

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT  
OFFICER  
DECISION**

In Re: MOTIONS TO RECUSE

CASE NO.: 2014-201

Contract Controversy: New Venue  
Technologies, Inc. vs. State of South  
Carolina  
Solicitation No. 5400001873  
Contract No. 4400003161

POSTING DATE: January 14, 2014

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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. (“NVTI”) requested resolution of issues related to a contract for Software Acquisition Management services between it and the State of South Carolina.

NVTI moves for the recusal of Michael B. Spicer as the Chief Procurement Officer and decisional officer for purposes of this case, Case No. 2014-206 on two grounds.

**I. CPO AS POTENTIAL WITNESS**

NVTI asserts that CPO, Mr. Michael B. Spicer is a potential witness in the contract controversy case, having been involved in various activities connected with the contract at issue, including a number of the activities that will be the subject of testimony in this matter.

The CPO for the Information Technology Management Office is a quasi-judicial officer, charged by statute with the duties of first attempting to settle the contract controversy and if settlement is not possible, presiding over, and determining contract controversies. *S.C. Code Ann.* § 11-35-4230. The CPO for the Information Technology Management Office is the CPO designated to

attempt to settle, preside over, and determine the contract controversy underlying NVTI's Contract Controversy Claims.

Rule 605 of the South Carolina Rules of Evidence (SCRE) is instructive on this point. This rule states: "[t]he judge presiding at the trial may not testify in that trial as a witness." Rule 605, SCRE. The reason for this rule is obvious: a judge must be impartial in his duties, and testifying strips him of that impartiality, forcing him into a partisan situation that is wholly inapposite to his statutory and ethical duties. Prior to the adoption of Rule 605, SCRE, the Supreme Court of South Carolina has said that "such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts." State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244, 247 (1942).

In addition, the South Carolina Procurement Review Panel addressed the issue of whether the CPO's involvement in establishing a contract prohibited the CPO from providing the initial review of the award in In Re: Protest by Amdahl Corporation and International Business Machines Corporation; Case 1986-6, November 6, 1986. The Panel found that there was not a lack of due process in having the CPO participate in the award of the contract and then judge whether it was properly awarded. In support of this decision the Panel cited decisions by both The U.S. Supreme Court and the S.C. Supreme Court. See, Withrow v. Larkin, 421 U.S. 35 (1975) ("The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing. Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'"); Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976) ("A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decision making power.") and Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 542, 340 S.E. 2d 144 (1986) ("Unless there is evidence that preformed opinions of board members are fixed and unchangeable, or that in the deliberations after hearing all the evidence, the result was dictated by such a preformed opinion, the appellant cannot

successfully maintain that he was deprived of a fair and impartial hearing.”). Specifically, the Panel ruled “no due process rights of IBM have been impaired in following the procedure set out in the Code wherein the CPO first reviews the award of the contract.”

## II. CPO REPORTS TO POTENTIAL WITNESS

NVTI also asserts that the Chief Procurement Officer for Information Technology should be disqualified because the CPO reports, as an employee, either directly or indirectly, to a potential witness in the case, Mr. Delbert Singleton. The Code created three chief procurement officers: the Materials Management Officer, the Information Technology Management Officer, and the State Engineer, within the Budget and Control Board and vested all rights, powers, duties, and authority relating to procurements by state agencies in the appropriate chief procurement officer. *S.C. Code Ann.* § 11-35-510. The Code established the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract solicited and awarded pursuant to the provisions of the Code. *S.C. Code Ann.* § 11-35-4230(1). This section of the Code also designated the appropriate chief procurement officer as the exclusive arbiter in resolving these contract controversies subject to appeal to the Procurement Review Panel. *S.C. Code Ann.* § 11-35-4230(6). In constructing this arrangement the Legislature surely recognized the possibility of a contract controversy between contractors and the offices of the Governor, the Treasurer, or the Comptroller, three members of the Board, and accepted that any potential influence on the decisions of the chief procurement officers would be mitigated by possibility of appeal to the Procurement Review Panel. While organizationally, the chief procurement officers and their respective offices are part of the Board’s Division of Procurement Services and Mr. Singleton is the Director of the Division of Procurement Services, any suggestion of any improper influence or intimidation would be meaningless in the face of an appeal to the Panel. In addition, the appearance of agency directors before the chief procurement officers is not unprecedented. Mr. Frank Fusco, Executive Director of the Board appeared before this chief procurement officer In Re: Venturi Technology Partners vs. ITMO, CPO Case 2004-211. Where there is an opportunity for *de novo* review, as there is at the Panel level, if there is a due process violation based on the insufficiency of the lower administrative body, the error is harmless error. See, [Ross v. Med.](#)

[Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 \(1997\)](#) (administrator's lack of impartiality cured by *de novo* review before impartial panel).

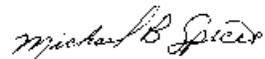
### III. PREJUDGMENT OF CASE

NVTI also alleges that the CPO, in issuing a hearing notice regarding the State's request to suspend NVTI for breach of the Software Acquisitions Manager contract, demonstrated that Mr. Spicer has prejudged Case No. 2014-205, which has yet to be heard, having already concluded that a breach has been committed. The hearing notice simply reflects the State's request for the suspension and debarment of NVTI, not a presumption of guilt on the part of the CPO.

#### **Determination**

For the reasons stated above, the Motion to Recuse is denied.

For the Information Technology Management Office



Michael B. Spicer  
Chief Procurement Officer

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised June 2013)*

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

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

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

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

**FILING FEE:** Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

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

