

STATE OF SOUTH CAROLINA)
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 COUNTY OF RICHLAND)
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 IN RE:)
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 Appeal by New Venue Technologies, Inc.,)
)
 (New Venue Technologies, Inc., Appellant,)
 vs. South Carolina Budget and Control)
 Board, Respondent; Case No. 2014-7))
 (Contract Controversy))
)
 Solicitation No. 5400001873 – Software)
 Acquisition Manager)
)

BEFORE THE SOUTH CAROLINA
 PROCUREMENT REVIEW PANEL

ORDER

Cases No. 2014-7

This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4230(6), and 11-35-4410(1)(a) of the South Carolina Consolidated Procurement Code (the Procurement Code). New Venue Technologies, Inc. (New Venue) has appealed the July 18, 2014, written determination of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO). The CPO’s written determination considered New Venue’s request for resolution of a contract controversy in which New Venue claimed that the State of South Carolina, by and through the Budget and Control Board (the Board), had breached State Term Contract Number 4400003161 for a Software Acquisitions Manager (the SAM contract). The Board answered New Venue’s complaint by denying that the State had breached the SAM contract and asserting counter-claims that New Venue had breached the SAM contract. In his written determination, the CPO found against New Venue and in favor of the Board.

The Panel convened two hearings to consider the issues raised by New Venue’s appeal. On May 13, 2015, the Panel convened to consider the Board’s motion for summary judgment

and New Venue's motion asserting that the Panel lacked jurisdiction to consider the Board's claims against New Venue because section 11-35-4230 violates the separation of powers provision of the South Carolina Constitution set forth in Article I, section 8. At this Panel hearing, Michael H. Montgomery, Esquire, represented the Board; John E. Schmidt, III, Esquire, represented New Venue; and M. Elizabeth Crum, Esquire represented the CPO.¹ After considering the briefs and arguments of counsel, the Panel voted to grant partial summary judgment in favor of the Board and to deny all other motions. The Panel's decision on the parties' motions will be addressed more fully below.

Thereafter, the Panel convened on June 1, 2015, for its scheduled² four-day hearing to consider the remainder of New Venue's claims as well as the Board's counter-claims. At the Panel's hearing on June 1st, Laurie Charles Sanders, Jr., Esquire, appeared on behalf of New Venue.³ Michael H. Montgomery, Esquire, appeared on behalf of the Board; and M. Elizabeth Crum, Esquire, appeared on behalf of the CPO. When it became apparent that New Venue was not prepared to go forward with the presentation of evidence to bear its burden of proof before the Panel, the Board moved for dismissal on the grounds that New Venue had failed to prosecute its appeal. As will be discussed below, the Panel voted unanimously to grant the Board's motion to dismiss the appeal.

¹ Counsel of record for the Board also included Frank S. Potts, Esquire. Geoffrey K. Chambers, Esquire, similarly served as counsel of record for New Venue. Additional counsel for the CPO included Adam B. Landy, Esquire; William Dixon Robertson, III, Esquire, and Shawn L. DeJames, Esquire.

² The Panel originally set a hearing to be held December 16 – 19, 2014. In early December, counsel for all parties advised the Panel that they had reached a mediated settlement agreement and that the Panel did not need to conduct its scheduled hearing. Thus, the Panel's December hearing was canceled. By letter dated March 13, 2015, counsel for the Board advised that the settlement agreement had not been performed and that the Panel needed to re-schedule a hearing. The Panel set a new hearing for June 1 – 4, 2015, and provided notice of the same on April 15, 2015.

³ Mr. Schmidt was relieved as co-counsel for New Venue by Panel order on May 20, 2015. This order notes that Geoffrey Chambers "will continue as sole counsel to New Venue." Although the Panel never received a formal notice of appearance, Mr. Chambers advised the Panel's counsel by phone call on May 20, 2015, that Mr. Sanders would be assisting him in representing New Venue.

Background

In reaching its determination on the motions before it, the Panel has considered the documentary record⁴ before it; the legal arguments of counsel, both written and oral; and the provisions of the Procurement Code and other applicable legal precedent, including Panel precedent. The Panel finds the facts discussed below relevant to the issues before it.

I. Solicitation and Award

On August 5, 2010, the Information Technology Management Office (ITMO) issued a Request for Proposal (RFP) seeking to acquire the services of a Software Acquisition Manager (SAM) “to maintain a real-time vendor hosted system for use by all Public Procurement Units.”⁵ RFP at 8; Record at 000036 (CPO Hearing Exhibit #8; hereinafter “RFP”). The RFP points out by way of background that PPU purchase software one of three ways: (1) through a state term contract; (2) through an agency term contract; or (3) from the retail market. *Id.* Section III of the RFP set forth the scope of work and specifications for the SAM project. RFP at 20 – 25; R. at 000048 – 000053. Within Section III, the RFP defines the business problem intended to be addressed by the SAM as the State’s lack of a software tracking/inventory system:

The State of South Carolina currently is without the centralized means of tracking software licenses and their associated usage across all [PPUs] in an attempt to

⁴ The record transmitted to the Panel included transcripts from testimony before the CPO. However, because such testimony is unsworn and because the Panel is charged with the responsibility of conducting a de novo review, the Panel has not considered any of this testimony in reaching its decision on any of the motions.

⁵ The Procurement Code defines a PPU as “either a local public procurement unit or a state public procurement unit.” S.C. Code Ann. § 11-35-4610(5) (2011). A “local public procurement unit” is defined as “any political subdivision or unit thereof which expends public funds for the procurement of supplies, services, or construction.” S.C. Code Ann. § 11-35-4610(3). A “state public procurement unit” is defined as “the offices of the chief procurement officers and any other purchasing agency of this State.” S.C. Code Ann. § 11-35-4610(6). These definitions are used in connection with cooperative purchasing agreements. S.C. Code Ann. § 11-35-4810 (2011). The cover page of the RFP for the SAM contract designated that the USING GOVERNMENTAL UNIT was “Statewide Term Contract.” RFP at 1; Record at 000029 (CPO Hearing Exhibit #8). The import of this designation is that it identifies the solicitation as one “seek[ing] to establish a Term Contract . . . open for use by all South Carolina Public Procurement Units [citation omitted].” RFP at 8; Record at 000036 (CPO Hearing Exhibit #8). Thus, the SAM contract, once awarded, could be utilized by both state and local PPUs. Elsewhere the RFP noted that use of a term contract is generally mandatory for most state agencies, but is optional for local PPUs. RFP at 37; R. at 000065 (CPO Hearing Exhibit #8).

increase the state's ability to reduce cost and maintain a real-time tracking system of software licenses, renewal dates, expiration dates and version. The State does not have a software tracking system/inventory system; therefore, each [PPU] may have an internal system/process. Each [PPU] has to track their own software/maintenance renewals that leads to potential issues of non-compliance and does not allow for aggregate sales, such as enterprise agreements. In addition, the current problem limits the state from aggregating its requirements and negotiating better prices and terms and conditions.

RFP at 21; Record at 000049. Thus, ITMO stated it was "soliciting proposals for a state term contract"⁶ to address this lack of a software tracking/inventory system. In addition ITMO noted that "[s]ince no funds have been appropriated for this project, a self-funded system is required;" and indicated the State's intent "to have participating [PPUs] submit all software purchase orders through the SAM." RFP at 20; R. at 000048. Under the contract, the SAM would

maintain the following information 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:

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

Id.

The RFP also stated the State's intent "to award a state term contract to one Offeror for use by all State Agencies"; however, use by local PPUs would be "optional" in accord with

⁶ "Term contract" is defined by the Procurement Code as "contracts established by the chief procurement officer for specific supplies, services or information technology for a specified time and for which it is mandatory that all governmental bodies procure their requirements during its term." S.C. Code Ann. § 11-35-310(35) (2011). A "governmental body" is defined as "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." S.C. Code Ann. § 11-35-310(18) (2011). However, the definition of "governmental body" expressly excludes the General Assembly and its branches or committees, and "all local political subdivisions." *Id.* The Panel finds that the "requirement" addressed by the SAM solicitation was the need for a tracking/inventory system.

section 11-35-4810⁷ of the Procurement Code. RFP at 20; R. at 000048. Noting again the various methods through which a PPU could purchase software, the RFP provided a link to existing state term contracts for the purchase of software products,⁸ briefly described how such software term contracts were awarded, and advised that these contracts impacted warranty periods, support, and maintenance. *Id.* The RFP also stated that “each [PPU] 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.” *Id.* (emphasis added). In addition to tracking information, the RFP required the SAM to market the contract: “Explain in detail Offeror’s marketing plan. How will SAM promote the contract?” RFP at 23; R. at 000051.

As previously noted, no budget had been set aside for the SAM project; thus, a self-funded system was required by the solicitation. Section VIII of the RFP addressed the bidding schedule and price-business proposal for the SAM project. RFP at 37; R. at 000067 (CPO Hearing Exhibit #8). A clause entitled “SELF-FUNDED BUSINESS MODEL” provided:

Contract is self-funded. Offer[or] shall retain a fee (a percentage of the total invoice less returns & taxes) that will be charged to the software provider (L[arge] A[ccount] R[eseller], V[alue] A[dded] R[eseller], etc.). The fee will then be deducted from that software provider’s invoice prior to SAM’s payment to the 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.

Id. Thus, the SAM would only receive its fee when the software provider’s contract with the State included an administrative fee like that included in the State’s software term contracts.

Conversely, software purchased at retail would not include any administrative fee.

⁷ See *supra* note 5.

⁸ For purposes of clarification, these state term contracts for the purchase of software products are hereinafter referred to as “software term contracts.”

Finally, Section VII of the RFP contains a clause which identifies the documents that will comprise any contract formed as a result of the solicitation. RFP at 30, R. at 000058. This clause provides in pertinent part:

(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.

Id.

Amendment #1 was issued on August 20, 2010, and answered various vendor questions. Amdt. 1, R. at 000077 – 000083 (CPO Hearing Exhibit #10; hereinafter "Amdt. 1"). The following vendor questions and State answers are relevant to the dispute before the Panel:

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 his 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.
Amdt. 1, R. at 000078.

* * * *

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.

Amdt. 1, R. at 00078.

* * * *

Q28. Will procurement code be changes 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.

Amdt. 1, R. at 000081.

* * * *

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

Amdt. 1, R. at 000081.

In addition to answering the questions above, Amendment #1 also established the Billing/Payment Structure as follows:

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.

Amdt. 1, R. at 000083.

As set forth in Section VII of the RFP, any Record of Negotiations becomes a part of the contract between the awardee and the State. The Record of Negotiations between ITMO and New Venue included the following provision:

22. The State Term Contract Number will be included as a field on the MySAM Central application.⁹ The primary and intended functionality for the end-user includes the following: Enter Order, Upload Documents, Confirm Order, and Submit Order.

* * * *

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.
Depending on the success of the program, the State may elect to increase their administrative fee and decrease the Software Acquisition Manager Transaction fee.

Record of Negotiations, ¶ 22 at 3 – 4; R. at 000405 – 000406; ¶ 38 at 5 – 6; R. at 000407 – 000408 (CPO Hearing Exhibit #29; hereinafter “RON”). The RON also included a “Frequently Asked Questions” document pertaining to MySAM Central and a PowerPoint presentation for marketing the solution to State agencies. The “Frequently Asked Questions” document contains the following questions and answers:

Q: 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 My SAM.

RON, “Frequently Asked Questions,” #6 at 1; R. at 000409.

* * * *

Q: I don’t see my State Term Contract Vendor’s name in the drop-down list. What do I do?

⁹ “MySAM Central” is the name of New Venue’s web-based software application designed to fulfill the functions of the SAM. *See generally*, RON at 1 – 6; R. at 000403 – 000408.

A: Choose the option, "Other" and enter the State Term Contract Vendor's name.
RON, "Frequently Asked Questions," #16 at 2; R. at 000410.

The PowerPoint marketing presentation introduces the SAM and describes its benefits to the agencies that adopt it. RON, PowerPoint, R. at 000411 – 000420. Although one slide indicates that agencies will be able to track both retail and state term contract purchases, nothing in the presentation states that use of the SAM is mandatory for agencies. RON, PowerPoint, R. at 000420; *see generally* at R. 000411 – 000422.

After negotiations concluded, ITMO posted a notice of intent to award the SAM contract to New Venue on December 21, 2010, and the award became final on January 4, 2011. Intent to Award, R. at 000445 (CPO Hearing Exhibit #32). The Intent to Award indicated a maximum contract period of February 15, 2011 through February 14, 2016. *Id.*

II. Post-Award Events

The Panel notes the following dates relevant to the performance of the SAM contract:

March 2, 2011: Change Order One executed, adding two Valued Added Services to the SAM contract. Change Order #001, R. at 000491 – 000493 (CPO Hearing Exhibit #37).

July 2011: New Venue received first purchase order from a PPU. R. at 010779 (CPO Hearing Exhibit #232).¹⁰

August 10, 2011: Change Order Two executed, deferring New Venue's remittance of the 0.5% ITMO administrative fee for the period of one year. Change Order #002, R. at 000502 (CPO Hearing Exhibit #39).

January 28, 2013: Show Cause Letter from ITMO to New Venue regarding its delinquent account with CompuCom, the State's Microsoft reseller under a software term contract. Show Cause Letter, R. at 000503 – 000504 (CPO Hearing Exhibit #40).

February 19, 2013: New Venue responds to Show Cause Letter by explaining factors contributing to the delinquency and outlining steps New Venue was taking to bring the

¹⁰ As noted by the CPO in his order, current holders of software term contracts objected to modifications to those contracts to include the SAM fee; therefore, those contracts had to be canceled and the State had to resolicit its needs. CPO Decision at 2 – 3 (July 18, 2014). The facts of these cancellations and the resolicitation of the software term contracts do not appear to be in dispute.

account current. New Venue Response, R. at 000506 – 000507 (CPO Hearing Exhibit #42).

September 1, 2013: Effective date of Contract Modification #1, which modified the SAM contract, particularly the software order and payment process. Contract Modification #1, R. at 000508 – 00510 (CPO Hearing Exhibit #43).

September 30, 2013: ITMO sends default letter to New Venue, citing New Venue's failure to pay CompuCom as specified in the contract and its failure to bring that account current. Default Letter, R. at 000513 – 000514 (CPO Hearing Exhibit #44).

October 8, 2013: Termination of the SAM contract. Termination Letter, R. at 000515 – 000517 (CPO Hearing Exhibit # 45).

November 14, 2013: New Venue files Request for Resolution of a Contract Controversy. New Venue's Contract Controversy Claims, R. at 000518 – 000584 (CPO Hearing Exhibit #46).

Discussion

I. The Board's Motion for Summary Judgment

New Venue's request for resolution includes a claim that the State breached the SAM contract by failing to require all PPUs to process all software purchases through the SAM. The Board, joined by the CPO, has moved for summary judgment on this claim on the grounds that the SAM contract simply did not require all software acquisition by all State agencies and participating local PPUs to be processed through the SAM. New Venue opposed the motion, contending that the SAM contract did include that mandate.

The Panel has considered and ruled on summary judgment motions in the past. *Appeal by Qmatic, Inc.*, Panel Case No. 2012-3 (June 28, 2012); *Appeal of Triad Mechanical Contractors*, Panel Case No. 2006-7 (October 19, 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996); *see also George v. Fabri*, 345 S.C. 440, 452, 548

S.E.2d 868, 874 (2001) (“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.”). The Panel finds that the question of the SAM contract’s requirements with regard to software purchases can be answered by looking at the contract documents and does not involve any issue of fact.

In reviewing a contractual dispute, the Panel is mindful that “[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *McGill v. Moore*, 318 S.C. 179, 672 S.E.2d 571 (2009) (citations omitted). Another rule of interpretation is that “[i]f the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Schulmeyer v. State Farm Fire and Casualty Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citations omitted). Furthermore, absent ambiguity or lack of clarity, neither of which New Venue has asserted here, “a court must construe [a contract’s] provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.” *Id.* Finally, the Panel must review the contract as a whole, without focusing on any particular clause in isolation. *See Thomas-McCain, Inc., v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) (“Where the agreement in question is a written contract, the parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.”) (citation omitted).

As previously discussed, the SAM contract in question is comprised of many provisions contained in multiple documents.¹¹ Reading these documents together to be “consistent and complimentary,” the Panel finds that the language of the SAM contract has the following force and effect:

1. The SAM will provide a centralized system to track software, license information, maintenance information, and support information.

¹¹ See *supra* at page 6, quoting from RFP at 30, R. at 000058.

2. The SAM contract will be a term contract open for use by all PPU's.
3. Use by local PPU's is optional.
4. State and local PPU's may purchase software by (1) state term contract; (2) agency term contract; or (3) retail market. The SAM solution will allow tracking of all of these purchases.
5. The contract is self-funded. The SAM will retain a portion of the administrative fee included in software term contracts.
6. Software term contracts were already being performed by software resellers. The existing software term contracts only included the ITMO administrative fee, not the SAM fee.
7. ITMO would work with these contract holders and determine if changes would need to be made to the current contracts to work with the SAM.
8. The SAM will market its solution to state agencies.

Because the SAM contract clearly contemplated multiple methods of purchasing software, the Panel finds that it did not require all PPU's to process all software purchases through the SAM. This finding is also supported by the facts that the SAM would only receive payment from software purchases under software term contracts that included the SAM fee and that the SAM was required to market its solution to State agencies. Therefore, the Panel grants the Board's motion for summary judgment on New Venue's claim that the State breached the SAM contract by failing to require all PPU's to process all software purchases through the SAM. However, the Panel denies the remainder of the Board's motion relating New Venue's claims that the State's delay in implementing the contract represented a material breach of the contract and that the State also breached the contract by processing only limited purchases under software term contracts through the SAM.

II. New Venue's Motion Regarding the Panel's Jurisdiction to Hear the Board's Counter-Claims

In its response to the Board's motion for summary judgment, New Venue asserted that section 11-35-4230 of the Procurement Code only authorized the Panel to hear its claims against the State. In particular, New Venue argued that Article 1, Section 8 of the South Carolina Constitution (the Separation of Powers clause) prohibits the legislature from establishing a

process through which the State could pursue claims against third parties.¹² In light of the Separation of Powers clause, New Venue argued that section 11-35-4230 is unconstitutional inasmuch as it purports to establish a process through which the State can pursue claims against a contractor. Therefore, New Venue urged the Panel to find that it did not have jurisdiction to consider the Board's counter-claims against it. Both the Board and the CPO argued that the Panel has exclusive jurisdiction under section 11-35-4230 to resolve contract controversies between the State and contractors and to consider claims brought both the State and New Venue. Alternatively, the Board and CPO asserted that the Panel lacks the authority to determine the constitutionality of a statute.

Section 11-35-4230 of the Procurement Code provides in pertinent part:

(1) Applicability. This section applies to controversies between a governmental body and a contractor . . . which 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. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor . . . concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Consolidated Procurement Code.

(2) Request for Resolution; Time for Filing. Either the contracting state agency or the contractor . . . may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one year of the date the contractor last performs work under the contract; except that in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

¹² New Venue contends that the portion of section 11-35-4230 allowing contractors to pursue claims against the State is constitutional because Article X, Section 10 and Article XVII, Section 2 of the South Carolina Constitution authorize the General Assembly to establish processes through which third parties can pursue claims against the State.

S.C. Code Ann. § 11-35-4230 (2011). The Panel is charged with the responsibility of reviewing a chief procurement officer's written determination in a contract controversy pursuant to sections 11-35-4230(6) and 11-35-4410(1)(a) of the Procurement Code. S.C. Code Ann. §§ 11-35-4230(6) and 11-35-4410(1)(a) (2011). The plain language of section 11-35-4230(2) clearly permits either the contractor or the contracting state agency to initiate contract controversy proceedings before the CPO. Therefore, the Panel concludes it has the statutory authority and obligation to hear the claims of both New Venue and the Board in the contract controversy before it and hereby denies New Venue's request not to exercise jurisdiction over the Board's counter-claims.

Furthermore, the Panel acknowledges that it lacks the authority to consider the constitutionality of its empowering legislation, which can only be determined by judicial review. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (An agency of the executive branch of government must follow the law as written until its constitutionality is judicially determined; it has no authority to pass upon the constitutionality of a statute or regulation); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 516 S.E.2d 655 (1999) (An administrative agency must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute); *South Carolina Tax Comm. v. South Carolina Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983) (An agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.).

III. Board's Motion to Dismiss New Venue's Appeal for Failure to Prosecute

As mentioned above, the Panel convened a hearing to consider the merits of New Venue's remaining claims and the Board's counter-claims on June 1, 2015. The Panel provided

notice of this scheduled hearing to all parties through counsel on April 15, 2015. After hearing counsel's opening statements on June 1st, the Panel Chairman asked Mr. Sanders to call New Venue's first witness. Mr. Sanders called Debbie Lemmon, formerly employed as a Procurement Manager at ITMO, who was under Panel subpoena at the request of New Venue's former counsel, John Schmidt. As Ms. Lemmon approached the witness stand, Mr. Montgomery objected to compelling Ms. Lemmon to testify because she was no longer employed by the State and New Venue had failed to tender an appearance fee and mileage with service of the subpoena as required by Rule 45(b)(1) of the South Carolina Rules of Civil Procedure.¹³ The Panel Chairman then asked Mr. Sanders if he was prepared to tender the witness fee and mileage so that Ms. Lemmon could testify. Mr. Sanders represented to the Panel that he did not have access to Mr. Chambers' law firm's account and requested a brief recess to try to contact Mr. Chambers to inquire as to how he should proceed. This attempt proved unsuccessful, and the Panel Chairman asked Mr. Sanders to call his next witness. Mr. Sanders indicated that Ms. Lemmon was the only witness New Venue planned to call and requested a recess until the next morning so that New Venue could resolve the issue of the witness fee. The Panel Chairman, noting that the hearing had been set for June 1st for some time and that the parties are charged with understanding their obligations with regard to witnesses, denied Mr. Sanders' request.

Thereafter, counsel for the Board requested a brief recess to confer with his client and counsel for the CPO regarding how to proceed. The Panel Chairman agreed to this request and also asked counsel for New Venue to determine why his client was not present at the Panel's

¹³ Although not bound by its provisions, the Panel has frequently looked to the South Carolina Rules of Civil Procedure for guidance, particularly with regard to Rule 45, which governs subpoenas. *See, e.g., Appeal by Heritage Community Services*, Panel Case No. 2013-1 (*as revised*, May 6, 2013).

hearing because she also was under a Panel subpoena¹⁴ issued at the request of the Board's counsel. When the Panel re-convened a short while later, New Venue's counsel advised that he understood his client was not present because she had not been served 10 days prior to the scheduled hearing.¹⁵ Counsel for both the Board and the CPO contended that Rule 45(b)(1) required 10 days' notice only when the subpoena commanded the production of documents. Thereafter, counsel for the Board and the CPO jointly moved for the introduction into evidence of the documents presented at the CPO's hearing. Counsel for New Venue objected to the inclusion of unsworn testimony before the CPO, whether taped or transcribed. The Panel accepted into evidence all of the documents presented during the CPO's hearing and excluded unsworn testimony. Finally, the Board and CPO moved for dismissal of New Venue's appeal for failure to prosecute.

As a preliminary matter, the Panel notes that as the party appealing the CPO's written determination, New Venue bears the burden of proving its breach of contract claims by a preponderance of the evidence. *See In re: Request for Review of Written Determination by Express Scripts Holding Company*, Panel Case No. 2013-10 (January 7, 2014) (party challenging a CPO's written determination bears the burden of proof). In light of New Venue's inability to move forward with the presentation of its case at the Panel's hearing, the Panel concludes that New Venue has failed to meet its burden of proof. *See In re: Protest by MTC Service Maintenance*, Panel Case No. 1997-2 (February 28, 1997) (wherein the Panel granted the State's motion for directed verdict for failure to meet the burden of proof where the protestant "indicated

¹⁴ Both Terris Riley and her husband, Jacque Riley, were under Panel subpoena dated May 21, 2015. Original proofs of service and affidavits of the process servers confirm that service was attempted eight times between May 23, 2015 and May 29, 2015 before service was effected. These documents are attached hereto as Panel Exhibit A; the originals are on file with the Panel.

¹⁵ The Panel feels compelled to note that it assembled for a four-day hearing scheduled in large part to hear New Venue's claims on appeal. It is astounding that Mrs. Riley would choose to absent herself from the very proceedings in which her claims would be heard.

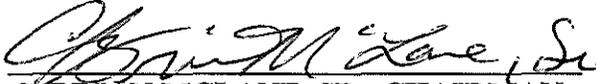
it did not intend to call any witnesses, but would question witnesses called by the State, as well as rely on the evidence in the record before the Panel.”). Therefore, the Panel grants the Board and the CPO’s motion to dismiss New Venue’s appeal for failure to prosecute.

Conclusion

Therefore, for the reasons stated herein, the Panel hereby DISMISSES New Venue’s appeal WITH PREJUDICE.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 16th day of June, 2015.

Columbia, South Carolina

Panel Exhibit A



Capitol City Investigations, LLC
Affidavit/Proof of Service

ISSUED BY THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND

In Re: New Venue Technologies, Inc.
Appellant

Case#2014-7

v.
SC Budget and Control Board
Respondent (Contract Controversy)

I Donnie Elgin being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

I Served: Terris S. Riley

With: Subpoena for Appearance with Information on the Subpoena and Diagram of State Capitol Complex

On: May 29th, 2015 at 8:21AM

At: 497 Langford Road Blythewood, SC 29016

Manner of Service: Substituted Service by serving Her Husband on her behalf at Their Shared residence. She was in vehicle behind Mr. Riley.

- Additional Attempts: (1) 05/23/2015 7:46PM Mary Perry stated they were not home
(2) 05/25/2015 6:54PM - No one would come to the door individuals inside residence
(3) 5/25/2015 9:12PM No one would come to the door individuals inside residence
(4) 05/26/2015 3:27-3:45PM - No one would come to the door individuals inside residence
(5) 05/26/2015 5:00PM attempted at 712 Calhoun Street (Business Closed)
(6) 05/28/2015 7:35-8:45PM - No one home waited at residence,
(7) 05/29/2015 6:00AM-8:21AM - Waited and served Mr. Riley in driveway with Mrs. Riley
behind him in another vehicle.

Description: (Approximate)

Age: 47 Sex: Male Skin Color: Black Height: 5'9" Weight: 230lbs Hair: Black


Signature of Process Server

SUBSCRIBED AND SWORN to before me this 29th day of May, 2015


SIGNATURE OF NOTARY PUBLIC

NOTARY PUBLIC for the State of South Carolina.

My Commission Expires: March 4th, 2025



CCI

Capitol City Investigations, LLC
Affidavit/Proof of Service

ISSUED BY THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND

In Re: New Venue Technologies, Inc.
Appellant

Case#2014-7

v.
SC Budget and Control Board
Respondent (Contract Controversy)

I Donnie Elgin being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

I Served: Jacques Riley

With: Subpoena for Appearance with Information on the Subpoena and Diagram of State Capitol Complex

On: May 29th, 2015 at 8:21AM

At: 497 Langford Road Blvthewood, SC 29016

Manner of Service: Served Jacque Riley - Personally

- Additional Attempts: (1) 05/23/2015 7:46PM Mary Perry stated they were not home
(2) 05/25/2015 6:54PM - No one would come to the door individuals inside residence
(3) 5/25/2015 9:12PM No one would come to the door individuals inside residence
(4) 05/26/2015 3:27-3:45PM - No one would come to the door individuals inside residence
(5) 05/26/2015 5:00PM attempted at 712 Calhoun Street (Business Closed)
(6) 05/28/2015 7:35-8:45PM - No one home waited at residence.
(7) 05/29/2015 6:00AM-8:21AM - Waited and served Mr. Riley in driveway

Description: (Approximate)

Age: 47 Sex: Male Skin Color: Black Height: 5'9" Weight: 230lbs Hair: Black


Signature of Process Server

SUBSCRIBED AND SWORN to before me this 29th day of May, 2015


SIGNATURE OF NOTARY PUBLIC

NOTARY PUBLIC for the State of South Carolina.

My Commission Expires: March 4th, 2025

Affidavit of Connie Elgin

I, Connie Elgin, having been duly sworn depose and say that:

I am a Process Server and I am employed by Capitol City Investigations, LLC.

I was present when several attempts were made to serve legal documents on Mr. Jacque Riley and Mrs. Terris Riley. Below is my experience:

On May 23, 2015 at approximately 7:46PM, we arrived at the address of 497 Langford Road, Blythewood, SC 29016, where a number of cars were in the driveway and yard, as well as people sitting outside. A female that I believed to be Terris Riley got up and waved as we entered the driveway (I had the opportunity to see Mrs. Riley when she was previously served). I assumed she was entering the residence. We turned around so that we would not block in any vehicles, and Donnie Elgin approached the door and rang the doorbell. Mary Perry (whom I had the opportunity to see when she was previously served) answered the door.

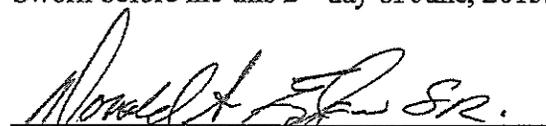
On May 25, 2015 at approximately 6:54PM, we returned to the above address where a Mini Cooper and El Camino were parked next to the detached garage, and a grey Toyota Camry was in the driveway. Donnie Elgin approached the door and saw two females inside. When he rang the doorbell, no one answered.

On May 25, 2015 at approximately 9:12PM, we returned to the residence and Donnie Elgin approached the door again. I saw a female walking inside the residence.

On May 28, 2015 at approximately 7:35PM, we returned to the residence, where the Mini Cooper and El Camino were parked in front of the detached garage.

This statement is truthful to the best of my knowledge.

Sworn before me this 2nd day of June, 2015.


Donald A. Elgin, Sr.

Notary Public for South Carolina
My Commission Expires 05/25/2016


Connie Elgin

Affidavit of Donnie Elgin

I, Donnie Elgin, having been duly sworn depose and say that:

I am a Process Server and I am employed by Capitol City Investigations, LLC.

I made several attempts to serve legal documents on Mr. Jacque Riley and Mrs. Terris Riley. Below is my experience:

On May 23, 2015 at approximately 7:46PM, we arrived at the address of 497 Langford Road, Blythewood, SC 29016, where a number of cars were in the driveway and yard, as well as people sitting outside. A female that I believed to be Terris Riley got up and waved as we entered the driveway (I had the opportunity to see Mrs. Riley when she was previously served). I assumed she was entering the residence. We turned around so that we would not block in any vehicles, and I approached the door and rang the doorbell. Mary Perry (whom I had the opportunity to see when she was previously served) answered the door. I identified myself and asked if Jacque and Terris were home. She said they were not home, and that Terris had gone to pick Jacque up. I told her that I had legal documents and asked if I could leave them with her, but she told me I could not because Terris had instructed her not to accept any documents on her behalf. I then served her with her own legal documents, and left a business card for Mr. and Mrs. Riley to call me when they returned.

On May 25, 2015 at approximately 6:54PM, we returned to the above address where a Mini Cooper and El Camino were parked next to the detached garage, and a grey Toyota Camry was in the driveway. I approached the door and saw two females inside. When I rang the doorbell, no one answered. They turned and looked at me, but would not come to the door. There are cameras outside the residence located above the door.

On May 25, 2015 at approximately 9:12PM, we returned to the residence and I approached the door again. Before ringing the door bell, I saw two females inside the residence, one I believed to be Mary Perry, and the other I believed to be Terris Riley. Mrs. Riley was standing and left the room. After ringing the door bell and knocking several times without anyone coming to the door, I left.

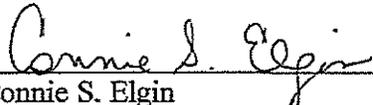
On May 26, 2015 from approximately 3:27PM-3:45PM, I waited outside the residence and no one came to the door.

On May 28, 2015 at approximately 7:35PM, we returned to the residence, where the Mini Cooper and El Camino were parked in front of the detached garage. I could not see anyone inside the residence, and we left at approximately 8:45PM.

On May 29, 2015 at approximately 6:00AM, I returned to the address and parked in an area where I could ensure to be out of view of the camera. I saw a white Tahoe at the residence. I then waited until approximately 8:21AM, when I witnessed the Tahoe exiting the residence and driving in the direction of my parked car. I then got out of my vehicle and approached the Tahoe. Mr. Riley and another male subject were sitting in the Tahoe. A person that I believed to be Mrs. Riley was located in another vehicle behind them. Mr. Riley rolled down the window, saying this was just like old times. I told him that I had legal documents for him and Terris, which I then handed to him.

This statement is truthful to the best of my knowledge.

Sworn before me this 2nd day of June, 2015.



Connie S. Elgin
Notary Public for South Carolina
My Commission Expires 03/04/2025



Donnie Elgin