



information about issues raised at the preproposal conference. (Record p.101)  
Proposals were opened on February 22, 1995.

Four proposals were submitted and evaluated by five DOT employees.(Record p. 216 & 221). The ranking of offerors determined by the evaluations are as follows:

| <u>Company</u>           | <u>Total Points</u> |
|--------------------------|---------------------|
| SC Logos                 | 470.65              |
| Travelsigns              | 451.80              |
| Carolina Interstate Logo | 356.20              |
| Charter Leasing          | 349.05              |

(Record p. 220)

A committee of six DOT employees and the MMO Procurement Manager, John Stevens, began negotiating a contract with South Carolina Logos, Inc. (Logos), the highest ranked offeror. (Record p. 222).

In a May 11, 1995 letter, MMO was informed that a contract with Logos had been negotiated. (Record p. 223). On May 19, 1995, MMO issued and posted the Notification of Contract Award to Logos. (Record p. 225). On June 5, 1995, Travelsigns protested the award (Record p. 26) and MMO suspended the Notification of Contract Award (Record p. 226). DOT, pursuant to S. C. Code Ann. section 11-35-4210(7), entered a contract with Logos on August 1, 1995. (Appellant Exhibit #1).

### CONCLUSIONS OF LAW

#### MOTIONS TO DISMISS

Prior to the Panel hearing, Logos filed a motion to dismiss the first issue raised in the appeal letter. General Services and DOT also filed motions and joined in the motion to dismiss all of the issues in the protest. The Panel heard argument from the parties on the motions and issued verbal rulings. The following is the Panel's findings concerning the motions.

### Motions to Dismiss Issue One and Three

The first issue in Travelsigns' letter to the Panel alleges that the evaluators acted arbitrarily and capriciously in not conducting oral presentations as provided in Part X of the RFP. Travelsigns did not raise the issue of oral presentations until the July 21, 1995 letter to the Panel. Issue three of Travelsigns' letter to the Panel alleges that the evaluation process failed to ensure that the State received the most advantageous procurement, as mandated by S. C. Code Ann. section 11-35-20(a). Again, Travelsigns did not raise the issue until the July 21, 1995 letter to the Panel.

The Notice of Award was posted on May 19, 1995. Travelsigns had fifteen days from the date of posting the award to submit issues of protest under S.C. Code Ann. section 11-35-4210, which provides in pertinent part, as follows:

any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date notification of award is posted in accordance with this code.

The Panel finds that the issue of oral presentations and the issue of the failure to ensure the most advantageous procurement are untimely raised, and the Panel is without jurisdiction to hear these issues. See, In Re: Protest of Oakland Janitorial, Case No. 1988-13, In Re: Protest of Vorec Corporation, Case No. 1994-9. Issue One is dismissed<sup>1</sup> and Issue Three is dismissed<sup>2</sup>.

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<sup>1</sup> If the Panel did not lack jurisdiction, the Panel would find, based on the record, that the issue of oral presentations is without merit. The RFP in Part XI, titled Special Instructions, Paragraph 6.0, titled Oral Presentations, states "offerors may be requested to make oral presentations of their proposal to the State of South Carolina." Record p. 217. Further, Amendment One to the RFP contains questions and answers from the preproposal conference, and directly addresses the issue of oral presentations in Question #29. The question is asked "[w]hat type of oral presentations would the selection committee require". The answer clearly indicates that oral presentations are at the discretion of the State. The answer states "[i]f the selection committee decides to have oral presentations, it will be only to clarify the ranking of the

### Motions to Dismiss Issue Two and Four

Travelsigns' July 21, 1995 appeal letter in Issue Two alleges that the evaluators' scores are clearly erroneous, as evidenced by the margin of points scored against Travelsigns. Travelsigns alleges this as bias of the evaluators. Further allegations are made that the evaluators made arbitrary and capricious determinations by not considering material required by the RFP and furnished by Travelsigns. As Travelsigns admitted in arguments that it did not allege bias, the issue of possible bias of the evaluators was dismissed.

The issues for determination are established in the initial protest letter to the CPO. In the Panel's review of Travelsigns' protest letter dated June 5, 1995, the second issue raised attacks the findings of the evaluators. The letter refers to "the significant discrepancy of scores among certain members of the evaluation panel", which is directly related to the allegation of erroneous scores. (Record p. 27). Further, although the words "arbitrary" or "capricious" do not appear in the protest letter, the letter does question the "panel's methodology for evaluating the following award criteria." (Record p. 27). The Panel finds that the

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offerors". Record p. 106. Travelsigns relies on the language of Part IX of the RFP, titled Award Criteria, which lists the award criteria and states "[f]rom the initial list of proposals, up to five (5) offers may be selected for oral presentations. Oral presentations will be used to reassure the selection of the top ranked offeror." Record p. 74. When read together, the RFP clearly intends to give the State the option of oral presentations, at the State's discretion. Any possible confusion over the use of 'may' and 'will' in the RFP is certainly clarified by the answer in Amendment One to the RFP. Travelsigns' issue of oral presentations is meritless.

<sup>2</sup> If the Panel did not lack jurisdiction, the Panel would find, based on the record and existing law, that the issue of the most advantageous procurement is without merit. Travelsigns alleges it offered the procurement most advantageous to the state, and attempts to explain why its proposal is superior to the proposal ranked highest by the State. The determination of what is most advantageous to the State can only be determined by the State. An offeror's claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee which determines the ranking of the offerors. See, Case No. 1992-16, In re: Protest of Coastal Rapid Public Transit Authority and Case No. 1994-11, In re: Protest of First Sun EAP Alliance, Inc. The decision of the evaluators may be attacked as arbitrary, capricious, erroneous, or biased, but the Panel will not re-evaluate the proposals.

protest letter raises the issue of the evaluators' scores being arbitrary and capricious. The motion to dismiss Issue Two is denied.

The fourth issue raised in Travelsigns' appeal letter relates to allegations that discussions during the contract negotiation concerning inclusion of urban interchanges expands the scope of work in the RFP. Travelsigns' protest letter dated June 5, 1995 raises the allegation that discussions during negotiations may have altered the scope of work set forth in the RFP. (Record p. 26). The motion to dismiss Issue Four is denied.

### ISSUES

Based on the Panel's rulings on motions, Travelsigns raised two issues for the Panels determination.

### Evaluations

The first issue for determination concerns the scoring of the evaluation committee. Travelsigns' alleges that the evaluators' scores are clearly erroneous, as evidenced by the margin of points scored against Travelsigns. The individual scores of the evaluation committee are as follows:

| <u>Offeror</u> | <u>Evaluators</u> |           |           |           |           |
|----------------|-------------------|-----------|-----------|-----------|-----------|
|                | <u>#1</u>         | <u>#2</u> | <u>#3</u> | <u>#4</u> | <u>#5</u> |
| Travelsigns    | 95.05             | 88.25     | 79.50     | 94.00     | 95.00     |
| Logos          | 97.00             | 94.55     | 88.15     | 95.00     | 95.95     |

It is noteworthy that all of the evaluators scores rank Logos higher than Travelsigns.<sup>3</sup> A comparison of scores shows that the scores of three evaluators reflect less than two points between the two highest ranked offerors. The scores of evaluator #2, Robert Ferrell, reflects a difference of 6.3 points and the scores

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<sup>3</sup> The Panel distinguishes In re: First Sun EAP Alliance, Inc., Case No. 1994-11, which states "[i]f an evaluator's score is erroneous, arbitrary, capricious or even biased, but it does not effect the outcome of the award, than it may not effect the finality of the award." First Sun deals with the elimination of the scores of one evaluator. If more then one evaluator's scores are involved, as in this case, then there exists the possibility of collusion, the influence of scores by a biased evaluator or similar circumstances that effect the process. Such circumstances may effect the finality of an award.

of evaluator #3, Barbara Wessinger, reflect a difference of 8.65 points. The total number of points available is 100. As the Panel has previously stated in Case No. 1993-14, In re: Protest of Drew Industrial Division, "the variation of evaluators scores alone, is only proof of the subjective nature of the evaluation aspect of the RFP process." See also, Case No. 1993-16, In re: Protest of NBS Imaging systems, Inc.

Further allegations are made that the evaluators' determinations are arbitrary and capricious because they did not consider material furnished by Travelsigns and required by the RFP. Travelsigns argues that the failure to verify references or financial information provided in the proposal and required by the RFP cause an evaluation to be arbitrary or capricious. Both Mr. Ferrell and Ms. Wessinger testified that they did not call any of the references provided by the offerors. Ms. Wessinger further testified that she evaluated the financial information provided and did not go outside the proposal to gather more information or verify the accuracy of the information provided. In fact, neither the Code nor the RFP requires the evaluators to look beyond the information that is submitted by the offeror in its proposal.<sup>4</sup> As in an employment application, the RFP may require offerors to provide references, which may or may not be contacted. It is the responsibility of the offeror to include in its proposal information in response to the requirements of the RFP. It is the evaluator's responsibility to consider the information provided. The Panel finds that Travelsigns failed to prove that the evaluators acted arbitrarily or capriciously in

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<sup>4</sup> While the evaluators might not be required to verify the references or financial information provided in the proposal, the required information may be used to determine the responsibility of the offeror. SC Code Ann. section 11-35-1810 provides that "[r]esponsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts."

deciding not to verify references and financial information provided in Travelsigns' proposal.

Travelsigns has failed to prove by a preponderance of the evidence that the evaluators acted erroneously, arbitrarily or capriciously. The testimony of Mr. Ferrell and Ms. Wessinger indicates that they independently evaluated each proposal against the requirements of the RFP. No evidence was presented to indicate the evaluations were not properly conducted under the requirements of the Consolidated Procurement Code.

#### Negotiations

The second issue for determination relates to allegations that discussions during the negotiation of the contract price, concerning inclusion of urban interchanges, expands the scope of work in the RFP. After the evaluations determined Logos as the highest ranked offeror, a DOT negotiation team began to negotiate a price with Logos. Travelsigns alleges that improper negotiations were conducted because urban interchanges were discussed. It is undisputed that urban interchanges are not included in the RFP, and are prohibited from being included by Regulation 63-338(10), which provides that "Specific Information Panels shall not be used at any interchange in urban areas."

Mr. B. K. Jones, Director of DOT, testified that his only discussion with the DOT Commission about expanding beyond the then established urban areas, took place prior to the RFP. Travelsigns alleged Mr. Jones expressed knowledge of contract negotiations including some discussion of urban interchanges in relation to the contract at a DOT Commission meeting. Mr. Jones did not participate in the negotiations of the contract. Mr. Jones further testified that the RFP is designed to address a certain number of interchanges only, which do not include urban areas. The contract entered into by DOT and Logos (Exhibit #1) incorporate the RFP and Logos' proposal. The Panel finds

that Travelsigns has failed to provide any evidence of the contract negotiations expansion of the scope of work beyond the RFP.

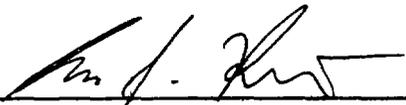
Travelsigns also questions why a Revised Construction Schedule is included in the Contract. Testimony reveals that the only revision is an adjustment in the starting and completion dates, due to delays. Travelsigns also expresses concern that the definition of "urban interchanges" could be altered during the ten (10) year term of the contract, and thus expand the scope of work in the RFP into current urban interchanges. The Panel will not consider such a speculative issue.

For the foregoing reasons, the Panel finds that Travelsigns' protest is denied for failure to carry its burden of proof by a preponderance of the evidence. The CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:

  
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Gus J. Roberts, Chairman

Columbia, SC

August 14, 1995.