

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
Sodexo Operations, LLC, Appellant,)	
v. Francis Marion University, Respondent)	Case No. 2014-1
(Contract Controversy))	
)	
)	

This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4230(6) and 11-35-4410(1)(a) of the South Carolina Consolidated Procurement Code (the Procurement Code). On March 24, 2014, Sodexo Operations, LLC (Sodexo), appealed the March 12, 2014, order of the Chief Procurement Officer (the CPO) denying its request that Francis Marion University (FMU) reimburse Sodexo for state sales taxes incurred in the service of board plan meals to students at FMU for the 2012 – 2013 and 2013 – 2014 academic years. On June 23, 2015, the Panel Chairman, pursuant to the Panel’s previous June 4, 2014, order designating him to hear and resolve matters related to discovery, convened a hearing to address FMU’s motion to compel discovery of documents related to the tax audit relied upon by Sodexo as the basis of its claim. Christian Stegmaier, Esquire, represented Sodexo in the hearing before the Panel Chairman. Milton G. Kimpson, Esquire, represented the South Carolina Department of Revenue (SCDOR). David C. Holler, Esquire, represented FMU, and W. Dixon Robertson, III, Esquire, represented the CPO.

Findings of Fact

The Panel Chairman finds the following facts are pertinent to the issues before him:

1. In its November 11, 2013, letter requesting resolution of a contract controversy, Sodexo advised that “The State of South Carolina audited Sodexo, and in March 2012, informed the

company that prepared meals sold to educational institutions are subject to sales tax.” Record at PRP14.

2. The Record before the Panel includes the CPO’s Hearing Exhibit #8,¹ which is a document from SCDOR to Sodexo Management Inc. dated March 14, 2012. Record at PRP125 – PRP126. This document informs the recipient that SCDOR has completed its audit and has attached an audit report explaining its Proposed Assessment. Record at PRP125. This document contains the following identifying information: “Period: 08/01/2007 to 07/31/2010; File #: 04071327; Audit #: 04/21/3557.” *Id.*

3. At the request of FMU, the Panel issued a subpoena on April 22, 2014 to SCDOR for “All documents relating to Audit #04/21/3557; File #04071327 Period 8/1/2007 to 7/31/2010.”

4. FMU served Requests for Production upon Sodexo on April 30, 2015.

5. By letter dated May 2, 2014, counsel for SCDOR objected to the Panel subpoena pursuant to S.C. Code Ann. Section 12-54-240.

6. The parties filed a Joint Stipulation of Facts before the Panel dated May 9, 2014. This document included the following stipulation: “Following an audit of Sodexo, in March 2012 the South Carolina Department of Revenue (“SCDOR”) informed Sodexo that the sale of meals to FMU were retail sales subject to sales tax under South Carolina Code Annotated Section 12-36-110(h).”

7. On May 13, 2014, Sodexo filed a motion before the Panel to quash FMU’s Requests for Production.

8. On June 4, 2014, the Panel issued an order denying Sodexo’s Motion to Quash and directing Sodexo to respond to FMU’s Requests for Production. This order also designated the Panel’s Chairman to hear and resolve any future discovery related motions.

9. On June 16, 2014, FMU filed a Motion for Order and Rule to Show Cause with the Panel seeking an order compelling SCDOR to comply with the April 22, 2014 subpoena.

10. On June 27, 2014, SCDOR filed a Reply to FMU’s Motion for Order and Rule to Show Cause.

11. Scheduled Panel hearings on the merits of the dispute were stayed at the parties’ request on July 1, 2014, and January 29, 2015.

12. By e-mail on April 27, 2015 (confirmed by letter dated April 29, 2015), counsel for Sodexo advised that mediation efforts had been unsuccessful and requested the Panel to schedule a new merits hearing.

¹ This document was also referenced and relied upon by Sodexo in its Memorandum in Support of Its Motion for Summary Judgment before the CPO. Record at PRP189; PRP267 – PRP268.

13. By e-mail on April 27, 2015, counsel for FMU requested that the Panel resolve outstanding discovery issues related to the tax audit documents before scheduling a new merits hearing.

Discussion

I. FMU's Requests for Production and Panel Order of June 4, 2014

FMU first sought the production of any documents related to the March 2012 audit through Requests for Production on April 30, 2014. At that time, Sodexo objected to the production of those documents on the grounds that the Panel lacked the statutory authority to allow discovery through methods other than subpoena. The Panel heard argument on Sodexo's Motion to Quash and rejected this argument in its June 4, 2014 order. In that order, the Panel ordered Sodexo to respond to FMU's Requests for Production within thirty days. In light of the parties' subsequent attempts to negotiate a settlement, Sodexo apparently did not comply with the Panel's order.

When Sodexo advised the Panel that a new merits hearing needed to be scheduled, FMU asked the Panel to resolve SCDOR's objection to the April 22, 2014 subpoena. At that time, Sodexo was given an opportunity to respond to FMU's June 16, 2014 Motion for Order and Rule to Show Cause, and Sodexo did so on May 15, 2015. In its response, Sodexo asserted for the first time that the audit was performed on a separate corporate entity, Sodexo Management, Inc., and that the documents sought contain confidential and proprietary information that should not be disclosed. The Panel is not persuaded by these new assertions.

Throughout this contract controversy, both before the CPO and before the Panel, Sodexo has consistently relied upon the March 2012 audit report as the basis for its claim that State sales taxes apply to board plan meals, and specifically to those sold at FMU. The Panel finds, therefore, that documents relating to the audit are relevant to the dispute before it and subject to

discovery. As noted above, FMU has sought production of documents related to that audit from Sodexo since April of last year, and the Panel ordered production of the same by order on June 4, 2014. The Panel will now enforce its previous order and again command Sodexo to respond to FMU's Requests for Production. To the extent that the documents sought contain confidential and/or proprietary information, the Panel finds that Sodexo's concerns about the dissemination of these sensitive documents can be addressed by a reasonable protective order issued pursuant to State Regulation 19-445.2200 and directs FMU's counsel to submit an appropriate protective order. S.C. Code Regs. R. 19-445.2200 (2011). Sodexo shall respond to FMU's Requests for Production within fifteen days of the date of this order or within fifteen days of the date of the protective order, whichever is later.

II. FMU's Motion for Order and Rule to Show Cause

SCDOR has objected to the Panel's April 22, 2014 subpoena issued at the request of FMU and which sought production of "[a]ll documents relating to Audit #04/21/3557; File #04071327 Period 8/1/2007 to 7/31/2010." SCDOR's objection is based on the grounds that the Panel's subpoena is not a "proper judicial order" as contemplated by section 12-54-240(A) of the South Carolina Code and that the Panel is not otherwise authorized by statute to acquire confidential taxpayer information. Section 12-54-240(A) provides in pertinent part:

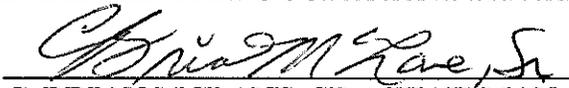
Except in accordance with proper judicial order or otherwise provided by law, it is unlawful for a person to divulge or make known in any manner any particulars set forth or disclosed in any report or return required under Chapters 6, 8, 11, 13, 16, 20, or 36 or Article 17, Chapter 21 of this title. A person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. If the offender is an officer or an employee of the State, he must be dismissed from office and is disqualified from holding any public office in this State for a period of five years thereafter. . . .

S.C. Code Ann. § 12-54-240(A) (2014). Subsection (B) of this provision lists several exceptions to the prohibition quoted above, but none of these exceptions applies to the Panel. S.C. Code Ann. § 12-54-240(B) (2014 and 2014 Supp.). However, the Panel is expressly authorized to issue subpoenas under section 11-35-4410(4)(a)(ii) of the Procurement Code. S.C. Code Ann. § 11-35-4410(4)(a)(ii) (2011).

In light of its finding that the audit documents sought by FMU are relevant to the dispute before the Panel, the Panel hereby directs SCDOR to comply with the April 22, 2014 subpoena. However, the Panel acknowledges that section 12-54-240(A) requires the issuance of a “proper judicial order” and that the Panel is an administrative body, not a court. Therefore, the Panel issues this order at the request of FMU so that FMU and SCDOR can request judicial comity of the Panel’s order in the Court of Common Pleas.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 25th day of June, 2014.

Columbia, South Carolina