

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

New Venue Technologies, Inc.,)
)
Petitioner,)

Civil Action No.: 2013-CP-40-7253

v.)

ANSWER TO COMPLAINT AND RETURN
PETITION FOR WRIT OF MANDAMUS
(NON-JURY)

Michael B. Spicer, individually and in his)
capacity of Chief Procurement Officer and)
Information Technology Management)
Officer for the State of South Carolina)
Information Technology Management)
Office and Alex Doe, his designee under)
law,)
)
Respondents.)

2013 DEC 10 PM 3:32
CLERK OF COURT

The Respondents Michael B. Spicer, individually and in his capacity of Chief Procurement Officer (CPO) and Information Technology Management Officer (ITMO) for the State of South Carolina Information Technology Management Office and Alex Doe, his designee under law (collectively, Respondents), hereby file this Answer to the Complaint and Petition for Writ of Mandamus, filed December 2, 2013, by the Petitioner New Venue Technologies, Inc. (Petitioner or NVTI) herein and received by the Respondents on December 2, 2013, as follows:

1. Any allegation not specifically admitted shall be deemed denied.
2. Paragraph 1 is a statement of the case or law to which no response is required; to the extent a response is required, the Respondents deny a Writ of Mandamus is presently appropriate.
3. The Respondents admit the allegations in Paragraph 2, except that the Respondents can neither admit nor deny the allegation the contract was wrongfully terminated

by the State of South Carolina, as the Respondents lack information sufficient to form a belief as to that allegation, and therefore deny the allegation.

4. The Respondents admit the allegations in Paragraph 3, except as to the allegations regarding Mr. Spicer's duties under S.C. Code Ann. § 11-35-4230, the Respondents crave reference to that statute as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute.

5. As to the allegations in Paragraph 4, the Respondents deny any designee has been appointed and crave reference to S.C. Code Ann. § 11-35-4230 as the statute speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute.

6. As to the allegations in Paragraph 5, the Respondents admit Petitioner filed a contract controversy pursuant to S.C. Code Ann § 11-35-4230, against the State of South Carolina on or about November 14, 2013, but lack information sufficient to form a belief as to the remaining allegations, and therefore deny the allegations.

7. As to the allegations in Paragraph 6, the Respondents crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute.

8. As to the first sentence of Paragraph 7, the Respondents crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute. The Respondents deny the allegations in the second sentence of Paragraph 7 and demand strict proof thereof.

9. The Respondents deny the allegations in Paragraph 8.

10. As to the allegations in Paragraph 9, the Respondents crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute.

11. The Respondents deny the allegations in Paragraph 10 and crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute. Respondents deny that Respondent Doe has any current specific legal duties to perform under § 11-35-4230.

12. As to the allegations of Paragraphs 11 and 12, the Respondents crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute. Respondents deny that Respondent Doe has any current specific legal duties to perform under § 11-35-4230.

13. As to the allegations of Paragraphs 13 and 14, the Respondents crave reference to S.C. Code Ann. § 11-35-4230 as it speaks for itself, and the Respondents deny any allegations and any inferences or statements contrary to or inconsistent with the statute.

14. As to the allegations in Paragraph 15, the Respondents deny the Petitioner has suffered or continues to suffer irreparable harm and denies all other remaining allegations except as remaining allegations are answered as follows:

- a. Regarding the allegation that the State has engaged in a course of conduct “designed to injure and intimidate Petitioner” and “prevent the Petitioner from exercising its legal rights,” the Respondents lack information sufficient to form a belief and therefore deny the allegation;
- b. Regarding the allegation that the State initiated a contract controversy, the Respondents admit the State initiated and later withdrew a contract controversy without prejudice, but Respondents lack information sufficient to form a belief as to the legal sufficiency of the contract controversy and therefore deny the remaining allegations;

- c. Regarding the allegation that the State made non-consensual chargebacks of funds from the Petitioner's bank accounts, the Respondents lack information sufficient to form a belief and therefore deny the allegation;
- d. Regarding the allegations that the State made widespread publication of the contract controversy against Petitioner and delayed in publishing the dismissal of the contract controversy, upon information and belief the Respondents deny the allegations, and aver that it is standard operating procedure, in the interest of transparency in government, for each Materials Management Office CPO to post requests for appeals from CPO decisions (§ 11-35-4410(1)(a)), review of determinations (§ 11-35-4410(1)(b)), protest hearings (§ 11-35-4210), requests for suspension or debarment (§ 11-35-4420) and requests for contract controversy (§ 11-35-4430) shortly after each is filed.
- e. Regarding the allegation the State threatened to involve criminal authorities against Petitioner, the Respondents lack information sufficient to form a belief and therefore deny the allegation;
- f. Regarding the allegation the State accused the Petitioner of criminal wrongdoing, the Respondents lack information sufficient to form a belief and therefore deny the allegation;
- g. Regarding the allegations Petitioner was detained, incarcerated, and imprisoned based on the assertion of criminal charges by the State, the Respondents lack information sufficient to form a belief and therefore deny the allegation; however, Respondents are informed and believe that Petitioner's president and chief executive, Ms. Terris Sherelle Riley, was arrested on or about November 1, 2013, and was charged with breach of trust with fraudulent intent according to an article in *The State* newspaper;
- h. Regarding the allegation that "unfounded and baseless debarment and suspension proceedings" were instituted against the Petitioner, the Respondents admits debarment and suspension proceedings were instituted against the Petitioner, and lacks information sufficient to form a belief as to the remaining allegations and therefore deny the same; and
- i. Regarding the allegation that the termination of the Petitioner's contract was wrongful, the Respondents lack information sufficient to form a belief and therefore deny the allegation.

15. As to the allegations in Paragraph 16, the Respondent admits the State of South Carolina initiated a contract controversy on September 30, 2013, that Mr. Spicer issued a notice of hearing on October 1, 2013, and that the hearing was set to be heard on October 31, 2013. The Respondents deny the remaining allegations.

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to comply with Rule 65(e))

16. The Respondents incorporate by reference all of the foregoing paragraphs as if set forth fully herein.

17. Petitioner's Motion for Writ of Mandamus does not comply in accordance with the requirements of Rule 65(e) of the South Carolina Rules of Civil Procedure (SCRCP). Rule 65(e) requires that a notice and motion for a Writ of Mandamus "shall be supported by affidavit or verified complaint setting forth clearly the facts entitling the moving party to such writ." Petitioner's Complaint is neither verified nor is it supported by an affidavit.

18. Petitioner's Motion for Writ of Mandamus must be denied.

FOR A SECOND AFFIRMATIVE DEFENSE
(CPO lacks jurisdiction to hear Petitioner's Contract Controversy)

17. The Respondents incorporate by reference all of the foregoing paragraphs as if set forth fully herein.

18. The CPO lacks jurisdiction over the Petitioner's Request for Contract Controversy because the CPO was deprived of jurisdiction to hear the Contract Controversy when NVTI filed its Motion for Sanctions on November 22, 2013, before the South Carolina Procurement Review Panel (Panel).

19. On September 30, 2013, the South Carolina Budget and Control Board (Board), the agency with whom NVTI contracted for services under Solicitation 5400001873, Statewide

Software Acquisition Manager (Contract) (Petitioner's Exhibit 1, Exhibit A), filed with Defendant CPO Spicer a request for contract controversy (Board Request) regarding NVTI's performance under the Contract. See Exhibit 1. This Contract is the same Contract that is the subject of this Complaint and Motion for Writ of Mandamus.

20. On November 7, 2013, the Board withdrew the Board's Request without prejudice. See Exhibit 2.

21. On November 14, 2013, Petitioner NVTI filed its Request for Contract Controversy (NVTI Request) regarding the Contract. See Petitioner's Exhibit 1. On November 22, 2013, Petitioner filed a Motion for Sanctions pursuant to S.C. Code Ann. § 11-35-4410(1) against the State for its "wrongful filing and withdrawal" of the Board Request. Petitioner's Motion for Sanctions (Sanctions Motion) arises from and is dependent upon a determination of whether a breach of the Contract occurred by either NVTI or the Board.

22. Pursuant to S.C. Code Ann. § 11-35-10 (2013) of the South Carolina Consolidated Procurement Code (Code), CPO is bound by the decisions of the Panel. Under In re: Request for Review by Excent Corporation, Panel Case No. 2013-3 (Apr. 29, 2013) (see Exhibit 3), once the Panel gains jurisdiction of a matter, the CPO is prevented from taking any action unless the automatic stay is lifted. *Id.* ("The Panel finds that the automatic stay imposed by section 11-35-4210(7) precludes any action, including cancellation, with regard to a protested solicitation so long as the protest or appeal to the Panel is pending unless the stay is lifted first."). On information and belief, a hearing on Petitioner's Sanctions Motion is scheduled for January 10, 2014.

23. Because the Panel, in deciding the Petitioner's Request for Sanctions, of necessity must consider the same Contract and facts as the Respondent CPO would need to

consider in deciding the NVTI Request, the Panel has exclusive jurisdiction at this point and the Respondent CPO Spicer is unable to take any further action regarding the NVTI Request unless and until he regains jurisdiction over the matter.

FOR A THIRD AFFIRMATIVE DEFENSE
(Failure to state a claim as to Spicer individually)

24. Respondents incorporate by reference all of the foregoing paragraphs as if set forth fully herein.

25. The Complaint fails to state a claim against Michael B. Spicer as an individual, and he should be dismissed individually from this action pursuant to Rule 12(b)(6), SCRCF.

26. The Complaint only alleges action or non-action by the CPO or a designee that has not been appointed. There are no allegations regarding Michael B. Spicer individually.

27. The Complaint and Petition¹ for Writ of Mandamus only alleges non-action by Mr. Spicer as CPO. A Writ of mandamus is a remedial writ that, by its very nature, only may be issued against a public official charged with ministerial duties.

28. As the Petitioner complains only of Mr. Spicer's alleged failure to execute his official, ministerial duties, none of which reach Mr. Spicer in his individual capacity, the Petitioner has failed to state a claim against Mr. Spicer as an individual.

29. Mr. Spicer should be dismissed from this action as an individual and should only be named in his official capacity as CPO.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Failure to state a claim as to Spicer as the Information Technology Management Officer)

30. Respondents incorporate by reference all of the foregoing paragraphs as if set forth fully herein.

¹ SCRCF Rule 65(e) refers to a "Notice of Motion and Motion" for Writ of Mandamus, not "Petition for Writ of Mandamus."

31. The Complaint fails to state a claim against Michael B Spicer as the Information Technology Management Officer (ITMO), and he should be dismissed as such from this action pursuant to Rule 12(b)(6), SCRCF.

32. The Complaint only alleges action or non-action by the CPO or a designee that has not been appointed. There are no allegations regarding Michael B. Spicer as the ITMO.

33. The Complaint and Petition for Writ of Mandamus only alleges non-action by Mr. Spicer as CPO. A Writ of mandamus is a remedial writ that, by its very nature, only may be issued against a public official charged with ministerial duties.

34. As the Petitioner complains only of Mr. Spicer's alleged failure to execute his official, ministerial duties under S.C. Code Ann. § 11-35-4230, which section does not charge the ITMO with any duties, ministerial or otherwise, the Petitioner has failed to state a claim against Mr. Spicer as the ITMO.

35. Mr. Spicer should be dismissed from this action as the ITMO and should only be named in his official capacity as CPO.

FOR A FIFTH AFFIRMATIVE DEFENSE
(No unreasonable delay)

36. The Respondent CPO has not unreasonably delayed in carrying out his statutory duties under S.C. Code Ann. § 11-35-4230.

37. The NVTI Request was filed on Thursday, November 14, 2013.

38. On Friday, November 22, 2013, Petitioner filed the Sanctions Request with the Panel, which deprived the CPO of jurisdiction over the NVTI Request.

39. S.C. Code Ann. § 11-35-4230 does not establish a timeframe for a CPO to discharge his duties under that section. Instead, the statute says "If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot

be settled by mutual agreement, the appropriate chief procurement officer or his designee promptly shall conduct an administrative review” S.C. Code Ann. § 11-35-4230(4).

40. When a CPO is required to conduct an administrative hearing on a protest of a solicitation or award pursuant to S.C. Code Ann. § 11-35-4210(4), the statute grants him fifteen (15) business days after the filing of the protest to hold the administrative hearing.

41. Of the eight (8) days between the time the NVTI Request was filed and Petitioner filed its Sanctions Request depriving the CPO of jurisdiction to hear the NVTI Request, only six (6) were business days. This time frame is within “the context of the State’s usual timeframes” and does not constitute an unreasonable delay.

WHEREFORE, having fully set forth the Answer to the Complaint and Petition for Writ of Mandamus, Respondents Michael B. Spicer, individually and in his capacity of Chief Procurement Officer and Information Technology Management Officer for the State of South Carolina Information Technology Management Office, and Alex Doe, his designee under law, pray that this Court issue an order:

- 1) determining that Petitioner has not complied with the requirements of SCRCF 65(e) and denying Petitioner’s Petition for Writ of Mandamus and dismissing the Complaint;
- 2) determining that the CPO does not have jurisdiction to hear Petitioner’s Request for Contract Controversy and denying Petitioner’s Petition for Writ of Mandamus and dismissing the Complaint;
- 3) dismissing Michael B. Spicer as a respondent individually;
- 4) dismissing Michael B. Spicer as a respondent as the ITMO;
- 5) dismissing the Petition for Writ of Mandamus; and

6) awarding the Respondents their costs and attorneys' fees incurred in the action and such other relief as this Court determines appropriate.

M. Elizabeth Crum, S.C. Bar No. 1486
lcum@mcnair.net
Amber B. Carter, S.C. Bar No. 78706
acarter@mcnair.net
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By: 
Attorneys for Respondents

December 10, 2013
Columbia, South Carolina

**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).

EXHIBIT

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.

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. 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.

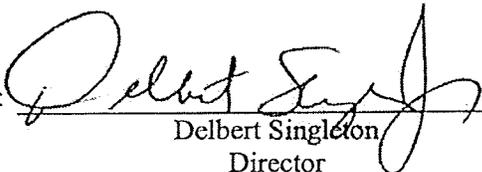
RELIEF REQUESTED

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.

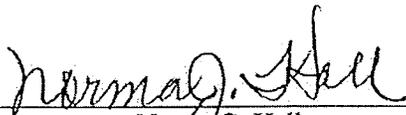
45. The State requests the Chief Procurement Officer order providing for the following relief:

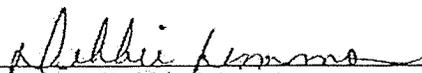
- a. Requiring New Venue to immediately bring current the State's account with CompuCom, and with any other vendor whose accounts are found to be delinquent;
- b. Requiring New Venues to make an accounting to ITMO:
 - i. of all amounts it has received from whatever source pursuant to the SAM contract;
 - 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.

SOUTH CAROLINA BUDGET AND
CONTROL BOARD
PROCUREMENT SERVICES DIVISION

By: 
Delbert Singleton
Director

INFORMATION TECHNOLOGY
MANAGEMENT OFFICE

By: 
Norma S. Hall
State IT Procurement Officer

By: 
Debbie Lemmon
Procurement Manager

Columbia, South Carolina

September 30, 2013

From: Potts, Frank
Sent: Thursday, November 07, 2013 3:16 PM
To: Spicer, Mike
Cc: Schmidt JES (john.schmidt@thesclawfirm.com);
geoffrey@cperlgroup.com; Crum, Molly; McCook, Keith; Koch, Paul;
Singleton, Delbert; Hall, Norma; Lemmon, Debbie;
'rivers.stilwell@nelsonmullins.com'; RHosay@foley.com
Subject: Case Number 214-205-Request for Resolution

Dear Mr. Spicer,
The State withdraws its request, referenced above, for resolution of a contract controversy, without prejudice.
Frank Potts

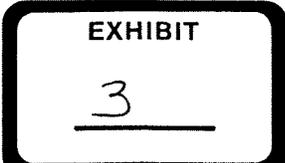
Frank S. Potts
1201 Main Street
Suite 350
Columbia, SC 29201
803.734.1277
fpotts@gs.sc.gov

EXHIBIT

2

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER ON MOTION TO STRIKE
IN RE: Request for Review by)	CPO'S WRITTEN DETERMINATION
Excent Corporation)	OF APRIL 4, 2013
)	
)	Case No. 2013-3
RFP No. 5400004448 – Automated)	
Individual Education Program (IEP))	
Case Management System for the)	
SC Department of Education)	

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for review by Excent Corporation (Excent) under section 11-35-4410(1)(b) of the Consolidated Procurement Code (the Procurement Code). On April 4, 2013, the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) issued a written determination canceling Solicitation number 5400004448, which involved the procurement of an Automated Individual Education Program (IEP) case management system for the South Carolina Department of Education (SCDE). The Panel conducted a hearing on Excent's motion to strike the written determination on April 19, 2013. At that hearing, John E. Schmidt, III, Esquire represented Excent. M. Elizabeth Crum, Esquire, represented Public Consulting Group, Inc. (PCG). Shelly B. Kelly, Esquire, represented SCDE, and William Dixon Robertson, III, Esquire, represented the CPO. A third vendor, CORE Education and Consulting Solutions, Inc. (CORE), was also affected by the written determination. However, Jeffrey D. Cooper, Esquire, CORE's In-House Counsel, advised the Panel that CORE did not wish to participate in the April 19th hearing.



Findings of Fact

The RFP in question was issued on July 5, 2012, and the offers were received on September 11, 2012. On November 30, 2012, ITMO posted an Intent to Award the contract to Excent, and PCG protested the intended award on December 10, 2012. The CPO conducted a protest hearing in late January, 2013, and issued an order granting PCG's protest on two grounds, canceling the original solicitation, and ordering resolicitation of the contract on February 7, 2013. Excent timely appealed that decision to the Panel on February 19, 2013, and a hearing on that appeal (the protest appeal) was set by the Panel for April 19, 2013.

On April 4, 2013, the CPO issued a new written determination (the April 4th determination) finding that all three finalists, Excent, CORE, and PCG, were non-responsive to the RFP and were, therefore, ineligible for award. Based on these new findings of non-responsiveness, the CPO ordered the cancellation of Solicitation number 5400004448. The CPO did not consult with SCDE prior to issuing the April 4th determination. Moreover, SCDE did not request cancellation of the solicitation. Finally, the Panel was first notified of the April 4th determination on April 5, 2013, when it received a letter from the CPO requesting a continuance in the protest appeal scheduled to be heard on April 19, 2013.

The CPO based his continuance request on two factors: (1) the appeal time for the April 4th written determination would expire at 5:00 p.m. on April 19th, and (2) if not appealed, the findings of the April 4th determination would render moot the issues pending before the Panel in the protest appeal. Excent, PCG, and SCDE all opposed the requested continuance. On April 11, 2013, Excent filed a request for the Panel to review the April 4th determination; that request for review challenged the CPO's legal authority to issue that determination in light of the protest appeal pending before the Panel. On April 12, 2013, the Panel Chairman denied the requested

continuance because the timing of the April 4th determination had been within the CPO's control. In addition, the Panel requested that the parties be prepared to argue the question of whether the CPO's written determination violated the automatic stay imposed by the operation of section 11-35-4210(7) of the Procurement Code prior to the beginning of the protest appeal hearing on April 19th. All parties were given an opportunity to file written briefs on the matters raised by Excent's request for review of the April 4th determination. The CPO and PCG each filed briefs in opposition to Excent's request on April 18, 2013.

Conclusions of Law

Excent argues that the April 4th determination violated the automatic stay first imposed when PCG filed its protest with the CPO and continued when Excent filed a timely appeal with the Panel. In support of its argument, Excent relies on section 11-35-4210(7) of the Procurement Code, which provides:

Automatic stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of a timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency,¹ makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

S.C. Code Ann. § 11-35-4210(7) (2011). Because the CPO acted without first consulting SCDE or lifting the automatic stay, Excent argues that the CPO did not have the authority to issue the April 4th determination. *See Triska v. DHEC*, 292 S.C. 190, 355 S.E.2d 531 (1986) (wherein the supreme court observed that DHEC's actions outside the scope of its statutory and regulatory

¹ "Using agency" is defined by the Procurement Code as "any governmental body of the State which utilizes any supplies, services, information technology, or construction purchased under this code." S.C. Code Ann. § 11-35-310(6) (2011). SCDE is the using agency in this solicitation.

authority were null and void). SCDE joined Excent in opposition to the April 4th determination and emphasized to the Panel its urgent need for a new IEP case management system.

The CPO disagrees and argues that another statutory section and its ensuing regulation authorize him to cancel solicitations at any time after award but prior to performance without regard to the automatic stay. In support of his position, the CPO relies on section 11-35-1520(7) of the Procurement Code, which provides:

Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and reaward of awards or contracts, after award but before performance, may be permitted in accordance with regulations promulgated by the board. . . . Except as otherwise provided by regulation, all decisions . . . to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

S.C. Code Ann. § 11-35-1520(7) (2011).² The regulation relied upon by the CPO in his order canceling the solicitation provides:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

....

(7) Administrative error of the purchasing agency³ discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

S.C. Code of State Regulations, Reg. 19-445.2085(C) (2011).

² This provision is made applicable to RFPs by section 11-35-1530(1), which states that the provisions of section 11-35-1520 and its ensuing regulations apply to competitive sealed proposals unless otherwise provided in section 11-35-1530. S.C. Code Ann. § 11-35-1530(1) (2011).

³ For the purposes of this procurement, ITMO was the purchasing agency.

In addition to these statutory and regulatory provisions, the CPO argues that the automatic stay did not prevent him from issuing the April 4th determination because the stay prohibited him from *proceeding* further with the solicitation or award and he did neither by canceling the solicitation. Finally, the CPO urges the Panel to take consideration of his role as guardian with regard to information technology procurements under section 11-35-820 of the Procurement Code, asserting that his cancellation in this instance was undertaken in that guardian role. *See* S.C. Code Ann. § 11-35-820 (2011) (tasking the Information Technology Management Officer with the oversight of all state information procurements).

Although the Panel has had several occasions to review cancellation decisions under Regulation 19-445.2085(C), it has never directly addressed the issue of whether such a determination issued while a protest appeal was pending before the Panel violated the automatic stay. The Panel decision most procedurally analogous to the instant case is *In re: Protest of Analytical Automation Specialists, Inc. ("Analytical")*, Panel Case No. 1999-1 (June 25, 1999). *Analytical* also involved an information technology solicitation conducted by ITMO where the intended award was protested to the CPO and then appealed to the Panel after the CPO denied the protest. The day before the scheduled Panel hearing, the using agency submitted a written request to the CPO seeking cancellation of the solicitation because the agency's requirements had changed. The CPO brought the request to the Panel's attention, seeking guidance about how to proceed because any decision by the CPO regarding cancellation and resolicitation would likely impact the protest appeal issues pending before the Panel. The Panel conducted a conference with the parties' attorneys, and decided to continue its hearing in the protest appeal until the CPO had reached a determination regarding the cancellation request.

A few weeks later, the CPO issued a written determination in which he found that the using agency's needs had indeed changed, and the CPO ordered cancellation of the solicitation and resolicitation of the agency's needs. The Panel then requested that the parties submit briefs in support of or in opposition to the CPO's determination. After reviewing the briefs and record before it, the Panel issued an order in which it found that the using agency's needs had changed and that resolicitation was warranted under the circumstances. In addition, the Panel agreed that the cancellation of the solicitation rendered the protest appeal issues moot and dismissed the appeal. Nonetheless, the Panel emphasized that cancellation was not to be undertaken lightly:

The Panel takes this opportunity to caution agencies to carefully consider before requesting cancellation and resolicitation, especially when a protest has been filed, as the request may appear to be an attempt to circumvent the procurement process. The Panel encourages the CPOs to continue to cautiously and carefully exercise the authority to cancel and resolicit procurements, especially when a protest has been filed.

Analytical at 5.

The Panel finds that the instant case is factually distinguishable from *Analytical* in several ways. First, unlike the using agency in *Analytical*, SCDE did not request, and in fact opposed, cancellation of the solicitation. Rather, the CPO acted on his own to review the proposals for responsiveness *after* he had already issued a decision resolving the original protest.⁴ Second, while the protest in *Analytical* did involve responsiveness issues, the cancellation was based on changes in the using agency's needs. The cancellation in the instant case does not find that SCDE's needs have changed at all, nor does the RFP need to be revised to address "inadequate and ambiguous specifications." See *In re: Protest of Blue Cross and Blue*

⁴ The CPO clearly had the authority to review all of the proposals for responsiveness while he had jurisdiction over the original protest. See *In re: Protest of Specialty Underwriters*, Panel Case No. 2004-2 (June 14, 2004) (wherein the Panel upheld the cancellation and resolicitation ordered by the CPO who discovered that none of the proposals submitted were responsive to the RFP during his consideration of a protest). However, that is not what occurred here.

Shield of South Carolina, Panel Case No. 1996-3 (April 13, 1996) (wherein the Panel upheld a CPO decision ordering cancellation and resolicitation where the specifications of the RFP created an ambiguity about the duration of the term of the contract). Finally, the CPO in this case did not notify the Panel until after he had issued the April 4th determination, even though he was fully aware of the protest appeal pending before the Panel and scheduled for a hearing on April 19th.⁵ At the very least, *Analytical* establishes a framework for approaching a cancellation during the pendency of a Panel appeal – a framework that was not followed here.

In addition, the Panel is not persuaded that canceling a solicitation is somehow distinct from “proceed[ing] further with the solicitation.” The Panel finds that the automatic stay imposed by section 11-35-4210(7) precludes any action, including cancellation, with regard to a protested solicitation so long as the protest or appeal to the Panel is pending *unless* the stay is lifted first. This finding does not prohibit the CPO from canceling a solicitation during the protest process, it merely confirms that he must do so in compliance with the requirements of section 11-35-4210(7).

For the foregoing reasons, the Panel finds that the April 4th determination was improvidently issued. However, because the Panel proceeded with its scheduled protest appeal hearing on April 19th, the Panel declines to strike the April 4th determination outright. Because the Panel has now heard that matter and indicated a ruling, thus lifting the stay, the Panel now remands the April 4th determination back to the CPO for further consideration in accordance with the Procurement Code and consistent with the Panel’s findings herein.

⁵ The Panel has no reason to doubt the CPO’s assertion that he canceled the solicitation in good faith while exercising his role as guardian over information technology procurements. However, the Panel notes that he also has a duty to maintain a good relationship with using agencies. *See* S.C. Code Ann. § 11-35-1010 (2011) (“The chief procurement officers shall afford each using agency reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agency.”) The Panel is concerned that SCDE was not even consulted about the possibility of cancellation in this case.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 29 day of April, 2013.
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

New Venue Technologies, Inc.,)
)
Plaintiff,)

Civil Action No.: 2013-CP-40-7253

v.)

CERTIFICATE OF SERVICE

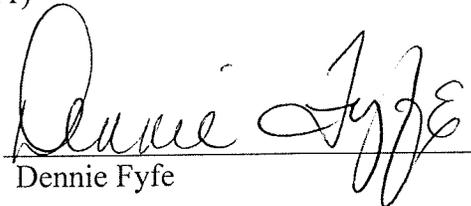
Michael B. Spicer, individually and in his)
capacity of Chief Procurement Officer and)
Information Technology Management)
Officer for the State of South Carolina)
Information technology Management)
Office and Alex Doe, his designee under)
law,)

2013 DEC 10 PM 3:40
STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
RICHLAND COUNTY

Respondents.)
_____)

I, Dennie Fyfe, do hereby certify that I have this date served one (1) copy of the Answer and Return to Complaint and Petition for Writ of Mandamus upon the following counsel of record via U.S. Mail, First Class, postage prepaid, to the following address:

John E. Schmidt, III, Esquire
Melissa J. Copeland, Esquire
Schmidt & Copeland, LLC
1201 Main Street, Suite 1100
P.O. Box 11547 (29211)
Columbia, SC 29201


Dennie Fyfe

December 10, 2013
Columbia, South Carolina