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 4400003161for 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, 2010[1]. Amendment One to the solicitation was issued on August 20, 2010[2] 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 Negotiations[3] and issuance of an Intent to Award[4]. 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 One[5] 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 2011[6]. Change Order Two[7] 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 Cause[8] letter citing failure to remit payment to the software contractors in a timely manner. New Venue responded[9] 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, 2013[10]. 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 Default[11] 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 contract[12]. 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 resolution[13] 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 Claims[15].

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
[14]The 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 Units[16] 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 PPUs 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 PPUs 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 2011and breached its obligation of good faith under Section 11-35-30[19] 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.

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 contracts[20], 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 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.

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 down-sizing 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 a 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 PPUs. There was also evidence that in some cases, New Venue required pre-payment by PPUs in violation of the contract.

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

New Venue invoiced PPUs 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

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 the 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

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

upon these representations, including those representations that payments had in fact been made. Consequently, the B&CB was injured. The B&CB was required to re-solicit bids for software vendors at its inconvenience, time, and expense; the record shows that New Venue knew that the B&CB expected vendors to be paid within three days of receipt by New Venue of payment for software. Moreover, the record shows that New Venue knew that payments were not being made within three business days. In some cases, payments were received by New Venue and orders were not even placed, although New Venue told ITMO, the PPUs, and the software resellers no such situation had occurred. The record shows that the amounts that were not remitted to software vendors were material. The record shows that New Venue allowed PPUs to continue to place orders for software and pay for that software, all while falsely indicating that orders had been placed. New Venue's clear intention was for the B&CB to continue to act on its ignorant belief that New Venue was acting in accordance with the contract terms. The B&CB is allowed to rely upon a contractor's assertions as a party to the contract. All of this was to the detriment and injury of B&CB.

Damages

The primary purpose of this contract was to maintain information about the software inventory and make it available to each PPU as it applies to that PPU, and to ITMO as it applies to a specific PPU or the State as a whole.

New Venue processed approximately $28,393,436.01 in net sales through the SAM and was contractually entitled to 2% or $567,868.72, as a fee for performing the primary purpose of the contract.

Section 11-35-4320 of the Code of Laws of South Carolina allows the CPO to award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law. While the contract does not specifically address "disgorgement" or "damages," the South Carolina Supreme Court has held that:

> Exemplary or punitive damages go to plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others…Punitive damages have now come, however, to be generally, though not universally, regarded, not only as a punishment for wrong, but as vindication of private right.

Smith v. Widener, 397 SC 468, 724 SE 2d 188 (2012). There are also the Mitchell guideposts to consider: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm to the plaintiff and the amount of the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. See, Mitchell v. Fortis, 385 SC 570, 686 SE 2d 176 (2009).

Not only did New Venue breach the contract in its performance, it failed to meet the primary objective of the contract for which it was paid. Because neither ITMO nor the PPUs ever received the ability to track or monitor software licenses, they received no benefit from New Venue's performance of this contract and New Venue is not entitled to the fee it received.

New Venue testified that the cost of ownership was $715,550.00 (Exhibit 12, P. 76, Record P. 161). This is a reasonable estimate of the B&CB's cost to replicate the information that New Venue did not deliver.

The B&CB was damaged in the amount of $36,308.74 by New Venue's failure to remit administrative fees owed to the B&CB.

The record reflects that B&CB conducted audits of agencies of similar size that cost the B&CB an average of $14,250.33. Based on this average audit cost, the B&CB incurred an excess audit cost of $124,776.53. The B&CB is also entitled to recover its excess audit costs.

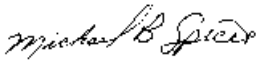
New Venue remains indebted to the resellers in approximately the amount of $2,700,000.00, which was paid to it by PPUs and never forwarded to the resellers even though the contract required such payments to be forwarded to the software vendor within three days of receipt by New Venue.

New Venue is indebted to various PPUs for at least $88,208.85 for invoices paid by the PPUs for orders never forwarded to the software vendors (Exhibit 454, P. 1, Record P. 25665).

In summary I find:

1. New Venue is directed to return the $567,868.72 to the B&CB for remittance to the PPUs.
2. The B&CB is awarded $873,302.50 in actual damages.
3. New Venue is directed to make payment to such resellers for all software paid for by PPUs to New Venue which was to be forwarded to resellers and was not.
4. New Venue is directed to repay various PPUs all amounts paid by PPUs to New Venue for software orders paid for to New Venue but never placed by New Venue with software vendors.

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.

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 2043 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 26, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201

_____ _____
Name of Requestor Address

_____ _____
City State Zip Business Phone

---

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

_____
_____
_____

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

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

_____ _____
Notary Public of South Carolina Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

_____
Chairman or Vice Chairman, SC Procurement Review Panel

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

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

Attachment 1

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	BEFORE THE CHIEF PROCUREMENT OFFICER DECISION
In Re: MOTIONS TO RECUSE	CASE NO.: 2014-206
Contract Controversy: New Venue Technologies, Inc. vs. South Carolina Budget and Control Board Solicitation No. 5400001873 Contract No. 4400003161	POSTING DATE: May 16, 2014 MAILING DATE: May 16, 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. ("NVTI") requested resolution of issues related to a contract for Software Acquisition Management services between it and the South Carolina Budget and Control Board (Board). A hearing of the issues in this case is scheduled for May 19, 2014.

Prior to the commencement of the hearing, the CPO received five motions from the parties addressing various issues:

NVTI argues that the State/ITMO did not meet the deadline of the scheduling order to exchange exhibits and made a motion that all state offered exhibits that were not exchanged timely must be excluded on objection of New Venue. NVTI also moved that it should be free to add such records, as it desires, to the list of exhibits during the hearing. Neither the South Carolina Rules of Civil Procedures nor the Administrative Procedures Act applies to an administrative review before a Chief Procurement Officer. Typically, exhibits are offered and accepted throughout the duration of the administrative review. The CPO has already received two binders containing 180 exhibits totaling 2,161 pages and an index of additional documents indicating a total of 379 exhibits of 25,912 pages. While it is difficult to imagine that either party overlooked even the

smallest scrap of evidentiary material, the CPO will accept all the documents offered so far including those that were allegedly late and any additional documents provided through the end of the administrative review, subject to the CPO's ruling on any objections.

NVTI moved for an order requiring the State/ITMO to produce the "audit" and related documents. The Board claims that those documents are its work product and not subject to disclosure. The CPO will defer ruling on this motion until a later date.

The Board moved that the CPO dismiss all aspects of this claim as may relate to any entity other than the Budget and Control Board. In its request for resolution (titled New Venue Technologies, Inc.'s Contract Controversy Claim), New Venue purports to assert its contract controversy claims as against the State of South Carolina, (including its governmental subdivisions and its Public Procurement Units) (hereinafter, collectively and individually, the "State"). Section 11-35-4230(1) limits the CPO's authority to resolve contract controversies to "controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest." Section 11-35-310(18) defines a governmental body as:

> "Governmental Body" means a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Office of Legislative Printing, Information and Technology Systems, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.

While Section 11-35-4820 and Regulation 19-445.2155 provide that local political subdivisions such as counties, municipalities, school districts, public service or special purpose districts and the Federal Government may purchase from or through the State at any time, there is no provision that subjects them to the authority of the Chief Procurement Officer in transactions allowed under these provisions. The motion by the Board is granted.

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

The CPO has already addressed all aspects of recusal based on a previous motion related to this case in a decision dated January 14, 2014, but will reiterate that decision is part here. However NVTI again moves for the recusal of the CPO in a new motion on the basis that he had a direct role in the negotiation and implementation of this contract and consequently would be ruling on allegations of his own failings and shortcomings. The CPO addresses the new motion as follows:

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.

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. 545, 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."

New Venue argues that Mr. Spicer's refusal to recuse himself would make it impossible for New Venue to call him as a witness, denying New Venue of a key witness about his role in the negotiation and implementation of this contract. The Intent to Award a contract to New Venue Technologies, Inc. was issued on December 21, 2010, with an effective date of January 4, 2011 and a contract start date of February 15, 2011. While the CPO, acting in his capacity as the Information Technology Management Officer may have offered advice and instruction to the ITMO procurement staff during the solicitation and award of this contract, any effect is memorialized within the four corners of the contract. On April 18, 2011, all ITMO operational and supervisory responsibilities were transferred from Mr. Spicer to Mrs. Norma Hall and Mrs. Hall reported directly to Mr. Voight Shealy the Materials Management Officer for the duration of this contract. The CPO had virtually no involvement in the implementation and administration of this contract or any other solicitation and award during the term of this contract. This controversy addresses issues related to the implementation and performance of the contract over which the CPO had no involvement. Any testimony by the CPO about the Board's intentions in forming the contract is voided by the fully executed contract. Consequently, New Venue's request of the CPO to recuse himself is denied.

Rule 605 of the South Carolina Rules of Evidence (SCRE) is instructive on the issue of testimony by a judge or hearing officer. 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).

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. 2014-206, which has yet to be heard, having already concluded that a breach has been committed. The hearing notice simply reflects the Board's request for the suspension and debarment of NVTI, not a presumption of guilt on the part of the CPO.

Determination

The motions received to date are addressed as indicated above.

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:

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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.

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

South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201

Name of Requestor _____ Address _____

City _____ State _____ Zip _____ Business Phone _____

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

_____

_____

_____

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

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

_____ _____
Notary Public of South Carolina Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

_____
Chairman or Vice Chairman, SC Procurement Review Panel

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

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

Attachment 2

CLOSING ARGUMENT OF NEW VENUE

What a peculiar case the State has offered.

Is the State really suggesting there is something fundamentally wrong with New Venue hiring relatives? The State didn't ever say any of these people were not qualified. Is mere relation a problem? I did notice that even Mr. Montgomery hired his daughter to work in a professional role here, and I am sure she did great. Nobody would say Mr. Montgomery shouldn't have hired her, or used her assistance. So I just can't see how that would be a genuine issue of dispute here. It was, like the whole case and history of misconduct by the State, a diversion.

The State's lengthy diversion is an attempt to change the topic. The real topic is that the State had a contract with New Venue - a contract that the State clearly breached first, and continuously, without interruption, until the State wrongfully terminated that contract. That is a core, and irrefutable legal issue, based on undisputed facts, testimony and importantly, contemporaneous admissions by the State.

The other pressing issue is that the State would have done much less harm to a decent, local, minority and woman owned business that it is obliged under our Code to HELP, if it had only terminated this contract for convenience at the outset. But the State chose not to do that. Why? To avoid the costs that are required to be paid in such cases? What an awful reason. To avoid embarrassment, or admitting error? Even worse.

This case is not about Ms. Riley's resume, which we spent days on- or her family employees, or her other employees, or her college course of study and other diversions we spent most of the time on. That windy argument - that diversion - shows you one thing pure and simple - the State has not one valid argument on the merits to stand on - and so it grasped at the remotest straws.

What is the case about? As we proved: New Venue had a valid contract - no dispute.

That contract required the State - all of its agencies - to buy software through the SAM, and to report the relevant data to be tracked to the SAM so it could be managed and reported. In fact, the contract itself is a Statewide "Term Contract," *defined by the Code to be mandatory for all governmental bodies, specifically, from the applicable definition*: "*and for which it is mandatory that all governmental bodies procure their requirements during its term.*"

There is no way around that. Its the law. While even the State admits that the contract covered all term contracts for software - the contract - the governing document - is not so limited. Neither is the law. Statewide Term Contracts are by definition mandatory for all of the State's governmental bodies, not elective.

This contract was to be implemented on 2/15/2011. Even the State admits that.

The State had to use EVERY effort to make the software vendors comply in processing, payment, and the SAM process - not the SAM to follow the contractor process, from implementation 2/15/2011 forward. *Not to to make New Venue conform to the software vendors.*

"Every effort" is by definition well more than even best efforts. But the State did not make best efforts, or even reasonable, or minimum efforts, to fulfill its duties under the contract. The State did not even meet the simple, contract requirement. Apparently, because the State - with its limited authority granted by the People - believes it is above the law. It is not.

The State entered a contract under which it was required to use every effort to require vendors to run all software purchases through the SAM. And even forgetting the "every effort" language, the State just had the contract duty to do this, and it did not, so it is liable.

Look at it most simply: What efforts did the State *not* take, that it readily could have taken, to implement all vendors for all software purchases on 2/15 as the State, by its contract promise, had agreed - as even the State has admitted it agreed to do?

Here are only some of the examples of what the State did not do, that it was required to do to meet its contract promises:

1. Tell each software vendor - "the State will not place ANY more orders to your organization until and unless you agree to THESE terms for the SAM and run all orders through the SAM. The State does not accept your conditions for using the SAM. The State will dictate the uniform conditions for using the SAM, as it promised New Venue, so that orders would be no problem."

This the State was required to do -- either before it published the RFP for the SAM and answered the vendors' questions - but at LEAST between award of a contract - which committed every effort - and 2/15 implementation.

2. Cease Orders through the State's Software Vendors, or even Terminate the contracts of the non-complying software vendors' contract for Convenience. Don't permit the State to even suggest that the State "couldn't" do that "because it had existing contracts with the vendors."
These are the exact same type of contracts that include same, applicable standard State clauses, such as the ones Mr. Montgomery pointed out - clauses that permitted the State to *cease orders*, that permitted the State to *terminate for convenience, and to lawfully and properly modify unilaterally*. But the State failed to take any of those available steps to meet its contract duties.

3. Use leverage to enforce SAM compliance by the software vendors. And what proper leverage did the State have with software vendors that it was required to exercise under the "every effort" clause? How about the fact that all of these software vendors had *failed*

to pay their very substantial administrative fees to the State? The use of this leverage would have been proper. As compared to the State's *improper* leverage it used as against New Venue.

4. Modify the contracts - It was interesting, discussing the unilateral Contract Modification law at the hearing. Here is why: *It is clear from a simple glance at the relevant documents that the unilateral contract modification law simply does not permit the State to do what it did to New Venue - in its purported unilateral modification. The Hearing Officer will commit obvious, reversible error if he holds that the modification implemented by the State was lawful.* This is why counsel for New Venue was so emphatic at the hearing. This unilateral modification is plainly, on its face, a violation of the law and New Venue's rights.

But the matter is most interesting for another reason not anticipated by the State: The State's *lawful* right to unilateral modification was required to be used in another, crucial way here. Indeed, the State's "every effort" duty, like its simple contract duty, included that the State could have, and was *required to*, implement a lawful and proper, unilateral contract modification - under the statute that the CPO cited to in the hearing - as to each software vendor in advance of the 2/15 SAM implementation. To make them comply with the terms of the SAM, as was promised to New Venue.

5. The CPO has probably noticed that each new contract for software that was awarded used an online checkbox that required software vendors to agree to the SAM terms before a bid could be submitted. Did the State ever enforce that? No. The State NEVER made the puny effort needed to enforce that duty, agreed to by every winning software vendor.

So, at a minimum, the State breached and failed to take any of the required efforts to move these software vendors into place under the existing SAM terms before the 2/15 start date.

The State admitted in writing, on paper, without coaxing, that it was the first to commit a material breach in this very regard by delay and non-implementation from day one. That document is in the record. And this material breach continued uninterrupted from day one until day last.

How else did the State breach first? The State failed to require the relevant software tracking data be supplied to New Venue once the few miserable orders that went through the SAM started - so late in the game that New Venue had already nearly choked to death from lack of air - due to the State's breach.

Could the State have required the agencies and the vendors to provide this data to New Venue? Yes - after all the State itself agreed to this under contract. It was obliged by terms of the agreement.

Evidently, the State feels the contract is what it says it is. Or what it wants it to say. Above the law. Our purpose is to correct that false and absurd impression, no matter how far we must take this case to prove it.

Of all things now, for the State, having failed to meet its duty to require that New Venue be provided the very software ID data that New Venue was to be tracking and reporting on - to accuse New Venue of breach for NOT REPORTING THE INFORMATION NEVER GIVEN! That is absurd. There is something seriously wrong when a party feels free to make such an absurd argument to a tribunal - and to think it might even be considered in all its flagrant absurdity.

I want to address the State's absurd arguments that it didn't have to buy any amounts or that all agencies were not obligated to make all purchases of software through the SAM, and that the Board isn't responsible and the agencies haven't been "served."

First contract controversies are not "served." There is not "process" for service of a contract controversy. The way this matter was raised as against the State is against all agencies and subdivisions. And the Board was, expressly, the agent for all of them in this purchase, and for the management of the contract, and is the entity to bring a controversy against for all State noncompliance and breach of a Statewide term contract, in every case.

Look at the RFP and the law. Because the RFP could not be clearer about the role of the Board, that this is a Statewide term contract. And as such, as a matter of law, it is MANDATORY FOR ALL GOVERNMENTAL BODIES.

There is, however, a minor procurement code exemption in statewide term contracts. That is, when another vendor offers the same product for more than 10 percent less than the statewide term contract price. Let's consider the Q&A that the State raised to urge that this Statewide term contract was not (contrary to what the law requires) mandatory for all agencies. Is it possible the questioner did not know that this was, as announced unequivocally, a Statewide term contract for mandatory use of the SAM day one by all agencies? No way. The RFP says it, and the Code says it - and the RFP the vendors were reading - the words that prompted any question, already said "ALL SOFTWARE" - THAT'S IN THE "INTENT AND PURPOSE." The fact that the law defines it as such, and requires it, ends the discussion, for the CPO has zero authority to contradict the Code. And nothing in the RFP or a Q&A can change the law.

So one must ask, why is this questioner asking this question?

It is more than obvious that the questioner is focused on whether the code would be "*changed*" to eliminate the exemptions and exceptions that could allow SOME PURCHASES of software to *not* be under the SAM. For example - a change to the law to remove the "ten percent less clause" as pertains software purchases by agencies. For another example - to change the law to remove the "small purchases" provisions as applied to software.

Because the expressed intent, the law and the RFP already made this a Statewide term contract, mandatory for all agencies, the ONLY laws that could need to be "changed" to make this STATEWIDE TERM CONTRACT mandatory for all agencies, was the 10% less provision, or the small purchases provision.

And that makes sense. Because if you are going to track software, doesn't it make sense to track all of it?

The clause that says "we might not buy anything" - well so what? THE STATE DID BUY! Two things in fact: (1) our services - which were engaged and commenced, though not with the State in compliance with the contract, ever, and (2) software. AND LOTS OF IT.

And lots of it that did NOT go through the SAM as required. Depriving New Venue of its right to earn it living - as was agreed. As the State had a contract duty and an every efforts obligation to do.

So what do we have here, anyway?

We have a contract.
We have a party - the State - in breach from day one till day last - even by its own admission by a long stretch, regardless of any picayune argument they may now make as a lawyers, conjured up "litigation position."
We have a party - the State - who never took the every efforts required day one to do their part so New Venue could make a dollar until New Venue had been sunk by the State's misfeasance.
At the same time, this same party - the State - imposed numerous new, costly, preconditions that were NOT in the contract - all supposedly to allow the State to finally do what they were already obliged to do by contract - run all orders through the SAM so New Venue could earn its revenue.

The State's conditions cost New Venue a lot of money - so it could not survive - having to spend, spend, spend to meet the State's new unlawful requirements, when at the same time, due to the State's breach - immediate and ongoing - New Venue could not earn any of the dollars it was ENTITLED to earn, for 10 months, and NEVER all of the monies it was entitled to earn. Under a self funded contract, it is absolutely required that the party who controls the steps that engage that right to earn also do what is required in good faith - EVERY EFFORT - to make that happen on time and without harmful - deadly - delay.

But we have worse.
Here, we have worse. Far worse.
Because here the State imposed new, non contract conditions on New Venue as an unlawful precondition to the State performing its contract duties - conditions that the State KNEW New Venue could not meet given that the State was at the same time - by misconduct - preventing New Venue from being able to meet those conditions!

Yes, the million dollar line of credit. And the State's inept effort to prove anything improper by New Venue in its efforts made solely to comply with this improper State demand, upon the State's own suggestion. Let's face it, the state proved nothing, because due to its own sloth or inability, the State never actually performed an audit. Only with a real audit - tested and subject to cross examination - could the state purport to say what dollar went where. And one thing is certain. New Venue never was anybody's trustee in this relationship. The RFP is quite clear on that. Dollars in New Venue accounts were New Venue dollars. If the State wanted a different relationship, legally, such as a trust, it was obliged to put that in the RFP. It did not. In fact, the State did not even choose to put a performance bond requirement in place. That is certainly not New Venue's fault.

After all, the State read the New Venue financials submitted. Any high schooler could see they did not support a million dollar line of credit - *unless the contract was fully implemented and ongoing.* And that's what the banks said to Terris Riley.

LET ME BE CLEAR - It is BAD FAITH to impose non-contract preconditions to performance of a party's exiting obligations and to - at the same time - take acts that make it impossible for the other party to comply with those unlawful preconditions.

This is a pure and simple legal question, and the argument contrary to New Venue's position is empty. It is unfounded, and sanctionable.

I don't make the law. A lawyer used to be called one who "read law." Well lawyers should read the law. And here in South Carolina, the law says very clearly:
When there is material breach of contract that causes damage or loss of the benefit of the bargain, there is a remedy. Here the remedy is simple - 2% of all software sales /purchases by all State agencies for the period of the contract.

The contract was wrongly terminated. The State ended this "relationship" by making a purported unilateral modification that was unlawful on its face, and implementing it over New Venue's objection. And then, by terminating for what purported to be "cause." If it had been terminated early on, for convenience the State could have limited its damage "period" - but the State did not do that.

Here, there are the damages for all the out of scope demands the State wrongfully imposed as preconditions to its own already agreed and promised performance. As well as the other losses we proved.

The law also says you can order and accounting to determine that exact amount, when requested, as here. And we asked for that. The CPO well knows that the State's SAP system can be readily queried to discern the relevant dollars of sales of software during the relevant period. Obviously, we can subpoena that data before the Panel - and obviously it must be provided - the SAP system has the data and I happen to know quite well the people who made that system for the State. But you can and should order that accounting at this stage.

The law says one other thing that is important.
The State asserts a claim for breach against New Venue. Even though it is clear, and the State even contemporaneously admitted it was the first to breach by many, many months. You see the law in South Carolina says that the first to breach cannot thereafter claim for a subsequent breach by the other party.

That is so simple, I would like to repeat it.

The first to breach cannot thereafter claim for a subsequent breach by the other party.

All the good reasons why this is the law, that directly apply here, don't matter, because that is the law.

That's about all that need be said about the State's case.

But before we are done, I must say that things still get worse.

Because then after being in breach for over a year or two continuous, and being put on notice of it, the State then took the offensive - against New Venue. That offensive attack has been over the top and relentless. Threatening debarment. Demanding contract amendments that aren't agreed - and even implementing improper unilateral amendment! The CPO knows that the State has urged Software vendors to sue New Venue - but they have not! Because they know the State is the one in the wrong in this case.

Cancelling the contract, bringing a sham contract controversy filled with known false and defamatory Statements, and publishing it for all the relevant world, knowing it would injure New Venue - hoping it would force New Venue to simply quit - to collapse. To go away. So the State would not have to confront it own dismal failure and wrongdoing.

But the State misjudged Terris Riley.

Terris Riley did not collapse, did not shrink, and did not go away. I am proud to say she did what all of us in this room should do every day. She stood firm for what was right.

And how did the State respond when that became clear?

Well, I can tell you. Because I was there, when an attorney for the State threatened to bring a criminal charge against Ms. Riley. I was on the street not far from the front of the door to this building. And when I heard that lawyer tell me that with all the venom he could muster, I must admit I was taken aback. Today, since then, that lawyer refuses to shake my hand. Because I am proud to represent New Venue and Terris Riley. And I am okay with that. Because it is not a reflection on me.

All of this changed my attitude about many things. But it will not change who Terris Riley is or who I am. We will stand for justice. We will not permit the government of the

people to target and attack people who are unfortunate enough to be the victim of State incompetence, wrongdoing and failure.

We ask for the award and remedy.

Attachment 3

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND	)	CASE NO. 2014-206
IN RE: Contract Controversy of New Venue Technologies, Inc.,	)	
Claimant,	)	
vs.	)	BUDGET AND CONTROL BOARD'S
	)	CLOSING ARGUMENT
South Carolina Budget and Control Board,	)	
Respondent.	)	

The South Carolina Budget and Control Board, by its undersigned Counsel, hereby submits its written closing argument in the above referenced Contract Controversy.

INTRODUCTION

This matter is before the CPO on a contract controversy claim initiated by New Venue Technologies, Inc., ("New Venue" or "NVTI") against the South Carolina Budget and Control Board (the "Board"). New Venue was represented by John E. Schmidt, III of Schmidt and Copeland, LLC and Geoffrey K. Chambers of CPERL Group. The Board was represented by Michael H. Montgomery of Montgomery Willard, LLC.

New Venue alleges breaches by the Budget and Control Board of the contract resulting from Solicitation number 5400001873. The Board awarded the contract to New Venue Technologies, Inc. by Intent to Award dated December 21, 2010 with the first year of the contract to commence on February 15, 2011. The contract was to be a one-year term with the possibility of four additional one-year extensions. The contract was for a software acquisition

manager ("SAM"). The SAM was designed to allow the tracking, management and transfer of software licenses within various State government agencies. The maximum contract period for the contract was to expire on February 14, 2016. The contract was designed to be self-funding, so that it would be funded by administrative fees assessed as part of state-term contracts for purchase of specific software. There were no appropriations or budget to pay for the contract except for the administrative fees included in related contracts. The contract was to start with Microsoft applications software and be expanded to other desktop type software.

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. Unfortunately, at the onset of the contract period, existing state contract software resellers refused change orders modifying the existing state contracts to utilize the SAM. This unforeseeable circumstance resulted in the Board acting to compel use of the SAM by terminating the existing contracts and re-soliciting the applicable contracts pursuant to the Consolidated Procurement Code. This unexpected step resulted in the delay New Venue contends constituted a breach. When new contracts were issued, they required the new contract awardees to participate in the SAM.

New Venue's second claim of breach against the Board is 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 public procurement unit

subject to the contract – regardless of whether the acquisition was made under a state term contract or subject to an administrative fee.

New Venue also vaguely contends that the Board breached the contract by "imposing various new requirements upon New Venue." This contention seems based upon perception, as other than the contract modification in September, 2013 all changes to the contract were approved in writing by New Venue.

The Board denies that it committed any breach of the Contract and asserts that New Venue materially and repeatedly breached the contract in several particulars. The Board 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 Board 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 Board also alleges that New Venue made material misrepresentations to the Board, to using governmental units of the State and to resellers regarding the status and collection of payments. The Board alleges that New Venue made these misrepresentations in order to further a scheme to defraud the Board, using governmental units and resellers, of funds remitted to New Venue by the public procurement units that were to pass through to the resellers. The Board alleges that it is entitled to actual and punitive damages because of New Venue's fraudulent conduct.

When the Board learned of the resellers' claims that millions of dollars had not been transmitted to the resellers pursuant to the contract, an audit was performed. That audit is still not final. The auditor's testimony revealed that New Venue had appropriated more than $2.7 Million dollars, which was used to fund personal expenses of New Venue's owners. These expenses included more than $711,000.00 dollars 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 on New Venue accounts. Again, there is no evidence in the record that any of these expenses were payments to the resellers – whose money New Venue used for these purposes. Subsequently, SLED investigated and had Ms. Riley arrested and charged for some of her acts in connection with this matter. A trial is pending. Ms. Riley endeavored to justify her misappropriation of more than $2,700,000.00 by contending that the money she was entrusted to pay to the vendors somehow became hers to use because of her allegations that the Board breached the contract between the parties.

Prior to the hearing of this matter, New Venue moved for the CPO to recuse himself from hearing the matter. The CPO denied that motion in a written decision. The Board moved to dismiss all claims that related to any State entity or political subdivision other than the Budget and Control Board. The CPO granted the Board's motion in a written decision.

The CPO took nine days of testimony and accepted 465 exhibits comprising more than 24,000 pages of evidence into the record.

OUTLINE OF THE FACTS

New Venue's case relies solely on the documentary evidence in the record and the testimony of its Chief Executive Officer Ms. Terris Riley ("Riley"). Riley's contentions rest largely upon her interpretation of certain portions of the language in the solicitation. While the contemporaneous record appears to be void of facts to support her contention, Riley asserts, during her lengthy and circuitous testimony, that the Board breached the contract by failing to force all participating procurement units to purchase all software of every kind through New Venue commencing on February 15, 2011. She alleges that she is contractually entitled to a fee amounting to two and one-half (2.50%) percent[1] of every software purchase of any kind made by a using governmental unit during the term of the contract. Riley interprets the contract to require all state agencies and participating local public procurement units to process all software acquisition through the SAM. She bases this contention on her interpretation of items within the procurement file. The documents in the file do not support her contentions.

The solicitation states its scope as follows:

> SCOPE
>
> 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[2].

Additional important clauses in the Solicitation include the following:

> BOARD AS PROCUREMENT AGENT

[1] .5% of this 2.5% is to be paid to the Board.
[2] Solicitation, Exhibit 8, P. 8, Record P 000036

(a) Authorized Agent. All authority regarding the conduct of this procurement is vested solely with the responsible Procurement Officer. Unless specifically delegated in writing, the Procurement Officer is the only government official authorized to bind the government with regard to this procurement. (b) Purchasing Liability. The Procurement Officer is an employee of the Board acting on behalf of the Using Governmental Units(s) pursuant to the Consolidated Procurement Code. Any contracts awarded as a result of this procurement are between the Contractor and the Using Governmental Units(s). **The Board is not a party to such contracts, unless and to the extent that the Board is a using governmental unit, and bears no liability for any party's losses arising out of or relating in any way to the contract.** [emphasis added]

DUTY TO INQUIRE
Offeror, by submitting an Offer, represents that it has read and understands the Solicitation and that its Offer is made in compliance with the Solicitation. Offerors are expected to examine the Solicitation thoroughly and should request an explanation of any ambiguities, discrepancies, errors, omissions, or conflicting statements in the Solicitation. Failure to do so will be at the Offeror's risk. Offeror assumes responsibility for any patent ambiguity in the Solicitation that Offeror does not bring to the State's attention.

Section III of the Solicitation also contains additional relevant paragraphs:

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[3]
>
> 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 11-25-4810. – 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.

A review of the referenced site lists all software contracts pertaining to the state that allow for payment of administrative fees to fund a self-funded contract. Reviewing it contemporaneously would have revealed the extent of business that was being offered under the proposed contract. New Venue apparently did not, or chose to forget that it did as it made its claims in this controversy.

It is crucial to note that New Venue has not, at any time prior to this contract controversy, contended that the Board or some other public procurement unit was obligated either to use the SAM for acquisitions of software not on state term contract or to provide payment other than

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[3] Amendment #1 to the Solicitation expressly repudiates the idea that "all software purchase orders will be submitted through the SAM". It states:
Q28. Will procurement code be changed to make it mandatory for all agencies to order items 1-8 on page 20 through SAM?
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, Record p. 000081 [emphasis added]

through state term contracts that delineated payment of the administrative fees necessary to compensate New Venue for its services. During this proceeding, New Venue has altered its claims to argue in essence that the contract allowed it to collect a "tax" on every software purchase made by the Board and every other public procurement unit regardless of whether there was any need or requirement to manage or track software licenses. That is not in accord with the purpose of the contract.

Moreover, New Venue admits its own failure to fulfill the contract requirements imposed upon it by the agreement. For example, during her testimony, Ms. Riley makes many illuminating statements, including the following:

> As to whether the SAM tracking solution was up and running:
>
> We couldn't. We didn't implement. Orientation and kickoff is when you implement. You don't have that unless you're going to implement.
>
> Q. You were supposed to be delivering all of the functionality of this system within three months of implementation. Is that correct?
>
> A. I'm going to say, no, that's not correct. The reason I'm going to say, no, that's not correct, is because in my conversations with Ms. Lemmon, our relationship became -- it was very clear of what we expected of each other, and the reason why I say that is it's documented that we worked together, and it was clear whether a modification or a change order was issued. I have enough documentation that clearly conveys what my intentions were and what Ms. Lemmon's intentions were throughout the entire time that we were engaged. So, regardless of what was written on paper, my understanding in February of 2011 through the final implementation -- my mind was not, "Oh, let me make sure I put check boxes in boxes that I can't even do right now because I don't have and never got a Software Key ID", so without a Software Key ID, all of this becomes moot to me. It's unnecessary, because that was the purpose of my application, to track Software Key IDs. If I was only going to track purchases, I could have done that in Excel. I could have built an Excel spreadsheet and only tracked purchase information in Excel and saved myself a lot of money and a lot of headache, but that's not what I presented to the State. That's not what they asked for. What they asked for was a solution to track software licenses. What we envisioned was giving end-users the ability to add information or edit information. You can't do that with an Excel spreadsheet. They already had an Excel spreadsheet. What would that solve? We presented a solution, and the State deemed our solution, number one, acceptable, and number two, they deemed New Venue responsible.

That was not my decision. That was the State's decision. If we were not able, if we were not capable, then they had the right to not award it to us. They had a right to cancel. They had a right to end the contract. They had a right to do all of it. I had no right. I had no money. I had no money to fight. They had the opportunity to just say, "Sorry, kid, you're out of here". They had that right. They chose not to use that right. They chose that. They chose to keep me thinking "We're going to implement, we're coming, we're working on it, we're coming, we're working on it". They could have ended it and rebid it, and I could have just applied again the same way they did with the SLIM contract, with the SLIM solicitation. It ended before, and I could have walked away.

Q: Let's go back to your Proposal where we were. You also had on Page 176 of the Proposal that you were going to provide Implementation and Production Rollout, and that wasn't done either, was it?

A: Implementation and Production Rollout?

Q: Yes, ma'am.

A: It's impossible to provide implementation when there's no implementation. Had the State permitted me to implement, this would have been provided.

New Venue also confirmed that there were never any training materials on the SAM website, that no State employee was ever able to log in to the SAM website and that many functions of the web-reporting tool referenced in the record of negotiations (Exhibit 29) were not placed into service. While New Venue purports to offer a variety of explanations or excuses for its failure to fulfill these requirements, it never is able to point out any document or correspondence where it notified the State of these issues or problems. Its only reference is to a meeting in 2013 where Ms. Riley states that Mr. Singleton and Ms. Hall agreed to suspend development on the solution, two years after the solution was to have been delivered under the contract.

Ms. Riley also agreed that she utilized monies in excess of the retained administration fee to the point that New Venue was indebted to vendors for an amount in excess of two million seven hundred thousand dollars which had been collected from the using governmental units and was not tendered to the resellers as required by the contract.

The Board's witnesses clarified the terms of the contract, New Venue's failure to conform to the requirements of the contract, and the injuries suffered by the Board because of New Venue's numerous breaches of the contract that ultimately resulted in the Board terminating the contract for cause. The Board's witnesses also described the numerous representations and misrepresentations made by New Venue about its performance, its payment status with vendors (until the very end – and even during her testimony – Ms. Riley endeavors to obscure the fact that New Venue did not make timely payments), the functionality of the software solution and the existence of the data that was to be collected by the solution.

Their testimony, coupled with Ms. Riley's admissions, demonstrates the serious failures of New Venue to perform and the propriety of the Board's ultimate termination of the contract.

ARGUMENT

I. New Venue Fails to Prove its Claims of a Breach of Contract by the Board

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. *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.

Here, New Venue has not met and cannot meet its burden to prove the elements of the contract on which it alleges breach, nor can it prove an unreasonable failure to perform by the Board (or any local public procurement unit). Furthermore, it has abjectly failed to prove

damages as a matter of law. Because New Venue has failed to meet its burden in proving a breach of contract, its case fails.

A. *Properly Construing the Contract Language Demonstrates that the Board Never Breached the Contract.*

A clear reading of the record with careful review of the order of precedence of the documents demonstrates that the contract does not impose the obligations on the Board, which constitute the heart of the requirements that New Venue alleges the Board failed to meet. The contract language reveals that the contract was designed to provide for the purchase of certain software, universally used over a wide realm of state agencies and local public procurement units including Microsoft, Adobe and others. The contract was not designed to encompass all software purchased by using governmental units of every kind and type and was limited to acquisition through the state term contracts for software that included an administrative fee sufficient to fulfill the self-funding mechanism that financed the operation of the contract.

1. The Contract does not Include "All" Software Purchases by the State.

The history and documents in the record clearly demonstrate that the Board has not breached its contract. First, New Venue's contention that the contract applies to "all" software purchases by the State defies logic and common sense. The contract is self-funded. This means that no payment is available except in circumstances where the Board has the ability to charge and did, in fact, charge and collect administrative fees. Board history and practice dictates that this has only occurred in the use of State Term Contracts.

Mr. Delbert Singleton testified about the concept and understanding of the contract. Critically, he noted that the contract was only envisioned and designed to track purchases on specific State Term Contracts. He said:

> That is to say when an agency needed to purchase software off a State term, that that single vendor would be the entity that would help pass for that order to the vendor and then help to track the software acquisition. That's the general concept.

Later in his testimony, Mr. Singleton explains the self-funded model:

> Q: And could you just explain so that we have an authoritative understanding of what the self-funded model was?
> A: The self-funded model was this, that with regard to the SAM contract, the SAM would draw it's (sic) funding, if you will, it's pay, if you will, from the admin fee that would be received by the SAM for those purchases that were made off of those statewide contracts. The SAM was, in the end, supposed to receive, if I recall correctly, two percent, a two percent admin fee and the State was to receive a (point) five percent admin fee. So that's the self-funded model. You would receive payment, if you will, when purchases were made. No purchases made, you got nothing.
> Q: And how does -- the administrative fee that you referred to, how does that get imposed upon whomever pays it?
> A: The State imposes that fee, if you will, on the state term contracts. That's how it gets imposed on those particular contracts.

Mr. Singleton also points out that the only administrative fees are imposed upon available State Term Contracts -- the only ones that should be at issue in this matter.

> Q: And in your experience has the State imposed a fee on agency contracts?
> A: No.

Mr. Singleton's testimony is consistent with the contract documents and common sense.

Likewise, Procurement Officer Debbie Lemmon confirmed how the vendors were to start and be added to the SAM Contract.

> Q: And did you have an understanding between you as to how this contract was going to work as it relates to the software you were going to track and how things were going to be added to the contract?
> A: Yes. We were going to -- it was going to be with the products on state term contract. And I forget the other part of your question. I'm sorry.

> Q: And how were those going to roll on, so to speak?
> A: They were going to roll on as we could get them on state term contract or how – and initially we tried to, with one vendor -- or with five vendors, we tried to convince them to work with the Software Acquisition Manager, which became a disaster.

Thus, the only reasonable interpretation of the contract is that the "all" applied only to State Term Contracts that included a provision requiring the use of the SAM. The contract was for the benefit of the State, not the vendor, and it is clearly appropriate that the State determined which software products needed tracking and management. For example, New Venue makes an argument that the SAP contract was wrongfully excluded. The SAP contract dealt with the SCEIS system. As the record reflects, that system is self-managed. As the SCEIS system has login control – there are no licenses to manage. It would be ludicrous for the State to contract to pay a fee to New Venue to track something that is inherently self-tracking.

The testimony is well supported by the documentary evidence. In addition to imposing the duty to inquire upon the vendor, the record is replete with statements to substantiate the proper interpretation of the contract.[4] Any interpretation other than that the contract was designed to work with specific existing and future state term contracts is nonsensical.

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[4] See for example:
Exhibit 10, Amendment #1 to the Solicitation:
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."
A6 It depends upon the solution that is received. The State will make every effort to work with current contract holders. Record P. 000078
Q/A24 "This RFP seems to invite proposals for a complete managed service for the successful bidder to take over the complete software procurement process, rather than simply for the installation of a software solution to manage the software purchase process itself. Is that correct? A24 No." Record P. 00080
Q/A28 "Will procurement code be changed to make it mandatory for all agencies to order items 1-8 on page 20 through SAM? 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. Record P. 000081
Exhibit 29

2. The Board Complied with the Required Start Date of the Contract.

The contract did not guaranty that revenue would immediately accrue to New Venue on the commencement date. At that point, New Venue had the SAM contract and had a responsibility to begin performing services. The issue that arose (and ultimately was remedied by the Board) was that the existing state contract vendors were not willing to participate in the SAM contract after New Venue had been identified as the SAM contractor.

Mr. Singleton testified about his discussions with New Venue on this issue:

> They were concerned that the -- again, the vendors had not bought into the MySAM Central concept. They had indicated, not only in this letter, but when I had lunch with them to discuss this matter, they indicated at that time and they indicated at least -- on at least one prior occasions (sic), could be others before then, that they had invested start-up costs, that they were not receiving any earnings under the contract. They were concerned about that. And on each occasion that I spoke with Ms. Riley -- it was primarily Ms. Riley. We had lunch with Mr. and Ms. Riley. On each occasion when I spoke with her I informed Ms. Riley that your start-up costs are the cost of doing business under the contract, that you were to be responsible for that, that generally that's included in -- you take that into account in putting together what you anticipate you would get from the contract. In this particular instance, this being a self-funded contract, the expectation, this particular contract, with all of your contracts, doesn't always --

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RON 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. Record p. 000407

FAQ #2.A. MySam will only track software purchases that are made through MySAM. However, **users have the ability to manually add inventory** and MySAM will reflect it in reporting. Record P. 000409 [emphasis added]

FAQ #6Q/A What if I purchase software outside of 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**" [emphasis added] Record P. 000409.

16Q/A I don't see my State Term Contract Vendor's name in the drop-down list. What do I do? A. Chose the option, "Other" and enter the State Term Contract Vendor's name."

> doesn't guarantee, if you will, that there would be earnings from the contract. This is no different – this contract was no different. And I explained that to them, that when the vendors started participating, then that's when, you know, she would expect to get earnings from the contract.

The evidence in the record reveals that the delay in the commencement of purchases through the SAM was an unexpected occurrence and that the Board acted reasonably and appropriately to conform to all material aspects of the contract. This delay also occurred because New Venue was not prepared to address requirements for change of reseller imposed by Microsoft when the contract was re-solicited. Moreover, there were delays in New Venue's agreeing to accounting practices with the resellers. Any delays in start were based upon the new concept and third party failures and disinclination to cooperate. New Venue never contemporaneously expressed a lack of understanding of the reasons for the delays nor did it contemporaneously make a claim that the delays constituted a breach.

A complete reading of the relevant documents further reveals that the contract between the parties does not contain a "time is of the essence" provision. The Board (and other state agencies and public procurement units) was unable to start utilizing the SAM on February 15, 2011 as scheduled due to the unwillingness of the existing state contract software resellers to participate in the SAM. Their unwillingness appears to have been mostly based on the resellers' perception of New Venue's financial strength (or lack thereof). The contract contains provisions that could allow the Contractor to seek adjustment for delay in performance[5] (Record p.000061). However, in this case, New Venue failed to make any timely claim thereunder and no notice was

[5] These opportunities could arise from the **Changes** paragraph in the Contract. This provision provides a contractor the right to seek adjustments for modifications in the contract. Based upon New Venue's argument that its inability to process software acquisitions on February 15, 2011 constituted a modification of the agreement, it seems appropriate that it should be bound by this contract provision.

given prior to a final payment under the contract, barring any claim for delay under the contract's terms.

Our courts have held that where there is no "time is of the essence requirement" performance must occur within a reasonable time. Here, based upon the circumstances, the Board acted affirmatively to expedite changes in the structure to allow performance to commence as quickly as practical considering the situation and the statutory requirements for re-solicitation of the State Term Contracts. The Board acted with due diligence and performed the contract within a reasonable time. The only conclusion that can be reached from the record in this matter is that the Board acted appropriately upon learning that the existing resellers would not consent to change their contracts to accommodate the SAM. The contracts either expired prior to re-solicitation or were cancelled for convenience to allow a prompt and timely re-solicitation. The Board then re-solicited the state term contracts to compel the new state contract vendors to deal through the SAM. Thereafter, the intended acquisitions were processed through the SAM.

In this circumstance, our courts have held that "Breach of a contract, to justify its rescission, must be so substantial and fundamental as to defeat the purpose of the contract. . . In such a case, mere delay in performance will not give rise to the right of rescission unless it be such as to warrant the conclusion that the party delaying does not intend to perform." The Court further states "These principles are clear. There is no mystery about the doctrine. Good faith is to all cases." Davis v. Cordell, 237 S.C. 88,101, 115 S.E.2d 649, 655(1960)

In Davis, as here, it appears that the Claimant "made demand upon appellant for 'some money' under the contract[6]; but never did she notify him of any definite time after which, upon his having failed to pay, she would rescind it. Davis, *supra* at 237 S.C. 102, 115 S.E.2d 656.

Likewise, New Venue never provided correspondence or claims from which a reasonable person might conclude that it believed that it was contending the contract had been breached or gave notice that a reasonable party could have concluded would hint that there would be a claim for damages. New Venue claims that the Board knew or should have known of the facts surrounding its alleged breach of the contract. It argues that the Board knew of the breach and therefore its notice was adequate. Judge Learned Hand eloquently disposed of this imaginative, but fallacious, argument. He said:

> The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice "of the breach" required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

American Mfg. Co. v. United States Shipping Board E.F. Cor., 7 F.2d 565,566 (2d. Cir. 1925).

The Board's performance of its obligations under the contract was timely. There was no unreasonable delay in performance. The Board acted reasonably, responsibly and diligently in

[6] A review of the e-mail exchanges between Ms. Riley of New Venue and the State demonstrate this correlation. For example, in Exhibit 97, Ms. Riley writes to Mr. Singleton, inter alia:
"Delbert, I am writing to request that your office begin consulting with the SAM immediately – allowing us to perform services within the scope of the SAM contract, in exchange for payment. These services include . . .
Delbert, all of the services above fall within the scope of the SAM contract and we are available to begin work immediately. We are desperately seeking avenues to bring in revenue as we continue to wait for the implementation of our contract. Consulting with your office would enable us to better absorb the financial strain that these delays have caused. Delbert, we are ready, available and looking for work."
Her language clearly demonstrates that New Venue is not of the belief that a breach has occurred and is looking for monies – on point with the fact patter in the case cited.

addressing unanticipated problems resulting from the actions of third parties who had rights under existing contracts. The alleged breach due to delay is not a breach. New Venue has failed to prove its case of breach resulting from any alleged delay in performance.

3. Any Delay Resulting from the State Contract Resellers' Lack of Cooperation was Justifiable

One simply cannot review the record here as it relates to the startup issues in the contract and conclude anything except that any delay in the initiation of orders through the SAM was justifiable. Ms. Riley essentially conceded that fact when she stated:

> Well, I don't know, and I can't confirm that, but to confirm what we were just saying, the State had the right to not enter a contract with me. The State had the right to cancel when they saw that they would not implement. I didn't make that choice. They did.

The testimony of the Board employees regarding this situation further supports the fact that they acted reasonably and appropriately and that the delay was justifiable.

Mr. Singleton testified about efforts made to get the resellers on board with the SAM contract from the beginning:

> A. I can tell you this, I can tell you that there was considerable conversation that was had with those vendors to come on board with the state term contract, with the SAM concept. That I can tell you. I'd have to defer to Debbie and/or Ms. Hall about that specific question. But I can tell you this, there was considerable work done with those vendors to get them to come on board. And, as indicated in the exhibit that I read earlier, in keeping with the mindset that if changes needed to be made to those state term contracts, that we would do that. And that's what they worked to do, to change those contracts to get them, if you will, on board.
>
> Q: And absent change in those contract, did the State have any way to require the existing state term contract holders to participate in the SAM?
>
> A: No.
>
> Q: Do you have any personal knowledge as to the reasons that those existing state term contract vendors, and maybe you can tell me who they were and what their reasons were for not wanting to participate in the SAM?

A: To my understanding, they had questions about New Venue's ability to perform from a financial standpoint. If I recall correctly, they were CompuCom and, if I recall, SHI. Primarily I recall those two.

Q: Okay. And so what did the State do when those resellers wouldn't participate?

A: Well, what did the State do. I had a number of conversations with Norma and with Debbie in terms of how can we help to get these contracts rolled under the SAM. What we had to do was, we either didn't re-solicit -- strike that. We either did not renew a contract that was coming close to expiring and re-solicited or we let them know that we were going to terminate those contracts and re-solicit. That's basically what we did. We set about trying to get those contracts rolled under the SAM. That's what we did. That's one of the number of things that we did in terms of trying to help them.

The Board performed its contract in a reasonable time and subject only to a justifiable delay, assuming that there was even an obligation inherent in the contract that orders commence on the start date.

4. New Venue Failed to Prove a Crucial Element of its Claim – that it Suffered Damages from any Alleged Breach of the Contract.

New Venue offered minimal testimony on its claimed damages. Under cross-examination, its CEO made a large number of comments similar in nature to the following examples:

Well, I'm going to have to think here, because we had a couple of different versions of this, and I actually think I may have submitted the wrong exhibit, because I didn't use that verbiage, and I recall modifying the verbiage, and I recall using a formula in the spreadsheet, so I'm not sure what that number is.

We know this number is not accurate, because we know that sales exist that we simply can't get our hands on, or we don't have the authority to validate and dig as deep as we would like to.

I'll have to confirm that -- then my statement is that I don't know. I can't speak to what I mean by "participation" other than -- I don't know where I've acknowledged the delay.

Well, I testified to it -- I testified to what I saw and what I read and what was compiled for me. What I didn't testify to was that I was the one that went through every figure. My bookkeeper/accountant was the one who helped me, and I do think I testified to that. So, she has the more experience and

> understanding of this kind of information. So, I would like to go on record saying that I did not testify as to the 100 percent that I'm the only one who worked on this document. So, it may be better for me to make sure we answer accurately to you, Mr. Montgomery, to have Martha explain these numbers.
>
> I'll have to defer to Martha to make sure we answer that accurately.

These are but a few of the examples of New Venue's vague and inaccurate claims as to its alleged damages. A thorough review of Ms. Riley's testimony reflects that she did not prepare her damages claim, did not understand her claimed damages and here claims as to damages were at best speculative assertions of injury based upon a misapprehension of the contract. Moreover, her claims were not tied to rational amounts or calculations for past or future damages that could be calculated with any degree of certainty. She offered neither an expert witness nor even the bookkeeper who she testified was primarily responsible for the calculations and underlying assumptions.

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). A clear analysis of the record reflects that New Venue failed to demonstrate its alleged damages to any level of specificity founded on facts. Instead, it simply offered speculative testimony from a single witness who promised that Martha, the accountant, could explain and validate the witness' contentions and would clear everything up. New Venue did not call Martha as a witness and its damages claim remained nothing more than speculation.

Furthermore, New Venue simply failed to meet any minimum standard of proof as to the amount of any damages it allegedly sustained. Our Courts have long held that 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).

New Venue failed to meet its burden by proving damages with the specificity required by law, and its entire claim fails on its inability to meet that critical element of its cause of action.

II. Even if there were a Breach by the State, New Venue was not Entitled to Fail to Perform its Obligations Pursuant to the Contract.

A. New Venue misapprehends the law regarding material breach

During the hearing, New Venue's counsel described New Venue's theory of the law as something akin to where a party is first to breach; the other party has a right to a free ride and the right to exercise self-help in determining its remedies for the breach with no further obligations to the other party. New Venue advanced this theory as justification for its failure to perform its contractual obligations, including those of delivering the web based software solution, making payments to resellers in the time required by the contract, delivering purchase orders in a timely manner, remitting all funds other than the administrative fees allowed by the contract to the resellers and the like.

Even if the Board had breached the contract as New Venue alleges, the alleged breach is not a material breach. However, were the CPO to find a material breach, New Venue does not have, in these circumstances, the right to be relieved of its obligation to perform.

Contract law has always distinguished between material and immaterial breaches. If a breach is immaterial, the existing rights of the parties do not change. The contract remains enforceable although the breach may occasion liability for damages, if any can be proved . . . a

material breach, on the other hand, does affect the substantive rights of the parties. A substantive or material breach is one which touches the fundamental purpose of the contract and defeats the object of the parties in making the contract . . . The standard of materiality [of contractual breach] must be applied in the light of the facts of each case in such a way as to further the purpose of securing for each party his expectation of an exchange of performance . . . A material as opposed to incidental breach of contract is one that is so important that it vitiates or destroys the entire purpose for entering into the contract. Fishman v. Smartserv Online, Inc., Superior Court, complex litigation docket at Stamford, Docket No. X05 CV 0172810 S (February 11, 2003, Rogers, J.).

"[A] 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." Kelly Capital v. SEI Private Trust, 532 Fed. Appx. 422 (4th Cir. 2013). New Venue at one point argues that it was unable to perform the fundamental nature of the contract because it was not provided with "Key ID's" or activation codes for the software. The record is replete with evidence that the tracking function could be carried out without these so called Key-ID's.

Here, one might correctly argue, that if a material breach occurred prior to the ultimate termination of the contract for breach; the party that materially breached the contract was, in fact, New Venue. New Venue was the party that failed to deliver the web-based software tracking solution. New Venue was the party who failed to remit payments entrusted to it for forwarding to the software resellers. It is clear that New Venue has failed to offer evidence or demonstrate facts that support a contention that the Board materially breached the contract. In fact, the ONLY failure that New Venue offers is that the Board did not deliver it wheelbarrows full of

money amounting to two percent of software purchases that the record reflects were never intended to be a part of the SAM contract. New Venue was never deprived of any benefit that it could have reasonably expected.

In fact, it is clear that New Venue, after a justifiable delay, received the benefits of the contract. It processed orders and collected administrative fees as contemplated by the contract. New Venue's complaints never rise to the level of destruction of the benefits of the contract or its essential purpose to New Venue. The Board, and other Agencies and public procurement units provided the order and fulfillment information to allow tracking of the software. While New Venue did not perform its obligations, nothing the Board allegedly did ever rose to the level of a material breach.

In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Restatement (Second) of Contracts § 241; Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 284 (2010).

The CPO should particularly note that the Board's employees and the Board's conduct consistently comported with standards of good faith and fair dealing as enumerated in the Procurement Code. Mr. Singleton's testimony is instructive on this issue. He stated:

Q: Now, in that time -- and I believe, Mr. Singleton, you're a licensed attorney, aren't you?

A: Yes, I am.

Q: And in that time and in your conversations with Ms. Riley, did she ever make a statement or give you any reason to believe that she believed that the State had failed to do what it was supposed to do under this contract?

A: She did not.

Q: And could you tell the CPO what she asked you to do and what her complaints were?

A: Again, her complaint was that the vendors were not being cooperative. Her complaint was was that she had invested -- New Venue had invested time, money, effort into developing the MySAM concept and there was no business at that point to show for. She wanted us to do what we could to get these vendors on board, and we did that. She even proposed or suggested -- I think the suggestion came from her. There was a suggestion that there be additional – maybe there was some additional things that could be done under the contract. We floated that around, had discussion about that. And then eventually came up with some value-added things that they could do. And we promoted that with the agencies.

New Venue never contended that the third party caused delays were a breach of the contract until after it failed to perform and the Board canceled the contract. Now, New Venue would suggest to the CPO that the circumstances here constitute a forfeiture. They do not.

Forfeitures, however, are not favored in the law, and a relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract; for one party's obligation to perform to be discharged, the other party's breach must be material. Kahlid Shah v. Cover-It, Inc., 86 Conn. App. 71, 859 A.2d 959 (2004). Additionally, it is elementary law that, if one would repudiate a contract, he must return or offer to return the consideration which he accepted in making the contract. Cook v. Hartford Fire Ins. Co., 168 S.C. 283, 167 S.E. 148 (1932). The law is clear that a party cannot take advantage of a situation as New Venue did here. At best, there was a minor failure of performance that was timely cured. The contract delineates what New Venue's

expectations can reasonably be. New Venue cannot set those expectations independent of the contract. New Venue's claims are meritless.

B. *New Venue's Assurances of Performance (even though they were ultimately false) Reflect its Failure to Claim a Breach and Waiver.*

New Venue claims that because the state contract vendors would not do business with it commencing on February 15, 2011, and because the Board was ultimately forced to re-solicit the state term contracts for the various software classes, that such actions constituted a material or total breach of the parties' contract by the Board.

Setting aside for the moment the question of whether or not this unavoidable circumstance constituted a material breach, when one party to a contract materially breaches, the non-breaching party has two options: it can terminate the agreement and sue for total breach, or it can continue the contract and sue for partial breach. See ARP Films, Inc. v. Marvel Entertainment Group, Inc., 952 F.2d 643 (2d Cir. 1991). Here, New Venue chose to continue with the contract rather than seek termination.[7] In doing so, it effectively limited its remedy for the alleged breach to suing for, at most, the partial breach occasioned by the Board's alleged late performance, ignoring the fact that the Board can only be liable for its activities as a public procurement unit under the contract. Nevertheless, for reasons known only to New Venue, it chose not to seek redress for any perceived breach until after the Board terminated New Venue's contract for cause. Only after the termination did New Venue assert that the Board's alleged breaches of the contract not only entitled it to recover damages against the State, but it also

[7] There are a number of items in the record that substantiate this position. New Venue's SAM Process Improvement Plan (Exhibit 336) and its response to the Show Cause Letter (Exhibit 376) provide ample support for this contention. In each of these, New Venue represents that it has corrected the error of its ways and is (or will shortly be) fully in compliance with its contractual obligations. These representations were made late in 2012 and early in 2013 – well after New Venue now alleges that the contract was inexorably broken.

allowed it to unilaterally, and without penalty, determine those provisions of the parties' contract which it would perform and those which it would not.

After a material breach, there is, however, no third option allowing the party claiming a breach to invoke self-help and only perform those obligations it wishes to perform. ESPN, Inc. v. Office of the Commissioner of Baseball, 76 F. Supp. 2d 383, 398 (S.D.N.Y. 1999). A party is only excused from performance when it terminates a contract in response to a material breach. Id. Selective performance is a remedy that contract law does not countenance. Id.

C. New Venue's Feigned Performance and Acceptance of Responsibility for its Non-Compliance Constitutes an Affirmative Waiver of any Claims of Breach

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). Waiver may be expressed or implied from a party's conduct. Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994). Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver. *See* Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). A waiver does not require consideration to be valid. *See* South Carolina Tax Commission v. Metropolitan Life Ins. Co., 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975), Lyles v. BMI, Inc., 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App. 1987). Even mere silence may in some circumstances constitute a binding waiver and prevent an aggrieved party from later asserting a material breach. American Hardware Mut. Ins. Co. v. BIM, Inc., 885 F.2d 132, 140-141 (4th Cir. 1989); *See, e.g.*, Steinbrecher v. Jones, 151 W.Va. 462, 153 S.E.2d 295, 302 (1965); Fisher v. West Virginia Coal & Trans. Co., 137 W.Va. 613, 73 S.E.2d 633, 640 (1952).

Although New Venue now claims the State breached the parties' contract when in failed to "put all software purchases through the SAM" in February 2011, more contemporaneously, New Venue gave the State no notice it considered its actions contrary to the terms of the contract and instead continued to act as if the contract was in force and it continued to reassure the Board that New Venue was fully performing the Contract for more than two years[8]. The fact that the parties entered into change orders affecting the terms of the contract as soon as March 2011 (and again in August 2011) indicates that the New Venue was afforded with ample opportunity to inform the State of any misgivings it might have regarding the Board's fulfillment of its contractual obligations. Certainly, it had other opportunities to do so over the intervening two-year period it continued to operate under the contract. The record reflects that New Venue outlined multiple strategies to bring itself into compliance with its contractual obligations on several occasions, yet never alleged that the Board or any state agency or local public procurement unit had breached the agreement[9]. Rather than give notice of some alleged breach by making a claim or allegation, New Venue states: "As a small business, we are grateful to the State of South Carolina for putting your confidence in our ability to perform in excellence. Because of the State, New Venue Technologies, Inc. created 9 new jobs in 2012 and we anticipate future growth as a result of additional vendors being added to the SAM contract."[10]

[8] Refer to Exhibits 336 and 376 for two of the many examples of these assurances contained in the record. Even during the hearing, Ms. Riley endeavored to contend that New Venue remained in compliance with its contractual obligations – at least as she saw them.

[9] See for example New Venue's response to the Show Cause letter from the Board (Exhibit 42) and New Venue's Process Improvement Plan (Exhibit 336). In both cases, New Venue identified multiple "factors that contributed to our delinquencies with CompuCom". In no case did New Venue attribute any of its problems to an alleged failure by the Board to perform any portion of the contract.

[10] Interestingly, rather than assert that there is a breach in the contract by the Board, New Venue rather affirms the proper interpretation of the contract, to wit, that the contract is designed to add vendors to the SAM as the CPO determines they are needed and appropriate. Hence, this might

During her lengthy testimony, Ms. Riley described this strategy as not wanting to tell the customer they are wrong[11].

Where a party to a contract has actual knowledge of a breach, but elects to continue performance, that party waives the right to sue the breaching party unless timely notice of the breach was provided to the breaching party. Howard v. Youngman, 81 S.W.3d 101, 111 (Mo. Ct. App. 2002); AM Cosmetics, Inc. v. Solomon, 67 F. Supp. 2d 312, 317-18 (S.D.N.Y. 1999); see also National Westminster Bank v. Ross, 130 B.R. 656, 675 (S.D.N.Y. 1991) (a party may continue to perform and later sue for breach **only where notice of the breach has been given to the other side**) [emphasis added]. New Venue's failure to provide the State with notice of its purported breach except as a reaction to the termination of the contract two years later does not constitute timely notice. No reasonable reading of any communication cited by New Venue as being designed to notify the Board of an alleged breach can reasonably be read to do so. Therefore, by virtue of its waiver New Venue has forfeited its right to sue the State for its alleged

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be also considered an admission as to how New Venue contemporaneously understood the contract.

[11] Ms. Riley described her response to the Show Cause letter as follows:

> She issued the Show Cause Letter to us. We, of course, continued to work to resolve the issue. At the end of the day, if within 30 days, it was not resolved, the bottom line is, I take ownership of my responsibilities. That's – I know what my contract says I'm supposed to do, and it's a lot like how I live my life. Whether you do your part or not, it's my responsibility to do what I know is the right thing to do. So, that's the approach I take in business. I don't do the blame, blame, blame, blame, blame, blame. I have to try to fix it so we can keep moving forward. Blame games cost money, and it's not a game I like to play. I like to keep moving. Find the point of failure, fix the point of failure and keep moving. That was our intent. Norma states, and I quote, "While this is a tough situation for all concerned, I have to look at the contractual obligations and ramifications of not adhering to the contract."

It is interesting to note that Ms. Riley's responses never assert that her failures to perform have any genesis in a breach or alleged breach by the Board until she initiated this contract controversy.

breach, and is itself liable to the State for its failure to perform in accordance with the terms of the contract.

D. New Venue's Conduct Precludes it the Ability to Make a Claim for a Material Breach in this Instance.

Even if it were determined that New Venue did not waive its right to sue the Board, or that it had made a *prima facie* case for breach of contract (which it has not). Due to the doctrine of election of remedies New Venue's only available remedy is to sue the Board or other alleged wrongdoers for damages incurred for the partial breach occasioned by the late performance (if the CPO determines that such a suit is even allowed under the contract). Election of remedies involves a choice between different means of redress afforded by law for the same injury, or different forms of proceeding on the same cause of action. Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts. Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 94, 33 S.E.2d 73, 747 (1945). In the present case, *if* the State materially breached the contract in February 2011 as New Venue claims, then New Venue was left with two remedies to address the breach -- 1) terminating the contract and suing for total breach, or 2) continuing with the contract and suing for partial breach. By choosing to continue with the contract, New Venue disclaimed option one and forfeited the opportunity to proceed except for a claim for partial performance.

Where a party with the right to terminate a contract chooses instead to continue the contract, the only inference to be drawn is that the party will derive a worthwhile benefit from its contractual relationship. Therefore, the party's election to continue rather than end the contract

essentially moots its legal justification for termination[12]. Once a party recognizes contractual benefits in the wake of a material breach, that particular breach can no longer be considered the antithesis of the contract, and it can no longer serve as the basis for termination. ESPN, supra. Put another way, a party cannot elect to continue with the contract, continue to receive benefits from it, and thereafter bring an action for total breach. In re Stillwater Capital Partners Inc. Litigation, 851 F. Supp. 2d 556, 570 (S.D.N.Y. 2012).

New Venue's claims of total breach cannot be asserted – even if the CPO were to determine that the Board breached the contract. New Venue's actions have terminated any viability such a claim might have had.

III. New Venue breached its agreement with the Board

The record contains substantial evidence that New Venue failed to fulfill the most basic obligations that it was required to complete under the contract and that the Board suffered money damages that have been proven by substantial and appropriate evidence. Ms. Riley's on the record admissions substantiate many of New Venue's breaches. Her admissions are significant, even as she talked around and obfuscated both the simple terms of the contract and her actions and performance. Her effort to obfuscate the obligation to remit the proceeds from payments less the administrative fee is instructive:

> 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

[12] Moreover, New Venue's claim that it was excused from performance as a result of the State's alleged breach.

the vendor's request, they simply did not want payments every day. That was with their request. That's what they asked for. I think Suzan Kurtulan, is her name -- when they first implemented the contract -- and Melisa the other young lady's name -- to get payments every day would have been a nightmare for them, not so much as a nightmare for us, because we're a small company, but for them to get payments every single day would have been a nightmare for this contract, given the volume of orders. So, that's why we put in place the Summary Billing and Invoicing Agreement.

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 the 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.

Q: Okay. Did you ever give the State notice, or for that matter, any of the vendors who you also had contracts with, notice that you were retaining and using that money prior to remitting it to them?

A: Well, it's not in my contract that I tell the vendors or that I tell the State or that I tell anyone how I utilize any revenue or any moneys that come into my business professionally or personally. That requirement is not in my contract.

New Venue treated the funds it was entrusted pursuant to the contract as its own bank. It re-interpreted its contractual obligations as it determined its needs. New Venue breached the contract in a multitude of ways.

A. New Venue failed to properly account for and remit administrative fees

The testimony of Jimmy Aycock, the Board's auditor, established that New Venue failed to properly account for and remit the administrative fees due the Board under the contract. Mr. Aycock found that gross software sales by New Venue totaled $29,511,000. However, New

Venue only reported the sum of $22,392,000. This resulted in a underreporting of over seven million dollars in gross software sales.

Mr. Aycock concluded and submitted into evidence his calculations, which reflected that New Venue underpaid administrative fees to the state for $32, 976.00.

B. New Venue failed to transmit payment to state contract vendors within the time required by the contract

The record is replete with evidence of New Venue's failure to transmit payments to software resellers within the three-day period allowed under the contract. This requirement emanates from the Record of Negotiations, which was initially drafted by New Venue (Exhibit 29). Number 7 of the Record of Negotiations provides:

> 7. The State will ensure that all Vendors participating in the 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. (Record P. 000404).[13]

As of the date of termination, New Venue owed more than two million, seven hundred thousand dollars ($2,700,000.00) to the resellers. Ms. Riley admitted that this debt was still outstanding. Exhibit 47 contains a copy of a letter to Earl Fajkus of CompuCom where she acknowledges owing $2,591,189.17 to CompuCom. These are funds that had been paid to New Venue by State Agencies and PPUs, 97.5% of these payments were to be forwarded to the software resellers. Obviously New Venue failed to transmit the funds in a timely manner. Mr. Aycock testified that her average payments were close to sixty days past due. Mr. Kirwan

[13] Interestingly, Ms. Riley endeavored to convince the CPO during her testimony that this language only created an obligation as to the Board, but did not impose any obligation on New Venue.

testified as to payments being transmitted much later than sixty days. Exhibit 453 and tables in Exhibit 256 substantiate this breach.

C. *New Venue's failure to comply with Audit requirements resulted in a cost to the Board.*

The section in the Solicitation captions "PRICING DATA – AUDIT – INSPCTION" (Record P. 00064) and *S. C. Code Ann.* §§11-35-2210-2220, *inter alia* provide the Board the right to audit records and imposes time requirements for records retention. 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 Board. The totality of documents provided by New Venue was entered into the record as Exhibit 462. Mr. Aycock explained and quantified the extra work required:

> Q: Over the course of this examination of these records were you able to make a determination of the extra work you had to do from an audit standpoint because New Venue did not comply or provide you the records that you requested?
>
> A: Yes, we did. We logged the time we spent on this examination to include hours we worked over, including hours we worked on weekends. And we logged -- not including what we're doing now and in preparation of this hearing, but actually working on the audit itself we logged approximately 2300 hours.
>
> Q: And how many hours do you think it should have taken to perform the work you were performing had New Venue provided the records that were necessary to do this?
>
> A: We compared these hours to some audits of what I would describe as medium size agencies, specifically Francis Marion University, South Carolina Vocational Rehabilitation Department, Greenville Technical College. And those audits, procurement audits, which were a review of contracts, compliance, Procurement Code where we're looking at purchase orders and invoices, much similar to the same type of things that we're doing here, dealing with payment registers. Those audits, as I recall, averaged about 225 hours as opposed to 2,300 hours spent on this New Venue examination.
>
> Q: So you had to do about an extra 2,000 hours of labor because of the fact that they didn't have the records?

A: That is correct.
Q: And did you make a determination as to what that cost the Board?
A: I did. And it was approximately $140,000.
Q: And how did you make that calculation?
A: Based on the hourly rates of the people that were involved, with fringes included, an overhead rate of our -- that's calculated for other audits we've done where we invoice such as Department of Transportation statutory audit we have to do. We added an overhead rate in there and extended out to almost $140,000. There's a spreadsheet that details that.

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 additional audit cost to be $139,026.83.

D. New Venue Failed to Timely Transmit Orders to Vendors

Item number 6 in the Record of Negotiations (Exhibit 29) (Record p. 000403) requires new venue to process all orders the next business day or where an order is received after 5:00 PM, no later than the second business day. Emmett Kirwan, a Contract Administrator with the Board, 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. In discussing Exhibit 453, Mr. Kirwan testified:

Q: Okay. And what did the contract require as far as the placement of orders?
A: My understanding from what I recollect is that orders were to be placed within one business day if received that day or two business days if received after 5:00 p.m. of that business day.
Q. Okay. And did that occur in this case?
A: That did not occur in this case.
Q: Did that occur in any of this group of transactions that you examined?
A: No, it did not.

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 public procurement

units. There was also evidence that in some cases, New Venue required pre-payment by PPUs in violation of the contract. New Venue also received payment for some $88,000.00 in charges for which it never forwarded purchase orders and improperly charged sales taxes to several PPUs.

E. New Venue failed to deliver a working copy of the MySam Central solution

New Venue admitted that it failed to deliver a working copy of the solution. Debbie Lemmon, Delbert Singleton and Emmett Kirwan all testified that they had attempted to obtain login access and been unable to access the system. Exhibit 423 includes Ms. Riley's explanation to Ms. Lemmon as to why the system is inoperable. Exhibit 424 includes Ms. Riley's explanations to Mr. Kirwan. Mr. Aycock testified that the data which Ms. Riley contended was delivered to the state was not included in Exhibit 462. There is no evidence that New Venue ever delivered a working MySam Central solution consistent with its obligation to provide a web-based solution for software tracking for the State. The Claimant was unable to demonstrate during the hearing and in the record any evidence to support a contention that a working web based software solution was ever completed or put in production. In Exhibit 53, New Venue projected the cost to develop the solution and obtain the data was $715,550.00. It is reasonable to expect that this would be a minimum number necessary for the Board to duplicate what New Venue failed to provide due to its breach of the contract.

F. New Venue Failed to Comply with the State's Requirements for End of Contract Life Procedure.

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.

There is no evidence in the record to support a contention that New Venue complied with these requirements. An examination of Exhibit 462 does not demonstrate that the information has been provided to the Board. Mr. Aycock testified that he or his staff reviewed every document provided by New Venue and that 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. The loss of this data is a cost to the Board.

G. New Venue committed Fraud.

The record reflects that New Venue and/or Ms. Riley committed fraud in their actions relating to this contract. New Venue made intentional material representations about the status

of payments to the state contract vendors. Ms. Riley repeatedly represented to state employees that its payments were being made on time and in accord with the contract[14].

Whenever a reseller complained that payments were untimely, she accused them of having erroneous data or made some excuse that later proved false – such as her contention that a payment was misapplied in both the Process Improvement Plan and her response to the Right to cure letter. Simply put, Ms. Riley made these false representations so that she could continue to appropriate monies rightfully owed to vendors to her own use. As the owner of a business that was struggling to get by before receiving the SAM Contract, she suddenly owned a million dollar home and many other assets – all bought with monies which she was obligated to pay to vendors pursuant to her contract. Ms. Riley kept $2.7 million dollars that should rightfully have been paid to the vendors – and her misrepresentations throughout the term of the contract allowed her to continue to amass personal wealth with other peoples' money[15].

The CPO should hold New Venue accountable for this fraud.

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[14] For example, she wrote in Exhibit 146 at page 001156 of the record: "With regards to our 45 day payment plan with CompuCom, we've paid all but $228,000 of the original $900,000 that was deferred while we worked to get our financials in place. The final $228,000 will be paid on 6-15. We've not missed a single promised-to-pay date with CompuCom, and we continue to pay for all other invoices with no delays. We've worked feverishly to put policies, procedures and financial oversight in place to ensure that this doesn't happen again, while also maintaining flawless records with other vendors."
It is evident that the statements that all other invoices were paid with no delays and her assertions about policies, procedures and the like were false. She made those representations intending for the board to rely upon them, the Board had a right to rely and did rely upon them to its detriment. The record contains numerous representations of this type.

[15] Ms. Riley describes this conversion of the vendors moneys as "the strategy that Martha Baker and Jeff Harmon presented to us" as an asset acquisition strategy. She asserts that by accumulating personal assets – presumably like a million dollar home – she could better get credit to fulfill her contract obligations. It was an interesting theory.

CONCLUSION

New Venue Technologies, Inc. has abjectly failed to prove that the Board breached its contract with New Venue. It has failed to prove any of the elements necessary to demonstrate a breach by a preponderance of the evidence. Moreover, it has abjectly failed to demonstrate any measureable damages adducible from the evidence presented that comport in any way with the legal requirements for proving loss in a contract case. New Venue's case fails on every measure and it is not entitled to any relief on its claims.

On the other hand, the Board has demonstrated numerous, systemic and specific breaches by New Venue that deprived the Board of the benefits under the contract. In addition to failing to place orders and remit payments in a timely fashion, New Venue failed to remit administrative fees in a timely and proper manner, failed to deliver the contracted for solution and failed to comply with the audit and post contract requirements of the contract. These latter breaches resulted in a loss to the Board of at least $887,552.83. This sum does not include any damages for New Venue's fraudulent conduct.

It is clear that New Venue made material misrepresentations to the Board and Vendors about the status of payments willfully to conceal the fact that it was retaining funds in the form of the 97.5% of collected funds it was obligated to pass through to the reseller within three days of receipt. New Venue was not entitled to hold and using those funds for purposes other than payments to resellers. The scheme allowed New Venue to appropriate more than $2,700,000.00 that its principals used to acquire property, travel and for personal expenses.

New Venue's behavior in this case violated the contract in every way alleged by the Board. That is would with no proof allege that the Board violated the contract in a round of "the best defense is a good offense" is astounding. New Venue failed to perform even the most rudimentary obligations under the contract. The Board, on the other hand, bent over backwards

to make every effort to help New Venue succeed. Change Orders were made to assist New Venue, the contract was allowed to move forward where it should have been terminated – all, really, until the misconduct of New Venue became apparent. Then the Board was left with no choice but to hold New Venue in Default and terminate the contract. The Board acted appropriately in every circumstance.

Based upon the facts, the Board would propose that the CPO adopt, inter alia, the following Findings of Fact and Conclusions of Law regarding this Contract Controversy.

Suggested Findings of Fact and Conclusions of Law:

1. New Venue Technologies, Inc. contracted with the Using Governmental Units to provide a web based software solution to assist them in tracking selected software licenses.
2. The software licenses to be managed were to be those which were on a state term contract and which the CPO and ITMO determined that it would be advantageous to the State to have tracked.
3. The contract was never to encompass "all" software purchases as New Venue contends because it required a self-funded system and only certain statewide term contract met the criteria for this system by imposing applicable administrative or user fees.
4. New Venue failed to make proper and appropriate inquiries as to the relationships with existing and future State contracts despite its assurances to the Board that it was doing so and had relationships with those parties.
5. The failure of the State contract software resellers to agree to the SAM change order to their contracts was not foreseeable.
6. The State contract resellers' rejection of the SAM was largely the result of their insecurity over New Venue's financial strength.
7. The Board acted reasonably and expeditiously to cancel, non-renew and re-solicit these contracts to require the resellers to work with the SAM.
8. The contract required New Venue to forward all purchase orders from public procurement units to the appropriate reseller in either 1 or 2 business days after receipt of the order.
9. On multiple occasions, New Venue failed to forward all purchase orders from public procurement units to the appropriate reseller in either 1 or 2 business days after receipt of the order.

10. New Venue's failure to timely forward purchase orders is a material breach of the Parties' contract.
11. The contract required New Venue to forward 97.5% of every payment received from the Board or any Public Procurement Unit to the appropriate reseller within three (3) business days after receipt of the Order.
12. On multiple occasions, New Venue failed Venue to forward 97.5% of the payments received from public procurement units to the appropriate reseller within three (3) business days after receipt of the applicable payment.
13. At the time the contract was terminated, New Venue had failed to transmit more than $2,700,000.00 in payments to the appropriate resellers.
14. New Venue remains indebted to the resellers in approximately the amount of $2,700,000.00, which was paid to it by Public Procurement Units and never forwarded to the resellers even though the contract required it to be forwarded within three days of receipt.
15. New Venue's failure to timely forward payments as required by the contract is a material breach of the Parties' contract.
16. New Venue collected funds from public procurement units for software that it never ordered from the resellers.
17. New Venue's failure to order software where it received purchase orders and payments from public procurement units is a material breach of the contract.
18. New Venue failed to properly account for and remit administrative fees to the Board in a timely and accurate manner.
19. New Venue's failure to properly account for and remit administrative fees to the Board in a timely and accurate manner constituted a material breach of the contract.
20. The Board was damaged in the amount of $32,976.00 by New Venue's failure to remit administrative fees owed to the Board.
21. New Venue failed to deliver the promised solution. The software tracking solution was never implemented and the Board received no value from the solution.
22. New Venue's failure to deliver the contracted for solution constituted a material breach of the contract and resulted in damages to the Board.
23. A fair measure of damages to the Board is New Venue's estimated cost of ownership.
24. New Venue testified that the cost of ownership was $715,550.00. This is a reasonable estimate of the Board's cost to replicate the information that New Venue did not deliver.
25. The Board has been damaged by the amount of the cost of ownership, a benefit for which it contracted and which it did not receive.

26. The materials that New Venue provided to the Auditors were represented to fulfill the post contract requirements.
27. A review of these files demonstrates that New Venue did not provide the Board with the software purchase information and other post contract materials as required by the contract.
28. New Venue's failure to provide the post contract materials constituted a material breach of the contract with the Board.
29. New Venue failed to make records available as required by the contract and South Carolina Code to assist the Board's auditor in auditing the contract records as required by the contract and applicable state law.
30. New Venue's failure to cooperate in the audit process resulted in the expenditure of an inordinate amount of time by the Auditor and caused damage to the State.
31. New Venue's failure to cooperate in the audit process constituted a material breach of the contract and caused damage to the Board for expenses.
32. The Board is entitled to recover its excess audit costs for $139,026.86 from New Venue.
33. The Board is entitled to an award on its counterclaim for $887,552.83 in actual damages, plus actual and exemplary damages on its fraud claim.
34. Actual damages include the unpaid administrative fees, excess audit costs and costs to replicate the solution that New Venue failed to provide.
35. The Board gave proper notice of the termination of the Contract including the right to cure.
36. New Venue failed to cure its material breach in the time allowed.
37. The contract was properly terminated in accord with the Procurement Code and South Carolina law.
38. In that the Board did not claim that the Board, for its own use, had acquired any software remaining undelivered by New Venue, the question of damages claims by any public procurement unit relating to monies paid to New Venue and not remitted to the reseller is not before the CPO in this matter.
39. This contract controversy and counterclaim are properly before the CPO.
40. The CPO has jurisdiction to hear and decide the claims between the Board and New Venue before it in this instance.
41. The CPO has authority to make a monetary award in addressing a contract controversy.
42. The Board is thereby awarded a judgment against New Venue for _____.

The Board encourages the CPO to act strongly and decisively in holding New Venue accountable for its numerous misdeeds and breaches of the contract.

Respectfully Submitted,

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June 18, 2014