

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Protest of Singletary Tax Services;	)	
Appeal by Singletary Tax Services	)	Case No. 2011-8
	)	
RFP No. 5400002768	)	
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This matter came before the South Carolina Procurement Review Panel (the Panel) when Singletary Tax Services (Singletary) filed a request for further administrative review via e-mail on July 16, 2011. On July 15, 2011, the Chief Procurement Officer (the CPO) issued a decision in which he denied Singletary’s protest regarding a Request for Proposals (RFP) conducted by the Materials Management Office (MMO) on behalf of the South Carolina Department of Education (the Department). The RFP was issued by MMO to acquire accounting and financial management services for First Steps County Partnerships (First Steps). With its July 16th e-mail, Singletary sought further review of the CPO’s July 15th decision. As intended awardees, Elliott Davis, LLC (ED), and Cherry Bekaert & Holland, LLP (CB&H), are also parties to the action before the Panel.

Singletary Tax Services is a sole proprietorship and is represented by John Singletary (Mr. Singletary). Boyd B. Nicholson, Jr., Esquire, represents First Steps. The Department is represented by Shelly B. Kelly, Esquire. Steven E. Farrar, Esquire, represents ED. R. Paul Childress, Esquire, and J. Buckley Warden, IV, Esquire, represent CB&H. Molly R. Crum, Esquire, represents the CPO.

On September 13, 2011, the CPO filed a motion with the Panel to dismiss Singletary's appeal; this motion also requested that the Panel dispose of this appeal without an evidentiary hearing. The Panel afforded the parties an opportunity to submit written legal briefs in response to the CPO's motion to dismiss. Based on the record before it, the applicable law, established Panel procedures, and the legal memoranda submitted by the parties, the Panel has conducted a *de novo* administrative review pursuant to Section 11-35-4410(1)(a) of the Procurement Code and issues this decision without a hearing.<sup>1</sup>

### **Findings of Fact**

#### **I. Factual Background Regarding the RFP**

First Steps is a statewide program to improve school readiness among preschool children and is funded with a combination of local, state, and federal resources. First Steps is overseen by the Department, which requested MMO to conduct a solicitation to acquire accounting and financial management services for the program. On April 7, 2011, MMO issued an RFP seeking qualified vendors to provide the following services: general accounting and bookkeeping; completion of local, state, and federal tax forms; performance as the primary point of contact for all financial audits; and the management of county bank accounts and balances. Under the terms of the RFP, the state was divided into two fiscal regions, Region 1 and Region 2. The RFP also provided that "One contract **may** be awarded for the entire state (46 counties). The [S]tate reserves the right to award one contract, two contracts, or no contracts based on the award criteria . . . and funds availability." The initial term of the contract was one year with an option to renew for up to five years. Thus, the maximum contract period contemplated by the RFP was

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<sup>1</sup> The Panel has previously dispensed with oral argument where the facts of a protest are not in dispute and the only issues to be decided are legal ones. *In re: Protest of Capital City Catering*, Case No. 2008-1; *In re: Protest of Accent Contracting, Inc.*, Case No. 2002-2; and *In re: Protest of Koch Industries, Inc.*, Case No. 1999-4.

from July 1, 2011, through June 30, 2016. The RFP also contained a standard statement explaining an aggrieved offeror's right to protest under the Procurement Code.

The RFP originally established an opening date of May 9, 2011, and an award notification date of May 11, 2011. Subsequent amendments moved the opening date to May 17, 2011. After the opening, MMO posted two notices that the award posting date had been extended pursuant to an applicable regulation.<sup>2</sup> The second of those notices ultimately reset the award date for May 31, 2011. On May 31, 2011, MMO posted notice of an intent to award Region 1 to CB&H and Region 2 to ED. Mr. Singletary filed his initial protest on June 7, 2011, and MMO suspended the intended awards on June 10, 2011. Both the intended award notice and the suspension notice clearly indicate that CB&H is to be awarded the contract for Region 1 and that ED is to be awarded the contract for Region 2. Moreover, both the intended award notice and the suspension notices note that the maximum period for the contracts is five years (July 01, 2011 through June 30, 2016). Finally, the intended award notice contains a statement regarding an aggrieved offeror's right to protest.

In his protest letter, Mr. Singletary asserted that he traveled to MMO's offices in Columbia, South Carolina, on two occasions for the public bid opening. The protest letter noted the dates of those visits as June 23, 2011, and June 31, 2011.<sup>3</sup> Mr. Singletary complained that a public bid opening did not take place on either of those dates.

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<sup>2</sup> The controlling regulation is codified at S.C. Code Ann. Regs. 19-445.2090(B).

<sup>3</sup> As more fully explained below, Mr. Singletary filed a separate federal lawsuit relating to this procurement on June 14, 2011. In his federal complaint, Mr. Singletary claims to have visited MMO's offices on April 23, 2011, and April 31, 2011. For the purposes of its review, the Panel assumes that the correct dates are the ones appearing in his protest letter: June 23rd and June 31st.

## **II. Procedural Background Regarding the Protest**

This particular protest and appeal have an unusually extensive procedural history. Therefore, a review of the various legal filings that have taken place since Mr. Singletary's initial protest was filed on June 7th is particularly instructive in this case. After Mr. Singletary filed his protest, the CPO requested that MMO and the other parties submit written responses to the allegations raised by Mr. Singletary's protest. The deadline for those responses was June 14, 2011. MMO responded in detail to the protest's allegations on June 14, 2011. On this same date, Mr. Singletary filed a separate federal lawsuit against the Department, First Steps, Dan Covey, CB&H, ED, and "others to be named" in the United States District Court for the District of South Carolina. In addition to asserting claims based on state procurement laws, Mr. Singletary's federal lawsuit alleged violation of his civil rights, bid rigging, civil conspiracy, and federal anti-trust violations.

Because it did not receive the CPO's request until after the June 14th deadline had passed, ED requested and was allowed an extension of time to respond to Mr. Singletary's protest. ED responded to the CPO on June 20, 2011, asserting that it had followed the bid process as outlined by the RFP and as instructed by the state procurement officer. Moreover, ED denied any illegal or improper conduct in participating in the solicitation. Thereafter, on June 28, 2011, Mr. Singletary sent an e-mail to MMO and the other parties alleging irregularities with the evaluation process for the first time. On July 15, 2011, the CPO issued a decision denying all of Mr. Singletary's grounds of protest.

## **III. Procedural Background Regarding the Appeal**

On July 16, 2011, Mr. Singletary sent an e-mail to MMO requesting further administrative review before the Panel. Counsel for the CPO forwarded that request to the Panel

on July 18, 2011. In this e-mail, Mr. Singletary indicated that his request was “to preserve necessary rights should the case be remanded back to the state court” and asserted that the separate federal lawsuit he filed removed the case from the state tribunal. Mr. Singletary’s appeal letter was not accompanied by the requisite filing fee,<sup>4</sup> and counsel for the Panel wrote to him on July 20, 2011, requesting that he remit the fee or file a hardship affidavit. Mr. Singletary did not respond to this letter, and on August 17, 2011, the CPO moved to dismiss the appeal for failure to pay the filing fee. On that same date, counsel for the Panel wrote to all the parties, acknowledging receipt of the CPO’s motion to dismiss and confirming that the Panel had not received the fee. Counsel for the Panel then requested that the parties respond in writing to the CPO’s motion to dismiss no later than September 2, 2011. Also on August 17, 2011, First Steps sent a letter to the Panel joining the CPO’s motion to dismiss and filing its own motion to dismiss the appeal for failure to adequately state the grounds for appeal. On August 18, 2011, the Panel received the filing fee from Mr. Singletary and a letter reiterating his contention that the case had been removed to federal court. Therefore, in Mr. Singletary’s opinion, the CPO’s motion to dismiss was “legally impermissible.”

Because the Panel had finally received Mr. Singletary’s filing fee, counsel for the Panel sent the parties a letter on August 23, 2011, and requested that they submit written legal memoranda by September 13, 2011, addressing (1) the effect, if any, the federal lawsuit had on the Panel’s administrative review, and (2) the grounds for dismissal raised by First Steps in its motion to dismiss. Mr. Singletary replied to this request by e-mail on September 6, 2011. In his e-mail, Mr. Singletary maintained his position that the Panel could not proceed with its review

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<sup>4</sup> The Panel is authorized to collect a filing fee pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011 – 2012. If a party is unable to pay the fee because of hardship, the Panel may waive the filing fee upon considering a notarized affidavit from the party.

because the case had been removed to federal court. He also alleged that his due process rights had been violated. Mr. Singletary did not address any of the grounds for dismissal in this e-mail.

ED was the next party to respond to the Panel's request, filing a legal memorandum on September 9, 2011. In its brief, ED argued that the separate federal lawsuit filed by Mr. Singletary, in which he alleges bid rigging and civil conspiracy, should not prevent the Panel from proceeding because the federal court likely did not have jurisdiction over the state procurement law claims because Mr. Singletary had not yet exhausted his administrative remedies. ED also joined in First Steps' motion to dismiss. CB&H also filed a legal memorandum on September 9th, arguing that the Panel's administrative review took precedence over the federal lawsuit and that the Panel should proceed. CB&H also filed its own motion to dismiss Mr. Singletary's appeal for failing to adequately state the grounds for appeal.

On September 13, 2011, the Panel received legal memoranda from the CPO, First Steps, and the Department. The CPO argued that the federal lawsuit should not preclude the Panel from proceeding because the district court had not issued an injunction ordering the Panel to stay its proceedings. The CPO also moved for dismissal of Mr. Singletary's appeal on the grounds of untimeliness, failure to state a claim, lack of jurisdiction, and vagueness. First Steps' brief argued that the Panel's proceedings should not be barred for the reasons stated by the other parties and reaffirmed its original motion to dismiss. In its brief, the Department argued that the Panel has exclusive jurisdiction over the state law procurement claims and that the Panel should proceed with its administrative review. The Department also joined in First Steps' motion to dismiss.

Upon consideration of the legal arguments presented by the parties, the Panel determined that the separate federal lawsuit did not preclude the Panel from proceeding with its

administrative review. On September 27, 2011, counsel for the Panel sent a letter to Mr. Singletary and the other parties informing them of the Panel's conclusion regarding its ability to proceed. Once again, the Panel asked Mr. Singletary to respond in writing to the various motions to dismiss no later than October 14, 2011. The other parties were informed that they could file any final replies no later than October 21, 2011.

On October 12, 2011, Mr. Singletary appeared in person at the Panel's offices and hand-delivered a letter which reasserted that the case had been removed to federal court and that the Panel was therefore precluded from proceeding. Mr. Singletary's letter was accompanied by a copy of a document entitled "Notice of Removal" which had been time and date stamped by the Clerk of the United States District Court on October 11, 2011. Mr. Singletary's letter to the Panel did not address the merits of any of the grounds for dismissal raised by the other parties. On October 20, 2011, the Panel received a letter from the CPO in lieu of a formal reply. In that letter, the CPO informed the Panel that on October 18, 2011, a United States Magistrate Judge had dismissed Mr. Singletary's Notice of Removal. In her order, the judge found that Mr. Singletary was not entitled to removal because he was not a defendant in any of the complaints submitted to the district court and that his notice was legally ineffective to remove any case pursuant to it.<sup>5</sup> Based on the judge's order and Mr. Singletary's failure to submit a timely written response to his September 13th motion to dismiss, the CPO has asked the Panel to rule on his motion and to dismiss Mr. Singletary's appeal in its entirety. Counsel for the CPO has also indicated that the Department, First Steps, ED, and CB&H concur in this request.

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<sup>5</sup> The Panel notes that this order issued by the U.S. Magistrate Judge conclusively confirms the Panel's earlier decision that the separate federal litigation does not preclude it from proceeding with its administrative review under the Procurement Code. Therefore, the Panel need not further address this particular issue.

## Conclusions of Law

### I. Allegations Regarding the Evaluation Process

As an initial matter, the Panel will address Mr. Singletary's attempt to raise allegations that the scores on the evaluation sheets were changed at some time after the evaluators signed them. This allegation was raised for the first time in an e-mail Mr. Singletary sent to MMO on June 28, 2011. Under the Procurement Code, an actual offeror who is aggrieved by the intended award of a contract may protest the intended award "within ten days of the date . . . notification of intent to award . . . is posted in accordance with this code." S.C. Code Ann. § 11-35-4210(1)(b) (2011). The written protest must be received by the CPO within the ten day time limit established by section 11-35-4210(1)(b), although a protestant is allowed five additional days to amend a protest that was timely filed under that section. S.C. Code Ann. § 11-35-4210(2)(b) (2011). The Panel has repeatedly ruled that the time for filing a protest is jurisdictional and cannot be waived by the conduct or consent of the parties. *See, e.g., In re: Protest of Oakland Janitorial Services, Inc.*, Case No. 1988-13; *In re: Protest of National Cosmetology Ass'n*, Case No. 1996-17; *In re: Protest of Jones Engineering Sales, Inc.*, Case No. 2001-8. Moreover, the Panel has noted that it cannot consider issues on appeal that are not established by the protest letter and presented to the CPO. *See Protest of DPConsultants, Inc.*, Panel Case No. 1998-6 ("The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.")

The intended award notice for this solicitation was posted on May 31, 2011. As computed by the Procurement Code,<sup>6</sup> ten days after May 31 would be June 10, 2011. Therefore,

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<sup>6</sup> Section 11-35-310(13) provides that "days" means calendar days and that "the day of the event from which the designated period of time begins to run is not included." S.C. Code Ann. § 11-35-310(13) (2011).

Mr. Singletary's initial protest letter, which was sent to MMO on June 7, 2011, was clearly received within the ten day time limit set by section 11-35-4210(1)(b). However, any desired amendment to the June 7th protest letter was due by June 15th to be considered timely under section 11-35-4210(2)(b). Although Mr. Singletary has objected to his June 28th e-mail as being characterized as an amendment, he undoubtedly seeks to add claims relating to the evaluation process and the conduct of the procurement officer to his protest by way of this e-mail. These same claims are also raised by his July 16, 2011, e-mail requesting further administrative review by the Panel. The Panel finds that the June 28th e-mail is in fact an untimely amendment to the June 7th protest letter. Moreover, his July 16th e-mail also attempts to raise those same untimely issues on appeal. Based on the record before it, the Panel can only conclude that these allegations were untimely and that they were not presented to the CPO. Therefore, the Panel lacks jurisdiction to consider any claims relating to the evaluation process and dismisses them from its review.

## **II. Protest Issues Raised Pursuant to the Procurement Code**

Mr. Singletary's June 7th protest letter is seven pages long and raises numerous issues, some of which are appropriate under the Procurement Code, and some of which are not. The Panel will next address those claims which appear to raise appropriate protest issues.

### **A. The Contractual Term of the Intended Award (Protest Issue Number One)**

Mr. Singletary first contends that the intended award to ED was for "a term through 12-31-9999" in violation of sections 11-35-1520(2)<sup>7</sup> and 11-35-2030(4) of the Procurement Code.

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<sup>7</sup> Section 11-35-1520(2) provides that "[a]n invitation for bids must be issued in an efficient and economical manner and must include specifications and all contractual terms and conditions applicable to the procurement." S.C. Code Ann. § 11-35-1520(2) (2011). Although the solicitation in the instant case is an RFP rather than an invitation for bids (IFB), some of section 11-35-1520's provisions apply to RFPs by virtue of the following language in section 11-35-1530(1): "a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, *unless otherwise provided in this section.*" S.C. Code Ann. § 11-35-1530(1) (2011) (emphasis added). Section 11-35-1530 does not contain a provision directly relating to what

Section 11-35-1520(2) requires the solicitation documents to contain “all contractual terms.” Section 11-35-2030(4) addresses multi-term contracts and limits the term for such contracts to five years, unless “the designated board officer”<sup>8</sup> approves a term of seven years. S.C. Code Ann. § 11-35-2030(4) (2011). Contract terms exceeding seven years must be approved by the board. *Id.*

The RFP in this solicitation did in fact establish a maximum term of five years, from July 1, 2011, through June 30, 2016. In addition, the RFP noted that the initial contract term was for one year from the effective date and that “this contract expires no later than the last date stated on the final statement of award.” Therefore, the Panel finds that the requirements of section 11-35-1520(2) have been met in this case.

Regarding the issue of whether ED was awarded a contract in excess of five years, the Panel finds that the intended award notice and the suspension notice both list a maximum contract term of July 1, 2011, through June 30, 2016. The Panel also finds that Mr. Singletary has failed to present any evidence showing that ED was in fact awarded a contract until the year 9999. Therefore, the Panel denies and dismisses this protest issue for failure to state a claim.

#### **B. Bid Opening (Protest Issue Number One)**

Mr. Singletary next complains that MMO failed to conduct a public bid opening in accordance with section 11-35-1520(5) on either June 23rd or June 31st when he traveled to MMO’s Columbia offices. However, Mr. Singletary’s reliance on section 11-35-1520(5) is misplaced because RFP openings are governed by section 11-35-1530(3) of the Procurement Code, not section 11-35-1520(5). Section 11-35-1530(3) provides:

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specifications, contractual terms and conditions must be contained in an RFP; therefore, it appears that section 11-35-1520(2) would apply here.

<sup>8</sup> The Panel notes that the word “board” here refers to the South Carolina Budget and Control Board. S.C. Code Ann. § 11-35-310(2) (2011).

Receipt of Proposals. Proposals must be opened publicly *in accordance with regulations of the board*. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection *after contract award*.

S.C. Code Ann. § 11-35-1530(3) (2011) (emphasis added). To aid the implementation of this statutory provision, the board has promulgated the following regulation:

(1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The Register of Proposals shall be certified in writing as true and accurate by both the person opening the proposals and the witness. *The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier*. Proposals and modifications shall be shown only to State personnel having a legitimate interest in them and then only on a “need to know” basis. *Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel*.

S.C. Code Ann. Regs. 19-445.2095(C) (2010) (emphasis added).

The RFP originally set the opening date and time for May 9, 2011, at 2:30 p.m., but Amendment 1 changed the opening date and time to May 17, 2011, at 2:30 p.m. Because May 17th was the established opening date, the Panel finds that the State was not required to conduct a public opening on either June 23rd or June 31st. Thus, Mr. Singletary’s complaint with regard to MMO’s failure to conduct a public opening on the two occasions that he traveled to Columbia is without merit.

Mr. Singletary also asserts that the State violated section 11-35-1520(5) by refusing to allow him to inspect the bid tabulation<sup>9</sup> at the time of opening. However, as noted above, section 11-35-1520(5) is inapplicable to RFPs. Under the statutory and regulatory provisions governing

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<sup>9</sup> Under section 11-35-1520(5), the bid tabulation collects the amount of each bid, each bidder’s name, and other relevant information about the bid. In addition, the bid tabulation is open to public inspection at the time of opening.

RFPs (section 11-35-1530(3) and regulation 19.445-2095(C)), the State is prohibited from disclosing information regarding an offeror's identity and the contents of its offer at the time of opening.<sup>10</sup> Because the State was obligated not to disclose such information at an RFP opening, Mr. Singletary has failed to state a claim. Therefore, the Panel denies and dismisses this protest issue.

**C. Re-award of Contract in Violation of Section 11-35-1520(7) (Protest Issue Number Two)**

Mr. Singletary's protest next alleges that the State originally awarded Region 2 to two vendors and then re-awarded the contract to one vendor after being notified of the mistake. Mr. Singletary asserts that the re-award of the contract to one offeror violates section 11-35-1520(7) of the Procurement Code. Section 11-35-1520(7)<sup>11</sup> provides in pertinent part:

Correction or Withdrawal of Bids: Cancellation of Awards. . . . After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. . . . Except as otherwise provided by regulation, *all decisions . . . to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.*

S.C. Code Ann. § 11-35-1520(7) (2011) (emphasis added).

Mr. Singletary's protest letter cryptically refers to a "behind the curtain public restricted bid contract" which resulted in an intended award of the same region to two vendors rather than one as required by the RFP. MMO and the CPO explain that the apparent dual award was the result of an internal administrative error that was only visible on a computer screen if a user

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<sup>10</sup> Under regulation 19-445.2095, the Register of Proposals is only open to public inspection at the time of notification of award or intended award. Even then, the information contained in the register is limited to "the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered." In any event, Mr. Singletary has only alleged deficiencies in the opening process, not that he was not permitted to inspect the Register of Proposals after the intended award was posted on May 31, 2011.

<sup>11</sup> The statutory provision governing RFPs, section 11-35-1530, is silent with regard to correction or withdrawal of bids; therefore, section 11-35-1520(7) appears to apply to both IFBs and RFPs.

clicked on the contract number link which would take the user to the vendor search/contracts screen. This administrative error was corrected, and Mr. Singletary apparently takes the position that this correction amounted to a re-award without a written determination under section 11-35-1520(7). However, the Panel finds that the intended award notice is the official contract document, not a computer screen summary which was only briefly visible. The intended award notice clearly indicates that CB&H was the intended awardee of Region 1 and ED was the intended awardee of Region 2. Based on the record before it, the Panel finds there is no evidence that Region 2 was ever awarded or intended to be awarded to two vendors or that an impermissible re-award occurred. Therefore, the Panel denies and dismisses this protest issue for failure to state a claim.

**D. Failure to Post Intended Award and Statement of Right to Protest (Protest Issue Number Three)**

Mr. Singletary's next protest issue relates to the posting requirements set forth in section 11-35-1520(10) of the Procurement Code.<sup>12</sup> Section 11-35-1520(10) requires the posting of an intended award notice ten days prior to entering a contract when that contract has a potential value of one hundred thousand dollars or more. S.C. Code Ann. § 11-35-1520(10) (2011). This statutory provision also requires the posting date to appear on the face of the notices. *Id.* Finally, this section requires "[t]he invitation for bids and a notice of award or notice of intent to award must contain a statement of bidder's right to protest." *Id.*

Just as provided for in the second extension of award notice, the intended award notice in the instant case was posted on May 31, 2011. The intended award notice clearly states that it will become the final statement of award more than ten days later, on June 13, 2011, unless the

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<sup>12</sup> This IFB provision applies to RFPs through the language of section 11-35-1530(9): "Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 11-35-1520(10)." S.C. Code Ann. § 11-35-1530(9) (2011).

intended award is suspended or canceled. Moreover, both the RFP and the intended award notice also include the required statement regarding an aggrieved offeror's right to protest. Thus, the only evidence before the Panel is that the State fully complied with the posting requirements of section 11-35-1520(10). Therefore, the Panel denies and dismisses this protest issue for failure to state a claim.

**E. Failure to Rank Prospective Bidders Pursuant to a Request for Qualifications (Protest Issue Number Four)**

Mr. Singletary next asserts that the State failed to rank prospective bidders pursuant to a Request for Qualifications (RFQ), which is a procedure established by section 11-35-1520(11)(b) of the Procurement Code. Mr. Singletary's reliance on this particular provision is misplaced for two reasons. First, section 11-35-1520(11)(b) applies only to IFBs, not RFPs. In a solicitation conducted under the RFP source selection method, RFQs are governed by section 11-35-1530(11). Second, as the plain language of section 11-35-1530(11) indicates, an RFQ is an optional procedure which a procurement officer may choose to conduct prior to soliciting proposals.<sup>13</sup> The record before the Panel contains no evidence that the procurement officer conducted an RFQ for this solicitation. Therefore, to the extent Mr. Singletary relies on section 11-35-1520(11)(b) for this particular protest ground, the Panel denies and dismisses it for failure to state a claim because that statutory provision does not apply to RFPs. Furthermore, if Mr. Singletary intended to raise the relevant statutory provision (i.e., section 11-35-1530(11)), the

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<sup>13</sup> Section 11-35-1530(11)(a) states, "Before soliciting proposals, the procurement officer *may* issue a request for qualifications from prospective officers." S.C. Code Ann. § 11-35-1530(11)(a) (2011) (emphasis added).

Panel still finds that the protest issue must be dismissed because the procurement officer did not conduct an RFQ in this solicitation, nor was he required to do so.<sup>14</sup>

#### **F. Bid Rigging**

In at least two places in his protest letter, Mr. Singletary makes statements to the effect that the awards to CB&H and ED are the result of “bid rigging.” However, Mr. Singletary fails to allege any facts supporting this claim in his protest letter or in any response to the CPO’s motion to dismiss. The Procurement Code requires that a protest “must set forth both the grounds of protest and the relief requested with enough particularity to give notice of the issues to be decided.” S.C. Code Ann. § 11-35-4210(2)(b) (2011). Mr. Singletary’s conclusory assertions that bid rigging took place are simply too vague and insufficient to state a claim. Therefore, to the extent that Mr. Singletary’s protest letter alleges bid rigging, that issue is denied and dismissed for failure to adequately state a claim.

#### **II. Protest Issues Unrelated to the Procurement Code (Protest Issues Five through Thirteen)**

In the fifth numbered paragraph of his protest letter, Mr. Singletary “reports anticompetitive practices in connection with [the RFP currently under review].” The Panel finds that allegations regarding anticompetitive or unfair trade practices in violation of state law are invalid protest claims under the Procurement Code. *See Unisys Corp. v. SC Budget and Control Board*, Opinion 25342, Richland County Circuit Court (2001) (holding that claims regarding unfair trade practices are viable in protest proceedings because transactions under the Procurement Code are exempt from the South Carolina Unfair Trade Practices Act). Therefore, the Panel denies and dismisses this protest issue for failure to state a claim.

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<sup>14</sup> Mr. Singletary also references section 11-35-1520(5) in Protest Issue Number Four. The Panel has thoroughly addressed the requirements for public bid openings on pages 10 through 12 of this order and need not discuss them further here.

In the sixth numbered paragraph of his protest letter, Mr. Singletary asserts that the State failed to comply with the requirements of the Freedom of Information Act (FOIA). The Panel finds that neither it nor the CPO has jurisdiction or authority over claims that FOIA has been violated. *See Protest of Transportation Management Services, Inc.*, Panel Case No. 2000-2 (dismissing an allegation involving a FOIA response for failure to state a claim). Therefore, the Panel dismisses this protest issue for failure to state a claim.

In the remaining paragraphs of his protest letter (numbered seven through thirteen), Mr. Singletary lists the names of various federal anti-trust statutes. The Panel declines to address any federal anti-trust violations as it clearly lacks jurisdiction and authority to do so. The Panel dismisses these claims for lack of jurisdiction.

In his appeal letter to the Panel, Mr. Singletary complained that the CPO's review violated his due process rights. The Panel notes that its *de novo* review in the instant case "renders harmless a procedural due process violation based on the insufficiency of the lower administrative body." *Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Services Information Technology Management Office*, 346 S.C. 158, 174, 551 S.E. 2d 263, 272 (2001) (citing *Ross v. Med. Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997)). The Panel afforded Mr. Singletary numerous opportunities to brief the grounds for dismissal raised by the CPO and the other parties. Despite those opportunities, Mr. Singletary repeatedly declined to address the motions to dismiss in any meaningful or substantive way. The Panel finds that it has satisfied the requirements of due process by providing Mr. Singletary notice and the opportunity to be heard.

Therefore, based on the reasons discussed above, the Panel grants the CPO's motion<sup>15</sup> to dismiss Mr. Singletary's request for review in its entirety for failure to state a claim, vagueness, and lack of jurisdiction.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
C. BRIAN MCLANE, SR., CHAIRMAN

This 8<sup>th</sup> day of November, 2011.

Columbia, South Carolina

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<sup>15</sup> Because the Panel has granted the CPO's motion *in toto*, it need not address the other parties' motions to dismiss.



