

# *Consumer Protection, Environmental, and Regulatory Law Group, LLC*

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Mr. Michael B. Spicer  
Chief Procurement Officer  
Information Technology Management Office  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

RE: Appeal of Decision Issued in Contract Controversy Case No. 2014-204

Dear Mr. Spicer:

This firm represents New Venue ("New Venue") in connection with this appeal and request for further administrative review of the Decision of the Chief Procurement Officer, Information Technology Management Office ("CPO"), posted on July 30, 2014 (the "Decision") regarding the disbarment of New Venue Technologies, New Venue Technologies LLC, Terris Riley. **A copy of the Decision is attached hereto as Exhibit 1.** New Venue herewith respectfully appeals and requests review of the Decision, pursuant to S.C. Code Ann. Sections 11-35-4220(5) and 4410. New Venue requests a hearing before the South Carolina Procurement Review Panel in regard to this matter. New Venue has supplied you the form requesting waiver of the \$250.00 filing fee. Should fee waiver be denied, New Venue will supply \$250 made payable to the S.C. Procurement Review Panel within 15 days of the notice of denial. This request is timely filed within ten days of the posting of the Decision on July 30, 2014 as recited on the Decision.

By this letter, New Venue Technologies, Inc. states that it disagrees with every finding of fact and conclusion reached by the CPO's order in Case 2014-204. New Venue hereby requests a hearing on this matter. The decision for suspension is based upon the information obtained at hearing of Case 2014-206 and did not receive an independent hearing. The CPO's decisions in Cases 2014-204 and 2014-206 arise out of the same set of incidents and facts. For this reason and in the interest of judicial efficiency, we ask the procurement panel combine consideration of the pending appeal of the CPO's decision in Case 2014-206 with the present appeal. We also ask the \$250 filing fee be waived because of the nature of the interdependence of the two cases and the current financial condition of New Venue Technologies, Inc.

The State of South Carolina breached the contract entered into with New Venue Technologies by failing to implement SAM, in accordance with the agreed upon contract, on February 15, 2011. Nearly a year later and throughout the life of this contract, the State only provided partial performance and was continuously in breach. When the State finally started to perform, it was only in a partial performance

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capacity at best. Any alleged breach referred to in Mr. Spicer's order is a direct result of the state's breach of contract.

Furthermore, Mr. Spicer's order refers to properties owned by the Riley's, and we will show that the State required New Venue to obtain a line of credit as a precondition to the States performance. This was in no place required by contract and was an extra contractual condition placed upon New Venue by agents of ITMO as a precondition to the State's performance of its duties under the contract. The purpose of the property was to obtain collateral to meet the extra contractual obligation of obtaining lines of credit. Obtaining a line of credit is an extra contractual prerequisite to the State's performance and is not an excuse for the State's failure to perform.

Mr. Spicer cites numerous ancillary or supporting reasons for his decision on suspension, but clearly states in his decision that the suspension is primarily based upon New Venue's failure to pay vendors within three days. We intend to address the ancillary allegations during our presentation of Case 2014-206, but for the purposes of appeal, focus will be afforded to what Mr. Spicer cites as the compelling reason for suspension, failure to pay within three days. Alleging the requirement of three day payment terms is a misrepresentation. There are no contractual documents signed by New Venue Technologies which requires them to pay vendors within 3 days. An email from Norma Hall will clearly show that ITMO knew and assented to the actual payment terms applied to New Venue. In this email, Mrs. Hall refers to the 53 day terms of payment under which New Venue was held. Furthermore, ITMO knew that there was no contractual obligation on New Venue for a 3 day payment terms, as evidenced by their own contract modification in September 2013, in which they attempted to create a three day payment requirement to vendors.

It is a well decided tenant of contract law that the first to breach cannot complain of a subsequent related breach. The State in this case breached the contract entered into with New Venue first, thus barring any subsequent claims brought against New Venue. "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." *Willms Trucking Co., Inc. v. JW Constr. Co., Inc.*, 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct.App.1994) ; see also *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.")

Any breach of contract by New Venue Technologies will be shown to be subsequent to and caused by the preceding breach of the State. Any failure to meet payment obligations or failure to record license numbers is not the fault of New Venue but rather the result of a breach by the State. It was the State's obligation to have software vendors supply license numbers for tracking and run all software purchases through the SAM system. Without compliance by the State, there is no possibility New Venue would be able to comply with either tracking license numbers or recording all

software purchases. Furthermore, the financial strain placed upon New Venue by the State's egregious noncompliance is what caused any complaints the State has made regarding New Venue's performance on this contract.

#### CONCLUSION

Based on the matters herein and contained in our appeal of Case 2014-206, as well as in the original contract controversy asserted by New Venue, New Venue asks that the Panel reverse the Decision of the CPO regarding suspension of New Venue Technologies, Inc. and other relief as may be permitted to New Venue by law.

Sincerely,



Geoffrey Chambers  
CPerl Group, LLC  
1201 Main Street, Suite 985  
Columbia, SC 29201  
Counsel for New Venue Technologies

cc: John Schmidt  
Christie Emanuel  
Michael Montgomery  
Liz Crum  
Amber Carter  
Shawn DeJames

## Exhibit 1: 2014-204 Without Attachments

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In Re: Determination of Probable Cause to Suspend New Venue Technologies, Inc., New Venue Technologies II, LLC, NewVenue Technologies, Terris Riley LLC, Terris Riley, and Jacque Riley

**BEFORE THE CHIEF PROCUREMENT  
OFFICER  
DECISION**

CASE NO.: 2014-204

POSTING DATE: July 30, 2014

MAILING DATE: July 30, 2014

The South Carolina Consolidated Procurement Code (the "Code") authorizes the appropriate chief procurement officer to suspend a person or firm from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment. S.C. Code Ann. § 11-35-4220. On October 8, 2013, the Information Technology Management Office ("ITMO") advised the Chief Procurement Officer ("CPO") that actions by New Venue Technology, Inc. ("New Venue") alleged in a contract controversy filed with the CPO on September 30, 2013, if proved, constitute cause for debarment under S.C. Code Ann. § 11-35-4220 (2011). Those actions include, but are not limited to, (1) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; (2) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; and (3) other acts so serious and compelling as to affect responsibility as a state contractor or subcontractor. By letter dated October 8, 2013, ITMO also requested the suspension of New Venue from consideration for award of contracts or subcontracts during an investigation whether such debarment be appropriate.

Section 11-35-4220(1) Authorizes the appropriate chief procurement officer to suspend a person or firm from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment.

- (2) Causes for Debarment or Suspension. The causes for debarment or suspension shall include, but not be limited to:
- (d) violation of contract provisions, as set forth below, of a character regarded by the appropriate chief procurement officer to be so serious as to justify debarment action:
    - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
    - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;
  - (f) any other cause the appropriate chief procurement officer determines to be so serious and compelling as to affect responsibility as a state contractor or subcontractor,

including debarment by another governmental entity for any cause listed in this subsection.

## **Background**

New Venue was awarded a state term contract for a Software Acquisition Manager (SAM) (Solicitation No. 5400001873) 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 Budget and Control Board (“Board” or “State”) filed a request for contract resolution alleging multiple breaches of the SAM state term contract by New Venue Technologies, Inc. Shortly thereafter, the State petitioned the CPO to suspend and debar New Venue from consideration of contract award. The State subsequently withdrew its contract controversy resolution request, but left the suspension / debarment petition in place. Subsequently, New Venue requested resolution of a contract controversy alleging breach of contract by the State. The Board denied New Venue’s allegations of breach of contract and filed counter claims. The CPO held an administrative review of both sets of allegations 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. The CPO issued a decision in Case 2014-206 In Re: Request for Resolution of Contract Controversy by New Venue Technologies, Inc. Counterclaim by South Carolina Budget and Control Board, on July 18, 2014 which is incorporated herein by reference.

## **DISCUSSION**

At the conclusion of the administrative review the CPO found that New Venue, not the Board, breached the contract. While the CPO’s decision in that matter is under appeal, the evidence and testimony presented during the administrative hearing revealed actions by New Venue that were so egregious as to compel the CPO to take immediate action on the Board’s petition to suspend New Venue its principal officers, and any business entities owned or operated by its principals pending the outcome of the State’s investigation to determine if debarment is warranted.

The CPO relies on the following findings of the administrative review in determining that there is probable cause for debarment. New Venue failed to perform any of the primary requirements of the contract including the establishment of a 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. New Venue failed to forward orders from Public Procurement Units (PPU) to the software providers within three days as required by the contract. New Venue intentionally mislead PPUs as to the status of their orders. In some cases, New Venue accepted payment from the PPUs without forwarding the order to the software providers. New Venue failed to remit payment to the software providers in accordance with the contract. New Venue intentionally mislead software providers and ITMO about the status of payments. New Venue appropriated more than \$2.7 million dollars that it received from PPUs that should have been remitted to the software vendors to fund personal expenses of New Venue's owners; Terris and Jacque Riley. These personal expenses included more than \$711,000.00 to a contractor for construction of the personal residence of Terris and Jacque Riley, 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.

Ms. Riley's testimony regarding New Venue's failure to remit payment to the software contractors within three(3) days of receipt of payment from the PPUs, as required by the contract, is particularly troubling:

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 to 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.

Mrs. Riley inflated her educational achievements claiming minors in Business Administration, Early Childhood Education, and Computer Science in addition to a bachelor's degree in English. The evidence showed that her only degree is one in English.

The corporate profile in New Venue's proposal appears to be misleading in indicating that they had "Offices (including virtual) located in MD, NC, and GA." Testimony indicated that these were not New Venue offices but businesses with which New Venue did business.

### **Determination**

New Venue Technologies, Inc., New Venue Technologies II, LLC, NewVenue Technologies, Terris Riley, LLC, Terris Riley, and Jacque Riley are suspended from consideration for award of contracts or subcontracts pending completion of investigations conducted by the Board or any other State agency the Board's requests to assist in the investigation to determine if debarment is warranted.

For the Information Technology Management Office



Michael B. Spicer  
Chief Procurement Officer

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Suspension / Debarment Appeal Notice (Revised October 2013)*

The South Carolina Procurement Code, in Section 11-35-4220, subsection 5, states:

(5) Finality of Decision. A decision pursuant to subsection (3) is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1), within ten days of the posting of the decision in accordance with Section 11-35-4220(4). 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 why the person disagrees 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 any affected governmental body must have the opportunity to participate fully in any review or appeal, administrative or legal.

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

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

FILING FEE: Pursuant to Proviso 108.1 of the 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**

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NewVenue Technologies, Inc.  
Name of Requestor

712-A Calhoun St.  
Address

Columbia SC 29201  
City State Zip

(803) 667-9650  
Business Phone

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1. What is your/your company's monthly income? \$0

2. What are your/your company's monthly expenses? \$4,100<sup>00</sup>

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

Due to pending litigation and unforeseen legal expenses, NewVenue has experienced severe financial hardships.

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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 7<sup>th</sup> day of August, 2014

Felicia S. Hipp  
Notary Public of South Carolina

James S. Riley  
Requestor/Appellant

My Commission expires: 10/02/2017

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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.**