

**CUDDY
&
McCARTHY**
A Limited Liability Partnership

JOHN F. MCCARTHY, JR.
JOHN F. KENNEDY
M. KAREN KILGORE
SANDRA J. BRINCK
PATRICIA SALAZAR IVES
AARON J. WOLF
REBECCA DEMPSEY
JACQUELYN ARCHULETA-STAEHLIN
JULIE A. WITTENBERGER
CHERYL D. FAIRBANKS
RAMON VIGIL, JR.
ANDREW M. SANCHEZ
PATRICK T. ORTIZ

CHARLES V. GARCIA
ARTURO L. JARAMILLO
JAMES S. RUBIN
CHARLOTTE H.
HETHERINGTON
R. DANIEL CASTILLE

EVELYN A. PETTON
YOUNG-JUN (JUN) ROH
TIMOTHY W. FOSTER
NANCY V. NIETO
DAVID A. RICHTER
GABRIELA M. STEWART

REPLY TO SANTA FE OFFICE

June 9, 2014

Via Hand Delivery and

E-mail: lawrence.maxwell@state.nm.us

Mr. Lawrence O. Maxwell
State Purchasing Agent -State Purchasing Division
New Mexico General Services Department
1100 St. Francis Drive – Joseph Montoya Building
Santa Fe, New Mexico 87502

Re: Protest of Request for Proposals #40-000-13-00027

Dear Mr. Maxwell:

In accordance with the procedures outlined in your letter dated June 2, 2014, NCS Pearson, Inc. (“Pearson”), through its undersigned counsel, submits this response to the protest dated December 11, 2013 filed by American Institutes for Research (“AIR”) challenging Request for Proposals No. 40-000-13-0027 for The Partnership for Assessment of Readiness for College and Careers (PARCC) Operational Assessments (the “RFP”) issued by the State Purchasing Division of the General Services Department and the New Mexico Public Education Department (collectively the “GSD/PED”).¹ Pearson appreciates this opportunity to submit its response in opposition to AIR's protest.

I. BACKGROUND

The Partnership for Assessment of Readiness for College and Careers (“PARCC”) is a consortium of 14 states, including New Mexico, working together to develop a common set of K-12 assessments in English Language Arts (“ELA”)/Literacy and Mathematics aligned to the

¹ The protest was initially deemed untimely by the GSD/PED, but in her ruling of May 27, 2014, Judge Singleton of the First Judicial District upheld AIR's appeal and ordered that the protest be heard on the merits. Because the protest being heard was filed on December 11, 2013, and before the deadline for submission of proposals in response to the RFP, the only facts relevant to the protest are those in existence as of December 11, 2013, and the only issues that should be addressed in this protest proceeding are those as set forth in AIR's December 11, 2013 protest letter.

Common Core State Standards that will measure whether students are on track to be successful in college and their careers. Through the RFP, the GSD/PED solicited proposals to establish a price agreement for use in New Mexico and available to other states for a solution to implement the PARCC assessment system beginning with the 2014-15 school year. [RFP, § I.A., p. 5].

Considerable time and effort has been spent by the PED and New Mexico schools to transition to PARCC assessments in the 2014-15 school year, and any delay would be to the detriment of the PED, its educators and the students they serve. Thus, the time frames required by the RFP were aggressive. The requirements and specifications in the RFP, however, should not have come as a surprise to AIR or any other prospective offerors as PARCC has been in development since 2010, PARCC-related contracts have been procured through other states since 2012 in anticipation of the administration of PARCC assessments starting in 2014, and the United States Department of Education requirements for Race to the Top Assessment Grant funding awarded to PARCC, such as requirements for interoperable systems and platforms, are well known in the assessment industry.

The RFP was issued on November 14, 2013, with a deadline for submission of proposals of December 30, 2013.² The RFP includes an incredibly detailed statement of work as well as voluminous specifications documentation developed by PARCC since 2010 and providing any and all prospective offerors with the information needed to submit a competitive proposal in response to the RFP.³ The scope of work includes ongoing item development, paper based and online forms construction, paper based assessment production and administration services, psychometric analysis, scoring, reporting, standard setting, and program management services. [RFP, § I.C., pp. 13-15; Appendix B]. The base term of the contract being procured through the RFP is four years with optional renewals for up to an additional four years. [RFP, § I.C., p. 13].

Recognizing the breadth of the scope of work that will allow New Mexico as well as other PARCC states utilizing the price agreement being procured through the RFP to realize substantial administrative and cost efficiencies and quality controls, GSD/PED encouraged vendors with limited capabilities to partner with vendors having complementary capabilities. The RFP states:

When appropriate, the Partnership encourages responses/replies that demonstrate strong partnerships between organizations. Organizations, regardless of size, that can provide expertise and high-quality solutions to assist the Partnership in developing the assessment system are ideal. . . .

[RFP, § I.C., p. 13, *see also* Vendor Questions and Responses, Response to Question #1 (“Vendors with limited corporate capabilities are encouraged to partner with vendors with complementary capabilities”)].

It appears that rather than attempting to evaluate and understand the voluminous information in the RFP provided to all prospective offerors to formulate a response to the RFP, and seeking to partner with other vendors to propose a solution responsive to the need for

² The initial deadline was December 11, 2013, but that deadline was extended to December 30, 2013.

³ A procurement library was established and made available to all prospective offerors. [RFP, § I.F., p. 18].

services expressed in the RFP, AIR's strategy was to file a protest in an effort to try to force a restructuring of the procurement for the PARCC operational assessments. The proposed restructuring as described in the AIR protest would divide the operational assessment procurement into numerous smaller procurements based on scope of work and time in a manner that might benefit AIR, but that would be to the disadvantage of the PED, New Mexico schools, teachers and students, as well as other PARCC states seeking to utilize the price agreement being procured through the RFP. Multiple procurements for a smaller scope of work over a shorter period of time will be less cost effective, less administratively efficient, and will undeniably jeopardize the quality of the assessments. Conducting multiple procurements would also be more time consuming when New Mexico and the other PARCC states do not have the luxury of time, and would require the additional expenditure of state agency resources and dollars. The Contract resulting from this RFP was expected to be executed in February. Effective delivery of the scope of work starting in fall 2014 was premised on that contract execution timeline. Further delay in the RFP process would cause irreversible and irrevocable harm to the project deadlines required for the PARCC assessments.

Clearly aware of the timing constraints for timely implementation of PARCC operational assessments, AIR waited until December 11, 2013,⁴ to submit its protest alleging that the RFP is anticompetitive, that there is a conflict of interest based on speculation that PARCC itself might compete for assessment contracts in other states, and that the RFP does not comply with New Mexico's statutory provision relating to cooperative purchasing. For the reasons described below, each of these arguments is without merit and AIR's protest should be denied.

II. ARGUMENT AND AUTHORITIES

A. AIR Lacks Standing

AIR's protest states that it is filed pursuant to Section 13-1-172 of the New Mexico Procurement Code which states:

Any *bidder* or *offeror* who is aggrieved in connection with a solicitation or award of a contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest.

NMSA 1978, § 13-1-172 (emphasis added). Thus, only a "bidder" or "offeror" has standing to initiate a protest pursuant to Section 13-1-172. "Bidder" and "offeror" are both defined terms in the New Mexico Procurement Code Regulations. A "bidder" is "one who submits a bid in response to an invitation to bid or submits a quote in response to a call for formal or informal quotes." NMAC 1.4.1.7(B)(4). An "offeror" is "one who submits a proposal in response to a request for proposals." NMAC 1.4.1.7(b)(13). AIR is neither a bidder nor an offeror as the

⁴ All of the issues raised in AIR's protest relate to the RFP as originally issued on November 14, 2013, and GSD/PED issued responses to vendor questions on November 26, 2013. AIR waited, however, until December 11, 2013, the date that the proposals were initially due before the date was extended to December 30, 2013, to lodge its protest to the solicitation in an effort to delay the procurement and an attempt to force a restructuring that would benefit AIR.

procurement at issue is a request for proposals and AIR had not at the time of submitting its protest, and has not since, submitted a proposal in response to the RFP. Accordingly, AIR lacks standing and its protest should be dismissed for that reason alone. Regardless, even if AIR has standing (which it does not), its protest should be denied on the merits for the reasons stated in the following sections of this response.

B. The RFP Does Not Unreasonably Restrict Competition in Violation of New Mexico Law.

The New Mexico Procurement Code does not require specifications to be drafted to ensure maximum competition at all costs in a manner that is not practicable or that does not meet the requirements of the procuring agency or agencies. Instead, the New Mexico Procurement Code states that: “all *specifications* shall be drafted to ensure maximum *practicable* competition *and fulfill the requirements of state agencies* and local public bodies.” NMSA 1978, § 13-1-164 (emphasis added). AIR relies on this statute to argue that the RFP unreasonably restricts competition because: (1) the PARCC test delivery platform does not yet exist, (2) the RFP combines the work for year one of the operational assessment with work in subsequent years, and (3) the RFP seeks both test development and administration services. Section 13-1-164 relates to drafting of “specifications” not to the drafting of a solicitation. AIR’s arguments, however, do not relate to “specifications” as that term is defined in the New Mexico Procurement Code. Section 13-1-164 is codified in that portion of the Code that includes provisions relating to use of brand-name specifications in procurements. The term “specification” is defined in the Code to mean “a description of the physical or functional characteristics or the nature of items of tangible personal property, services or construction.” NMSA 1978, § 13-1-89. This definition goes on to state that a “specification” “may include a description of any requirements for inspecting or testing, or for preparing items of tangible personal property, services or construction for delivery.” Thus, the “specifications” for a services contract are essentially the scope of work.

The issues in AIR’s bid protest do not relate to the physical or functional characteristics or the nature of services being procured. Rather, AIR’s complaints about the RFP involve issues relating to how the RFP is structured such as the timing of issuance of the RFP, the term of the contract being procured through the RFP, and the combination of components of work being procured through the RFP. Accordingly, Section 13-1-164 is not applicable to the issues raised in the AIR protest.

Further, even if Section 13-1-164 is applicable to the AIR protest issues, none of these aspects of the RFP unreasonably restricts competition as asserted by AIR. Such aspects of the RFP do not prevent or prohibit any prospective offeror from responding to the RFP and do not give Pearson, or any other prospective offeror, an unfair and unlawful competitive advantage.

1. The RFP Does Not Violate New Mexico Law Because of Overlapping Technology Development Efforts by PARCC.

AIR argues the RFP unnecessarily restricts competition by requiring offerors to “design and price a process that will depend upon a platform that does not yet exist.” [AIR Protest, p. 6]. Specifically, AIR complains that the RFP states that the Content/Delivery Platform (“CDP”) for years two through eight⁵ has not yet been procured or developed. The RFP expressly recognizes that PARCC was engaging in “ongoing technology development efforts” that “overlap with the release of this RFP and the Operational Assessment activities that will result from this contract.” [RFP, § B.2., p. 11]. Accordingly, the RFP advises prospective offerors to become familiar with the related technology components and services and sets forth detailed information and specifications regarding those technology components. [RFP § B.2., p. 11].

AIR's argument fails for at least two reasons. First, because of the overlapping technology development efforts, all prospective offerors were in the same boat not knowing for sure what specific CDP would be utilized for years two through eight, and in fact for any year, of the contract being procured through the RFP. Second, despite the overlapping technology development efforts by PARCC, all offerors had access to voluminous specifications documents, including technology specifications in the text of the RFP, attachments to the RFP, and documents incorporated by reference in the RFP,⁶ as well as information publicly available to all prospective offerors as a result of PARCC's overlapping technology procurement.

On September 9, 2013, PARCC, through PARCC, Inc., its program management vendor, issued the PARCC Technology Bundle Request for Proposals No. 2013-11 (the “Technology Bundle Procurement”) seeking to competitively procure the development of an open source software solution that would serve as a computer based test delivery platform, item bank, data warehouse, reporting engine, and shared services technology, with a data warehouse and reporting engine as a separate component. The Technology Bundle Procurement specifications were publicly available, and included detailed requirements for the development of the PARCC technology components, and specifically required the components to adhere to interoperability standards for application program interfaces, data models, data transport, multimedia rendering, metadata, accessibility, and security as defined in the *PARCC Technology Systems Architecture* and the *PARCC Technology and Interoperability Standards*, included in those procurement specifications. These key interoperability requirements provide for development of technology components pursuant to established standards that allow for the assessment content and data to be exchanged between systems hosted by different vendors without impacting the accurate rendering of the content or data. PARCC's interoperability requirements are incorporated in all work that PARCC has contracted with vendors, and all vendors seeking to provide services related to the PARCC assessments have access to such interoperability standards, and the ability to offer systems and services that comply with the standards. As of December 11, 2013 (the date of AIR's protest), and December 30, 2013 (the deadline for submission of proposals in response to the RFP), a contract had not been awarded in response to the Technology Bundle Procurement. This fact did not prevent AIR or any other prospective offeror from responding to the RFP. In addition, it simply would not be practical and would not fulfill the requirements of New Mexico and the other PARCC states to wait until a CDP was procured to move forward

⁵ As set forth in Section II. B.2. of this response below, AIR's assertion that the RFP requires use of Pearson's CDP in year one of the contract being procured through the RFP is also incorrect.

⁶ The New Mexico Procurement Code defines a “request for proposals” to include “all documents, including those attached or incorporated by reference, used for soliciting proposals.” NMSA 1978, § 13-1-81.

with the procurement for operational assessment services considering the 2014-15 start date for operational assessments.

AIR's statement that "interested bidders know little about the delivery platform for years two through eight of the contract period" is not accurate. A significant volume of information regarding the delivery platform being procured by PARCC, Inc. on behalf of PARCC was publicly available as a result of the pending Technology Bundle Procurement. Further, the GSD/PED included in the RFP a vast amount of information regarding the assessment technology requirements, PARCC's approach to developing interoperable assessment content, as well as its requirements for an interoperable computer-based assessment delivery platform. PARCC has adopted industry open standards for content interoperability, QTI 2.1 and APIP standards managed by the IMS Global Learning Consortium, providing sufficient transparency into PARCC's technical specifications and encouraging open competition.

The RFP Statement of Work in Appendix B includes 153 pages of specifications and requirements for the item development, assessment administration, psychometric, standard setting, reporting, and program management services that would be provided pursuant to the resulting contract. In addition, there are more than 20 attachments to the RFP which set forth additional detailed requirements regarding the contracted scope of work, as well as the specifications for the technology platform and reporting data warehouse that are relevant to the contracted scope of work. The specifications included in the RFP, provided as attachments, or incorporated by reference in the RFP, include the following:

- A. Project Terms and Definitions: This document provides seven pages of defined terms used throughout the RFP and in the various specifications documents. This library of terms allows all vendors to use the common language regarding the requirements each PARCC State has incorporated into its assessment system.
- B. Item Development Targets: The item development targets provided in the RFP define the types and number of items that the vendor would be required to develop as part of the contracted services. This information allows all vendors to understand the specific volume of item development work to be included in the pricing.
- C. Supporting ELA Development Documents Available on PARCC Website: The RFP includes direct links to PARCC specifications documents including the Item Guidelines for ELA/Literacy PARCC Summative Assessment which allow vendors to design and price their ELA/Literacy assessment solution.
- D. Supporting Documents for Mathematics Development: This attachment explains the PARCC assessment math design, and provides the information and resources necessary for vendors to design a compliant math assessment solution.
- E. Sources of Cognitive Complexity for ELA and Math: This document helps vendors understand the methods by which item developers could incorporate requisite levels of complexity in item development efforts to meet the PARCC specifications.

- F. Text Complexity Analysis Worksheets: The Text Complexity Worksheets are tools that item developers use to evaluate the complexity of passages selected for the assessment, and provides additional specification for item developers.
- G. Linguistic Complexity Guidelines: This is a document created by the Wisconsin Center for Education Research for another consortium, WIDA, which explains the method of evaluating language complexity of test items, and provides additional specifications for vendors in item development.
- H. TEIs for the PARCC Assessments: This document memorializes PARCC’s Technology Enhanced Item (“TEI”) requirements and guidelines, allowing vendors to understand the types of TEIs required for the assessment system, and the related technology implementation requirements.
- I. PARCC Accessibility Guidelines: This document provides PARCC’s guidelines for developing assessment items for all students, including English learners and students with disabilities. The document includes specifications regarding PARCC’s implementation of Universal Design in its assessments.
- J. Fairness Review Guidelines: PARCC adopted guidelines for review of assessment content for fairness, to assist with content development and provide specification regarding subject matter of assessment items.
- K. PARCC Translation Policy Memo: This memo details PARCC’s specifications for assessment language translation.
- L. PARCC Item Development Technical Guide: The PARCC Item Development Technical Guide provides technical specifications for item developers to use when preparing assessments and items for delivery to PARCC, including item style, accessibility, encoding, exchange, delivery, discovery, validation, and compliance criteria. This document also allows platform developers to understand the technical specifications and encoding for items to be administered and rendered in an online platform (269 pages of specifications).
- M. PARCC Field Test Student Data Upload File Layout: This file provides the data file requirements for student assessment registration, allowing vendors to understand the student registration platform requirements.
- N. Organization File Upload Layout: The Organizational File Upload Layout includes additional student registration data that allows vendors to understand specifications for the registration platform.
- O. ED Technology Standards Letter: This United States Department of Education letter binds PARCC to comply with interoperability standards when developing assessment items and platforms, as such interoperable standards would allow states to transport

test items and student data across test delivery platforms, student data warehouses, and assessment registration platforms.

- P. PARCC Student Enrollment Scenarios: This attachment provides detailed student testing volume scenarios across school grades, allowing vendors to use such information when estimating pricing based on volume tiers.
- Q. DRAFT PARCC Technology and Interoperability Standards: These standards memorialize PARCC's implementation of nationally known standards and extensions of such standards as appropriate to comply with the ED Technology Standards Letter. This document memorializes PARCC's implementation of industry established standards for Internet Layer Interface/Protocol Standards, Data Model Standards, Language Standards, and additional standards relevant for the development of items and assessment technology.
- R. Growth Proposal: This document memorializes additional specifications relevant for item development, and the purpose of the assessment system.
- S. Accessibility Features and Accommodations for PARCC Field Test: This document details the computer based and paper based specifications for making the assessments accessible for students.
- T. PARCC Style Guide: The Style Guide provides specific item development styles to be utilized in the development of assessments to provide for consistency across the years and across assessments (224 pages of style specifications).
- U. PARCC Meetings Per Year: This provides specifications for the number of meetings to be conducted, allowing for accurate cost collection for the scope of work.
- V. PARCC Standard Setting Lead Recommendation: RFP Attachment V provides clarification and requirements regarding an offeror's proposal response for Standard Setting, offering flexibility in responses.
- W. PARCC Technology Bundle Specifications: The PARCC Technology Bundle Procurement documentation is made available through the RFP via four separate links, and includes direct reference to the source document at <http://parconline.org/procurement>. As noted above, the PARCC Technology Bundle Procurement documentation includes detailed specifications regarding the design of the assessment delivery platform providing an offeror with the information needed to understand the companion assessment development requirements necessary to render content in the platform.
- X. PARCC Technology Guidelines: The RFP includes a link to the PARCC Technology Guidelines which contain device and browser specifications for administration of the assessments.

In light of all of this information included in the body of RFP, its attachments, or incorporated by reference in the RFP, the needs of New Mexico and other PARCC states that may use the price agreement procured through the RFP, was anything but “unspecified” as suggested by AIR in its protest. AIR’s stated inability to understand the requirements and specifications of the RFP scope of work, the delivery platform, and other technical requirements was not the product of an incomplete RFP. Rather, the RFP provided specifications and requirements sufficient to allow all interested offers to develop competitive technical and cost proposal responses. AIR’s protest is a clear demonstration of its inability or unwillingness to devote the effort necessary to digest, interpret and analyze the voluminous information provided in the RFP, its exhibits and attachments in order to prepare a comprehensive response within the deadline imposed by the procuring agencies.

2. A Base Contract Term of Four Years is Reasonable, Practicable, and Justified.

AIR next alleges that the RFP unreasonably restricts competition because the RFP combines work being procured during the first year with a base term of three additional years as well as an optional four year renewal period.⁷ As AIR would have it, GSD/PED would procure operational assessment services for the 2014-15 school year only to be followed by another procurement for years two through four and the optional renewal periods. This would be neither practical nor would it fulfill the requirements of New Mexico and the other PARCC states. Conducting a procurement of this magnitude and importance for a one year contract only to turn around and expend additional time and resources to conduct one or more other procurements for future years of the operational assessments makes no sense.

GSD/PED has a reasonable basis for procuring a four year contract for PARCC operational assessment services, as a longer term contract will achieve significant cost savings based on the efficiencies vendors can incorporate into the pricing for a multi-year contract. The one-time fixed costs that a vendor must incur in the first year of delivering a large scale assessment program would be spread out over four years, rather than incurred each year of an annual contract. Procurement of operational assessment services over a four year base term also affords New Mexico, and other PARCC states that may utilize the price agreement, practical efficiencies of dealing with a consistent vendor over a four year period, including increasing stability in quality performance management as the program matures over the contract term. In contrast, conducting a separate procurement for operational assessment services to be provided after year one, as advocated by AIR, would involve the inherent risk of the potential need for GSD/PED to transition to a new vendor just when the operational assessments are getting off the ground thereby jeopardizing the quality of the operational assessments, including timely administration, for not only New Mexico but other PARCC states. GSD/PED is afforded the discretion by the Procurement Code to determine that a multi-year sequenced procurement is both practicable and advantageous to achieve its need for the product to be procured from the successful vendor. See NMSA 1978, §§ 13-1-111, 13-1-117, 13-1-150.

⁷ In its protest, AIR repeatedly refers to years two through eight of the contract, thereby suggesting that the price agreement awarded pursuant to the RFP will be for an eight year term. This is not correct. The RFP clearly provides that the contract being procured is for “one 48-month contract” which “may be renewed for up to four (4) 12-month periods.” [RFP, § I.C., p. 13].

AIR's argument is also factually flawed to the extent it is based on AIR's misunderstanding that the RFP requires use of Pearson's CDP during year one of the contract being procured through the RFP. This is not the case. The RFP, in Appendix B, states that the "CDP Vendor will provide the shared services, test registration, test delivery, and item banking systems for the first operational year." [RFP, Appendix V, p. 84]. In response to vendor question 18 inquiring about the identity of the CDP Vendor, GSD/PED responded: "The CDP vendor has yet to be contracted for." [Vendor Questions and Responses, Response to Question #18]. Notwithstanding this response, AIR misconstrues GSD/PED's response to question 19 as stating that Pearson is the CDP Vendor for year one. Question 19, however, inquired about the funding stream for Pearson's TestNav System not whether such system was required to be used as the CDP for the first year of the contract being procured through the RFP. GSD/PED's response was that: "The use of the delivery platform system for the first operational year was included as part of an earlier competitive procurement during the grant-funded development program." [Vendor Questions and Responses, Response to Question #19].

That earlier competitive procurement was a procurement by PARCC, through the State of Indiana as its fiscal agent, pursuant to which a contract was entered into with Pearson for Assessment Administration services, including an item tryout, development of test forms for field testing, paper-based and computer-based field test administration services including the use of Pearson's test delivery platform, and psychometric research services with an effective date of March 26, 2013. The Assessment Administration contract, which is a public record in the State of Maryland,⁸ anticipated that the PARCC states would utilize Pearson's computer based test delivery platform services for the first operational year, but such option was not funded under the Race to the Top Assessment Grant, and therefore was not a funded option under the contract. *See* Exhibit "A."⁹

AIR's argument further ignores the portion of the RFP which specifically requests offerors to propose the use of their test delivery platform for all four years of the resulting contract as a cost option. Page 87 of the RFP, which is part of Appendix B containing the scope of work, asks an offeror to provide as a cost option the following:

Contractor-provided Assessment Content, Assessment Delivery, and Shared Service for years one through four. For this option, the Contractor is not required to follow PARCC's interoperability requirements for data exchanges between Contractor supplied components. The Contractor would be expected to follow PARCC's interoperability requirements for data exchanges (item/student/organization) to/from the Contractor's and PARCC's data warehouses and reporting components. The Contractor shall identify where meeting PARCC's requirements would delay or prevent successful implementation in year one.

[RFP, Appendix B, p. 87].

⁸ Indiana's responsibilities as fiscal agent were transferred to Maryland.

⁹ The PARCC member states were to determine the source of funding for the first operational administration, and amend the contract on or about July 1, 2014 to fund the use of a test delivery platform for the PARCC use during the first operational year.

Rather than limiting competition, the RFP included all specifications and requirements necessary for offerors to propose unique solutions and cost options which would allow GSD/PED to select the proposal which is most advantageous to the PED and the State of New Mexico as a whole. Furthermore, AIR's argument that Pearson has unequal access to specifications for the services procured in this RFP is inaccurate, as all PARCC specifications regarding the item bank, assessment delivery platform, reporting data warehouse, and interoperable items were freely available to all offerors, and not limited to Pearson. AIR has not shown, and cannot show, that the four year base term of the RFP unreasonably restricts competition.

3. **GSD/PED is Not Required to Separately Procure Test Development and Administration Work.**

Not only does AIR argue that GSD/PED is required to conduct separate procurements for year one and all other years of the operational assessment contract, but AIR contends that GSD/PED is also required to separately procure test development services from administration services. These arguments ignore the requirements that procurements must be practical and meet the needs to the procuring agency, and also ignore the discretion given to GSD/PED in deciding when it is necessary to divide products or services being purchased into components that are the subject of separate procurements. The New Mexico Procurement Code states in pertinent part: “[i]n preparing specifications, if, ***in the opinion of the state purchasing agent or central purchasing office***, a proposed component is of a nature that would restrict the number of bidders or responsible Offerors and thereby limit competition, ***if practicable***, the state purchasing agent or central purchasing office shall draft the specifications without the component and procure the component by issuing a separate invitation for bids or request for proposals or by entering into a sole source procurement.” NMSA 1978, § 13-1-164 (emphasis added). This statute clearly allows the State Purchasing Agent or Central Purchasing Office to make the determination regarding whether it is practicable to separate components of a project into separate procurements. Here, the RFP reflects that it was the opinion of GSD that conducting separate procurements for test development and administration services is not required.

AIR contends that GSD/PED should unbundle the test development function from the administration function because: (a) certain vendors have unequal access to information based on work they have done under other PARCC-related test development contracts, and (b) bundling test development with administration work will provide an incumbency advantage for assessment administration work unrelated to development work. These allegations are unfounded. Moreover, AIR cannot show that a procurement for both test development and administration work unreasonably limits competition. Additionally, the unbundled procurements suggested by AIR simply are not practicable considering the time constraints for implementation of the operational assessments as well as the challenges and risks associated with having separate contractors responsible for test development and administration.

a. **The RFP Is Not Anticompetitive Because Pearson and ETS Are Performing PARCC Item Development Contracts Procured By Florida.**

As pointed out by AIR, Pearson, as well as Educational Testing Service (“ETS”) were both awarded contracts for PARCC Item Development services effective June 1, 2012, by the State of Florida, which at the time was acting as fiscal agent for PARCC. These Item Development contracts are paid with federal Race to the Top Assessment Grant funds and include test content development and design services.

As a result of its existing PARCC Item Development contract, Pearson does not have unequal access to information needed by a prospective offeror to respond to the RFP and, therefore, the fact that Pearson has an existing contract does not mean that the RFP unreasonably restricts competition. As previously noted in Section A of the Argument and Authorities portions of this response, the RFP includes the specifications and requirements necessary to allow any offeror to develop a competitive proposal response for all aspects of the scope of work including item development. The fact that Pearson and ETS may have knowledge relating to the item development work they have been performing, does not make the RFP unlawful. In any procurement, the past experience of a vendor in performing similar work should be of advantage to that vendor. That, however, does not make the advantage unfair or improper. Although Pearson is not an incumbent contractor as operational assessment services have not yet been procured by PARCC, any advantage Pearson or ETS may have based on their performance of other PARCC-related contracts is not dissimilar to that of incumbent contractors generally. The Federal Comptroller General has advised that the competitive advantage an incumbent contractor may have from contract performance is not an unfair or improper competitive advantage. *PRC, Inc. - Recon.*, Comp. Gen. No. B-274698.4, 97-2 ¶ 10 at 2-3. An incumbent contractor may possess unique advantages and capabilities due to its prior experience, and the Government is not required to attempt to equalize competition to compensate unless there is evidence of preferential treatment or other improper action. *Clifton Diving Corp.*, Comp. Gen. No. B-289271m 2002 CPD ¶ 32 at 6. Thus, an agency is not required to structure its procurements in a manner that neutralizes the competitive advantage that incumbent contractors may have. *CW Government Travel, Inc.*, Comp. Gen. No. 283408 et al., CPD ¶ 89 at 7. Nonetheless, GSD/PED has structured its RFP to address any Organizational Conflict of Interest (“OCI”) concerns that may be associated with a contractor previously awarded PARCC work and requires any such contractor responding to the RFP to present a plan to mitigate against OCI issues. [RFP, §C.33., p. 31]. GSD/PED, however, has correctly stated that “relevant prior experience is not an OCI situation and does not constitute an unfair competitive advantage requiring mitigation or avoidance.” [Vendor Questions and Responses, Response to Question #10]. GSD/PED is not required to completely discount or devalue the experience of prospective vendors who have performed similar work previously in order to “level the playing field” as AIR suggests. Such experience is ordinarily given credit in the RFP evaluation factors, selected by the procuring agency in accordance with Section 13-1-114. The thrust of AIR’s protest would bar use of such factors as anti-competitive, when in fact such experience provides obvious benefits and cost efficiencies to the procuring agency.

AIR cannot demonstrate that the RFP is structured to give Pearson unequal access to information or that Pearson's existing item development work under the Florida contract in any way restricts or stifles competition in response to the New Mexico RFP. AIR fails to specify what information Pearson may have or to which it has exclusive access which affords it a competitive advantage and which is not furnished in the extensive RFP specifications, including

the exhibits, attachments and materials incorporated by reference in the RFP. In essence, AIR is not only arguing that the RFP should be restructured to break apart test development and administration into separate components independently procured, but AIR is suggesting that Pearson (and ETS) should be disqualified from any test development operational assessment contract due to their existing PARCC Item Development contracts. There is no legal basis whatsoever for such position which would, ironically, restrict or limit competition for the test development work in a manner that would unduly favor AIR.¹⁰

b. *Test Development Experience Will Not Give Certain Vendors an Unfair Incumbency Advantage for Administration Work.*

AIR further argues that the role of Pearson and ETS, as the current vendors for item development work, provides them with a competitive advantage for the assessment administration work, for which they are not an incumbent. AIR argues that by “bundling the uncompleted initial test development with future year two - eight operational assessment administration, the RFP affords these vendors an unwarranted advantage for the assessment administration component” because the vendors will have “lower transition costs, a more advantageous learning curve, or any of the other benefits of an incumbent, which skews the evaluation in these vendors favor” and “does not represent the best value in assessment administration.” [AIR Protest, p. 9]. This argument, however, ignores the fact that the evaluation factors in the RFP provide for test development and assessment administration to be scored separately. [RFP, § V.A., p. 38]. AIR's argument also wrongly assumes that evaluators will not be able to distinguish between test development experience and administration experience. Just as any offeror should receive points for past test development experience, an offeror should also receive points for past administration experience. As previously noted, to the extent that a prospective offeror is lacking experience in one area or the other, the RFP encourages such vendor to partner with one or more vendors with complementary capabilities.

c. *Unbundling Test Development from Administration Is Not Practical and Does Not Meet the Needs of New Mexico and the Other PARCC States.*

As stated in GSD/PED's response to vendor question 1, GSD/PED's rationale for issuing one PARCC operational assessment for test development and administration was to reduce “vendor management complexity for the Consortium states.” [Vendor Questions and Responses, Response to Question #1]. Notwithstanding AIR's argument to the contrary, the use of a single contract vehicle to procure comprehensive assessment development and administration services to be provided to a consortium of up to fourteen states is certainly “a legitimate basis” for combining these components in a single RFP. The State and PARCC have already made a determination to break Program Management Partner services, as well as Report Design and Data Warehousing services into separate procurements, indicating that a great deal of analysis and thought has been given to the most reasonable and practical contract and management structure. If the PARCC operational assessments were to be procured with different contracts for year one and future years, as well as different contracts for each type of service, as advocated by

¹⁰ In making its argument that test development should be unbundled from test administration due to Pearson's superior access to information, AIR again incorrectly suggests that the RFP requires use of Pearson's CDP platform for year one of the contract.

AIR, New Mexico and other PARCC states would be looking at potentially dealing with four or more contractors and contracts for just the operational assessments over just a four year period of time. There is enough complexity associated with the practical aspects of state education departments and public schools implementing new Common Core assessments without adding to an additional layer of complexity associated with an unnecessarily unwieldy and impractical, procurement and contracting process. With every contract and contractor added there are increased risks associated with transition and communication issues, not to mention increased risk of inconsistency in quality and the additional time and effort of state resources required not only to procure separate contracts, but to monitor and manage multiple contracts. It is certainly reasonable for the State of New Mexico to use a single procurement to contract for the interrelated services of assessment development and delivery, and the exercise of its discretion in this manner is authorized by the New Mexico Procurement Code.

C. GSD/PED's Means of Providing Access to Secure Test Content Was Appropriate.

As a corollary to its arguments that the RFP unreasonably restricts competition, AIR complains about GSD/PED providing access to sample test questions and source code to prospective offerors claiming that such access is “unnecessarily limited at best and unauthorized at worst.” [AIR Protest, pp. 10-11]. During the RFP question and answer process, a respondent requested that GSD/PED provide an electronic set of PARCC items to offerors, including the technology-enhanced items that would be delivered through the computer-based assessment delivery platform. GSD/PED's response provided all prospective offerors an opportunity to view the sample items at an organized, on-site meeting, subject to a non-disclosure agreement. AIR's argument makes significant assumptions about the ownership of the sample items which the State offered to display to prospective offerors, arguing that unfettered access to the sample items was necessary to “level the playing field.” This argument is misguided for several reasons.

First, AIR ignores the fact that the sample items to which GSD/PED offered to provide access could have been secure and exempt from public records requests, and the secure, on-site demonstration of such content was necessary to ensure the integrity of the assessment content and intellectual property. The State's ability to protect the security or confidentiality of intellectual property that is exempt from public release (as is the case with secure assessment content) cannot support a claim that such action unduly restricts competition.

Second, any claim that unfettered access to the sample items that GSD/PED offered to display was required to “level the playing field” is inaccurate because the item development specifications and requirements for such items were clearly articulated and included in the RFP. As previously discussed, the RFP includes and incorporates by reference item development and technical requirements in the numerous specification documents. The *PARCC Item Development Technical Guide* provides 269 pages of technology-enhanced item interaction data, encoding requirements, example XML, and rendering description, including additional links to source documents and specifications for the established interoperability standards adopted by PARCC. The detailed written specifications offered a roadmap by which offerors could develop a responsive, competitive response to the RFP.

D. A Hypothetical Conflict of Interest Is Not Relevant To the Determination of Whether the RFP Complies With the Law.

AIR alleges that a conflict of interest would exist if PARCC decided to bid on assessment work procured in Florida and New York, and cites five news articles that speculate on PARCC's intent to bid on the work – even going so far as to attach links to these news articles as “Exhibit C” to the protest. AIR states “if these stories are valid” then PARCC will be competing against the companies from which it is soliciting proposals in this procurement. [AIR Protest, p. 11]. PARCC, however, is not soliciting proposals in this procurement. The GSD/PED is soliciting proposals and will make any contract award. [RFP, § II.B.12., p. 22]. AIR's conflict of interest argument is based on pure speculation which is irrelevant, inaccurate, and has no basis to sustain any colorable claim of protest under New Mexico law.

E. The RFP Is A Procurement for a Price Agreement and Is Not a Cooperative Procurement.

AIR's final argument in its protest is that GSD/PED has not executed any cooperative purchasing agreements with other PARCC states in violation of New Mexico law. AIR relies on Section 13-1-135 of the New Mexico Procurement Code which authorizes a state agency to participate in, sponsor or administer a cooperative procurement agreement “in accordance with an agreement entered into and approved by the governing authority of each of the state agencies, local public bodies or external procurement units involved.” NMSA 1978, § 13-1-135. GSD/PED admittedly has not entered into a cooperative purchasing agreement with any other PARCC state. AIR's cooperative purchasing argument, however, is misplaced because the RFP is not a cooperative procurement. Instead, it is a price agreement procurement.

Section 13-1-44 of the New Mexico Statutes Annotated defines a “cooperative procurement” as “a procurement conducted by or on behalf of more than one state agency or local public body . . .” NMSA 1978, § 13-1-44. AIR's argument is premised on AIR's misunderstanding that GSD/PED is conducting this procurement on behalf of the 13 other PARCC states. The RFP, however, clearly states that it is being issued by GSD/PED “to solicit sealed proposals to establish a price agreement that would be available to entities both within the State of New Mexico as well as entities outside of the State of New Mexico, including other states. . . . [RFP, § I.A., p. 5; *see also* RFP, § I.C., p. 13 (“It is intended that a price agreement would be available to entities within the State of New Mexico as well as to entities outside the State of New Mexico, including other states . . .”). In responding to vendor questions, the GSD/PED reiterated in response to a question about cooperative procurement agreements that: “This is a New Mexico RFP.” [Vendor Questions and Responses, Response to Question #8]. A “price agreement” is defined as “a definite quantity contract or indefinite quantity contract which requires the contractor to furnish . . . services . . . to a state agency or a local public body which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.” NMSA 1978, § 13-1-71. Discretion to enter into such price agreements is afforded in the New Mexico Procurement Code under specified criteria. *See* NMSA 1978, § 13-1-129.

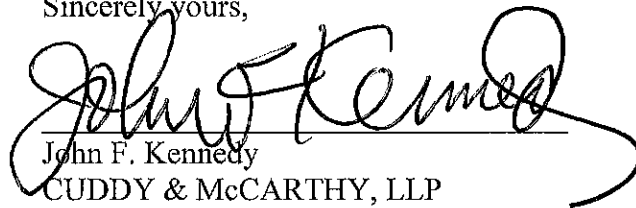
AIR also appears to misconstrue GSD/PED's response to vendor question 7 in which GSD/PED states: “It is anticipated that other PARCC Consortium states will make cooperative

purchases under the contract to be awarded by New Mexico, placing direct orders with the contracted vendor under the terms of that contract, or otherwise make direct purchases under comparable contract terms, such as through sole source arrangements.” [Vendor Questions and Responses, Response to Question #7]. The reference to “cooperative purchases” in this response does not make the RFP a cooperative procurement. Instead, that reference is to cooperative purchases made pursuant to the laws of other PARCC Consortium states consistent with the language on page 15 of the RFP stating: “This RFP is available to entities outside of New Mexico so long as outside entities comply with New Mexico law and laws of their own state.” [RFP, § I.C., p. 15]. Section 13-1-135 of the New Mexico Procurement Code simply does not apply to this RFP. Therefore, there is no basis under New Mexico law to invalidate the RFP due to the absence of cooperative purchasing agreements between New Mexico and the other PARCC Consortium states.¹¹

III. CONCLUSION

AIR has not shown, and cannot show, that the RFP is in violation of law. Accordingly, for all of the reasons stated above, Pearson respectfully requests that you deny AIR's protest.

Sincerely yours,



John F. Kennedy
CUDDY & McCARTHY, LLP
1701 Old Pecos Trail
Post Office Box 4160
Santa Fe, New Mexico 87502-4160
(505) 988-4476
jkennedy@cuddymccarthy.com

New Mexico Local Counsel for Pearson

and

Karen D. Walker
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
(850) 425-5612
karen.walker@hklaw.com

Co-Counsel for Pearson

¹¹ There are Memoranda of Understanding between the PARCC states under which they have made commitments to administer the PARCC assessment systems in their states. [Vendor Questions and Responses, Response to Question #7].

cc: Mr. Jon Cohen, Executive Vice President, AIR
Mr. Dan Hill, General Counsel, NMPED
Mr. Paul Kippert, J.D., State Purchasing Dept.