

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
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 IN RE: )  
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 Appeal by New Venue Technologies, Inc., )  
 )  
 (New Venue Technologies, Inc., Appellant, )  
 vs. South Carolina Budget and Control )  
 Board, Respondent; Case No. 2014-7) )  
 (Contract Controversy) )  
 )  
 AND )  
 )  
 IN RE: )  
 )  
 Appeal of Suspension by New Venue )  
 Technologies, Inc., (Case No. 2014-9) )  
 )  
 Solicitation No. 5400001873 – Software )  
 Acquisition Manager )  
 )

BEFORE THE SOUTH CAROLINA  
 PROCUREMENT REVIEW PANEL  
  
 ORDER ON PRE-HEARING DISCOVERY

Cases Nos. 2014-7 and 2014-9

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These matters are before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4230(6), 11-35-4220(5), and 11-35-4410(1)(a) of the South Carolina Consolidated Procurement Code (the Procurement Code). New Venue Technologies, Inc. (New Venue) has appealed two decisions of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO). In connection with those appeals, the Panel’s Chairman conducted a conference call on September 4, 2014, to discuss a scheduling order with counsel for New Venue, the CPO, and the South Carolina Budget and Control Board (the Board). During the course of the phone call, counsel for New Venue questioned the authority of the Panel to issue subpoenas for potential fact witnesses to attend depositions. The subpoenas in question had been issued by the Panel at the Board’s

request on August 11, 2014, and August 14, 2014. Thereafter, the Board effected service on the witnesses and provided copies to all counsel of record. Although New Venue's counsel did not file a written objection to the deposition subpoenas, he contended during the conference call that the Panel lacked legislative authority to issue such subpoenas and that the Panel's failure to adopt formal rules and procedures prevented it from authorizing discovery in a contract controversy.

In light of New Venue's objection, the Panel Chairman determined to convene a quorum of the Panel to consider the question of pre-hearing discovery in these cases. As a result, the Panel convened a hearing on September 17, 2014, to consider the issue. At the Panel hearing, Michael H. Montgomery, Esquire, represented the Board. John E. Schmidt, III, Esquire, represented New Venue. M. Elizabeth Crum, Esquire, and Shawn L. DeJames, Esquire, represented the CPO.

### **Discussion**

The underlying dispute between the parties involves a contract awarded to New Venue under an ITMO solicitation to acquire a statewide Software Acquisitions Manager. Because it will hear the merits of this case in the near future, the Panel makes no finding of fact regarding the parties' dispute other than to note that New Venue and the Board each have alleged that the other breached the contract. The issue presented to the Panel at its September 17th hearing and addressed herein is a pure legal question: Does the Panel have the authority to issue subpoenas requiring persons to attend depositions in accordance with Rules 30 and 45 of the South Carolina Rules of Civil Procedure? The Panel finds that it does have such authority, as explained below.

The Panel is created by statute and "charged with the responsibility to review and determine de novo" requests for further administrative review related to protests, contract

controversies, and suspensions or debarments. S.C. Code Ann. § 11-35-4410(1)(a) (2011). Section 11-35-4410(4)(a) establishes that the Administrative Procedures Act (the APA) does not apply to administrative reviews conducted by the Panel and vests the Panel with the authority to:

- (i) establish its own rules and procedures for the conduct of its business and the holding of its hearings;
- (ii) issue subpoenas;
- (iii) interview any person it considers necessary; and
- (iv) record all determinations.

S.C. Code Ann. § 11-35-4410(4)(a) (2011). Section 11-35-4410(4)(b) further provides that “[a] party aggrieved by a subpoena issued pursuant to this provision shall apply to the panel for relief.” S.C. Code Ann. § 11-35-4410(4)(b) (2011).

Although the Panel has not adopted rules specific to its administrative review of contract controversies,<sup>1</sup> it has adopted a procedural memorandum that addresses the question of subpoenas:

The Panel has the authority to issue subpoenas under S.C. Code Ann. Section 11-35-4410(4)(a)(ii), and will consider written requests for the issuance of subpoenas. The Panel will not issue “blank” subpoenas to be filled in by the party. The party requesting the subpoena is responsible for service of the subpoena.

Panel Memorandum to All Participants at page 3. This memorandum is provided to all parties after an appeal is filed with the Panel.

The Panel notes that neither the statute nor its memorandum in any way limits its ability to issue subpoenas.<sup>2</sup> In the absence of such limitation, the Panel finds that it has the discretion to

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<sup>1</sup> The Panel has noted a distinct increase in the number of contract controversy cases brought before it in the last two years. Given that increase and the fact that contract controversies are generally more complicated and fact dependent than protests, the Panel has determined that the adoption of formal rules governing such proceedings, and possibly governing suspension and debarment cases as well, is prudent. To that end, the Panel will soon begin work on drafting such rules.

issue subpoenas for any purpose requested by a party, including depositions, if it determines that doing so will benefit the process of its de novo administrative review. This finding is consistent with Panel precedent. *In re: Sodexo Operations, LLC, Appellant, v. Francis Marion University, Respondent*, Panel Case No. 2014-1(I) (Order on Motions, June 4, 2014); *see also In re: Petition for Administrative Review, GTECH Corp. v. South Carolina Education Lottery*, Panel Case No. 2002 (Order on Motions, May 3, 2002) (wherein the Panel quashed several Rule 30(b)(6) subpoenas on the ground of relevance, not its authority to issue such subpoenas). However, the Panel limits its holding today to its administrative review of contract controversies. In the instant case, the Panel finds that allowing depositions to take place may obviate the need to call all of the potential witnesses during the Panel’s hearing and may help to narrow the issues on appeal. Thus, the Panel will allow the Board to conduct the depositions it has noticed under Panel subpoenas.<sup>3</sup>

The depositions authorized by the Panel shall be conducted in accordance with the procedures set forth in Rule 30 of the South Carolina Rules of Civil Procedure. Furthermore, the use of the depositions in the Panel’s hearing on the merits will be governed by Rule 32 of the South Carolina Rules of Civil Procedure. Finally, the Panel designates its Chairman to consider and resolve any future discovery related motions.

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<sup>2</sup> Section 11-35-4410(4)(a)(ii) simply states the Panel has the authority to “issue subpoenas.” This language stands in stark contrast to the language granting subpoena powers to agencies that conduct contested case hearings under the APA: “The agency hearing a contested case may issue subpoenas in the name of the agency for the attendance and testimony of witnesses and the production and examination of books, papers, and records on its own behalf or, upon request, on behalf of another party to the case.” S.C. Code Ann. § 1-23-320(D) (Supp. 2013). The Panel noted above that the APA does not apply to its proceedings. Nonetheless, it is clear that if the legislature had likewise intended to limit the Panel’s subpoena authority, it surely would have included similar statutory language.

<sup>3</sup> To the extent New Venue objected to the issuance of deposition subpoenas because the Panel has not adopted formal rules regarding them, the Panel notes that its lack of formal rules regarding discovery does not violate due process. *Tall Tower, Inc., v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987). Any person aggrieved by a deposition subpoena issued by the Panel may apply to the Panel for relief, thus providing an opportunity to be heard in a meaningful time and in a meaningful manner. *Unisys Corp. v. South Carolina Budget and Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001).

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: *C. Brian McLane, Sr.*  
C. BRIAN MCLANE, SR., CHAIRMAN

This 29<sup>th</sup> day of September, 2014.

Columbia, South Carolina