

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by ACT, Inc. (2014-16);	)	
and Appeal by South Carolina Budget	)	Case No. 2014-16 and
and Control Board (2014-17)	)	Case No. 2014-17
	)	
RFP #5400008105 – S.C. Department of	)	
Education – Statewide Assessment –	)	
Grades 3 – 11	)	
	)	

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These cases are before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4210(6) and 11-35-4410(1) of the South Carolina Consolidated Procurement Code (the Procurement Code). On December 18, 2014, the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) issued a written determination granting the protest of Data Recognition Corporation (DRC). ACT, Inc. (ACT) and the South Carolina Budget and Control Board (the Board) both appealed the CPO’s written determination. The Panel convened a hearing on March 25, 2015, to consider these appeals. During 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. Keith C. McCook, Esquire, represented the Board, and W. Dixon Robertson, III, Esquire, represented the CPO. Cathy L. Hazelwood, Esquire, represents the South Carolina Department of Education (the Department), but did not participate in the hearing.

## Findings of Fact

### I. Solicitation and Procedural Background

In May of last year, the General Assembly passed Act 200, which required the procurement of a new statewide education assessment system for the State's school children.<sup>1</sup> In a departure from historical practice,<sup>2</sup> Act 200 provided that the Executive Director of the Board would direct the procurement of the new assessments with the advice and consent of a special assessment panel. S.C. Code Ann. § 59-18-325(C)(1). Act 200 required the procurement to be completed before September 30, 2015. *Id.* The Department was instructed to administer the assessments procured by the Board "[i]n school years 2014 – 2015, 2015 – 2016, and 2016 – 2017." S.C. Code Ann. § 59-18-325(C)(3).

In accordance with Act 200, ITMO issued a request for proposals on June 30, 2014. Record at PRP128. Two offers, one from ACT and one from DRC, were received and opened on the due date, August 11, 2014. Record at PRP4 [CPO Decision]; *see also, In re: Request for Review by Data Recognition Corp.*, Panel Case No. 2014-13 (December 18, 2014), Panel Exhibit B, "Written Determination Regarding Which Solicitation by a Responsible Offeror is Most Advantageous to the State." Both proposals were evaluated and ranked. Record at PRP249 – PRP369. On September 19, 2014, ITMO posted a notice of intent to award the contract to ACT. Record at PRP247. DRC protested the intended award on September 29, 2014. Record at PRP115 – PRP117. The intended award was suspended on September 30, 2014. Record at PRP248. DRC supplemented its protest on October 6, 2014. Record at PRP118 – PRP127.

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<sup>1</sup> Act 200 is now codified at S.C. Code Ann. § 59-18-325(C) (Supp. 2014).

<sup>2</sup> This is the second time this particular procurement has come before the Panel. In the previous instance, the Panel reviewed the CPO's written determination to lift the automatic stay to allow the intended award to ACT to go forward. *In re: Request for Review by Data Recognition Corp.*, Panel Case No. 2014-13 (December 18, 2014). In its decision affirming the CPO, the Panel observed that historically the Department would work in conjunction with the Materials Management Office to procure statewide assessments, but that the terms of Act 200 limited the Department's role during this solicitation. *Id.* at 2 – 3.

DRC's protest raised issues regarding ACT's responsiveness and alleged mistakes by the State during the evaluation and award that undermined the integrity of the procurement process.

The CPO conducted a hearing to consider DRC's protest on October 23 – 24, 2014. Record at PRP4; *see also Request for Review by Data Recognition Corp.*, Panel Case 2014-13 at 3. On October 31, 2014, before the CPO had issued a decision on the merits of DRC's protest, the Executive Director requested him to lift the automatic stay and allow the award to ACT to go forward, citing the urgent need to have testing in place for the spring of 2015. *Request for Review by Data Recognition Corp.*, Panel Case No. 2014-13 at 8. The CPO granted this request on November 1, 2014. *Id.* DRC appealed this determination to the Panel, and the Panel affirmed the CPO's decision lifting the stay after a hearing on November 19, 2014. *Id.* at 14 – 15. DRC did not appeal the Panel's decision.

The CPO issued his decision on the merits of DRC's protest on December 18, 2014. Record at PRP4 – PRP36. As will be discussed more fully below, he granted several issues of protest regarding ACT's responsiveness; the State's evaluation and ranking of a materially non-responsive offer; and the State's negotiations with a non-responsive offeror. Record at PRP24 – PRP29; PRP32 – PRP33. Recognizing his previous decision to lift the automatic stay and the reasons for that decision, the CPO ordered the following as a remedy:

Having granted DRC's protest on its merits, the CPO has necessarily determined that the Intent to Award a contract to ACT based on Solicitation No. 5400008105 was made in violation of law. Section 11-35-4310(3) provides the following remedies for awards in violation of law:

- (3) If, after an award of contract, it is determined that the solicitation or award is in violation of law;
  - a. the contract may be ratified and affirmed, provided it is in the best interests of the State; or

b. the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

For the reasons outlined in my determination to lift the automatic stay, and in light of the urgency to have a testing protocol in place for the students of the State for Spring 2015, the CPO finds that it is in the best interests of the State to ratify the contract. However, since the award to ACT was in violation of the Code the CPO directs that the contract be terminated at the end of the first year, in lieu of the three year term provided for in the solicitation. The Budget and Control Board is ordered to resolicit these requirements and award a contract in compliance with the Code.

Record at PRP36.

On December 29, 2014, ACT appealed the CPO's decision to the Panel. Record at PRP53 – PRP61. ACT's initial appeal letter challenged the CPO's findings regarding ACT's responsiveness; the State's scoring and ranking of ACT's proposal; and the State's negotiation with ACT. Record at PRP57 – PRP61. In addition, ACT asserted that the CPO lacked the authority under section 11-35-4310(3) to grant the relief ordered in his written determination. Record at PRP55 – PRP57. However, by letter dated February 13, 2015, counsel for ACT advised the Panel that it was withdrawing all of its appeal issues except "No. I, which concerns the CPO's lack of authority to grant the relief ordered in his decision."<sup>3</sup> Letter from David B. Summer, Jr., to The Honorable C. Brian McLane, Sr., dated February 13, 2015 [on file with the Panel].

Also on December 29th, the Board appealed the remedy portion of the CPO's decision to the Panel. Record at PRP113 – PRP114. The Board specifically challenged the CPO's authority to order resolicitation under section 11-35-4310(3) and Act 200's instructions for the solicitation of the new assessments, particularly with regard to the special assessment panel, which was dissolved upon contract award. Record at PRP113. In addition, the Board asserted that the

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<sup>3</sup> In his letter, ACT's counsel also stated, "In withdrawing these issues, ACT does not concede the correctness of the CPO's rulings. However, ACT accepts them for the purposes of argument before the Panel."

CPO's directive that the contract be terminated at the end of the first year "is an unwarranted exercise of discretion." Record at PRP114. Neither DRC nor the Department appealed the CPO's decision to the Panel.

## **II. Findings of Fact from the CPO's Order**

As noted above, ACT has withdrawn all of its appeal issues except for the one challenging the remedy granted by the CPO. The Board's appeal similarly challenges only the remedy portion of the CPO's order. Because the issue before it is limited to the CPO's authority to grant the relief ordered in his decision, the Panel finds that the parties are bound by his other findings and conclusions in that decision. *See In re: Protest of Kodak and Xerox Corp.*, Panel Case No. 1988-15(I) at 4 (December 21, 1988) (wherein the Panel advised, "[B]ecause the decision of the CPO was not appealed except as to relief, the Panel would accept the findings and conclusions of the CPO.") Therefore, the Panel adopts the CPO's findings and incorporates them herein by reference. The Panel makes particular note of the following findings, which are relevant to the issue before it:

1. ACT's proposal was materially non-responsive to Act 200 and Section 19.0 of the RFP because it failed to offer four student achievement levels for the college and career readiness assessment for grade 11. Record at PRP25.
2. ACT's proposal was materially non-responsive to Section 19.0 of the RFP because it failed to offer to convene and fund a committee of South Carolina educators to develop appropriate student achievement levels. Record at PRP25 – PRP27.
3. ACT's proposal was materially non-responsive to Section 10.1 of the RFP because it failed to confirm it would provide school districts with paper copies of student level reports for the grade 11 assessment (ACT) and offered paper copies of the grade 3 – 8 assessment (Aspire) only at an additional cost. Record at PRP27 – PRP29.
4. ACT's proposal was materially non-responsive at the time of scoring and ranking by the evaluation team on August 21, 2015. Record at PRP32 – PRP33. Under section 11-35-1530(7), an offeror must be responsive to have its proposal scored and ranked. *Id.*

5. As a non-responsive offeror, ACT necessarily could not have been the highest ranked offeror for the purposes of negotiations under section 11-35-1530(8). Record at PRP35. Therefore, the negotiations conducted under this section were invalid. *Id.*

In addition to the findings above, the CPO's order found other instances of troubling conduct on the part of the State during the course of this procurement. For example, several evaluators expressed concern about ACT's responsiveness during the evaluation and requested clarification, but ACT's proposal was scored and ranked without benefit of such clarification on August 21, 2014. Record at PRP32. The negotiation team met with the evaluation team that same day, marking the beginning of negotiations between ACT and the State. Subsequently, the procurement officer sent ACT e-mails to ACT on August 29th and September 3rd which identified issues of non-responsiveness in ACT's proposal which the State sought to modify through "discussions."<sup>4</sup> Record at PRP16, n. 7; PRP32. As a result of these exchanges, the CPO notes, "ACT's proposal was modified to bring it in compliance with most of the material and essential requirements of the solicitation after evaluation."<sup>5</sup> Record at PRP32. Nothing in the CPO's order or in the record before the Panel indicates that ACT's modified proposal was resubmitted to the evaluation team prior to award.

### III. Relevant Contract Provisions

The Panel also finds that the following contract provisions are relevant to the dispute before it. First, the RFP contains the following clause regarding the initial contract term:

**TERM OF CONTRACT – EFFECTIVE DATE/INITIAL CONTRACT PERIOD (JAN 2006)**

The effective date of this contract is the first day is the first day of the Maximum Contract Period as specified on the final statement of award. The initial term of

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<sup>4</sup> As the CPO explained thoroughly in his decision, the discussions allowed under section 11-35-1530(6) and Regulation 19-445.2095(I) to cure issues of responsiveness in a proposal must occur prior to final ranking. Record at PRP6 – PRP8.

<sup>5</sup> The Panel acknowledges the CPO's observation that proposals may be modified through negotiations conducted under section 11-35-1530(8). *See* Record at PRP33. However, negotiations should only take place with the highest ranked offeror – that is, the offeror whose proposal is responsive at the time of final ranking. It is established before the Panel that ACT's proposal was not responsive at the time of final ranking.

this agreement is **3 years, 0 months, 0 days** from the effective date. Regardless, this contract expires no later than the last date stated on the final statement of award.

Record at PRP185. The RFP also contains a clause entitled “**TERMINATION FOR CONVENIENCE,**” which provides in pertinent part:

(1) Termination. The Procurement Officer may terminate this contract in whole or in part, for the convenience of the State. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

Record at PRP186. This clause also defines the contractor’s obligations and rights to compensation in the event the State terminates the contract for convenience. *Id.*

### **Conclusions of Law**

Prior to the Panel’s scheduled hearing on March 25, 2015, the CPO, DRC, ACT, and the Board all filed separate motions for summary judgment, and the Panel entertained argument on those motions at the beginning of its hearing. The Panel has considered and ruled on summary judgment motions in the past. *Appeal by Qmatic, Inc.*, Panel Case No. 2012-3 (June 28, 2012); *Appeal of Triad Mechanical Contractors*, Panel Case No. 2006-7 (October 19, 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). As noted above, absent an appeal of any issue besides the remedy granted by the CPO, the material facts before the Panel are not in dispute and are established by the CPO’s order. *In re: Protest of Kodak and Xerox Corp.*, Panel Case No. 1988-15(I) (December 21, 1988). Therefore, the question before the Panel is whether one of the parties is entitled to judgment as a matter of law.

Based on the posture of this case, the Panel accepts as established the fact that the award to ACT was in violation of law. When a contract award is made in violation of law, section 11-

35-4310(3) of the Procurement Code applies. This section provides two possible remedies: (1) ratification and affirmation of the contract if it is in the best interests of the State; or (2) termination of the contract and payment of damages as provided in the contract. S.C. Code Ann. § 11-35-4310(3)(a) and (b) (2011).

ACT has argued that the CPO has exceeded his authority under section 11-35-4310 by attempting to fashion a “hybrid” remedy by ratifying only the first year of the contract and then ordering termination. However, the Panel disagrees with ACT’s interpretation of the CPO’s order. In his order, the CPO quotes section 11-35-4310(3) in its entirety and then “ratifies the contract,” finding that it is in the best interests of the State to do so “[f]or the reasons outlined in my determination to lift the automatic stay, and in light of the urgency to have a testing protocol in place for the students of the State for Spring 2015.”<sup>6</sup> Record at PRP36. The Panel finds that the language used by the CPO clearly indicates his decision to follow section 11-35-4310(3)(a) and ratify the contract’s initial term of three years and that such ratification is clearly within his authority under that statutory provision.

It is the next portion of the CPO’s remedy that presents the true issue before the Panel: Did the CPO have the authority to prospectively direct the termination of ACT’s contract at the end of the first year of the initial term? The CPO argues that in directing the termination of ACT’s contract at the end of the first year he was exercising his plenary authority over State procurements. In other words, the CPO asserts that his decision to terminate after the first year was separate from his decision to ratify under section 11-35-4310(3)(a). In support of his

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<sup>6</sup> The Panel cannot overemphasize the unique nature of this procurement resulting from the provisions of Act 200, which shortened timelines and established direction by the Executive Director with the assistance of the special assessment panel, but did not otherwise remove the solicitation from the requirements of competitive sealed proposals in the Procurement Code, which the CPO aptly described as a “labyrinth.” Record at PRP8. Compounding these dual constraints was the overriding necessity of having testing in place for this spring. The CPO recognized that necessity when he lifted the automatic stay and allowed the award to ACT to go forward. The Panel observes that the CPO’s decision, much like its own, is driven by the unusual circumstances of this particular procurement.



position, the CPO cites section 11-35-510 of the Procurement Code, which vests the appropriate chief procurement officer with “[a]ll rights, powers, duties, and authority relating to the procurement of supplies . . . .” S.C. Code Ann. § 11-35-510 (2011). The term “procurement” includes the management of contracts after award: “‘Procurement’ . . . includes . . . all phases of contract administration.” S.C. Code Ann. § 11-35-310(24) (2011). Authority over contract administration necessarily includes the termination of a contract, whether it is for default, for cause, or for convenience. As noted above, ACT’s contract with the State contains a termination for convenience provision which provides for termination of the contract “in whole or in part.” Record at PRP186. The Panel finds that the CPO exercised his express authority under sections 11-35-510 and 11-35-310(24) of the Procurement Code and acted as permitted by the contract’s termination clause in directing that ACT’s contract be terminated at the end of the first year.<sup>7</sup>

The Board has argued that the CPO’s decision violates the mandates of Act 200, which required the Department to administer the assessments procured by the Board for three consecutive school years beginning with 2014 – 2015. This argument ignores the fact that Act 200 did not exempt the solicitation from the general requirements of the Procurement Code. Read together, Act 200 and the Procurement Code required a lawful procurement resulting in a lawful contract. Neither took place here, and the Panel rejects this argument. Furthermore, the Panel finds the CPO’s decision reflects the gravity with which he fulfills his role as guardian of the Procurement Code: his remedy strikes a fair balance between competing interests that ensures open competition and fair treatment by enforcing the rules, thus protecting the integrity of the State procurement system.

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<sup>7</sup> In argument before the Panel, counsel for the Board and ACT both took issue with the CPO exercising his plenary authority to terminate ACT’s contract in the context of an administrative review of a protest. Given the extraordinary circumstances of this particular procurement, the Panel finds that requiring the CPO to issue his decision to terminate after the first year on a separate piece of paper would serve no practical purpose, especially when these extraordinary circumstances are unlikely of repetition.

### Conclusion

Therefore, for the reasons stated herein, the Panel hereby grants the CPO's motion for summary judgment and affirms the decision of the CPO.<sup>8</sup>

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: */s/ C. Brian McLane, Sr.*  
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 7<sup>th</sup> day of April, 2015.

Columbia, South Carolina

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<sup>8</sup> At the hearing, the Panel voted four to one to affirm the CPO's written determination in full. As the dissenting voter, Mr. Franks expresses his view that the CPO should have ratified the initial term of the contract, but should not have directed that the contract be terminated at the end of the first year.