

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by TAC 10, Inc., and	)	Refiled December 10, 2012
Mr. Mark DeGroote	)	Case No. 2012-2
	)	
(Debarment of SMART Public Safety	)	
Software, Inc., Mr. Robert Sorenson,	)	
Mr. Mark DeGroote, and TAC 10, Inc.)	)	
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On November 8, 2012, the Panel received a Motion for Reconsideration from the Chief Procurement Officer in this matter. After careful consideration of the motion for reconsideration, the Panel finds that it addressed all of the issues raised by the parties and denies the motion. However, the Panel withdraws its original order and substitutes it with this revised order.

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request by TAC 10, Inc. (TAC 10), and Mr. Mark DeGroote (Mr. DeGroote) for further administrative review under sections 11-35-4220(5) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). TAC 10 and Mr. DeGroote appealed the January 19, 2012, decision of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) debarring TAC 10 and Mr. DeGroote for a period of three years from the date of their original suspension, which was February 17, 2011.<sup>1</sup>

The Panel conducted a two-day hearing on the appeal beginning on September 6, 2012. In the hearing before the Panel, TAC 10 and Mr. DeGroote were represented by E. Wade Mullins, III, Esquire, and Matthew H. Stabler, Esquire. The South Carolina Department of

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<sup>1</sup> The CPO's January 19, 2012, order also debarred Mr. Robert Sorenson and SMART Public Safety Software, Inc., for a period of three years. However, neither Mr. Sorenson nor SMART has appealed their debarment to the Panel.

Natural Resources (DNR) was represented by Buford S. Mabry, Jr., Esquire. The CPO was represented by William Dixon Robertson, III, Esquire, and Molly R. Crum, Esquire.

### **Motion to Quash Subpoena**

At the request of the CPO, the Panel issued a subpoena on August 30, 2012, commanding the attendance of Mr. DeGroot at the Panel's scheduled hearing on September 6th and 7th. Mr. DeGroot, a resident of Cedar Falls, Iowa, objected to the issuance of the subpoena and filed a motion to quash, arguing that the Panel did not have the authority to compel the attendance of an out-of-state witness. After considering the written response of the CPO to Mr. DeGroot's motion to quash, the Panel Chairman determined that the Panel's subpoena power did not extend beyond the borders of the state of South Carolina. *See* Rule 45(b)(2), SCRCP (“[A] subpoena may be served at any place *within* the State.”) (emphasis added). Therefore, the Chairman quashed the subpoena issued to Mr. DeGroot.<sup>2</sup>

### **Findings of Fact**

#### **I. Facts Surrounding the Solicitation and SMART's Performance**

As mentioned above, this appeal arises from the CPO's order of January 19, 2012, debarring TAC 10 and Mr. DeGroot from doing business with the State for a period of three years. The underlying solicitation involved an IFB issued by the ITMO on behalf of DNR. With this IFB, DNR sought “a fully integrated information system” which would be fully compatible with DNR's existing Oracle database and “provide computer aided dispatch; summons ticket, warning ticket, arrest warrant, bench warrant, privilege suspension, and investigations case management; incident reporting; daily and monthly officer activities reporting; and other mission

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<sup>2</sup> The Panel notes that had the CPO requested the subpoena sooner, then time may have permitted the taking of a telephonic deposition pursuant to Rule 30(b)(7), SCRCP, and perhaps its subpoena could have been endorsed by the South Carolina Circuit Court and thereafter “domesticated” by an Iowa court. In any event, Mr. DeGroot did in fact attend and testify at the Panel's hearing, rendering most of this discussion academic.

critical law enforcement functions to the agency.” Record at PRP65. The IFB also required “the vendor to place the software source code in escrow with a commercial escrow agent giving the agency the right to access and modify the source code for the purpose of maintaining and supporting the software in the event of the vendor’s insolvency, liquidation, or bankruptcy.” Record at PRP75.

Smart Public Safety Software, Inc. (SMART) submitted a bid on March 31, 2009, and the bid was signed by SMART’s president, Robert Sorenson. Record at PRP132. SMART’s bid identified an implementation team which SMART represented would work on the DNR project. Record at PRP195. Mr. DeGroot was the second person listed on the team, and his position was described as “Vice President of Development (Development Oversight).” *Id.* The implementation team also included Jeannette Dorn as “Vice President Operations (Project Oversight)” and Gary Lennert as “Project Manager.” *Id.*

Mr. Sorenson testified before the Panel that he signed the bid submitted to DNR. He explained that the bid preparation team was responsible for including Mr. DeGroot’s name and biography in the bid. However, Mr. Sorenson also testified that the integration of SMART’s software with an Oracle database was something that SMART had not done before and that outside contractors, not Mr. DeGroot, were responsible for the development of that part of the project. Furthermore, Mr. Sorenson testified that Mr. DeGroot was not involved with the day-to-day operations of the DNR project, but that he would have attended staff meetings where the project was discussed. Mr. Sorenson confirmed that Mr. Lennert, the initial project manager, reported to Ms. Dorn; Mr. Stevenson, who replaced Mr. Lennert, reported either to Mr. Sorenson or Ben Metz.<sup>3</sup>

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<sup>3</sup> Mr. Sorenson did not identify Mr. Metz’s position at SMART, but Mr. DeGroot later described him as the vice president of “the product line” and said that he was responsible for web-based development.

Regarding the requirement of escrow, SMART's bid offered the following:

Upon demand, SMART shall deposit a current version of the Software source code (defined as the Software provided by SMART that is currently running on the Customer's server) in escrow with a mutually agreeable commercial escrow agent. Customer has the right to access and modify the source code of the Software System, for the sole purpose of maintaining and supporting the Software according to this agreement, in the event of SMART's insolvency, liquidation, bankruptcy, or SMART's general inability to perform its obligations under this Agreement. Customer shall be responsible for all costs associated with the escrow.

Record at PRP167. In addition, the record before the Panel contains a Record of Negotiations between ITMO and SMART; in these negotiations, the parties agreed that SMART, not DNR, would bear the costs of escrow. Record at PRP224 – PRP225.<sup>4</sup> Robert Sorenson signed the Record of Negotiations on behalf of SMART on May 13, 2009, and Robin Rutkowski signed on ITMO's behalf on May 14, 2009. Record at PRP 214. ITMO posted an intent to award the contract to SMART on May 14, 2009, and the contract went into effect on May 15, 2009. Record at PRP48.

Dr. James D. Scurry of DNR testified at length before the Panel. Dr. Scurry is DNR's Technology Development Program Director and acted as DNR's IT contact on this contract. Dr. Scurry explained that DNR sought a web-based, integrated law enforcement system to replace its outdated system, which was located on mainframes and did not fully encompass all of DNR's various law enforcement functions. In addition, the new system would need to interface with DNR's existing Oracle database. Dr. Scurry testified that DNR sought a COTS<sup>5</sup> solution which could be customized for DNR's law enforcement needs because using a commercially available

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<sup>4</sup> The IFB contained a standard clause which provided that the contract between the parties would include the following documents: "(1) a Record of Negotiations, if any, executed by you and the Procurement Officer . . . (3) the solicitation, as amended . . . [and] (5) your offer . . . ." Record at PRP81.

<sup>5</sup> COTS is an abbreviation for "commercial off-the-shelf" and indicates a software package which is easily installed and useable without customization.

system saves time and resources. Dr. Scurry explained that customization was necessary because the commercially available systems were designed more for “blue cops” as opposed to “green cops.” Once SMART was awarded the contract, DNR expected that SMART would deliver its COTS solution and then customize that solution to meet DNR’s stated needs. Based on SMART’s bid and other communication with SMART, Dr. Scurry and DNR expected the project to be completed by the end of December 2009.

Work on the project began when DNR issued an electronic purchase order on June 18, 2009, in the amount of \$281,800.00 for the SMART software and licenses. Record at PRP288. A notation on the purchase order indicates that that amount “does not include installation, training, or customization services.” *Id.* DNR received the CD containing the software executables on June 23, 2012, and completed a Receiving and Inspection Report confirming receipt and authorizing payment on June 24, 2012. Record at PRP278; PRP289. In early July, Dr. Scurry exchanged e-mails with Mr. Sorenson and various DNR staff members to schedule a conference call “to talk about installation, configuration and customization at a general level.” Record at PRP293 – PRP294. The conference call, or “kick-off meeting,” was held on July 15, 2009. Record at PRP278. Along with Mr. Sorenson, Jeannette Dorn, responsible for Project Oversight, and Gary Lennert, Project Manager, attended the meeting on behalf of SMART. Record at PRP423; PRP424. Mr. DeGroot did not participate in the kick-off meeting. Record at PRP423.

On August 12, 2009, Dr. Scurry and Floyd Stayner of DNR met with Mr. Lennert to devise a work plan and rough timeline for implementing the project. Record at PRP299 – PRP301. Thereafter, DNR issued a purchase order in the amount of \$63,274.00 on September 2, 2009. Record at PRP302. This purchase order was “for professional services to customize,

configure and install software and train DNR staff.” Record at PRP278. SMART submitted an invoice in the amount of \$4,000.00 to DNR on November 13, 2009 for professional services on the DNR project between July and October, 2009, and DNR completed the receiving and inspection report to authorize payment to SMART on November 13, 2009. Record at PRP304. Thus, the total amount paid by DNR to SMART by the end of November 2009 was \$285,800.00.

Dr. Scurry testified that DNR became concerned with SMART’s lack of progress on the project during the latter part of 2009, especially since the project was originally scheduled for completion in December. Dr. Scurry and other DNR staff held a conference call with Mr. Sorenson, Mr. Lennert, and David Stevenson of SMART on January 12, 2010. Record at PRP279; PRP317. SMART informed DNR that they were building a staging system for the remote installation of the SMART software at DNR, which was tentatively scheduled for early February. Record at PRP279. On January 27, 2010, Dr. Scurry sent an e-mail to Mr. Sorenson expressing his concern that no one from DNR had heard from SMART regarding the remote installation, which was scheduled to take place the following week. Record at PRP318. Additionally, Dr. Scurry noted that he was troubled that SMART would not meet the March “go live” date. *Id.* Although SMART did attempt to install the software on February 2 – 3, 2010, Dr. Scurry testified that it never ran on DNR’s hardware.

Shortly thereafter, SMART informed DNR that Mr. Stevenson would be assuming the Project Manager position on the project, and the parties agreed to a new “go live” date of April 30th. The record before the Panel contains numerous e-mails during late February through the middle of April among Dr. Scurry, other DNR staff, Mr. Stevenson, and other SMART staff (but not Mr. DeGroot) attempting to work out the logistics of the project. *See generally*, Record at PRP324 – PRP338. Nevertheless, Dr. Scurry remained concerned that SMART was not meeting

its deadlines and e-mailed Mr. Stevenson on April 27, 2010, to request an overall status conference on the Project. Record at PRP340. Dr. Scurry testified that he also called Mr. Sorenson in late April regarding the missed deadlines.

After the system failed to “go live” on April 30th, Dr. Scurry sent an e-mail on May 11th to Mr. Sorenson and Mr. Stevenson expressing his belief that the project would not be completed by the end of the State’s fiscal year. Record at PRP341. Dr. Scurry also reminded them that carryover funds would not be available to complete the Project and requested that SMART either complete the project or reimburse DNR the funds already expended. *Id.* Dr. Scurry testified that he spoke with Mr. Sorenson by phone on May 12th and was informed for the very first time that SMART had been experiencing financial difficulties for months and that all of SMART’s projects were halted until the bank and SMART’s board reached some resolution, which was expected to occur within ten to fourteen days. Dr. Scurry asked whether the source code had been escrowed as required by the contract, and Mr. Sorenson indicated that he did not know, but would check the escrow status. Dr. Scurry testified that he did not recall whether or not Mr. DeGroote was on the May 12th phone call. A few days later, Mr. Sorenson informed Dr. Scurry that DNR was not on the escrow list, but that steps were being taken to add them the list. In fact, Dr. Scurry testified that the source code for the DNR project was never escrowed.

On June 9, 2010, Dr. Scurry received a phone call from Mr. Stevenson, who informed him that the financial issues had been resolved and that SMART had been sold to a company called TAC 10. Dr. Scurry then called the phone number previously used by SMART, which was answered by TAC 10 staff. Dr. Scurry testified that he was then connected with Mr. DeGroote, the president of TAC 10, who told him that primary staff members from SMART were now on staff with TAC 10, including Mr. Stevenson. Mr. DeGroote also informed Dr.

Scurry that although TAC 10 had purchased the assets of SMART, it had chosen not to assume the liabilities of SMART, including the DNR project. However, Mr. DeGroot indicated that TAC 10 was willing to sit down with DNR and work things out. Dr. Scurry testified that the only subsequent contact he had with TAC 10 or Mr. DeGroot was the letter he received from TAC 10's lawyer on June 10, 2010. Record at PRP344. This letter confirmed that TAC 10 had purchased SMART's assets, including all software and source code, and that TAC 10 had not purchased the DNR contract. *Id.* Dr. Scurry testified that DNR received no further contact from Mr. DeGroot or TAC 10 after receiving the letter.

Dr. Scurry testified that he considered Mr. Lennert, Mr. Sorenson, and, later, Mr. Stevenson, to be his primary contacts within SMART. Dr. Scurry admitted that he had contact with everyone listed on the implementation team in SMART's bid except for Mr. DeGroot. Finally, Dr. Scurry testified that Mr. Sorenson never informed him during phone conversations in May that he had been removed as SMART's president. In his testimony before the Panel, Mr. Sorenson confirmed that he never informed Dr. Scurry that he was no longer SMART's president during the phone conversations in May. Moreover, Mr. Sorenson admitted that he told Dr. Scurry that he was trying to work out a way to escrow the source code.

## **II. Facts Surrounding SMART's Finances and TAC 10's Purchase of SMART's Assets**

During the Panel hearing, Mr. Sorenson testified that he acted as SMART's president for five years and that he had been appointed president by the board of directors. As president, Mr. Sorenson had the authority to enter contracts on SMART's behalf and to seek financing for the company. Mr. Sorenson testified that SMART had pledged all of its assets, including the software it had developed, as collateral for several commercial loans from Lincoln Savings Bank (LSB). The record before the Panel contains copies of security agreements and loan documents

between SMART and LSB during April and October of 2009. Record at PRP410 – PRP422. Mr. Sorenson explained that he asked LSB for an extension of SMART’s credit line in October 2009, but that SMART did not begin experiencing financial difficulties until the beginning of 2010. At that time, Mr. Sorenson learned that SMART’s original investors were not willing to invest any more money in the company. Mr. Sorenson testified that SMART then consulted a business broker about either securing additional investment capital or selling the business. Mr. Sorenson said that SMART reduced its staff as it looked for buyers and that the intent was to sell the entire company. Mr. Sorenson also testified that two companies expressed an interest in buying SMART during this time period. However, when no outside investors or buyers were secured by the end of April, SMART’s board voted to remove Mr. Sorenson as president and named Mr. DeGroote as acting president.

The commercial loans secured by SMART’s assets matured on April 30, 2010, and the record before the Panel contains a copy of LSB’s May 4, 2010, letter demanding either immediate payment of all outstanding indebtedness<sup>6</sup> or surrender of the assets pledged as collateral. Record at PRP360. Apparently LSB did not know that Mr. Sorenson was no longer SMART’s president because this demand letter was addressed to him. *Id.* In any event, SMART’s board voted on May 5, 2010, to voluntarily surrender the pledged assets to LSB and circulated a resolution among the shareholders seeking their approval. Panel Exhibit #2 at TAC000040, “Notice of Written Action of Board of Directors and Shareholders,” and at TAC000041, “SMART Public Safety Software, Inc. Action of Shareholders Taken In Writing In Lieu of Meeting.”

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<sup>6</sup> SMART owed in excess of \$2,000,000.00 to LSB.

As SMART's acting president, Mr. DeGroot signed a voluntary surrender agreement surrendering SMART's assets to LSB on May 28, 2010. Record at PRP361 – PRP367. Teron Meinders, a commercial lender with LSB who handled SMART's loans, testified before the Panel that the asset surrender satisfied SMART's debt to LSB. On that same date, TAC 10 purchased most of those assets from LSB; Mr. DeGroot signed the asset purchase agreement as TAC 10's president. Record at PRP368 – PRP393. As noted above, TAC 10 did not purchase SMART's contract with DNR, nor did it assume any liabilities under that contract. The asset purchase agreement provided that TAC 10 was acquiring SMART's assets, including its software and source code, "free and clear of all liens and encumbrances" and that TAC 10 would only assume the obligations of certain assigned contracts existing at closing. Record at PRP368. The attachment listing the "assigned contracts" does not include the DNR contract. Record at PRP377 – PRP378.

### **III. Testimony of Mark DeGroot**

The Panel also received the testimony of Mr. DeGroot, who confirmed that he was a software developer and vice president for SMART at the time of the DNR bid and project. However, Mr. DeGroot explained that he did not develop web-based solutions and did not work on the DNR project. Although he was aware of SMART's decision to submit a bid for the DNR project, Mr. DeGroot said he had opposed SMART's bid because he was concerned about SMART's inexperience with Oracle integration, but he admitted that he had not committed his objections to writing. Mr. DeGroot also testified that he was not aware that he had been included on the implementation team for the DNR bid until some time after the bid had been submitted. Mr. DeGroot maintained that he never had any contact with DNR and never personally worked on the project between June 2009 and April 2010.

Mr. DeGroot testified that Mr. Sorenson informed the employees at SMART that the company was in financial distress during February or March of 2010. Mr. DeGroot understood that the company was seeking outside capital investment or a buyer; he also testified that he participated in product demonstrations for potential buyers during March and April of 2010. *See* Panel Exhibit #6 (e-mails discussing product demonstrations for companies referred to as Tiburon and Southern). Mr. DeGroot thought that Tiburon would make an offer to purchase SMART at that time. Ultimately, neither Tiburon nor Southern offered to buy the entire company.<sup>7</sup>

Regarding his appointment as acting president of SMART, Mr. DeGroot testified that he attended the board's meeting on April 30, 2010. At this meeting, the board outlined his duties as acting president, which he understood to be a position limited to preparing SMART for sale and communicating with customers. After LSB sent its demand letter to SMART, the board voted to surrender SMART's assets and directed Mr. DeGroot to do so. As SMART's acting president, Mr. DeGroot did not believe he had the authority to enter into contracts on SMART's behalf or to spend any money. Indeed, Mr. DeGroot observed that LSB controlled SMART's funds during the time SMART was seeking outside investment or a buyer. Furthermore, Mr. DeGroot testified that SMART's software and source code were its primary assets and that he had a duty to maximize their value for potential sale.

Although Dr. Scurry did not remember Mr. DeGroot being on the May 12, 2010, phone call with Mr. Sorenson, Mr. DeGroot testified that he was on the phone call and identified himself to Dr. Scurry. Mr. DeGroot said that he was not aware of DNR's right to escrow under the contract or any demand for escrow prior to that phone call. Mr. DeGroot explained that

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<sup>7</sup> Mr. Meinders testified that the only offer LSB received other than TAC 10's was an offer from Southern Software to purchase a portion of the software for \$250,000.00.

although Mr. Sorenson was still a SMART employee on May 12th, neither he nor Mr. Sorenson told Dr. Scurry that Mr. Sorenson was no longer SMART's president. When asked why he did not pay to escrow the source code between May 12th and May 28th, Mr. DeGrootte responded that he did not think LSB would allow him to do that. Additionally, Mr. DeGrootte testified that there would not have been enough time to escrow the code, which usually takes about a month to accomplish. Finally, Mr. DeGrootte stated that he believed that SMART's software and source code were its primary assets and escrowing the source code would have devalued SMART as a company seeking a buyer.

Mr. DeGrootte testified that he began formulating a plan for forming a new company to purchase SMART when it became apparent that SMART was going to fail because the prospective buyers were only interested in purchasing SMART's software. Mr. DeGrootte explained that his business plan was to support SMART customers who were already running the software; in other words, the new company would support existing "live" customers and take on new contracts that did not require development or customization. *See* Panel Exhibit #2 at TAC000050, E-mail from Mark DeGrootte to Dana Uhlenhopp and Teron Meinders of LSB dated May 16, 2010 (proposing a "Plan C" in which a new company would be formed to purchase the assets of SMART with LSB financing). Mr. DeGrootte and LSB reached an agreement on the terms of the purchase on May 25, 2010. Panel Exhibit #2 at TAC000052 – TAC000054, Letter of Intent from Mark DeGrootte to Dana Uhlenhopp dated May 25, 2010. On May 26, 2010, TAC 10 was incorporated as an Iowa corporation with Mr. DeGrootte listed as its registered agent. Record at PRP394 – PRP395. As mentioned above, SMART surrendered its

assets and TAC 10 purchased most of them on May 28, 2010. Although he owned a small interest in SMART, Mr. DeGrootte did not receive any money from the sale of SMART's assets.<sup>8</sup>

Mr. DeGrootte explained that he helped prepare the list of customers acquired by TAC 10 in the asset purchase. Record at PRP391 – PRP393. Mr. DeGrootte testified that TAC 10 could only afford to take on “live” customers who were currently running the software and did not require customization or development, and those factors influenced which of SMART's customers TAC 10 decided to keep. Mr. DeGrootte admitted that TAC 10 initially used SMART's phone number and offices as a matter of convenience and a means to provide continuity to SMART's existing customers until they were notified of the change. TAC 10 signed a new lease in August of 2010 and now has its own phone number. Mr. DeGrootte also testified that fourteen of TAC 10's current employees were formerly employed by SMART; he explained that hiring his former co-workers was necessary for the success of TAC 10 because he needed people who understood the complexity of the software.

#### **IV. Procedural Background of the Suspension and Debarment of Mr. DeGrootte and TAC 10**

On July 9, 2010, Michele Mahon of ITMO sent a Show Cause letter to Robert Sorenson asking him to respond to DNR's allegation that SMART had failed to perform its obligations in the following particulars:

1. SMART has failed to contact or return communications from the SCDNR since March 2010.
2. SMART has failed to escrow the source code and notify the State of the acceptable escrow agent as required by the contract.
3. SMART did perform a partial installation of the software including executables and licenses, but nothing delivered is usable.

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<sup>8</sup> Indeed, it appears that none of SMART's shareholders recovered their investments in the company. Furthermore, Mr. Meinders testified that LSB still has not sold any of the SMART assets not purchased by TAC 10.

4. After the partial install, SMART was to provide, which has not been provided, customized software that would include the following:
  - a. Computer aided dispatch which SMART represented to SCDNR they were days away from a go live in March 2010.
  - b. Build forms that correspond to the SC Law Enforcement forms already in place, incorporating it into the core software and delivering it to SCDNR.
  - c. Write a violations program and integrations program into Oracle.

Record at PRP267. When she did not receive a response to the Show Cause letter, Ms. Mahon wrote to the CPO for ITMO on August 2, 2010, requesting a debarment hearing based upon SMART's breach of contract and failure to perform. Record at PRP246 – PRP247. Ms. Mahon also requested that Mark DeGroot and TAC 10, Inc., be included “in the debarment proceedings for the same reasons as SMART because the officers of TAC 10 were the officers of SMART minus Mr. Sorenson as it would be evident to the current TAC 10 officers that there was an existing contract with the State of South Carolina.” Record at PRP247. A second Show Cause letter was sent on September 30, 2010, which was identical to the first one but also provided notice to Mr. DeGroot as Vice President of SMART. Record at PRP271 – PRP272.

The CPO held an initial suspension hearing on October 26, 2010,<sup>9</sup> and ordered the suspension of Mr. Sorenson, Mr. DeGroot, SMART, and TAC 10 on February 17, 2011. PRP8 through PRP19. Thereafter, the CPO held a debarment hearing<sup>10</sup> on August 18, 2011, and issued an order on January 19, 2012, debarring Mr. Sorenson, Mr. DeGroot, SMART, and TAC 10 for a period of three years from the date of the original suspension. Record at PRP20 – PRP33.

### **Conclusions of Law**

Mr. DeGroot and TAC 10 have requested the Panel to conduct a *de novo* review of the CPO's debarment determination pursuant to section 11-35-4410(1)(a) of the Procurement Code.

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<sup>9</sup> Mr. Sorenson and Mr. DeGroot did not attend the suspension hearing, nor did any other representatives of SMART or TAC 10.

<sup>10</sup> The CPO provided notice of the debarment hearing to SMART, Mr. Sorenson, Mr. DeGroot, and TAC 10 on June 14, 2011. Panel Exhibit #3, Notice of Rescheduling of Hearing, dated June 14, 2011.

S.C. Code Ann. § 11-35-4410(1)(a) (2011).<sup>11</sup> Mr. DeGroot argues that the CPO did not have probable cause to debar him because the evidence presented at the CPO's hearing did not support a finding that he was a "principal" of SMART as that term is used in section 11-35-4220(6) of the Procurement Code. Furthermore, TAC 10 argues that the CPO did not have probable cause to debar it because the evidence presented at the CPO's hearing did not support a finding that it was an "affiliate" of SMART as that term is used in section 11-35-4220(6) of the Procurement Code. The Panel will address each of these arguments below.

The Procurement Code defines "debarment" as "the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the State, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance." S.C. Code Ann. § 11-35-310(14) (2011). The CPO is authorized to debar a person or firm "from consideration for award of contracts or subcontracts if doing so is in the best interest of the State and there is probable cause for debarment." S.C. Code Ann. § 11-35-4220(1) (2011). Subsection 2 of the statute outlines circumstances under which debarment is appropriate, and the CPO found the following provisions to be relevant in this case:

(d) violation of contract provisions, as set forth below, of a character regarded by the appropriate chief procurement officer to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;

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<sup>11</sup> Because the State bears the burden of proof in debarment proceedings, DNR and the CPO presented their cases first in the Panel hearing.

(f) any other cause the appropriate chief procurement officer determines to be so serious and compelling as to affect responsibility as a state contractor or subcontractor, including debarment by another governmental entity for any cause listed in this subsection.

S.C. Code Ann. §11-35-4220(2) (2011). It is undisputed in this case that SMART breached its contract with DNR, and that is the primary basis for the debarment of SMART and Mr. Sorenson. As previously noted, neither SMART or Mr. Sorenson have appealed their debarment. Because the fact of SMART's breach is established before the Panel, the Panel does not need to address the question of whether or not debarment was appropriate with regard to SMART and Mr. Sorenson.<sup>12</sup> The issue before the Panel, therefore, is whether or not the debarment of SMART and Mr. Sorenson should be extended to include Mr. DeGroot and TAC 10.

The Procurement Code authorizes a CPO to extend a debarment decision to a contractor's "principals" and "affiliates," provided that they are "specifically named and given written notice of the proposed debarment and an opportunity to respond." S.C. Code Ann. § 11-35-4220(6) (2011). As an initial matter, the Panel notes that Mr. DeGroot and TAC 10 received actual notice of the CPO's debarment hearing. Furthermore, they were represented by counsel and participated in the CPO's hearing. Therefore, the due process requirements of section 11-35-4220(6) have been met.

In extending his debarment decision to include Mr. DeGroot, the CPO found that Mr. DeGroot was a principal of SMART. For the purposes of extending debarment, the Procurement Code defines "principals" as "officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including,

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<sup>12</sup> Indeed, their debarment for a period of three years from the date of the original suspension, February 17, 2011, remains in full effect.

but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.” S.C. Code Ann. § 11-35-4220(6) (2011). Unquestionably, Mr. DeGroote was an officer of SMART – first as a vice president during the time of the bid and initial contract performance and later as acting president during the company’s search for a buyer and eventual insolvency. However, Mr. DeGroote asserts that debarment is an extraordinary remedy that has a direct impact on his company’s ability to seek new business. Therefore, Mr. DeGroote argues that the State must show the principal it proposes to debar was involved in the conduct that serves as the basis for debarment. In other words, Mr. DeGroote contends that the State must prove that Mr. DeGroote was responsible for SMART’s failure to deliver an operable integrated information system to DNR or for DNR’s failure to escrow the source code as required by the contract.

The question of what proof is necessary to justify the extension of debarment to a principal under section 11-35-4220(6) is a novel issue before the Panel. However, the Panel is persuaded by Mr. DeGroote’s argument that the State must show something more than just the facts of his position as a corporate officer and a general awareness that SMART had a contract with DNR in which SMART was having performance issues. Mr. DeGroote testified that he never directly worked on the DNR project despite having been identified as a member of the implementation team in SMART’s bid. In addition, Mr. Sorenson confirmed that the work on the Oracle interface was performed by outside contractors, not Mr. DeGroote. Furthermore, Dr. Scurry admitted that he did not remember having any contact with Mr. DeGroote prior to the June 9, 2010, phone call when he was informed that TAC 10 had purchased SMART’s assets but

had not assumed liability for the DNR project.<sup>13</sup> The Panel finds that the evidence before it paints the picture of a company entering into a contract for services it had not previously performed at a time it was experiencing severe financial difficulties.<sup>14</sup> This combination of circumstances, not any bad act by Mr. DeGroot, caused SMART to breach its contract with DNR. Therefore, the Panel finds that Mr. DeGroot did not contribute directly to the breach and cannot be debarred on that basis.

Regarding the failure to escrow the source code, Dr. Scurry testified that he first asked Mr. Sorenson about the escrow on May 12, 2010.<sup>15</sup> Although DNR was not aware of SMART's financial predicament at the time, it is undisputed that LSB sent its formal demand letter to SMART on May 4, 2010, and that the SMART shareholders voted to surrender the company's assets to the bank on May 5, 2010. Moreover, Mr. DeGroot testified that he understood his authority as acting president to be limited to communicating with customers and to preserving SMART's assets for sale, and that he was not authorized to enter contracts or spend money. In addition, once the decision to surrender the assets took place, Mr. DeGroot did not believe that LSB would allow him to escrow the source code. Considering all the evidence before it, the Panel finds that Mr. DeGroot could not have escrowed the source code as DNR requested on May 12th because SMART's board had already voted to surrender all of SMART's assets to

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<sup>13</sup> While the Panel sympathizes with DNR's dissatisfaction with Mr. DeGroot and TAC 10's decision not to assume SMART's responsibilities under the DNR contract, nothing in the record or the evidence presented to the Panel suggests that this decision was anything other than a business decision.

<sup>14</sup> The Panel notes that DNR placed itself in an untenable position when it made such a large initial payment, albeit for funding reasons, before actually installing the COTS software. By the time SMART attempted and failed to remotely install the software, eight months had passed and SMART was in financial difficulty. As a result, when DNR realized that it had paid \$281,800.00 for software that would not run it was too late to demand return of its investment. To prevent such occurrences in the future, the Panel urges the State to consider adopting contract terms and methods to safeguard its funds. For example, the State could contractually require that initial payments be held in trust until interim acceptance of deliverables takes place.

<sup>15</sup> The Panel notes that SMART's bid proposed that escrow would occur upon demand by DNR. The Record of Negotiations does not indicate that the State objected to that condition. The Panel notes that DNR would be in a much better position today had it demanded escrow of the source code when it first became concerned about SMART's ability to perform and to complete the project on time.

LSB.<sup>16</sup> In short, DNR's request came too late to have any practical effect. Therefore, Mr. DeGroote cannot be debarred on the basis of his failure to escrow the source code.

In his debarment decision, the CPO determined that TAC 10 should be debarred because it was an "affiliate" of SMART. The relevant portion of the debarment statute provides:

[B]usiness concerns . . . are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to interlocking management or ownership . . . shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended or proposed for debarment.

S.C. Code Ann. § 11-35-4220(6) (2011). TAC 10 was incorporated on May 26, 2010, with Mr. DeGroote as its president. Two days later, on May 28th, SMART surrendered its assets to LSB and TAC 10 purchased most of those assets. Although Mr. DeGroote was SMART's acting president on that date, Mr. DeGroote testified that the board had limited his authority to preserving SMART's assets and surrendering them to LSB once the majority of the shareholders had given their approval. Therefore, even though Mr. DeGroote was also president of TAC 10 on that same date, the Panel finds that the evidence before it is insufficient to establish proof of control through interlocking management. Furthermore, because SMART and TAC 10 did not do business at the same time, the Panel finds that they did not "share facilities" or have "common use of employees" as those terms are used in subsection (6) of the debarment provision. Finally, nothing in the record or the evidence presented to the Panel suggests that TAC 10 was formed following a proposed debarment or suspension. Indeed, the record reflects that the recommendation for debarment was made several months later, on August 2, 2010. Thus, the

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<sup>16</sup> The Panel is disturbed that Mr. Sorenson did not disclose that he was no longer SMART's president during the May 12th phone call or at any time thereafter when he indicated to Dr. Scurry that he was trying to get DNR's source code escrowed. However, this failure to disclose cannot change the fact that Mr. DeGroote lacked the authority to escrow the source code when the demand was made on May 12th.

Panel finds that the State has not proven that TAC 10 is an affiliate of SMART. Accordingly, TAC 10 cannot be debarred on that basis.<sup>17</sup>

For the reasons stated above, the Panel finds that the State has failed to meet its burden of proof regarding the debarment of Mr. DeGroot and TAC 10. The Panel hereby reverses the January 19, 2012, decision of the CPO.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: 1/s/ C. Brian McLane, Sr. (CMB)

**C. BRIAN MCLANE, SR., CHAIRMAN**

This 10<sup>th</sup> day of December, 2012.

Columbia, South Carolina

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<sup>17</sup> The Panel notes that under the current language of the debarment statute only persons or firms may be considered for debarment. S.C. Code Ann. § 11-35-4220(1) (2011). However, the provision allowing for the extension of debarment includes the following sentence: “Debarment constitutes debarment of all divisions or other organizational elements of the contractor, *unless the debarment decision is limited by its terms to specific divisions, organization elements, or commodities.*” *Id.* at § 11-35-4220(6) (emphasis added). Setting aside the question of whether software could be included in the definition of “commodities,” the Panel notes that its decision likely would have been different had the State sought debarment of SMART’s COTS software, now owned by TAC 10, based on its complete failure to run on the DNR system. Perhaps the language of the Procurement Code needs to be revised to address more accurately the types of technological purchases made by the State today.