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May 15, 2015

VIA ELECTRONIC MAIL AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer for Information Technology
1201 Main Street, Suite 600
Columbia, South Carolina 29201

**Re: Request for Debarment of New Venue Technologies, Inc.,
Terris S. Riley, Jacque P. Riley, NewVenue Technologies, New Venue Technologies
II, LLC, NVT, LLC, Terris Riley, LLC, and La'Fem Empowered, Inc.
Case No.: 2015-
Our File No. 2135598**

Dear Mr. Spicer:

Enclosed herewith please find a Petition for Debarment and Request for Hearing involving the above referenced individuals and entities. They are being personally served with this Petition. We will provide appropriate certificates of service upon receipt of the same from the process server.

Due to the seriousness of the allegations contained in the Petition, and for the reasons enumerated in the Petition, we would respectfully request that you grant an expedited hearing in this matter. Thank you in advance for your attention to this matter.

With kind regards, I am

Very truly yours,

MONTGOMERY WILLARD, LLC



Michael H. Montgomery

MHM:mkf

MAY 15 2015 4:45 PM

REC'D BID CONTROL

cc: (via e-mail only) Dixon Robertson, Esq. Attorney for the CPO
Elizabeth Crum, Esq. Attorney for the CPO
Keith McCook, Esquire
Frank S. Potts, Esquire
David Avant, Esquire

| | | |
|--|---|-------------------------------------|
| STATE OF SOUTH CAROLINA |) | BEFORE THE CHIEF PROCUREMENT |
| |) | OFFICER |
| COUNTY OF RICHLAND |) | CASE NO: 2015- |
| |) | |
| In re: |) | |
| New Venue Technologies, Inc., |) | PETITION FOR DEBARMENT |
| New Venue Technologies II, LLC, |) | AND |
| Terris Riley, LLC, |) | REQUEST FOR HEARING |
| NVT, LLC, |) | |
| La’Fem Empowered, Inc., |) | |
| NewVenue Technologies, |) | |
| Terris S. Riley, and |) | |
| Jacque P. Riley, |) | |
| Parties to be Debarred. |) | |
| |) | |
| |) | |

South Carolina Budget and Control Board, Petitioner, as a party aggrieved by conduct of New Venue Technologies, Inc., its Principals, including, but not limited to Terris Riley and Jacque P. Riley and their other entities and affiliates including New Venue Technologies II, LLC; Terris Riley, LLC; NVT, LLC; La’Fem Empowered, Inc.; and NewVenue Technologies, said conduct subjecting these parties to debarment pursuant to *S.C. Code Ann.* §11-35-4220(2), hereby moves that the Chief Procurement Officer (“CPO”) conduct an administrative review, afford a reasonable opportunity to New Venue and its principals to respond, schedule a hearing and institute debarment proceedings pursuant to *S.C. Code Ann.* §11-35-4220 against the named parties, related entities and their principals.

The Board respectfully requests that the CPO commence this process and schedule a hearing as soon as possible.

The grounds for the Board’s request for debarment are included in this Petition.

In support of this Petition, Petitioner would show the CPO as follows:

1. New Venue Technologies, Inc. is a South Carolina Domestic Corporation with a registered address of 8 Burberry Lane, Columbia, SC 29229. Upon information and belief, the Corporation operates out of the home of Jacque and Terris Riley at 497 Langford Road, Blythewood, South Carolina and the Burberry Lane address is outdated. Terris S. Riley and Jacque P. Riley have served as Principals and Officers of New Venue Technologies, Inc. at all relevant times during New Venue Technologies, Inc.'s involvement with the Software Acquisition Manager Contract entered between New Venue and the State of South Carolina Budget and Control Board.

2. Terris S. Riley is, upon information and belief, the President and CEO of New Venue Technologies, Inc. Ms. Riley resides at 497 Langford Road, Blythewood, South Carolina.

3. Jacque P. Riley is, upon information and belief, an officer of New Venue Technologies, Inc. Mr. Riley resides at 497 Langford Road, Blythewood, South Carolina.

4. New Venue Technologies II, LLC is a South Carolina Limited Liability Company filed on July 30, 2010. Jacque Riley, is the Registered Agent of New Venue Technologies II, LLC . His address as registered agent is 222 Talon Way, Bythewood, SC 29016. Upon

information and belief, the Company is owned and or operated by Terris and/or Jacque Riley, Principals of New Venue.

5. Terris Riley, LLC was organized on September 7, 2012. Terris Riley, is listed as the Registered Agent for Terris Riley, LLC. Terris Riley, LLC has a registered address of 222 Talon Way, Blythewood, South Carolina 29016. Upon information and belief, Terris Riley, LLC is owned and/or operated by Terris and/or Jacque Riley, Principals of New Venue.

6. NVT, LLC was organized on November 5, 2014. Martha Baker, who was and is New Venue Technologies' bookkeeper is listed as the Registered Agent for NVT, LLC. NVT, LLC has a registered address of 989 Knox Abbott Dr., Cayce, SC 29033. Upon information and belief, NVT, LLC is, upon information and belief owned and/or operated by Terris and/or Jacque Riley, Principals of New Venue.

7. La'Fem Empowered, Inc. was organized as an Eleemosynary Corporation on September 22, 2011. Terris S. Riley is listed as the Registered Agent for La'Fem Empowered, Inc. The registered agent address is 222 Talon Way, Blythewood, SC 29016. Upon information and belief, Terris S. Riley is a principal and involved in the operation of the Corporation.

8. NewVenue Technologies is, upon information and belief, a sole proprietorship sometimes operated by Terris S. Riley and/or Jacque P. Riley as a separate entity and as an alter-ego of New Venue Technologies, Inc.

9. Upon information and belief, NewVenue Technologies, Inc; Terris Riley, LLC; New Venue Technologies II, LLC; NewVenue Technologies; NVT, LLC, and La’Fem Empowered, Inc. are all affiliates and entities related to Terris S. Riley and New Venue Technologies, Inc..

10. New Venue Technologies, Inc. was a party to a State Term Contract arising from Solicitation No. 5400001873 for a Software Acquisition Manager Project. The contract was cancelled by the State for Cause on or about October 8, 2013.

11. New Venue Technologies, Inc. initiated a contract controversy proceeding before the Chief Procurement Officer for Information Technology. That case was heard as Case No. 2014-204. After a lengthy hearing the CPO issued a decision on July 18, 2014 addressing the issues presented in the contract controversy. A copy of that decision is attached as Exhibit “A”.

12. By Decision filed July 30, 2014 the CPO, *sua sponte*, found probable cause to suspend New Venue Technologies, Inc.; New Venue Technologies II, LLC; NewVenue Technologies; Terris Riley LLC; Terris S. Riley and Jacque P. Riley from “consideration for award of contracts or subcontracts pending completion of investigations conducted by the Board or any other State agency the Board requests to assist in the investigation to determine if debarment is warranted”.

13. The CPO's Order (attached hereto as Exhibit "B") sets forth the basis for the CPO's determination of probable cause for suspension of New Venue.

14. New Venue has appealed the decision underlying the CPO's determination of probable cause for suspension of New Venue.

15. Notably, New Venue's more than 8600 word appeal letter (attached hereto as Exhibit "C") does not contest a number of relevant findings of the CPO, to wit:

- a. New Venue failed to remit payment to software providers in accordance with the contract.
- b. New Venue intentionally mislead PPUs as to the status of their orders.
- c. New Venue withheld funds from Vendors remitted to it specifically to make pass through payments to those vendors.
- d. New Venue remains indebted to Vendors in an amount in excess of Two Million dollars, which funds were remitted to it in full payment of obligations by the State, State Agencies and PPUs.
- e. New Venue never contests or denies its use of funds as enumerated in the CPO's Decision and the Suspension Order.

16. In fact, New Venue, in its Appeal to the Panel failed to contest any of the findings of the CPO relating to New Venue's fiscal malfeasance with regard to honoring its contractual obligation to remit 97.5 % of its receipts from State Agencies and PPUs to software resellers on the then existing State Term Contracts.

17. In its Appeal to the Panel, New Venue fails to offer any justification for its conversion of these vendor funds to its own use.

18. Upon information and belief, New Venue's failure to contest these factual findings in its Protest letter constitutes an admission of the same.

19. The Acts identified in the CPO's Decision and in the Suspension Order evince a violation of contract provisions of a character to be so serious as to require debarment of New Venue and its affiliates. These include a deliberate failure to perform and a recent record of unsatisfactory performance in accordance with the terms of the SAM contract.

20. Since the CPO's order suspending New Venue, it (and Terris S. Riley, its principal) has continued to engage in conduct that should invoke debarment pursuant to *S.C. Code Ann.* §11-35-4220 including, but not limited to:

- a. Violation of an order of the Chief Procurement Officer by seeking and attempting to be considered for the award of contracts with the Medical University of South Carolina. Upon information and belief, Terris S. Riley acting in the name of New Venue Technologies, Inc. delivered a consulting proposal to MUSC. That proposal is attached hereto as Exhibit "D".
- b. Neither in the Proposal nor in any other communication with MUSC did Riley disclose that she and New Venue were ineligible for the award of a contract by MUSC due to the CPO's Order.
- c. Upon information and belief, Riley's misrepresentation of this fact was willful and knowing and done with intent to deceive MUSC into awarding her the contract in violation of the CPO's suspension order.
- d. Riley acted to induce MUSC to enter a contract with her, while she knew that she and New Venue were subject to the Order of Suspension and were "suspended from consideration for award of contracts or subcontracts. . ."

- e. Riley's conduct included e-mail communications wherein when she learned that her proposal was over \$50,000 and required higher level approval, she attempted to engage MUSC over a shorter term so as to keep the Contract Award at a level below the \$50,000.00. See the e-mails attached hereto as Exhibit "E".
- f. Upon information and belief, Riley induced her bookkeeper, Martha Baker, to set up or cooperate with her in setting up a new entity, NVT, LLC, in an effort to conceal her involvement from the Board upon receipt of the proposed Contract from MUSC.
- g. Upon information and belief, Riley engaged in this conduct in an effort to avoid MUSC learning of her suspension and in an effort to obtain a contract that she knew New Venue could not legally be awarded using fraudulent means.
- h. Upon information and belief, Riley further engaged in this conduct in an effort to conceal her identity and avoid detection by the State that she was involved in and operating as a State Contractor or Subcontractor in direct violation of the CPO's suspension Order.

21. Riley and New Venue attempted to induce MUSC to violate the Chief Procurement Officer's suspension Order.

22. While Riley may argue that she was not obligated to disclose her suspension, her failure to do so violates implied covenants of good faith and fair dealing contained in the Procurement Code and evinces evidence of her making material misrepresentations by way of omission in attempting to obtain contracts with State agencies.

23. Riley's (and New Venue's) conduct in this matter reflects a proclivity for misrepresentation and dishonesty which seriously and compellingly affects responsibility as a state contractor as codified in *S.C. Code Ann.* §11-35-4220(f).

24. Riley and New Venue have further been subject to additional litigation for failure to pay debts. For example, on December 1, 2014, Branch Banking and Trust instated Civil Action No. 2014-CP-40-07403 alleging that New Venue and Terris Riley had failed to pay monies owed the Bank. This and a lengthy list of prior litigation shown in the Richland County index, attached as Exhibit "F" further demonstrates her and New Venue's lack of responsibility and supports debarment.

25. Terris S. Riley has been charged with criminal acts and a True Bill was issued by the Richland County Grand Jury on November 12, 2014 indicting her on charges including Embezzlement and Embezzlement of public funds in an amount greater than 10,000.00. A copy of the indictments is attached hereto as Exhibit "G".

26. The Grand Jury's indictment is, as a matter of law, a finding of probable cause to charge Ms. Riley with the criminal acts referenced on the indictments.

27. New Venue Technologies was administratively dissolved on May 7, 2015 by the South Carolina Secretary of State. This administrative dissolution further reflects a lack of responsibility that should be considered by the CPO in addressing the debarment request. (Exhibit "H")

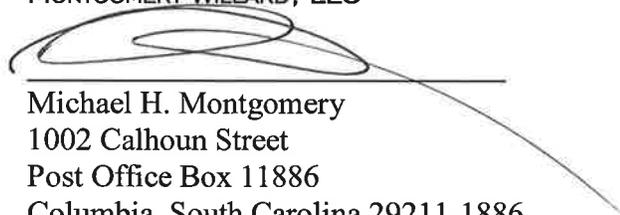
28. New Venue's uncontested failure to perform in accordance with the terms of the SAM contract coupled with the further and subsequent examples of the proclivity of New Venue

and its Principals to withhold and misrepresent material facts to the State, State Agencies and PPU's, to fail to honor its contracts and agreements constitute appropriate cause for debarment pursuant to S.C. Code Ann. 11-35-4220(2).

29. Based upon the information included in the record of this matter as well as this Petition, the Board requests that the CPO commence and complete an administrative review of this matter, and schedule a hearing to conduct his review and provide New Venue, its affiliated entities and the Riley's a reasonable opportunity to be heard on the earliest available date and that the CPO make an appropriate finding regarding the debarment of New Venue Technologies, Inc., its affiliated entities, as identified herein and Terris S. and Jacque P. Riley.

Respectfully Submitted,

MONTGOMERY WILLARD, LLC



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*ATTORNEYS FOR THE STATE OF SOUTH
CAROLINA BUDGET AND CONTROL BOARD*

May 15, 2015
Columbia, South Carolina

MONTGOMERY WILLARD, LLC



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER
DECISION

In Re: Request for Resolution of Contract
Controversy by New Venue Technologies,
Inc. Counterclaim by South Carolina Budget
and Control Board

CASE NO.: 2014-206

Contract Controversy: New Venue
Technologies, Inc. vs. South Carolina
Budget and Control Board
Solicitation No. 5400001873 - Software
Acquisition Manager
Contract No. 4400003161

POSTING DATE: July 18, 2014

MAILING DATE: July 18, 2014

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. New Venue Technologies, Inc. (New Venue / NVTI) requested resolution of issues related to State Term Contract Number 4400003161 for a Software Acquisitions Manager (Exhibit 46). The State of South Carolina, by and through the Budget and Control Board (B&CB), subsequently filed Answers and Counter Claims (Exhibit 47). The CPO held an administrative review of the issues from May 19, through May 29, 2014. The CPO took nine days of testimony and accepted 465 exhibits comprising more than 25,000 pages of evidence into the record. In lieu of oral closings, the parties agreed to submit written closing arguments which are included as attachments two and three. New Venue was represented by John E. Schmidt, III, Esquire of Schmidt and Copeland, LLC and Geoffrey K. Chambers, Esquire of CPERL Group, LLC. The B&CB was represented by Michael H. Montgomery, Esquire of Montgomery Willard, LLC. The CPO was represented by Shawn Lavery DeJames, Esquire of the Office of General Counsel, South Carolina Budget and Control Board, M. Elizabeth Crum, Esquire of the McNair Law Firm, P.A. and Amber B. Carter, Esquire of the McNair Law Firm, P.A.

Background

This controversy emanates from a state term contract for a Software Acquisition Manager (SAM) (Solicitation No. 5400001873). The SAM contractor, New Venue, was to provide and maintain a real-time, web-based, vendor hosted system and to act as an order fulfillment, distribution, and tracking system to monitor software licenses, license transfers, license redistribution, support, maintenance, maintenance renewals, and warranty transactions as well as invoicing and payment from acquisition to the end of the life cycle. No funds were appropriated for this project so offerors were asked to propose a self-funded model to pay for this service.

The solicitation was issued on August 5, 2010¹. Amendment One to the solicitation was issued on August 20, 2010² answering questions from prospective bidders. Proposals were received from New Venue and Dell on September 13, 2010 (Exhibit 11, P. 1, Record P. 84). Dell's proposal was subsequently rejected and proposal clarifications and modifications were sought from New Venue. Negotiations with New Venue began on October 15, 2010 and concluded on December 21, 2010 with the execution of the Record of Negotiations³ and issuance of an Intent to Award⁴. The Intent to Award was to become the final award on January 4, 2011 and contract performance was to begin on February 15, 2011.

Prior to awarding the SAM contract, state term software contracts included a 1% ITMO admin fee. The SAM contract resulted in an increase of the admin fee to 2.5%. Because this increased admin fee was not reflected in the existing state term software contracts, the contracts needed to be modified to comport with the new admin fee. In addition, there were other documents that contractually defined the relationship between the SAM and the software contractors which were necessary to incorporate into the state term software contracts. Upon award of the SAM contract, ITMO prepared a change order (Exhibit 62, P. 2, Record P. 697) modifying the existing state term software contracts to incorporate the new admin fee, the SAM Vendor Participation Agreement (Exhibit 34, P. 3, Record P. 450), the MySAM Services Agreement (Exhibit 34, P. 8, Record P. 455), and to relieve the software vendors of their existing obligation to remit the ITMO admin fee and the monthly report of contract usage. The software vendors were advised that failure to agree to a modification to the existing contracts would result in cancellation and re-solicitation to incorporate the SAM process. The software vendors refused to modify the existing contracts and ITMO

¹ Exhibit 8, P. 1, Record P. 29 New Venue claims that the Board violated the contract from the outset as no transactions were tracked and processed through the SAM by New Venue until September 2011. New Venue contends that the Board had a duty to require all state agencies and participating local public procurement units to place all software orders for software of any type through the SAM.

² Exhibit 10, P. 1, Record P. 77

³ Exhibit 29, P. 1, Record P.402

⁴ Exhibit 32, P.1, Record P. 445

began a process of cancelling and re-soliciting existing state term software contracts to incorporate the SAM.

Under the SAM contract, participating Public Procurement Units (PPUs) would send purchase orders to New Venue. New Venue would send the order to the software vendor. The software vendor would fulfill the order and invoice New Venue. New Venue would invoice the PPU. The PPU would pay New Venue. New Venue would deduct 2.5% from the PPU's payment as an administration fee and remit the balance to the software vendor. New Venue would then remit .5% of the retained 2.5% admin fee to ITMO, leaving 2% to New Venue for operation of the SAM.

Change Order One⁵ was executed on March 2, 2011 adding additional services to the SAM contract. Microsoft software products were made available through the SAM on July 25, 2011 through reseller CompuCom Systems, Inc. (CompuCom). New Venue (SAM) received the first purchase order from a PPU in July of 2011⁶. Change Order Two⁷ was executed on August 10, 2011, deferring the ITMO administration fee for 12 months. The record reflects that Oracle products were made available in February 2012 through reseller Mythics, Inc.; IBM Middleware products were made available in March 2012 through IBM Public Sector Solutions; Citrix products were made available in March 2012 through reseller Advantec Global Systems; and Microsoft EES (School and Campus) products were made available in December 2012 through reseller Software House International Corp. (SHI).

On January 28, 2013, ITMO sent New Venue a Show Cause⁸ letter citing failure to remit payment to the software contractors in a timely manner. New Venue responded⁹ on February 19, 2013, with assurances that the delinquent payments would be brought current. The record reflects that Symantec products were made available on February 4, 2013 through reseller CDW Government LLC and Corel products were made available on June 11, 2013 through reseller En Point Technologies Sales, Inc.

Contract Modification One, modifying the order and payment process, became effective on September 1, 2013¹⁰. As a result of Contract Modification One, PPUs would send orders directly to the software vendor and copy New Venue; the software vendor would invoice and receive payment from the PPU; New Venue would collect the appropriate data, invoice the software vendor for the 2.5% admin fee, receive payment from the software vendor, retain 2% and remit .5% to ITMO.

⁵ Exhibit 37, P. 1, Record P. 491

⁶ Exhibit 232, P. 1, Record P. 10779

⁷ Exhibit 39, P. 1, Record P. 502

⁸ Exhibit 40, P. 1, Record P. 503

⁹ Exhibit 42, P. 1, Record P. 506

¹⁰ Exhibit 43, P. 1, Record P. 508

On September 30, 2013 ITMO sent New Venue a Notice of Default¹¹ citing continued delinquent payments to the software vendors. There was testimony that the B&CB began an audit of the contract on October 2, 2013, which is still incomplete. According to the testimony, the auditors examined 20 New Venue bank accounts to account for funds paid to New Venue by PPUs. On October 8, 2013, ITMO terminated the contract¹². The B&CB filed request for resolution of a contract controversy on September 30, 2013. The B&CB requested the CPO make a determination whether probable cause existed for New Venue's debarment on October 8, 2013. The B&CB withdrew its request for resolution of a contract controversy without prejudice on November 7, 2013. New Venue requested resolution¹³ of the contract controversy on November 14, 2013.¹⁴ New Venue petitioned the South Carolina Procurement Review Panel to sanction the B&CB for a frivolous filing on November 22, 2013. The Panel dismissed New Venue's motion for sanctions and remanded the case to the CPO suggesting that the CPO combine the State's request for review with New Venue's request for review. An unsuccessful settlement conference was held on February 19, 2014, and the B&CB responded on April 23, 2014 with Answers and Counter Claims¹⁵.

Findings of Fact

| | |
|----------------------------------|--------------------|
| Solicitation Issued | August 5, 2010 |
| Amendment One Issued | August 20, 2010 |
| Opening Date | September 13, 2010 |
| Responsibility Check Performed | October 2010 |
| Record of Negotiations Executed | December 21, 2010 |
| Intent To Award Issued | December 21, 2010 |
| Award Effective Date | January 4, 2011 |
| Contract Commencement Date | February 15, 2011 |
| Change Order One | March 2, 2011 |
| Change Order Two | August 10, 2011 |
| Show Cause Letter | January 28, 2013 |
| Response to Show Cause | February 19, 2013 |
| Contract Modification One | September 1, 2013 |
| Notice of Default | September 30, 2013 |
| Contract Termination | October 8, 2013 |
| New Venue Request for Resolution | November 14, 2013 |
| Settlement Conference | February 19, 2014 |
| Answer and Counter Claims | April 23, 2014 |

¹¹ Exhibit 44, P. 2, Record P. 513

¹² Exhibit 45, P. 1, Record P. 515

¹³ Exhibit 46, P. 1, Record P. 518

¹⁴The Board initially filed a request for resolution on September 30, 2013, and withdrew on November 7, 2013. The Board also filed a request for Suspension on September 30, 2013, that is still pending. New Venue requested sanctions against the Board at the Panel on November 22, 2013. Panel remanded to CPO on January 21, 2014.

¹⁵ Exhibit 47, P. 1, Record P. 585

Discussion

Prior to commencement of the hearing, the parties made several motions which the CPO addressed in writing (Attachment 1) at the beginning of the hearing.

To meet its burden in this contract controversy, New Venue must demonstrate by a preponderance of the evidence that there was a binding contract entered into by the parties, that there was a breach or unjustifiable failure to perform an element of the contract and that New Venue suffered damages as a result of the breach. The B&CB must meet the same burden of proof in its counterclaim in this contract controversy. *See e.g. Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962), Baughman v. Southern Railway Co., 127 S.C. 493, 1121 S.E. 356 (1924).

I. New Venue's Allegations of Breach of Contract

New Venue alleges the B&CB breached the contract by failing to require all PPUs to process all software purchases through the SAM; by failing to process any orders through the SAM for the first five months of the contract; and by failing to ensure New Venue received a 2.5% admin fee from every software purchase made by a PPU. New Venue further alleges that it was damaged by the B&CB's alleged breach and is entitled to a monetary reward.

A. New Venue alleges breach for failure to process all PPUs' software purchases through the SAM.

New Venue alleges that the contract required all state agencies and participating Public Procurement Units¹⁶ to process ALL software purchases from any source through the SAM beginning on February 15, 2011, and that the State breached that requirement by failing to process any software orders through the SAM until August of 2011 and then only from select state term contracts.¹⁷ New Venue relies on a sentence from the Purpose published in the solicitation which states:

It is the intent of the State to have participating Public Procurement Units submit all software purchase orders through the SAM.

(Emphasis added) (Exhibit 8, P. 20, Record P 48)

¹⁶ The term Public Procurement Unit is a defined term in the Code that includes both State agencies and local public procurement units. Section 11-35-4610(5) "Public procurement unit" means either a local public procurement unit or a state public procurement unit."

¹⁷ New Venue's case relied solely on the testimony of its Chief Executive Officer, Ms. Terris Riley and the documentary evidence in the record.

The B&CB argues that, when taken in the context of the contract as a whole, the only reasonable interpretation of the contract is that the B&CB only intended to process software purchases from state term contracts through the SAM and then only after existing contracts could be modified or re-solicited and new contracts created to require processing software orders through the SAM. See, S.C. CONST. art. I, § 4. I find NewVenue's interpretation is not supported by the plain language of the contract.

The contract anticipated software purchases outside the SAM and purchases through the SAM were limited to software purchased through state term contracts. The contract is comprised of the Record of Negotiations, any clarifications of New Venue's proposal (Exhibit 19), the solicitation as amended, any modifications to New Venue's proposal (Exhibit 18), New Venue's proposal, the Intent to Award and purchase orders, in that order.¹⁸

The Record of Negotiations was executed by both parties on December 21, 2010, and includes a list of Frequently Asked Questions and Answers. There is no explanation as to why these Q and As were included, but their inclusion makes them part of the contract and reflective of the agreement of the parties. Several of these Q and As offer some insight.

Q 6. What if I purchase software outside MySAM – will MySAM automatically know to update my organization's inventory?

A. No. It is the responsibility of the organization to manually update/add any inventory obtained outside of MySAM

(Exhibit 29, P. 8, Record P. 409). Amendment One to the solicitation included the following:

Q28. Will procurement code be changed to make it mandatory for all agencies to order items 1-8 on page 20 through SAM?

¹⁸ Exhibit 8, P. 30, Record P. 58:

CONTRACT DOCUMENTS and ORDER OF PRECEDENCE

(a) Any contract resulting from this solicitation shall consist of the following documents: (1) a Record of Negotiations, if any, executed by you and the Procurement Officer, (2) documentation regarding the clarification of an offer [e.g., 11-35- 1520(8) or 11-35-1530(6)], if applicable, (3) the solicitation, as amended, (4) modifications, if any, to your offer, if accepted by the Procurement Officer, (5) your offer, (6) any statement reflecting the state's final acceptance (a/k/a "award"), and (7) purchase orders. These documents shall be read to be consistent and complimentary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above. (b) The terms and conditions of documents (1) through (6) above shall apply notwithstanding any additional or different terms and conditions in either (i) a purchase order or other instrument submitted by the State or (ii) any invoice or other document submitted by Contractor. Except as otherwise allowed herein, the terms and conditions of all such documents shall be void and of no effect. (c) No contract, license, or other agreement containing contractual terms and conditions will be signed by any Using Governmental Unit. Any document signed or otherwise agreed to by persons other than the Procurement Officer shall be void and of no effect. [07-7A015-1]

A28. No, the procurement code will not be changed; however, the Chief Procurement Officer may in time decide to make this a mandatory project. This cannot be determined without historical data.

(Exhibit 10, P. 5, Record P. 81)

There existed numerous state term contracts for various software, including but not limited to: Microsoft products from CompuCom and Citrix products through reseller Advantec Global Systems. The state term contracts for software, however, did not encompass every piece of software a PPU may have need to purchase. The contract explicitly stated that PPUs may purchase some software outside of the SAM: "In addition, each Public Procurement Unit may have their own individual term contracts that may include software licenses/maintenance and agencies can purchase software from local retailers and catalog sales" (Exhibit 8, P. 20, Record P. 48). Thus not all software was required to be purchased through state term contracts. Only state term contract software was to be purchased through the SAM, and only where the state term contract had been modified or amended to provide for utilization of the SAM.

Taken together, utilization of the SAM was not mandatory for every purchase of software, and purchases outside the SAM were anticipated and recognized by the parties in the Record of Negotiations. The primary purpose of this contract was to track software related inventory. The invoicing and payment of purchases through the SAM was a method of paying for the inventory tracking with some incidental data collection. The primary purpose of the contract is clearly stated in first three paragraphs of the scope of the solicitation:

BACKGROUND

The State of South Carolina is comprised of 97 Agencies statewide with 61,956 employees (see Appendix B). ITMO does not have access to other Public Procurement Unit employment counts and Offeror can request this information from the individual Public Procurement Units.

The State, as a whole, does not have a software tracking/inventory system. Public Procurement Units purchase software from state or agency term contracts or from the retail market. Each Public Procurement Unit is responsible for maintaining its own software inventory and employs at least one person, on a full or part-time basis, to track its software licenses and maintenance. There is no prescribed inventory tracking methodology. The current situation limits the state's ability to aggregate its software requirements and consequently limits its ability to negotiate cost effective contracts, prevents the state transferring unused licenses from agency to agency to maximize its investment, and limits that state's ability to track license compliance.

PURPOSE

The South Carolina Information Technology Management Office (ITMO) is soliciting proposals for a state term contract for the fulfillment and tracking of software licenses and maintenance purchases, warranty information, license and maintenance expiration dates,

and support services purchase and expiration dates. Since no funds have been appropriated for this project, a self-funded system is required (see Section III., Budget). It is the intent of the State to have participating Public Procurement Units submit all software purchase orders through the SAM. The SAM will maintain the following information and make it available to each Public Procurement Unit as it applies to that Public Procurement Unit, and to ITMO as it applies to a specific Public Procurement Unit or the state as a whole:

1. Software License Purchases
2. Software License Expiration Dates
3. Software License Renewals
4. Software Maintenance Purchases
5. Software Maintenance Expiration Dates
6. Software Support Purchases
7. Software Support Contract Expiration Dates
8. Volume Discount Transactions for Software & Maintenance

INTRODUCTION

The State intends to award a state term contract to one Offeror for use by all State Agencies. Use by cities, counties, school districts and other political subdivisions are optional under Section 11-35-4810. - Cooperative purchasing. As stated earlier, Public Procurement Units purchase software from state or agency term contracts or from the retail market. Some software products currently on state term contract can be found at:

<http://www.cio.state.sc.us/itmo/contract/osp/Software/software.htm>.

State term contracts are issued by ITMO and are typically one-year contracts with four optional one-year renewal options for a total potential duration of five (5) years. Warranty periods on software purchased off the state term contract vary from manufacturer to manufacturer. Usually, support is purchased at same time licenses are purchased. Generally, maintenance is purchased before the warranty period expires. In addition, each Public Procurement Unit may have their own individual term contracts that may include software licenses/maintenance and agencies can purchase software from local retailers and catalog sales. It is the State's intent to have all of the above tracked.

(Exhibit 8, P. 20, Record P. 48) It is important to note that no funds were appropriated for the inventory tracking project so an administration fee collected through the invoicing and payment of certain software purchases was designed as a means to fund the project. The contract is clear that the admin fee only was intended to be assessed on purchases that were made through the SAM.

The solicitation required this contract be self-funded contract:

Since no funds have been appropriated for this project, a self-funded system is required (see Section III., Budget).

(Exhibit 8, P. 20, Record P. 48)

The solicitation defined a self-funded model as:

SELF FUNDED BUSINESS MODEL

Contract is self-funded. Offer shall retain a fee (a percentage of the total invoice less returns & taxes) that will be charged to the software provider (LAR, VAR, etc.). The fee will then be deducted from that software provider's invoice prior to SAM's payment to software provider. 1% will be submitted to the State as an administrative fee. For example, if the SAM fee is 3% then 2% remains with the SAM and 1% is submitted to ITMO as an administrative fee.

The fee must be the same for all transactions. Transactions include, but are not limited to, software licenses, license transfers, license redistribution, software maintenance transactions, and training and support costs and all changes that require monetary transactions.

(Exhibit 8, P. 39, Record P. 67)

In addition to the fee to be assessed to fund the project, the successful contractor was also responsible for remitting an admin fee to ITMO/MMO.

ADMINISTRATIVE FEE – ITMO

The Information Technology Management Office (ITMO) issues and maintains State term contracts for the benefit of Using Governmental Units within the State of South Carolina. In order to maintain and enhance the quality and quantity of its State term contracts an administrative fee of one percent (1%) of the total actual sales and services will be assessed of the Software Acquisition Manager. Total actual sales will be equal to gross sales less return goods and taxes as stated on the invoice.

(Exhibit 8, P. 33, Record P. 61)

Once the successful proposal was identified, the parties modified and clarified fees to be collected in the Record of Negotiations:

38. This contract is self-funded. The first year of the Software Acquisition Manager (SAM) the SAM fee will be 2.5% for each software purchase submitted through the SAM. Two percent (2%) remains with the SAM and one half percent (0.5 %) is submitted to ITMO as an administrative fee. At the end of any 12 month period, the State may negotiate the SAM fee.

(Exhibit 29, P. 6, Record P. 407)

The contract limits the purchases to be processed through the SAM to software purchases made from state term contracts. Delbert Singleton, Director of the Division of Procurement Services, testified that administrative fees are only imposed on state term contracts. ITMO Procurement Manager Debbie Lemmon testified that the software purchased through the SAM was to be software on state term contract. Amendment One to the solicitation included a number of questions and answers that clearly indicate that purchases processed through the SAM were limited to software purchases from state term contracts:

Q5. How will this contract affect or be affected by the current state term contracts in place? Will they continue, and if so, will endusers purchase from the SAM, and the SAM will purchase from the state contracted vendors?

A5. At this time, the current contract holders will perform as usual. If changes need to be made to current contracts to work with the SAM, ITMO will make this determination.

End users will only process their Purchase Orders through the SAM, not purchase from the SAM. Purchase orders can be viewed as a pass-through.

(Exhibit 10, P. 2, Record P. 78)

Q6. How will this affect current discount structures for state contracts, if the SAM can add an admin fee for the SAM, and an admin fee for the state? Will the state contract vendor also have to pay the admin fee for the state, if 2 contracts are used (the SAM contract, and the Microsoft contract for instance)? Or will the SAM pay the state the admin fee once?

A6. It depends upon the solution that is received. The State will make every effort to work with current contract holders.

(Exhibit 10, P. 2, Record P. 78)

Q30. Will all the checks/payments issued by SAM to vendors for items 1-8 on page 20 say State of SC?

A30. The checks/payments do not have to say State of SC but must include the following information:

- A. The purchasing agency name with delivery information.
- B. The State Term Contract Number
- C. Purchase Order information
- D. Reseller Quote and Quote number
- E. Reseller Invoice/Billing number

(Exhibit 10, P. 5, Record P. 81)

This contract required the SAM to be able to track software whether the purchase was processed through the SAM or through some other method, and it anticipated that other methods would be used. The contract limited software returns to software purchased from state term contracts. The ITMO admin fee was only included in state term contracts. There was no contractual basis for collecting an ITMO admin fee unless purchases were made through state term contracts. This contract did not require the purchase of all software by all participating PPU's through the SAM. Only software purchases from state term contracts were to be processed through the SAM. The contract clearly indicates that the purpose of the contract was to track and report the PPU's software. The processing of purchases and collection of an admin fee was not the purpose of the contract but a means of paying for the tracking and reporting of software inventory. The

contract does not require all state agencies and participating PPUs to process ALL software purchases from any source through the SAM. There is no material breach of the contract by the B&CB for failure to force all PPUs to process all software purchases through the SAM.

B. New Venue alleges breach for failure to process any orders through the SAM for the first five months of the contract

New Venue alleges that the State breached the contract by failing to process any orders through the SAM between February 15, 2011 and August 2011 and breached its obligation of good faith under Section 11-35-30¹⁹ by failing to do everything in its power to insure that all software purchases were processed through the SAM beginning on February 15, 2011.

Delbert Singleton, Director of the Division of Procurement Services, and Debbie Lemmon, ITMO Procurement Manager, testified that the state term software vendors refused to agree to change the state term contracts to provide that software vendors be required to process orders through SAM, at least in part based on the financial strength of New Venue. The software vendors were delivering product to the PPUs with the understanding that the PPU would pay New Venue and New Venue would pay the software vendors. It is only reasonable to expect that when one business contemplates entering into an agreement with another business that involves millions of dollars, that both businesses would exercise due diligence in evaluating their prospective partner.

The Code requires a determination of responsibility prior to contract award that would include whether the potential awardee has the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to meet all contractual requirements. The record reflects ITMO's efforts to determine New Venue's responsibility, including a listing with the South Carolina Secretary of State showing that New Venue was in "Good Standing" (Exhibit 25, P. 1, Record P. 388), a Dunn and Bradstreet report (Exhibit 26, P. 1, Record P. 390), satisfactory reference verifications (Exhibit 22, P. 1, Record P. 364), and two and a half years of financial statements in October 2010. (As of June 30, 2010, New Venue's balance sheet showed \$99.00 in checking/savings and \$17,928.00 in total assets [Exhibit 24, P. 4, Record P. 381]). ITMO determined that New Venue was a responsible bidder based on the information it obtained in October 2010 and awarded it the contract. There is nothing in the record indicating New Venue's financial situation in February 2011 when the software vendors cited that New Venue's financial strength was a problem.

¹⁹ Section 11-35-30. Obligation of good faith.

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.

Decision, page 11

In the Matter of New Venue vs. State of South Carolina, Case 2014-206

The record reflects New Venue's attempts to secure loans and lines of credit, with mixed results, beginning in March 2011 through the end of the contract (Exhibit 72, P. 3, Record P. 757). New Venue complains that these efforts to secure loans and lines of credit were imposed on it by the B&CB at the insistence of the software vendors as a precondition to implementation of the contract and were not part of the SAM contract. The SAM contract did not require New Venue to undergo credit worthiness checks and secure loans or lines of credit at the insistence of the software vendors and there is no indication that the B&CB imposed these requirements as part of the contract. Ms. Riley understood this on July 26, 2011 when she emailed Debbie Lemmon about a request from CompuCom:

He also requested that I fill out a credit application with CompuCom. I responded that New Venue will not complete a credit application and we will not apply for any kind of line of credit with CompuCom for any reason. This is not apart (sic) of our agreement with the State of SC.

(Exhibit 282, P. 1, Record P. 24774)

The record does not support New Venue's assertion that the B&CB forced it to seek loans and lines of credit as a precondition of contract implementation. The record does reflect that New Venue's quest for loans and lines of credit continued throughout the contract, and in some cases the loans and lines of credit were secured to bring accounts with the software contractors current.

On March 2, 2011, ITMO and New Venue agreed to Change Order One (Exhibit 37, P. 1, Record P. 491), which added Asset Inventory Management services and Current State Discovery services to the contract. These services were not dependent on the underlying software contracts and were available to agencies immediately. ITMO assisted in making the availability of these services known to all PPUs (Exhibit 273, P. 1, Record P. 24753).

The record reflects that the first, and most lucrative, contract re-solicited was the contract for Microsoft software products. The IFB issued on May 27, 2011 with award final July 25, 2011. New Venue began to receive orders from PPUs at the end of July 2011 and on August 10, 2011, ITMO and New Venue agreed to Change Order Two (Exhibit 39, P. 1, Record P. 502), which deferred the remittance of the ITMO portion of the admin fee for 12 months.

While one can understand that a vendor would like to be able to generate revenue on day one of the contract, that is typically not the case. Most state term contracts experience some ramp up time to make PPUs aware of the contract and for PPUs to get purchase orders in the pipeline. Due to the unanticipated

reaction from the software vendors to modifying the existing contracts²⁰, the ramp up time for this contract was a little longer than normal. Further, as the clear language of the solicitation shows, New Venue could not reasonably expect any amount of revenue from this contract. The solicitation put contractors on notice that the quantity of purchases was unknown and that the contractor was not guaranteed any amount of revenue, or any revenue at all:

ESTIMATED QUANTITY - UNKNOWN

The total quantity of purchases of any individual item on the contract is not known. **The State does not guarantee that the State will buy any specified item or total amount.** The omission of an estimated purchase quantity does not indicate a lack of need but rather a lack of historical information. [07-7B095-1]

(Exhibit 8, P. 35, Record P. 63) (emphasis added).

Thus, there was no guarantee of orders on the effective date of the contract and New Venue could not reasonably expect any amount of revenue, and certainly not on any particular date. Given the circumstances, the B&CB took every reasonable step to begin processing software orders through the SAM as soon as possible. There was no material breach of the contract by the B&CB.

C. New Venue alleges breach for failure to ensure New Venue received a 2.5% fee from all PPUs' software purchases.

New Venue also claims the B&CB breached the contract in that it “failed and refused to permit and require all software orders and purchases to be submitted to the SAM so that NVTI could receive its 2.5% fee.” Essentially, New Venue claims that it was entitled to a payment of two and one-half percent of every software purchase made by every PPU – regardless of whether the acquisition was made under a state term contract or subject to an administrative fee. As discussed earlier, the SAM admin fee was limited to purchases from software state term contracts. The purpose of this contract was for the tracking of software licenses, maintenance, support, and to facilitate license transfers. The admin fee was not the primary purpose of the contract, but rather was a means of paying for the tracking related services.

D. New Venue's claim for damages.

New Venue claimed damages including: the costs of analysts, developers and testers to build the solution to meet the State's requests; the costs of training, staffing, and paying a help desk team; the costs of

²⁰ There was testimony that the software vendors were amendable to the concept of a SAM prior to the award of the contract. It was not until New Venue was identified as the awarded vendor that the software vendors raised objections and concerns.

graphic design for marketing material required by the Contract; the costs of engaging support to assist in designing and building the online training tutorial under the Contract; the costs of all hardware, software, equipment, space, materials, supplies and personnel necessary for the implementation of the Contract; the cost of disaster recovery systems required for performance of the Contract; and other damages.

The burden of proving damages for breach of a contract rests on the plaintiff. Jackson v. Midlands Human Resources Center, 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988). The proof of damages must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn. Sterling Dev. Co. v. Collins, 309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992); Drews So. v. Ledwith-Wolfe Assoc., 296 S.C. 207, 371 S.E.2d 532 (1988).

In its effort to prove damages, New Venue relied solely on the testimony of Ms. Riley who either deferred the particulars of New Venue's claims to the accountant, Martha, or refused to provide names and contact information for persons who could corroborate her testimony. Martha was not called as a witness. While the record did reflect that there was one order placed by a PPU that should have been submitted through SAM but was not so placed, New Venue failed to prove it suffered any damages because the record reflects that the admin fee was paid to New Venue for this acquisition outside of SAM. New Venue failed to meet any minimum standard of proof as to the amount of any damages it allegedly sustained.

II. The Board's Allegations of Breach of Contract

The B&CB alleges that New Venue failed to deliver the online software tracking and management tool required by the contract; that New Venue failed to properly account for and remit administrative fees to the B&CB as required by the contract; that New Venue failed to timely place orders with the software resellers as required by the contract; that New Venue failed to timely remit payments to the software resellers as required by the contract; that New Venue collected funds for orders that it never placed; and that New Venue improperly diverted funds belonging to the resellers to its own use all in violation of contract requirements.

The B&CB also alleges that New Venue made material misrepresentations to the B&CB, to using governmental units of the State and to resellers regarding the status and collection of payments. The B&CB alleges that New Venue made these misrepresentations in order to further a scheme to defraud the B&CB, using governmental units and resellers, of funds remitted to New Venue by the PPU's that were to pass through to the resellers. The B&CB alleges that it is entitled to actual and punitive damages because of New Venue's fraudulent conduct.

A. Failure to deliver the online software tracking and management tool required by the contract

The B&CB alleges that New Venue failed to deliver the online software tracking and management tool required by the contract. The contract called for New Venue to provide and maintain a real-time, web-based, vendor hosted system (Exhibit 8, P. 8, Record P. 36). The Record of Negotiations included some specific requirements for the web-based system:

16. MySAM Central™ will support SSL (Secured Socket Layer) protocol for encrypted communications across the Web server.
17. MySAM Central will support the following Internet Browser:
 - 1.1 IE 7 and higher
 - 1.2 Foxfire 3.6 and higher
 - 1.3 Safari 4.0 and higher
20. The Upload Documents functionality on MySAM Central will not scrutinize content of the uploaded file(s) – the individual user is responsible for all content uploaded and/or faxed to the SAM
21. MySAM Central will allow multiples Quote uploads. However only ONE Purchase Order can be uploaded per order
22. The State Term Contract Number will be included as a field on the MySAM Central application. The primary and intended functionality for the end-user includes the following: Enter Order, Upload Documents, Confirm Order, and Submit Order.
23. MySAM Central will be load balance tested to ensure stability for a peak-time use of 100 concurrent connections. As we implement new phases and new functionality to MySAM Central, the number of concurrent users will increase. This will be based on data obtained from trend usage reports. The system will be modified to ensure maximum response times, stability and functionality. In addition, MySAM Central will utilize automatic log-out functionality due to no activity. This internal system monitoring will minimize concurrent connections ensuring best system performance.

(Exhibit 29, P. 1, Record P. 405)

The contract required the online system to act as an order fulfillment, distribution, and tracking system to monitor software licenses, license transfers, license redistribution, software maintenance and renewals, and warranty transactions as well as invoicing and payment from acquisition to the end of the life cycle (Exhibit 8, P. 8, Record P. 36). More specifically, New Venue was to track software licenses and maintenance purchases, warranty information, license and maintenance expiration dates, and support services purchase and expiration dates. ... New Venue was to maintain the following information and make it available to each PPU as it applied to that PPU, and to ITMO as it applied to a specific PPU or the State as a whole:

1. Software License Purchases
2. Software License Expiration Dates
3. Software License Renewals
4. Software Maintenance Purchases

5. Software Maintenance Expiration Dates
6. Software Support Purchases
7. Software Support Contract Expiration Dates
8. Volume Discount Transactions for Software & Maintenance

(Exhibit 8, P. 20, Record P. 48).

Ms. Riley testified that New Venue could not track the required information because the State did not insist that the software manufacturers provide New Venue with the Software License Key IDs. Amendment One does indicate that the manufacturer is to send the Software License Key IDs or key code to New Venue:

Public Procurement Unit (PPU) sends Purchase Order to SAM. SAM sends the purchase order to the manufacturer. The manufacturer sends the key code to the PPU. SAM sends invoices as well.

Notes:

1. PO from PPU must be cut to SAM notating the Manufacturer's quote and billing address & State Term Contract # if applicable
2. Manufacturer sends key code & invoice to SAM
3. SAM sends key code & invoice to procuring PPU
4. PPU sends payment to SAM who pays the manufacturer

(Exhibit 10, P. 7, Record P. 83). However, this requirement was changed in the Record of Negotiations:

2. New Venue is not responsible for delivering software orders, nor for delivering vendor KeyIDs for software downloads unless this is decided upon by the State.

(Exhibit 29, P. 2, Record P. 403)

The contract required a web reporting tool and specific reports to make the information "available to each Public Procurement Unit as it applies to that Public Procurement Unit, and to ITMO as it applies to a specific Public Procurement Unit or the state as a whole." The Record of Negotiations included requirements for the web reporting tool:

25. The web reporting tool will be intuitive and user-friendly with standard and customizable reports. (February Release)
26. The web reporting will reflect current contract usage details as required by the State's Reporting Manager. (February Release)
27. The web reporting tool will include real-time trending as well as 'snap-shot' of Web trending for a given date. (May Release)
28. The web reporting tool will be used to trend 'Peak/Low' time usage. (May Release)
29. The web reporting tool will include trending by Agency. (May Release)

30. The web reporting tool will trend the average time it takes to submit an order. (May Release)
31. The web reporting will trend by Agency and MySAM Central holistically. (May Release)
32. The web reporting tool will trend the average number of line items per order. (May Release)
33. The web reporting tool will trend to average total cost per order. (May Release)

(Exhibit 29, P. 5, Record P. 406).

Ms. Riley testified that the functionality that was to be available in February 2011, according to the contract, was not available because of the State's failure to make the software manufacturers provide New Venue with the software Key IDs:

"A web reporting tool will be intuitive and user friendly with standard and customizable reports". That would be available with the February release, but several things had to happen. The first thing that had to happen was that I had to have the Software License Key ID. I did not have that. If I had that information, then I could make sure that I would have made that account available, at a least at Debbie's, which is the State super admin user.

Ms. Riley also testified that the functionality scheduled for the May release in the contract was delayed until a June 7, 2013 meeting when it was decided by ITMO and New Venue that all development of the MySam Central system should be discontinued. The CPO notes that there is no change order or other contractual documentation to this effect in the record.

The contract also required "MySAM Central™ will provide Usernames and Passwords for each user" (Exhibit 29, P. 3, Record P. 404). When questioned about usernames and passwords Ms. Riley provided the following answers:

Q: Well, I just want to make sure I understand, Ms. Riley. Is it true that no user name or password was ever issued to any State user to be able to access MySAM Central?

A: The accounts were created, but they were not issued, because role-based security was not implemented.

Q: So, there was never a situation where any State user was able to log into this system from February of 2015 -- or excuse me, February of 2011 through today using that system?

A: They could from my office, but they declined that offer.

The contract also requires New Venue to facilitate license transfers:

The SAM will facilitate the transfer (including cross-agency transfer) of any kind of software licenses. It shall be the State's responsibility to inform the SAM of any instances in which a transfer of license is permissible. SAM will advertise available transfers via the MySAM Central applications and Agencies may obtain information from the SAM.

(Exhibit 29, P 2. Record P. 403)

On August 27, 2013, Debbie Lemmon emailed Terris Riley:

Terris,

We have an agency that has requested the following:

“Has anyone actually transferred licenses between agencies or done any analytics regarding statewide licensing that the SAM was intended to address?”

Request an account with MySAM Central to review with our customer.

Can you provide me an account with MySAM Central by close of business on Wednesday, August 28, 2013?

(Exhibit 423, P. 3, Record P. 25186) Terris Riley replied by email that same day:

We can create user accounts, but there are some areas that we need to talk through first... Also, in light of this, we must redefine the roles of each user. So before we create any roles for any users, we need to schedule a meeting with you to determine how the user roles will be set up... The answer to your question is no, we cannot have an account created for a user by COB 8/28. Reports are available, but I would request that you allow us to get through this 'end-of-the-month' rush. As you know, we have less staff now. If you'd like, the Agency can call me or Anthony for a one-on-one consult regarding licensing information for their agency only...I will be in a mandatory GSA training class on Wednesday, Thursday & Friday of this week, but I am available next week to come in and discuss how we should proceed with 1) the User Accounts and 2) License Transfers. I'll keep an eye out for your invite! Thanks, Debbie!

(Exhibit 423, P. 2, Record P. 25185) Mr. Emmett Kirwan of ITMO sought access to the MySAM system on September 24, 2013:

Terris,

As the contract administrator for ITMO I need to have access to the reports available to the State of South Carolina in MySAM Central as an ITMO Super-user. Please provide me with a username and password that will gain me access to all South Carolina's MySAM Central reports. I understand you are out of the office until Friday, however I need this access no later than Thursday, September 26, 2013 at noon.

(Exhibit 431, P. 2, Record P. 25201) On September 24, 2013 Ms. Riley responded:

Hi Emmett,

I hope you are doing well.

Thanks for contacting me. I contacted Debbie about a similar request a few weeks ago. When Jacque & I met with Norma, Delbert, and Debbie along with our attorney, Geoff Chambers, (back in June), we were in the midst of preparing to roll out the next phase of development for the MySAM system (which includes the implementation of the State Admin User role). However, the State explained the need to modify the SAM contract

ASAP. We discussed the great challenges this would present for NewVenue from the applications development perspective as well as from a financial perspective (most importantly). In order to transition, we collectively agreed on certain strategies to help minimize impact, expenses & costs immediately. Some of these adjustments included downsizing our staff as well as halting development work for MySAM (for now).

... As I previously explained to Debbie, this feature is currently not available in MySAM, but we will be happy to provide you with custom reports with the information you require. To properly set your expectations, Emmett, we will not be able to provide you with access to our system until we have worked through this modification and have regained the financial stability to resume development work.

(Exhibit 431, P. 3, Record P. 25200) Mr. Kirwan made an additional request for access to the system on September 25, 2013:

Terris,

Thank you for your response. Since this feature is not available would you at least be able to provide me a login so that I can see what State Agencies and other Using Governmental Units see when they receive their login credentials and are able to login?

(Exhibit 431, P.2, Record P. 25199) Ms. Riley responded a short time later that day:

Hi Erwin,

My apologies, let me be more clear. This feature--State Admin level access--(technically called **role-based security**) is simply not available because it's not in the production environment. This has not been coded yet.

What is it that you are wanting to accomplish? Do you want to test-drive the system? If so, I will check to see if our demo environment is still accessible. It's an exact replica of MySAM but there is no real data.

Otherwise, I will be happy to provide a live demo of the actual production environment for you at my office when I return. What days/times look good for you next week?

(Exhibit 431, P. 1, Record P. 25198)

Ms. Riley's email refers to a June 2013 meeting with MMO alleging that a decision was made to temporarily halt future development of the MySAM application. That decision is not memorialized in the contract and even if it were, the password and login function was supposed to be available on February 15, 2011 when the contract started. There is no evidence that New Venue provided the real-time, web-based, vendor hosted system to act as an order fulfillment, distribution, and tracking system to monitor software licenses, license transfers, license redistribution, support, maintenance, maintenance renewals, and warranty transactions as well as invoicing and payment from acquisition to the end of the life cycle.

B. New Venue failed to properly account for and remit administrative fees to the Board as required by the contract

The testimony of Jimmy Aycock, the B&CB's auditor, established that New Venue failed to properly account for and remit the administrative fees due the B&CB under the contract. Mr. Aycock found that gross software sales by New Venue totaled \$29,511,226.03 (Exhibit 181, P. 48, Record P. 743). The MMO admin fee of .5% should have been \$147,556.13. New Venue only reported the sum of \$22,392,132.95 to the B&CB (Exhibit 181, P. 48, Record P. 743). This resulted in an underreporting of over seven million dollars in gross software sales. Based on New Venue's reported sales, New Venue should have remitted \$111,965.66 to MMO. However, New Venue only remitted \$111,247.39 to MMO (Exhibit 233, P. 1, Record P. 10782). New Venue underpaid administrative fees to the State in the amount of \$36,308.74.

C. New Venue failed to timely place orders with the software resellers as required by the contract

The Record of Negotiations required:

All orders are processed the next business day. For orders received after 5 PM, that order will be processed within the next 2 business days. Note all required documents (the PO and either a quote or a contract number) must be received by the SAM before an order can be processed.

(Exhibit 29, P. 2, Record P. 403)

Emmett Kirwan, a Contract Administrator with the B&CB, testified about his analysis of New Venue's timely transmission of orders under the contract and concluded that New Venue regularly failed to transmit orders within the time required by the contract. Exhibit 453 in the record demonstrates this failure (Exhibit 453, P. 1, Record P. 25408). Moreover, Mr. Kirwan determined that in many cases, New Venue was not even placing the purchase orders until after it received payment from the state agencies and PPU's. There was also evidence that in some cases, New Venue required pre-payment by PPU's in violation of the contract.

D. New Venue collected funds for orders that it never placed

New Venue invoiced PPU's for orders totaling \$88,208.85, received payment, but never forwarded the orders to the software vendors (Exhibit 454, P. 1, Record P. 25665).

E. New Venue failed to timely remit payments to the software resellers as required by the contract

The B&CB asserts that New Venue did not remit payments within 3 business days as required by the contract, and instead often took 45 days or more to remit payments. The contract clearly requires the software resellers to be paid within 3 business days after the SAM receives payment from the PPU.

The State will ensure that all Vendors participating in SAM understand that all invoices will be paid from the SAM to the Vendor within 3 business days after the SAM has received payment from the State.

(Exhibit 29, P. 3, Record P. 404) In spite of the fact that she signed the Record of Negotiations that included this requirement, Mrs. Riley characterized this as a “desire of the State” that was not a binding contractual requirement on New Venue. However on February 9, 2012, Debbie Lemmon emailed Terris Riley and a number of CompuCom employees stating:

According to the contract, CompuCom has agreed to accept payment from the Software Acquisition Manager within three (3) business days after the Software Acquisition Manager (New Venue) receives payment from the State.

(Exhibit 305, P. 1, Record P. 24833)

When the B&CB’s auditors reviewed New Venue’s banking transactions they discovered that the average time between the time the PPUs paid New Venue and the time New Venue remitted the funds to the software vendors was:

| | |
|----------|--|
| CompuCom | 49.59 days with a high of 153 days (Exhibit 256, P. 23, Record P. 24692) |
| Advantec | 60.73 days with a high of 378 days (Exhibit 256, P. 25, Record P. 24694) |
| SHI | 50.89 days with a high of 127 days (Exhibit 256, P. 27, Record P. 24696) |
| Mythics | 45.40 days with a high of 58 days (Exhibit 256, P. 29, Record P. 24698) |

Exhibit 456 shows numerous examples where NVTI received payment from the PPU and failed to remit payment to the software vendors in accordance with the contract (Exhibit 256, P. 15, Record P. 24684). Exhibit 425 shows that SC Judicial Department paid New Venue on 5/20/2013 and New Venue deposited the payment in its account on 5/22/2013. On September 11, 2013 Ms. Riley emailed Norma Hall that the PO was showing as unpaid. New Venue paid CompuCom for the Judicial Department’s software order from CompuCom on September 20, 2013 (Exhibit 256, P. 17, Record P. 24686).

Mrs. Riley referred to an agreement with CompuCom to allow for summary billing on a thirty or forty-five day basis, and while there are emails on the subject in the record, the CPO finds no executed agreement. Regardless, no such agreement between CompuCom and New Venue was ever incorporated into the contract, the B&CB was not a party to any such agreement, and an agreement between CompuCom and New Venue does not alter the contract between New Venue and the B&CB. Further, it is apparent from the

Decision, page 21

In the Matter of New Venue vs. State of South Carolina, Case 2014-206

record that CompuCom believed that New Venue was to remit payment within three days of receiving payment from the PPU.

In an email from Earl Fajkus of CompuCom to David Williams of CompuCom dated November 1, 2012:

When we initially reviewed, discussed and approved this opportunity with the State, the understanding and agreement with New Venue and the State was clear in that New Venue would pay us within 3 days of being funded by the State.

(Exhibit 321, P. 1, Record P. 24902) In an email from CompuCom's Earl Fajkus to Terris Riley dated January 25, 2013:

A review indicates that at this point you have past due invoices totaling \$1,464,218, on accounts with a total balance of \$2,810,148. That delinquent balance of \$1.46 Million represents 52% of your total balance, with the majority of invoices being severely delinquent, (i.e. more than 30 days past due, with a large portion of those invoices are from the September – November 2012 time frame!). Further review of your accounts show that they have been chronically delinquent for the last 12 months, with examples, month after month, of invoices paid by the State of South Carolina to New Venue not being forwarded to CompuCom in a timely manner. The agreement is that payments are to be forwarded to CompuCom within 3 days of receipt, Not 30 or 60 days as has been typical over the history of this account.

(Exhibit 359, P. 1, Record P. 25025) In a September 27, 2013 email from Mrs. Riley to Earl Fajkus of CompuCom:

To date, New Venue Technologies, Inc. owes approximately \$2.5M...Earl, now that the modifications are in effect, we will need to work with you and your team at CompuCom to agree on (semi) long-term solution for us to repay this debt.

(Exhibit 181, P. 46, Record P. 741)

Ms. Riley's testimony regarding New Venue's failure to remit payment to the software contractors within three days of receipt of payment from the PPUs is informative:

Q: Ms. Riley, if you could direct me to any authority within the contract documents that provides you the ability to withhold moneys other than administration fee from the vendors?

A: Well, I would answer, if I'm understanding you, Mr. Montgomery, that it's not a matter of withholding money, but more of a matter of when money is remitted, and I believe that is addressed in the Summary Billing Agreement between CompuCom and I, and I believe that is established in the way in which we performed and the way in which we submitted our payments to CompuCom, so I won't say that there's anything that says I have a right to withhold money, but I don't believe there's anything that defines any terms that I did not comply with throughout the contract.

Q: But your contention is that the State was bound by your Summary Billing agreement with CompuCom?

A: Well, I'll say it this way. New Venue Technologies and CompuCom had an agreement, because the State Solicitation, nor does my Record of Negotiations explicitly describe exactly when I would make my payment. It placed no duty on me as to when I would remit my payment. That was governed by and established agreement between New Venue and CompuCom, because at the vendor's request, they simply did not want payments every day. That was with their request. That's what they asked for.

Q: Do you contend that you had any entitlement to the use of the 97.5 percent of the funds that you collected and were to remit to the resellers?

A: I contend that I have entitlement to any revenue that comes into my company for the use of productivity in my business, for the use of moving our business forward, and especially for the use of adhering to new contract requirements that were not in place before I was awarded the contract.

Q: Okay. Did you ever notify the State in any way that "I'm keeping money as part of that 97.5 percent that I'm supposed to be delivering to the vendor"?

A: Well, that would mean keeping -- keeping to me -- this is what "keeping" means. "Keeping" means that I am -- I've taken some money. I've stashed some money away, and I have the intent to keep that money stashed away and never to pay anybody, never to remit anything and never to inform you of what it is I intend to do or what it is I'm trying to accomplish ever. That's what "keep" means. So, my answer to you is that, no, I did not contact the State to tell them what I'm keeping, because that's not what I did.

On November 2, 2012, Ms. Norma Hall contacted New Venue about delinquent accounts with CompuCom. On January 28, 2013 the B&CB served New Venue with a show cause letter addressing the late payments to the software contractors and possible termination of the contract (Exhibit 40, P. 1, Record P. 503). New Venue responded on February 19, 2013:

Ms. Hall, when you notified me on November 2, 2012, we immediately began to aggressively attack the situation. At that time CompuCom's aging report reflected \$1.8M as delinquent invoices. As of today, we have reduced this amount to \$318,551.55 (which we anticipate clearing up by later February/early March). To date, our payments to CompuCom since our November 2nd conversation total \$2,225,044.24.

(Exhibit 42, P. 1, Record P. 506)

New Venue did not bring its accounts with CompuCom current as promised. On March 22, 2013, Voight Shealy, the Materials Management Officer, advised Norma Hall that:

According to CompuCom, New Venue owes CompuCom a total of \$2,825,608.66.
 According to CompuCom, \$1,376,024.13 of that is past due.

(Exhibit 392, P. 1, Record P. 25109) According to the auditors, as of October 2013, there is \$2,702,511.26 that was paid to New Venue that was not forwarded to the software vendors (Exhibit 256, P. 1, Record P. 24670).

From July of 2012 until February of 2013, the only software orders being processed through New Venue were for Microsoft products from CompuCom. Looking at New Venue's banking records for the first few months of the CompuCom contract indicate that New Venue received payments from PPUs for two months before it made the first payment to a software contractor and then only paid the software contractor slightly more than half (55%) of what New Venue had received from the PPUs.

| | SAM Deposits | Payments to Software Resellers | Other NV Expenditures |
|------------|---------------------------------------|--|--|
| 8/31/2011 | \$48,713.07 | \$0.00 | \$42,212.44 |
| 9/30/2011 | \$950,149.34 | \$0.00 | \$69,293.11 |
| 10/31/2011 | \$560,175.52 | \$856,993.95 | \$227,039.56 |
| 11/31/2011 | \$299,115.79 | \$249,138.02 | \$81,943.59 |
| 12/31/2011 | \$527,576.98 | \$456,935.41 | \$109,440.86 |
| | Exhibit 182, P. 161, Record P. 988 | Exhibit 183, P. 294, Record P. 1599 | Exhibit 183, P. 294, Record P. 1599 |

There are numerous examples in the record of New Venue's failure to meet this requirement and it is clear from the chart above that New Venue was never in compliance with this requirement. This is a material breach of the contract.

F. New Venue improperly diverted funds belonging to the resellers to its own use all in violation of contract requirements

Mr. Aycock reported some of the audit findings in Exhibit 256 (Exhibit 256, P. 31, Record P. 24700) Showing Gross Expenses of \$34,977,362.74 of which \$28,393,436.01 could be directly tied to payments from PPUs for software. Software contractors were paid \$24,809,153.52 leaving a balance of \$3,584,282.49. New Venue was entitled an admin fee of 2% of the SAM deposits or \$567,868.72. The MMO admin fee of .5% of the SAM deposits equaled \$141,967.18. Subtracting the admin fees from the \$3,584,282.49 leaves a balance of \$2,874,446.59 still owing to the software contractors.

The auditors concluded that New Venue spent \$4,385,026.85 on things not related to the SAM contract. This included "Other Expenses" of \$3,511,260.94 and Miscellaneous expenses of \$873,765.91 (Exhibit 256, P. 32, Record P. 24701).

The auditor's testimony revealed that New Venue had appropriated more than \$2.7 Million, which was used to fund personal expenses of New Venue's owners. These expenses included more than \$711,000.00 to a contractor for construction of the personal residence of Terris and Jacque Riley, New Venue's owners, more than \$66,500.00 for the purchase of the land for that house, plans, a swimming pool and landscaping at the home totaling almost \$70,000.00. Mr. and Ms. Riley took more than \$600,000.00 in cash withdrawals from accounts; none of the cash was paid to any software resellers, and spent nearly \$200,000.00 in religious donations and consultant services. The Rileys spent more than \$564,000.00 in debit card transactions from New Venue accounts. New Venue was entitled to only 2% of the \$28,393,436.01 it received from the PPUs, \$567,868.72, far less than the amount of money retained and spent by Mr. and Mrs. Riley.

G. New Venue failed to comply with the End-of Life requirements of the contract

The contract required certain obligations to survive termination of the contract:

SURVIVAL OF OBLIGATIONS (JAN 2006)

The Parties' rights and obligations which, by their nature, would continue beyond the termination, cancellation, rejection, or expiration of this contract shall survive such termination, cancellation, rejection, or expiration, including, but not limited to, the rights and obligations created by the following clauses: Indemnification - Third Party Claims, Intellectual Property Indemnification, and any provisions regarding warranty or audit.

(Exhibit 8, P. 32, Record P. 60)

STATEWIDE TERM CONTRACT (JAN 2006)

... The State shall be entitled to audit the books and records of you and any subcontractor to the extent that such books and records relate to the performance of the work. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer.

(Exhibit 8, P. 37, Record P. 65) At item 41 in the Record of Negotiations (Exhibit 29), New Venue agreed to comply with the end of life requirements set forth in the solicitation. The solicitation provided:

Procedure for End of Contract Life

Software Acquisition Manager must agree at the end of their contract period, whether the State conducts a new procurement for this service or not, contractor must provide the State, within 30 days of contract end date the following information including but not limited to:

- All data in as mutually agreed upon in a industry common format such as ASCII
- Back-ups
- Report layouts
- Open Source Software
- Any other information obtained from the State pertaining to this contract.

At the conclusion of the contract, the Contractor will initiate a decommissioning procedure that will result in the shutting down of the existing site, export and delivery of the data using either Microsoft Excel or a CSV File (comma separate values). The data is to be accessible on a secure website within 60 days after the contract termination, and remain available on the site for a minimum of 90 calendar days at no additional cost.

The only information New Venue provided was bank statements, cancelled checks, purchase orders, and invoices in either PDF or picture format. An examination of Exhibit 462 does not demonstrate that the information required by contract to be provided to the B&CB has been provided to the B&CB. There were no registers showing what payments were for what invoices or what invoice payments were covered by what deposits. There were no record layouts. There was no inventory by manufacturer, product, agency, or accumulated totals. Mr. Aycock testified that he or his staff reviewed every document provided by New Venue and that neither the data nor the reports were included therein. New Venue breached the contract in this particular by failing to provide the data and information it agreed to provide in the contract. This is a material breach of the contract.

In addition, Mr. Aycock testified about the failure of New Venue to provide records required to conduct the audit pursuant to the contract and statute. He also testified that New Venue failed to cooperate as the contract required in the audit process and the resulting cost to the B&CB. The totality of documents provided by New Venue was entered into the record as Exhibit 462. The record shows that the absence of records and the condition of the records received resulted in the audit requiring about 2000 hours more than a typical audit of an agency of similar size. Exhibit 254 details the additional time and audit cost incurred by the Board as a result of New Venue's non-compliance with the audit requirements in the Contract. It reflects the total audit cost to be \$139,026.83. The average cost to audit an agency of similar size was \$14,250.33. The audit of New Venue cost \$124,776.50 more than the audit of an agency of similar size.

H. New Venue made material misrepresentations to defraud the State and software resellers

The B&CB also alleges that New Venue made material misrepresentations to the B&CB, to using governmental units of the State and to resellers regarding the status and collection of payments. The

Decision, page 26

In the Matter of New Venue vs. State of South Carolina, Case 2014-206

B&CB alleges that New Venue made these misrepresentations in order to further a scheme to defraud the B&CB, using governmental units and resellers, of funds remitted to New Venue by the PPUs that were to pass through to the resellers. The B&CB alleges that it is entitled to actual and punitive damages because of New Venue's fraudulent conduct.

One example is an email from Terris Riley to Debbie Lemmon dated February 17, 2012 in which Ms. Riley states:

Please see a copy of all payments made to CompuCom attached. (You may want to view the "Summary of CCpymnts" report first as it is a high-level overview. The other reports are highly detailed and include the details of each order placed.)

With CompuCom, Suzan and I agreed on Wednesday, that NewVenue currently has 0 purchase orders that are that are 60 days past due--with the exception of the \$359K. (As I mentioned before, there are several outstanding invoices (totaling approximately \$104,547.91) that we are collecting on that has already been paid to CompuCom. This was an error on our end because of misapplied payments.)

(Exhibit 309, P. 1, Record P. 24842) On February 17, 2012, Norma Hall reviewed the "Summary of CCpymnts" from Ms. Riley and made the following observation:

Debbie,
When I subtract the amount NewVenue has paid CompuCom I get a remaining balance of \$481,352.08. Terris states in the spreadsheet that "*Note* Awaiting payment for December \$359K invoice". The two amounts do not add up, even if you subtract 2.5% for NewVenue's admin fee (if it hadn't already been subtracted by Terris) – the amount would be \$469,318.28 if you subtracted the 2.5% (\$12,033.80). I'm a little confused by that.

If the amount is from a December invoice, then that payment is at least 45 days late if not longer. Help me understand what the spreadsheet is really saying.

(Exhibit 310, P. 1, Record P. 24844) On February 17, 2012, CompuCom emailed Ms. Riley requesting an update on 8 invoices delinquent 60 days or more and 10 more invoices that were at least 37 days late. Ms. Riley responded:

Liese,
Again, your reports are inaccurate. All of these except the one for \$359K have been paid via wire transfer and Suzan has those reports.

New Venue has 0 invoices that are 60 days past due. I do not know who/how payments are posted, but I have every wire transaction documented and my bank retains copies as well. My only suggestion is that you speak with Suzan as I am not re-hashing this again today.

Thanks & have a super weekend.

Terris

(Exhibit 451, P. 1, Record P. 25299)

“Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right.” Regions Bank. V. Schmauch, 354 S.C. 648, 672, 582 S.E. 2d 432, 444 (2003). In South Carolina, “Fraudulent act” is broadly defined as “any act characterized by dishonesty in fact or unfair dealing. Connor v. City of Forest Acres, 348 S.C. 454, 466, 560 S.E. 2d 606, 612 (2002). In accordance with Unisys Corporation v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E. 2d 263 (2001), a contract controversy is an appropriate place to award punitive damages where there has been fraud. “The CPO ... may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract *or by applicable law*.... (punitive damages recoverable for fraudulent act independent of breach).” Id. at 273. In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. See Regions Bank, 354 S.C. 648, 582 S.E. 2d 432.

Determination

New Venue’s claim that all software was to be purchased through the SAM is not supported by the language of the contract. The contract anticipated purchases outside the SAM. Consequently there is no breach of the contract by the B&CB.

New Venue’s claim that it was entitled to 2% of all software purchases made is not supported by the contract. New Venue was only entitled to 2% of the purchases processed through the SAM. Consequently, there is no breach of the contract by the B&CB.

The contract did not require the processing of any number of orders through the SAM on February 15, 2011, or at any time thereafter. In fact, the contract clearly stated that the quantity of purchases was unknown and there might be no purchases at all. The B&CB did not breach the contract by not processing software purchases through the SAM until August of 2011.

New Venue, was to provide and maintain a real-time, web-based, vendor hosted system and act as an order fulfillment, distribution, and tracking system to monitor software licenses, license transfers, license redistribution, support, maintenance, maintenance renewals, and warranty transactions as well as invoicing and payment from acquisition to the end of the life cycle. The SAM was supposed to track all software, in inventory, or acquired by participating PPUs during the term of the contract. No funds were appropriated for this project so a self-funding mechanism was established. New Venue was supposed to receive 2% of

the purchase of software licenses, maintenance, and support from state term contracts as compensation for providing the SAM.

New Venue failed to provide a real-time, web-based, vendor hosted system to track software related inventory. This is a material breach of the contract.

The only software tracking accomplished during this contract was incidental invoicing and payment. Ms. Riley testified that New Venue did not collect the required data because it did not receive the software Key ID. New Venue's claim that it could not track software license purchases or any related information including inventory because it did not receive the software Key ID is without merit in part because the Record of Negotiations relieved New Venue of responsibility for receiving and distributing the Key ID. There is no indication in the record that New Venue collected any data about software or sorted or segregated the purchase of licenses from maintenance or support by agency or in the aggregate. When asked by the auditors to provide all data, specific information about the software inventory was not provided and is assumed not to exist. This fails the essential purpose of the contract and is a material breach of the contract.

The only part of this contract New Venue made any effort to perform was the invoicing and payment portion and it failed to perform those functions in accordance with the contract. The contract required New Venue to forward all purchase orders from PPUs to the appropriate reseller in either 1 or 2 business days after receipt of the order. In multiple instances New Venue failed to forward the purchase orders even after receiving payment. This is a material breach of the contract. To accept payment without performing the required service is a fraudulent act and a breach of the obligation of good faith.

The contract required New Venue to forward 97.5% of every payment received from the B&CB or any PPU to the appropriate reseller within three (3) business days after receipt of the payment. On multiple occasions New Venue failed to comply with this requirement. This is a material breach of the contract. On multiple occasions, New Venue withheld payment to the appropriate reseller and appropriated more than \$2.7M of these funds for its own use and the use of its principles. This is a fraudulent act.

New Venue failed to provide all data, reports, backups, and records as required by the end-of-life provisions of the contract. This is a material breach of the contract.

New Venue collected funds from PPUs for software that it never ordered from the resellers. This is a material breach of the contract and a fraudulent act.

The record shows that New Venue represented that it would perform the contractual obligations, including but not limited to paying software vendors within three days of receipt of payment from the PPU. It was intended by the parties that this representation by New Venue that it would pay software vendors be relied upon by the B&CB, the PPUs and also the software vendors. The record shows that New Venue knew that payments had not in fact been made to software vendors as expected. The PPUs and the B&CB relied