

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Contract Controversy
of:

Sodexo Operations LLC

v.

Francis Marion University

Materials Management Office
RFP No. 08-S7677/5400000172

Dining Services for
Francis Marion University

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO. 2013-140

POSTING DATE: March 12, 2014

MAILING DATE: March 12, 2014

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter dated November 11, 2013, from Sodexo requesting resolution of a contract controversy under S.C. Code Section 11-35-4230. The controversy results from a contract for dining services for Francis Marion University (FMU) awarded Sodexo on May 19, 2008, by the Materials Management Office (MMO) pursuant to Request for Proposals (RFP) #08-S7677/5400000172.¹ On December 2, 2013, Sodexo began adding sales tax to its bills for meals served to students who had purchased meal plans. FMU refused to pay the portion of the invoices attributable to sales tax. Sodexo seeks damages from FMU of \$244,758.13, representing the sales taxes billed from September 3, 2012, through February 3, 2014; and a determination that FMU is responsible for paying sales tax on student meal plans going forward. FMU denies it is liable for Sodexo's sales tax liability.

¹ Sodexo held the contract prior to this award. While it is unclear how long Sodexo has been the University's food services contractor, Sodexo's billing practices prior to September 3, 2013, represented the course of dealing between the parties for many years.

In order to resolve the matter, the CPO conducted a hearing February 21, 2014. Appearing before the CPO were Sodexo, represented by Joel W. Collins, Jr., Esquire, and Kristian C. Bell, Esquire; and FMU, represented by David C. Holler, Esquire. John Stevens, State Procurement Officer, also appeared in the hearing, although the State Procurement Office did not advocate for either party in the controversy.

NATURE OF PROTEST

Sodexo's letter requesting resolution of the contract controversy is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On February 6, 2008, MMO published the RFP.
2. On May 19, 2008, the Materials Management Office posted a Statement of Award to Sodexo.
3. On August 1, 2008, the initial contract period began.
4. On March 14, 2012, the South Carolina Department of Revenue reported on its sales and use tax audit of Sodexo assessing Sodexo additional sales taxes for Meal Plan.
5. On September 3, 2012, Sodexo began adding and itemizing sales taxes due on its monthly invoices to FMU for Meal Plans. FMU paid the Meal Plans, but refused payment of the itemized sales taxes.
6. On November 11, 2013, Sodexo filed its request for resolution with the CPO.

ISSUE

Sodexo serves meals to two different kinds of customers in FMU dining facilities. Anyone can purchase a meal for cash. Sodexo collects from those customers the price of the meal, plus sales tax. It remits the sales tax collected to the Department of Revenue. Students (or their parents) may also purchase meal plans at the beginning of each academic term. They pay FMU for the entire cost of the meal plan, typically as part of tuition and boarding fees, at the beginning of each semester. All students are issued a student ID card with information encoded

in a magnetic stripe. FMU includes meal plan information on the cards. Students on a meal plan present or swipe their cards at the point of sale terminal each time they get a meal. Sodexo does not charge them. Instead, Sodexo bills FMU each month for the number of meal plan meals served, at an agreed rate per meal.

FMU and Sodexo agree sales taxes apply both to meals purchased for cash and to meals served as part of a Meal Plan. The issue before the CPO is whether FMU must pay Sodexo sales taxes on meals served under a Meal Plan during the 2012-2013 and 2013-2014 Academic years.

CONTRACT REQUIREMENTS

The RFP includes a provision titled “CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE (JANUARY 2006).” [RFP, Part VII. Terms and Conditions – A. General, p. 58]

For purposes of this dispute, the order of precedence is:

- (1) Record of Negotiations [Exhibit 3];
- (2) Solicitation [Exhibit 1];
- (3) Offer, including the business proposal [Exhibit 2]; and
- (4) Award Statement [Exhibit 4].

All these documents must be read together, respecting the order of precedence, to determine the obligations of the parties to this contract.

The RFP includes standard language requiring the State to pay sales taxes:

TAXES (JANUARY 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....

[RFP, Part VII. Terms and Conditions – A. General, p. 60] ² The Record of Negotiations does not change this provision.

² The Instructions to Bidders includes the sentence, “Do not include any sales or use taxes in your price that the State may be required to pay.” [RFP, Part II. Instructions to Offerors, A – General Instructions, p. 6] Sodexo contends this language prohibited it from billing FMU for sales tax prior to September 2012. This provision in the RFP instructed Sodexo not to include sales, use, and other applicable taxes in its financial offer. It is intended to ensure offerors are stating their prices in the same manner, thereby allowing all bids to be considered on the same

The solicitation describes FMU’s meal plan system in ¶3.4. [RFP, Part III. Scope of Work / Specifications, p. 16] Meal plan pricing was fixed for the academic year beginning August 2008:

	<u>Unlimited Access</u>	<u>Other</u>
19 Meal Plan	\$1,300 per semester	
14 Meal Plan	\$1,205 per semester	
6 Meal Plan		\$475 per semester
Patriot Plan		\$475 per semester
Debit Card		\$10 increments

[*Id.* at p. 17, ¶3.4.2] For subsequent academic years the pricing could be adjusted “based upon documentation of food service price increases and upon approval of the University.” [*Id.*] The RFP further explained:

Meal plan prices, food prices, and portions shall be recommended by the Contractor subject to approval by the University’s assigned Contract Manager. The Contractor will not alter prices once approved by the Contract Manager without obtaining further approval, and must be able to justify that proposed price increases are the result of legitimately escalating costs of doing business. University approval of price increases shall not be unreasonably withheld.

[*Id.* at pp. 21-2, ¶3.11.1.1] Pricing for “[m]eal plan programs for subsequent years of the Contract [was to] be developed as a part of the Annual Plan.” [*Id.* at p. 34, ¶3.12.9] The RFP described the Annual Plan procedure in 3.13.1:

The Contractor shall submit to the Contract Manager on the first of December prior to the beginning of each Fiscal Year for University approval an Annual Plan that addresses the following items:

- Proposed Menus for Board Plans and Cash Facilities
- Pricing Structure
- Proposed Hours of Operation
- Proposed Meal Plan Program
- Detailed Marketing Plan, including goals and tools for measuring success
- Employee Training Program
- Budgets for all Operating Costs

footing. It does not waive or limit taxes that may accrue under law to whoever wins the contract, nor does it affect the State’s obligation to pay certain of those taxes.

Pro Forma Financial Projections by Reporting Period and Year
Proposed Equipment and Smallwares Expenditure Budget
Proposed Capital Expenditure and FF&E Budget
Customer Satisfaction Measures
Assessment of the Campus Dining Services Program versus Best Practices
in the University Marketplace

[*Id.*]

The solicitation does not provide a detailed definition of the contractor's operating costs. Sodexo, however, included a comprehensive discussion in its business proposal. Under the heading "Business Model Assumptions," Sodexo defined "Operating Expenses" to include:

All costs, [c]harges and expenses incurred in connection with the Food Service operation including, but not limited to...sales, use, and other taxes related to the Food Service (other than taxes collected and remitted by Sodexo to a taxing authority)....

[Ex. 2, p. 12-9] Nothing in the Record of Negotiations or the RFP conflicts with Sodexo's definition of its operating costs. As stated above, Sodexo collects sales tax for cash sales and remits the tax to the Department of Revenue; it does not for meal plan servings.

According to the structure defined in the RFP, Sodexo and FMU meet each December to review budgets and, among other things, set student meal plan pricing for the academic year beginning the following fall. [*Id.* at p. 42, Board Rates, ¶3.18.14] Once meal plan rates are set, FMU publishes them as part of the cost of attending the school, and adds the cost to student accounts before billing. [*Id.* at p. 39, Meal Plan Collections, ¶3.18.1] FMU makes regular periodic payments to Sodexo for meal plan students:

Payments under this contract will be made monthly on the basis of an invoice computed by multiplying the number of boarding students provided by the University to the contractor times the daily meal plan rate. Each invoice will be adjusted for credits due for withdrawals and new boarders and will be re-established at the beginning of each new school term or semester.

[*Id.* at p. 42, ¶3.18.19] While the number of students participating in meal plans may change from semester to semester, FMU does not change the pricing during the academic year and the

following summer term. Nothing in the Record of Negotiations alters the Annual Plan review process.

CONCLUSIONS OF LAW

The Annual Plan procedure contemplates that FMU and Sodexo will review the financial, capital, and marketing aspects of the food service operations every December. Based on this review, the parties will agree on a price for meal plans. The daily meal plan rates that result from the Annual Plan meeting serve two purposes. First, they establish the amount FMU will bill its students for meal plans. Second, they establish the amount FMU pays Sodexo for those meals. It makes no sense that those amounts would be different.

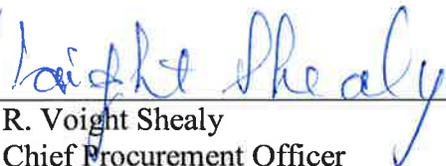
By defining its operating expenses in the Financial Proposal, Sodexo was bound to include in the proposed meal plan rates all costs it expected FMU to pay—including sales taxes that it did not collect on cash sales. Pursuant to the contract, if Sodexo failed to include an operating expense then FMU was not obligated to pay Sodexo for it. Whether Sodexo included the sales tax, or overlooked to do so, is immaterial. Based on Sodexo's submittal of proposed meal plan rates that reflected all operating expenses, FMU published the agreed prices, added them to student bills, and told the students and their families how much it would cost to attend for a semester. Similarly, since Sodexo agreed to include sales taxes in the meal plan price, FMU paid the tax when it remitted the extended daily meal plan amounts on Sodexo's invoices.

Sodexo claims it did not know it was obligated to collect sales tax until a Department of Revenue audit and assessment in July 2012. FMU and Sodexo acknowledge continuing discussions over the sales tax issue. The annual review of meal prices is the one and only means for FMU to address price increase requests resulting from escalating expenses for any reason, including tax liabilities, facing Sodexo. According to both Sodexo and FMU, though, Sodexo has not used the Annual Plan process to ask for a price increase to cover its liability for sales taxes

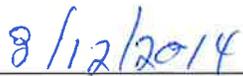
on Meal Plans. Since Sodexo has made no request, FMU has neither approved nor denied an increase. Whether an increase is warranted for sales taxes under ¶3.18.14 of the RFP is not before the CPO.

DETERMINATION

For the foregoing reasons, Sodexo's request for damages is denied. The CPO does implore FMU to work cooperatively with Sodexo through the Annual Plan process to address the matter of sales taxes on Meal Plans going forward.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

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 2013 General Appropriations Act, “[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing.” PLEASE MAKE YOUR CHECK PAYABLE TO THE “SC PROCUREMENT REVIEW PANEL.”

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**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.

Law Department

**Thomas R. Stanton
Attorney**

November 11, 2013

Via Electronic Mail & Overnight Delivery

Mr. Voight Shealy
Materials Management Officer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Francis Marion University; Dining Services Agreement; Solicitation 5400000192

Dear Mr. Shealy:

The State of South Carolina audited Sodexo and, in March 2012, informed the company that prepared meals sold to educational institutions are subject to sales tax. Sodexo soon thereafter engaged the administration at Francis Marion University ("FMU") regarding the effect of the audit on the above-referenced contract. Sodexo contends that FMU is liable under South Carolina law in the amount of \$185,945.00 pursuant to the audit. Sodexo has repeatedly requested payment of same to no avail.

On July 10, 2013, FMU's tax counsel wrote to Sodexo, essentially denying FMU had any liability, and on August 20, 2013, Sodexo's tax counsel replied in writing. Following this exchange, discussions continued between the parties including an October 15 meeting between Jim Jenkins, Sodexo's Senior Vice President, and Jay Kispert, FMU's Vice President of Business Affairs. Mr. Jenkins and Mr. Kispert exchanged letters following the meeting. Copies of the four letters mentioned above are enclosed for ease of reference.

The parties have been unable to resolve this dispute for well over a year. Sodexo has no desire to initiate litigation against FMU over this matter, and only wishes to be paid the monies lawfully owed by FMU and to continue to provide outstanding service to the FMU community. Nevertheless, Sodexo cannot carry FMU's sales tax liability on its books any longer. Accordingly, Sodexo hereby requests that the Chief Procurement Officer expeditiously resolve this dispute.

Mr. Voight Shealy
November 11, 2013
Page 2



Sodexo expressly reserves all other rights and remedies available pursuant to the contract and applicable law.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Stanton", written over a horizontal line.

Thomas R. Stanton

Enclosures

cc: Jim Jenkins
Fred Formichella
Mike Nance
Jay Kispert

TURNER PADGETT

TURNER PADGETT GRADUATE & FAMILY, PA

CHARLESTON
COLUMBIA
GEORGE
GREENVILLE
MYRTLE BEACH

JOHN M. SCOTT III

REPLY TO:

E-Mail: jscott@turnerpadgett.com
Writer's Direct Dial: 843-656-4457
Direct Fax: 843-413-5845

July 10, 2013

Fred Formicola
Sr. Vice President
Sodexo Campus Services
1641 S Northcross Drive, Suite B
Huntersville, NC 28078

Re: Sales Tax Liability for Meals Sold as Part of Board Plan
Our File No.: 12482.101

Dear Mr. Formicola:

I am writing to you on behalf of my client, Francis Marion University. In regard to the above referenced matter, as you may be aware, Sodexo recently started adding Sodexo's liability for South Carolina sales taxes to the monthly invoices it submits to Francis Marion. These amounts have totaled upwards of \$15,000 per month. Please be advised that Francis Marion believes the inclusion of these amounts on the monthly invoices is inconsistent with the terms of its contract and with the requirements of South Carolina law.

After speaking with Francis Marion's Vice President for Business Affairs, Jay Kispert, and President, Dr. Fred Carter, and after reviewing the pertinent documentation, I understand that Francis Marion contracted with Sodexo in 2007 for Sodexo to provide and manage the on-campus dining services at Francis Marion (the "Contract"). The Contract was renewed for a ten year period in 2017. Pursuant to the terms of the Contract, "[p]ayments under this contract will be made monthly on the basis of an invoice computed by multiplying the number of boarding students provided by the University to the contract times the daily meal plan rate." The daily meal plan rate is based off of the Meal Plan Pricing amounts set forth in the Contract at section 3.4.2. Moreover, according to the Contract, any proposed changes to the Meal Plan rates must be submitted to Francis Marion for approval as part of the Annual Plan

BUSINESS - LITIGATION - NO. 10085

319 S. Eby Street (29501) • PO Box 5478 • Florence, SC 29502
Phone (843) 662-9008 • Fax (843) 567-0828 • turnerpadgett.com

TURNER FARM

Ired Formicola
July 10, 2013
Page 2

Based on the applicable provisions of the Contract, Francis Marion is not responsible for any sales tax liability resulting from the sale or provision of meals on the Board Plan. As is clear from the quoted language above, the monthly invoices for Board Plan meals should not include a sales tax component. The Contract calls for the invoice amounts attributable to Board Plan meals to be based solely on the meal plan rate. The meal plan rate's were set and agreed upon by both Francis Marion and Sodexo when the Contract was executed. Any provision for sales taxes is therefore implicit in meal plan rates. The inclusion, within the meal plan rates, of amounts needed to cover sales tax liabilities is also consistent with Sodexo's own business model assumptions as to operating expenses. According to subsection 1(c) of the Business Model Assumptions section in Sodexo's Financial Proposal to Francis Marion, sales, use, and other taxes related to the Food Service are a part of Sodexo's operating expenses. Consequently, any additional amounts needed by Sodexo for sales tax liabilities would need to be requested as a proposed change to the meal plan rate and submitted as part of Sodexo's Annual Plan. No such request had been made by Sodexo.

Sodexo's contractual responsibility for the sales tax liability is also consistent with South Carolina law. It is a well-established principle under South Carolina law that food service providers such as Sodexo are liable for sales taxes attributable to the meals sold as part of a university board plan. The officers, Sodexo's attempts to pass its liability for sales taxes on to Francis Marion is not only inconsistent with the Contract but also the requirements of South Carolina law.

Quite frankly, Francis Marion finds it unacceptable for Sodexo to deviate from the Contract, and to retro-act on prior business practice, and begin unilaterally imposing liabilities in excess of \$10,000 per month on Francis Marion for Sodexo's sales taxes. All of this being said, and for the reasons described above, Francis Marion will not pay the amounts attributable to Sodexo's sales tax liabilities that appear on past, or future, invoices from Sodexo.

Should you have any questions regarding anything addressed by this letter, please do not hesitate to contact me.

Best Regards,

TURNER, PAMELA GRAHAM LANEY, P.A.



John M. Scott III

JMS:
Jim Jenkins
John J. Kispert



Mr. John M. Scott III
Turner, Padgett, Graham & Laney
319 S. Ivy Street
Florence, SC 29502

Re: Sales Tax Liability - Part of Board Plan

Dear Mr. Scott:

I am writing in response to your letter of July 10, 2013. Reference is made to the Francis Marion University, Inc. ("FMU") Agreement, Solicitation Number 540000192, signed by Daniel W. Covey, Procurement Director, on May 15, 2008 (the "Contract").

The Taxes section of the Contract is found on page 58, and states in pertinent part as follows:

Any tax the contractor may be required to collect or pay upon sales or delivery of the products shall be paid by the contractor. Such sums shall be due and payable to the contractor upon acceptance of the products. Payment to contractor, after payment to contractor, shall constitute full and final payment to contractor, and no action against the taxpayer shall be taken.

The State of South Carolina, in its 2012-2013 Budget and, in March 2012, informed the company that prepared meals sold to educational institutions are subject to sales tax. The audit cited South Carolina regulation 117-305.1, which states that "sales by food service companies of meals to an educational institution or directly to the institution as part of a board plan, are retail sales subject to the sales or the use tax if the food service company is merely under contract with the educational institution and is not an agent of the educational institution."

Thus, per South Carolina law, Francis Marion are retail sales subject to sales tax. South Carolina imposes the sales tax on the purchaser of the meals. Sodexo is not Sodexo's retail sales tax agent. Sodexo is statutorily required to collect and remit sales taxes on student board plans and meal plans.

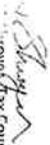
Your letter states that sales tax is not Sodexo's operating expenses. While Sodexo's operating expenses are not sales tax to its vendors on items such as food and equipment, and such payments of sales tax become a part of Sodexo's operating expenses, Sodexo's sales tax liability is not an operating expense. Sodexo's customers, and is not a sales tax expense of Francis Marion and is not an operating expense of Francis Marion and is not an operating expense of the State of South Carolina.



Sodexo is not requesting:
purchases. Rather, Sodexo is re-
117-305.1 and the audit determi-
Sodexo's sales of prepared meals.

Plain rates due to increased tax on Sodexo's
ation comply with South Carolina regulation
of South Carolina that sales tax is imposed on
ations.

Please let me know if you have any questions.


Gregory A. Taylor, Tax Counsel

October 21, 2013

Mr. Jay Kispert
Vice President for Business Affairs
Francis Marion University
P.O. Box 100547
Florence, SC 29501

Re: Agreement Concerns

Jay,

It was good to get together last Tuesday. I appreciate your time and the discussion. As you know we are committed to exceptional dining experience and providing products and services that exceed your expectations. I truly believe our Sodexo team at Francis Marion University works hard to deliver these expectations each and everyday.

I mentioned that I would review the tax calculation and get back to you. I reviewed the timeline and decisions. Sodexo was informed during a sales tax audit conducted by the state of the tax obligation. We informed the University in March of 2012. Per the South Carolina law, if we are an independent contractor, we must charge tax to the client on board meals. If we have an agency relationship, we need to self accrue use tax on the cost of food used on the board meals. We do not see any other alternative, and have been complying with state law. In this state the University has not remitted the tax to Sodexo. We currently have a past due balance for all services as of 10/18/2013 of \$185,945.00. We have no legal basis to dispute the tax that has been reported.

Francis Marion can elect to stand out of the current Agency status. Associated taxes on a going forward basis are then calculated on food spend less net sales. We have several agency relationships in the state of South Carolina. Regardless, the University needs to make a decision concerning this matter. Sodexo has paid the tax on behalf of the University and is carrying a concerning accounts receivable balance. Please let me know if you need any additional assistance with this matter.

We would also like to review the current enrollment numbers. The reduced boarders have caused a significant reduction in revenue that is needed to cover the current operating service levels on campus. We are currently projecting a level 1 this unit level. Sodexo is requesting immediate action on these two items.

We are committed to success and will continue to look forward to solving these issues and working towards the future!

Sincerely,



Jim Jenkins
Senior Vice President
Sodexo Education



FRANCIS MARION UNIVERSITY

John J. Kispert
Vice President for
Business Affairs

November 1, 2013

Mr. Jim Jenkins
Senior Vice President
Sodexo Education
11044 Research Blvd.
Suite A105
Austin, TX 78739

Jim,

Thank you for your letter of 10/30/13. It was also our pleasure to recently meet with the Sodexo team. We have reviewed your request for reimbursement of sales and use taxes and offer the following response.

Francis Marion University (FMU) is not "responsible" for any sales and use tax. As we have reviewed the contract and timeline, it appears this tax has been in place since the beginning of our contract. As I am sure you are aware, FMU is required to contract through the state procurement code as was done in this case. As a bidder with the state procurement officer, Sodexo is required to include in its bid the recognition that the sales and use tax imposed upon FMU students is timely collected and remitted to the Department of Revenue.

Sodexo, as the contract provider, is required to include a mechanism to collect and remit the sales tax from FMU students. Sodexo, as a bidder, was required to submit a bid to the state procurement officer detailing the entire cost of providing board services to FMU students. If any omissions occurred, as apparently the Department of Revenue now claims, those omissions occurred between Sodexo and the state procurement officer.

The tax Sodexo erroneously seeks from FMU is not a tax imposed upon FMU, but rather a tax that Sodexo failed to include in its bid with the state procurement officer. Failed to recognize the tax was not included in the contract offer; the bid was approved, failed to implement a collection and remitting process; and failed to actually collect and remit the tax until such time as Sodexo was audited by the department of revenue.

We are certainly willing to work with the state procurement office and Sodexo so that the appropriate tax may be collected and remitted in the future. However, FMU has played no role in the omission of collecting this tax in the past and is not responsible for the \$185,945 Sodexo has now erroneously billed FMU.

The amount that Sodexo has erroneously billed FMU are taxes imposed upon FMU students, not FMU. Sodexo's omission to include the taxes in its bid with the state procurement officer, or failure to collect and remit the taxes to the Department of Revenue are not in any way the responsibility of FMU.

We respectfully disagree that Sodexo informed FMU in March of 2012 of a potential tax liability. Sodexo failed to make proper notification under the terms of the contract to either FMU or the Materials Management Office, Procurement Services Division of the State Budget and Control Board which is the issuing authority that administered the solicitation to provide Dining services to FMU. By failing to properly notify FMU, Sodexo obstructed FMU's contractual rights to contest the tax assessment and waived Sodexo's contractual rights, if any, to assert such a claim.

FMU is working with our attorneys and with the Material Management Office to address a contractual modification that realistically addresses the existing relationship between the parties and complies with the applicable tax laws.

We recognize the fact that there are a reduced number of students enrolled in meal plans this semester as compared to recent years. However, there is no contractual obligation on the part of FMU to guarantee a minimum number of boarders each semester. Conversely, it is Sodexo's responsibility for developing and implementing a proactive marketing plan to promote the Dining Services Program to the entire University community.

We sincerely appreciate the hard working and dedicated Sodexo employees in their service to FMU. The shortcomings in our contractual relationship have occurred in dealing with larger more far-reaching issues such as the subject of this letter.

Sincerely,



John J. Kiser

Cc: Dr. Luther F. Carter