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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. 2014-206

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 18, 2014 (the "Decision") regarding contract controversies asserted by New Venue and the South Carolina Budget and Control Board. **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 11-35-4210(6) 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 \$250.00 filing fee made payable to the S.C. Procurement Review Panel. This request is timely filed within ten days of the posting of the Decision on July 18, 2014 as recited on the Decision.

This case involves a contract that was awarded to New Venue to perform services as a Software Acquisition Manager ("SAM"). Under the State's own language, the State clearly expressed the purpose and scope of this contract. The **INTENDED** scope of the contract is clear by express terms of the contract, which the state wrote, and is broader than the CPO found. A look at the actual contract words is in order:

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.

* * * *

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 State intends to award a state term contract to one Offeror **for use by all State Agencies.**

* * * *

It is the intent of the State to have participating Public Procurement Units submit all software purchase orders through the SAM.

* * * *

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

Regardless, even the CPO found that the contract was to cover ***at least all purchases of software from software resellers under statewide term contracts,*** which are, like the SAM contract, mandatory for all agencies. This, the State never did.

The contract to perform this service commenced, by its terms, on February 15, 2011, the chosen implementation date, as documented. The contract was to renew each year unless notice was given. Notice was never given.

The State did not meet its obligation to commence full performance on February 15, 2011. During performance, and after the time for the State to have implemented the contract, in May of 2011, the State Purchasing Officer documented that the State, not New Venue, was "at fault" for not implementing on time. See Exhibit 2, attached (e-mail and reference from Debbie Lemmon, ITMO Procurement Officer, stating as follows:

**"#4 "What are some things you wish the vendor would do differently?"
None at this time.**

1. How smooth was your implementation? Did the system easily plug into your existing technology environment? Due to unforeseen delays on our (the State's) end, the application that NewVenue delivered is not fully implemented yet. The web solution (www.mysamcentral.com) is ready and has been fully tested. We also use it for demos during presentations. It was excellently designed and the NewVenue team exceeded our expectation.")

See also, Exhibit 3 e-mail from Debbie Lemmon, stating: "The anticipated "Go-Live" date of February 15, 2011 will be delayed... I apologize for the delay of this project."

Here, the duty of the State to run all software (or *at least* all statewide term contract software, as the CPO found) through the SAM was essential. This was important because New Venue was to be paid 2% of all software cost that passed through the SAM.

Through the course of two years, the State simply never was in compliance with its contractual obligation to ensure that all software purchases (or *at least* all statewide term contract software, as the CPO found) were run through the SAM. *In fact, the State did not run the first order through the SAM for six months.* After that, though a reseller was added to the SAM by the state from time to time, never did the state come even close to its obligation to run all software purchases - even those under state term contracts - through the SAM.

This failure by the State was also a big deal, because as a result of this, and other costly wrongs by the State, New Venue incurred enormous, extra-contractual charges, and at the same time, earned zero revenue. Once some resellers were added to the SAM, some revenue was realized, but New Venue was never afforded the chance to earn the entire volume of revenue to which New Venue was entitled.

The CPO's decision overlooks these crucial and clear facts -- for good reason. The CPO was made well aware of the fact that the law simply does not permit the party first in breach to recover on a claim for a subsequent breach by the other party. **The first to commit material breach of the agreement is precluded them from recovering, even if there were a subsequent breach by the other party.** *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008)("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." (internal quotation marks omitted)).

There is another reason that motivated the CPO to ignore the above, crucial facts. Because in fact, it was **the CPO's conduct and failures led to the delay in the State's performance** obligations under the New Venue contract. See 3, (select e-

mails of Debbie Lemmon regarding delays Naturally, New Venue objected to the CPO being the official to hear and decide this case, as certainly he was not a disinterested or unbiased person in this context.

In this unique setting, the CPO actually had present on his behalf at the hearing more lawyers than any party - in fact, three lawyers for the CPO alone were in attendance, including two outside lawyers, contracted for this unprecedented role.

As a part of its Request for Review, New Venue incorporates by reference each and every allegation of its original Contract Controversy, **a copy of which is attached hereto as Exhibit 4**, and which is incorporated herein by reference.

To the extent that the CPO's Decision finds any facts contrary to those asserted in Exhibit 4, New Venue requests a review of those findings. To the extent the CPO's Decision makes any conclusions of law at variance from those asserted in Exhibit 4, New Venue requests a review of those conclusions of law. New Venue requests a review of every finding of fact and conclusion of law in the CPO's Decision related to the conclusion that New Venue breached its contract in any way, committed any wrongful act in any way, and New Venue requests review of the award of any remedy to any agency or subdivision of the State, including but not limited to the Budget and Control Board, and all of the four findings regarding remedies on page 31 of the CPO's Decision. New Venue also requests review of all rulings, orders and interlocutory and other decisions and determinations of the CPO in regard to the contract controversy asserted by New Venue and that asserted by the Budget and Control Board.

THE CPO WHO DECIDED THE CASE VIOLATED NEW VENUE'S DUE PROCESS RIGHTS TO A DISINTERESTED TRIBUNAL

The CPO Decision is flawed in its entirety and violated New Venue's Due Process rights as a consequence of the CPO, Michael D. Spicer, hearing and deciding the case. Mr. Spicer refused to recuse himself from the case even though he was a required witness, whose very conduct was in dispute among other things in the case, as shown only in part, above. See Exhibit 3, above. It is in fact curious that the CPO expresses uncertainty in his Decision about how the parties came to incorporate certain materials into the Record of Negotiations¹ - after all, the CPO reviewed, made notes, comments and changes to, and approved the Record of Negotiations. See, e.g. Exhibit 5, among numerous other documents. The Circuit Court in Richland County was informed of this violation, and ruled not that there was no Due Process violation, but only that any such violation of Due Process would be "cured" by the de

¹ Decision at 6: "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."

novo appeal to the Panel. However, Mr. Spicer refuses to make himself available as a witness in the case, and so New Venue continues to be prejudiced by Mr. Spicer improperly hearing and deciding a case directly involving his own misconduct. Clearly, no member of the Panel would want any case they had to be heard and decided by a Judge who was actually interested in the outcome and the propriety of whose conduct was one of the things to be decided. The same is true for New Venue. While this case is de novo, New Venue does not waive its right to call all needed witnesses, including Mr. Spicer himself, on any and all issues. New Venue also asks that for the above reasons, Mr. Spicer's decision be disregarded entirely.

THE CPO'S DECISION VIOLATES PLAIN CONTRACT LANGUAGE, UNLAWFULLY
MODIFIES THE CLEAR CONTRACT AS WRITTEN, AND DIRECTLY VIOLATES
NUMEROUS SOUTH CAROLINA LAWS AND COURT DECISIONS.

The First Party to Breach May Not Recover In A Claim Under the Contract.

Among the other flaws as to which review is requested, the CPO's Decision is fundamentally flawed and is contrary to well-established law of South Carolina in a number of ways. The core flaw is the CPO failed to acknowledge that the State was the first to breach this contract, and as such, the State may not recovery in a claim under that contract. South Carolina law could not be more clear - the first to commit material breach of the agreement is precluded them from recovering, even if there were a subsequent breach by the other party. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008)("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.").

The CPO Impermissibly Re-Wrote the Contract to Try to Avoid the Legal Consequence of the State's Clear Breach In Which he Played an Instrumental Part.

Here, as New Venue showed in a way that could not be ignored by a fair and impartial tribunal (including through written admissions of the State's own contract officer) the State was not only the first to breach the contract - it was never in compliance with the contract from the first day until the last day of the contract.

The CPO erred also by completely re-writing the plain language of the parties' contract. This is impermissible as a matter of law. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions *as determined by the contract language.*" *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327,330 (1999). "[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 86,6 (Ct. App. 2002).

This contract placed unambiguous obligations on the State, which the State did not meet due to mere inconvenience. However, under South Carolina law, the court must enforce an unambiguous contract according to its terms, *regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully*. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

"The judicial function of a court of law is to enforce a contract as made by the parties, and *not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous*." *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) In a case such as this, neither the CPO nor the Court may re-write the parties' written contract. See *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983) (stating that it is not the function of the court to rewrite contracts for parties). Indeed, **if a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect**. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976).

Where an agreement is *ambiguous*, the court then should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998). Even then, to discover the intention of a contract, the court must first look to its language--if the language is perfectly plain and capable of legal construction, *it alone determines the document's force and effect*. *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493-94 (Ct. App. 2004); *accord Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

As one can see from the many decisions cited above, in a contract case, one would expect the actual contract language to be quoted, and relied upon as to the issues in dispute. Instead, the CPO "construes" at length about what the contract "means" and "intends" and quotes nothing (or external alleged "information") to support his statements of what the contract requires on the issues that are actually in dispute.

By contrast, New Venue relies on the simple, clear and express language of the contract - language that the State itself wrote. "Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. **Contracts** § 324)

Note from the *Willoughby* decision *supra*, that a key reason the CPO errantly proceeded to "construe" the contract without first finding ambiguity is that if he stated that he found the contract to be ambiguous, he was obliged to "construe" and "interpret" it against the State, not for the State, as he lavishly did, with abandon. In this case, the language contortions applied by the biased CPO all construed language in favor of the drafter, the State. This is legal error. Other construction rules were violated as well, but the prime violation is the plain meaning rule, which prohibits construction of the plainly worded contract meaning.

First, the CPO erred as a matter of law in "*interpreting and construing*" the clear and unambiguous contract language at issue. It is well-settled that Courts must not "construe" a contract unless and until it is first determined that the contract is somehow "ambiguous." *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect). *See also Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976).

Here, New Venue has proven in a way that would have been accepted by any neutral, disinterested judge, that the contract was unambiguous in the several particulars "construed" or "interpreted" by the CPO. Before the CPO may even begin to attempt to vary that express language (at risk of plain legal error) he must first find and conclude that the contract was ambiguous. That is a legal question. Here, the CPO did not so find.

The CPO makes a number of factual findings through interpretations of the contract without citing any contract provision at all to support, and these interpretations run afoul of South Carolina law. For example, the CPO states that "the contract anticipated software purchases outside the SAM² and purchases through the SAM were limited to software purchased through state term contracts."³ However, the

² This finding by the CPO is a misdirection. Because some State purchases are so small they do not fall within the scope of even purchasing laws, there would of course be some *de minimis* purchases initially made outside the SAM process. This case is not about the State's failure to process the *de minimis* small purchases through the SAM. It is about the State's complete non-compliance from day one till day last. In the solicitation process, vendors wanted to know, and therefore asked in a Q/A in the RFP how these and like exemptions would be handled, and whether changes would be made to the Procurement Code to require even such small purchases of software to be made through the system, despite the small purchase exemption. The CPO's use of this to attempt to contradict the primary "intent" statements of the RFP is disingenuous, and is an attempt to re-write the contract to make it illusory entirely. Again, legally forbidden.

³ This finding by the CPO is unsupported by any statement in the contract, and contradicts the quoted statement of the RFP/Contract's intent. The RFP provided:
"STATEWIDE TERM CONTRACT (JAN 2006)
With this solicitation, the state seeks to establish a term contract (as defined in Section 11-35-310(35)) available for use by all South Carolina public procurement units (as defined in Section 11-35-4610(5)). Use by state governmental bodies (as defined in Section 11-35-310(18)), which

contract itself as drafted by the State is clear - all software purchases by the State were covered. *See* various Contract provisions quoted verbatim herein. A statement of construction to say the contract is limited to state term contract software violates the plain language and impermissibly contradicts the clear statement of intent - "all software" - as drafted by the State.

One of the CPO's misconstructions was that it was NOT the **"intent of the State to have participating Public Procurement Units submit all software purchase orders through the SAM"** when that was in fact the express and clear, *verbatim language of intent in the contract* - even as quoted by the CPO. The CPO ignored and modified this plain and simple fundamental statement of intent by the State by resort to impermissible, extreme and convoluted "interpretation" to the contrary of this intent. Given this clear, verbatim statement of *intent* in the contract, every "interpretation" and "construction" by the CPO that did not effectuate this intent was clear legal error. *See* numerous decision cited *supra*.

The CPO also erred in that the contract was clear and legally obliged to be *mandatory* (not elective) for all State agencies. The solicitation and resulting contract expressly state that they were for a "statewide term contract." The Consolidated Procurement Code specifically defines a statewide term contract as one that is mandatory for all state agencies. See S.C. Code Ann. § 11-35-310(35) ("Term contract" means 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**. As provided in the solicitation, if a public procurement unit is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price. The solicitation used to establish the term contract must specify contract terms applicable to a purchase from the vendor offering the lower price. If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external

includes most state agencies, is mandatory except under limited circumstances, as provided in Section 11-35-310(35). See clause entitled "Acceptance of Offers 10% Below Price" in Part VII.B. of this solicitation. Use by local public procurement units is optional. Section 11-35-4610 defines local public procurement units to include any political subdivision, or unit thereof, which expends public funds. Section 11-35-310(23) defines the term political subdivision as all counties, municipalities, school districts, public service or special purpose districts. 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 subcontract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer. [07-7B225-1]"

audit. A term contract may be a multi-term contract as provided in Section 11-35-2030.")

The CPO also erred by evidently finding that the State had the right to decide when it would start to comply with the contract, and how much compliance it would undertake. The CPO states that "The contract did not require the processing of any number of orders through the SAM on February 15, 2011 [note: *the agreed implementation date*], or at any time thereafter." This conclusion is "slick" and is employed by the CPO in an absurd manner, which violates the clear contract language and the clear law. The contract says its intent is for *all software* to be purchased through the SAM, not for a "*number*" of orders. While this is not "*any number*" of orders, ***it still means all orders, not fewer than all***, whatever that *number* may be.

The contract required, at a minimum, all software purchases by all agencies to run through the SAM. It has a plain and written start date and end date. Even under the CPO's analysis, all state term contract software purchases were to be run through the SAM. When? *When the contract started*. When stop? *When the contract was over*. How many purchases? *Not some "number," but definitely ALL*.

By finding and holding as he did, that the State was under no obligation at all, and could participate when and to the extent it was convenient, the CPO impermissibly "interpreted" a clear and unambiguous contract. He also "interpreted" it in a way to render it illusory and meaningless - an interpretation approach that is simply unlawful. The law is plain - contracts are to be interpreted to give meaning to the terms thereof. *See decisions cited supra*.

A party, *even the State*, is bound by its contracts. Here, the CPO's decision asserts that the State can decide what parts of a contract it will honor and when. That sort of mindset has no place in this State, and has been historically reserved to petty dictators in banana republics.

All of these unlawful misinterpretations by a biased CPO are used in the Decision to "clean up" the horrendous and outrageous treatment by the State of this vendor - mistreatment that ultimately demolished a well regarded business that employed a number of South Carolina citizens, and supported South Carolina families and charities.

THE CPO IGNORED THE FACT THAT EVEN AS HE NARROWLY DESCRIBED THE STATE'S CONTRACT DUTY, THE STATE NEVER COMPLIED WITH THAT DUTY FOR TWO YEARS UNTIL IT WRONGLY TERMINATED.

Regardless, the State did not even uphold this limited aspect of its promise (as found by the CPO) to run all state term contract software purchases through the SAM. The State violated its promise to do that from day one until the last day of the contract when the State further breached by improperly terminating the contract. Never

during the entire two year contract period were all state term contract purchases run through the SAM. Thus, the State simply *never was in compliance with the contract*, from day one until day last.

THE CPO IGNORED THE FACT THAT THE STATE HAD THE READY ABILITY TO MEET EVEN ITS NARROW CONTRACT OBLIGATION AS FOUND BY THE CPO, BUT SIMPLY DID NOT DO IT.

The CPO also erred in evidently holding that the State was under no obligation whatsoever to timely take the lawful and required steps needed to bring it into compliance with its contract duties to which it voluntarily agreed. Here, there were many options available to the State to comply, all of which New Venue can show. At a minimum, in order to meet even the limited obligation that the CPO found regarding all state term contract software purchases, all the State had to do was a "unilateral contract modification" of those state term contracts for software, under Section 11-35-310(9).

The CPO himself asserted (and *argued* at the hearing held before him) that this section of the law allows the State to make unilateral changes to state contracts without the consent of the contractor. While this changes/modification law and standard changes clause did in fact allow the State to make the very simple changes that the State needed to make to its state term contracts for software bring it into immediate compliance with its contract duties - at least to the extent that even the CPO recognized them - the State simply did not do so, in complete violation of New Venue's contract rights. Indeed, during the solicitation process, as documented in the contract, the State specifically assured vendors that it would address such changes, and that any need for such changes should not concern the vendors, as the State was to handle the conformity of the resellers to the SAM:

Q17. Have you already received authorizations from manufacturers/vendors that will allow these indirect agreements to be set up through the SAM? Most manufacturers/vendors only allow the reseller to sell directly the customer. Adobe Education, for example, does not allow indirect relationships – have you already worked with Adobe to allow this SAM-reseller-enduser relationship?

A17. Since the Purchase Order will read in care of (c/o SAM) SAM, this should not be a problem. The state will make every effort to work with manufacturers/vendors to help them understand our processes.

See Exhibit 4 at 62 (from Amendment 1 of the RFP).

Even more, once it became evident to the State that it would not do what it took to comply with its contract obligations (as all of the rest of us must do - why the State is an exception is not at all clear) the State had perfectly good and reasonable options that would have done no harm to New Venue. If it was not going to honor the contract, the State could, and should have terminated it for convenience as permitted by law and the contract. This would have required the State to pay some costs to New Venue, but it would have been better that what the State, under the direction of the CPO, chose to do - get abusive of its vendor. This alone shows that there are no equities that can favor the State. It is nothing short of a villain in this matter.

THE CPO'S CONCLUSIONS OF NEW VENUE'S ALLEGED SUBSEQUENT BREACH AND MISFEASANCE PURPOSEFULLY IGNORED THE DOCUMENTED CONTEMPORANEOUS EVIDENCE, INCLUDING EVIDENCE OF THE CPO'S OWN INVOLVEMENT IN STATE MISCONDUCT THAT RESULTED IN THE COMPLAINED OF "DEFICIENCIES."

The CPO essentially held that the contract was to track software, and that New Venue did not track the software, and so New Venue breached.⁴ The problem with this conclusion, is that the State breached first *by not even providing New Venue the opportunity to track the software*. This breach by the state took place in two ways. First, as described above, by not implementing the contract fully, ever, the State made it impossible to track software - New Venue could not track software that was bought outside the SAM in contravention of New Venue's contract rights. Never was the State in compliance with its duty to do that. Never did the State even comply with the more narrow duty that the CPO found it had to run all state term contract software purchases through the SAM. By not running purchases through the SAM, the State not only deprived New Venue of needed revenue to which it was entitled (2% of the price of all software sold) it also made it impossible for New Venue to track that software. This is exactly why the first to breach rule exists. It is embarrassingly shameful for the CPO to conclude that New Venue breached by not tracking software, given that gargantuan volumes of State software was never run through the SAM at all.

The State's second way in which it "forced" the "breach" found in the CPO's Decision was that New Venue consistently bid, contracted for and demanded that the State supply or cause the software vendors to supply New Venue the very license key or "code" that is needed and used to uniquely identify and track that software. At the hearing before the CPO, New Venue supplied various *contemporaneous documents* between New Venue and the State in which New Venue expressed that this data

⁴ In making this finding, the CPO ignored the fact that when New Venue pressed repeatedly to get the agencies and vendors to supply this data so that it could be tracked, the requests were ignored. (See Exhibit 6). After asking a vendor, ITMO officials told New Venue, in writing, to "butt out."

needed to be supplied in order for tracking to be done. Only a biased and interested hearing officer could have ignored that documentary evidence. And only a biased and interested hearing officer could have decided that New Venue was in breach for not tracking software when the State refused to do its contractually required part to provide or cause to be provided the data needed to track the software. New Venue will provide to the Panel the exact pages of the record that show these contemporaneous documents.

THE CPO ERRED BY RULING THAT THE STATE HAD THE RIGHT TO FORCE NEW VENUE, WITHOUT CONSENT, TO UNDERTAKE COSTLY CHANGES IN PERFORMANCE TO MEET THE WHIMS OF EACH OF THE STATE TERM CONTRACT HOLDERS FOR SOFTWARE, INSTEAD OF THE STATE REQUIRING THE SOFTWARE SELLERS TO COMPLY WITH THE SAM CONTRACT, AS PER THE SAM CONTRACT.

The CPO seems to rule that once software term contract resellers found out that New Venue won the SAM contract, they changed their requirements and insisted on changes in the SAM that made compliance by New Venue costly, and ultimately impossible, *and that this somehow excuses the State's breach*. This is not the law.

The State undertook by contract and told proposers that it would handle the software resellers and make them comply with the SAM provisions - not the other way around. *See Exhibit 4, above quoted Q and A from Amendment 1 to RFP*. If the finding of fact by the CPO were true, it is irrelevant, but also, New Venue was never told if it. Certainly the State could have worked with New Venue at that stage to terminate for convenience, and pay New Venue appropriate costs for such termination. Perhaps the State was motivated by injudicious frugality in not wanting to pay such charges for termination, but that, too, is no excuse. New Venue was entitled to fair and true performance by the State, as promised. If the State would not, or could not do that (which is denied, as all the state had to do was a unilateral contract modification to each software reseller term contract, as discussed above) the State should have notified New Venue in the first months, and paid the cost of that termination. Rather than oppress, and bury a woman owned minority business into near bankruptcy, and to follow that course with aggressive and uncalled for attacks on the company. Sadly, all of this could have been avoided if the State had dealt with New Venue fairly and in good faith.

In no world known to any practitioner of contract law is it an excuse or defense that one party's separate contractor's conduct can excuse that same party's performance. This is akin to "well, I'd like to pay for the Buick, but my employer did not pay me this month, so I won't." By improperly excusing the State's breach due to software seller recalcitrance, the CPO not only ignored the State's plain breach, he also failed to grant an award to New Venue of the numerous costs proved by New Venue incurred by New Venue's extraordinary efforts to comply with the numerous, unilateral changes to the contract that imposed expensive new conditions on New

Venue - all incurred while the State was not implementing per its own contract obligation.

THE CPO IMPROPERLY DETERMINED THAT THE STATE HAD THE RIGHT TO UNILATERALLY MODIFY THE NEW VENUE CONTRACT TO MAKE AN "ADMINISTRATIVE CHANGE" AS WAS DONE, WITHOUT COMPENSATION AND WITHOUT NEW VENUE'S CONSENT.

At the hearing, the CPO improperly rendered an oral conclusion - before presentation of the evidence was even complete. He asserted that the State had the right to make the unilateral modification of the New Venue contract as it did under S.C. Code Ann. Section 11-35-310 (9) and the "Changes" clause of the New Venue contract.

However, a simple look at the changes clause, the law, and the modification document itself shows that the change in question was not at all permitted. Such a change is specifically not permitted as to the change specified in the Modification document itself. On the face of it, the unilateral modification the State made near the end of the contract - intended to put a "squeeze" on New Venue - was not permitted, and was an unlawful, further breach by the State.

AFTER THE STATE DID NOT SUCCEED IN FORCING NEW VENUE TO ABANDON ITS CONTRACT, THE STATE BREACHED BY WRONGFULLY TERMINATING THE CONTRACT.

The State, not wanting to terminate for convenience and pay costs to New Venue, finally terminated the contract, though it lacked cause to do so. The CPO erred in not so finding and concluding.

THE CPO IMPROPERLY HEARD AND RELIED ON EVIDENCE ABOUT AN AUDIT, BUT REFUSED TO PERMIT NEW VENUE TO SEE THE AUDIT OR RELATED DOCUMENTS.

Reaching the apex of unfairness, the CPO refused to allow New Venue to have access to the supposed "audit" performed by or for the State in order to prepare for the case, or even during the case when the "auditor" testified, so that he could be cross examined and challenged. This too violated New Venue's Due Process rights, and points to the serious wrong that was done to New Venue by the CPO's refusal to recuse himself.⁵

⁵ Naturally, once the State chose to have a witness to testify about the "audit," the "audit" was no longer privileged, if it were privileged to begin with. See *Floyd v. Floyd*, 365 S.C. 56 (S.C. App. 2005). See also *S.C. State Highway Dept v. Booker*, 260 S.C. 245 (1973) The Federal case of *United States v. 23-76 Acres of Land*, 32 F.R.D. 593 (D. Md., 1963) has squarely faced these

The Panel will recall that years ago, in a similar situation, not nearly so egregious, CPO Ron Moore recused himself and had Voight Shealy hear the *Unisys* case because of allegations of personal involvement in the activities by Mr. Moore in that matter. That did not happen here. New Venue demands access to the audit and associated documents.

All of the "findings" and conclusions of the CPO's decision rest on this undisclosed "audit." The audit was sought under FOIA. It is a public record. It is owned by the public, not by the Budget and Control Board, or by some State employees. These persons work for taxpayers, including New Venue. It is nothing short of shameful that the records of this public information are at once used against New Venue, and at the same time, New Venue is refused access to them. Again such government oppression is like that found in a Dictatorship, and has no place in this State. New Venue denies, challenges, and requests review of each and every fact and conclusion asserted as a part of the government's claim and the CPO's Decision on that claim. This includes all findings and conclusions of contract breach, fraud, and other alleged wrongdoing.

THE CPO'S "INTERPRETATIONS" OF THE CONTRACT VIOLATED AND RENDERED
MEANINGLESS NUMEROUS CLEAR AND UNAMBIGUOUS CONTRACT CLAUSES AND
IGNORED GOVERNING LAW AND PRECEDENT.

The CPO's Decision is contradicts the Contract language in a number of ways, and is "loose" in making sweeping statements about the contract and what it intended, without quoting contract provisions to support those sweeping, general statements.

This approach by the CPO violates clear and applicable South Carolina law. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327,330 (1999). "[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 86,6 (Ct. App. 2002).

"The judicial function of a court of law is to enforce a contract as made by the parties, and *not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.*" *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) In a case such as this, neither the CPO nor the Court may re-write the parties' written contract. See *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310

issues. In what has been called a "well-reasoned decision", the Court attacked the various defenses that have arisen in pre-trial discovery procedures. See Pre-Trial Discovery in Condemnation Proceedings: An Evaluation, 42 St. John's L. Rev., 52, 60 (1967).

S.E.2d 814 (1983) (stating that it is not the function of the court to rewrite contracts for parties).

By contrast, the law requires, and New Venue believes it is important to look - as the above quoted cases clearly require - at the actual contract language that applies. Below, quoted verbatim, are just some of the numerous, actual, written and clear contract provisions that the CPO's Decision ignores and renders meaningless, all in violation of law:

Contract Provisions The CPO's Decision Ignores Or Renders Meaningless

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.

USING GOVERNMENTAL UNIT means the unit(s) of government identified as such on the Cover Page. **If the Cover Page names a Statewide Term Contract as the Using Governmental Unit, the Solicitation seeks to establish a Term Contract [11-35-310(35)] open for use by all South Carolina Public Procurement Units [11-35-4610(5)].**

The State intends to award a state term contract to one Offeror **for use by all State Agencies**.

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.

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

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.

RELATIONSHIP OF THE PARTIES (JAN 2006)

Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party. [07-7B205-1]

THIRD PARTY BENEFICIARY (JAN 2006)

This Contract is made solely and specifically among and for the benefit of the parties hereto, and their respective successors and assigns, and no other person will have any rights, interest, or claims hereunder or be entitled to any benefits under or on account of this Contract as a third party beneficiary or otherwise. [07-7A090-1]

PURCHASE ORDERS (JAN 2006)

Contractor shall not perform any work prior to the receipt of a purchase order from the using governmental unit. The using governmental unit shall order any supplies or services to be furnished under this contract by issuing a purchase order. Purchase orders may be used to elect any options available under this contract, e.g., quantity, item, delivery date, payment method, but are subject to all terms and conditions of this contract. Purchase orders may be electronic. **No particular form is required.** An order placed pursuant to the purchasing card provision qualifies as a purchase order. [07-7A065-1]

CONTRACT DOCUMENTS and ORDER OF PRECEDENCE (JAN 2006)

(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.**

Billing/Payment Requirements

For both Public Procurement Unit and Software Manufacturer billing and payment requirements see Section III Specifications for detailed explanation.

RELATIONSHIP OF THE PARTIES (JAN 2006)

Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party.
[07-7B205-1]

CHANGES (JAN 2006)

(1) Contract Modification. By a written order, at any time, and without notice to any surety, the Procurement Officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

- (a) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the [State] in accordance therewith;
- (b) method of shipment or packing;
- (c) place of delivery;
- (d) description of services to be performed;
- (e) time of performance (i.e., hours of the day, days of the week, etc.); or,
- (f) place of performance of the services. Subparagraphs (a) to (c) apply only if supplies are furnished under this contract. Subparagraphs (d) to (f) apply only if services are performed under this contract.

(2) Adjustments of Price or Time for Performance. If any such change increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made in the contract price, the delivery schedule, or both, and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract. Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the State promptly and duly make such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) Time Period for Claim. Within 30 days after receipt of a written contract modification under Paragraph (1) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the State is prejudiced by the delay in notification.

(4) Claim Barred After Final Payment. No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract. [07-7B025-1]

The CPO Violated Clear Governing And Applicable Legal Precedent.

Some of the many governing laws and precedents that the CPO ignored are set forth below:

S.C. Code Ann. § 11-35-310 (35) "Term contract" means 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. As provided in the solicitation, if a public procurement unit is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price. The solicitation used to establish the term contract must specify contract terms applicable to a purchase from the vendor offering the lower price. If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external audit. A term contract may be a multi-term contract as provided in Section 11-35-2030.

Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008)("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." (internal quotation marks omitted)).

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327,330 (1999). "[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 86,6 (Ct. App. 2002).

"The judicial function of a court of law is to enforce a contract as made by the parties, and *not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.*" *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) In a case such as this, neither the CPO nor the Court may re-write the parties' written contract. *See Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983) (stating that it is not the function of the court to rewrite contracts for parties).

11-35-310(9)

Contract Modification - (9) "Contract modification" means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

SECTION 11-35-3410. Contract clauses and their administration.

(1) Contract Clauses. The board may promulgate regulations requiring the inclusion in state supplies, services, and information technology contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

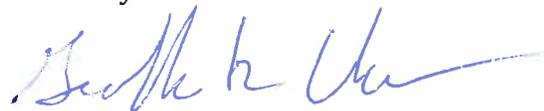
(a) the unilateral right of a governmental body to order in writing changes in the work within the scope of the contract and temporary stopping of the work or delaying performance...

The CPO's refusal to apply the well established law of South Carolina, not just once, but over and over, evidences clear disregard for the law and the rights of New Venue. Without a doubt, the CPO's thumb was firmly on the scales in this case. This is exactly what New Venue sought to avoid when it asked for the appointment of a fair, impartial, neutral and disinterested hearing officer.

CONCLUSION

Based on the matters herein, as well as in the original contract controversy asserted by New Venue, New Venue asks that the Panel reverse the Decision of the CPO, and Order that the State has breached its contract with New Venue, that the State was the first to breach the contract, and that the State's breach was ongoing, and caused New Venue damages, and that as a consequence New Venue shall be awarded its damages as proven at the hearing before the Panel, and for all such further and other relief as may be permitted to New Venue by law, and that the State and its subdivisions shall take and recover nothing on their claims as required by South Carolina law.

Sincerely,



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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: 2014-206 Without Attachments

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In Re: Request for Resolution of Contract
Controversy by New Venue Technologies,
Inc. Counterclaim by South Carolina Budget
and Control Board

Contract Controversy: New Venue
Technologies, Inc. vs. South Carolina
Budget and Control Board
Solicitation No. 5400001873 - Software
Acquisition Manager
Contract No. 4400003161

**BEFORE THE CHIEF PROCUREMENT
OFFICER
DECISION**

CASE NO.: 2014-206

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 4400003161 for 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, 2010¹. Amendment One to the solicitation was issued on August 20, 2010² 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 Negotiations³ and issuance of an Intent to Award⁴. 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 One⁵ 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 2011⁶. Change Order Two⁷ 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 Cause⁸ letter citing failure to remit payment to the software contractors in a timely manner. New Venue responded⁹ 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, 2013¹⁰. As a result of Contract Modification One, PPU's 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 Default¹¹ 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 contract¹². 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 resolution¹³ 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 Claims¹⁵.

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 Units¹⁶ 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 PPU's 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 PPU's 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 2011 and breached its obligation of good faith under Section 11-35-30¹⁹ 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 PPU's 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 contracts²⁰, 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 downsizing 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 an 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 prepayment 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 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.

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 PPU's, \$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

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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 PPU's 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 PPU's 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 PPU's 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 PPU's 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 PPU's for at least \$88,208.85 for invoices paid by the PPU's 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 PPU's.
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 PPU's to New Venue which was to be forwarded to resellers and was not.
4. New Venue is directed to repay various PPU's all amounts paid by PPU's 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.

Exhibit 2: E-mail Reference Check for New Venue Technologies

Sent: Wednesday, May 18, 2011 11:45 AM
To: CURRIE, GENEVA
Subject: RE: Reference Check for Newvenue Technologies, Inc.
Importance: High

Geneva,

I am very pleased and honored to provide you with a reference for NewVenue Technologies, Inc (see attached).

Please advise if you need anything else. I am available if anyone needs to talk with me about NewVenue Technologies, Inc.

Thank you very much allowing me the opportunity to assist you with your project.

Debbie Lemmon
Information Technology Management Office (ITMO)
1201 Main Street, Suite 601
Columbia, SC 29201
Phone # (803) 896-5236
Email: dlemmon@itmo.sc.gov

From: CURRIE, GENEVA [<mailto:GCURRIE@mailbox.sc.edu>]
Sent: Tuesday, May 17, 2011 12:54 PM
To: Lemmon, Debbie
Subject: RE: Reference Check for Newvenue Technologies, Inc.

That would be great Debbie! Look forward to hearing from you tomorrow.

-Geneva

From: Lemmon, Debbie [<mailto:dlemmon@mmo.sc.gov>]
Sent: Tuesday, May 17, 2011 12:49 PM
To: CURRIE, GENEVA
Subject: RE: Reference Check for Newvenue Technologies, Inc.

Geneva,

Rec'd your reference request. More than happy to respond. Should be able to respond by tomorrow.

Thank you,
Debbie

Debbie Lemmon
Information Technology Management Office (ITMO)
1201 Main Street. Suite 601

Columbia, SC 29201
Phone # (803) 896-5236
Email: dlemmon@itmo.sc.gov

From: CURRIE, GENEVA [<mailto:GCURRIE@mailbox.sc.edu>]
Sent: Tuesday, May 17, 2011 12:20 PM
To: Lemmon, Debbie
Subject: Reference Check for Newvenue Technologies, Inc.

Mrs. Lemmon,

Newvenue Technologies, Inc provided your name as the contact for a reference check for the services that they provided to the State of South Carolina Information Technology Management Office. Our department at the University of South Carolina has a few questions to present to you about this company. Attached you will find the questionnaire. We appreciate and thank you in advance for your time and assistance with this reference check. If you have any additional questions or need any additional information you may contact me at the information listed below.

Geneva Currie
Administrative Coordinator
TRIO Programs
1400 Wheat Street
Columbia, SC 29208
803/777-5125 Fax: 803/777-7380
gcurrie@mailbox.sc.edu



1: "What's your relationship with the vendor?" The State of SC just awarded (in January) NewVenue Technologies, Inc. the Software Acquisition Manager (SAM) contract. I have been working with this vendor since August of 2011 and we have an excellent working relationship.

#2: "How do you interact with the vendor?" We interact through email, via phone, formal meetings and even Webex online meetings. We have very good communications with NewVenue and we are pleased to have awarded this contract to them.

#3: "Describe a situation where the vendor disappointed you, and how they responded." We have not incurred a situation in which this has happened yet. However, we would anticipate that NewVenue would be very responsive.

#4 "What are some things you wish the vendor would do differently?"
None at this time.

1. How smooth was your implementation? Did the system easily plug into your existing technology environment? Due to unforeseen delays on our (the State's) end, the application that NewVenue delivered is not fully implemented yet. The web solution (www.mysamcentral.com) is ready and has been fully tested. We also use it for demos during presentations. It was excellently designed and the NewVenue team exceeded our expectation.

2. How long did it take to fully train your staff to use the solution? N/A

3. Did the vendor assist in your roll-out? If so, in what way? NewVenue will be facilitating the entire rollout of MySAM Central application throughout the State of South Carolina.

4. Have you experienced any problems with the software, such as bugs? We do not anticipate any bugs, but should they occur, we are confident that NewVenue will get them resolved quickly.

5. What kind of user adoption rates have you experienced? The feedback we have received from most agencies has been positive and many are anxiously awaiting the full implementation.

6. What kind of feedback have you gotten from end users about the solution's ease of use, functionality, etc.? Not applicable yet

7. What kind of ROI have you achieved so far? Have you seen the kind of results you expected/were promised, or do you feel you could be getting more from the system? I am not able to respond to this yet, however, we are confident that NewVenue's solution will result in tremendous savings and immeasurable benefits once fully implemented.

8. What kind of support have you received, and how responsive is the vendor to your questions and issues? NewVenue is extremely responsive to the State's needs and they have given us no reason to be concerned with their level of service.

9. Would you recommend this vendor and why? I would highly recommend NewVenue Technologies, to perform IT services for your organization. Terris Riley and her team of highly skilled professionals are committed to excellence and I believe you would be pleased with their services and products.

NewVenue is a small and local minority business. We are pleased to be able to award this major State contract to a SC-based business.

Additional Notes/Comments

NewVenue is also a vendor on the State's IT Temporary Services contract.

Exhibit 3: E-mails of Debbie Lemmon

Terris S. Riley

From: Lemmon, Debbie [dlemmon@mmo.sc.gov]
Sent: Thursday, February 03, 2011 12:43 PM
To: triley@newvenue.tech.com
Cc: jriley@newvenue.tech.com
Subject: Software Acquisition Manager (SAM)
Importance: High

Terris,
The anticipated "Go Live" date of February 15, 2011 will be delayed.

IMPORTANT!!!! Please discuss the following issues only with myself and Mike Spicer

Noted areas of concern:

1. Mike Spicer is working on issues related to the purchase order addresses for the software resellers. Therefore, my meeting with the software resellers cannot take place until this is resolved. In addition, I will need for the software resellers to agree to assign payment to the SAM which they may need their legal to review before signing.
2. I spoke with Mike yesterday about the software discovery and for the SAM to be able to dump our customer's existing files in the SAM database. [As a result, he has advised a business case needs to be presented and approved before these services can be provided.] Mike will need to present the business case to the Information Solutions Technology Committee (ITSC) for their review and comments.
3. Request we schedule some time to work together on the business case
4. Due to the current events listed above, do you want me to continue setting up customer meetings for NewVenue Technologies, Inc?

I apologize for the delay of this project.

Debbie Lemmon
Information Technology Management Office (ITMO)
1201 Main Street, Suite 430
Columbia, SC 29201
Phone # (803) 896-5236
Email: dlemmon@itmo.sc.gov

No virus found in this message.
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Version: 10.0.1204 / Virus Database: 1435/3418 - Release Date: 02/02/11

2/16/2014

Terris S. Riley

From: Lemmon, Debbie [dlemmon@mmo.sc.gov]
Sent: Monday, January 10, 2011 3:19 PM
To: triley@newvenuetech.com
Subject: FW: Emailing: Software Vendor Change Order Template

FYI..

Attached change order has NOT been approved by Mike Spicer

From: Lemmon, Debbie
Sent: Monday, January 10, 2011 3:13 PM
To: Lemmon, Debbie
Subject: FW: Emailing: Software Vendor Change Order Template

From: Mahon, Michele
Sent: Thursday, January 06, 2011 10:43 AM
To: Lemmon, Debbie
Subject: Emailing: Software Vendor Change Order Template

The message is ready to be sent with the following file or link attachments:

Software Vendor Change Order Template

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

No virus found in this message.

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Version: 10.0.1191 / Virus Database: 1435/3371 - Release Date: 01/10/11



State of South Carolina

Change Order #

Contract Number	: 44XXXXXXX
Procurement Officer	: Debbie Lemmon
Phone	: 803-896-5236
E-Mail Address	: dlemmon@tmo.sc.gov
Address	: 1201 Main Street, Suite 430 Columbia, SC 29201

DESCRIPTION: Name of Contract

USING GOVERNMENTAL UNIT: Statewide Term Contract

CONTRACTOR'S NAME AND ADDRESS: Please Add your contact Name and Full Company Information Here

TYPE OF CHANGE:

- Change to Contract Scope of Work
- Change to Contract Pricing Pursuant to Existing Contract Clause.
 Clause Name _____, Clause No. _____
- Administrative Change to Contract (such as changes in paying office, name of Agency Contract Administrator, etc.)
- Other Change

IMPORTANT NOTICE:

- Change Order: Contractor is required to sign this document and return 1 copy to the procurement officer named above by the following date: Month, XX, 2011 by 10:00 AM EST.
 - Contract Modification: Contractor is required to acknowledge receipt of this document in writing by the following date: _____
- Contractor does not indicate agreement with change simply by acknowledging receipt.

DESCRIPTION OF CHANGE / MODIFICATION:

The State of South Carolina is documenting a change to the XXXX Software Statewide Term Contract to incorporate the following changes:

1. The Contractor agrees to participate in the Software Acquisition Management Contract, see attached Enrollment Agreement. (Debbie to get form from NewVenue)
2. Increase in administrative fee from 1% to 2.5% and the vendor requirement for contract reporting and administrative fee and payment will be eliminated. The increase in the administrative fee should have no affect on the total cost to the State of South Carolina since the cost of providing the reports will be zero for the Contractor.
3. Volume Discounts –volume discounts should be applied to the State as a whole. Volume discounts will be effective 12 months after the date on this document.

(negotiate volume discounts and then put the volume tiers in here)

Volume discount by like agencies if a statewide single entity volume discount is not available

- i. State Agencies & Local governments
- ii. Higher Education
- iii. K-12

4. The State wishes to obtain a tiered price sheet from the software contractor, provide tier levels and volume discounts if more than one agency is involved, broken out in the following levels:
 - a. Agency Cost Sheet
 - b. Higher Education Cost Sheet
 - c. K-12 Cost Sheet

Please provide your costs in the spreadsheet attached to this document.

5. License Redeployment – Provide the following options if possible: (Define UGU in this respect)
 - a. License reassignment within a Using Governmental Unit, from one user to another
 - b. License reassignment within the State that may be between different Using Governmental Units (Agency to Agency)

Comment [MM1]: Redeployment will be optional in the CO. If we are dealing with the manufacturer, they can authorize us to redeploy, if we are dealing with the distributor, we will have to work that out with the manufacturer. 4 is needed if distributor and we dealt with manufacturer then it doesn't have to be in here.

Terris S. Riley

From: Lemmon, Debbie [dlemmon@mmo.sc.gov]
Sent: Friday, October 29, 2010 8:32 AM
To: Terris S. Riley
Cc: Mahon, Michele
Subject: RE: quick recap
Follow Up Flag: Follow up
Flag Status: Red

Terris,
Demo okay on Monday, Nov 1...

Per Mike Spicer, "OK, with the disclaimer that the award has not been made yet.

Norma does not work in ITMO, therefore she will not be invited to the demo

Thank you,
Debbie

From: Terris S. Riley [mailto:triley@newvenue.tech.com]
Sent: Thursday, October 28, 2010 5:44 PM
To: Lemmon, Debbie; Mahon, Michele
Cc: 'Jacque Riley'; 'Terris S. Riley'
Subject: quick recap

Hi Ladies...

Here's our recap:

NewVenue:

1. Send Debbie our Terms/Conditions (Application Assumptions & Constraints basically)
2. Send Debbie an updated marketing presentation
3. Send Debbie an updated FAQ Doc
4. Create press release for distribution
5. Create News Article for Michele to distribute (i.e. CIO Newsletter, SCAGPO Website, etc.)
6. Create Announcement Flyer for distribution
7. Arrive at ITMO on Monday, Nov 1 @ 9:30am to present MySAM Central to ITMO Staff
8. Prepare WebEx demo for 11/18 @ 10am.

Question: Do you think it would be ok to invite Norma so she could see it?

Michelle:

1. Send NewVenue the template for Software & Maintenance (FYI, I have no idea what this is—I have it

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in my notes and can't remember what we were discussing at the time! hahaha)

2. Send NewVenue the Agency Codes
3. Send NewVenue Email Address list(s) for all IT staff for each agency
4. Send NewVenue Email Address list for all State IT Directors (including DSIT)
5. Confirm with SCEIS as to whether they can automatically send POs to NewVenue in PDF format
6. Refer NewVenue Technologies to contacts at SCAGPO for an opportunity to present MySAM Central

Debbie:

1. Prepare the file for the Intent to Award
 2. Prepare the file for the Intent to Award
 3. Prepare the file for the Intent to Award
- hahahahaha....(smile, Debbie)

Upcoming Key Dates:

- Monday, Nov.1 @ 9:45 am--MySAM Central Demo
- Wednesday, Nov. 3--Issue Intent to Award
- Wednesday, Nov. 3--Design Document Sign-off w/Debbie & Michelle
- Tuesday, Nov. 16--Award goes live
- Tuesday, Nov. 16--Send WebEx Invites & Announcements, etc. Statewide
- Thursday, Nov. 18--WebEx Demo
- Thursday, Dec. 2--WebEx Demo
- Thursday, Dec. 9--WebEx Demo
- Thursday, Dec. 16--WebEx Demo
- Wednesday, Dec. 15--MySAM Go-Live Date

Ok, I think that's it! Please let me know if I've missed anything...had to send it out while it's still fresh on the brain!

Have a good evening and weekend. Talk soon.

Regards,

Terris. S. Riley

NewVenue Technologies, Inc.

www.newvenuetech.com

ph 803.386.1036

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2/16/2014

Exhibit 4: NVTI Contract Controversy Claim

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
In re: Contract Controversy of)	
NewVenue Technologies, Inc.)	
)	
<i>Claimant,</i>)	
)	
vs.)	<u>NEW VENUE</u>
)	<u>TECHNOLOGIES, INC.'S</u>
State of South Carolina)	<u>CONTRACT</u>
)	<u>CONTROVERSY CLAIMS</u>
<i>Respondent .</i>)	
_____)	

Claimant, New Venue Technologies, Inc., ("NVTI") by and through its undersigned counsel, asserts 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"), as follows:

GENERAL ALLEGATIONS

1. This controversy concerns a contract solicited and awarded under the South Carolina Consolidated Procurement Code. The Chief Procurement Officer or his designee has exclusive jurisdiction over the claims alleged herein pursuant to S.C. Code Ann. § 11-35-4230.
2. The CPO does not have jurisdiction over claims which NVTI may have that are not in the nature of contract, including but not limited to tort claims as against individuals and state entities, and claims under federal statutes, including but not limited to federal claims which pre-empt state laws.
3. On August 5, 2010, the Information Technology Management Office issued Solicitation No. 5400001873, as amended, a copy of which (together with Amendment 1 thereto) is attached hereto as Exhibit A.

4. NVTI was a proposer who submitted a response to Solicitation No. 5400001873 ("solicitation"). NVTI was issued an "Intent to Award" with respect to the Contract. A copy of the Intent to Award is attached hereto as Exhibit B.

5. The Statement of Intent to Award issued and posted by the State on December 21, 2010 states that it "becomes the final Statement of Award effective 08:00:00, January 4, 2011", and that "the final statement of award serves as acceptance of [NVTI's] offer."

6. Pursuant to this Statement of Award, the Contract was to commence on February 15, 2011, and was to continue until and including February 14, 2016.

7. The start date of February 15, 2011 was a result of the State pushing back the start date from earlier discussed and promised start dates in December 2010 and early January 2011.

8. Per the Solicitation, the documents that constitute the contract at issue (hereinafter "Contract") include the Record of Negotiations, documents regarding clarification of the offer under procurement authorities, the Solicitation, as amended, modifications to New Venue's offer, if any were accepted by the Chief Procurement Officer, the NVTI offer, the notice of award and purchase orders. The Solicitation provided that any document signed or otherwise agreed to by the persons other than the Procurement Officer shall be void and of no effect.

9. The Solicitation, and thus, the Contract, provided that "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."

10. The Solicitation, and thus, the Contract, further provided that "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."

11. The Solicitation, and thus the Contract, also provided that "The State intends to award a state term contract to one Offeror for use by all State Agencies."

12. Under the Contract awarded to NVTI, to commence on February 15, 2011, all participating Public Procurement Units and all State Agencies were required to submit all software purchase orders through the SAM. As to each such order and purchase of software, NVTI, as contractor, was entitled to "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." In the case of NVTI's proposal, under this contract, NVTI was entitled to retain a SAM fee of 2.5% of all software purchased by the State of South Carolina and its Public Procurement Units from February 15, 2011 until expiration of the contract on February 14, 2016.

13. The Solicitation did not provide for any Public Procurement Unit to be excluded from the SAM. Public Procurement Units subject to the SAM, and thus the requirements of the Contract, include but are not limited to two hundred seven state agencies, public entities and political subdivisions of the state such as DHEC, The Citadel, Charleston County School Districts, DSIT, University of South Carolina, South Carolina State University, and others.

14. The State has acknowledged and agreed that orders and purchases of Citrix, Corel, IBM Middleware, Microsoft, Microsoft EES, Oracle, and Symantec software, among others, were to be included as a part of the contract at issue. However, no software orders or purchases were excluded by the Contract, and thus, all software orders and purchases from February 15, 2011 until February 14, 2016 were to be subject to the 2.5 percent fee to be paid to NVTI. Under the Contract, NVTI, as contractor, was entitled to "retain a fee" equaling 2.5 percent of the total of each such invoice less returns & taxes, as to all software purchases by the State of South Carolina and all of its agencies and subdivisions.

15. Well into the Contract term, the State acknowledged in writing that NVTI's web solution was "ready and has been fully tested" that it "was excellently designed" and that New Venue "exceeded our expectations." Further, the State acknowledged in writing that "delays on our (the State's) end" was the reason that the system delivered by NVTI was "not fully implemented yet."

16. Due to the acts and omissions of the State, each of which constitute significant, material and ongoing breach of the Contract, the State 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.

17. In fact, starting February 15, 2011, the State and its agencies, subdivisions and Public Procurement Units submitted no purchases to the SAM for more than seven months, in violation of the Contract. This breach of Contract by the State deprived NVTI of significant and substantial revenue that NVTI relied on and needed to perform under the Contract. NVTI notified the State of this ongoing breach repeatedly and asked the State to conform to the Contract repeatedly, to no avail.

18. Moreover, after seven months into the Contract term, the State and its agencies, subdivisions and Public Procurement Units thereafter submitted only a limited number of all software orders and purchases to the SAM, in ongoing violation of the Contract. This ongoing and persistent breach of Contract by the State deprived NVTI of significant and substantial revenue that NVTI relied on and needed to perform under the Contract. NVTI notified the State of this ongoing and persistent breach repeatedly and asked the State to conform to the Contract repeatedly, to no avail.

19. As a consequence of its failure and refusal to implement and require all software orders and purchases to be submitted to the SAM, throughout the entire term of the contract, the State has been in breach of the Contract from the first day of the Contract until the last day of the Contract, on October 8, 2013, the date on which the State wrongfully, and in breach of its Contract, terminated the Contract, purportedly "for cause" but without justification.

20. Under the Contract, the State agreed it took responsibility for working with all current state term contract holders ("Vendors"), as to software, to make any changes needed to the contracts of the Vendors to work with the SAM.

21. The State also had agreed that it would "make every effort" to work with manufacturers/vendors to help them understand the processes associated with the Contract.

22. In the Contract, the State clearly specified that it was not outsourcing software purchasing, but that "the contract was limited to the tracking of license purchases, renewals, etc."

23. In the Contract, the State also expressly agreed that "Neither party is an employee, agent, partner, or joint venturer of the other."

24. In the Contract, the State specifically stated that its intent was not to invite the contractor to take over the complete software procurement process, but was rather "simply for the installation of a software solution to manage the software purchase process itself."

25. By its actions in breach of the Contract, the State deprived NVTI of significant revenue needed for NVTI to successfully perform its Contract with the State, and thus the State, despite NVTI's best efforts, set NVTI up to fail. Even despite such ongoing misconduct by the State, NVTI admirably continued to perform all expressly stated, material aspects of its Contract. In doing so, NVTI incurred significant damages and losses, for which the State is liable.

26. These damages include, but are not limited to: lost revenue equaling 2.5% of the total dollar amount of all purchases of software by all State agencies and by all Public Procurement Units which were to participate in the SAM commencing and from February 15, 2011 until close of business on February 14, 2016; the total 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 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 that NVTI was

awarded; the cost of disaster recovery systems required for performance of the Contract, among others.

27. The State further breached its Contract with NVTI, after commencement thereof, by imposing and attempting to impose on NVTI new conditions, not contained in or a part of the parties' Contract, as a pre-condition for the State to perform its own contractual obligations, in violation of NVTI's rights under the Contract. NVTI incurred damages, losses and harm as a consequence of attempting to comply with these extra-contractual demands of the State. Despite the fact that the State's numerous and onerous demands were over and above the requirements of NVTI's Contract with the State, NVTI continued to attempt to meet these excessive demands, at great expense, cost and damage to NVTI.

28. Among other violations by the State of NVTI's rights under the Contract, software Vendors were never required by the State to provide NVTI with software Licenses/KeyIDs; NVTI was forced by the State to implement additional functionality within the MySAM Central application that was not was not a part of the Contract or the original system requirements; NVTI was forced by the State to undergo creditworthiness and financial approval processes by software Vendors at the insistence of software Vendors and such Vendor approvals were never a part of the Contract requirements; the State informed NVTI only after the Contract commenced that a substantial line of credit (not specified or required by the Contract, was required by the State as a precondition to implementation of the Contract; as a result of the State's extra-contractual line of credit requirement, NVTI was required to, and did, seek financing from numerous sources to satisfy the State's extra-contractual demands; from January 2011 through August 2011, NVTI (at its own expense) traveled, in good faith,

throughout the State of South Carolina to perform "demos" for agencies for a contract that the State was unreasonably refusing to implement, in violation of the Contract and NVTI's rights.

29. NVTI wrote to the State notification, warning that the State's ongoing and numerous breaches were causing NVTI serious harm, placing NVTI at risk of financial ruin. NVTI stated ""However, due to the non-cooperative Vendors, we are unable to service these customers, which means we are still making \$0 for this contract even though our solution is in place and is ready to be implemented."

30. NVTI further notified the State in writing that "In good faith, we have spent (and continue to spend) the money to build and maintain our solution due to the fact that we were awarded a contract by the State of South Carolina - promising us the opportunity to earn revenue beginning February 15, 2011. It is now May and we have yet to make our first dollar. All the while our expenses are climbing."

31. NVTI sent yet another such notice to the State as June 2011 approached, when the State continued in its extraordinary non-performance and breach. Again, NVTI warned the State that it continued to incur costs and losses, without any of the revenue to which it was entitled under the Contract.

32. The State thereafter further breached its Contract with NVTI by sending NVTI a "Show Cause Letter" dated January 28, 2013, and a demand letter, dated September 30, 2013, when in fact the State itself was in breach, had been in breach, and persistently remained in material breach of its contractual obligations to NVTI from the beginning of the Contract, continuously, throughout.

33. The State further breached its Contract with NVTI on or about August 26, 2013 when it improperly issued "Contract Modification #1" in violation of NVTI's Contract rights,

and improperly proceeded to modify its own actions, rights and obligations and NVTI's rights obligations from those set forth under the parties' Contract.

34. As alleged herein, during the term of the Contract, the State wrongfully, and in breach of its Contract, made excessive and costly extra-contractual demands of NVTI as a pre-condition to the State's own performance of its existing obligations under the Contract.

35. The State's excessive, extra-contractual demands of NVTI and the extensive damages already caused to NVTI by the State's ongoing and enduring breaches of Contract as alleged herein, culminated in extreme and aggressive misconduct by the State as against NVTI, amounting to (among other things) further breach of Contract by the State, and a violation of the State's obligation of good faith and fair dealing. This misconduct includes but is not limited to the State's initiation of an unfounded Contract Controversy as against New Venue, which contained numerous false and unsupported accusations, and which was only at length withdrawn; large non-consensual chargebacks of funds from bank accounts of NVTI; threats by the State to involve criminal authorities against NVTI; unfounded and spurious accusations of criminal wrongdoing on the part of NVTI by the State; the assertion of unfounded criminal charges as against NVTI made by the State and its employees and agents, which resulted in NVTI's principal being unlawfully detained, incarcerated and falsely imprisoned; the institution of unfounded and baseless debarment and suspension proceedings as against NVTI; and the wrongful termination of NVTI's contract. NVTI has suffered contract damages (in addition to other damages to be redressed separately, in other fora having jurisdiction thereof) as a result of these extreme actions on the part of the State.

36. NVTI seeks an award of all damages resulting from the State's numerous breaches of Contract asserted herein; an award of all costs and losses caused to NVTI by the State as a result of the State's misconduct, wrongdoing and breaches described herein.

37. NVTI seeks an accounting of all orders and purchases by the State (including all of its agencies) of software from February 15, 2011 until the date of the hearing, and an award to NVTI of 2.5% of the total amount of all such purchases, (less the minimal amounts NVTI has been already paid for any such purchases); and an Order that the State must pay to NVTI, monthly, 2.5% of all orders and purchases software by the State and all of its agencies from the date of the hearing on this matter until February 14, 2016.

38. NVTI also seeks an accounting of all orders and purchases of software by the State's Public Procurement Units that participated in the SAM from February 15, 2011 until the date of the hearing, and an award to NVTI of 2.5% of the total amount of all such purchases, (less the minimal amounts NVTI has been already paid for any such purchases); and an Order that the State must pay to NVTI, monthly, 2.5% of all orders and purchases software by the said Public Procurement Units from the date of the hearing on this matter until February 14, 2016.

39. NVTI further asks for an award of damages for such amounts, as well as damages for the state's unlawful breach of the contract in the manners stated herein, the costs and damages flowing therefrom, future, lost profits as a result of the improper termination of the contract, attorneys' fees and costs, as well as all remedies available in this matter and such other and further relief as the CPO deems appropriate.

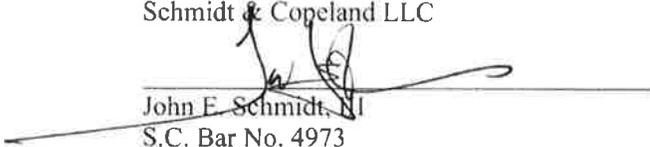
40. By asserting the Claims and Request for Resolution herein NVTI and its principals do not waive, but expressly reserves all claims at law and in equity, for all state tort

law claims and for all federal law claims available as against the State and others acting wrongfully in concert therewith.

41. NVTI asks that the CPO appoint a proper, disinterested and impartial hearing officer to set a prompt hearing; to Order that the State promptly comply with the various lawful Freedom of Information Law requests that have been submitted to the State by or on behalf of NVTI; to afford NVTI all Due Process rights reserved to it by law; to hear and decide this matter promptly; and to grant to NVTI all relief requested herein, and all relief otherwise permitted by law.

RESPECTFULLY SUBMITTED,

Schmidt & Copeland LLC



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1201 Main Street, Suite 1100

P.O. Box 11547(29211)

Columbia, SC 29201

803.748.1342 (phone)

803.748.1210 (fax)

ATTORNEYS FOR NEW VENUE TECHNOLOGIES,
INC.

Columbia, South Carolina
November 14, 2013

Exhibit 5: Mike Spicer Reviewed RON

	State of South Carolina Request for Proposal	Solicitation Number: 5400001873
		Date Issued: 08/05/2010
		Procurement Officer: Debbie Lemmon
		Phone: 803-896-5236
		E-Mail Address: dlemmon@itmo.sc.gov

DESCRIPTION: **Software Acquisition Manager**
 USING GOVERNMENTAL UNIT: **Statewide Term Contract**

The Term "Offer" Means Your "Bid" or "Proposal". Unless submitted on-line, your offer must be submitted in a sealed package. Solicitation Number & Opening Date must appear on package exterior. See "Submitting Your Offer" provision.

SUBMIT YOUR OFFER ON-LINE AT THE FOLLOWING URL: <http://www.procurement.sc.gov>

SUBMIT OFFER BY (Opening Date/Time): **09/13/2010 14:30:00** (See "Deadline For Submission Of Offer" provision)

QUESTIONS MUST BE RECEIVED BY: **08/19/2010 12:00:00** (See "Questions From Offerors" provision)

NUMBER OF COPIES TO BE SUBMITTED: **See Page 3**

CONFERENCE TYPE: Pre-Proposal DATE & TIME: 08/19/2010 10:00:00 <small>(As appropriate, see "Conferences - Pre-Bid/Proposal" & "Site Visit" provisions)</small>	LOCATION: B&CB Procurement Services Division ITMO 1201 Main Street, Suite 430 Columbia, SC 29201
--	---

AWARD & AMENDMENTS	Award will be posted on 10/14/2010 . The award, this solicitation, any amendments, and any related notices will be posted at the following web address: http://www.procurement.sc.gov
-------------------------------	--

Unless submitted on-line, you must submit a signed copy of this form with Your Offer. By submitting a bid or proposal, You agree to be bound by the terms of the Solicitation. You agree to hold Your Offer open for a minimum of thirty (30) calendar days after the Opening Date. (See "Signing Your Offer" and "Electronic Signature" provisions.)

NAME OF OFFEROR <small>(full legal name of business submitting the offer)</small>		Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror. The entity named as the offeror must be a single and distinct legal entity. Do not use the name of a branch office or a division of a larger entity if the branch or division is not a separate legal entity, i.e., a separate corporation, partnership, sole proprietorship, etc.
AUTHORIZED SIGNATURE <small>(Person must be authorized to submit binding offer to contract on behalf of Offeror.)</small>		TAXPAYER IDENTIFICATION NO. <small>(See "Taxpayer Identification Number" provision)</small>
TITLE <small>(business title of person signing above)</small>		STATE VENDOR NO. <small>(Register to Obtain S.C. Vendor No. at www.procurement.sc.gov)</small>
PRINTED NAME <small>(printed name of person signing above)</small>	DATE SIGNED	STATE OF INCORPORATION <small>(If you are a corporation, identify the state of incorporation.)</small>

OFFEROR'S TYPE OF ENTITY: (Check one) <small>(See "Signing Your Offer" provision.)</small>		
<input type="checkbox"/> Sole Proprietorship	<input type="checkbox"/> Partnership	<input type="checkbox"/> Other _____
<input type="checkbox"/> Corporate entity (not tax-exempt)	<input type="checkbox"/> Corporation (tax-exempt)	<input type="checkbox"/> Government entity (federal, state, or local)

COVER PAGE (NOV. 2007)

EXHIBIT A

PAGE TWO

(Return Page Two with Your Offer)

HOME OFFICE ADDRESS (Address for offeror's home office / principal place of business)	NOTICE ADDRESS (Address to which all procurement and contract related notices should be sent.) (See "Notice" clause)
	_____ Area Code - Number - Extension Facsimile _____ E- mail Address

PAYMENT ADDRESS (Address to which payments will be sent.) (See "Payment" clause)	ORDER ADDRESS (Address to which purchase orders will be sent) (See "Purchase Orders and "Contract Documents" clauses)
_____ Payment Address same as Home Office Address _____ Payment Address same as Notice Address (check only one)	_____ Order Address same as Home Office Address _____ Order Address same as Notice Address (check only one)

ACKNOWLEDGMENT OF AMENDMENTS							
Offerors acknowledges receipt of amendments by indicating amendment number and its date of issue. (See "Amendments to Solicitation" Provision)							
Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date

DISCOUNT FOR PROMPT PAYMENT (See "Discount for Prompt Payment" clause)	10 Calendar Days (%)	20 Calendar Days (%)	30 Calendar Days (%)	_____ Calendar Days (%)
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PAGE THREE

IMPORTANT INFORMATION FOR ALL OFFERORS

All Offerors desiring to respond to this solicitation should register and submit your response online. To respond online, you must follow the new South Carolina Enterprise Information System (SCEIS) vendor registration instructions found at the South Carolina Procurement Information Center website address of: <http://www.procurement.sc.gov/> . Even if you are registered in the old procurement system, you must still register or update your information in the new SCEIS system. Once the registration process is complete, the system will generate a new SCEIS vendor userid and password. The Offeror must keep this information current or you will not be able to submit future bids.

OFFERORS ENCOUNTERING REGISTRATION PROBLEMS SHOULD CONTACT:

DSIT Help Desk (803) 896-0001 Select Option 1 then Option 1

Monday – Friday 8:00 AM – 4:30 PM

Other vendor instructions found at <http://www.procurement.sc.gov/> include:

- [Vendor Registration Guide](#)
- [Help Desk Information](#)
- [How do I Respond to A Solicitation - Word Document](#)
- [How do I Respond to A Solicitation - Interactive Document](#)
- [How do I Respond to A Bid with Complex Pricing Line Items](#)
- [How do I Respond to A Bid with Complex Pricing – Price Scale](#)

NUMBER OF COPIES

Offerors will need to follow these instructions carefully when responding to the solicitation online.

1. The original solicitation response should be submitted on-line and is the official response.
2. All bidders must attach all additional requested documents to their response in the online system. These documents can be attached under the “**My Notes**” tab of the online solicitation either on the main page or under the necessary line item.

In addition to the offer you submit on-line, please submit the following:

3. One redacted copy of both the technical proposal, business proposal and qualifications **submitted online**
4. 1 complete original paper copy
5. **7 copies** of your technical proposal, business proposal and qualifications on CD
6. **7 copies** of your cost proposal on a separate CD

All copies requested must be delivered no later than the date and time specified on the cover page of the solicitation to the following address:

Information Technology Management Office
Attention: **Debbie Lemmon**
Attention: **5400001873**
1201 Main Street, Suite 600
Columbia, SC 29201

Offeror Verification of Submitted Responses

After submitting an online response to a solicitation, Offeror may validate their submission with the following steps:

1. Go back to the initial screen
2. Select Start by clicking the Start button'
3. Bid Submitted will appear in the Bid Status Column as seen below

Process Bids

Find Bid Invitations and Auctions

Number of Document	Name	Status	Processed by Me
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="button" value="Start"/>	Extended Search		

Tip: Choose a symbol in the navigation column or navigate to the bid overview by choosing the bid number

Search Result: 32 Hits

Number	Name	Trans. Type	Start Date	End Date	Bid Status	Action
5400000603	Testing follow-on documents	Invitation For Bid		06/26/2008 16:00:00	Follow-on Document Created	
5400000602	Printers	Invitation For Bid		06/27/2008 17:00:00	Bid submitted	

You may want to print this page for your records.

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I. SCOPE OF SOLICITATION

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.

ACQUIRE SERVICES (JAN 2006)

The purpose of this solicitation is to acquire services complying with the enclosed description and/or specifications and conditions. [01-1010-1]

MAXIMUM CONTRACT PERIOD – ESTIMATED (JAN 2006)

[10/26/2010 – 10/25/2015]. Dates provided are estimates only. Any resulting contract will begin on the date specified in the notice of award. See clause entitled "Term of Contract – Effective Date/Initial Contract Period". [01-1040-1]

II. INSTRUCTIONS TO OFFERORS - A. GENERAL INSTRUCTIONS

DEFINITIONS (JAN 2006)

EXCEPT AS OTHERWISE PROVIDED HEREIN, THE FOLLOWING DEFINITIONS ARE APPLICABLE TO ALL PARTS OF THE SOLICITATION.

AMENDMENT means a document issued to supplement the original solicitation document.

BOARD means the South Carolina Budget & Control Board.

BUYER means the Procurement Officer.

CHANGE ORDER means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.

CONTRACT See clause entitled Contract Documents & Order of Precedence.

CONTRACT MODIFICATION means a written order signed by the Procurement Officer, directing the contractor to make changes which the changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

CONTRACTOR means the Offeror receiving an award as a result of this solicitation.

COVER PAGE means the top page of the original solicitation on which the solicitation is identified by number. Offerors are cautioned that Amendments may modify information provided on the Cover Page.

OFFER means the bid or proposal submitted in response this solicitation. The terms Bid and Proposal are used interchangeably with the term Offer.

OFFEROR means the single legal entity submitting the offer. The term Bidder is used interchangeably with the term Offeror. See bidding provisions entitled Signing Your Offer and Bid/Proposal As Offer To Contract.

ORDERING ENTITY Using Governmental Unit that has submitted a Purchase Order.

PAGE TWO means the second page of the original solicitation, which is labeled Page Two.

PROCUREMENT OFFICER means the person, or his successor, identified as such on the Cover Page.

YOU and YOUR means Offeror.

SOLICITATION means this document, including all its parts, attachments, and any Amendments.

STATE means the Using Governmental Unit(s) identified on the Cover Page.

SUBCONTRACTOR means any person having a contract to perform work or render service to Contractor as a part of the Contractor's agreement arising from this solicitation.

USING GOVERNMENTAL UNIT means the unit(s) of government identified as such on the Cover Page. If the Cover Page names a Statewide Term Contract as the Using Governmental Unit, the Solicitation seeks to establish a Term Contract [11-35-310(35)] open for use by all South Carolina Public Procurement Units [11-35-4610(5)].

WORK means all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the

Contractor's obligations under the Contract.
[02-2A003-1]

AMENDMENTS TO SOLICITATION (JAN 2004)

(a) The Solicitation may be amended at any time prior to opening. All actual and prospective Offerors should monitor the following web site for the issuance of Amendments: www.procurement.sc.gov (b) Offerors shall acknowledge receipt of any amendment to this solicitation (1) by signing and returning the amendment, (2) by identifying the amendment number and date in the space provided for this purpose on Page Two, (3) by letter, or (4) by submitting a bid that indicates in some way that the bidder received the amendment. (c) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged. [02-2A005-1]

AWARD NOTIFICATION (NOV 2007)

Notice regarding any award or cancellation of award will be posted at the location specified on the Cover Page. If the contract resulting from this Solicitation has a total or potential value of fifty thousand dollars or more, such notice will be sent to all Offerors responding to the Solicitation. Should the contract resulting from this Solicitation have a total or potential value of one hundred thousand dollars or more, such notice will be sent to all Offerors responding to the Solicitation and any award will not be effective until the eleventh day after such notice is given. [02-2A010-1]

BID/PROPOSAL AS OFFER TO CONTRACT (JAN 2004)

By submitting Your Bid or Proposal, You are offering to enter into a contract with the Using Governmental Unit(s). Without further action by either party, a binding contract shall result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page. An Offer may be submitted by only one legal entity; "joint bids" are not allowed. [02-2A015-1]

BID ACCEPTANCE PERIOD (JAN 2004)

In order to withdraw Your Offer after the minimum period specified on the Cover Page, You must notify the Procurement Officer in writing. [02-2A020-1]

BID IN ENGLISH and DOLLARS (JAN 2004)

Offers submitted in response to this solicitation shall be in the English language and in US dollars, unless otherwise permitted by the Solicitation. [02-2A025-1]

BOARD AS PROCUREMENT AGENT (JAN 2004)

(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 Unit(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. [02-2A030-1]

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (MAY 2008)

GIVING FALSE, MISLEADING, OR INCOMPLETE INFORMATION ON THIS CERTIFICATION MAY RENDER YOU SUBJECT TO PROSECUTION UNDER SECTION 16-9-10 OF THE SOUTH CAROLINA CODE OF LAWS AND OTHER APPLICABLE LAWS.

(a) By submitting an offer, the offeror certifies that-

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to-

- (i) Those prices;
- (ii) The intention to submit an offer; or
- (iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory-

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; or

(2)(i) Has been authorized, in writing, to act as agent for the offeror's principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification [As used in this subdivision (b)(2)(i), the term "principals" means the person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal];

(ii) As an authorized agent, does certify that the principals referenced in subdivision (b)(2)(i) of this certification have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification.

(c) If the offeror deletes or modifies paragraph (a)(2) of this certification, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure. [02-2A032-1]

CERTIFICATION REGARDING DEBARMENT AND OTHER RESPONSIBILITY MATTERS (JAN 2004)

(a) (1) By submitting an Offer, Offeror certifies, to the best of its knowledge and belief, that-

(i) Offeror and/or any of its Principals-

(A) Are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any state or federal agency;

(B) Have not, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

(C) Are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision.

(ii) Offeror has not, within a three-year period preceding this offer, had one or more contracts terminated for default by any public (Federal, state, or local) entity.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

(b) Offeror shall provide immediate written notice to the Procurement Officer if, at any time prior to contract award,

Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) If Offeror is unable to certify the representations stated in paragraphs (a)(1), Offer must submit a written explanation regarding its inability to make the certification. The certification will be considered in connection with a review of the Offeror's responsibility. Failure of the Offeror to furnish additional information as requested by the Procurement Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly or in bad faith rendered an erroneous certification, in addition to other remedies available to the State, the Procurement Officer may terminate the contract resulting from this solicitation for default.

[02-2A035-1]

CODE OF LAWS AVAILABLE (JAN 2006)

The South Carolina Code of Laws, including the Consolidated Procurement Code, is available at: <http://www.scstatehouse.net/code/statmast.htm> . The South Carolina Regulations are available at: <http://www.scstatehouse.net/coderegs/statmast.htm> [02-2A040-1]

COMPLETION OF FORMS/CORRECTION OF ERRORS (JAN 2006)

All prices and notations should be printed in ink or typewritten. Errors should be crossed out, corrections entered and initialed by the person signing the bid. Do not modify the solicitation document itself (including bid schedule). (Applicable only to offers submitted on paper.) [02-2A045-1]

DEADLINE FOR SUBMISSION OF OFFER (JAN 2004)

Any offer received after the Procurement Officer of the governmental body or his designee has declared that the time set for opening has arrived, shall be rejected unless the offer has been delivered to the designated purchasing office or the governmental bodies mail room which services that purchasing office prior to the bid opening. [R.19-445.2070(H)] [02-2A050-1]

DRUG FREE WORK PLACE CERTIFICATION (JAN 2004)

By submitting an Offer, Contractor certifies that, if awarded a contract, Contractor will comply with all applicable provisions of The Drug-free Workplace Act, Title 44, Chapter 107 of the South Carolina Code of Laws, as amended. [02-2A065-1]

DUTY TO INQUIRE (JAN 2006)

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. [02-2A070-1]

ETHICS CERTIFICATE (MAY 2008)

By submitting an offer, the offeror certifies that the offeror has and will comply with, and has not, and will not, induce a person to violate Title 8, Chapter 13 of the South Carolina Code of Laws, as amended (ethics act). The following statutes

require special attention: Section 8-13-700, regarding use of official position for financial gain; Section 8-13-705, regarding gifts to influence action of public official; Section 8-13-720, regarding offering money for advice or assistance of public official; Sections 8-13-755 and 8-13-760, regarding restrictions on employment by former public official; Section 8-13-775, prohibiting public official with economic interests from acting on contracts; Section 8-13-790, regarding recovery of kickbacks; Section 8-13-1150, regarding statements to be filed by consultants; and Section 8-13-1342, regarding restrictions on contributions by contractor to candidate who participated in awarding of contract. The state may rescind any contract and recover all amounts expended as a result of any action taken in violation of this provision. If contractor participates, directly or indirectly, in the evaluation or award of public contracts, including without limitation, change orders or task orders regarding a public contract, contractor shall, if required by law to file such a statement, provide the statement required by Section 8-13-1150 to the procurement officer at the same time the law requires the statement to be filed. [02-2A075-2]

OMIT TAXES FROM PRICE (JAN 2004)

Do not include any sales or use taxes in Your price that the State may be required to pay. [02-2A080-1]

PROTESTS (JUNE 2006)

Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest within fifteen days of the date of issuance of the applicable solicitation document at issue. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. See clause entitled "Protest-CPO". [Section 11-35-4210] [02-2A085-1]

PUBLIC OPENING (JAN 2004)

Offers will be publicly opened at the date/time and at the location identified on the Cover Page, or last Amendment, whichever is applicable. [02-2A090-1]

QUESTIONS FROM OFFERORS (JAN 2004)

(a) Any prospective offeror desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing. Questions must be received by the Procurement Officer no later than five (5) days prior to opening unless otherwise stated on the Cover Page. Label any communication regarding your questions with the name of the procurement officer, and the solicitation's title and number. Oral explanations or instructions will not be binding. Any information given a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors as an Amendment to the solicitation, if that information is necessary for submitting offers or if the lack of it would be prejudicial to other prospective offerors. (b) The State seeks to permit maximum practicable competition. Offerors are urged to advise the Procurement Officer -- as soon as possible -- regarding any aspect of this procurement, including any aspect of the Solicitation, that unnecessarily or inappropriately limits full and open competition. [02-2A095-1]

REJECTION/CANCELLATION (JAN 2004)

The State may cancel this solicitation in whole or in part. The State may reject any or all proposals in whole or in part. [SC Code Section 11-35-1710 & R.19-445.2065] [02-2A100-1]

RESPONSIVENESS/IMPROPER OFFERS (JAN 2004)

(a) Bid as Specified. Offers for supplies or services other than those specified will not be considered unless authorized by the Solicitation.

(b) Multiple Offers. Offerors may submit more than one Offer, provided that each Offer has significant differences other than price. Each separate Offer must satisfy all Solicitation requirements. If this solicitation is an Invitation for Bids, each

separate offer must be submitted as a separate document. If this solicitation is a Request for Proposals, multiple offers may be submitted as one document, provided that you clearly differentiate between each offer and you submit a separate cost proposal for each offer, if applicable.

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]

(d) Price Reasonableness: Any offer may be rejected if the Procurement Officer determines in writing that it is unreasonable as to price. [R. 19-445.2070].

(e) Unbalanced Bidding. The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.
[02-2A105-1]

RESTRICTIONS APPLICABLE TO OFFERORS (JAN 2004)

Violation of these restrictions may result in disqualification of your offer, suspension or debarment, and may constitute a violation of the state Ethics Act. (a) After issuance of the solicitation, *you agree not to discuss this procurement activity in any way with the Using Governmental Unit or its employees, agents or officials*. All communications must be solely with the Procurement Officer. This restriction may be lifted by express written permission from the Procurement Officer. This restriction expires once a contract has been formed. (b) Unless otherwise approved in writing by the Procurement Officer, *you agree not to give anything to any Using Governmental Unit or its employees, agents or officials prior to award*. [02-2A110-1]

SIGNING YOUR OFFER (JAN 2004)

Every Offer must be signed by an individual with actual authority to bind the Offeror. (a) If the Offeror is an individual, the Offer must be signed by that individual. If the Offeror is an individual doing business as a firm, the Offer must be submitted in the firm name, signed by the individual, and state that the individual is doing business as a firm. (b) If the Offeror is a partnership, the Offer must be submitted in the partnership name, followed by the words by its Partner, and signed by a general partner. (c) If the Offeror is a corporation, the Offer must be submitted in the corporate name, followed by the signature and title of the person authorized to sign. (d) An Offer may be submitted by a joint venturer involving any combination of individuals, partnerships, or corporations. If the Offeror is a joint venture, the Offer must be submitted in the name of the Joint Venture and signed by every participant in the joint venture in the manner prescribed in paragraphs (a) through (c) above for each type of participant. (e) If an Offer is signed by an agent, other than as stated in subparagraphs (a) through (d) above, the Offer must state that it has been signed by an Agent. Upon request, Offeror must provide proof of the agent's authorization to bind the principal. [02-2A115-1]

STATE OFFICE CLOSINGS (JAN 2004)

If an emergency or unanticipated event interrupts normal government processes so that offers cannot be received at the government office designated for receipt of bids by the exact time specified in the solicitation, the time specified for receipt of offers will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal government processes resume. In lieu of an automatic extension, an Amendment may be issued to reschedule bid opening. If state offices are closed at the time a pre-bid or pre-proposal conference is scheduled, an Amendment will be issued to reschedule the conference. Useful information may be available at:
http://www.scemd.org/scgovweb/weather_alert.html [02-2A120-1]

SUBMITTING CONFIDENTIAL INFORMATION (AUG 2002)

(An overview is available at www.procurement.sc.gov) For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Offeror contends contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged and confidential, as that phrase is used in Section 11-35-410.

For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the words "TRADE SECRET" every page, or portion thereof, that Offeror contends contains a trade secret as that term is defined by Section 39-8-20 of the Trade Secrets Act. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "PROTECTED" every page, or portion thereof, that Offeror contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected. If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive. If only portions of a page are subject to some protection, do not mark the entire page. By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED", (2) agrees that any information not marked, as required by these bidding instructions, as a "Trade Secret" is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure. In determining whether to release documents, the State will detrimentally rely on Offeror's marking of documents, as required by these bidding instructions, as being either "Confidential" or "Trade Secret" or "PROTECTED". By submitting a response, Offeror agrees to defend, indemnify and hold harmless the State of South Carolina, its officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney's fees, arising out of or resulting from the State withholding information that Offeror marked as "confidential" or "trade secret" or "PROTECTED". (All references to S.C. Code of Laws.) [02-2A125-1]

SUBMITTING YOUR OFFER OR MODIFICATION (JAN 2004)

(a) Offers and offer modifications shall be submitted in sealed envelopes or packages (unless submitted by electronic means) - (1) Addressed to the office specified in the Solicitation; and (2) Showing the time and date specified for opening, the solicitation number, and the name and address of the bidder. (b) If you are responding to more than one solicitation, each offer must be submitted in a different envelope or package. (c) Each Offeror must submit the number of copies indicated on the Cover Page. (d) Offerors using commercial carrier services shall ensure that the Offer is addressed and marked on the outermost envelope or wrapper as prescribed in paragraphs (a)(1) and (2) of this provision when delivered to the office specified in the Solicitation. (e) Facsimile or e-mail offers, modifications, or withdrawals, will not be considered unless authorized by the Solicitation. (f) Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation. [02-2A130-1]

TAX CREDIT FOR SUBCONTRACTING WITH DISADVANTAGED SMALL BUSINESSES (JAN 2008)

Pursuant to Section 12-6-3350, a taxpayer having a contract with this State who subcontracts with a socially and economically disadvantaged small business is eligible for an income tax credit equal to four percent of the payments to that subcontractor for work pursuant to the contract. The subcontractor must be certified as a socially and economically disadvantaged small business as defined in Section 11-35-5010 and regulations pursuant to it. The credit is limited to a maximum of fifty thousand dollars annually. A taxpayer is eligible to claim the credit for ten consecutive taxable years beginning with the taxable year in which the first payment is made to the subcontractor that qualifies for the credit. After the above ten consecutive taxable years, the taxpayer is no longer eligible for the credit. A taxpayer claiming the credit shall maintain evidence of work performed for the contract by the subcontractor. The credit may be claimed on Form TC-2, "Minority Business Credit." A copy of the subcontractor's certificate from the Governor's Office of Small and Minority Business (OSMBA) is to be attached to the contractor's income tax return. Questions regarding the tax credit and how to file are to be referred to: SC Department of Revenue, Research and Review, Phone: (803) 898-5786, Fax: (803) 898-5888. Questions regarding subcontractor certification are to be referred to: Governor's Office of Small and Minority Business Assistance, Phone: (803) 734-0657, Fax: (803) 734-2498. [02-2A135-1]

TAXPAYER IDENTIFICATION NUMBER (JAN 2004)

(a) If Offeror is owned or controlled by a common parent as defined in paragraph (b) of this provision, Offeror shall submit with its Offer the name and TIN of common parent.

(b) Definitions: "Common parent," as used in this provision, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member. "Taxpayer Identification Number (TIN)," as used in this provision, means the number required by the Internal Revenue Service (IRS) to be used by the offeror in reporting income tax and other returns. The TIN may be either a Social Security Number or an Employer Identification Number.

(c) If Offeror does not have a TIN, Offeror shall indicate if either a TIN has been applied for or a TIN is not required. If a TIN is not required, indicate whether (i) Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States; (ii) Offeror is an agency or instrumentality of a state or local government; (iii) Offeror is an agency or instrumentality of a foreign government; or (iv) Offeror is an agency or instrumentality of the Federal Government. [02-2A140-1]

VENDOR REGISTRATION MANDATORY (JAN 2006)

You must have a state vendor number to be eligible to submit an offer. To obtain a state vendor number, visit www.procurement.sc.gov and select New Vendor Registration. (To determine if your business is already registered, go to "Vendor Search"). Upon registration, you will be assigned a state vendor number. Vendors must keep their vendor information current. If you are already registered, you can update your information by selecting Change Vendor Registration. (Please note that vendor registration does not substitute for any obligation to register with the S.C. Secretary of State or S.C. Department of Revenue. You can register with the agencies at <http://www.scbos.com/default.htm>) [02-2A145-1]

WITHDRAWAL OR CORRECTION OF OFFER (JAN 2004)

Offers may be withdrawn by written notice received at any time before the exact time set for opening. If the Solicitation authorizes facsimile offers, offers may be withdrawn via facsimile received at any time before the exact time set for opening. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for opening, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid. The withdrawal and correction of Offers is governed by S.C. Code Section 11-35-1520 and Regulation 19-445.2085. [02-2A150-1]

II. INSTRUCTIONS TO OFFERORS -- B. SPECIAL INSTRUCTIONS

CONFERENCE - PRE-BID/PROPOSAL (JAN 2006)

Pre-Bid/Proposal Conference Date and Time: **08/19/2010 10:00:00 EST**

Location of Pre-Bid/Proposal Conference: **B&CB Procurement Services Division ITMO 1201 Main Street, Suite 430
Columbia, SC 29201**

Due to the importance of all offerors having a clear understanding of the specifications and requirements of this solicitation, a conference of potential offerors will be held on the date specified on the cover page. Bring a copy of the solicitation with you. Any changes resulting from this conference will be noted in a written amendment to the solicitation. Your failure to attend will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the State. The State assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available at the conference. Nor does the State assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract. [02-2B025-1]

CONTENTS OF OFFER (RFP) – SOLUTIONS-BASED

The following outline may be helpful in preparing your proposal. Your offer should address each of the areas outlined below (as applicable) and provide the information requested. As your offer will be evaluated based on the information you provide, failure to provide a complete and comprehensive presentation of your solution could negatively effect our evaluation of your offer.

Offeror's Response should include:

- 1. Technical Proposal**
- 2. Qualifications**
- 3. Business Proposal**
- 4. Cost Proposal**

The Technical Proposal, Offeror's Qualifications, and Business Proposal should be bound together. The Cost Proposal should be bound separately.

1. Executive Overview: Your offer should include a summary of the proposed solution that reflects your understanding of both the state's needs and how your solution will satisfy those needs. Please explain your overall approach to the management of this effort, including a brief discussion of the total organization (structure and relationships among personnel and consultants/subcontractors).
2. Technical Overview: Your offer should include a summary of the proposed technical solution with enough detail to demonstrate an understanding of the current environment and scope of the project
3. Detailed explanation of proposed solution
 - 3.1 Management
 - 3.1.1 Implementation schedule
 - 3.1.1.1 from contract formation to installation and acceptance
 - 3.1.1.2 installation, testing, and pilot, as appropriate
 - 3.1.1.3 detailed staffing deployment schedule
 - 3.1.1.4 milestones and deliverables
 - 3.1.2 Project management practices, policies, and certifications
 - 3.1.3 Application development methodologies
 - 3.1.4 Subcontracting, outsourcing, offshore contribution (if any)
 - 3.1.5 Escalation policies, practices, and contacts

3.2 Technical. As appropriate, provide an explanation and/or information about the following, in detail:

3.2.1 Functional capabilities of the proposed solution, including all performance capabilities, specifications and response times.

3.2.2 Technical information about proposed solution, including technical specifications of any proposed equipment or services

3.2.3 Software, if any, including manufacturer, functional capabilities, warranties, support levels, and documentation (any applicable license agreements and documents reflecting offeror's authority to include such software).

3.2.4 Services included in the proposal and otherwise available

3.2.5 Environmental requirements for the proposed solution.

3.2.6 Software development plan, interfaces documentation, data synchronization, and replication plans, etc.

3.2.7 Technical and operational manuals, by reference.

3.3 Change Management. Who initiates change requests, what justifications and explanations are included, risks associated with change, approval process, etc.

3.4 Installation and support.

3.4.1 Installation -- provide detailed information on the installation requirements and schedule.

3.4.2 Training -- explain any proposed training solution. Include plans for training new employees beyond the initial training cycle, employee readiness evaluations, training feedback, student-instructor ratios, duration of training, etc. Include plans for updating and maintaining training plans, system documentation, operational documentation, etc. For the duration of the implementation or term of the contract as appropriate. Include any other training solutions that are available.

3.4.3 Support services including hardware and software maintenance include an explanation of any proposed support services including performance guarantees. Identify all proposed maintenance including a detailed explanation of response times. Include any forms or agreements.

3.4.4 Data conversion requirements should include who is responsible for developing any data conversion programs, what the acceptable level of conversion, how many records are to be converted, who is responsible for entering any records that do not convert properly, etc.

3.4.5 Service level agreements (SLA) with performance commitments. If appropriate, include industry standard response times and performance requirements for normal business processing and/or critical business processing as appropriate.

3.4.6 Disaster recovery plans should be included, as appropriate.

3.4.7 Back-up plans for proposed network, data, and systems outages and disruptions, if appropriate.

3.4.8 Warranties -- include all functional, performance, and quality of workmanship warranties. Describe acceptable warranty performance specifications and warranty performance reporting to include number of calls, number and type of repairs and changes, etc.

3.5 Intellectual property: explain the ownership rights to all proposed intellectual property.

3.6 Staffing

3.6.1 Contractor

3.6.1.1 Key staff, their resumes, and areas of responsibility on this project

3.6.1.2 Non-key staff, by number and areas of responsibility on this project

3.6.1.3 State the number of state employees necessary and what training and skill levels are anticipated?

3.6.2 Other -- are there any other staffing requirements?

3.7 Business proposals

3.7.1 Total cost of ownership -- provide anticipated cost of purchasing, owning, operating, maintaining, and supporting the proposed solution for the total potential term of the contract. Include a detailed accounting of the total cost of ownership.

3.7.2 Risk analysis -- identify the internal and external factors could significantly impact the probability of completing this project on time and within budget

3.7.3 Risk mitigation -- identify any actions that could be taken to mitigate the identified risks

3.7.4 Risk sharing -- identify any opportunities for mutually beneficial risk sharing

3.7.5 Performance incentives -- identify any opportunities for performance-based incentives

3.7.6 Financing options -- identify any alternative financing options available to the state

3.8 Offeror's Qualifications. Provide the information requested by the following provisions:

Qualifications -- Required Information --

Subcontractor Identification

3.8.1 Offeror's References

The Offeror's references should include, but are not limited to, the following:

- **References***
Provide at least 3 references to include:
 - Client name
 - Client address
 - Contact name
 - Telephone number
 - Email address
 - Technical contact name
 - Technical contact telephone number
 - Technical contact email address
 - Brief summary of the project
 - Letters of reference (if available)

*The State may or may not elect to contact references provided.

3.8.2 Subcontractor's References

The Subcontractor's References should include, but are not limited to, the following:

- Client name
- Client address
- Contact name
- Telephone number
- Email address
- Technical contact name
- Technical contact telephone number
- Technical contact email address
- Brief summary of the project
- Letters of reference (if available)

*The State may or may not elect to contact references provided.

[02-2B030-1]

CONTENTS OF OFFER (RFP) -- ITMO

The contents of your offer must be divided into two parts, the technical proposal, qualifications & business proposals. The cost proposal should be bound separately. Each part should be bound in a single volume.

CLARIFICATION (NOV 2007)

Pursuant to Section 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your offer or the requirements of the solicitation. Such communications may be conducted only with offerors who have submitted an offer which obviously conforms in all material aspects to the solicitation.

Clarification of an offer must be documented in writing and included with the offer. Clarifications may not be used to revise an offer or the solicitation. [Section 11-35-1520(8); R.19-445.2080] [02-2B055-1]

DISCUSSIONS and NEGOTIATIONS (NOV 2007)

Submit your best terms from a cost or price and from a technical standpoint. Your proposal may be evaluated and your

offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. If improper revisions are submitted, the State may elect to consider only your unrevised initial proposal. [11-35-1530(6); R.19-445.2095(1)] The State may also elect to conduct negotiations, beginning with the highest ranked Offeror, or seek best and final offers, as provided in Section 11-35-1530(8). If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal. [02-2B060-1]

ON-LINE BIDDING INSTRUCTIONS (NOV 2007)

(a) Mandatory Registration: **For on-line bidding, you must register before you can submit an offer! See instructions in clause entitled "VENDOR REGISTRATION MANDATORY".**

(b) Steps for On-Line Bidding:

#1 The link provided on the solicitation's Cover Page will take you to our web based on-line bidding system, where you will enter and/or upload your offer.

#2 Follow the general user instructions posted at www.procurement.sc.gov under the heading "Submitting Offers On-Line". [02-2B105-1]

OPENING PROPOSALS -- PRICES NOT DIVULGED (JAN 2006)

In competitive sealed proposals, prices will not be divulged at opening. [Section 11-35-1530 & R. 19-445.2095(c) (1)] [02-2B110-1]

PROTEST - CPO - ITMO ADDRESS (JUNE 2006)

Any protest must be addressed to the Chief Procurement Officer, Information Technology Management Office, and submitted in writing

(a) by email to protest-itmo@itmo.sc.gov ,

(b) by facsimile at 803-737-0102 , or

(c) by post or delivery to 1201 Main Street, Suite 430, Columbia, SC 29201. [02-2B120-1]

III. SCOPE OF WORK/SPECIFICATIONS

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.

CURRENT BUSINESS PROBLEM

The State of South Carolina currently is without the centralized means of tracking software licenses and their associated usage across all Public Procurement Unit's in an attempt to 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 Public Procurement Unit may have an internal system/process. Each Public Procurement Unit 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 priced and terms and conditions.

BUDGET

There is no estimated budget set aside for this procurement and there is no data available to provide the number of customers that may use the services requested by this solicitation.

SUBMITTAL OF PURCHASE ORDER

All orders shall be submitted to the vendor named on the purchase order within three (3) business days after receipt of purchase order from Public Procurement Unit (See Purchase Order Clause).

TECHNICAL SUPPORT -- INCLUDED (JAN 2006)

Upon request, contractor shall provide technical assistance or service. Such service shall be available within 2 hours following request. [03-3075-1]

Technical Support must be available 8 AM - 5 PM EST Monday - Friday. This includes help desk support.

SPECIFICATIONS

Offeror is to respond in the following format:

- Executive Overview
- Technical Overview
- Detailed Technical Explanation of Proposed Solution with specifications
- Any Available Value Added Options
- Offeror's Qualifications

Audit(s)

A. Performance Audits (Mandatory)

The State reserves the right, at its sole discretion to conduct periodic performance audits in all areas of services provided by the SAM throughout the term of this contract at the discretion of the State's Contract Administrator. The SAM will provide all requested documentation necessary for the performance audit, as requested by the State, within fifteen (15) calendar days of request.

B. Software Audits

Explain Offeror's role in a software audit to include but not limited to:

- Providing reports on demand
- Availability for questions and answers

Billing/Payment Requirements

For both Public Procurement Unit and Software Manufacturer billing and payment requirements see Section III Specifications for detailed explanation.

Contract Administrator

The SAM will assign a Contract Administrator as a contact person for contract management purposes. The State reserves the right to request a replacement of the Contract Administrator at anytime.

Customer Service

- Provide a detailed customer service plan

Disaster Recovery

Offeror to explain the following in detail:

- Disaster Recovery Plan
- Back-ups
- Hosted location
- System updates/upgrades

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.

Implementation

Offeror must provide a detailed Project Management plan with an associated timeline.

Inventory/Redeployment

Offeror to explain inventory/redeployment process of the following in detail:

- Redeployment process
 - License reassignment within a Public Procurement Unit
 - License reassignment within the State that may be between different Public Procurement Unit's
 - Provide tracking and refunds to original license holder as well as transferring the license information to the Software Manufacturer all while maintaining accurate records.
- Inventory Management

- Retail Software Sales
- Hardware installed software licenses (i.e. operating, imaged software) and aligning purchase orders to software license(s) purchased with the procuring Public Procurement Unit and associated Public Procurement Unit machine information
- Open Source software utilization
- Retail purchases not purchased through the license management tool

Maintenance/Warranty

Offeror to explain the following in detail:

- Tracking maintenance (i.e. CALs, renewals, etc.)
 - Identifying the type of license (perpetual, time limited, token ring, enterprise, server, named user, department, etc.)
- License expirations/renewals notifications
- Reporting maintenance and warranty to the Public Procurement Units(s)

Marketing

Explain in detail Offeror's marketing plan. How will SAM promote the contract?

Order Fulfillment

Offeror to explain the following in detail:

- Processing real-time orders/payments/invoices (see Business Proposal Section XIII for more details).
- Accepting payments from agencies for software and passing the payments through to the vendors
- Processing returns, exchanges and/or refunds.
- Volume purchases
- Provide access to the management tool/system
- Work with current contract software vendors to facilitate this solution

Other

Explain Offeror's ability to do the following:

- License Management for software purchased by Public Procurement Units
- Asset Management for software only
- Lifecycle management (i.e. purchased, deployed, available, expired, etc.)
- How to reduce, reuse, and/or recycle software licenses
- Reassignment and documentation of existing licenses within Departments within Public Procurement Unit or between multiple Public Procurement Unit departments
- Cancellation/Removal of old version software licenses renewed or not renewed
- Maintain a designated Contract Administrator (vacation/replacement plan)
- Detail any alternate approaches or solutions not covered in the Scope of Work

Reporting/Tracking

- The State would like the availability of real-time reporting on all Public Procurement Unit levels. Please explain in detail, Offerors real-time, web-based, reporting feature for end-users
- Are the reports customizable or canned
- How would system maintain accurate records in a hosted database
 - What information will be retained
 - Who will have access
- Provide a list of reports being offered, provide samples

- What type of reporting tool will be provided
- What types of customization will be available to the Public Procurement Units
- Describe what system triggers, protocols and/or reports the system generates
- Must provide monthly activity reports available online
- Explain how reconciliation of monthly reports will be handled

The Offeror must include a minimum of the following reporting fields:

- Product Name/brand
- Type of License
- Product Serial Number
- Product Version
- Enrollment Information
- Activation Information
- Product Maintenance (required, not required, expiration/renewal dates)
- Product Warranty Duration, track and display license expiration
- Public Procurement Unit and Contact: name, email and phone
- Public Procurement Unit budget code
- Number of Copies Purchased and what type (seat, enterprise, token, de facto etc.)
- Requirement for purchase (per seat, per CPU, enterprise, etc.)
- Retail or State Term Contract Purchase

Security

Offeror to explain the following in detail:

- Security process for data maintained by the system
- How Offeror protects against unauthorized data breaches
- System Confidentiality Layout
 - Software Vendor
 - Public Procurement Units
 - Breach of Security

Software Acquisition Manager (SAM)/Vendor Relations

Offeror to explain the following in detail:

Volume Discounts

- How Offeror intends to build relationships with software VARs, LARs and publishers to increase the State's ability to obtain volume discounts?
 - Value Added Reseller (VAR)
 - Large Account Reseller (LAR)
 - Enterprise Software Advisor (ESA)
 - Publisher Authorized Reseller
- How Offeror intends to track requests for software products to determine if more than one Public Procurement Unit is requesting the same software product in order to obtain volume discounts?
- How Offeror will inform Public Procurement Units of possible volume discount savings?
- How Offeror will track software maintenance whether initial or renewal, to notify Public Procurement Units of possible volume discounts for maintenance?

Support

Offeror to explain the following in detail:

- Provision for technical and sales support

- Escalation process for fixes

Training Requirements

Offeror to explain the following in detail:

- Offeror's training process for vendor users and Public Procurement Unit users.
- Online availability of tutorials

Public Procurement Unit Requirements

Provide a list of suggested requirements that Public Procurement Units should be aware of for ease of use of the contract.

Value Added Option(s)

Please explain in detail

- Any value added options that may or may not be used by Public Procurement Units. For examples, inventory of existing software licenses, software audits
- How will system differentiate between tracking of data from SAM start date and existing data obtained through the Value Added option(s)?

Web-site Requirement

Offeror to explain the following in detail:

- Browser requirements of your web-enabled system
- Alternate system access methods that will be used if Web service is down.
- Website user limitations
- Address error and data recovery due to hardware, software, and communications problems
- The standard workflow capabilities of your system and how Public Procurement Unit's process requirements can be embedded in the workflow.

IV. INFORMATION FOR OFFERORS TO SUBMIT

INFORMATION FOR OFFERORS TO SUBMIT -- GENERAL (JAN 2006)

Offeror shall submit a signed Cover Page and Page 2. Offeror should submit all other information and documents requested in this part and in parts II.B. Special Instructions; III. Scope of Work; V. Qualifications; VIII. Bidding Schedule/Price Proposal; and any appropriate attachments addressed in section IX. Attachments to Solicitations. [04-4010-1]

MINORITY PARTICIPATION (JAN 2006)

Is the bidder a South Carolina Certified Minority Business? Yes No

Is the bidder a Minority Business certified by another governmental entity? Yes No

If so, please list the certifying governmental entity: _____

Will any of the work under this contract be performed by a SC certified Minority Business as a subcontractor? Yes No

If so, what percentage of the total value of the contract will be performed by a SC certified Minority Business as a subcontractor? _____

Will any of the work under this contract be performed by a minority business certified by another governmental entity as a subcontractor? Yes No

If so, what percentage of the total value of the contract will be performed by a minority business certified by another governmental entity as a subcontractor? _____

If a certified Minority Business is participating in this contract, please indicate all categories for which the Business is certified:

- Traditional minority
- Traditional minority, but female
- Women (Caucasian females)
- Hispanic minorities
- DOT referral (Traditional minority)
- DOT referral (Caucasian female)
- Temporary certification
- SBA 8 (a) certification referral
- Other minorities (Native American, Asian, etc.)

(If more than one minority contractor will be utilized in the performance of this contract, please provide the information above for each minority business.)

For a list of certified minority firms, please consult the Minority Business Directory, which is available at the following URL:<http://www.govoepp.state.sc.us/osmba/>
[04-4015-1]

OFFSHORE CONTRACTING (JAN 2006)

Work that will be performed offshore by the Offeror and/or its subcontractors must be identified in the Offeror's response. For the purpose of this solicitation, offshore is defined as outside the 50 States and US territories. Offeror is to include an explanation for the following:

- (a) What type of work is being contracted offshore? _____
- (b) What percentage (%) of the total work is being contracted offshore? _____
- (c) What percentage (%) of the total value of the contract is being contracted offshore?

(d) Provide a Service Level Agreement (SLA) demonstrating the arrangement between the off-shore contactor and the Offeror. Attach Service Level Agreement to this document or paste here. Data provided by the Offeror in regards to this clause is for information only and will not be used in the evaluation and determination of an award.
[04-4020-1]

SUBMITTING REDACTED OFFERS (FEB 2007)

You are required to mark the original copy of your offer to identify any information that is exempt from public disclosure. You must do so in accordance with the clause entitled "Submitting Confidential Information." In addition, you must also submit one complete copy of your offer from which you have removed any information that you marked as exempt, i.e., a redacted copy. The information redacted should mirror in ever detail the information marked as exempt from public disclosure. The redacted copy should (i) reflect the same pagination as the original, (ii) show the empty space from which information was redacted, and (iii) be submitted on magnetic media. (See clause entitled "Magnetic Media Required Format.") Except for the redacted information, the CD must be identical to the original hard copy. Portable Document Format (.pdf) is preferred. [04-4030-1]

V. QUALIFICATIONS

QUALIFICATION OF OFFEROR (JAN 2006)

To be eligible for award of a contract, a prospective contractor must be responsible. In evaluating an Offeror's responsibility, the State Standards of Responsibility [R.19-445.2125] and information from any other source may be considered. An Offeror must, upon request of the State, furnish satisfactory evidence of its ability to meet all contractual requirements. Unreasonable failure to supply information promptly in connection with a responsibility inquiry may be grounds for determining that you are ineligible to receive an award. S.C. Code Section 11-35-1810. [05-5005-1]

QUALIFICATIONS -- REQUIRED INFORMATION

In order to evaluate your responsibility, Offeror shall submit the following information or documentation for the Offeror and any subcontractor, if the value of subcontractor's portion of the work exceeds 10% of your price (if in doubt, provide the information):

- (a) Include a brief history of the Offeror's experience in providing work of similar size and scope.
- (b) Your most current financial statement, financial statements for your last two fiscal years, and information reflecting your current financial position. If you have audited financial statements meeting these requirements, you must provide those statements. [Reference Statement of Concepts No. 5 (FASB, December, 1984)]
- (c) A detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which you have performed and the general history and experience of your organization.
- (d) A list of every business for which Offeror has performed, at any time during the past three year(s), services substantially similar to those sought with this solicitation. Err on the side of inclusion; by submitting an offer, Offeror represents that the list is complete.
- (e) List of failed projects, suspensions, debarments, and significant litigation.

Failure to provide the above information or documentation with your response will not render your offer non-responsive. However, it may result in a finding that your offer is not responsible. It may also result in your offer being scored accordingly, especially if the information or documentation is being used as an evaluation factor.

SUBCONTRACTOR -- IDENTIFICATION (JAN 2006)

If you intend to subcontract with another business for any portion of the work and that portion exceeds 10% of your price, your offer must identify that business and the portion of work which they are to perform. Identify potential subcontractors by providing the business name, address, phone, taxpayer identification number, and point of contact. In determining your responsibility, the state may evaluate your proposed subcontractors. [05-5030-1]

VI. AWARD CRITERIA

AWARD CRITERIA -- PROPOSALS (JAN 2006)

Award will be made to the highest ranked, responsive and responsible Offeror whose offer is determined to be the most advantageous to the State. [06-6030-1]

AWARD TO ONE OFFEROR (JAN 2006)

Award will be made to one Offeror. [06-6040-1]

EVALUATION FACTORS -- PROPOSALS (JAN 2006)

Offers will be evaluated using only the factors stated below. Evaluation factors are stated in the relative order of importance, with the first factor being the most important. Once evaluation is complete, all responsive Offerors will be ranked from most advantageous to least advantageous.

1. Technical Proposal (40 points) - The degree, completeness and suitability of the Offeror's proposed technical solutions to meet or exceed the requirements.
2. Business Proposal (25 points) - The impact of the proposed solution on the business and financial operations of the State. Business Proposal should describe in detail all benefits to the State. The value of the proposed solution to meet or exceed the needs of this RFP with specific respect to, Risk Analysis, Risk Mitigation, Risk Sharing.
3. Qualifications (20 points) - The Offeror's financial responsibility and financial strength must reflect sound financial stability; the Offeror's experience and references should provide evidence of its depth and breadth of experience, and evidence of successful past projects.
4. Cost Proposal (15 points) – The percentage fee associated with all invoices.

[06-6065-1]

VII. TERMS AND CONDITIONS -- A. GENERAL

ASSIGNMENT (JAN 2006)

No contract or its provisions may be assigned, sublet, or transferred without the written consent of the Procurement Officer. [07-7A004-1]

BANKRUPTCY (JAN 2006)

(a) Notice. In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to the Using Governmental Unit. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to the bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of all State contracts against which final payment has not been made. This obligation remains in effect until final payment under this Contract. (b) Termination. This contract is voidable and subject to immediate termination by the State upon the contractor's insolvency, including the filing of proceedings in bankruptcy. [07-7A005-1]

CHOICE-OF-LAW (JAN 2006)

The Agreement, any dispute, claim, or controversy relating to the Agreement, and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation. [07-7A010-1]

CONTRACT DOCUMENTS and ORDER OF PRECEDENCE (JAN 2006)

(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]

DISCOUNT FOR PROMPT PAYMENT (JAN 2006)

(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a discount for prompt payment in conjunction with the offer, offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the Contractor has not placed a date on the invoice, the due date shall be calculated from the date the designated billing office receives a proper invoice, provided the state annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date. When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day
[07-7A020-1]

DISPUTES (JAN 2006)

(1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United State's Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation. (2) Service of Process. Contractor consents that any papers, notices, or process necessary or proper for the initiation or continuation of any disputes, claims, or controversies relating to the Agreement; for any court action in connection therewith; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor at the address provided as the Notice Address on Page Two or by personal service or by any other manner that is permitted by law, in or outside South Carolina. Notice by certified mail is deemed duly given upon deposit in the United States mail. [07-7A025-1]

EQUAL OPPORTUNITY (JAN 2006)

Contractor is referred to and shall comply with all applicable provisions, if any, of Title 41, Part 60 of the Code of Federal

Regulations, including but not limited to Sections 60-1.4, 60-4.2, 60-4.3, 60-250.5(a), and 60-741.5(a), which are hereby incorporated by reference. [07-7A030-1]

FALSE CLAIMS (JAN 2006)

According to the S.C. Code of Laws Section 16-13-240, "a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty" of a crime. [07-7A035-1]

FIXED PRICING REQUIRED (JAN 2006)

Any pricing provided by contractor shall include all costs for performing the work associated with that price. Except as otherwise provided in this solicitation, contractor's price shall be fixed for the duration of this contract, including option terms. This clause does not prohibit contractor from offering lower pricing after award. [07-7A040-1]

NON-INDEMNIFICATION (JAN 2006)

Any term or condition is void to the extent it requires the State to indemnify anyone. [07-7A045-1]

NOTICE (JAN 2006)

(A) After award, any notices shall be in writing and shall be deemed duly given (1) upon actual delivery, if delivery is by hand, (2) upon receipt by the transmitting party of automated confirmation or answer back from the recipient's device if delivery is by telex, telegram, facsimile, or electronic mail, or (3) upon deposit into the United States mail, if postage is prepaid, a return receipt is requested, and either registered or certified mail is used. (B) Notice to contractor shall be to the address identified as the Notice Address on Page Two. Notice to the state shall be to the Procurement Officer's address on the Cover Page. Either party may designate a different address for notice by giving notice in accordance with this paragraph. [07-7A050-1]

PAYMENT (JAN 2006)

(a) The Using Governmental Unit shall pay the Contractor, after the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, including the purchase order, payment shall not be made on partial deliveries accepted by the Government. (b) Unless the purchase order specifies another method of payment, payment will be made by check. (c) Payment and interest shall be made in accordance with S.C. Code Section 11-35-45. Contractor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable. [07-7A055-1]

PUBLICITY (JAN 2006)

Contractor shall not publish any comments or quotes by State employees, or include the State in either news releases or a published list of customers, without the prior written approval of the Procurement Officer. [07-7A060-1]

PURCHASE ORDERS (JAN 2006)

Contractor shall not perform any work prior to the receipt of a purchase order from the using governmental unit. The using governmental unit shall order any supplies or services to be furnished under this contract by issuing a purchase order. Purchase orders may be used to elect any options available under this contract, e.g., quantity, item, delivery date, payment method, but are subject to all terms and conditions of this contract. Purchase orders may be electronic. No particular form is required. An order placed pursuant to the purchasing card provision qualifies as a purchase order. [07-7A065-1]

SETOFF (JAN 2006)

The state shall have all of its common law, equitable, and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the state with regard to this contract, any other contract with any state department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the state for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. [07-7A070-1]

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. [07-7A075-1]

TAXES (JAN 2006)

Any tax the contractor may be required to collect or pay upon the sale, use or delivery of the products shall be paid by the State, and such sums shall be due and payable to the contractor upon acceptance. Any personal property taxes levied after delivery shall be paid by the State. It shall be solely the State's obligation, after payment to contractor, to challenge the applicability of any tax by negotiation with, or action against, the taxing authority. Contractor agrees to refund any tax collected, which is subsequently determined not to be proper and for which a refund has been paid to contractor by the taxing authority. In the event that the contractor fails to pay, or delays in paying, to any taxing authorities, sums paid by the State to contractor, contractor shall be liable to the State for any loss (such as the assessment of additional interest) caused by virtue of this failure or delay. Taxes based on Contractor's net income or assets shall be the sole responsibility of the contractor. [07-7A080-1]

TERMINATION DUE TO UNAVAILABILITY OF FUNDS (JAN 2006)

Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled. In the event of a cancellation pursuant to this paragraph, contractor will be reimbursed the resulting unamortized, reasonably incurred, nonrecurring costs. Contractor will not be reimbursed any costs amortized beyond the initial contract term. [07-7A085-1]

THIRD PARTY BENEFICIARY (JAN 2006)

This Contract is made solely and specifically among and for the benefit of the parties hereto, and their respective successors and assigns, and no other person will have any rights, interest, or claims hereunder or be entitled to any benefits under or on account of this Contract as a third party beneficiary or otherwise. [07-7A090-1]

WAIVER (JAN 2006)

The State does not waive any prior or subsequent breach of the terms of the Contract by making payments on the Contract, by failing to terminate the Contract for lack of performance, or by failing to strictly or promptly insist upon any term of the Contract. Only the Procurement Officer has actual authority to waive any of the State's rights under this Contract. Any waiver must be in writing. [07-7A095-1]

VII. TERMS AND CONDITIONS -- B. SPECIAL

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.

The Administrative Fee will be remitted in the form of a check to:

Information Technology Management Office
Attn: Reports Manager
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Each remittance will include the period covered and the contract number. The monthly administrative fee shall be submitted by the last business day of the month for the previous month's actual sales. (For example, the administrative fee for sales made in July is due by the end of August.)

CHANGES (JAN 2006)

(1) Contract Modification. By a written order, at any time, and without notice to any surety, the Procurement Officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

- (a) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the [State] in accordance therewith;
- (b) method of shipment or packing;
- (c) place of delivery;
- (d) description of services to be performed;
- (e) time of performance (i.e., hours of the day, days of the week, etc.); or,
- (f) place of performance of the services. Subparagraphs (a) to (c) apply only if supplies are furnished under this contract. Subparagraphs (d) to (f) apply only if services are performed under this contract.

(2) Adjustments of Price or Time for Performance. If any such change increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made in the contract price, the delivery schedule, or both, and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract. Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the State promptly and duly make such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) Time Period for Claim. Within 30 days after receipt of a written contract modification under Paragraph (1) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the State is prejudiced by the delay in notification.

(4) Claim Barred After Final Payment. No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

[07-7B025-1]

COMPLIANCE WITH LAWS (JAN 2006)

During the term of the contract, contractor shall comply with all applicable provisions of laws, codes, ordinances, rules, regulations, and tariffs. [07-7B035-1]

CONTRACT LIMITATIONS (JAN 2006)

No sales may be made pursuant to this contract for any item or service that is not expressly listed. No sales may be made pursuant to this contract after expiration of this contract. Violation of this provision may result in termination of this contract and may subject contractor to suspension or debarment. [07-7B045-1]

CONTRACT REPORTING REQUIREMENTS - ITMO (MAY 2009)

The CONTRACTOR will be required to process monthly usage reports via email to the ITMO Reports Manager for all term contracts.

A Standardized Contract Reporting Form must be used to report. All "sales" must be reported. If "No Sales" are achieved for a specific month, then "Zero" (0) must be reported for that specific month. Failure to report your monthly activity is grounds for cancellation of your contract. If personal assistance is required, please contact the reports manager at 803-737-0283 or click reports assistance.

CONTRACTOR PERSONNEL (JAN 2006)

The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. [07-7B060-1]

CONTRACTOR'S OBLIGATION -- GENERAL (JAN 2006)

The contractor shall provide and pay for all materials, tools, equipment, labor and professional and non-professional services, and shall perform all other acts and supply all other things necessary, to fully and properly perform and complete the work. The contractor must act as the prime contractor and assume full responsibility for any subcontractor's performance. The contractor will be considered the sole point of contact with regard to all situations, including payment of all charges and the meeting of all other requirements. [07-7B065-1]

DEFAULT (JAN 2006)

(a) (1) The State may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to:

- (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
- (ii) Make progress, so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or
- (iii) Perform any of the other material provisions of this contract (but see paragraph (a)(2) of this clause).

(2) The State's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Procurement Officer) after receipt of the notice from the Procurement Officer specifying the failure.

(b) If the State terminates this contract in whole or in part, it may acquire, under the terms and in the manner, the Procurement Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the State for any excess costs for those supplies or services. However, the Contractor shall continue the work not

terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the State in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the State may require the Contractor to transfer title and deliver to the State, as directed by the Procurement Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Procurement Officer, the Contractor shall also protect and preserve property in its possession in which the State has an interest.

(f) The State shall pay contract price for completed supplies delivered and accepted. The Contractor and Procurement Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property; if the parties fail to agree, the Procurement Officer shall set an amount subject to the Contractor's rights under the Disputes clause. Failure to agree will be a dispute under the Disputes clause. The State may withhold from these amounts any sum the Procurement Officer determines to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the termination had been issued for the convenience of the State. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the State, the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the contractor's rights under the Disputes clause.

(h) The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or under this contract.

[07-7B075-1]

ESTIMATED QUANTITY -- UNKNOWN (JAN 2006)

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]

ILLEGAL IMMIGRATION (NOV. 2008)

(An overview is available at www.procurement.sc.gov) By signing your offer, you certify that you will comply with the applicable requirements of Title 8, Chapter 14 of the South Carolina Code of Laws and agree to provide to the State upon request any documentation required to establish either: (a) that Title 8, Chapter 14 is inapplicable to you and your subcontractors or sub-subcontractors; or (b) that you and your subcontractors or sub-subcontractors are in compliance with Title 8, Chapter 14. Pursuant to Section 8-14-60, "A person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony, and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both." You agree to include in any contracts with your subcontractors language requiring your subcontractors to (a) comply with the applicable requirements of Title 8, Chapter 14, and (b) include in their contracts with the sub-subcontractors language requiring the sub-

subcontractors to comply with the applicable requirements of Title 8, Chapter 14. [07-7B097-1]

LICENSES AND PERMITS (JAN 2006)

During the term of the contract, the Contractor shall be responsible for obtaining, and maintaining in good standing, all licenses (including professional licenses, if any), permits, inspections and related fees for each or any such licenses, permits and /or inspections required by the State, county, city or other government entity or unit to accomplish the work specified in this solicitation and the contract. [07-7B115-1]

OWNERSHIP OF DATA & MATERIALS (JAN 2006)

All data, material and documentation either prepared for the state pursuant to this contract shall belong exclusively to the State.

PRICE ADJUSTMENTS (JAN 2006)

(1) Method of Adjustment. Any adjustment in the contract price made pursuant to a clause in this contract shall be consistent with this Contract and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the Contractor (including profit, if otherwise allowed):

- (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (b) by unit prices specified in the Contract or subsequently agreed upon;
- (c) by the costs attributable to the event or situation covered by the relevant clause, including profit if otherwise allowed, all as specified in the Contract; or subsequently agreed upon;
- (d) in such other manner as the parties may mutually agree; or,
- (e) in the absence of agreement by the parties, through a unilateral initial written determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, including profit if otherwise allowed, all as computed by the Procurement Officer in accordance with generally accepted accounting principles, subject to the provisions of Title 11, Chapter 35, Article 17 of the S.C. Code of Laws.

(2) Submission of Price or Cost Data. Upon request of the Procurement Officer, the contractor shall provide reasonably available factual information to substantiate that the price or cost offered, for any price adjustments is reasonable, consistent with the provisions of Section 11-35-1830.

[07-7B160-1]

PRICING DATA -- AUDIT -- INSPECTION (JAN 2006)

[Clause Included Pursuant to Section 11-35-1830, - 2210, & -2220] (a) Cost or Pricing Data. Upon Procurement Officer's request, you shall submit cost or pricing data, as defined by 48 C.F.R. Section 2.101 (2004), prior to either (1) any award to contractor pursuant to 11-35-1530 or 11-35-1560, if the total contract price exceeds \$500,000, or (2) execution of a change order or contract modification with contractor which exceeds \$100,000. Your price, including profit or fee, shall be adjusted to exclude any significant sums by which the state finds that such price was increased because you furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between parties. (b) Records Retention. You shall maintain your records for three years from the date of final payment, or longer if requested by the chief Procurement Officer. The state may audit your records at reasonable times and places. As used in this subparagraph (b), the term "records" means any books or records that relate to cost or pricing data submitted pursuant to this clause. In addition to the obligation stated in this subparagraph (b), you shall retain all records and allow any audits provided for by 11-35-2220(2). (c) Inspection. At reasonable times, the state may inspect any part of your place of business which is related to performance of the work. (d) Instructions Certification. When you submit data pursuant to subparagraph (a), you shall (1) do so in accordance with the instructions appearing in Table 15-2 of 48 C.F.R. Section 15.408 (2004) (adapted as necessary for the state context), and (2) submit a Certificate of Current Cost or Pricing Data, as prescribed by 48 CFR Section 15.406-2(a) (adapted as necessary for the state context). (e) Subcontracts. You shall include the above text of this clause in all of your subcontracts. (f) Nothing in this clause limits any other rights of the state.

[07-7B185-1]

PRIVACY -- WEB SERVICES (JAN 2006)

You agree that any information acquired by you about individuals or businesses that is available to you as a result of your performance of this contract shall not be retained beyond the end of the term of the contract without the express written consent of the government. Such information shall never be sold, traded, or released to another entity, including affiliates, and shall not be used for any purpose other than performing this contract. Upon request, contractor shall provide written confirmation of compliance with this clause. [07-7B195-1]

RELATIONSHIP OF THE PARTIES (JAN 2006)

Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party. [07-7B205-1]

RELATIONSHIP OF USING GOVERNMENTAL UNITS (JAN 2006)

Each Using Governmental Unit's obligations and liabilities are independent of every other Using Governmental Unit's obligations and liabilities. No Using Governmental Unit shall be responsible for any other Using Governmental Unit's act or failure to act. [07-7B210-1]

SHIPPING / RISK OF LOSS (JAN 2006): F.O.B. Destination.

Destination is the shipping dock of the Using Governmental Units' designated receiving site, or other location, as specified herein. (see Delivery clause)

STATEWIDE TERM CONTRACT (JAN 2006)

With this solicitation, the state seeks to establish a term contract (as defined in Section 11-35-310(35)) available for use by all South Carolina public procurement units (as defined in Section 11-35-4610(5)). Use by state governmental bodies (as defined in Section 11-35-310(18)), which includes most state agencies, is mandatory except under limited circumstances, as provided in Section 11-35-310(35). See clause entitled "Acceptance of Offers 10% Below Price" in Part VII.B. of this solicitation. Use by local public procurement units is optional. Section 11-35-4610 defines local public procurement units to include any political subdivision, or unit thereof, which expends public funds. Section 11-35-310(23) defines the term political subdivision as all counties, municipalities, school districts, public service or special purpose districts. 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 subcontract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer. [07-7B225-1]

TERM OF CONTRACT -- EFFECTIVE DATE / INITIAL CONTRACT PERIOD (JAN 2006)

The effective date of this contract is the first day of the Maximum Contract Period as specified on the final statement of award. The initial term of this agreement is 1 year, 0 months, 0 days from the effective date. Regardless, this contract expires no later than the last date stated on the final statement of award. [07-7B240-1]

TERM OF CONTRACT -- OPTION TO RENEW (JAN 2006)

At the end of the initial term, and at the end of each renewal term, this contract shall automatically renew for a period of 1 year(s), 0 month(s), and 0 day(s), unless contractor receives notice that the state elects not to renew the contract at least thirty (30) days prior to the date of renewal. Regardless, this contract expires no later than the last date stated on the final statement of award. [07-7B245-1]

TERMINATION FOR CONVENIENCE -- INDEFINITE DELIVERY / INDEFINITE QUANTITY CONTRACTS (JAN 2006)

Unless the termination so provides, a termination for convenience shall not operate to terminate any purchase orders issued

prior to the effective date of termination. [07-7B255-1]

TERMINATION FOR CONVENIENCE (JAN 2006)

(1) Termination. The Procurement Officer may terminate this contract in whole or in part, for the convenience of the State. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(2) Contractor's Obligations. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the State. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(3) Right to Supplies. The Procurement Officer may require the contractor to transfer title and deliver to the State in the manner and to the extent directed by the Procurement Officer: (a) any completed supplies; and (b) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract. The contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the contractor in which the State has an interest. If the Procurement Officer does not exercise this right, the contractor shall use best efforts to sell such supplies and manufacturing materials in accordance with the standards of Uniform Commercial Code Section 2-706. Utilization of this Section in no way implies that the State has breached the contract by exercise of the Termination for Convenience Clause.

(4) Compensation. (a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data required by Section 11-35-1830 bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Procurement Officer and the contractor may agree to a settlement and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State, the proceeds of any sales of supplies and manufacturing materials under Paragraph (3) of this clause, and the contract price of the work not terminated;

(c) Absent complete agreement under Subparagraph (b) of this Paragraph, the Procurement Officer shall pay the contractor the following amounts, provided payments agreed to under Subparagraph (b) shall not duplicate payments under this Subparagraph:

(i) contract prices for supplies or services accepted under the contract;

(ii) costs reasonably incurred in performing the terminated portion of the work less amounts paid or to be paid for accepted supplies or services;

(iii) reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c)(ii) of this paragraph;

(iv) any other reasonable costs that have resulted from the termination. The total sum to be paid the contractor under this Subparagraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Subparagraph (b) of this Paragraph, and the contract price of work not terminated.

(d) Contractor must demonstrate any costs claimed, agreed to, or established under Subparagraphs (b) and (c) of this Paragraph using its standard record keeping system, provided such system is consistent with any applicable Generally Accepted Accounting Principles.

(5) Contractor's failure to include an appropriate termination for convenience clause in any subcontract shall not (i) affect the state's right to require the termination of a subcontract, or (ii) increase the obligation of the state beyond what it would have been if the subcontract had contained an appropriate clause.

[07-7B265-1]

VIII. BIDDING SCHEDULE / PRICE-BUSINESS PROPOSAL

BIDDING SCHEDULE (NOV 2007)

Item	Quantity	Unit of Measure	Unit Price (%) (*see note below)
1	1	Activity unit	
Product Catg.: 20888 - Software Monitoring			
Item Description: Software Acquisition Manager			

***IMPORTANT NOTICE:** Amount entered in the unit price will be for one transaction and the amount will be considered a percentage (%) not a whole number. For example, see Self Funded Business Model below.

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.

BUSINESS PROPOSAL

Offerors are to submit a Business Proposal with the Technical Proposal and qualifications. The Business Proposal may include the following considerations:

- (a) Total Cost of Ownership -- What is the anticipated cost of purchasing, owning, leasing, operating, maintaining, and/or supporting the proposed solution for the total potential term of the contract? Provide a detailed accounting.
- (b) Risk Analysis -- What internal or external factors could significantly impact the probability of completing this project on time and within budget?
- (c) Risk Mitigation -- What actions can be taken to mitigate the identified risks?
- (d) Risk Sharing -- Are there opportunities for mutually beneficial risk sharing?
- (e) Performance Incentives -- Are there opportunities for performance-based incentives?
- (f) Financing Options -- Are there alternative financing options available to the State?
- (g) Implementation Plan
- (h) Staffing Implementation Plan
- (i) Optional Solutions - alternate solutions for the same functional offering along with the cost delta and an explanation of the sections of the proposal the alternate solution replaces.

IX. ATTACHMENTS TO SOLICITATION

LIST OF ATTACHMENTS

ATTACHMENTS LIST [09-9002-1]

The following documents are attached to this solicitation:

- A. OFFEROR INFORMATION
- B. NONRESIDENT TAXPAYER REGISTRATION AFFIDAVIT INCOME TAX WITHHOLDING
- C. STATE AGENCY FTE COUNT COMPARISON

ATTACHMENT A

OFFEROR INFORMATION

The following information will be placed on the State’s website if Offeror is awarded a contract with the State of South Carolina. Please type the information requested on this form.

Software Acquisition
Manager:

Name of company

Mailing address (purchase order mailing address)

City, State Zip Code

Place, send or fax orders to:

Inside Sales Representative

Phone # with Ext. + toll free # (if available)

Fax #

Email Address

On-Site Sales Support person

Phone # with Ext. + toll free # (if available)

Fax #

Email Address

Technical Support Person

Phone # with ext + toll free # (if available)

Fax #

Email Address

State of SC Vendor # (if available)

F.E.I.N.

ATTACHMENT B

NONRESIDENT TAXPAYER REGISTRATION AFFIDAVIT INCOME TAX WITHHOLDING

IMPORTANT TAX NOTICE - NONRESIDENTS ONLY

Withholding Requirements for Payments to Nonresidents: Section 12-8-550 of the South Carolina Code of Laws requires persons hiring or contracting with a nonresident conducting a business or performing personal services of a temporary nature within South Carolina to withhold 2% of each payment made to the nonresident. The withholding requirement does not apply to (1) payments on purchase orders for tangible personal property when the payments are not accompanied by services to be performed in South Carolina, (2) nonresidents who are not conducting business in South Carolina, (3) nonresidents for contracts that do not exceed \$10,000 in a calendar year, or (4) payments to a nonresident who (a) registers with either the S.C. Department of Revenue or the S.C. Secretary of State and (b) submits a Nonresident Taxpayer Registration Affidavit - Income Tax Withholding, Form I-312 to the person letting the contract.

The withholding requirement applies to every governmental entity that uses a contract ("Using Entity"). Nonresidents should submit a separate copy of the Nonresident Taxpayer Registration Affidavit - Income Tax Withholding, Form I-312 to every Using Entity that makes payment to the nonresident pursuant to this solicitation. Once submitted, an affidavit is valid for all contracts between the nonresident and the Using Entity, unless the Using Entity receives notice from the Department of Revenue that the exemption from withholding has been revoked.

Section 12-8-540 requires persons making payment to a nonresident taxpayer of rentals or royalties at a rate of \$1,200.00 or more a year for the use of or for the privilege of using property in South Carolina to withhold 7% of the total of each payment made to a nonresident taxpayer who is not a corporation and 5% if the payment is made to a corporation. Contact the Department of Revenue for any applicable exceptions.

For information about other withholding requirements (e.g., employee withholding), contact the Withholding Section at the South Carolina Department of Revenue at 803-898-5383 or visit the Department's website at: www.sctax.org

This notice is for informational purposes only. This agency does not administer and has no authority over tax issues. All registration questions should be directed to the License and Registration Section at 803-898-5872 or to the South Carolina Department of Revenue, Registration Unit, Columbia, S.C. 29214-0140. All withholding questions should be directed to the Withholding Section at 803-896-1420.

PLEASE SEE THE "NONRESIDENT TAXPAYER REGISTRATION AFFIDAVIT INCOME TAX WITHHOLDING" FORM (FORM NUMBER I-312) LOCATED AT:

<http://www.sctax.org/Forms+and+Instructions/withholding/default.htm>

[09-9005-1]

ATTACHMENT C – State Agency FTE Count (may not include all agencies)

State Agency Name	# of Employees	# of Employees	Diff
	2007	2010	Current
Governor - Executive Control	40	25	-15
Governor - Law Enforcement (SLED)	647	474	-173
Governor - Exec Policy & Program	290	204	-94
Governor - Mansion & Grounds	41	6	-35
Lieutenant Governor's Office	45	42	-3
Secretary of State's Office	32	25	-7
Comptroller General's Office	62	44	-18
Treasurer's Office	63	60	-3
Retirement System Investment Comm	N/A	18	+18
Attorney General's Office	154	162	+8
Indigent Defense Commission	23	64	+41
Adjutant General's Office	373	121	-252
Election Commission	17	14	-3
Budget & Control Board	1,240	1,031	-209
Budget & Control Board - Auditors	46	30	-16
Higher Education Commission	63	19	-44
Higher Education Tuition Grants	4	4	0
Citadel, The	635	632	-3
Clemson University	4,319	3,850	-1,069
Charleston, College of	1,418	1,323	-95
Coastal Carolina University	1,152	947	-205
Francis Marion University	488	484	-4
Lander University	451	339	-112
South Carolina State University	741	652	-89
University of South Carolina	8,832	5,868	-2,964

Winthrop University	1,197	820	-377
Medical University of SC	3,455	2,970	-485
Technical & Comprehensive Education	197	70	-127
Education, Dept of	1,122	924	-198
Governor's School of Arts and Humanities	149	72	-77
Governor's School of Science and Math	48	33	-15
Educational Television Commission	273	187	-86
Trident Technical College	630	661	+31
Northeastern Technical College	91	82	-9
Florence-Darlington Technical College	243	229	-14
Greenville Technical College	687	674	-13
Horry-Georgetown Technical College	300	279	-21
Midlands Technical College	598	562	-36
Orangeburg-Calhoun Technical College	194	172	-22
Piedmont Technical College	274	273	-1
Spartanburg Technical College	287	284	-3
Central Carolina Technical College	183	197	+14
Tri-County Technical College	288	316	+28
York Technical College	298	287	-11
Aiken Technical College	143	136	-7
Denmark Technical College	121	110	-11
Tech College of the Low Country	144	146	+2
Williamsburg Technical College	66	65	-1
Wil Lou Gray Opportunity School	74	52	-22
Vocational Rehabilitation, Dept of	1,308	1,125	-183
Deaf and Blind School	595	340	-255
Archives & History, Dept of	71	50	-21
Library, State	49	36	-13

Arts Commission	36	24	-12
Museum Commission	86	31	-55
Health & Human Services, Dept of	1,282	1,047	-235
Health & Environmental Control, Dept of	4,760	3,784	-976
Mental Health, Dept of	5,316	4,207	-1109
Disabilities & Special Needs, Dept of	140	121	-19
Alcohol & Drug Abuse Services, Dept of	37	25	-12
DDSN - Midlands Center	532	442	-90
DDSN - Whitten Center	719	602	-117
DDSN - Coastal Center	476	384	-92
DDSN - Pee Dee Center	547	455	-92
Public Safety, Dept of	1,561	1,385	-176
Social Services, Dept of	3,936	3,503	-433
John De La Howe School	105	73	-32
Blind Commission	128	105	-23
Housing Finance & Development Authority	123	121	-2
Human Affairs Commission	40	36	-4
Minority Affairs Commission	8	8	0
Corrections, Dept of	5,891	5,659	-232
Probation, Parole & Pardon Svcs, Dept of	767	641	-126
Juvenile Justice, Dept of	1,621	1,386	-235
Law Enforcement Training Council	N/A	108	+108
Forestry Commission	399	354	-45
Agriculture, Dept of	213	128	-85
Natural Resources, Dept of	941	647	-294
Sea Grant Consortium	24	12	-12
Parks, Recreation & Tourism, Dept of	845	404	-441
Commerce, Dept of	153	104	-49

Patriot's Point Development Authority	112	67	-45
Conservation Bank Board	1	2	+1
Public Service Commission	37	36	-1
Office of Regulatory Staff	74	67	-7
Workers' Compensation Commission	65	54	-11
State Accident Fund	74	72	-2
Patients' Compensation Fund	5	5	0
Second Injury Fund	22	21	-1
Insurance, Dept of	99	82	-17
Financial Institutions, State Board of	33	31	-2
Consumer Affairs, Dept of	59	35	-24
Labor, Licensing & Regulation, Dept of	714	396	-318
Motor Vehicles, Dept of	1,426	1,161	-265
Revenue, Dept	764	645	-119
Ethics Commission	11	11	0
Employment Security Commission	1,209	874	-335
Procurement Review Panel	2	2	0
Transportation, Dept of	5,033	4,997	-36
Aeronautics Div	N/A	12	+12
Current as 4/13/2010		61,956	
Current as 11/29/2007	*74,687		- 13.331



State of South Carolina

Request for Proposal
Amendment #1

Solicitation Number: 5400001873
Date Issued: 08/20/2010
Procurement Officer: Debbie Lemmon
Phone: 803-896-5236
E-Mail Address: dlemmon@itmo.sc.gov

DESCRIPTION: **Software Acquisition Manager**

USING GOVERNMENTAL UNIT: **Statewide Term Contract**

The Term "Offer" Means Your "Bid" or "Proposal". Unless submitted on-line, your offer must be submitted in a sealed package. Solicitation Number & Opening Date must appear on package exterior. See "Submitting Your Offer" provision.

SUBMIT YOUR OFFER ON-LINE AT THE FOLLOWING URL: <http://www.procurement.sc.gov>

SUBMIT OFFER BY (Opening Date/Time): **09/13/2010 14:30:00** (See "Deadline For Submission Of Offer" provision)

QUESTIONS MUST BE RECEIVED BY: **08/19/2010 12:00:00** (See "Questions From Offerors" provision)

NUMBER OF COPIES TO BE SUBMITTED: **See Page 3 of the original solicitation**

CONFERENCE TYPE: **Pre-Proposal**
DATE & TIME: **08/19/2010 10:00:00**

LOCATION: **B&CB Procurement Services
Division ITMO 1201 Main Street, Suite 430
Columbia, SC 29201**

(As appropriate, see "Conferences - Pre-Bid/Proposal" & "Site Visit" provisions)

AWARD &
AMENDMENTS

Award will be posted on **10/14/2010**. The award, this solicitation, any amendments, and any related notices will be posted at the following web address: <http://www.procurement.sc.gov>

Unless submitted on-line, you must submit a signed copy of this form with Your Offer. By submitting a bid or proposal, You agree to be bound by the terms of the Solicitation. You agree to hold Your Offer open for a minimum of ninety (90) calendar days after the Opening Date. (See "Signing Your Offer" and "Electronic Signature" provisions.)

NAME OF OFFEROR

(full legal name of business submitting the offer)

Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror. The entity named as the offeror must be a single and distinct legal entity. Do not use the name of a branch office or a division of a larger entity if the branch or division is not a separate legal entity, i.e., a separate corporation, partnership, sole proprietorship, etc.

AUTHORIZED SIGNATURE

(Person must be authorized to submit binding offer to contract on behalf of Offeror.)

TAXPAYER IDENTIFICATION NO.

(See "Taxpayer Identification Number" provision)

TITLE

(business title of person signing above)

STATE VENDOR NO.

(Register to Obtain S.C. Vendor No. at www.procurement.sc.gov)

PRINTED NAME

(printed name of person signing above)

DATE SIGNED

STATE OF INCORPORATION

(If you are a corporation, identify the state of incorporation.)

OFFEROR'S TYPE OF ENTITY: (Check one)

(See "Signing Your Offer" provision.)

Sole Proprietorship

Partnership

Other _____

Corporate entity (not tax-exempt)

Corporation (tax-exempt)

Government entity (federal, state, or local)

AMENDMENTS TO SOLICITATION (JAN 2004)

(a) The Solicitation may be amended at any time prior to opening. All actual and prospective Offerors should monitor the following web site for the issuance of Amendments: www.procurement.sc.gov (b) Offerors shall acknowledge receipt of any amendment to this solicitation (1) by signing and returning the amendment, (2) by identifying the amendment number and date in the space provided for this purpose on Page Two, (3) by letter, or (4) by submitting a bid that indicates in some way that the bidder received the amendment. (c) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged. [02-2A005-1]

In accordance with the clause above, Amendment #1 is issued with the following questions and answers. Bid opening date and time remains the same.

Questions (Q)

Answers (A)

Q1. Is the SAM allowed to be a state contract vendor? For example, if the vendor holds multiple state contracts, can they also be chosen as the SAM?

A1. Yes

Q2. General procurement question, is SC vendor preference permitted to companies that maintain an office (not headquarters) in SC?

A2. Preferences do not apply to Request for Proposals.

Q3. Our team leader read the Scope of Work and told me that it looked like ITMO wanted "someone to sell the licenses" is that a clear understanding of SAM?

A3. Software Acquisition Manager does not have to be a reseller of software.

Q4. Why wouldn't ITMO set up a new company in SAP and use their customer, vendor, and item integrated databases with sales orders, purchase orders, AP & AR?

A4. ITMO is looking for the best solution.

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.

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.

Q7. What Technical Support will the SAM have to provide? Technical Support for each of the products on orders that the SAM processes? Or Technical Support for the tool that the SAM will develop for endusers in order to view their current licenses/maintenance?

A7. Technical support for software will be handled by the individual contract holder. SAM technical support will be for training and usage questions regarding the SAM system only.

Q8. If the SAM is also a state contract vendor, the SAM will have records of all purchases, including those purchases made by other resellers. If the SAM is responsible for contacting endusers with maintenance expiration notices, how will the state ensure that recurring yearly maintenance will go through the original reseller and not the SAM, if the SAM is a state contract vendor?

A8. The SAM advises the agency that maintenance renewal is coming due. If SAM fails to do this, then they will be in breach of contract. In addition if SAM fails to process the PO in a timely fashion, they are also in breach.

Q9. What if the manufacturer does not allow License Reassignment to different agencies/departments?

A9. This will be handled by the Information Technology Management Office.

Q10. What if the manufacturer does not allow Volume License purchases across different agencies/departments?

A10. See A9.

Q11. Have you already set up terms (like the Microsoft EA) with manufacturers on when they will allow Volume purchasing?

A11. No.

Q12. Will vendors have access to this management tool so they can also view maintenance expiration? Or just endusers and the SAM?

A12. Just end-users , the SAM, and ITMO.

Q13. Who will the manufacturers/vendors send the license confirmations to? The enduser, reseller, and SAM? If the license confirmation is just sent to the enduser and reseller, who is responsible for sending this confirmation to the SAM to keep record?

A13. Once the Reseller received the purchase order, the License confirmations are sent to the SAM for record keeping and to then distribute the confirmation to the Agency. Reseller should already have this information prior to sending it to the SAM.

Q14. How will returns be handled? Would they go through the reseller, then through the SAM? What if the enduser just contacts the reseller, and the reseller doesn't contact the SAM? The SAM won't have accurate records. So will it be the reseller's responsibility to contact the SAM, or the enduser's responsibility?

A14. Through the SAM to the reseller. End-users will be trained on how to participate with the SAM. All State Software Contract holders will be responsible for sending this information to the SAM. If a software is not on contract, but purchased by an agency, it is the agencies responsibility to let the SAM know about this purchase.

Q15. What if endusers submit an order to the SAM, the SAM forwards the order to the reseller, but then the enduser needs to make a change? What if the enduser contacts the reseller, without contacting the SAM? The SAM will have inaccurate records. Is it the enduser or reseller's responsibility to make sure the SAM is notified of any changes?

A15. See A14.

Q16. Who does the enduser go to for post-sales support? The reseller they purchased the product through, or the SAM?

A16. The Reseller.

Q17. Have you already received authorizations from manufacturers/vendors that will allow these indirect agreements to be set up through the SAM? Most manufacturers/vendors only allow the reseller to sell directly the customer. Adobe Education, for example, does not allow indirect relationships – have you already worked with Adobe to allow this SAM-reseller-enduser relationship?

A17. Since the Purchase Order will read in care of (c/o SAM) SAM, this should not be a problem. The state will make every effort to work with manufacturers/vendors to help them understand our processes.

Q18. When endusers submit POs, what will they need to put on their PO, if they must first send the PO to the SAM? Do they put the SAM's information, or the reseller's information? What if they put the SAM's information, but ultimately want to order through a reseller. If the SAM is also a vendor, the SAM might process the order instead of sending to a reseller. So, will it be the enduser's responsibility to tell the SAM which vendor they want to purchase through? If there is no other vendor information, will the SAM automatically be allowed to process the order?

A18. See A17 and A14.

Q19. What are the ramifications if the SAM, who may also be a reseller, tries to contact the customer and "poach" the business from the reseller on the current PO to benefit themselves?

A19. SAM may face breach/debarment proceedings for this type of action, pending investigation.

Q20. Does the State contemplate outsourcing their software purchasing to the successful bidder? Or is the RFP limited to the tracking of license purchases, renewals, etc.

A20. No, we don't contemplate outsourcing. SAM may be a reseller on another contract.

Q21. What is meant by a "self-funded system?"

A21. See Self-funded model, page 39 of Solicitation.

Q22. Inventory/Redeployment – does the State envision that the successful bidder will allocate personnel and/or resources to support the Redeployment Process and Inventory Management as described in that section? Or to simply provide relevant data out of the SAM reporting tool?

A22. See A4.

Q23. Marketing – what resources does the State plan to dedicate to the marketing of the contract?

A23. The state will do presentations, newsletters and a broadcast email to all procurement and IT directors for distribution. We also post a website with information for our users on the ITMO State Term Contacts page.

Q24. 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.

Q25. Page 23 of the RFP, under Order Fulfillment, suggests that the SAM would be expected to accept software orders and then (in some instances) place them with other resellers rather than directly with the publisher. Is that correct?

A25a. No

If so, it is important to note that some of the major software publishers do not allow resale of their volume licensing software products to anyone other than the end user. Also, although we are a software reseller for the major publishers' programs, we do not have a mechanism to place software orders with our competitors. Would the State consider revising this RFP so that software orders are placed directly with the awarded vendor for both fulfillment of the software licenses and the SAM services associated with these licenses?

A25b. No.

Q26. Page 21 of the RFP requires technical support with a 2 hour turnaround. Is it the Software Asset Management solution for which you require support, or support for the software products themselves?

A26. See A7.

Q27. It appears in the RFP that the SAM will be expected to assist the State with a variety of software issues, including some instances where the software orders were not placed with the SAM and therefore there would not be revenue or funding flowing through to the SAM (e.g. redeployment of open source software – page 22). Can you confirm?

A27. See A4.

Question

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.

Q29. Will each Public Procurement Unit provide the most current inventory information to be loaded into SAM prior to SAM going "live".

A29. No, the design is for all future purchases.

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

Q31. Will it be possible to have uniformity in naming items 1-8 on page 20 to match the mfg. naming?

A31. See A4.

Q32. Will "returns" be prohibited - as it usually is with software licenses of that kind.

A32. See A4.

Q33. When agencies go through SAM and place an order for items 1-8 on page 20 are they including payment with their order?

A33. No, payment is net 30 days after receipt of invoice.

Q34. Has anyone calculated current costs vs. perceived savings by volume discounts etc. even with a markup included?

A34. We have no historical data to provide a response.

Q35. Are there guidelines to which information should be redacted?

A35. See page 14 of the Solicitation, "Submitting Confidential Information".

Q36. Why the 11-day delay? Is this a way to give contractors a chance to re-bid against the frontrunner?

A36. There is an intent period in SC for protests after an award notice.

Q37. How will we be paid?

A37. See A21.

Q38. What criteria will we be audited against? Is there a disincentive if we do not meet the criteria (i.e. withholding payment)? Should we include a surveillance plan with our proposal?

A38. Audits may be performed on data obtained from the start of the contract. Failure to comply with the contract could lead to a breach in contract, please refer to the Terms and Conditions in the solicitation. As for a surveillance plan, see A4.

Q39. Procedure for End of Contract Life

- Any other information obtained from the State pertaining to this contract. This is too broad a statement. Can we get examples? If they request information at the end of the contract for data we didn't track, are there penalties? RISK

A39. It means any information obtained from the State pertaining to this contract. Only the information obtained can be provided. Penalties arise when the requirements are not met.

Q40. 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.

Who provides secure website? Are there specific requirements as to what constitutes a "secure website"? We need specifics so that we can include costs of this requirement into bid amount. RISK

A40a. The outgoing SAM will provide the secure website.

A40b. See A4 for response to secure website requirements.

Q41. Retail software Sales

Don't they mean purchases? Or are there units that sell software?

A41. Retail sales are the same as purchases. Agencies may purchase from non state term contract software vendors.

Q42. 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.

What criteria will we be audited against? Is there a disincentive if we do not meet the criteria (i.e. withholding payment)? Should we include a surveillance plan with our proposal?

A42. See A38.

Q43. Billing/Payment Requirements

For both Public Procurement Unit and Software Manufacturer billing and payment requirements see Section III Specifications for detailed explanation.

I could not find the paragraphs that give detailed explanation for these requirements.

A43. Refer to A30 and **Section VIII** of the Original Solicitation “**Self-Funded Model**” as well replace the current Billing/Payment Structure with the following:

BILLING/PAYMENT STRUCTURE

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

Q44. Any other information obtained from the State pertaining to this contract.

This is too broad a statement. Can we get examples? If they request information at the end of the contract for data we didn’t track, are there penalties? RISK

A44. See A39.

STATE OF SOUTH CAROLINA
B&CB, DIV. OF PROCUREMENT SERVICES, ITMO
1201 MAIN STREET, SUITE 430
COLUMBIA SC 29201

Intent to Award

Posting Date: December 21, 2010

Solicitation: 5400001873
Description: Software Acquisition Manager
Agency: Statewide Term Contract

The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective **08:00:00, January 04, 2011**. Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35- 4210]

PROTEST - CPO ADDRESS - ITMO: Any protest must be addressed to the Chief Procurement Officer, Information Technology Management Office, and submitted in writing

- (a) by email to protest-itmo@itmo.sc.gov ,
- (b) by facsimile at 803-737-0102 , or
- (c) by post or delivery to 1201 Main Street, Suite 430, Columbia, SC 29201.

Contract Number: 4400003161
Awarded To: NEWVENUE TECHNOLOGIES INC
PO Box 292142
COLUMBIA SC 29229

Total Potential Value: \$ 1,000,000.00
Maximum Contract Period: February 15, 2011 through February 14, 2016

Item	Description	
00010	Software Acquisition Manager	1,000,000.00

Procurement Officer
Debbie Lemmon

Terris S. Riley

From: Lemmon, Debbie [dlemmon@mmo.sc.gov]
Sent: Thursday, November 04, 2010 11:22 AM
To: triley@newvenuetech.com
Subject: SAM

Terris,

Draft language regarding the 2.5 % fee as follows:

Self Funded Business Model

The contract is self-funded. The first year of the Software Acquisition Manager (SAM) the SAM fee will be 2.5%. 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 the 12 month period, the State may negotiation 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.

(NOTE: The draft Record of Negotiations will need to reviewed and approved by Mike Spicer before going final.)

Your thoughts?

Debbie Lemmon
Information Technology Management Office (ITMO)
1201 Main Street, Suite 430
Columbia, SC 29201
Phone # (803) 896-5236
Email: dlemmon@itmo.sc.gov

No virus found in this message.

Checked by AVG - www.avg.com

Version: 2012.0.2242 / Virus Database: 3222/6272 - Release Date: 10/22/13

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 9.0.864 / Virus Database: 271.1.1/3235 - Release Date: 11/03/10 04:36:00

2/16/2014

Exhibit 6: E-mail Regarding Software Identification Numbers

Terris S. Riley

From: Lemmon, Debbie [dlemmon@mmo.sc.gov]
Sent: Thursday, July 21, 2011 12:34 PM
To: triley@newvenuetech.com
Subject: FW: Follow-up

From: Lemmon, Debbie
Sent: Thursday, July 21, 2011 12:34 PM
To: 'amarshall@newvenuetech.com'
Subject: RE: Follow-up

No, so much to prepare for Monday...probably will not be able to review the situation until next week

From: amarshall@newvenuetech.com [mailto:amarshall@newvenuetech.com]
Sent: Thursday, July 21, 2011 12:32 PM
To: Lemmon, Debbie
Cc: triley@newvenuetech.com; Jacque' Riley
Subject: Follow-up

Hi Debbie,

I wanted to follow-up with you on the license keys/software unique identifiers. Have you had an opportunity to verify the ids between systems, i.e., SCEIS, BANNER, etc? I didn't want to lose sight of this action item as we prepare for implementation next week.

Thanks.

Ashonya K. Marshall
Project Manager
NewVenue Technologies, Inc.
www.newvenuetech.com
ph 803.348.9928

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the following communication, the information contained herein is privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

Please consider the environment before printing this e-mail.

No virus found in this message.
Checked by AVG - www.avg.com
Version: 10.0.1390 / Virus Database: 1518/3776 - Release Date: 07/20/11

4/22/2014