

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 May 22, 2014, the Panel convened a hearing to address various motions filed by Sodexo and FMU.¹ Joel W. Collins, Jr., Esquire, and Kristian C. Bell, Esquire, represented Sodexo in the hearing before the Panel. David C. Holler, Esquire, represented FMU, and W. Dixon Robertson, III, Esquire, represented the CPO.

I. Background

Sodexo provides campus dining services at FMU. As part of those services, students at FMU have the option to purchase meal plans at a rate agreed to by Sodexo and FMU. The meal plan rates are established prior to each academic year as part in the Annual Plan process set forth in the parties’ contract. The dispute before the Panel concerns whether FMU is obligated to

¹ As a result of the Panel’s rulings on these motions, a hearing on the merits of Sodexo’s appeal will be scheduled for a later date.

reimburse Sodexo for State sales taxes Sodexo has been directed to collect on meal plan meals as the result of a South Carolina Department of Revenue (SCDOR) audit. For the purposes of this order, the Panel adopts verbatim the parties' Joint Stipulation of Facts, which was filed with the Panel on May 9, 2014:

- 1) Sodexo Operations, LLC ("Sodexo") furnishes food and dining services to Francis Marion University ("FMU") pursuant to Contract Number 08-S7677-A13771 (the "Contract").
- 2) The Contract was issued following Solicitation Number 08-S7677. (PRP36 – PRP104)
- 3) MMO [Materials Management Office] Procurement Officer Daniel Covey issued the statement of award in favor of Sodexo on May 19, 2008. (PRP118)
- 4) The terms of the contract govern the relationship between Sodexo and FMU. (PRP93)
- 5) 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). (PRP267 – PRP268)
- 6) Since the audit, Sodexo has continued to fulfill its contractual obligation to furnish dining services and meals to FMU.
- 7) According to SCDOR's letter dated March 14, 2012, a protest to the Proposed Assessment of SCDOR's auditors was due on June 14, 2012.
- 8) Sodexo notified FMU of the audit findings and tax liability on or before July 12, 2012. (1172-108 Sodexo 0048)²
- 9) Sodexo is required to submit to the FMU "any proposed changes to the Board Plan rates effective for the following year and ensuing summer sessions as part of the Annual Plan." (PRP77)

² In addition to the Joint Stipulation of Facts, the parties filed a Joint Exhibit List with the Panel on May 9, 2014. The citation here to "1172-108 Sodexo 0048" presumably references documents produced by Sodexo to FMU and designated as Item 3 in the parties' Joint Exhibit List. Although the Panel has adopted every stipulated fact presented in the Joint Stipulation of Facts for the purposes of this order, it notes that the only documents currently in its official file are those compiled in the Initial Record (numbered PRP1 – PRP325). The Initial Record itself is comprised of the documents the CPO transmitted to the Panel after Sodexo filed its appeal. During the Panel's motions hearing, counsel for both Sodexo and FMU referred to documents which they had exchanged, but which had not yet been presented to the Panel. If the parties have consented to these documents being automatically admitted into evidence, the Panel encourages them to file them with the Panel in advance of the merits hearing.

II. Motions for Summary Judgment

Both parties moved for summary judgment before the Panel. The Panel has considered and ruled on summary judgment motions in the past. *In re: Appeal of Triad Mechanical Contractors*, Case No. 2006-7 (October 19, 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any genuine issues of material fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Osbourne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment should be granted “when plain, palpable and undisputed facts exist on which reasonable minds cannot differ.” *Bayle v. South Carolina Dep’t of Transportation*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

In his order, the CPO found that Sodexo failed to utilize the Annual Plan process to request an increase in meal plan prices to account for sales taxes. Sodexo has appealed this finding to the Panel and contends that it did request such an increase. The Panel finds that genuine issues of material fact exist regarding the Annual Plan process and whether Sodexo’s request satisfied contractual requirements. In addition, the Panel finds that genuine issues of material fact exist regarding whether FMU’s response to Sodexo’s notice regarding the SCDOR audit constitutes an acceptance or rejection of Sodexo’s request for the payment of sales taxes. These issues of fact impact the relative rights and obligations of the parties under the contract.³ Therefore, the Panel denies both parties’ motions for summary judgment.

³ The Panel notes that its jurisdiction is limited to the administrative review of the contract documents. The Panel clearly does not have the authority to revisit SCDOR’s audit conclusions and will not entertain arguments

III. Discovery Related Motions

In addition to the motions for summary judgment, the Panel heard argument on one motion to compel; two motions to quash; one motion for sanctions; and one motion for costs and attorney's fees. The Panel observes that these motions reflect the fact that the parties have been embroiled in this dispute since the summer of 2012 and are unquestionably at odds. Nonetheless, the Panel takes this opportunity to remind them of their mutual obligation of good faith under the Procurement Code. S.C. Code Ann. § 11-35-30 (2011) ("Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. 'Good faith' means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.").

The Panel seeks to protect both the integrity of its proceedings and the character of the evidence presented to it so that it may fulfill its duties to resolve the controversy currently before it. Therefore, pursuant to its authority under section 11-35-4410(4)(a)(i), the Panel hereby instructs the parties that all documents and/or other data compilations which might impact on the subject matter of this litigation be preserved and that any ongoing process of destruction involving such documents cease. The parties are directed to notify any agent, employee, board member, or vendor having in their possession information relevant to the dispute of this duty to preserve that information. If any document requested by a party has previously been destroyed, the opposing party shall describe in detail the circumstances of and reasons for such destruction and produce all documents which relate to the circumstances or the reasons for such destruction.

challenging those conclusions. The Panel also reminds the parties that while its review is *de novo* and it will receive additional evidence, the issues it will hear "are limited to those raised before the Chief Procurement Officer." Panel Procedural Memorandum, "Record" at page 3; *accord, In re: Protest of Oracle USA, Inc.*, Panel Case No. 2007-10(II) (December 17, 2007) (wherein the Panel dismissed two issues raised by an appeal letter where those issues had not been raised first to the Chief Procurement Officer).

A. Sodexo's Motion to Compel

On April 7, 2014, the Panel issued, at Sodexo's request, a subpoena *duces tecum* that commanded FMU to produce all minutes and notes from FMU's Board of Trustees meetings from June 1, 2012 to present. On May 13, 2014, Sodexo moved for a Panel determination to compel production of minutes and notes for the following months:

- a. July 2012
- b. September 2012
- c. October 2012
- d. December 2012
- e. April 2[0]13
- f. May 2013
- g. July 2013
- h. September 2013
- i. October 2013
- j. December 2013
- k. January 2014
- l. February 2014
- m. March 2014
- n. April 2014

The Panel finds that such minutes and notes, if they exist, could be relevant to the dispute before it. Therefore, the Panel grants Sodexo's motion to compel and directs FMU to respond formally to Item 3 in such motion within thirty days of the date of this order.

B. FMU's Motion to Quash

On May 8, 2014, the Panel issued, at Sodexo's request, five subpoenas commanding the attendance of Mr. George C. McIntyre, Dr. H. Randall Dozier; Mr. L. Franklin Elmore; Mr. Kenneth W. Jackson; and Dr. L. Fred Carter at the Panel's hearing scheduled for May 22, 2014. Dr. Carter is the President of FMU, and the other subpoenaed individuals are members of the FMU Board of Trustees. The subpoenas also directed these individuals to produce at the hearing the minutes of any Board meetings they have within their possession. On May 16, 2014, FMU moved to quash these subpoenas on the grounds that any testimony elicited from these individuals would be irrelevant to the dispute before the Panel; that each of these individuals was unable to attend the May 22nd hearing because of job duties and responsibilities; and that the subpoenas were issued "solely for the purpose to intimidate, harass, and embarrass FMU's President and its Board members." Sodexo opposed FMU's motion to quash and argued that it had limited its subpoenas to those individuals likely to have knowledge of any Board subcommittee meetings at which the issue of sales taxes on meal plans might have been discussed.

The Panel finds that the subpoenaed individuals may have information relevant to the dispute before it and that Sodexo is entitled to question these individuals regarding their knowledge. Moreover, the Panel notes that the Conference and Scheduling Order previously issued in this case did not address other methods of discovery and that Sodexo reasonably requested the issuance of attendance subpoenas pursuant to section 11-35-4410(4)(a)(ii). Therefore, the Panel denies FMU's motion to quash at this time. However, as will be more fully explained below, the Panel will authorize additional discovery in this case. If it is determined at the conclusion of this additional discovery that these subpoenaed individuals do not possess

information or knowledge relevant to the issues on appeal, the Panel encourages Sodexo to consider withdrawing these subpoenas.

C. Sodexo's Motion to Quash

On its own initiative, FMU served Sodexo with Requests for Admission and Requests for Production of Documents on April 30, 2014. On May 13, 2014, Sodexo moved to quash these requests on the grounds that section 11-35-4410(4) of the Procurement Code limits discovery in Panel proceedings to the issuance of subpoenas. While the Panel acknowledges that section 11-35-4410(4)(a)(ii) expressly authorizes it to issue subpoenas, the Panel finds that it may also authorize other discovery under section 11-35-4410(4)(a)(i): "The Procurement Review Panel is vested with the authority to: (i) establish its own rules and procedures for the conduct of its business and the holding of its hearings." S.C. Code Ann. § 11-35-4410(4)(a)(i) (2011). While discovery needs in most protest issues are satisfied through the issuance of subpoenas, the Panel's practice over the last several years has been to issue scheduling orders in contract controversies. *See, e.g., In re: Contract Controversy – Agricultural Biotechnology/Molecular Biology Complex (EllisDon Construction, Inc., v. Clemson University)*, Panel Case No. 2005-2(III) (Undated Scheduling Order of M. Bakker, Hearing Officer); *In re: South Carolina Patients' Compensation Fund, Appellant/Respondent, v. Modus21, LLC, Respondent/Appellant*, Panel Case No. 2013-5(I) (August 21, 2013). While it may have been preferable for FMU to ask that it be permitted to serve its Requests for Admission and Requests for Production through the Conference and Scheduling Order previously filed in this case, the Panel finds that the failure to do so is not fatal in this instance, especially in light of the fact that a merits hearing will now be scheduled for a later date. Therefore, the Panel denies Sodexo's motion to quash and directs

Sodexo to respond to FMU's requests as directed below in the amendment to the Conference and Scheduling Order.

D. FMU's Motions for Sanctions, Costs, and Attorney's Fees

In response to Sodexo's motion to compel, FMU moved for the imposition of sanctions against Sodexo. FMU argued that Sodexo violated Rule 11 of the South Carolina Rules of Civil Procedure because Sodexo's counsel failed to consult with FMU's counsel prior to filing the motion to compel. Although the Panel has looked to the South Carolina Rules of Civil Procedure in the past for guidance, it has not adopted Rule 11 and declines to do so in this instance. Thus, the Panel denies FMU's motion for sanctions.

In addition, FMU sought an award of costs and attorney's fees based alternatively on Rule 45(c)(1) of the South Carolina Rules of Civil Procedure or section 11-35-4330⁴ of the Procurement Code. The Panel has adopted the protections afforded by Rule 45(c)(1) to persons responding to subpoenas, including the award of costs and attorney's fees. However, in light of the Panel's denial of FMU's motion to quash the subpoenas issued to FMU's President and Board members, the Panel also denies FMU's request for costs and attorney's fees. Furthermore, the Panel finds that section 11-35-4330 is inapplicable based on the Panel's decisions herein to grant Sodexo's motion to compel and to deny FMU's motion to quash.

E. Provision for Additional Discovery and Amendment to the Conference and Scheduling Order

As discussed above, the Panel will permit limited additional discovery in this case pursuant to its authority under section 11-35-4410(4)(a)(i) of the Procurement Code. First, Sodexo is directed to respond to FMU's Requests for Admissions and Requests for Production

⁴ Section 11-35-4330 authorizes the Panel to impose an appropriate sanction, including a reasonable attorney's fee, upon a showing that a motion has been "interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of . . . the litigation." S.C. Code Ann. § 11-35-4330(1) and (2) (2011).

within thirty days of the date of this order. Second, the Panel will permit telephonic depositions of the individuals Sodexo subpoenaed to appear at the Panel's May 22nd hearing for the purposes of determining whether these witnesses have any knowledge of the dispute before the Panel and/or possession of documents related to that dispute. The Panel implores the parties to communicate and work cooperatively to schedule these depositions.⁵ In the event agreement cannot be reached, however, the Panel will consider issuing subpoenas commanding such depositions if requested. Third, the Panel designates its Chairman to consider and resolve any future discovery related motions.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 14th day of June, 2014.

Columbia, South Carolina

⁵ The Panel is working to schedule a new merits hearing to be held as soon as is practicable and would prefer that the depositions be completed no later than ten (10) days prior to the scheduled hearing. However, the Panel acknowledges that the new hearing date may affect the parties' ability to comply. If the parties desire that a new conference and scheduling order be issued once the new hearing date is set, they should contact counsel for the Panel.