

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Request for Review by Data)	
Recognition Corporation)	Case No. 2014-13
)	
)	
Solicitation No. 5400008105)	
South Carolina Department of Education –)	
Statewide Education Assessment for)	
Grades 3 – 8)	

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on November 19, 2014, pursuant to a request for review by Data Recognition Corporation (DRC) under section 11-35-4410(1)(b) of the South Carolina Consolidated Procurement Code (the Procurement Code). DRC sought review of the November 1, 2014, written determination lifting the automatic stay imposed by section 11-35-4210(7) of the Procurement Code by the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO). In the Panel’s hearing, DRC was represented by E. Wade Mullins, III, Esquire. David B. Summer, Jr., Esquire, and Faye A. Flowers, Esquire, represented ACT, Inc. (ACT). Shelly B. Kelly, Esquire, represented the South Carolina Department of Education (SCDE). Keith C. McCook, Esquire, represented the South Carolina Budget and Control Board (B&CB). William Dixon Robertson, III, Esquire, represented the CPO.

Findings of Fact

I. Solicitation and Legislative Background

On June 30, 2014, ITMO issued a Request for Proposal (RFP) seeking proposals “for the administration, scoring, and reporting services of statewide, standards-based summative assessment(s) for students in grades 3 – 8 and 11.” RFP No. 5400008105, Section III, page 16.

The RFP was issued in response to legislation passed by the General Assembly in the spring of 2014 and subsequently signed into law by Governor Haley. In particular, Act 200 required the Executive Director of the B&CB, Marcia S. Adams, to direct a procurement to acquire a new summative assessment system for the 2014 – 2015 school year to assess students in grades 3 through 8, and in grades 10 and 11 if funds were available, in English/language arts (ELA) and mathematics. S.C. Act No. 200, § 3(C)(1) (May 30, 2014) (amending S.C. Code Ann. § 59-18-325). In addition, Ms. Adams was to direct a procurement to acquire a college and career readiness assessment for students entering grade 11 for the first time in the 2014 – 2015 school year.¹ *Id.* at § 3(C)(2). Act 200 mandated that the procurement of both of these assessments be completed by September 30, 2014 and directed SCDE to administer the assessments procured by the B&CB “[i]n school years 2014 – 2015, 2015 – 2016, and 2016 - 2017.” *Id.* at § 3(C)(1), (C)(2), and (C)(3). Act 200 also created a “special assessment panel” (the Assessment Panel), with whose “advice and consent” Ms. Adams was to conduct the procurement. *Id.* at (C)(1), (C)(2), and (C)(4).²

Historically, SCDE, through its Office of Assessment, has worked with the Materials Management Office of the B&CB to procure and administer statewide assessments. *See* Supplemental Statement by the S.C. Department of Education, dated October 25, 2014 (attached to this order as Panel Exhibit A). However, by its very terms, Act 200 limits SCDE’s role in the procurement of the new assessments by appointing Ms. Adams to direct the procurement “with

¹ The new college and career readiness assessment for students in grade 11 was made necessary by Act 155, which eliminated the previously administered South Carolina High School Assessment Program (HSAP), passage of which had been required for a high school diploma. Act No. 155, § 1(B)(1) (April 14, 2014) (amending S.C. Code Ann. § 59-18-310).

² Act 200 specifies that the Assessment Panel must be composed of the following individuals or their designee: (a) the Chairman of the State Board of Education; (b) the Chairman of the Education Oversight Committee; (c) the Chairman of the Board of Directors for the South Carolina Chamber of Commerce; (d) the Chairman of the South Carolina Commission on Higher Education; (e) the Chairman of the South Carolina Technical College System Board; and (f) the State Superintendent of Education. Act No. 200, § 4(a).

the advice and consent” of the Assessment Panel, on which the State Superintendent of Education is one voice out of six. Nonetheless, SCDE was identified as the using agency on the cover page of the RFP and was directed to administer the assessments procured by the B&CB. RFP No. 5400008105, Cover Page; Act No. 200, § (C)(3).

As previously noted, ITMO issued the RFP on June 30, 2014. On August 11, 2014, two offers were received: one from DRC and one from ACT. *See* Written Determination Regarding Which Solicitation by a Responsible Offeror is Most Advantageous to the State and Record of Basis for Award (attached to this order as Panel Exhibit B). On September 19, 2014, ITMO posted a notice of intent to award the statewide education assessment contract to ACT. Panel Hearing Exhibit #6, Affidavit of W. Jason Evans, Attachment #1. DRC timely protested the intended award on September 29, 2014, and amended its protest on October 6, 2014. Under the Procurement Code, the filing of a protest automatically stays the procurement. S.C. Code Ann. § 11-35-4210(7) (2011). With regard to this particular solicitation, the automatic stay imposed by DRC’s protest clearly prevented the solicitation from being concluded by September 30, 2014, as mandated by Act 200.³ The CPO conducted a hearing on DRC’s protest on October 23 and 24, 2014. Panel Hearing Exhibit #1, Determination to Lift Stay, November 1, 2014.

II. Information Gathering Regarding Delay and Assessment Panel Meeting

The documentary record before the Panel reflects that David Avant, General Counsel for the B&CB, contacted several SCDE staff, including Dr. Nancy W. Busbee,⁴ by e-mail on October 22, 2014, seeking information regarding a “drop dead date” “for having a vendor in place to administer the grade 3-11 Assessments so that teachers, students, [and] district

³ Despite setting a very short time frame for completing this procurement, Act 200 did not otherwise exempt it from the provisions of the Procurement Code. As such, DRC had every right to protest the intended award. The Panel merely notes that the practical effect of the protest impeded the B&CB’s ability to conclude the procurement as directed by the General Assembly.

⁴ Dr. Busbee is SCDE Deputy Superintendent, Accountability Division.

administrators can be prepared for the assessments and so that the results can be relied on?" Panel Hearing Exhibit #6, Affidavit of W. Jason Evans ("Evans Aff."), page 110. Apparently receiving no response, Mr. Avant contacted Dr. Busbee again on October 28, 2014, after the hearing before the CPO. *Id.* Dr. Busbee answered by e-mail that same day:

David,
I have conferred with Liz Jones regarding a drop dead date for Spring 2015 testing. In that the chosen vendor will need to prepare, print, and distribute the testing material to schools across the state (prior to the agreed upon material delivery and testing date), as well as be able to schedule and provide the training as defined in the RFP, *the drop dead date should come from the vendor(s)*. If the chosen vendor can accomplish the required work in order to test in ELA and Math, for the required grades during the testing window previously agreed upon for Spring of 2015, then the SCDE will be able to prepare and train the appropriate agency, district, and school staffs by the drop dead date provided by the chosen vendor.
Nancy.

Id. (emphasis added).

Under the testing schedule adopted by SCDE, test administration for the 2014 – 2015 school year is scheduled to take place in April – May of 2015. Panel Exhibit #1, Attachment 1, Continued, "ESEA Flexibility Request," page 58.⁵ The testing schedule included in the ESEA Flexibility Request indicates that beginning in November 2014 and continuing through January 2015 the following action will occur:

Disseminate general information to school districts during Instructional Leaders Roundtable, Chief Academic Officers, and state guidance counselor meetings, regarding test formatting and alignment of test to curriculum standards.

⁵ "ESEA" refers to the federal Elementary and Secondary Education Act of 1965, as amended. Ms. Karla Hawkins, SCDE Deputy General Counsel, testified before the Panel that many states, including South Carolina, apply to the United States Department of Education (the DOE) for waivers (or flexibility) because they have difficulty meeting all of the requirements of "No Child Left Behind." Ms. Hawkins explained that Act 200 and the new statewide assessments were part of South Carolina's waiver request and included a testing schedule that was updated in July 2014. The DOE granted South Carolina's waiver request. Panel Exhibit #1, Attachment 1, Continued, Letter to The Honorable Mick Zais from Deborah S. Delisle, DOE Assistant Secretary.

Id. at 57. The testing schedule also provides that training for district test coordinators, school test coordinators, test administrators, and monitors will take place during February and March of 2015. *Id.*

As suggested by Dr. Busbee, Ms. Adams' office contacted the intended awardee, ACT, for information regarding the effects of further delay on contract performance. Mr. Paul J. Weeks, ACT Vice President for Client Relations, responded with a letter to Ms. Adams on October 30, 2014. Panel Hearing Exhibit #1, pages 11 – 14. Mr. Weeks writes:

ACT's performance of the contract has already been delayed by approximately thirty days, and ACT and the State will be required to move with all haste to address and attempt to minimize the effects of the delay already experienced. As of today, and assuming no further, or very minimal delays, ACT stands ready to perform the contract as negotiated at no additional costs to the State. If the contract is delayed [into December by the protest and appeal process], ACT advises that the best interests of the State in obtaining the services it seeks will be negatively impacted in that timely performance of the contract will be jeopardized and in that significant cost consequences could result depending on the length of the delay.

Id. at 12. Mr. Weeks goes on to explain that, among other concerns, further delay will compress the timetable for implementation; could lead to user error; could reduce the efficacy of training; could impact the testing schedule and post-test deliverables; and could impair teachers' ability to prepare students for testing. *Id.* at 12 – 14.

Ms. Adams also sought input from the Executive Director of the South Carolina Education Oversight Committee (EOC), Ms. Melanie D. Barton. Ms. Barton sent Ms. Adams a memorandum on October 30, 2014, which is included in the record before the Panel. Panel Hearing Exhibit #1, Attachment 1, pages 15 – 17. Ms. Barton recounts the requirements of Act 200 and notes that as part of South Carolina's ESEA waiver the State "must procure and implement a new, high-quality assessment for use in 2014 – 2015." *Id.* at 15. Ms. Barton notes

that time is critical both in terms of the days remaining in the school year and the need to begin training for the new assessments as quickly as possible:

If the current protest is not settled until the end of November, at best, the . . . implementation schedule would likely not be initiated until at least January 5, 2015. School and districts typically are closed for the winter holiday on or before December 19. Therefore, the earliest possible date that full implementation could occur is January 5, 2015, leaving only 71 school days until testing begins in the last week of April to prepare for the assessment. If implementation could begin as early as November 3, 2015 [sic], the state would have 103 days to prepare for the first week of testing.

Id. at 16. Ms. Barton also points out that **“the unknowns around the assessment impact more than just the accountability system; the assessment impacts instruction and evaluations.”**

Id. at 17 (emphasis in original). Examples of those “unknowns” include whether or not the test will be timed, the type of response (constructed or selected) included, and whether the assessment will measure student growth. *Id.* Finally, Ms. Barton points out that South Carolina is required to test on the Common Core State Standards in the 2014 – 2015 school year and must procure a new assessment because the test administered in 2014 “contained items that were common to both the previous state standards and to the Common Core State Standards.” *Id.*

The Assessment Panel met on October 31, 2014, and the minutes from that meeting are in the record before the Panel. Panel Hearing Exhibit #8, Affidavit of Katherine B. Fanning (“Fanning Aff.”), pages 3 – 4. Five of the Assessment Panel’s six members participated in the meeting, including Scott D. English, SCDE Chief Operating Officer, who served as designee for the State Superintendent for Education. Fanning Aff. at 3, 7. In addition to Mr. English, several key SCDE staff also attended the meeting: Dr. Busbee, Deputy Superintendent; Shelly Kelly, General Counsel; and Elizabeth Jones, Director, Office of Assessment. *Id.* The Assessment Panel adopted a motion to “direct the Executive Director of the Budget and Control Board to consult with the Chief Procurement Officer and request that he lift the stay of the award of the

contract to ACT for a summative assessment for grades 3 through 11 as provided in Act 200 of 2014 because awarding the contract without further delay is necessary to protect the best interests of the State of South Carolina.” Panel Hearing Exhibit #3, Motion for the Panel.⁶ Four of the five participating members voted in favor of the motion, but Mr. English abstained. Fanning Aff. at 4.

III. Request to Lift Automatic Stay, Written Determination of the CPO, Award, and Request for Panel Review

Sometime after the Assessment Panel’s adoption of the motion on October 31, 2014, Ms. Adams submitted a letter to the CPO requesting that he lift the automatic stay imposed by section 11-35-4210(7) of the Procurement Code and allow the award to ACT to go forward without

⁶ The motion further provided:

IT IS EVIDENT:

That unless the stay is lifted, the contract will not be awarded to either vendor until late November or December at the earliest;

that the successful vendor, Department of Education, school districts, schools, administrators, teachers and students have a great deal of preparatory work to do prior to the implementation of assessments in the spring;

that the Department, districts, schools, administrators, teachers and students will be unduly prejudiced by pushing the implementation date of the contract into late November/December, particularly given the number of school holidays beginning in late November and running into January;

that the State of South Carolina has been given a waiver by the U.S. Department of Education of certain requirements under the Federal Elementary and Secondary Education Act (ESEA) based, in part, on a schedule for implementing and administering student assessments for the 2014-2015 school year;

that pushing the implementation date of the assessments into December will result in the schedule presented to the U.S. Department of Education being pushed back beyond that approved as part of the ESEA waiver; and

that the State of South Carolina has withdrawn from the Smarter Balanced Assessment Consortium, and, as such, there is no existing assessment that could be administered should the efforts to procure a new assessment fail or be delayed beyond a point that an administration date in Spring 2015 is feasible.

delay in order to protect the best interests of the State. Panel Hearing Exhibit #1, Determination to Lift Stay, Attachment 1 at 4 - 8. Ms. Adams' letter recites the resolution of the Assessment Panel directing her to ask the CPO to lift the automatic stay, provides a general background regarding the solicitation and protest, and estimates that, absent a lifting of the stay, a further delay of sixty to ninety days is likely considering the protest and appeal process. *Id.* at 5 – 6. Ms. Adams then discusses the basis of her request and offers several reasons for lifting the stay. First, Ms. Adams notes that the statutory deadline for completing the procurement by September 30th – which the General Assembly determined to be in the best interests of the State – has already passed. *Id.* at 6. Second, Ms. Adams states that she is “informed that the practical problems associated with the anticipated delay will have serious and unacceptable consequences for the State” and that she has consulted with SCDE, ACT, and EOC regarding those consequences. *Id.* at 7.⁷ Based upon the information from those sources,⁸ Ms. Adams states that she “ha[s] concluded that proceeding with an award of the contract without further delay is necessary to protect the best interests of the State.” *Id.*

On November 1, 2014, the CPO granted Ms. Adams' request and issued a written determination lifting the automatic stay. Panel Hearing Exhibit #1. A Statement of Award to ACT was also issued on November 1, 2014. Panel Hearing Exhibit #6, Affidavit of W. Jason Evans, Attachment #5. Thereafter, SCDE issued a purchase order to ACT on November 3, 2014. Panel Hearing Exhibit #2, Purchase Order, SC Department of Education Admin. DRC filed its

⁷ See also *supra* pp. 3 – 6.

⁸ With her letter to the CPO, Ms. Adams attached this supporting correspondence received from Dr. Busbee, Mr. Weeks, and Ms. Barton. Panel Hearing Exhibit #1, Attachment 1 and Attachment 1, Continued. In addition, she included e-mails received from various district officials around the state expressing concern about the effects of delaying the new assessments. *Id.*

request for review with the Panel on November 3, 2014, and, as previously noted, the Panel conducted a hearing on November 19, 2014.

IV. Testimony Before the Panel

Dr. Busbee, whose duties as SCDE Deputy Superintendent include supervising the Office of Assessment, testified during the Panel's hearing. Dr. Busbee testified that even though she was not involved with this particular procurement except as in an advisory capacity, she is familiar with the procurement process and that she was generally aware of DRC's protest and that the award to ACT had been stayed. Dr. Busbee acknowledged that she attended the public portions of the Assessment Panel's October 31st meeting and understood that one of the alternatives discussed at that meeting was the possibility of asking the CPO to lift the automatic stay. Although Dr. Busbee testified that she did not follow all of the legal discussion regarding lifting the stay at that meeting, she acknowledged that Mr. English did not vote on the motion directing Ms. Adams to request the CPO to lift the stay. Moreover, Dr. Busbee testified that she received a copy of Ms. Adams' letter to the CPO requesting him to lift the stay, but that she did not have an opportunity to discuss the request with other SCDE staff prior to the CPO's November 1st decision. Finally, Dr. Busbee stated that she and others at SCDE wanted the CPO to rule on the merits of DRC's protest first.

Ms. Hawkins of SCDE also testified before the Panel. As previously noted, Ms. Hawkins is SCDE Deputy General Counsel and acts as the State's contact person for the ESEA waiver request. Ms. Hawkins stated that EOC has no role in the waiver process. Ms. Hawkins also testified that although Act 200 and the new assessments were referenced in the State's waiver request in July of this year, ongoing changes, such as a delay in contract implementation for the new assessments, could be addressed by requesting an amendment to the current waiver. In

other words, Ms. Hawkins testified that the only impact a further delay would have on the ESEA waiver would be if the DOE denied the State's request for a waiver amendment.

The final witness before the Panel was Ms. Sherri Nooyen, DRC's Vice President for Program Management. Ms. Nooyen testified that she oversees DRC's assessment contracts, including the current contract with the State. Ms. Nooyen testified that although DRC has the ability to align its current assessments with the Common Core standards, it does not have a test immediately ready for roll out.

Conclusions of Law

The Panel has jurisdiction to consider DRC's request to review the CPO's written determination lifting the automatic stay under section 11-35-4410(1)(b) of the Procurement Code. S.C. Code Ann. § 11-35-4410(1)(b) (2011). As a general rule, a timely protest of an intended award imposes an automatic stay precluding the State from "proceed[ing] further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of a timely appeal to the Procurement Review Panel, until a decision is rendered by the panel." S.C. Code Ann. § 11-35-4210(7) (2011). However, this provision also provides "except that . . . award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the . . . award of the contract without further delay is necessary to protect the best interests of the State." *Id.* In other words, this exception allows a CPO to lift the automatic stay if he (1) consults with the head of the using agency, and (2) issues a written determination finding that proceeding with the award is necessary to protect the best interests of the State.

In reviewing a CPO's written determination lifting the automatic stay, the Panel's standard of review is established by section 11-35-2410(A) of the Procurement Code, which provides that such a decision is "final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011). As the party challenging the CPO's written determination, DRC bears the burden of proving its allegations of error by a preponderance of the evidence. *In re: Request for Review of Written Determination by Express Scripts Holding Company*, Panel Case No. 2013-10 (January 7, 2014).

DRC first argues that the CPO erred in lifting the automatic stay because he did not consult with the head of the using agency, SCDE, prior to lifting the stay in violation of section 11-35-4210(7). The RFP lists SCDE as the using agency, and SCDE's "head" is Dr. Mitchell M. ("Mick") Zais, the State Superintendent of Education. There is no evidence before the Panel that the CPO ever consulted Dr. Zais prior to issuing his written determination lifting the automatic stay on November 1st. However, both documentary evidence and testimony before the Panel clearly establish that Dr. Zais's designee, Mr. English, and several other key SCDE staff attended the Assessment Panel's meeting on October 31st where several options were discussed, including the possibility of asking the CPO to lift the automatic stay. Moreover, Mr. English abstained from voting on the motion passed by the Assessment Panel that directed Ms. Adams to consult with the CPO and request a lifting of the automatic stay. Finally, no one from SCDE offered any objection to the request after Ms. Adams delivered it to the CPO on October 31, 2014.

The Panel finds that under the facts of this particular case, SCDE and Dr. Zais had actual and constructive notice that Ms. Adams planned to ask the CPO to lift the automatic stay and

failed to proffer any objection.⁹ Therefore, even though the CPO did not consult directly with Dr. Zais prior to lifting the stay, thus violating section 11-35-4210(7), the Panel finds that this error was harmless and did not prejudice SCDE.¹⁰ See *In re: Appeal by Excent Corp.*, Panel Case No. 2013-2 (May 15, 2013) (wherein the Panel found that it was harmless error for evaluators to consider a reference from a competitor’s customer where there was no evidence such consideration affected the outcome of the procurement); and *In re: Protest of Value Options*, Panel Case No. 2001-7 (August 3, 2001) (wherein the Panel applied the standard of review set forth in section 11-35-2410(A) and declined to reverse a procurement officer’s finding of responsibility absent a showing of a “clear and prejudicial violation” of a procurement rule).

DRC next argues that the CPO erred in finding that award without delay was necessary to protect the best interests of the State because (1) he based it on “speculative assertions” regarding the effect of further delaying contract implementation; and (2) he failed to consider reasonable alternatives, such as an extension of the current contract. In particular, DRC complains that the CPO lifted the automatic stay before issuing a decision regarding the merits of its protest and without giving it and SCDE the opportunity to respond to Ms. Adams’ request. During the Panel hearing, DRC also argued that any reliance the CPO placed on the possibility of a delay affecting the State’s ESEA waiver was misplaced because the State could seek an amendment of the waiver. With these arguments, the Panel finds that DRC is challenging the CPO’s determination as being arbitrary and capricious.

⁹ The Panel notes that by its own counsel’s admission, SCDE remained “neutral” during the procurement process until the time the CPO lifted the automatic stay. Even after that occurred, SCDE did not formally take a position regarding the lifting of the stay until it filed a letter with the Panel on November 18, 2014, the day before the Panel’s scheduled hearing.

¹⁰ The Panel observes that the exception provided in section 11-35-4210(7) requires “consultation with,” not the consent of, the head of the using agency and does not refer to an aggrieved bidder or offeror at all. Indeed, the exception does not require the CPO to seek input from any vendor who would be affected if the CPO determines to lift the stay. Thus, even though DRC raised the statutory violation in its request for review, the violation must be reviewed for prejudice to the using agency, not the vendor.

Section 11-35-4210(7) vests the CPO with the authority to determine whether “award of the contract without further delay is necessary to protect the best interests of the State.” The Panel finds that such a determination necessarily requires the CPO to exercise his business judgment in fashion similar to that of a procurement officer making a responsibility determination. In exercising this business judgment, the CPO must also engage in some speculation regarding the future and the possible effects of delaying – or not delaying – the award. The fact that this speculation occurs does not invalidate the CPO’s finding absent a showing that it lacks a rational basis.¹¹ See *In re: Appeal by Allied Waste Services*, Panel Case No. 2013-12 (March 12, 2014) (wherein the Panel noted it would not overturn a non-responsibility determination on the grounds it was arbitrary and capricious unless the appellant “demonstrate[s] a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis.”) (citations omitted). In other words, the question before the Panel is not whether it would have reached the same determination the CPO did, rather the Panel must decide whether the CPO’s determination is supported by a reasonable or rational basis.

The CPO accompanied his one-page written order¹² with numerous attachments, including Ms. Adams’ letter requesting that he lift the stay. As more fully discussed above, Ms. Adams’ letter notes that Act 200 mandated completion of the procurement by September 30, 2014, and that that deadline had passed without contract implementation occurring because of

¹¹ DRC has not alleged that the CPO’s determination was affected by subjective bad faith or prejudicial statutory violation with regard to these two grounds.

¹² Lifting the automatic stay is unquestionably a decision not to be undertaken lightly, and the Panel does not doubt that each CPO carefully considers all relevant factors before reaching a decision. However, this particular order does not recite supporting facts in any detail. In the future, the Panel encourages the CPOs to include supporting facts in their written determinations sufficient to inform readers of those factors the CPO considered most significant in deciding that lifting the stay is in the best interests of the State.

DRC's protest of the intended award.¹³ Ms. Adams also points out that the administrative process surrounding that protest had delayed contract implementation for thirty-one days as of October 31st and that the prospect of an appeal of the CPO's decision on the merits of DRC's protest could realistically further delay implementation for sixty to ninety days. Ms. Adams' letter also relates to the CPO her communications with Dr. Busbee of SCDE, Mr. Weeks of ACT, and Ms. Barton of the Education Oversight Committee, all of which support a conclusion that further delay could imperil having student assessments in place and completing training for test administrators for the 2014 – 2015 school year as required by Act 200.

Considering all of the evidence and the testimony before it, the Panel finds that Ms. Adams' letter and all of the documents she submitted with it to the CPO constitute a rational basis for the CPO's determination to lift the automatic stay. The Panel also finds that the question of whether the State's ESEA waiver would be impacted was only one of many factors cited by Ms. Adams and considered by the CPO in reaching his decision. Finally, the Panel finds that an extension of DRC's current contract would not have been allowed because Act 200 required the procurement of new assessments. Furthermore, DRC's own witness admitted that DRC did not have assessments aligned with the Common Core standards ready for immediate implementation. Therefore, the question of whether the CPO considered extension as a reasonable alternative is immaterial.

Conclusion

In conclusion, the Panel finds that the CPO's failure to consult directly with the State Superintendent of Education was harmless error. In addition, the Panel finds that DRC has failed

¹³ The Panel reiterates that DRC had every right to protest the intended award and makes no finding regarding the merits of that protest because it remains under the jurisdiction of the CPO. However, the fact that the protest was filed clearly prevented the B&CB from concluding the procurement on September 30, 2014, as mandated by Act 200.

to demonstrate by a preponderance of the evidence that the CPO's written determination lifting the automatic stay is "clearly erroneous, arbitrary, capricious, or contrary to law." Therefore, the Panel hereby affirms the decision of the CPO lifting the stay.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 18th day of December, 2014.

Columbia, South Carolina

) BEFORE THE CHIEF PROCURMENT
) OFFICER
)
PROTEST OF AWARD OF CONTRACT)
)
FOR SOLICITATION NO. 5400008105) Supplemental Statement by the
)
S.C. DEPT OF EDUC--STATEWIDE) S.C. Department of Education
)
ASSESSMENT GRADES 3-11)
)

The South Carolina Department of Education (SCDE) has worked successfully with the Materials Management Office (MMO) of the Budget and Control Board (BCB) for many years in procuring assessments that are administered to the students of this state. The SCDE staff has expertise in statewide assessment and contract management. That staff has administered multiple contracts throughout the years with values into the tens of millions of dollars.

This procurement process was different, not because of the SCDE's involvement or questions, but because of the lack of the SCDE's involvement. While the Chief Procurement Officer's review of factual matters should be limited to facts that were presented at the hearing, facts were presented by way of closing argument that the SCDE is compelled to address by way of this statement. Act 200 charged the Executive Director of the Budget and Control Board with the task of procuring this contract. Act 200 states "the Executive Director of the State Budget and Control Board, with the advice and consent of the special assessment panel, shall direct the procurement of a summative assessment system for the 2014-2015 school year, and subsequent years." The law required a specific team of people to draft the RFP, specifically designated as the special assessment panel "composed of the following individuals or their designee:

- (i) the Chairman of the State Board of Education;
- (ii) the Chairman of the Education Oversight Committee;
- (iii) the Chairman of the Board of Directors for the South Carolina Chamber of Commerce;
- (iv) the Chairman of the South Carolina Commission on Higher Education;
- (v) the Chairman of the South Carolina Technical College System Board; and
- (vi) the State Superintendent of Education.”

The SCDE did not draft this RFP, although SCDE staff was available and provided guidance when requested. Had Liz Jones, Director of the Office of Assessment been called to testify, she could have shed light on that process but she was not called. In fact, no one who was involved in the *drafting* of the RFP was called to testify. Comments regarding the RFP development process in the closing are outside of the testimony that was presented and should not be factored in the CPO’s decision. Although there were multiple witnesses who were called to testify, I do not recall any witness who testified that the RFP was confusing or that they did not understand any requirement of the RFP. There was no testimony presented that either vendor questioned what the RFP required with regard to score reports, standards setting meetings, or any other requirement. Even so, the procurement code provides a remedy for questioning the RFP or specifications by allowing questions and answers and the ability to file a protest based on the specifications. (See page 5 of the RFP for provisions allowing both). No protest was filed regarding the specifications. Therefore, consideration as to whether the RFP was confusing or unclear in any way is outside of the scope of testimony presented and should not be considered.

With regard to negotiations, the only person called to testify with regard to the negotiation process was Jason Evans. While the record may prove otherwise because of the length of his testimony, I do not recall Mr. Evans testifying to any confusion caused by the

number of people or agencies involved in the negotiation process. Statements made in closing regarding this matter are outside of the testimony and should not be considered by the CPO. Mr. Weeks provided testimony about responding to questions but he never testified regarding the number of people or agencies involved from the state level.

Finally, the characterization of some of the issues that the BCB sought clarification for were minor shows a complete lack of understanding for what the SCDE needs in an assessment program and mischaracterizes the testimony that was presented. For example, seating charts may seem trivial to a lay person, but seating charts are essential to test security. There was testimony that seating charts are used to determine if students are cheating. Additionally, under South Carolina law, the SCDE reports test security violations to the State Law Enforcement Division (SLED) for investigation. (See S.C. Code Ann. Section 59-1-445 “The South Carolina Law Enforcement Division shall investigate allegations of violations of mandatory test security, either on its own initiative following receipt of allegations, or at the request of a school district or the State Department of Education”). Seating charts assist in those investigations to validate claims of security violations. Test administration is a complicated process—transferring the burden of providing seating charts to school districts seems easy or trivial but the only way to ensure that charts are handed out and completed is to have the charts as part of the testing packet. Providing seating charts is a simple requirement for a vendor to comply with.

The issues that were clarified were all important to the SCDE. The SCDE relied on the BCB to conduct the procurement in a manner that was consistent with the procurement code. Through the passage of Act 200, the General Assembly placed functions that would have ordinarily been handled by the SCDE, and trusted them with the Executive Director of the BCB.

The only desire of the SCDE is to have an affordable assessment administered beginning spring of 2015 that complies with state law and will be acceptable for state and federal accountability purposes. The SCDE staff worked in good faith with staff of the BCB in the development of the RFP and in the negotiation of the contract with ACT. The SCDE trusted and relied on the expertise of the BCB to conduct this procurement in a manner consistent with the procurement code. We fully understand that the determination as to whether that occurred is within the CPO's authority and we look forward to the decision.

Respectfully submitted:

/s/ Shelly Bezanson Kelly

Shelly Bezanson Kelly
General Counsel
S.C. Department of Education
1429 Senate Street
Columbia, SC 29201
skelly@ed.sc.gov

October 25, 2014

Served via electronic mail:

Dixon Robertson, Esquire (drobertson@ogc.sc.gov)
Jason Evans (jevans@io.sc.gov)
David Avant, Esquire (davant@oed.sc.gov)
Keith McCook, Esquire (kmccook@ogc.sc.gov)
Wade Mullins, Esquire (wmullins@brunerpowell.com)
David Summer, Esquire (davidsummer@parkerpoe.com)
Faye Flowers, Esquire (fayeflowers@parkerpoe.com)

Panel Exhibit B

SOLICITATION NUMBER 5400008105
Statewide Assessments for Grades 3-11
SC Department of Education

WRITTEN DETERMINATION
REGARDING WHICH SOLICITATION BY A RESPONSIBLE OFFEROR
IS MOST ADVANTAGEOUS TO THE STATE
AND RECORD OF BASIS FOR AWARD

Purpose

It is the intent of the Information Technology Management Office (ITMO), on behalf of the South Carolina Department of Education (SCDOE), to establish a contract for Statewide Assessments for Grades 3-11.

The initial term of the contract will be for three (3) years with two (2) one year options to renew.

Overview

This solicitation was issued on June 30, 2014. Deadline for questions was due on July 14, 2014. Amendment #1 was issued on July 17, 2014. The deadline for submitting an offer was set for August 11, 2014 at 14:30 PM. The deadline for submitting an offer remained unchanged during this procurement. On August 11, 2014, the State received 2 responses for this procurement. One was received from DRC and another from ACT.

Panel Charging and Evaluation

Evaluation panel members were charged on August 15, 2014. They were provided the RFP panel instructions, solicitation, amendment and scoring documents. Evaluators were to do a complete and thorough review of both offers received to assure compliance with all requirements and to score each proposal based on the scoring criteria set forth in the RFP (with the exception of the business proposal). The scoring meeting was held on August 21, 2014. The proposals were discussed during executive session and then scored during regular session. After all the proposals were finalized, the scores were tallied in an Excel spreadsheet for all evaluation factors except the business proposal. The points for the business proposals were not shared with the evaluation panel until all score sheets were handed in and recorded. Once all score sheets were handed in, the formula used by the State of SC to determine the points for cost was applied to the cost for both vendors and the points were added to each of the evaluator's scores. The highest ranked offeror was ACT.

Negotiations

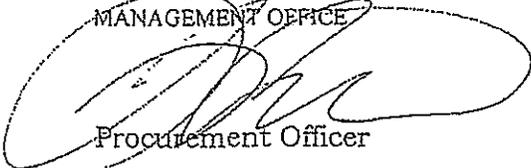
The specific items negotiated can be found in the executed Record of Negotiations (RON).

Recommendation

Proceed with issuing a statement of Intent to Award to ACT, Inc. for the Statewide Assessment for Grades 3-11.

Date: 9/19/2014

INFORMATION TECHNOLOGY
MANAGEMENT OFFICE



Procurement Officer