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Decision

Matter of: Request for Resolution of Contract Controversy by United Way
Association of South Carolina

Case No.: 2018-113

Posting Date: May 3, 2018

Contracting Entity: South Carolina Department of Health and Human Services

Solicitation No.: Emergency Procurement

Description: Provision of Services for Medicaid Beneficiaries, Potential Beneficiaries
and/or Third Parties Inquiring About the South Carolina Medicaid
Program

The South Carolina Consolidated Procurement Code (the “Code”) authorizes a contracting state agency or the contractor or subcontractor, when the subcontractor is the real party in interest, to initiate resolution proceedings before the appropriate chief procurement officer of controversies that arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. S.C. Code Ann. § 11-35-4230 (2012). United Way Association of South Carolina (UW) requested resolution of issues related to its contract with the South Carolina Department of Health and Human Services (DHHS) for the Provision of Services for Medicaid Beneficiaries, Potential Beneficiaries and/or Third Parties Inquiring About the South Carolina Medicaid Program. [Attachment 1]

BACKGROUND

UW has provided 2-1-1 and call center services to DHHS through a series of sole source contracts since at least 2002.¹ DHHS, without competition, awarded UW another sole-source contract for these services on July 1, 2012, at a total cost of \$996,000. The 2012 contract required UW to operate the call center from 8:00 AM until 6:00 PM five days per week, exclusive of holidays recognized by the State of South Carolina, and to respond to Medicaid beneficiaries, potential beneficiaries, and/or third parties inquiring about the South Carolina Medicaid program. It anticipated an average of 15,000 calls per month; required telephony infrastructure to handle 30,000 calls per month; and allowed up to 35% of calls to be routed to third parties. In May of 2013, DHHS amended the agreement to include responding to its clients for Community Long Term Care (CLTC) Services for an additional \$16,500.

UW and DHHS entered into a new sole-source contract on July 1, 2013. The 2013 agreement included Medicaid Call Center Services, Health Care Reform Assistance Call Center Services, and CLTC Services at a cost of \$1,827,767. UW was to bill DHHS \$152,314 monthly, in arrears. The contract anticipated an average of 22,000 calls per month and required telephony infrastructure to handle 40,000 calls per month. Like the previous contract, it allowed up to 35% of calls to be routed to third parties. Operating hours were unchanged. On September 16, 2013, the parties amended the contract, modifying requirements for the Health Care Reform Assistance Call Center Services and adding Healthy Connections Consumer Portal Call Center Services. The amendment added to UW's staffing and training responsibilities; set specific service levels and other metrics; and provided for liquidated damages if those service levels were not met. It increased operating hours to include Saturdays from 8:00 AM until 1:00 PM. UW's fee increased

¹ DHHS's justification for the July 1, 2012, contract recites that UW had been the sole 2-1-1 provider for over ten years.

by \$615,979, to \$2,443,746. It could bill DHHS monthly, in arrears, for \$217,916, plus an additional amount in September 2013 to cover expenses of hiring and training additional staff.²

The parties negotiated another sole-source contract on July 1, 2014. The scope of the 2014 agreement made few substantive changes from the requirements of the 2013 contract and its Amendment 1. It anticipated an increase in call volume from 22,000 to 30,000 calls per month and required capacity to increase from 40,000 to 50,000 calls per month. It also allowed a higher percentage of calls to be routed to third parties. UW's monthly fee increased to \$240,968. Effective January 1, 2015, DHHS and UW amended this contract by adding an additional fee of \$1,590,762. The amendment more than doubled the anticipated call volume, from 30,000 to 80,000 per month; doubled capacity requirements from 50,000 to 100,000 calls per month; and halved the percentage of calls allowed to be routed to third parties from 40% to 20%. Monthly payments to UW increased from \$240,968 to \$446,736, except for a one-time payment in January 2015 of \$802,889.

In its 2014 report, the audit section of the Division of Procurement Services took exception to DHHS' issuing call center contracts without competition. The report specifically referenced the 2012 and 2013 contracts. DHHS concurred with these findings, and agreed to compete its next contract for these services.³ Because of a concern that a replacement contract could not be awarded before the expiration of the 2015 agreement, DHHS declared an Emergency under Section 11-35-1570 on June 15, 2015. It entered into a one-year contract with UW for essentially the same services at a rate of \$446,736 per month, not to exceed \$5,360,832.00. UW was to invoice DHHS monthly in arrears for the services provided. UW was to operate the SCDHHS service from 8:00am - 6:00pm, Monday through Friday, following the State of South Carolina's

² The amendment also contemplated an additional monthly fee of \$51,881, beginning in December 2013, if the parties agreed that increases in call volume required UW to hire additional staff. Nothing in the record indicates if these additional fees were paid.

³ Pursuant to a delegation from the CPO, DHHS issued Solicitation No. 5400011045 for Member Contact Center Services for Medicaid beneficiaries, potential beneficiaries, and/or third parties inquiring about the South Carolina Medicaid program on February 18, 2016. Proposals for a replacement contract were received on May 3, 2016. Six months after receipt of proposals for a replacement contractor, DHHS issued an Intent to Award to Xerox State Healthcare, LLC on November 17, 2016. After an unsuccessful protest by Palmetto GBA, LLC, the award became final on February 13, 2017.

holiday schedule and inclement weather policy. It was anticipated that UW would provide sufficient staff to answer an average of 85,000 calls per month with telephony infrastructure to handle 100,000 calls per month, with up to 20% of calls routed to third parties. The Emergency contract would remain in full force and effect until such time as a competitive contract could be awarded and the emergency no longer existed. The contract (like the two previous agreements) also required UW to include on every monthly invoice a signed and dated statement thus:

The Contractor shall incorporate the following certification statement in each of its monthly invoices:

I do solemnly swear (or affirm) that I have examined the information contained in this request or report. That all information has been prepared from the books and records of Contractor. That the aforesaid information is true and correct to the best of my knowledge and belief; and, that no other request for payment from other federal and/or state funds has been made nor has any other payment been received, applied for, nor will they be applied for, for the services herein described. That Contractor has on file the proper documentation to support this request for payment. And, that the costs represented are true costs incurred during the period of this request.⁴

This statement must be signed and dated by a finance person duly authorized by Contractor....

Records indicate that at the end of each month, UW sent DHHS one invoice in the amount of \$443,986 for Medicaid Services and another invoice in the amount of \$2,750 for CLTC Services. The Medicaid invoices included the required certification, the CLTC invoices did not.

The Emergency contract with UW was amended (Amendment One) on May 9, 2016, to expand the hours of operation for Medicaid Call Center Services to include Martin Luther King Day, Presidents Day, Confederate Memorial Day, Independence Day (when the holiday falls on the weekend), Veterans Day, the day after Thanksgiving and the day after Christmas at a cost not to exceed \$95,222.13, or approximately \$13,600 per holiday. By December 31, 2016, UW had invoiced DHHS for four holidays as authorized by the amendment. Payment for those charges is not disputed.

⁴ This certification was required by every sole source contract and amendment to appear on any invoice for Medicaid Services.

On February 15, 2017, the Emergency contract with UW was again amended. (Amendment Two) This amendment extended the contract until July 31, 2017, increased the monthly reimbursement from \$446,736 to \$550,000, and defined transition activities. The parties agreed in the amendment “to discuss and define the scope of any transition plan,” and to set out any additional terms in a separate agreement. This amendment is the source of UW’s request for resolution.

On August 15, 2017, UW filed a request for resolution of a contract controversy. [Attachment 1] Its first cause of action alleges, first, that the increase in UW’s fee, negotiated in Amendment Two was retroactive to the beginning of the contract on July 1, 2015, and that DHHS thus owes UW \$2,065,280,⁵ plus late payment penalties; and second, that DHHS breached the terms of Amendment Two by failing to negotiate a separate agreement for transition services. Its second cause of action claims that SCDHHS’s failure to agree to terms for transition services violated the statutory duty of good faith and fair dealing imposed by S.C. Code Ann. § 11-35-30.

On August 31, 2017, DHHS responded to UW’s allegations and filed a counterclaim alleging UW breached the contract and acted in bad faith by submitting invoices for retroactive price adjustments that are neither provided for in the contract nor in compliance with the required certification statement, demanding a transition contract to provide services already required by the contract, threatening to terminate the contract because DHHS would not pay the invalid invoices or enter into another contract for services already required by the contract, attempting to interfere with DHHS’ orderly transfer of the main call-in number, and submitting altered invoices. [Attachment 2]

On September 6, 2017, UW amended its request for resolution and responded to DHHS’ counterclaims. [Attachment 3] On September 5, 2017, UW moved to dismiss DHHS’ counterclaims alleging that the CPO lacks power, jurisdiction and authority to decide any claims

⁵ This figure represents the increase in monthly fee under Amendment Two ($\$550,000 - \$446,736 = \$103,264$), for the twenty months from July 2015 through February 2017.

by the State or any governmental body as against a contractor for the recovery of monetary relief. [Attachment 4]

DISCUSSION

UW's first cause of action alleges two breaches of the contract by DHHS. The first alleged breach is that DHHS refused to pay the monthly amount stipulated in Amendment Two retroactive to the beginning of the contract on July 1, 2015 and associated late payment penalties. DHHS argues that there was no agreement in Amendment Two to make the payments retroactive to the beginning of the contract.

RETROACTIVE EFFECT OF PRICE INCREASE

Amendment Two modified the monthly payment terms from \$446,736 to \$550,000. UW argues:

Amendment Two is clear and unambiguous in that it specifically provided that the Contract payment amount as revised by the Amendment would be *effective July 1, 2015*. See Amendment Two, Article I.

Article I as it appeared in the July 1, 2015 agreement read:

ARTICLE I CONTRACT PERIOD

This Contract shall take effect on July 1, 2015 and shall, unless sooner terminated in accordance with Article VII, continue in full force and effect until the emergency no longer exists. The services described herein shall be provided throughout the entire Contract period either through funds made available by this Contract or by other funds. If any services are provided on or after July 1, 2015 but prior to the execution date of the Contract, such services shall be reimbursed in accordance with the Contract.

Amendment Two modified Article I as follows:

NOW, THEREFORE, the following revisions shall be accomplished and incorporated into the July 1, 2015 Contract, as amended, effective as if fully set forth therein.

REVISION I

NOW THEREFORE, **ARTICLE I, CONTRACT PERIOD**, shall be revised and amended and shall now read as follows:

ARTICLE I CONTRACT PERIOD

This Contract shall take effect on July 1, 2015 and shall, unless sooner terminated pursuant to Article VII(A)- (H), continue in full force and effect until July 31, 2017. The services described herein shall be provided throughout the entire Contract period either through funds made available by this Contract or by other funds. If any services are provided on or after July 1, 2015 but prior to the execution date of the Contract, such services shall be reimbursed in accordance with the Contract. At the end of the initial contract period, and at the end of any renewal term, this Contract shall automatically renew for a period of thirty (30) days, unless Contractor or SCDHHS receives written notice that the other will terminate the Contract not later than sixty (60) days prior to the expiration of the Contract period or any subsequent renewal term.

(highlighting added to identify changes)

The amendment states no more than Article I was being revised and the revisions were those highlighted above. The only substantive modification appears in the first sentence: the indefinite termination date, “until the emergency no longer exists,” is replaced with a date certain, July 31, 2017. There is no change to Article I indicating that the change in payments would be retroactive to the beginning of the contract.

The Amendment also modifies Article IV(A), METHOD OF REIMBURSEMENT. The language in the July 1, 2015 agreement read as follows:

SCDHHS shall pay Contractor an amount not to exceed Five Million, Three Hundred Sixty Thousand, Eight Hundred Thirty-Two Dollars (\$5,360,832) for services provided pursuant to this Contract. The Contractor shall invoice SCDHHS in arrears for fees on a monthly basis in the amount of Four Hundred Forty-Six Thousand, Seven hundred Thirty-Six Dollars (\$446,736).

Amendment Two modified Article IV as follows:

NOW THEREFORE, **ARTICLE IV, CONDITIONS FOR REIMBURSEMENT BY SCDHHS**, shall be revised and amended and shall now read as follows:

A. METHOD OF REIMBURSEMENT

SCDHHS shall pay Contractor an amount not to exceed \$95,222.13 for services provided pursuant to Amendment One. The Contractor shall invoice SCDHHS in arrears for fees on a monthly basis in the amount of Five Hundred Fifty Thousand Dollars (\$550,000) plus any additional amounts for Amendment One. Amendment One may end prior to a given holiday listed in Section 1. Any holiday where services are not provided or the Contract ends prior to services being provided shall not be compensated.

(highlighting added to identify changes) The original agreement and both Amendments One and Two included the certification requirement discussed in the text accompanying note 6, *ante*. Nothing in the changes to Article IV(A) indicates that the parties intended the increased monthly payments to be retroactive to the beginning of the contract.

Finally, the following text appears above the parties' signatures on Amendment Two:

IN WITNESS WHEREOF, SCDHHS and the Contractor, by their authorized agents, have executed this Amendment as of the 15th day of February, 2017.

The parties could have said the amendment was to relate back to the inception of the contract, but they did not. Instead, they noted that the amendment was signed "as of the 15th day of February, 2017."

The primary aim of contract interpretation is to determine and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App.1990). In determining the intention of the parties, one must first look to the language of the contract. *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 373 S.E.2d 584 (1988). The meaning of a written agreement must be found by reference to the whole document. *Carr v. United Van Lines, Inc.*, 289 S.C. 194, 345 S.E.2d 734 (Ct. App.1986). If the contract is clear and unambiguous, there is nothing to interpret and the text alone determines the force and effect of the agreement. *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985).

The CPO finds that Amendment Number Two is not ambiguous regarding the retroactive effect of the monthly price increase. The recitations indicate that the amendment is forward-looking:

“the following revisions *shall be accomplished...*” (emphasis supplied). Revision I changes the contract period by establishing a *future* date certain as the termination of the agreement. Revision II defines a number of activities *to be performed* by the contractor as Transition Activities. Revision III, which increases the monthly fee, provides “The Contractor *shall invoice* SCDHHS in arrears for fees on a monthly basis...” (emphasis supplied). Nothing in Revision III speaks to repricing work UW had already performed over the preceding twenty months. There simply is no language in the amendment to indicate an intention that the price increase would apply retroactive to the inception date of the contract. Where the intent to make an agreement retroactive is not clear on the face of the contract, courts have declined to apply modifications retroactively. *AgroFresh Inc. v. MirTech, Inc.*, 257 F. Supp.3d 643, 661 (D. Del. 2017).

Since the amendment is unambiguous, extrinsic evidence cannot be used to give it a meaning different from that indicated by its plain terms. *C.A.N. Enterprises, ante*, at 377–78, 373 S.E.2d at 586. Even if there were an ambiguity, though, correspondence during negotiations plainly shows the parties did not intend for the amendment to be retroactive. On December 22, 2016, DHHS proposed \$446,736 per month plus the amount for any services provided pursuant to Amendment One and that the contract end on June 30, 2017. It included an option for month-to-month renewals thereafter, “at the sole discretion of the SCDHHS.” On January 5, 2017, UW responded through counsel after the new year. He included a “proposed amendment” that extended the contract until December 31, 2017, with automatic one-year renewals unless DHHS gave 60 days’ notice of non-renewal prior to the end of the term. It required monthly payments of \$800,000 beginning January 15, or a total of \$9,600,000 for the proposed one-year term. It purported to eliminate any contract adjustments resulting from an audit that apparently was then underway, and to suspend any additional contract audit activities. Finally, it provided that the service level credits and liquidated damages provisions of the original contract “shall be void and of no effect.” The amendment proposed by UW did not include a retroactive fee increase.

DHHS returned a redlined proposal a few days later. It changed the termination date to July 31, 2017, with automatic month-to-month renewals thereafter unless canceled. It added a description of transition services, left the fee at the original monthly rate of \$446,736, but provided for an

increase beginning May 1, 2017, based on the consumer price index for all urban consumers. DHHS struck through UW's audit terms and elimination of service level credits and liquidated damages.

UW's legal counsel responded by electronic mail on February 1, 2017. He wrote:

Your team must recognize that your proposed six month contract and 30 day extension terms are unfair to the good employees of United Way who have dedicated themselves to service under this contract for a long time. There is a human element at play here, and your agency, maybe more than any other, should be sensitive to this.

In view of the above, United Way seeks to gain your agency's approval of the following simple terms *for an extension*:

1. Monthly pricing of 550,000.00 (far below market rate);
2. Duration of one year;
3. Written Notice of termination of 60 days prior to the end of any given term;
4. Automatic extensions of 90 days unless such notice is given.

(emphasis supplied). Later that day, DHHS requested substantiation of UW's requested fee:

For the requested monthly increase to \$550,000 to be considered, please provide a detailed description of the basis for the requested increase. The Department continues to offer a guaranteed period of six months at this time, with automatic 30-day extensions and a 60-day notice of termination clause.

UW provided some of the requested information. On February 13, 2017, DHHS emailed UW's counsel:

My folks have agreed to the \$550,000 monthly fee. I've attached a proposed draft Amendment Two which I believe incorporates everything we've agreed upon. Please note that we removed the one time CPI-U increase that was previously in there, since we agreed to a lump sum increase to 550K.

I think we have a deal that can be submitted to CMS for approval.

On February 14, 2017, UW's counsel responded:

All I can say is if that is the best and final offer, please have it signed and send to me and we will have our client sign. We will turn it around same day and it will be done.

Need this week.

On February 20, 2017, UW returned the amendment, signed, to DHHS.

In a nearly indistinguishable claim, the United States Court of Appeals for the Federal Circuit found evidence like that described above failed to establish that an amendment was retroactive:

Even if there were an ambiguity in the contract, the negotiating history of the contract shows that it was not intended to be retroactive.... We see no error in the BCA's findings that Gardiner's testimony regarding various meetings with HUD officials does not establish that the parties agreed to make Modification 2 retroactive, and that Gardiner's letter does not reveal any communications to that effect. The parties had previously had a dispute regarding the prices for task orders 13 and 14 during the original negotiations for those task orders in 1996, and GKA had reluctantly agreed to the government's prices. During the period of performance of those task orders before Modification 2, GKA urged repeatedly that the prices should be modified. There was another dispute on this very issue during negotiations over the extension. *Against this background, it seems inconceivable that the parties would have agreed to retroactive pricing without making that intent explicit either during the negotiations leading to the agreement or in the agreement itself. Since they did neither, we conclude that even if there were an ambiguity in the language, it should be resolved in favor of the government's position.*

Gardiner, Kamy & Assocs., P.C. v. Jackson, 467 F.3d 1348, 1353 (Fed. Cir. 2006) (emphasis added). UW's claim for \$2,065,280 is denied.⁶ Since the amount demanded is not due, neither is any interest UW claimed.

⁶ In its original request for resolution, UW claimed that it "properly invoiced SCDHHS in accordance with the Contract, as amended," for the retroactive payments and late payment penalties. The following day, August 16, 2017, its lawyer furnished a number of documents to the CPO and other counsel, including three invoices he represented that his client had submitted to DHHS: No. DHHSADJ2017 dated March 7, 2017, for \$2,065,280; No. DHHS INT#1 dated April 27, 2017, for \$1,412.65; and No. DHHS INT#2 dated May 19, 2017, for \$8,135.57. Each of these invoices included a certification by Richard R. Butcher, Chief Financial Officer for UW, as required by the contract. In response DHHS denied ever having received those invoices with Mr. Butcher's certification, or any certification. DHHS furnished an affidavit averring that the only copies of the three invoices UW had sent to it contained no certification. Attached to the affidavit were copies of the three invoices, with no certification. Among the defenses the agency asserted was that it was not obliged to pay any invoice lacking the required certification. Confronted with this information, counsel for UW acknowledged that the original versions of these invoices as submitted to DHHS did not include the required certification. He apparently furnished amended invoices bearing the same invoice numbers, dates, plus the required certification to DHHS on or about September 6, 2017, without any indication of their actual creation date or that they were amended invoices. In his email transmitting an amended request for resolution, counsel characterized this as "a simple mistake we have confirmed through careful

AGREEMENT FOR TRANSITION SERVICES

UW's second allegation claims that DHHS refused to negotiate a transition agreement "as required by the terms of the parties Contract." Two months after signing Amendment Two, Kelly Callahan Cruise, UW's Interim CEO, corresponded with DHHS about transition activities. On May 30, Elizabeth Hutto, DHHS' Deputy Director, wrote Ms. Cruise requesting UW transfer the toll-free telephone number for the call center. In an email to DHHS' general counsel dated June 5, 2017, UW, through counsel, refused to perform any transition work until "the transition agreement addressed by our existing agreement is signed." There were two attachments to the message. First was a brief description of transition tasks, with no schedule dates. It was no more than a repackaging of the "Transition Activities" set out in Amendment Two. Second was a document prepared by UW's lawyer titled "Transition Agreement." It called for DHHS to pay UW \$3.7 million dollars over a six-month turnover period. According to the agency's response to these claims, after reviewing the "Transition Agreement," DHHS "determined that the only transition item it would seek from the United Way was ownership and control of the Community Long Term Care toll free number...."

Three days later counsel followed up in another email:

Thanks for discussing with me the other day the United Way issues we encountered with HHS staff seeking performance of a contract that has not yet been signed. I would ask you to firmly instruct your team on this today, early,

examination of our records." In fact, it was DHHS, not UW or its lawyer, who confirmed that the invoices UW had submitted lacked any certification.

Counsel for UW also represented to the CPO:

It is noteworthy that a number of past invoices lacked particular aspects of certification, but they had, up to the time of this dispute, always been paid by SCDHHS, and at no time were any invoices rejected for any such non-compliance, such requirements obviously having been waived as a matter of course of dealing and performance.

In fact, UW submitted two invoices each month beginning in August 2015 and continuing through March 31, 2017, one for the Medicaid Call Center Services in the amount of \$443,986.00 which always included the required certification, "signed and dated by a finance person duly authorized by Contractor," and a second invoice for the CLTC Services Community Long Term Care Services in the amount of \$2,750.00 which did not include the certification. Contrary to counsel's assertion, there was no course of dealing to submit or pay invoices for Medicaid Services without the required certification.

because my client continues to deal with this problem. Please confirm to me this has been managed. Then, let's discuss when this agreement will be finalized so we not have to deal with this complexity.

On June 14, 2017, DHHS advised UW's lawyer it would retain private counsel to represent the agency "in all matters related to our contract with United Way," and asked that all further communications be directed to outside counsel. Those communications were unsatisfying to all, and on July 12, 2017, UW's lawyer wrote the agency's outside counsel:

I have had a chance to review your letter with my client.

We disagree with your assertions in it extensively. Even a cursory reading of the emails and documents you reference shows your attempt to characterize them is not just misplaced, but is roundly contradicted. And your client's complaints about transition problems are obviously caused by your client's own contract breach by its inexplicable refusal to negotiate in good faith a transition agreement. I remind you that your anticipated new contractor proposed far more in charges for transition services than the amount United Way sought for the obviously needed transition services. To say such charges aren't in good faith is not very supportive of your new prospective contractor, among other things....

Subsequently UW refused to transfer the call center's toll-free number. On July 27, 2017, its lawyer wrote agency counsel demanding that DHHS:

...stop any and all efforts to convert the [call center toll-free] telephone number to its own use and [] not take any actions inconsistent with United Way's rights in that number. If we do not receive such written assurances by the stated deadline, United Way will file claims against HHS, including claims for conversion and tortious interference with contract, in Circuit Court on Monday, July 31, 2017.

Just over two weeks later UW filed its request for resolution. Respecting transition services, it alleged:

Although Amendment Two provided that the parties would discuss and define the terms of a transition agreement detailing services and payment for transition activities required to transition certain work and services to a new contractor, SCDHHS failed and refused to negotiate the transition services agreement.

United Way promptly provided a draft Transition Agreement to SCDHHS for review, comment and negotiation, but SCDHHS refused to negotiate such agreement as required by the terms of the parties Contract, despite United Way's

numerous requests. Furthermore, in bad faith, SCDHHS persisted throughout the ensuing months in demanding that United Way personnel perform transition activities despite SCDHHS' refusal to negotiate a contract for those services as agreed.

Revision II of Amendment Two listed contractor responsibilities for transition activities. It included subsections summarizing the transition plan; describing the transition approach; and specifying personnel for the transition team. It provided that DHHS would determine when transaction was complete, and required UW to continue contract work until DHHS formally accepted the transition. To the extent these provisions added to the contract scope of work, they were the only changes. Revision IV provided in relevant part:

2. The parties agree to discuss and define the scope of any transition plan and the terms thereof in accordance with Revision II of Amendment Two, and that any agreement on such transition plan and terms will be separate from this agreement.

Nearly a year before Amendment Two was signed, on April 11, 2016, Ms. Cruise had provided "rough cost estimates regarding the Turnover portion of the Emergency contract." That estimate totaled \$272,650.⁷ Revision III of Amendment Two increased UW's monthly compensation by \$103,264 and guaranteed a six-month extension of the contract, adding nearly \$620,000 to UW's total compensation. The CPO is convinced that Amendment Two includes all material terms for transition services; and that the cost of transition services (even if they were not part of the original scope of work) was included in the monthly fee increase. If it were otherwise, the amendment might be unenforceable. *See Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014) ("[A]n agreement which leaves open material terms is unenforceable.")

⁷ It appears that, contemporaneous with this communication, Ms. Cruise signed and returned to DHHS a version of Amendment One that included a "Turnover Plan" in more detail than ultimately ended up in Amendment Two. The version Ms. Cruise signed did not increase the monthly fee (besides payment for holidays), nor did it extend the contract. This version obliged UW to continue performance at the contract rate, and made clear that transition services were included in the scope of work. It is not clear to the CPO why an additional or different version of the amendment needed to be negotiated at all.

If the quoted text of Revision IV has any meaning at all, it is no more than an agreement to agree. “Provisions which are essentially agreements to agree in the future have no legal effect.” *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015); *accord, Stevens and Wilkinson of South Carolina, ante* (“...the MOU is therefore unenforceable. It is only an agreement to agree in the future outlining the framework under which the parties would proceed to negotiate the development of the hotel.”). At most, the modification obliges the parties “to discuss and define the scope of any transition plan and the terms thereof.” They did exactly that. Email exchanges between the parties indicate that discussions about the transition plan occurred. An email from DHHS’ Beth Hutto states that DHHS’ draft transition document was undergoing an internal review. An email from UW’s Kelly Callahan to DHHS’ Gwendolyn Gaymon on April 11, 2017, included a rough estimate of \$272,650 for the Turnover portion of the Emergency Contract. A June 5, 2017, email from UW’s legal counsel included a draft transition plan task list and transition agreement. Clearly, there were discussions as contemplated by the Amendment. However, not all contract negotiations result in an agreement. UW reads the Amendment as a mandate that the parties form a separate agreement on the scope and terms of a transition plan. This interpretation is not supported by the text of the amendment. It states simply “that *any agreement on such transition plan and terms* will be a separate agreement” (emphasis supplied). In this case there was no agreement by the parties, no separate agreement, and no breach of the contract by DHHS for failure to reach a separate agreement.

DUTY OF GOOD FAITH AND FAIR DEALING

UW’s second cause of action alleges that DHHS breached its statutory duty of good faith and fair dealing by refusing to negotiate the transition agreement and demanding that UW employees perform transition services nonetheless.

S.C. Code Ann. § 11-35-30 imposes an obligation of good faith and fair dealing:

Every contract ... 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.

This section reflects South Carolina common law recognizing an implied covenant of good faith and fair dealing in every contract. *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850, 853 (1992). Breach of the covenant, though, is not an independent cause of action separate from a claim of breach of contract. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004); *King v. Carolina First Bank*, 26 F. Supp. 3d 510 (D.S.C. 2014). To the extent that UW seeks damages for DHHS' alleged breach of the duty of good faith and fair dealing—apart from UW's breach of contract allegations—it fails to state facts sufficient to support a claim upon which relief can be granted.

UW MOTION TO DISMISS

DHHS asserted two counterclaims against UW: one for breach of contract and another for breach of the statutory duty of good faith and fair dealing. UW moved to dismiss the counter claims on constitutional grounds. It argues that the General Assembly, by providing for adjudication of claims *by the State* in S.C. Code Ann. § 11-35-4230, violated Article I, Section 8, and Article V, Section 11, of the South Carolina Constitution. According to UW, the CPO thus lacks power, jurisdiction and authority to decide any claims by the State or any governmental body as against a contractor for the recovery of monetary relief. The CPO lacks authority to hear questions of constitutionality and must presume that all duly enacted laws of the General Assembly are constitutional. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (An agency of the executive branch of government must follow the law as written until its constitutionality is judicially determined; it has no authority to pass upon the constitutionality of a statute or regulation); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 516 S.E.2d 655 (1999) (An administrative agency must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute); *South Carolina Tax Comm. v. South Carolina Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983) (An agency must obey a law

found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.).

Section 11-35-4230 Authority to resolve contract and breach of contract controversies provides:

(1) **Applicability.** This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code.

By its terms, Section 11-35-4230 is the exclusive means of resolving controversies between the State and its contractors arising from a contract awarded pursuant to the Consolidated Procurement Code. It makes no distinction based on which party asserts the claim. Accordingly the CPO will consider and determine the Department's counterclaims against UW.

DHHS COUNTERCLAIMS

DHHS' first counterclaim is for breach of contract, based on UW's submittal of invoices contrary to the terms of Amendment Two. DHHS did not request any specific relief for the alleged breach, and offered neither claim nor proof for monetary damages. An action for breach of contract has three elements: contract, breach, and resulting damages. Assuming without deciding that UW's acts described in the first counterclaim do, in fact, breach the contract, the absence of any damage is fatal to the Department's claim.

The second counterclaim alleges United Way breached the statutory duty of good faith and fair dealing by submitting the invoices for retroactive payment that it knew were not provided for by the Amendment, lacking the required certification, then later submitting modified invoices without any indication that they were modified, when or to what extent they were modified. DHHS argues that the certification on the modified invoices which attests that "no other request

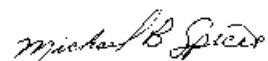
for payment from other federal and /or state funds has been made nor has any other payment been received, applied for, nor will they be applied for, for the services herein described” was submitted in bad faith since UW had already invoiced and received payment for the services rendered since the beginning of the contract. DHHS also cites UW’s submission of the altered invoices with its request for resolution, without disclosing the invoices had never been submitted to DHHS for payment. Finally, DHHS points to UW’s demand for a transition contract at a price of \$3.4 million over UW’s initial internal estimate of the transition costs of \$272,650, UW’s threats to terminate the contract if DHHS didn’t pay the retroactive invoices, and UW’s attempted interference with the transfer of the mail call-in number to the new contractor as examples of UW’s violation of its obligation of good faith and fair dealing.

While DHHS may be entitled to some relief, it is not through a breach of contract claim. For the same reasons discussed above—breach of the duty of good faith is not an independent cause of action separate from a claim of breach of contract—DHHS’ independent claims for breach of the duty of good faith and fair dealing fail to state facts sufficient to support a claim upon which the CPO can grant relief.

CONCLUSION

In this case, UW has been compensated as required under the contract. DHHS’ refusal to pay invoices not authorized by the contract or any amendment is not a breach of the contract. The failure to reach a separate agreement for transition services beyond those agreed to in Amendment Two is not a breach of contract nor is it a breach of the obligation of good faith and fair dealing. For the reasons discussed above, all claims and counterclaims are dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
United Way Association of South)	
Carolina, Inc.	)	REQUEST FOR RESOLUTION OF
	)	CONTRACT CONTROVERSY
vs.)	
)	
South Carolina Department of Health)	
and Human Services)	
)	

Claimant, United Way Association of South Carolina (“United Way”), by and through its undersigned counsel, asserts its request for resolution of a contract controversy and claims as against the State of South Carolina Department of Health and Human Services under law, including S.C. Code § 11-35-4230, as follows:

GENERAL ALLEGATIONS

1. This controversy concerns a contract solicited and awarded under the South Carolina Consolidated Procurement Code. The Chief Procurement Officer or his designee has exclusive jurisdiction over the claims alleged herein pursuant to S.C. Code Ann. § 11-35-4230.

2. On or about July 1, 2015, South Carolina Department of Health and Human Services (“SCDHHS”) entered into a contract (“Contract”) with United Way for call center services. United Way and SCDHHS are collectively referred to as the “parties.”

3. SCDHHS is a governmental body and is an agency of the government of the State of South Carolina.

4. United Way is a not for profit organization and is or was at all relevant times a contractor to SCDHHS.

5. On or about May 9, 2016, the parties entered into Amendment One to the Contract.

6. On or about February 15, 2017, the parties entered into Amendment Two to the Contract.

7. Amendment Two modified the amount and method of payment to United Way and provided that “the contractor shall invoice SCDHHS in arrears for fees on a monthly basis in the amount of Five Hundred Fifty Thousand Dollars (\$550,000) plus any additional amounts for Amendment One.”

8. Amendment Two increased the stated monthly payment amount from \$446,736 to \$550,000. *See* Contract, Amendment Two, Revision III, A.

9. Amendment Two is clear and unambiguous in that it specifically provided that the Contract payment amount as revised by the Amendment would be *effective July 1, 2015*. *See* Amendment Two, Article I. While the language of the contract in Amendment Two is clear and unambiguous that the increase in the monthly charge was to be *effective July 1, 2015*, it should be noted that it was appropriate for the increase in payment to relate back to the beginning of the Contract (July 1, 2015) because United Way had been performing significant out of scope services since that date – out of scope work for which it had been seeking compensation; and this amendment to the payment provision was a way to provide that compensation for services provided. Indeed, United Way had asserted to SCDHHS that it had a claim for such out of scope services that it sought to negotiate and resolve as a part of Amendment Two.

10. Amendment Two also provided as follows:

The parties agree to discuss and define the scope of any transition plan and the terms thereof in accordance with

Revision II of Amendment Two, and that any agreement on such transition plan and terms will be separate from their agreement.

See Amendment Two, Revision IV, 2.

11. In accordance with the terms of Amendment Two, United Way issued invoices to SCDHHS for the increase in monthly payments related back to July 1, 2015. Accordingly, United Way issued invoices for SCDHHS dated March 7, 2017, April 27, 2017, and May 19, 2017.

12. Despite the agreed upon amendment to the Contract regarding payment, including the amount and method of payment, SCDHHS has made only partial payments to United Way and has not made the full payment due under the proper invoices provided by United Way, despite repeated requests for payment. Specifically, SCDHHS has not paid United Way any invoices amounts representing services rendered in the period prior to March of 2017. Accordingly, United Way is due payment well in excess of \$2.065 million from SCDHHS, plus any and all further statutory interest penalty charges as warranted.

13. Further, because United Way has properly notified SCDHHS of the statutory interest penalties and charges to be applied to past due invoices as permitted under South Carolina law, such statutory and invoiced interest penalties on these invoices have accrued and continue to accrue.

14. United Way is now due payment well in excess of \$2.065 million from SCDHHS, plus any and all further statutory interest penalty charges as warranted and as continue to accrue during the pendency of this claim.

15. Although Amendment Two provided that the parties would discuss and define the terms of a transition agreement detailing services and payment for transition activities required to transition certain work and services to a new contractor, SCDHHS failed and refused to negotiate the transition services agreement.

16. United Way promptly provided a draft Transition Agreement to SCDHHS for review, comment and negotiation, but SCDHHS refused to negotiate such agreement as required by the terms of the parties Contract, despite United Way's numerous requests. Furthermore, in bad faith, SCDHHS persisted throughout the ensuing months in demanding that United Way personnel perform transition activities despite SCDHHS' refusal to negotiate a contract for those services as agreed.

17. Under the South Carolina Consolidated Procurement Code, including but without limit S.C. Code § 11-35-4230, The Chief Procurement Officer has jurisdiction over the parties and claims herein in the first instance, and such claims have been timely asserted by United Way under law, because United Way has performed work under the said Contract during the past year.

For a First Cause of Action
(Breach of Contract)

18. United Way incorporates the provisions of the preceding paragraphs as if set forth fully herein.

19. The Contract between the parties, as amended, provided the amount and terms of payment.

20. United Way properly invoiced SCDHHS in accordance with the Contract, as amended.

21. SCDHHS has not paid in full the proper invoices sent to it by United Way.

22. SCDHHS has breached the contract by failing to pay in full United Way's proper invoices in excess of \$2.065 million, including interest penalties which continue to accrue.

23. The Contract provided that the parties would negotiate an agreement and payment for transition services.

24. SCDHHS in bad faith failed and refused to negotiate such a transition agreement.

25. United Way has been damaged by SCDHHS' breaches.

26. United Way seeks an award of all damages and remedies available for SCDHHS' breach of contract.

For a Second Cause of Action
(Breach of Statutory Duty of Good Faith and Fair Dealing)

27. United Way incorporates the provisions of the preceding paragraphs as if set forth fully herein.

28. SCDHHS owes United Way a duty of good faith and fair dealing.

29. The South Carolina Consolidated Procurement Code provides as follows:

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.

S.C. Code. Ann. § 11-35-30.

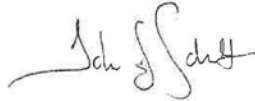
30. SCDHHS has violated this statutory duty of good faith and fair dealing by refusing to negotiate the transition agreement, and by demanding that United Way employees perform transition services nonetheless.

31. United Way has been harmed by SCDHHS' violation of this statutory duty.

32. United Way seeks an award of all damages and remedies available for SCDHHS' violation of the duty of good faith and fair dealing.

WHEREFORE, having stated its claims against SCDHHS, United Way asks that the CPO set a prompt hearing to hear, review and decide this matter promptly; that the CPO grant to United Way all relief available, including all such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law, including but not limited to a ruling that SCDHHS' lack of payment and refusal to negotiate a transition agreement was a breach of contract and of good faith and fair dealing, and a ruling that SCDHHS must pay to United Way all damages and losses incurred as a result of the wrongful conduct alleged herein as may be proven at a hearing; and all relief otherwise permitted by law.

Schmidt & Copeland LLC



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ATTORNEYS FOR UNITED WAY

Columbia, South Carolina
August 15, 2017

Attachment 2

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
United Way Association of South)	
Carolina, Inc.	)	RESPONSE TO
	)	REQUEST FOR RESOLUTION
v.	)	OF CONTRACT CONTROVERSY
)	
South Carolina Department of Health)	
and Human Services)	
)	

The South Carolina Department of Health and Human Services (SCDHHS) hereby responds to the Request for Resolution of Contract Controversy of United Way Association of South Carolina, Inc. (United Way) pursuant to S.C. Code §11-35-4230. Any allegation not specifically admitted herein is denied.

GENERAL ALLEGATIONS

1. SCDHHS admits the allegations of Paragraphs 1-6
2. In answering the allegations of Paragraph 7, SCDHHS craves reference to the amendment to the contract entered into by SCDHHS and United Way on or about February 15, 2017 (Amendment Two), denies all allegations inconsistent therewith, and admits only that Amendment Two provided that “the Contractor shall invoice SCDHHS in arrears for fees on a monthly basis in the amount of Five Hundred Thousand Dollars (\$550,000) plus any additional amounts for Amendment One.” SCDHHS specifically denies that Amendment Two modified the method of payment to United Way and denies any remaining allegations of Paragraph 7.
3. SCDHHS admits the allegations of Paragraph 8.

4. SCDHHS denies the allegations of Paragraph 9 and demands strict proof thereof.
5. In answering the allegations of Paragraph 10, SCDHHS craves reference to Amendment Two and denies the allegations of Paragraph 10 and all allegations inconsistent therewith. For ease of reference, Amendment Two provides as follows:

The parties agree to discuss and define the scope of any transition plan and the terms thereof in accordance with revision II of Amendment Two, and that any agreement on such transition plan and terms will be separate from this agreement.

Amendment Two, Revision IV, 2.

6. In answering the allegations of Paragraph 11, SCDHHS admits only that United Way issued invoices to SCDHHS. SCDHHS denies both that United Way issued invoices in accordance with the terms of Amendment Two and that the invoices provided to the Chief Procurement Officer (CPO) are the same invoices provided to SCDHHS. The invoices provided by United Way to the CPO are attached hereto as Exhibit A. The original invoices provided by United Way to SCDHHS are attached hereto as Exhibit B¹. SCDHHS denies any remaining allegations in Paragraph 11.
7. SCDHHS denies the allegations of Paragraphs 12-16 and demands strict proof thereof.
8. SCDHHS admits the allegations of Paragraph 17.

For a First Cause of Action
(Breach of Contract)

9. In response to Paragraph 18, SCDHHS hereby incorporates the provisions of the preceding paragraphs as if set forth fully herein.
10. SCDHHS denies the allegations of Paragraphs 19-25 and demands strict proof thereof.

¹ See also the Affidavit of Elizabeth B. Hutto.

11. The allegations of Paragraph 26 do not require a response. To the extent that any response is required to Paragraph 26, the same is denied.

For a Second Cause of Action
(Breach of Statutory Duty of Good Faith and Fair Dealing)

12. In response to Paragraph 27, SCDHHS hereby incorporates the provisions of the preceding paragraphs as if set forth fully herein.
13. In response to the allegations of Paragraph 28, SCDHHS admits that both SCDHHS and United Way owe one another a respective duty of good faith and fair dealing. SCDHHS denies any implication by United Way that SCDHHS is the only party with an obligation of good faith.
14. SCDHHS admits the allegations of Paragraph 29.
15. SCDHHS denies the allegations of Paragraphs 30-31 and demands strict proof thereof.
16. The allegations of Paragraph 32 do not require a response. To the extent that any response is required to Paragraph 32, the same is denied.
17. Answering the “WHEREFORE” clause following Paragraph 32, SCDHHS denies that SCDHHS is in breach of any contract or statutory duty of good faith and fair dealing. SCDHHS further denies that United Way is entitled to any recovery or relief whatsoever from SCDHHS. SCDHHS further demands strict proof of the damages alleged in the “WHEREFORE” clause following Paragraph 32.

AFFIRMATIVE DEFENSES

18. Each and every allegation set forth in the proceeding paragraphs is realleged and reiterated as fully as if set forth verbatim herein.
19. United Way’s claims are barred by mistake, fraud, duress, illegality, misrepresentation, and payment.

For a First Counterclaim
(Breach of Contract)

20. Each and every allegation set forth in the proceeding paragraphs is realleged and reiterated as fully as if set forth verbatim herein.
21. United Way and SCDHHS entered into a contract dated July 1, 2015 for the purchase and provision of services for Medicaid beneficiaries, potential beneficiaries, and/or third parties inquiring about the South Carolina Medicaid Program (Contract). Amendment Number One to the Contract was entered on or about May 9, 2016 (Amendment One). Amendment Two was entered on or about February 15, 2017.
22. United Way has breached both the Contract and Amendment Two by submitting retroactive invoices contrary to the terms of the Contract and Amendment Two. Exhibit B.
23. Amendment Two contains no language stating that the monthly payment increase from \$446,736 to \$550,000 would be applied retroactively.
24. Amendment Two cannot be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. *See S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989); *Pulliam v. Doe*, 246 S.C. 106, 110, 142 S.E.2d 861, 863 (1965). Amendment Two does not contain express words evidencing intent that it be retroactive or words necessarily implying such intent.
25. If Amendment Two was retroactive, then Amendment Two would have been required to be approved by the Centers for Medicare and Medicaid Services (CMS).
26. Because Amendment Two was not retroactive, the total amendment value was not high enough to require CMS approval. This fact was communicated by SCDHHS to counsel for United Way in writing.

27. To the extent that United Way is seeking payment for a total amendment value in excess of the CMS threshold of \$1 million dollars in accordance with 45 Code of Federal Regulations Section 95.611(b)(1)(iv), United Way does not have an approved and enforceable contract regarding the same.
28. SCDHHS seeks an award of all damages and remedies available for United Way's breach of contract.

For a Second Counterclaim
(Breach of Statutory Duty of Good Faith and Fair Dealing)

29. Each and every allegation set forth in the proceeding paragraphs is realleged and reiterated as fully as if set forth verbatim herein.
30. United Way has breached the statutory duty of good faith and fair dealing with regard to the Contract and Amendment Two by engaging in the following actions:
- a. Submitting invoices to SCDHHS for retroactive price adjustments that are knowingly neither provided for by the Contract and/or Amendment Two nor in compliance with the certification statement requirement of both the Contract and/or Amendment Two;
 - b. Demanding a transition contract which purports to provide services already required of United Way by the Contract at a price \$3.4 million over United Way's own internal estimate of true transition costs;
 - c. Threatening to terminate the Contract early if SCDHHS does not pay the invalid retroactive invoices or enter into an unnecessary and duplicative transition contract; and
 - d. Attempting to interfere with SCDHHS' orderly transfer of the main call in number of 888-549-0820 to the new contractor.

31. Amendment Two was not intended by anyone to be retroactive, including United Way. In addition to the Amendment itself, all emails authored by United Way's counsel support the position that the price increase is effective going forward. On February 1, 2017 counsel for United Way wrote the following in asking SCDHHS to execute Amendment Two:

Why you would not recognize an amount less than this very recent long term bid price that you have accepted as reasonable price for a **short-term, one year contract** has not been explained... [United Way] seeks to gain your agency approval of the following simple terms for an extension:

1. Monthly pricing of 550,000.00 (far below market rate);

2. **Duration of one year...**

Exhibit C, emphasis added. Additionally, the spreadsheet attachment titled Summary of Increases prepared by United Way wherein the first numerical column, "recurring monthly costs increases," has been added to the third column "recoupment over 12 months" to get to the total UW was seeking, called "total incremental & recoupment costs per month" of \$127,748 shows United Way did not intend for Amendment Two to be retroactive. Exhibit D. This third column seeking "recoupment" over 12 months makes it clear United Way did not intend for any amendment to be retroactive. *Id.* United Way built into its initial demand a "recoupment" of \$37,287 to be added to each monthly bill going forward for a period of time United Way hoped would be 12 months.

32. Moreover, upon information and belief, United Way has submitted altered invoices in support of its claims in this action as further evidence of its ongoing bad faith.

33. Article IV, Section A of the Contract contains the following method of reimbursement requirement:

The Contractor shall incorporate the following certification statement in each of its monthly invoices:

I do solemnly swear (or affirm) that I have examined the information contained in this request or report. That all information has been prepared from the books and records of Contractor. That the aforesaid information is true and correct to the best of my knowledge and belief; and, that no other request for payment from other federal and/or state funds has been made not has any other payment been received, applied for, not will they be applied for, for the services herein described. That contractor has on file the proper documentation to support this request for payment. And, that all the costs represented are true costs incurred during the period of this request.

This statement must be signed and dated by a finance person duly authorized by Contractor...

34. This method of reimbursement requirement is also contained in Amendment Two, Revision III, Section A.
35. Invoice # DHHSADJ2017 which was received by SCDHHS in March 2017 seeking \$2,065,280.00 did not meet the certification statement requirements of the Contract and/or Amendment Two. Exhibit B.
36. However, the version of Invoice # DHHSADJ2017 submitted to the CPO along with United Way's Request for Resolution of Contract Controversy has been altered sometime since March 7, 2017 to include the certification statement language and the typed name "Richard R. Butcher". Exhibit A.
37. Upon information and belief, United Way has altered the document initially provided to SCDHHS in March of 2017 and submitted the altered document to the CPO. *Compare* Exhibits A and B.
38. Alteration of documents submitted to the CPO is so serious and compelling as to affect responsibility as a state contractor.
39. By submitting altered documents to the CPO further United Way has further violated the statutory duty of good faith and fair dealing.

40. Even if the version of Invoice # DHHSADJ2017 seeking \$2,065,280.00 had contained the certification statement required by both the Contract and/or Amendment Two, the certification statement cannot be submitted in good faith, because it is undisputed that United Way has already “received and applied for” payment for the services at issue for the period of time from July 2015 to February 2017.
41. Invoice # DHHSADJ2017 seeking \$2,065,280.00 was not submitted in good faith. The same holds true for DHHSINT#1 dated April 27, 2017, DHHSINT#2 dated May 19, 2017, DHHSINT#3 dated June 21, 2017, DHHSINT#4 dated July 21, 2017, and DHHSINT#5² dated August 21, 2017 seeking interest on the erroneous \$2,065,280.00 invoice in the collective amount of \$42,436.55.
42. The Contract initially provided that “Either party may terminate this Contract upon providing the other party with thirty (30) days written notice of termination.” Contract, Article VII, Section I. Prior to Amendment Two removing the ability to terminate upon thirty (30) days written notice, United Way threatened to terminate upon thirty (30) days notice while seeking SCDHHS’ very best offer.
43. The Contract also provides that “This Contract may be canceled or terminated by either party at any time within the Contract period whenever it is determined by such party that the other party has materially breached or otherwise materially failed to comply with its obligation hereunder.” Contract, Article VII, Section C.

² SCDHHS notes that DHHSINT#5 which was provided to the CPO on August 30, 2017 via email does appear to be the same version of DHHSINT#5 that was provided to SCDHHS. SCDHHS further notes that neither version of DHHSINT#5 contains the mandatory certification statement.

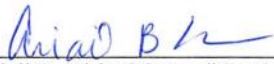
44. United Way also threatened immediate termination if SCDHHS did not pay the erroneous invoices and/or enter into a new unnecessary and duplicative transition agreement which United Way characterized as a breach.
45. United Way's threats regarding termination violate the duty of good faith.
46. United Way's proposed "Transition Agreement" seeking an additional payment of \$3,700,000.00 was not proposed in good faith because, the "Transition Plan Tasks" proposed is for the most part duplicative of tasks already covered by the Contract and Business Associate Agreement between the parties.
47. The proposed "Transition Agreement" was described by United Way as a "soft landing" for the United Way.
48. United Way's proposed "Transition Agreement" seeking an additional payment of \$3,700,000.00 was not proposed in good faith because, the \$3,700,000.00 sought by United Way grossly exceeds Kelly Callahan Cruise's earlier estimate shared with SCDHHS in a spreadsheet titled "UWASC Turnover Costs Estimate" which lists a total turnover cost estimate of \$272,650. Exhibit E. To date, United Way has failed to identify any good faith basis for transition or turnover cost to have increased by over \$3.4 million.
49. Once United Way demanded an additional \$3,700,000.00 from SCDHHS for its "soft landing", SCDHHS determined that the only transition item SCDHHS would seek from the United Way was ownership and control of the Community Long Term Care (CLTC) toll free number of 1-855-278-1637.
50. SCDHHS and United Way did not come to an agreement regarding the price for the transfer of this CLTC call in number, so SCDHHS acquired a new CLTC call in number.

51. On or about July 26-27, 2017, United Way attempted to interfere with SCDHHS' orderly transfer of the main call in number of 888-549-0820 to the new contractor and falsely claimed ownership of the main call in number of 888-549-0820 causing damages and expense to SCDHHS in violation of the duty of good faith.
52. SCDHHS seeks an award of all damages and remedies available for United Way's breach of the statutory duty of good faith and fair dealing.
53. SCDHHS also seeks for the CPO to consider the alterations made to the invoices United Way provided to the CPO (Exhibit A), compared to the actual invoices United Way submitted to SCDHHS requesting payment (Exhibit B), and take whatever action the CPO deems appropriate under the South Carolina Procurement Code.

WHEREFORE, having fully answered United Way's Request for Resolution of Contract Controversy, SCDHHS hereby requests that the CPO enter an order denying United Way's request for relief, finding Amendment Two is not retroactive; and finding that United Way has violated the statutory duty of good faith and fair dealing. Additionally, SCDHHS requests that the CPO consider the alterations made to the invoices United Way provided to the CPO (Exhibit A), compared to the actual invoices United Way submitted to SCDHHS requesting payment (Exhibit B), and take whatever action the CPO deems appropriate under the South Carolina Procurement Code.

JOLLEY LAW GROUP, LLC

Dated: August 31, 2017


Ariail B. Kirk (SC Bar # 71101)
Kelly M. Jolley (SC Bar # 72573)
Post Office Box 22230
Hilton Head Island, SC 29925
843.681.6500 phone
877.513.3444 fax
*Attorneys for South Carolina Department of
Health and Human Services*

Attachment 3

From: [John Schmidt](#)
To: [Spicer, Michael](#); [White, John](#)
Cc: [Robertson, Dixon](#); [Byron Roberts](#); [Kelly McPherson Jolley](#); [Missy Copeland](#); [Tracy Solet](#); [Allyson Toomer](#); [Ariail Kirk](#)
Subject: Re: In the Matter of the Request for Resolution of a Contract Controversy Between United Way Association of South Carolina and the Department of Health and Human Services, Case 2018-113
Date: Wednesday, September 06, 2017 5:30:52 PM
Attachments: [DOC090617-09062017155742 INVOICES CERT 03.07.17 to 08.21.17.pdf](#)
[UWay Amended Breach of Contract.pdf](#)

Dear Mr. Spicer,

In its answer to the claims of United Way, SCDHHS has pointed out that certain records we supplied to you in response to your request for "all invoices ... related to this contract to the date of filing" were in some manner "erroneous" copies.

As background, United Way had earlier revised its invoices to re-submit them to SCDHHS to include missing certifications. United Way mistakenly thought that such revised invoices had been sent to SCDHHS previously. Therefore, we sent such invoices to you, thinking that they had already been submitted to SCDHHS, when in fact they had not yet been sent to SCDHHS, through oversight. Regardless, because no copies were attached to or made exhibits to the contract controversy pleading itself, this is a simple matter to correct.

United Way did in fact originally send the invoices that lacked a "certification." Inasmuch as these records were submitted in response to your request by error, such occurrence certainly does not rise to the level asserted by SCDHHS in its pleading. It is a simple mistake we have confirmed through careful examination of our records. It is noteworthy that a number of past invoices lacked particular aspects of certification, but they had, up to the time of this dispute, always been paid by SCDHHS, and at no time were any invoices rejected for any such non-compliance, such requirements obviously having been waived as a matter of course of dealing and performance.

The facts remain that actual invoices for the disputed amounts at issue were submitted by United Way to SCDHHS and such invoices were dated as indicated in the contract controversy claim. And such invoices were not paid, but the lack of certification was never asserted by SCDHHS before this claim was filed as a reason for non-payment thereof.

Because SCDHHS has now raised the certification issue, United Way is now submitting amended and revised invoices of the same dates for all amounts at issue. These have been submitted in full accordance with the contract today. Copies are attached.

United Way would certainly be pleased if SCDHHS would use the opportunity afforded by this re-issuance of the revised and corrected invoices to pay them so that this matter can be deemed resolved. However, based on the response filed by SCDHHS, we submit copies of these to you for consideration as a part of our claim. We also submit an amended contract controversy claim asserting such breach.

John

[John Schmidt](#) | Schmidt & Copeland LLC

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
United Way Association of South)	
Carolina, Inc.	)	AMENDED REQUEST FOR RESOLUTION OF
	)	CONTRACT CONTROVERSY
vs.)	
)	
South Carolina Department of Health)	
and Human Services)	
_____)	

Claimant, United Way Association of South Carolina (“United Way”), by and through its undersigned counsel, asserts its amended request for resolution of a contract controversy and claims (“contract controversy”) as against the State of South Carolina Department of Health and Human Services under law, including S.C. Code § 11-35-4230, as follows:

GENERAL ALLEGATIONS

1. This controversy concerns a contract solicited and awarded under the South Carolina Consolidated Procurement Code. The Chief Procurement Officer or his designee has exclusive jurisdiction over the claims alleged herein pursuant to S.C. Code Ann. § 11-35-4230.

2. On or about July 1, 2015, South Carolina Department of Health and Human Services (“SCDHHS”) entered into a contract (“Contract”) with United Way for call center services. United Way and SCDHHS are collectively referred to as the “parties.”

3. SCDHHS is a governmental body and is an agency of the government of the State of South Carolina.

4. United Way is a not for profit organization and is or was at all relevant times a contractor to SCDHHS.

5. On or about May 9, 2016, the parties entered into Amendment One to the Contract.

6. On or about February 15, 2017, the parties entered into Amendment Two to the Contract.

7. Amendment Two modified the amount and method of payment to United Way and provided that “the contractor shall invoice SCDHHS in arrears for fees on a monthly basis in the amount of Five Hundred Fifty Thousand Dollars (\$550,000) plus any additional amounts for Amendment One.”

8. Amendment Two increased the stated monthly payment amount from \$446,736 to \$550,000. *See* Contract, Amendment Two, Revision III, A.

9. Amendment Two is clear and unambiguous in that it specifically provided that the Contract payment amount as revised by the Amendment would be *effective July 1, 2015*. *See* Amendment Two, Article I. While the language of the contract in Amendment Two is clear and unambiguous that the increase in the monthly charge was to be *effective July 1, 2015*, it should be noted that it was appropriate for the increase in payment to relate back to the beginning of the Contract (July 1, 2015) because United Way had been performing significant out of scope services since that date – out of scope work for which it had been seeking compensation; and this amendment to the payment provision was a way to provide that compensation for services provided. Indeed, United Way had asserted to SCDHHS that it had a claim for such out of scope services that it sought to negotiate and resolve as a part of Amendment Two.

10. Amendment Two also provided as follows:

The parties agree to discuss and define the scope of any transition plan and the terms thereof in accordance with Revision II of Amendment Two, and that any agreement on such transition plan and terms will be separate from their agreement.

See Amendment Two, Revision IV, 2.

11. In accordance with the terms of Amendment Two, United Way issued invoices to SCDHHS for the increase in monthly payments related back to July 1, 2015. Accordingly, United Way issued invoices for SCDHHS dated March 7, 2017, April 27, 2017, and May 19, 2017. United Way has further sent revised invoices bearing the same dates to SCDHHS in the exact manner set forth in the Contract and as set forth specifically in Amendment Two. Such revised invoices were mailed as required on or about September 6, 2017 and were also emailed as required on September 6, 2017. Such revised invoices were sent because, despite its normal practices in paying invoices without full compliance with all details of the Contract, such as certification, SCDHHS has, in this case, indicated that it has not paid the invoices to date due to lack of certification. Accordingly, United Way remedies that matter. When SCDHHS pays the said invoices in full, United Way will withdraw its request. However, SCDHHS has also asserted other, invalid reasons for non-payment, and so United Way will not withdraw this claim until the payments on the invoices at issue are made in full. United Way further offers further invoices as the amounts claimed continue to accrue interest.

12. Despite the agreed upon amendment to the Contract regarding payment, including the amount and method of payment, SCDHHS has made only partial payments to United Way and has not made the full payment due under the proper invoices provided

by United Way, despite repeated requests for payment. Specifically, SCDHHS has not paid United Way any invoices amounts representing services rendered in the period prior to March of 2017. Accordingly, United Way is due payment well in excess of \$2.065 million from SCDHHS, plus any and all further statutory interest penalty charges as warranted. SCDHHS has indicated that it will not pay the invoices at issue.

13. Further, because United Way has properly notified SCDHHS of the statutory interest penalties and charges to be applied to past due invoices as permitted under South Carolina law, such statutory and invoiced interest penalties on these invoices have accrued and continue to accrue.

14. United Way is now due payment well in excess of \$2.065 million from SCDHHS, plus any and all further statutory interest penalty charges as warranted and as continue to accrue during the pendency of this claim.

15. Although Amendment Two provided that the parties would discuss and define the terms of a transition agreement detailing services and payment for transition activities required to transition certain work and services to a new contractor, SCDHHS failed and refused to negotiate the transition services agreement.

16. United Way promptly provided a draft Transition Agreement to SCDHHS for review, comment and negotiation, but SCDHHS refused to negotiate such agreement as required by the terms of the parties Contract, despite United Way's numerous requests. Furthermore, in bad faith, SCDHHS persisted throughout the ensuing months in demanding that United Way personnel perform transition activities despite SCDHHS' refusal to negotiate a contract for those services as agreed.

17. Under the South Carolina Consolidated Procurement Code, including but without limit S.C. Code § 11-35-4230, The Chief Procurement Officer has jurisdiction over the parties and claims herein in the first instance, and such claims have been timely asserted by United Way under law, because United Way has performed work under the said Contract during the past year.

For a First Cause of Action
(Breach of Contract)

18. United Way incorporates the provisions of the preceding paragraphs as if set forth fully herein.

19. The Contract between the parties, as amended, provided the amount and terms of payment.

20. United Way properly invoiced SCDHHS in accordance with the Contract, as amended.

21. SCDHHS has not paid in full the proper invoices sent to it by United Way and has indicated unequivocally that it will not make such payments.

22. SCDHHS has breached the contract by failing and refusing to pay in full United Way's proper invoices in excess of \$2.065 million, including interest penalties which continue to accrue, and in indicating its refusal to pay such sums.

23. The Contract provided that the parties would negotiate an agreement and payment for transition services.

24. SCDHHS in bad faith failed and refused to negotiate such a transition agreement.

25. United Way has been damaged by SCDHHS' breaches.

26. United Way seeks an award of all damages and remedies available for SCDHHS' breach of contract.

For a Second Cause of Action
(Breach of Statutory Duty of Good Faith and Fair Dealing)

27. United Way incorporates the provisions of the preceding paragraphs as if set forth fully herein.

28. SCDHHS owes United Way a duty of good faith and fair dealing.

29. The South Carolina Consolidated Procurement Code provides as follows:

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.

S.C. Code. Ann. § 11-35-30.

30. SCDHHS has violated this statutory duty of good faith and fair dealing by refusing to negotiate the transition agreement, and by demanding that United Way employees perform transition services nonetheless.

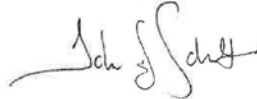
31. United Way has been harmed by SCDHHS' violation of this statutory duty.

32. United Way seeks an award of all damages and remedies available for SCDHHS' violation of the duty of good faith and fair dealing.

WHEREFORE, having stated its claims against SCDHHS, United Way asks that the CPO set a prompt hearing to hear, review and decide this matter promptly; that the CPO grant to United Way all relief available, including all such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law, including but not limited to a ruling that SCDHHS' lack of payment and refusal to negotiate a transition agreement was a breach of contract and of good faith and fair

dealing, and a ruling that SCDHHS must pay to United Way all damages and losses incurred as a result of the wrongful conduct alleged herein as may be proven at a hearing; and all relief otherwise permitted by law.

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ATTORNEYS FOR UNITED WAY

Columbia, South Carolina
September 6, 2017

Attachment 4

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
United Way Association of South)	
Carolina, Inc.	)	MOTION TO DISMISS
	)	COUNTERCLAIMS
vs.)	
)	
South Carolina Department of Health)	
and Human Services)	
)	

Claimant, United Way Association of South Carolina (“United Way”), by and through its undersigned counsel, moves to dismiss the counterclaims asserted by the South Carolina Department of Health and Human Services (“SCDHHS”) in this matter, on the grounds that the Chief Procurement Officer (“CPO”) lacks power, jurisdiction and authority to decide any claims by the State or any governmental body as against a contractor for the recovery of monetary relief. Any act or law purporting to permit the CPO to hear and decide any such cases is unconstitutional and is void *ab initio* as being in clear violation of the Separation of Powers Clause.

In South Carolina, claims at law against private persons and businesses are to be heard and decided by the Judicial Branch of government – the Courts. Article V, Section 11 of the South Carolina Constitution provides:

SECTION 11. Jurisdiction of Circuit Court.

The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.

Further, Article I Section 8 of the South Carolina Constitution provides:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

The above clause, the Separation of Powers Clause, precludes the CPO (or the Panel) from hearing any claim by the State or its agencies as against a contractor such as United Way. *See also Carolina Glass v. State*, 87 S.C. 270, 292-93, 69 S.E. 391 (1910), where the Court stated:

So long, therefore, as the action of the Commission was confined to the investigation of all dealings, past and present, with the dispensary, and the determination of the just liabilities of the State growing out of them, it was, as we have seen, based upon constitutional authority, and was valid and binding. But we find no authority in the Constitution for the Legislature to provide by law how claims of the State against others shall be established or adjusted, except through the Courts. We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the State against the plaintiff, it is unconstitutional, null and void.

See also S.C. Const. Art X § 10. "Claims against State. The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." and *Art. XVII § 2.* "Claims against State. The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted."

As stated in *Carolina Glass*, the Constitution specifically provides for separation of powers between the judicial, legislative and executive branches. The judicial branch is in charge of claims among parties, except as specifically otherwise provided for by the Constitution. The only Constitutional exception is the provision for *claims against the State*, as set forth above. Neither the CPO, the Panel, nor any other body of the legislative

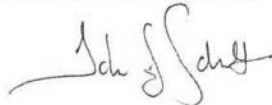
or executive branches, has any authority under the Constitution to adjudicate disputes over monetary claims at law of the State or its subdivisions against a citizen.

By asserting this motion as a complete defense, United Way does not waive, but instead expressly reserves all of its other defenses, denials and avoidances available to it in law or in equity, such matters to be heard by the Courts of this State as is provided for by the Constitution. United Way denies all material allegations of the Counterclaims.

United Way objects to, and specifically does not consent to subject matter jurisdiction, personal jurisdiction, venue, process and service of process, or authority of the CPO to hear and decide the claims at law against United Way, and United Way hereby moves to dismiss the Counterclaims for lack of subject matter jurisdiction, personal jurisdiction, venue, insufficient process and failure of service of process, and authority of the CPO to hear and decide the claims at law against United Way over such Counterclaims.

WHEREFORE, having so moved, United Way asks that the CPO to promptly issue an order dismissing the Counterclaims of SCDHHS.

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STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Contract Controversy Appeal Notice (Revised July 2017)

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2016 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

South Carolina Procurement Review Panel

Request for Filing Fee Waiver 1205 Pendleton Street, Suite 367, Columbia, SC 29201

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.