

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In Re: State of South Carolina v. New  
Venue Technologies, Inc.

Contract Controversy

Software Acquisition Manager (SAM)  
Contract No. 4400003161

**BEFORE THE CHIEF PROCUREMENT OFFICER**

CASE NO. 2014-204

**REQUEST FOR RESOLUTION**

The State of South Carolina, through its purchasing agency Information Technology Management Office, submits this Request for Resolution of a contract controversy to the Chief Procurement Officer, pursuant to S.C. Code Ann. § 11-35-4230 (2011). The State would show the CPO the following:

**JURISDICTION**

1. The Information Technology Management Office (“ITMO”) exists by authority of S.C. Code Ann. § 11-35-820. Section 11-35-1580(b) charges ITMO with “administering all procurement and contracting activities undertaken for governmental bodies involving information technology.”

2. New Venue Technologies, Inc. (“New Venue” or “Contractor”), is a corporation organized and existing under the laws of the State of South Carolina, and conducts business throughout the State from its offices in Columbia, Richland County, South Carolina. New Venue is registered as SC Vendor Number 7000147823.

3. This controversy concerns a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code. The Chief Procurement Officer has exclusive jurisdiction to resolve the controversy pursuant to Code Section 11-35-4230(1).

## THE CONTRACT

4. The State currently is party to statewide term contracts for the purchase of various software products. Those contracts include the following:

Software	Vendor	Solicitation/Contract No.
Citrix	Advantec Global Systems	5400003405/4400005025
Corel	En Pointe Technologies Sales, Inc.	5400005917/4400006768
IBM Middleware	IBM Public Sector Solutions/WSCA	5400001124/4400008965
Microsoft	CompuCom Systems, Inc.	5400003109/4400003937
Microsoft EES	SHI International Corp.	5400003580/4400006148
Oracle	Mythics, Inc.	5400003569/4400006276
Symantec	CDW Government LLC	5400004922/4400006327

5. On August 5, 2010, ITMO issued Solicitation No. 5400001873, seeking a statewide term contract for a Software Acquisition Manager (SAM). According to the solicitation:

It is the State's intent to solicit responses for a Software Acquisition Manager (SAM) to maintain a real-time web-based vendor hosted system for use by all Public Procurement Units. The SAM can be defined as a software acquisition manager acting as an order fulfillment, distribution, and tracking system designed to monitor software licenses, license transfers, license redistribution, software maintenance and renewals, and warranty transactions as well as invoicing and payment from acquisition to end of life cycle.

6. Under the terms of the solicitation, a State agency or participating political subdivision desiring to buy software from one of the statewide contracts was to issue a purchase order to the SAM. Within three business days following receipt of the order, the SAM must submit the order to the appropriate vendor. Billing occurs at the time of the agency transaction. Payment is made to the SAM who, as agent for the participating public procurement unit, then pays the software vendor.

7. The SAM contract is designed to be self-funding. That is, the SAM contractor is compensated by administrative fees collected from the vendors of software products purchased through the SAM. Additionally, the SAM is responsible to collect, and remit to ITMO, an administrative fee of one (1%) percent of gross sales. As described in the solicitation, the SAM

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.

8. On December 21, 2010, ITMO posted its intent to award the SAM contract to New Venue.

The Record of Negotiations includes the following terms:

...all invoices will be paid from the SAM to the Vendor within 3 business days after the SAM has received payment from the State.

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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.

9. The SAM contract required the contractor to release its vendor-hosted web-based solution in two phases, in February and May, 2011. According to the Record of Negotiations:

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 the average total cost per order. (May Release)

10. The reporting functions in the hosted solution are required to track the following:

Product Name	Product Warranty Duration, track and display license expiration
Type of License	Agency and Contact: name, email and phone
Product Serial Number	Agency Cost Codes
Product Version	Number of Copies Purchased and Type
Enrollment Information	Retail Purchases
Activation Information	Term Contract Purchase
Product Maintenance (required, not required, expiration/renewal dates)	

#### **WEB-BASED SOLUTION**

11. There are four static pages at the Internet domain [www.mysamcentral.com](http://www.mysamcentral.com). However, New Venue refuses to provide login credentials to any ITMO personnel.

12. ITMO is informed and believes that none of the web-based reporting functionality required by the contract exists.

13. New Venue's failure to provide a web based solution, including the reporting capability described above, is a breach of the contract.

14. As a result of New Venue's breach of contract the State has suffered actual damages.

#### **PAYMENTS TO VENDORS**

15. In late 2012, ITMO learned that New Venue was not paying CompuCom Systems, Inc., within three business days following receipt of payment for software purchased from CompuCom. The amounts past due from New Venue to CompuCom exceeded \$1.4 million. New Venue presented to the State a plan to bring the account current by January 31, 2013.

16. New Venue failed to execute the plan it had proposed. CompuCom advised New Venue that it would suspend the State's account—and that of all public procurement units desiring to purchase Microsoft products from the CompuCom contract—unless New Venue brought the account current by January 31, 2013.

17. On January 28, 2013, ITMO issued a letter to New Venue demanding that it show cause why the State should not terminate the SAM contract.

18. By letter dated February 19, 2013, New Venue advised ITMO it had reduced the amount due CompuCom from \$1.8 million to \$381,552. In the letter New Venue also promised to pay the remaining balance to Compucom by early March 2013. Finally, it described measures taken to “ensure that this situation does not ever happen again.” Based on New Venue's representations ITMO considered the matter to be resolved.

19. ITMO recently obtained from CompuCom an aging report dated March 22, 2013. That report identifies nearly 400 unpaid invoices totaling over \$2.8 million. One hundred eighty-eight bills were 45 or more days past due, a total of \$1,376,024.

20. On September 16, 2013, CompuCom copied ITMO with a message to New Venue, demanding that New Venue bring current \$1.3 million in past due invoices.

21. New Venue's failure to make payments to CompuCom when due is a breach of the SAM contract.

22. ITMO recently learned that New Venue owes SHI International Corp., the State's vendor for Microsoft Enrollment for Education Solutions (EES), over \$372,000. Nine of the invoices are over a month past due.

23. New Venue's failure to make payments to SHI when due is a breach of the SAM contract.

24. New Venue has caused the State to incur actual damages, measured by the time value of monies paid to New Venue but withheld from the State's vendors.

25. Alternatively, New Venue has been unjustly enriched by its wrongful withholding of State funds to be paid to the State's vendors, such amount to be measured by the time value of the monies paid and withheld.

26. ITMO is assessing the status of New Venue's accounts with other vendors on statewide term contracts, and may amend this Request if those accounts are in arrears.

#### **FRAUDULENT ACT**

27. Among the outstanding invoices CompuCom identified on September 16, 2013, is one for \$312,506.80, for software purchased by the South Carolina Judicial Department. According to the Judicial Department, that invoice was paid by check dated May 20, 2013. New Venue negotiated the check on May 22, 2013. New Venue thus withheld monies belonging to the State of South Carolina for at least four months, applying those funds instead for its own purposes.

28. Among the outstanding invoices SHI identified is one for \$209,673.67, for software purchased by the South Carolina Department of Education. According to the Comptroller General's Office, that invoice was paid by check on July 23, 2013. New Venue has withheld those monies belonging to the State of South Carolina for at least two months, applying those funds instead for its own purposes.

29. New Venue failure to make payments when due to the State's vendors was deliberate, and part of a scheme or artifice to defraud the State.

30. The State has incurred nominal damages and actual damages resulting from New Venue's breach of the contract.

31. New Venue's breach of the SAM contract was accompanied by at least two fraudulent acts, to-wit the misapplication of State funds.

32. New Venue is liable to the State for punitive damages because of its fraudulent acts accompanying the breach of contract.

#### **ADMINISTRATIVE FEES**

33. ITMO is currently reviewing records of payments the State has made to New Venue furnished by the Comptroller General; and requesting from political subdivisions who participated in the SAM contract records of payments those public procurement units have made to New Venue.

34. ITMO is analyzing those records to determine if New Venue has properly accounted for ITMO administrative fees it is required to remit on a monthly basis.

35. ITMO may amend this Request if its analysis discloses that New Venue owes additional administrative fees.

#### **ORDER PROCESSING**

36. The South Carolina Department of Health and Environmental Control issued a purchase order to New Venue on July 25, 2013, for Citrix software. New Venue did not release the purchase order to Advantec Global Systems, the Citrix vendor, until September 5, 2013—forty-two days after DHEC emailed it to the SAM.

37. On September 10, 2013, ITMO notified New Venue of the delay in processing DHEC's purchase order, and demanded that all purchase orders be timely released to the software vendors.

38. New Venue's failure to process purchase orders within three business days of receipt is a breach of the SAM contract.

#### **CONTRACT MODIFICATION**

39. Effective September 1, 2013, ITMO changed the ordering procedures for agencies and political subdivisions purchasing from the contracts identified in paragraph 4 above. Instead of

ordering software from the SAM, customers now order from—and make payment to—the statewide term contract vendor. Ordering instructions require agencies to email a copy of the purchase order to New Venue.

40. This change in the order process means that New Venue no longer manages the order process between public procurement units and vendors, and no longer makes payments to vendors on the State's behalf. This is a significant change to New Venue's scope of work under the SAM contract.

41. ITMO believes the change has significantly reduced New Venue's cost to perform the contract.

#### **NOTICE OF DEFAULT**

42. The contract documents (Solicitation, page 34) provide:

(a) (1) The State may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to:

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension....

Except for the State's grace, the contractor has no right to cure this kind of default.

43. By letter dated September 30, 2013, ITMO notified New Venue that its failure to make timely payment to CompuCom was a default under the terms of the contract, and demanded that New Venue immediately bring that account current.

#### **RELIEF REQUESTED**

44. The matters described in this Request constitute a default or defaults in New Venue's performance of its contract. As a result of New Venue's failure to perform the State has suffered actual damages, and will incur damages in the future to secure performance of the SAM contract.

45. The State requests the Chief Procurement Officer order providing for the following relief:

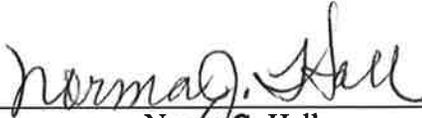
- a. Requiring New Venue to immediately bring current the State's account with CompuCom, and with any other vendor whose accounts are found to be delinquent;
- b. Requiring New Venues to make an accounting to ITMO:
  - i. of all amounts it has received from whatever source pursuant to the SAM contract;
  - ii. of all amounts it has remitted to the vendors identified in paragraph 4 above;
  - iii. of the amount, based on gross sales less returns, that it should have paid to ITMO as administrative fees; and
  - iv. of the time it has retained payments received, and the amount of each payment, before remitting to the appropriate vendor the price of the software purchased.
- c. Requiring New Venue to pay to the State nominal damages, and actual damages and punitive damages in an amount to be proven upon the hearing of this matter; and
- d. Terminating Contract No. 4400003161 for default; or, alternatively,
- e. Terminating Contract No. 4400003161 for the convenience of the State and determining that no compensation be paid to New Venue on account of such termination; or, alternatively,
- f. If the contract be not terminated:
  - i. Determining the value of services New Venue no longer performs, as described in paragraphs 39, 40, and 41 above;
  - ii. Requiring, pursuant to the contract and to S.C. Code Ann. § 11-35-1830, that New Venue furnish cost or pricing data related to those services; and
  - iii. Determining the amount of a deductive change order reflecting the value so established; and
- g. Providing for such other relief as the Chief Procurement Officer may find appropriate.

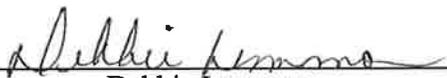
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Columbia, South Carolina

September 30, 2013