a final agency decision subject to judicial review [under section 1-23-380(A) of the Administrative Procedures Act].” (quoting *S.C. Baptist Hosp. v. S.C. Dep’t of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987)). The Panel adopts this definition and concludes that the term “final decision” used in subsection (3) requires a decision that includes consideration of the merits of the dispute. Applying this definition to the issue at hand, the Panel concludes that neither the November 7th e-mail nor the November 18th notice of continuance can be considered a “final decision” because neither document addresses the merits of the contract controversy dispute. Moreover, the Panel observes that the November 7th e-mail is not a document issued by the CPO himself and thus cannot be considered to be his decision. In the absence of a “final decision,” the Panel concludes that it lacks jurisdiction to consider New Venue’s motion for sanctions.

The Panel must also address the issue of subpoenas it issued on December 19, 2013, at New Venue’s request and pursuant to the Panel’s authority under section 11-35-4410(4) of the Procurement Code. S.C. Ann. § 11-35-4410(4)(ii) (2011). The Panel’s authority to issue subpoenas is premised upon its jurisdiction over the matter pending before it. Because the Panel has determined that it lacks jurisdiction to hear New Venue’s motion for sanctions, the subpoenas issued for Delbert Singleton, Michael Spicer, Norma Hall, Debbie Lemmon, and Emmett Kirwan are hereby quashed.

Therefore, for the reasons stated above, the Panel hereby quashes the subpoenas issued on December 19th, grants the State’s motion to dismiss New Venue’s motion for sanctions and remands the matter to the CPO. Upon remand, the Panel requests the CPO to consider whether

he has the authority to (1) enter a final decision regarding the State's September 30th request for review; or (2) schedule a hearing regarding the State's request for review and/or the State's withdrawal of its request for review; or (3) combine the State's request for review with New Venue's request for review currently pending before the CPO.<sup>3</sup>

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: */s/ C. Brian McLane, Sr.* <sup>(die)</sup>  
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 21<sup>st</sup> day of January, 2013.

Columbia, South Carolina

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<sup>3</sup> The Panel feels compelled to note that New Venue's motion for sanctions relies in large part upon its assertions that the State breached the contract between the parties first and that these issues are the subject of New Venue's request for resolution currently pending before the CPO. Even if it had determined that it had jurisdiction to hear New Venue's motion for sanctions at this time, the Panel has reservations about whether the dispute would be ripe for consideration until New Venue's request for review is concluded.

**Panel Attachment A**

**Exhibit A**  
Repurpose of November 25, 2013 Hearing

Spicer, Mike <mspicer@mmo.sc.gov>

Oct  
25

to Molly, Frank, geoffrey, john.schmidt

Gentlemen,

The parties are already scheduled for a hearing on November 25<sup>th</sup> of this year to address the State's motion to suspend New Venue for cause from consideration for award of contracts or subcontracts if doing so is in the best interest of the State and there is probable cause for debarment. I will reschedule this hearing since I do not intend to address this matter until after the contract controversy is resolved. If possible, I would like to repurpose the hearing on the 25<sup>th</sup> to address the contract controversy.

The question I have for the State is whether it can complete its audit and be prepared to proceed with this matter by the 25<sup>th</sup> of November?

I await your response and comments.

**Exhibit B**  
Text of Mr. Spicer's Order dated November 18<sup>th</sup>, 2013

**Hearing Notice**

November 18, 2013

In Re: Suspension / Debarment of New Venue Technologies, Inc. – Breach of  
Contract No. 4400003161, Software Acquisition Manager - Case No. 2014-206

To: John E Schmidt, Esquire  
Schmidt & Copeland LLC  
1201 Main Street, Suite 1100  
Columbia, SC 29201  
P.O. Box 11547  
Columbia, SC 29211

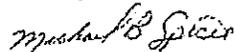
C: Debbie Lemmon, ITMO  
Norma Hall, ITMO  
Shawn Lavery DeJames, Assistant General Counsel  
William Dixon Robertson, Assistant General Counsel  
Keith McCook, Assistant General Counsel, MMO/ITMO

**Please be advised that the hearing of this matter is postponed indefinitely.**

Please be advised that based on the breach of contract 4400003161 for a Software Acquisition Manager, a hearing in regards to the possible suspension of New Venue Technologies, Inc.; Terris S. Riley, Chief Executive Officer and President of New Venue Technologies, Inc.; and Jacque P. Riley, Vice President of New Venue Technologies, Inc., will be held on Monday, November 25, 2013, at 10:00 AM, in the Information Technology Management Office conference room, 1201 Main Street, Suite 600, Columbia, South Carolina, 29201.

Exhibits and evidence will be accepted at the hearing. The Information Technology Management Officer shall issue a decision in writing within ten days after the completion of the administrative review. The decision shall state the reasons for the action taken and shall be based on the evidence presented or available at the hearing that is specifically related to the issues.

Sincerely,



Michael B. Spicer  
Chief Procurement Officer