

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4004289

New Venue Technologies Inc

South Carolina Procurement Review Panel

South Carolina Budget and Control Board

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment of the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2061 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of August, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Geoffrey Kelly Chambers

Christian M. Emanuel
Michael H. Montgomery

William Dixon Robertson III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

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SEP 23 2016

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RICHLAND COUNTY
2016 AUG 10 AM 9:49
JENNIFER W. McBRIDE
CLERK OF COURT & G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 NEW VENUE TECHNOLOGIES, INC.,)
)
) Petitioner,)
)
) vs.)
)
) SOUTH CAROLINA PROCUREMENT)
) REVIEW PANEL, SOUTH CAROLINA)
) BUDGET AND CONTROL BOARD,)
) OFFICE OF INFORMATION)
) TECHNOLOGY, SOUTH CAROLINA)
) DEPARTMENT OF ADMINISTRATION,)
) CHIEF PROCUREMENT OFFICER)
) MICHAEL SPICER,)
)
) Respondents.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2015-CP-40-4289

ORDER GRANTING RESPONDENTS'
 MOTIONS TO DISMISS
 FOR FAILURE TO TIMELY
 PERFECT APPEAL

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SC Court of Appeals

RICHLAND COUNTY
 FILED
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 JANETTE W. HIGBRIDE
 C.C.P. & G.S.

This matter came before the Court on June 28, 2016 regarding the Notice of Appeal and Petition (sic) Judicial Review filed by Petitioner New Venue Technologies, Inc. ("New Venue") on July 16, 2015 purporting to appeal an Order of the South Carolina Procurement Review Panel ("Panel") dismissing New Venue's Procurement Protest for failure to prosecute the same and denying its motions to dismiss Counterclaims against it filed by the State Fiscal Accountability Authority ("SFAA"), formerly a part of the South Carolina Budget and Control Board ("Board"). Respondents SFAA and Chief Procurement Officer Michael Spicer ("CPO") filed Motions to Dismiss the Appeal on the ground that New Venue failed to timely serve (or failed to serve at all) the Appeal and, therefore, the Appeal is not perfected. The Panel joined in these motions at the hearing.

Present at the hearing were Christian M. Emanuel, Attorney for the South Carolina Procurement Review Panel, Michael H. Montgomery, Attorney for the South Carolina State Financial Accountability Authority ("SFAA") *nee* South Carolina Budget and Control Board, W.

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Dixon Robertson, III, Attorney for Chief Procurement Officer Michael Spicer, and Geoffrey K. Chambers, Attorney for New Venue.

INTRODUCTION

This case arises under the South Carolina Consolidated Procurement Code, *S.C. Code Ann.* §§11-35-10, *et seq.*

In January 2011, the Board awarded a contract to New Venue for software acquisition management. Within two years, complaints by software vendors caused Board staff to review payments that New Venue was supposed to make to those vendors. On October 8, 2013, the Board terminated the New Venue contract. On November 14, 2013, New Venue asked the CPO to resolve a contract controversy, pursuant to *S.C. Code Ann.* §11-35-4230 (2011). The Board filed a counterclaim against New Venue, alleging that it had misappropriated or diverted more than two and one-half million dollars in funds due the state, political subdivisions and vendors to the use of its principals. Mr. Spicer, as CPO, was the hearing officer for the contract claims. On July 18, 2014, the CPO posted his decision. It denied New Venue's claims, ordered New Venue to return \$567,868.72 to the Board, and awarded the Board \$873,302.50 in actual damages. During the CPO hearing, New Venue moved to dismiss SFAA's counterclaim alleging that the CPO did not have subject matter jurisdiction over the State's claims against a vendor. The CPO denied this motion.

New Venue appealed the CPO's decision to the Panel pursuant to *S.C. Code Ann.* §§ 11-35-4230(6) and 11-35-4410(1)(a). On June 16, 2015, the Panel issued its written decision. In it, the Panel dismissed New Venue's appeal with prejudice because New Venue failed to offer any testimony or evidence supporting its claims. The Panel also denied New Venue's motion to dismiss the Board's claims against it. New Venue claimed that the statute granting the Panel

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jurisdiction to hear those claims (S.C. Code Ann. § 11-35-4230(2) (2011)) violated the separation of powers provision of the South Carolina Constitution set forth in Article I, section 8.

During the instant Hearing, New Venue asserted that the Respondents' Motion to Dismiss could not be heard and granted because there was no subject matter jurisdiction. New Venue based its assertion on the averment that subject matter jurisdiction can be raised at any time. As is explained herein, the question raised did not deal with the subject matter jurisdiction of this Court and New Venue cannot use a claim of lack of subject matter jurisdiction below to avoid following applicable court rules and law in this proceeding.

SUBJECT MATTER JURISDICTION

New Venue, the Petitioner in this action, raised the issue of subject matter jurisdiction during its argument in the hearing before the CPO and in appealing the decision to the Panel. In again raising this matter before this court, its counsel essentially asserts that it was not necessary to perfect its appeal by serving its pleadings upon opposing parties and counsel as required by the Administrative Procedures Act (APA), Appellate Court Rules, and the South Carolina Rules of Civil Procedure because there was no subject matter jurisdiction for the CPO and Procurement Review Panel to decide the State's claims against New Venue.

It is instructive to note that while every court has the power and duty to determine whether it has subject matter jurisdiction, there are accepted methods to raise the issue. In this instance, it seems that New Venue has expressly asserted that this Court has jurisdiction over the appeal. Its pleading states:

The Petitioner, New Venue Technology, Inc. ("Petitioner" or "MTM"[sic]), by and through its undersigned attorney, pursuant to S.C. Code Ann. §§ 11-35-4410(6) and 1-23-380(1), respectfully files this Notice of Appeal and Petition for Judicial Review of the South Carolina Procurement Review

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Panel's Order dated June 16, 2015 denying New Venue Technologies, Inc.'s motion that the Panel does not have jurisdiction to hear State claims against New Venue and the Panel's dismissal of New Venue's claims.

In Paragraph 19 of New Venue's pleading, it avers:

19. The second ground for appeal is neither the CPO nor the panel had the power to hear and decide claims of the State and to the extent the contract controversy statute (South Carolina Code Section 11-35-4230) provides that they can, it is unconstitutional.

New Venue's pleading further makes a jurisdictional challenge to the subject matter jurisdiction of the Chief Procurement Officer and Procurement Review Panel in paragraphs 37 through 49 of its pleading.

The pleading itself makes it clear that New Venue does not dispute this Court's subject matter jurisdiction over the controversy. The pleading makes it clear that one prong of New Venue's appeal is the argument that the CPO and Procurement Review Panel did not have subject matter jurisdiction to hear the State's claims against New Venue. This Court has subject matter jurisdiction to decide the issues in this case and it is apparent that New Venue does not challenge that fact.

In *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993), the esteemed Justice Bell noted:

As we have stated in *Woodard v. Westvaco Corp.*, Op. No. 2026 (S. C. Ct. App. filed June 7, 1993) (Davis Adv. Sh. No. 15), the proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12 (b) (1), SCRCF. If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the court should treat the motion as if it were a Rule 12 (b) (1) motion. The motion may be supported by, and the court may consider, affidavits or other evidence necessary to determine the question of jurisdiction. *Id.*

In this Court, New Venue appeals the determination of the Chief Procurement Officer and the Procurement Review Panel finding that they had subject matter jurisdiction to adjudicate the State's Counterclaims against New Venue. The Procurement Review Panel's Decision (No

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2014-7(IV)) addressed at length New Venue's argument that Article I, Section 8 of the South Carolina Constitution prohibits the legislature from establishing a process through which the State could pursue claims against third parties. The Panel correctly noted that:

The plain language of section 11-35-4230(2) clearly permits either the contractor or the contracting state agency to initiate contract controversy proceedings before the CPO. Therefore, the Panel concludes it has the statutory authority and obligation to hear the claims of both New Venue and the Board in the contract controversy before it and hereby denies New Venue's request not to exercise jurisdiction over the Board's counter-claims. Furthermore, the Panel acknowledges that it lacks the authority to consider the constitutionality of its empowering legislation, which can only be determined by judicial review. *See. Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (An agency of the executive branch of government must follow the law as written until its constitutionality is judicially determined; it has no authority to pass upon the constitutionality of a statute or regulation); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 516 S.E.2d 655(1999) (An administrative agency must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute); *South Carolina Tax Comm. v. South Carolina Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d. 489 (1983) (An agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.).

Panel Decision 2014-7(IV) pp. 13-14.

New Venue's appeal to this Court is, *inter alia*, its apparent effort to seek the judicial determination of the constitutionality of S.C. Code Ann. §11-35-4230(2). The motions filed by the Respondents deal not with the actions of the Chief Procurement Officer or the Procurement Review Panel, but instead, with the process and requirements of the rules of this Court – which even New Venue must concede, has subject matter jurisdiction over the cause¹. This Court finds that an issue of subject matter jurisdiction raised before an Administrative body or state agency does not render the requirements of the Administrative Procedures Act and Rules of Court moot and unenforceable as it relates to the claim. There is a lengthy history of similar holdings by our

¹ New Venue implicitly recognized this Court's subject matter jurisdiction over the cause by filing the pleading in this forum.

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Courts. In *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 329-330, 199 S.E. 296 (S.C. 1938), our Supreme Court addressed this issue and opined:

Appellants argue, however, that the question of the Court's jurisdiction of the subject-matter may not be lost, but may be raised at any time and place. This principle, of course, is firmly settled in this State, but it is not applicable in this appeal. The question of jurisdiction may be raised once, but when the issue has been decided adversely to a party he cannot continue to raise it, in different stages of the trial. His remedy is to preserve his exception in the first instance, and his failure to do so forecloses the right to again raise it. [emphasis added]

Where the jurisdiction of the Court is challenged and the question decided--whether specifically or by inevitable inference--a judgment on that issue unless reversed or set aside, is as conclusive and binding on all parties to the cause as the adjudication of the Court on any other question involved in the case. *State v. Adams*, 83 S.C. 149, 65 S.E. 220; *Beasley v. Newell*, 40 S.C. 16, 18 S.E. 224, 34 C. J., Sec. 1320, page 907, and cases cited in notes.

Therefore, this Court has personal and subject matter jurisdiction to address the Motions filed by the State Fiscal Accountability Authority *nee* Budget and Control Board and the Chief Procurement Officer and Appellant/Petitioner's assertion of a lack of subject matter jurisdiction below does not insulate it from the requirements of the rules of Court during the proceedings for judicial adjudication of its constitutional claim.

Addressing those motions, the Court makes the following determinations.

FINDINGS OF FACT

New Venue filed its Notice of Appeal and Petition (sic) Judicial Review with the Richland County Clerk of Court on July 16, 2015. New Venue never served the Notice of Appeal on the Office of Information Technology, and New Venue never served counsel for the CPO or SFAA with its Notice. On November 9, 2015, counsel for New Venue mailed a copy of the "Summons and Complaint" in this matter to the Chief Procurement Officer. His letter stated that the pleadings were "being served upon you pursuant to SCRCF Rule 4(d)(5)." The Chief

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Procurement Officer filed a copy of the letter in the record. On November 12, 2015, 119 days after filing its Notice of Appeal, New Venue's process server delivered a clocked copy of its pleadings to the Procurement Review Panel with a letter stating, inter alia, "This is being served upon you pursuant to SCRCP Rule 4(d)(5)." Counsel for the SFAA has never been served as reflected by affidavit and pleading and no proof of service on any party has been filed with the Clerk of Court for Richland County. No service has been made upon the attorneys for any of the Respondent parties.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Section 1-23-380(A) prescribes the procedure for perfecting an appeal:

Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency and all parties of record.

Nothing in Section 1-23-380 suggests that this procedure should be different when appeal is to the circuit court.² According to the APA, an appeal to the circuit court is "instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency" (emphasis supplied).

Rule 203(a), SCACR, provides:

A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262.

² In fact, the APA directs the Administrative Law Court, when exercising its appellate jurisdiction, to follow the appellate court rules:

Review by an administrative law judge of a final decision in a contested case, heard in the appellate jurisdiction of the Administrative Law Court, must be in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decisions *with the presiding administrative law judge exercising the same authority as the court of appeals....*

S.C. Code Ann. § 1-23-600(E) (Supp. 2015) (emphasis supplied).

(emphasis supplied). Rule 203(b) requires service be made on all parties of record within thirty days after receipt of written notice of the order. Rule 262(b) reads in full:

Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the *service shall be made upon the attorney* unless service upon the party himself is ordered by the appellate court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(emphasis supplied). Neither the court not the parties may extend the time for service of the notice of appeal. [emphasis added] Rule 263(b), *S.C.A.C.R., Burnett v. South Carolina State Highway Dept.*, 252 S.C. 568, 167 S.E.2d 571 (1969) (service of notice of appeal required by condemnation statute); see *Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000) (service of notice of appeal is a jurisdictional requirement).

The Administrative Procedures Act requires service and filing of a notice of appeal in accordance with the South Carolina Appellate Court Rules. Those rules mandate service of the notice of appeal within thirty days after receipt of the written order from which appeal is taken. New Venue failed to serve either the Chief Procurement Officer or his attorney until nearly five months after it received the Panel's order. It purported to serve the Procurement Review Panel 119 days after filing the Appeal. It never served counsel for SFAA, the CPO or the Procurement Review Panel with the Notice and never filed a proof of service with the Clerk of Court. Because New Venue failed to serve its Notice of Appeal within the time required by statute, the circuit court lacks appellate jurisdiction over the appeal and must dismiss it. *Allison v. W.L.*

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Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011); *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 94, 668 S.E.2d 795, 796 (2008) (*dicta*); *Great Games, Inc. v. South Carolina Dept. of Revenue*, 339 S.C. 79, 82, 529 S.E.2d 6, 7 n. 5 (2000).

An alternate analysis relying upon Rule 74, S.C.R.C.P. leads to the same conclusion. S.C. Code Ann. § 11-35-4410 (2011) creates the Procurement Review Panel and defines its jurisdiction, membership, and procedure. The last paragraph of the section provides:

Notwithstanding another provision of law, including the Administrative Procedures Act, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court. The standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act. The filing of an appeal does not automatically stay a decision of the panel.

Id. The statute fixes no time within which the appeal must be filed or served. In the absence of statutory limitations on service and filing, Rule 74, SCRCPP, fixes the time in which the appeal must be filed and served upon all parties. See *Witzig v. Witzig*, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996) (declining to apply Rule 74's general 30-day limitation where specific statute required service and filing within ten days).

Rule 74, SCRCPP, prescribes the procedure on appeal to the circuit court. It provides in pertinent part:

Except for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court or decision of an administrative agency or tribunal shall be in accordance with the statutes providing such appeals. Notice of appeal to the circuit court must be served on all parties within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from. In all such appeals the *notice of intention to appeal shall be filed* with the clerk of court to which the appeal is taken and with the inferior court or administrative agency or tribunal within the *time provided* by the statute, or *by this rule when no time is fixed by statute*, for service of the notice of intention to appeal.

(emphasis supplied). In the absence of a statute fixing the time for appeal, Rule 74 requires that any appeal filed pursuant to S.C. Code Ann. § 11-35-4410(6) “must be served on all parties within thirty (30) days after receipt of the written notice of the order.”

According to its petition, New Venue received written notice of the order on June 18, 2015. It did not even attempt service on the Chief Procurement Officer and the Procurement Review Panel until nearly five months later. Its method of service—via regular mail to the Chief Procurement Officer, and by delivering a copy of the petition to his business office as well as by delivering a copy to the Procurement Review Panel—failed to comply with the service requirements in Rule 4(d)(5), which requires that any action served on the State must also be served upon the Attorney General. As of December 22, 2015, New Venue has not accomplished service on the Chief Procurement Officer, nor has it filed any proof of service with the Clerk of Court. As of May 15, 2016, New Venue had not accomplished service on any of the Respondents pursuant to Rule 4(d)(5) and, as of June 22, 2016, no proof of service on any party has been filed with the Clerk of Court.

Because New Venue failed to serve all parties within thirty days of June 18, 2015, the circuit court lacks appellate jurisdiction to hear the appeal. Accordingly, the Notice of Appeal and Petition must be dismissed. *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004); *Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000).

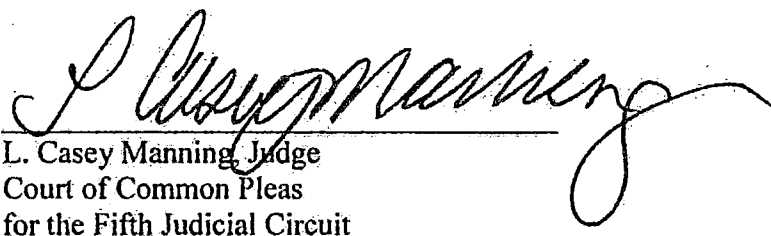
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CONCLUSION

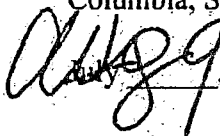
For the reasons enumerated herein, this Court GRANTS the Respondents' Motions to Dismiss the Appeal based upon New Venue's failure to serve the appeal upon the Counsel for the Respondents, as required by the applicable rules.

NOW IT IS THEREFORE ORDERED THAT Petitioner's appeal requesting that this Court review and reverse the Procurement Review Panel's Order dismissing Petitioner's Appeal and Denying Petitioner's Motions is **DISMISSED** with prejudice.

AND IT IS SO ORDERED.


L. Casey Manning, Judge
Court of Common Pleas
for the Fifth Judicial Circuit

Columbia, South Carolina

, 2016

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