

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER ON MOTION TO STRIKE
IN RE: Request for Review by	)	CPO'S WRITTEN DETERMINATION
Excent Corporation	)	OF APRIL 4, 2013
	)	
	)	Case No. 2013-3
RFP No. 5400004448 – Automated	)	
Individual Education Program (IEP)	)	
Case Management System for the	)	
SC Department of Education	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for review by Excent Corporation (Excent) under section 11-35-4410(1)(b) of the Consolidated Procurement Code (the Procurement Code). On April 4, 2013, the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) issued a written determination canceling Solicitation number 5400004448, which involved the procurement of an Automated Individual Education Program (IEP) case management system for the South Carolina Department of Education (SCDE). The Panel conducted a hearing on Excent's motion to strike the written determination on April 19, 2013. At that hearing, John E. Schmidt, III, Esquire represented Excent. M. Elizabeth Crum, Esquire, represented Public Consulting Group, Inc. (PCG). Shelly B. Kelly, Esquire, represented SCDE, and William Dixon Robertson, III, Esquire, represented the CPO. A third vendor, CORE Education and Consulting Solutions, Inc. (CORE), was also affected by the written determination. However, Jeffrey D. Cooper, Esquire, CORE's In-House Counsel, advised the Panel that CORE did not wish to participate in the April 19th hearing.

### **Findings of Fact**

The RFP in question was issued on July 5, 2012, and the offers were received on September 11, 2012. On November 30, 2012, ITMO posted an Intent to Award the contract to Excent, and PCG protested the intended award on December 10, 2012. The CPO conducted a protest hearing in late January, 2013, and issued an order granting PCG's protest on two grounds, canceling the original solicitation, and ordering resolicitation of the contract on February 7, 2013. Excent timely appealed that decision to the Panel on February 19, 2013, and a hearing on that appeal (the protest appeal) was set by the Panel for April 19, 2013.

On April 4, 2013, the CPO issued a new written determination (the April 4th determination) finding that all three finalists, Excent, CORE, and PCG, were non-responsive to the RFP and were, therefore, ineligible for award. Based on these new findings of non-responsiveness, the CPO ordered the cancellation of Solicitation number 5400004448. The CPO did not consult with SCDE prior to issuing the April 4th determination. Moreover, SCDE did not request cancellation of the solicitation. Finally, the Panel was first notified of the April 4th determination on April 5, 2013, when it received a letter from the CPO requesting a continuance in the protest appeal scheduled to be heard on April 19, 2013.

The CPO based his continuance request on two factors: (1) the appeal time for the April 4th written determination would expire at 5:00 p.m. on April 19th, and (2) if not appealed, the findings of the April 4th determination would render moot the issues pending before the Panel in the protest appeal. Excent, PCG, and SCDE all opposed the requested continuance. On April 11, 2013, Excent filed a request for the Panel to review the April 4th determination; that request for review challenged the CPO's legal authority to issue that determination in light of the protest appeal pending before the Panel. On April 12, 2013, the Panel Chairman denied the requested

continuance because the timing of the April 4th determination had been within the CPO's control. In addition, the Panel requested that the parties be prepared to argue the question of whether the CPO's written determination violated the automatic stay imposed by the operation of section 11-35-4210(7) of the Procurement Code prior to the beginning of the protest appeal hearing on April 19th. All parties were given an opportunity to file written briefs on the matters raised by Excent's request for review of the April 4th determination. The CPO and PCG each filed briefs in opposition to Excent's request on April 18, 2013.

### **Conclusions of Law**

Excent argues that the April 4th determination violated the automatic stay first imposed when PCG filed its protest with the CPO and continued when Excent filed a timely appeal with the Panel. In support of its argument, Excent relies on section 11-35-4210(7) of the Procurement Code, which provides:

Automatic stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of a timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency,<sup>1</sup> makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

S.C. Code Ann. § 11-35-4210(7) (2011). Because the CPO acted without first consulting SCDE or lifting the automatic stay, Excent argues that the CPO did not have the authority to issue the April 4th determination. *See Triska v. DHEC*, 292 S.C. 190, 355 S.E.2d 531 (1986) (wherein the supreme court observed that DHEC's actions outside the scope of its statutory and regulatory

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<sup>1</sup> "Using agency" is defined by the Procurement Code as "any governmental body of the State which utilizes any supplies, services, information technology, or construction purchased under this code." S.C. Code Ann. § 11-35-310(6) (2011). SCDE is the using agency in this solicitation.

authority were null and void). SCDE joined Excent in opposition to the April 4th determination and emphasized to the Panel its urgent need for a new IEP case management system.

The CPO disagrees and argues that another statutory section and its ensuing regulation authorize him to cancel solicitations at any time after award but prior to performance without regard to the automatic stay. In support of his position, the CPO relies on section 11-35-1520(7) of the Procurement Code, which provides:

Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and reaward of awards or contracts, after award but before performance, may be permitted in accordance with regulations promulgated by the board. . . . Except as otherwise provided by regulation, all decisions . . . to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

S.C. Code Ann. § 11-35-1520(7) (2011).<sup>2</sup> The regulation relied upon by the CPO in his order canceling the solicitation provides:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

....

(7) Administrative error of the purchasing agency<sup>3</sup> discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

S.C. Code of State Regulations, Reg. 19-445.2085(C) (2011).

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<sup>2</sup> This provision is made applicable to RFPs by section 11-35-1530(1), which states that the provisions of section 11-35-1520 and its ensuing regulations apply to competitive sealed proposals unless otherwise provided in section 11-35-1530. S.C. Code Ann. § 11-35-1530(1) (2011).

<sup>3</sup> For the purposes of this procurement, ITMO was the purchasing agency.

In addition to these statutory and regulatory provisions, the CPO argues that the automatic stay did not prevent him from issuing the April 4th determination because the stay prohibited him from *proceeding* further with the solicitation or award and he did neither by canceling the solicitation. Finally, the CPO urges the Panel to take consideration of his role as guardian with regard to information technology procurements under section 11-35-820 of the Procurement Code, asserting that his cancellation in this instance was undertaken in that guardian role. *See* S.C. Code Ann. § 11-35-820 (2011) (tasking the Information Technology Management Officer with the oversight of all state information procurements).

Although the Panel has had several occasions to review cancellation decisions under Regulation 19-445.2085(C), it has never directly addressed the issue of whether such a determination issued while a protest appeal was pending before the Panel violated the automatic stay. The Panel decision most procedurally analogous to the instant case is *In re: Protest of Analytical Automation Specialists, Inc. ("Analytical")*, Panel Case No. 1999-1 (June 25, 1999). *Analytical* also involved an information technology solicitation conducted by ITMO where the intended award was protested to the CPO and then appealed to the Panel after the CPO denied the protest. The day before the scheduled Panel hearing, the using agency submitted a written request to the CPO seeking cancellation of the solicitation because the agency's requirements had changed. The CPO brought the request to the Panel's attention, seeking guidance about how to proceed because any decision by the CPO regarding cancellation and resolicitation would likely impact the protest appeal issues pending before the Panel. The Panel conducted a conference with the parties' attorneys, and decided to continue its hearing in the protest appeal until the CPO had reached a determination regarding the cancellation request.

A few weeks later, the CPO issued a written determination in which he found that the using agency's needs had indeed changed, and the CPO ordered cancellation of the solicitation and resolicitation of the agency's needs. The Panel then requested that the parties submit briefs in support of or in opposition to the CPO's determination. After reviewing the briefs and record before it, the Panel issued an order in which it found that the using agency's needs had changed and that resolicitation was warranted under the circumstances. In addition, the Panel agreed that the cancellation of the solicitation rendered the protest appeal issues moot and dismissed the appeal. Nonetheless, the Panel emphasized that cancellation was not to be undertaken lightly:

The Panel takes this opportunity to caution agencies to carefully consider before requesting cancellation and resolicitation, especially when a protest has been filed, as the request may appear to be an attempt to circumvent the procurement process. The Panel encourages the CPOs to continue to cautiously and carefully exercise the authority to cancel and resolicit procurements, especially when a protest has been filed.

*Analytical* at 5.

The Panel finds that the instant case is factually distinguishable from *Analytical* in several ways. First, unlike the using agency in *Analytical*, SCDE did not request, and in fact opposed, cancellation of the solicitation. Rather, the CPO acted on his own to review the proposals for responsiveness *after* he had already issued a decision resolving the original protest.<sup>4</sup> Second, while the protest in *Analytical* did involve responsiveness issues, the cancellation was based on changes in the using agency's needs. The cancellation in the instant case does not find that SCDE's needs have changed at all, nor does the RFP need to be revised to address "inadequate and ambiguous specifications." *See In re: Protest of Blue Cross and Blue*

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<sup>4</sup> The CPO clearly had the authority to review all of the proposals for responsiveness while he had jurisdiction over the original protest. *See In re: Protest of Specialty Underwriters*, Panel Case No. 2004-2 (June 14, 2004) (wherein the Panel upheld the cancellation and resolicitation ordered by the CPO who discovered that none of the proposals submitted were responsive to the RFP during his consideration of a protest). However, that is not what occurred here.

*Shield of South Carolina*, Panel Case No. 1996-3 (April 13, 1996) (wherein the Panel upheld a CPO decision ordering cancellation and resolicitation where the specifications of the RFP created an ambiguity about the duration of the term of the contract). Finally, the CPO in this case did not notify the Panel until after he had issued the April 4th determination, even though he was fully aware of the protest appeal pending before the Panel and scheduled for a hearing on April 19th.<sup>5</sup> At the very least, *Analytical* establishes a framework for approaching a cancellation during the pendency of a Panel appeal – a framework that was not followed here.

In addition, the Panel is not persuaded that canceling a solicitation is somehow distinct from “proceed[ing] further with the solicitation.” The Panel finds that the automatic stay imposed by section 11-35-4210(7) precludes any action, including cancellation, with regard to a protested solicitation so long as the protest or appeal to the Panel is pending *unless* the stay is lifted first. This finding does not prohibit the CPO from canceling a solicitation during the protest process, it merely confirms that he must do so in compliance with the requirements of section 11-35-4210(7).

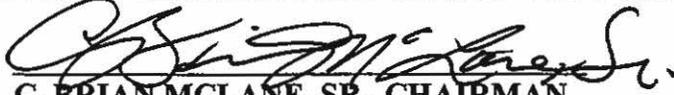
For the foregoing reasons, the Panel finds that the April 4th determination was improvidently issued. However, because the Panel proceeded with its scheduled protest appeal hearing on April 19th, the Panel declines to strike the April 4th determination outright. Because the Panel has now heard that matter and indicated a ruling, thus lifting the stay, the Panel now remands the April 4th determination back to the CPO for further consideration in accordance with the Procurement Code and consistent with the Panel’s findings herein.

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<sup>5</sup> The Panel has no reason to doubt the CPO’s assertion that he canceled the solicitation in good faith while exercising his role as guardian over information technology procurements. However, the Panel notes that he also has a duty to maintain a good relationship with using agencies. See S.C. Code Ann. § 11-35-1010 (2011) (“The chief procurement officers shall afford each using agency reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agency.”) The Panel is concerned that SCDE was not even consulted about the possibility of cancellation in this case.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

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

This 29 day of April, 2013.  
Columbia, South Carolina