

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Catamaran, LLC	)	
	)	Case No. 2015-2
	)	
	)	
Sol. No. PEBA0012015	)	
Pharmacy Benefits Management Services	)	
for South Carolina Public Employee	)	
Benefit Authority (PEBA)	)	

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This matter is 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 May 26, 2015, the Interim Chief Procurement Officer for Supplies and Services (the CPO) issued a written determination denying the protest of Catamaran, LLC (Catamaran). Catamaran had protested the South Carolina Public Employee Benefit Authority’s (PEBA’s) intended award of the Pharmacy Benefits Managements Services contract (PBM contract) for the State Health Plan to Express Scripts, Inc. (ESI). Catamaran timely appealed the CPO’s denial of its protest to the Panel on June 4, 2015. The Panel convened a hearing to consider dispositive motions filed by ESI, PEBA, and the CPO on July 10, 2015. After the conclusion of the Panel hearing, the Panel Chairman, by designation of the Panel, also considered Catamaran’s request for a Protective Order allowing review of confidential information contained in ESI’s proposal.<sup>1</sup>

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<sup>1</sup> As discussed more fully below, the Panel unanimously voted to dismiss two of Catamaran’s three amended protest grounds at the July 10th motions hearing. By a vote of 4 to 1, the Panel also indicated its intention to hear the merits of remaining protest ground as scheduled on July 24, 2015. However, Catamaran advised the Panel on July 23, 2015, that it was withdrawing its remaining protest ground and that, therefore, the Panel did not need to conduct a hearing on July 24th. As a result, the Panel canceled its July 24th hearing.

At the July 10th hearing, M. Elizabeth Crum, Esquire, and Adam B. Landy, Esquire, represented Catamaran. Michael H. Montgomery, Esquire, represented ESI; and E. Wade Mullins, III, Esquire, represented PEBA. W. Dixon Robertson, III, Esquire, represented the CPO.

### Findings of Fact

In January of this year, PEBA issued an RFP seeking to procure Pharmacy Benefit Management (PBM) Services for the State Health Plan. Record at PRP14. The initial solicitation documents were replaced in their entirety by Amendment #2, which was issued on February 11, 2015. Record at PRP341 – PRP439. The RFP provided that proposals would be evaluated the following award criteria: A. Total Net Cost; B. Background and Qualifications; C. Pharmacy Network Management; D. Formulary Analysis; E. Service Description; and F. Performance Guarantees. Record at PRP398 – PRP399. “Total Net Cost” was identified as the most important award criterion. Record at PRP398.

The financial proposals, from which total net cost would be determined, were to be evaluated separately by PEBA as described below. Record at PRP398. The RFP provided that the proposal with the lowest total net cost would receive all of the evaluation points assigned to that criterion. *Id.* With regard to the ranking of the financial proposals, the solicitation specified:

**A. Total Net Cost.** Ranking of financial proposals will be based on a simulated total net cost to PEBA, which will be calculated as the sum of the fixed, all-inclusive PMPM [per member per month] administrative fees and claims net of guaranteed rebates. The estimated claims cost will be based on the repayment of claims incurred during the period of January 1, 2014 through December 31, 2014 using each Offeror’s pricing guarantees quoted in Tab A-9<sup>2</sup> and the Offeror’s

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<sup>2</sup> Tab A-9 is an Excel spreadsheet containing pricing guarantees. An Offeror’s proposed PMPM administrative costs were to be submitted in a separate Excel spreadsheet designated Tab A-10. In other words, the data entered by an

submitted preferred, MAC [Maximum Allowable Cost] and specialty drug lists (the Offeror with the lowest total net cost under each Option will receive all of the evaluation points assigned to the criterion of Total Net Cost. Points will be awarded proportionally to each of the other Offerors on the basis of the following formula ((lowest net cost/Offeror net cost amount) \* assigned evaluation points).

Record at PRP398.

Four offers were received and opened by PEBA on March 20, 2015. Record at PRP5 (CPO's Decision, Finding of Fact No. 2). PEBA's evaluation panel independently reviewed and scored proposals from ESI, Catamaran, and MedImpact Healthcare Systems based on the five non-total net cost criteria. Record at PRP19. The composite score sheet,<sup>3</sup> which includes scores for all six criteria, reveals that ESI was the highest ranked offeror and Catamaran was the second highest ranked offeror. *Id.* When evaluated, ESI's financial proposal contained the lowest total net cost; therefore, ESI received all 35 points for this criterion. *Id.* Catamaran received the next highest number of points at 26.6. *Id.*

The record before the Panel includes an exhibit that shows PEBA's calculation of the administrative fees proposed by ESI, Catamaran, and MedImpact. Record at PRP22 – PRP23. This exhibit establishes that PEBA calculated ESI's total net cost for the initial term of the contract (three years) to be \$2,154,082,043.02 and Catamaran's total net cost to be \$2,834,007,116.48. Record at PRP22 – PRP23. As noted by the CPO, the difference between ESI and Catamaran's calculated total cost is \$679,925,073.46. Record at PRP6.

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Offeror in Tab A-9 and Tab A-10 would be used by PEBA to evaluate the Offeror's financial proposal. The CPO found in his determination that the formula used by PEBA to evaluate the financial proposals "accurately incorporated ESI's administrative fees, ingredient costs, dispensing fees, and rebate guarantees." Record at PRP9.

<sup>3</sup> The Panel notes that the composite score sheet is signed by Georgia Gillens, PEBA's Procurement Officer, and dated April 14, 2015. Record at PRP19. In his order, the CPO found that Ms. Gillens and the evaluation panel held the panel selection meeting on April 14, 2015. Record at PRP5. The facts that the selection meeting took place on April 14th and that the composite score sheet accurately reflects each offeror's ranking are not disputed by any party.

PEBA and ESI entered into negotiations after ESI was determined to be the highest ranked offeror. Record at PRP20. The Record of Negotiations indicates that ESI agreed to perform the initial three-year term of the contract at an additional savings of \$36,311,717.26. *Id.* Therefore, the total net cost with negotiated savings for the first three years of the contract is \$2,117,770,325.76, or \$705,923,441.92 per year. The Intent to Award, posted on April 21, 2015, indicates a total net cost of \$3,529,617,209.60 for the maximum term of the contract (five years). Record at PRP21.

Catamaran timely protested the intended award on May 1, 2015. Record at PRP25 – PRP28. Catamaran supplemented its protest on May 6, 2015. Record at PRP29 – PRP38. The CPO conducted an administrative review without a hearing and issued a written determination denying Catamaran’s protest on May 26, 2015.<sup>4</sup> Record at PRP4 – PRP11. Catamaran timely appealed the CPO’s decision to the Panel on June 4, 2015. Record at PRP39 – PRP59.

### **Discussion**

Catamaran’s appeal to the Panel renews the three protest grounds asserted in its amended protest letter: (1) ESI’s pricing proposal violates section 11-35-30 of the Procurement Code [Amended Protest Ground 1/Appeal Ground 1]; (2) ESI’s pricing proposal and/or PEBA’s cost calculations contain a mistake [Amended Protest Ground 2/Appeal Ground 3]; and (3) ESI is not a responsible offeror because it offered a commercially unreasonable or unrealistic financial proposal [Amended Protest Ground 3/Appeal Ground 4]. In support of these three protest grounds, Catamaran relies on the fact of the 24% price differential between its proposal and ESI’s proposal. Catamaran Appeal Letter, Record at PRP43 and PRP55. Catamaran has also

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<sup>4</sup> The CPO’s written determination notes, “This decision is based on the procurement file, memoranda filed by the attorneys, and applicable law.” Record at PRP4.

questioned ESI's ability "to establish a robust statewide chain pharmacy network" as a result of its "commercially unreasonable price." *Id.* at PRP35 – PRP36; PRP54 – PRP55.

In addition, Catamaran asserts three additional appeal grounds based on the CPO's dismissal of its protest: (4) the CPO erred in dismissing Catamaran's appeal without allowing Catamaran an opportunity to prove its case because he "misapprehended the difference" between the notice requirements of section 11-35-4210 and the burden of proof at a hearing [Appeal Ground 2]; (5) the CPO violated Catamaran's due process rights by denying Catamaran a hearing and by basing his ruling in part upon materials in the procurement file not made available to Catamaran despite a FOIA request [Appeal Ground 5]; and (6) the CPO erred by not granting Catamaran's request for a protective order and issuing the same [Appeal Ground 6].

ESI, PEBA, and the CPO each filed motions to dismiss Catamaran's appeal in its entirety for failing to state a claim upon which relief could be granted.<sup>5</sup> In short, ESI, PEBA, and the CPO argued that Catamaran's protest grounds – whether couched as a violation of the statutory requirement of "the observance of reasonable standards of commercial fair dealing"; a "mistake"; or an issue of responsibility – all simply assert that ESI's pricing was too low and should have been rejected by PEBA. ESI, PEBA, and the CPO contend that an allegation of a price being too low is not a valid basis for protest under the Procurement Code. For the reasons more fully explained below, the Panel agrees and grants the motions to dismiss with regard to Catamaran's claims based on section 11-35-30's "observance of reasonable standards of commercial fair dealing" [Amended Protest Ground 1/Appeal Ground 1] and the issue of ESI's responsibility [Amended Protest Ground 3/Appeal Ground 4].<sup>6</sup>

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<sup>5</sup> The Panel notes that PEBA's motion alternatively sought summary judgment as a matter of law.

<sup>6</sup> Although the Panel denied the motions to dismiss with regard to Catamaran's claim based upon "mistake" [Amended Protest Ground 2/Appeal Ground 3] at the conclusion of the motions hearing on July 10th, Catamaran

## I. ESI's "Low Price" Violates Section 11-35-30 of the Procurement Code [Amended Protest Ground 1/Appeal Ground 1]

Catamaran asserts that ESI's low price violates section 11-35-30, which requires vendors to observe "reasonable standards of commercial fair dealing." In its amended protest letter, Catamaran argued that ESI's low price was "low ball" and not "realistic" and that as a result, ESI would not be able to meet the RFP's requirement that the awarded contractor establish "a robust pharmacy network." Record at PRP35. Therefore, Catamaran argued that ESI's proposal should be deemed non-responsive because it offered a commercially unreasonable price.<sup>7</sup> Record at PRP36.

Catamaran's claim that ESI's unreasonably low price violates the Procurement Code's obligation of good faith presents a novel issue. The Procurement Code's obligation of good faith is set forth in section 11-35-30, which provides:

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

S.C. Code Ann. § 11-35-30 (2011). In particular, Catamaran focuses on the phrase "the observance of reasonable commercial standards of fair dealing." Catamaran points out that this phrase was not a part of the Model Procurement Code and is therefore unique to South

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subsequently advised the Panel that it was withdrawing that claim from its appeal. *See supra* n. 1. Therefore, the issue of "mistake" [Amended Protest Ground 2/Appeal Ground 3] was removed from the Panel's consideration and will not be further addressed in this order.

<sup>7</sup> In his written determination, the CPO found that this protest ground raised the question of ESI's responsibility and would be addressed in his discussion on the third ground of protest. Record at PRP7. Catamaran has argued on appeal that the CPO improperly transformed its claim based on section 11-35-30 into one based on section 11-35-1810 (the Procurement Code provision requiring the State to determine an offeror's responsibility prior to awarding a contract). The import of this "transformation" is that the standard for reviewing a responsibility determination is "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011). Catamaran argues this standard of review was wrongly applied because section 11-35-30 is not listed under section 11-35-2410. For the purposes of its administrative review, the Panel has applied a *de novo* standard of review to Catamaran's claim based on section 11-35-30. S.C. Code Ann. § 11-35-4410(1)(a) (2011). Moreover, the Panel finds that to the extent the CPO applied the wrong standard of review, it was harmless error because the end result is the same: an allegation that an offered price is too low does not state a claim under section 11-35-30.

Carolina’s Consolidated Procurement Code. Furthermore, Catamaran notes that nearly identical language is contained within the South Carolina Uniform Commercial Code (the UCC) and urges the Panel to look to similar provisions within the UCC for guidance.<sup>8</sup> *See* S.C. Code Ann. § 36-1-201(b)(20) (Supp. 2014) (“‘Good faith’ . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing.”)<sup>9</sup> In particular, Catamaran urges the Panel to consider the UCC’s concept of “commercially reasonable” as it applies to the sale of collateral after a default. *See* S.C. Code Ann. § 36-9-610(b) (2003) (“Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.”); *see also* S.C. Code Ann. § 36-9-627(b) (2003) (setting forth three methods of achieving a commercially reasonable disposition of collateral).<sup>10</sup> Catamaran contends that in the context of this solicitation, the offer of PBM services at a fixed PMPM rate is analogous to the sale of a product and that section 11-35-30 of the Procurement Code requires that a factual determination regarding the reasonableness of ESI’s price be made in light of the large price

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<sup>8</sup> The Panel notes that Catamaran’s reliance on the UCC to support its position is different from the theory it pursued before the CPO. Before the CPO, Catamaran argued that federal procurement decisions considering price realism supported its claim that an unrealistic or unreasonable price violated the Procurement Code’s obligation of good faith. Record at PRP35; *see also* CPO Written Determination, Record at PRP7. However, Catamaran did not assert the federal concept of price realism to support its claim in its appeal letter or any argument before the Panel. Therefore, the Panel deems this line of argument abandoned and will not address it further in this order.

<sup>9</sup> The Panel notes that the phrase “the observance of reasonable commercial standards of fair dealing” was added to section 36-1-201’s definition of good faith in a revision of the entire section that went into effect in October 2014. *See* Official Comment to Section 36-1-201, S.C. Code Ann. § 36-1-201(Supp. 2014). Prior to the 2014 amendment the phrase was applied to merchants under the UCC: “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in trade.” S.C. Code Ann. § 36-2-103(1)(b) (2003). This definition was removed from section 36-2-103(1)(b) by the same 2014 act revising the definition of “good faith” in section 36-1-201(b)(20). *See* S.C. Code Ann. § 36-2-103(1)(b) (Supp. 2014) (noting that the subsection is “reserved”). The revised definition of “good faith” in section 36-1-201(b)(20) now applies to all provisions in the UCC except for those in Chapter 5 governing letters of credit.

<sup>10</sup> Section 36-9-627(b) provides in pertinent part:

A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

- (1) in the usual manner on any recognized market;
- (2) at the price current in any recognized market at the time of disposition; or
- (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

S.C. Code Ann. § 36-9-627(b) (2003).

differential between ESI's price and Catamaran's price. The Panel disagrees and finds that the provisions of the UCC governing secured transactions are wholly inapposite to the provisions of the Procurement Code governing public bidding.

The UCC sections cited by Catamaran are designed to protect a defaulting party and oblige a secured creditor to act in good faith to obtain the highest price possible when selling collateral. Indeed, the UCC has a specific provision for determining whether the manner of disposition – or sale – is “commercially reasonable.” By contrast, there is no corresponding provision within the Procurement Code requiring “commercially reasonable” pricing in the submission of bids or offers. Rather, the Procurement Code is designed to foster competition and ensure that the State receives the lowest price or the most advantageous offer while also providing fair and equitable treatment to all participants. S.C. Code Ann. § 11-35-20(a), (b), and (f) (2011). The Panel finds that applying the UCC's concept of “commercially reasonable” sales of collateral to pricing in solicitations under the Procurement Code as suggested by Catamaran would actually hinder competition, not foster it. Therefore, the Panel finds that the aims and purposes of the UCC and the Procurement Code are significantly different and that Catamaran's reliance on the UCC is misplaced.

Having rejected Catamaran's reliance on the UCC, the Panel must now consider whether Catamaran's allegation of a price differential of 24% is sufficient to state a claim under section 11-35-30. In other words, does a vendor engaged in competitive bidding violate the obligation of good faith merely by offering a substantially lower price than another vendor? Although the Panel has not answered this precise question before, it is persuaded by the federal decisions cited by the CPO in his decision for the proposition that an allegation of an unusually low bid in a fixed-priced solicitation is not a valid basis for protest. *See Ferguson Surveying and*

*Engineering*, B-244570.2, 1991 WL 243193, at \*1 (Comp. Gen. Nov. 8, 1991) (“A protestor’s claim that another offeror has submitted an unreasonably low price – or even that the price is below the cost of performance – is not a valid basis for protest. A bidder or offeror, in its business judgment, properly may decide to submit a price that is extremely low.”); *Indeck Power Equipment Co.*, 8-259151.2, 1995 WL 150472, at \*2 (Comp. Gen. April 3, 1995) (“As the inclusion of ‘unrealistically low’ prices under some line items also does not violate any statute or regulation, Nationwide’s preparing its bid in this manner does not provide a basis for rejecting it.”); *accord*, *Appeal by WIN Laboratories, Ltd.*, Panel Case No. 1992-14(II) (November 20, 1992) (wherein the Panel found that a bidder who submitted a lower than wholesale price on a type of DAT drives did not violate section 11-35-30 because it based its low price “on its expert prediction of the future market for these drives.”).

Moreover, the Panel finds that a protest pursued under section 11-35-30 must assert some factual allegation of fraud, misrepresentation, or unfair treatment in order to state a claim upon which relief can be granted. *See, e.g., Appeal by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11 (October 31, 1994) (while a vendor’s statements regarding its qualifications and experience might be considered “puffing,” they were not misleading and did not violate the obligation of good faith); *Protest by Polaroid Corp.*, 1988-12 (November 7, 1988) (wherein the Panel found the State did not fairly and equally consider protestant’s proposal on several evaluation factors in violation of section 11-35-30). Assuming *arguendo* that Catamaran is correct in characterizing ESI’s price as being unreasonably low, the Panel finds that this allegation, absent any further allegation of misrepresentation or bad faith, is not sufficient to state

a claim based on section 11-35-30. Therefore, the Panel dismisses the portion of Catamaran's protest alleging a violation of section 11-35-30.<sup>11</sup>

## **II. ESI Is Not a Responsible Offeror Because It Offered a Commercially Unreasonable Price [Amended Protest Ground 3/Appeal Ground 4]**

Catamaran argues that ESI is not a responsible offeror because its "commercially unreasonable" price will prevent it from establishing a robust pharmacy network as required by the RFP. The Procurement Code requires that responsibility be determined prior to making an award. S.C. Code Ann. § 11-35-1810(1) (2011). An inquiry into responsibility considers an offeror's ability to perform the contract requirements and "may be substantiated by past performance." S.C. Code Ann. § 11-35-1410(6) (2011). As noted by the CPO in his written determination, PEBA's action in making the award to ESI indicates that PEBA found ESI to be a responsible offeror. Under the Procurement Code, a procurement officer's finding of responsibility is a matter of discretion that should not be overturned absent proof that it is "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011); *Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009). As the party challenging the responsibility determination, Catamaran must demonstrate that the responsibility determination lacks a reasonable or rational basis. *Protest of Value Options*, Panel Case No. 2001-7 (August 3, 2001) (citing *Robert E. Derecktor of Rhode Island v. Goldschmidt*, 516 F.Supp. 1085 (D.R.I. 1981)).

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<sup>11</sup> The Panel notes that its decision finding that Catamaran's protest fails to state a claim under section 11-35-30 affirms the CPO's decision with regard to that protest ground. As a result, Catamaran's complaints about the CPO confusing the notice requirements of section 11-35-4210 with the protestant's burden of proof (Appeal Ground 2) are rendered moot and need not be addressed by the Panel with regard to this protest issue. To the extent Appeal Ground 2 applies to Catamaran's protest ground based on mistake (Protest Ground 2/Appeal Ground 3), the Panel finds that any error on the part of the CPO was rendered harmless by the Panel Chairman's issuance of a protective order allowing Catamaran access to the requested confidential information.

Catamaran's claim regarding ESI's responsibility is based upon speculation and conjecture that ESI will not be able to fully perform the contract because of its pricing proposal. The Panel finds such a claim is a matter of contract administration and does not state a proper challenge to responsibility. *See, e.g., ASC Medicar Service, Inc.*, B-213724 (Comp.Gen.), 84-1 CPD P 45, 1983 WL 27814 (1983); *Kitco, Inc.*, B-221386 (Comp. Gen.), 86-1 CPD P 321, 1986 WL 63328 (1986). Moreover, Catamaran does not allege any facts tending to show that PEBA's responsibility determination lacked a reasonable or rational basis. Therefore, the Panel finds has failed to state a claim upon which relief can be granted and hereby dismisses the portion of Catamaran's protest alleging that ESI is not a responsible offeror.<sup>12</sup>

### **III. Catamaran's Claim of Due Process Violation [Appeal Ground 5]**

Catamaran argues that the CPO violated its due process rights by refusing to afford Catamaran a hearing and by relying on materials in the procurement file not provided to Catamaran through its FOIA request. However, the Panel notes that section 11-35-4210, which governs the CPO's review process, requires him to conduct an "administrative review" and issue a decision based on that review, but does not mandate that he hold a hearing. S.C. Code Ann. § 11-35-4210(4) (2011). In any event, the Panel notes that it conducted a *de novo* review of Catamaran's claims as required by section 11-35-4410(1) of the Procurement Code; it afforded all parties the opportunity to brief the issues raised by the various dispositive motions; and it convened a hearing to entertain oral argument on those issues. Thus, Catamaran was provided an opportunity to be heard "at a meaningful time and in a meaningful manner." *S.C. Nat'l Bank*

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<sup>12</sup> Nonetheless, the Panel takes this opportunity to encourage procurement officers to take extra care in making a responsibility determination where an offeror's price is significantly lower than the next offeror's price. While in this case Catamaran acknowledged that ESI could likely absorb any potential loss, the Panel is concerned that some bidders or offerors may bid an extremely low price in order to win a contract, but not have the financial reserves to enable them to sustain the bid price over the term of the contract. *See, e.g., Appeal by Trinity 7 Security, LLC*, Panel Case No. 2012-8 (March 11, 2013) (wherein the Panel upheld a finding of non-responsibility based in part on a balance sheet indicating liabilities exceeding the vendor's assets).

*v. Central Carolina Livestock*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (citation omitted). The Panel declines to find that the CPO violated Catamaran’s due process rights by failing to conduct a hearing. See *Unisys Corp. v. South Carolina Budget and Control Bd., et al.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) (citing *Ross v. Med. Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (an adequate *de novo* review by the Panel “renders harmless a procedural due process violation based on the insufficiency of the lower administrative body.”).<sup>13</sup>

#### **IV. Catamaran’s Request for a Protective Order [Appeal Ground 6]**

Catamaran asserts that the CPO erred by failing to issue a protective order allowing Catamaran access to confidential information contained in the procurement file so that it could pursue its protest in a meaningful way. The Procurement Code recognizes that offers may contain privileged and confidential information not customarily subject to disclosure under FOIA. S.C. Code Ann. § 11-35-410(B) (2011); S.C. Code Ann. § 30-4-40 (2007, as amended). However, a regulation promulgated pursuant to the Procurement Code authorizes the CPO or the Panel to issue an appropriate protective order allowing access to such information where it “serves to facilitate the pursuit of a protest.” S.C. Code of State Regulations, Reg. 19-445.220(A) (2011). In light of the fact that the CPO dismissed all of Catamaran’s grounds of protest, the Panel finds that the CPO had no basis for issuing a protective order and declines to find that the CPO abused his discretion under the circumstances.

With regard to the Panel’s proceedings, Catamaran renewed its request for a protective order shortly after filing its appeal. At the conclusion of the motions hearing on July 10th, the Chairman, acting at the designation of the Panel and with the consent of the parties, considered

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<sup>13</sup> The Panel observes that it did not dismiss all of Catamaran’s claims at the conclusion of the July 10th motions hearing and that it stood prepared to hear Catamaran on the merits of its protest ground alleging mistake on July 24th.

Catamaran's renewed request. Catamaran asked that its outside counsel and retained expert be allowed to review documents from ESI's financial proposal (Tab A-9 – Performance Guarantees; Tab A-10 – Pricing Information; and Maximum Allowable Cost (MAC) lists). Catamaran also asked for access to PEBA's expert's work sheets and documents showing the formula used to calculate the offeror's Total Net Cost and the work sheets showing the calculations themselves. Catamaran argued that it required access to the protected information so that it could pursue its remaining protest ground alleging mistake on the part of ESI and/or PEBA. Catamaran contends that its request is not extraordinary and that it has reasonably limited both the scope of the information sought and the number of persons who would be allowed access.

In a recent decision addressing the issue of confidential information, the Panel adopted the balancing test set forth by the South Carolina Supreme Court in *Lafitte v. Bridgestone Corporation*, 381 S.C. 460, 674 S.E.2d 154 (2009). *Appeal by Palmetto Traffic Group, LLC; Appeal by Short Counts, LLC*, Panel Cases No. 2014-3 and 2014-4 (I) (July 24, 2014). The *Lafitte* balancing inquiry involves three prongs: (1) the party opposing discovery must show that the information is a trade secret and that disclosure would be harmful; (2) if trade secret status is established, the party seeking discovery must show that the matter is relevant and necessary to bring the matter to trial; and (3) the court must weigh the potential harm of disclosure against the need for the information in reaching a decision. *Lafitte*, 381 S.C. at 475, 674 S.E.2d at 161.

The Chairman finds that the first prong of the test is not disputed: Catamaran's request implicitly recognizes that the information sought from ESI's financial proposal is confidential and that its disclosure would be harmful to ESI in future solicitations. As for the second prong of the test, the Chairman agrees that Catamaran will not be able to bear its burden of proof regarding the protest issue of mistake without access to the requested confidential information.

In considering the third prong of the *Lafitte* test, the Chairman notes that the Panel's vote on the dispositive motions limits Catamaran's protest and appeal to the issue of mistake. The Chairman finds that Catamaran's outside counsel should be able to evaluate any evidence within the confidential information concerning this issue without the assistance of any expert. In addition, the Chairman notes that Catamaran's proposed expert is a former ESI employee and may have a conflict. Finally, the Chairman finds that limiting access to Catamaran's outside counsel will minimize the risk of potential disclosure. For these reasons, the Chairman grants Catamaran's request and issues a Protective Order.<sup>14</sup>

### Conclusion

Therefore, for the reasons stated herein, the Panel hereby dismisses Catamaran's protest and appeal ground based on section 11-35-30 of the Procurement Code and Catamaran's protest and appeal ground based on PEBA's finding of responsibility for failure to state claims upon which relief can be granted. In addition, the Panel denies Catamaran's additional appeal grounds challenging the process before the CPO. Finally, the Panel finds that there is no further issue to be decided in light of Catamaran's withdrawal of its remaining protest and appeal ground regarding alleged mistakes.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

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

This 6<sup>th</sup> day of August, 2015.

Columbia, South Carolina

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<sup>14</sup> After the Chairman granted Catamaran's request, ESI submitted a request seeking access to the same material from Catamaran's proposal. In the interest of fairness, the Chairman also granted ESI's request. The Protective Order as issued on July 10th is attached hereto at Panel Attachment A.

Panel Attachment A

STATE OF SOUTH CAROLINA )		BEFORE THE SOUTH CAROLINA PROCUREMENT
	)	REVIEW PANEL
COUNTY OF RICHLAND )		Case No. 2015-2
	)	
In the Matter of: Protest of Catamaran, Inc. )		
Solicitation: PEBA0012015 Pharmacy Benefits )		
Management Services )		<b>Protective Order — Protest</b>
Services for the State Health Plan )		
_____ )		

The State routinely receives documents in response to solicitations. While most documents in the State’s possession are subject to public disclosure, many of these documents contain commercial or financial information that is privileged and confidential. (Sections 11-35-410 and 30-4-40(a), South Carolina Code of Laws). Consistent with the law and the State’s standard solicitation instructions, one or more bidders or offerors may identify some of those documents, or portions thereof, as exempt from public disclosure. (Section 11-35-410(E) and Regulations 19-445.2030(4), -445.2095(C)). In some cases, information contained in those documents may also appear in documents created by the State.

In order to facilitate a protest or other proceeding currently pending before it, S.C. Code Ann., Reg. § 19-445.2200 authorizes the Procurement Review Panel (“the Panel”) to issue a protective order controlling the treatment of protected information (“Protected Information”). Such orders allow access to information without eroding any of the protection the Protected Information may be due and without deciding whether such Protected Information is in fact exempt from public disclosure.

The above captioned matter is currently pending before the Panel. In order to facilitate the pursuit of an administrative review in this matter, I find that one or more persons may need to access to certain Protected Information. This order establishes procedures for seeking

access to and for safeguarding such Protected Information. This order is subject to revision by the Panel or the CPO, as directed by the Panel.

IT IS ORDERED that the attached General Terms, List of Protected Information, and Application & Consent Form shall govern the disclosure of Protected Information in this matter.



C. Brian McLane, Sr.  
Chairman, South Carolina Procurement  
Review Panel

July 10, 2015  
Columbia, South Carolina

## Protective Order General Terms

### General

This order does not: (a) prohibit a public body from releasing information which the public body must release under applicable law, (b) require the release of any public record that a public body is prohibited from releasing by law, or (c) preclude a party from asserting any legally cognizable privilege to withhold any document or information. This order does not decide whether a document, or the information therein, is exempt from public disclosure by the State or entitled to any protections available under the law.

### Definitions

The following definitions apply to all parts of this order.

“Covered Proceeding” means the appeal currently pending before the Panel as identified in the caption of this order, and any appeal from such proceeding. In an appeal, this order is subject to revision by the appellate tribunal.

“Originator” means the entity from which the State originally acquired the information, as identified on the List of Protected Information.

“Protected Information” means all documents, and all information contained in the documents, identified in the attached List of Protected Information, unless such information was independently available to the Qualified Person from a public or otherwise proper source prior to release of the information pursuant to this order.

“Qualified Person” means a person who has signed an Application & Consent Form and includes the following individuals, as designated by the Panel Chairman:

M. Elizabeth Crum, Esquire, and Adam B. Landy, Esquire, of the McNair Law Firm, P.A., Columbia, SC

Michael H. Montgomery, Esquire, of Montgomery Willard, LLC, Columbia, SC

Christopher A. Smith, Esquire, of Husch Blackwell, LLC, St. Louis, MO

E. Wade Mullins, III, Esquire, and Henry P. Wall, Esquire, of Bruner Powell Wall & Mullins, LLC, Columbia, SC

W. Dixon Robertson, III, Esquire, of the South Carolina Fiscal Accountability Authority,  
Columbia, SC

“Solicitation” means the solicitation identified in the caption of this order.

### Terms

1. By disclosing a copy of Protected Information to a Qualified Person, a state employee does not waive any applicable exemption from public disclosure. In making such a disclosure pursuant to this order, a state employee should package the Protected Information as provided in Paragraph 6.
2. As provided by S.C. Code Ann. Regs. § 19-445.2200, “[p]rotected information received by a person pursuant to a protective order issued under this regulation shall be released only pursuant to and in compliance with the protective order.” Accordingly, Qualified Persons shall release Protected Information only pursuant to and in compliance with this order.
3. Qualified Persons shall not use or disclose Protected Information for any purpose other than preparing for and participating in the Covered Proceeding. Disclosure of Protected Information for any other purpose is prohibited. Except as necessary to prepare for or to participate in the Covered Proceeding, Qualified Persons shall not duplicate the Protected Information.
4. Qualified Persons may disclose Protected Information only to the Originator, the Originator’s legal counsel of record for the Covered Proceeding (not including in-house counsel), any Qualified Person, the CPO, the CPO’s staff and legal counsel, members and staff of the Procurement Review Panel, or a judge of the South Carolina Circuit Court or appellate court, including court personnel. Qualified Persons may otherwise disclose Protected Information if mandated by law; however, prior to such disclosure, sufficient advance notice shall be provided to appropriate management of the Originator in order to allow the Originator a reasonable opportunity to oppose such disclosure. All disclosures must be made consistent with the requirements of Paragraphs 5 and 6.
5. At all times, Qualified Persons shall take all necessary precautions to avoid the improper or inadvertent disclosure of Protected Information and to keep the Protected Information secure. Support and/or subordinate personnel of Qualified Persons shall not be permitted access to Protected Information absent individual application and approval by the Panel or CPO, as directed by the Panel, as a Qualified Person.
6. Except at the time being viewed, Qualified Persons shall keep Protected Information in a sealed parcel or envelope conspicuously bearing the following legend:

THIS ENVELOPE IS SEALED PURSUANT TO AN ORDER OF THE PANEL DATED JULY 10, 2015, IN MATTER NUMBER 2015-2. THE INFORMATION MAY BE SHOWN TO ONLY QUALIFIED PERSONS AS DEFINED IN THE ORDER.

Each page of each document constituting Protected Information must bear the legend "Protected Information: Protective Order Applies". The sealed parcel shall contain a copy of this order.

7. Request for approval as a Qualified Person shall be made by submitting a signed Application & Consent Form to the Panel, or the CPO, as directed by the Panel. A copy of a completed Application & Consent Form, exactly as submitted, must be transmitted and received by the Originator (or the Originator's attorney of record in the Covered Proceeding, if applicable) prior to its submission.

8. Special Restrictions: If the Originator objects to the Panel's or the CPO's approval, as directed by the Panel, of any applicant, desires to restrict a Qualified Person from accessing specific Protected Information, or seeks special restrictions regarding a specific Qualified Person, the Originator must provide written notice to the Panel and the Qualified Person by the close of the second day following receipt of the application. The applicant and the Originator must promptly confer and attempt to resolve any dispute over access to Protected Information on an informal basis before filing a motion with the Panel. If the dispute cannot be resolved informally, either party may file a motion with the Panel. Either party may also file a motion if the other party does not respond within twenty-four hours to a request to resolve the dispute. A motion must describe in detail the frequency and methods of communication attempted or utilized (telephonic and/or in-person conferences are encouraged) together with the intermediate measures, including selected redaction, explored by the parties and explain why such measures do not resolve the dispute.

9. No later than ten (10) days after the expiration of any appeal period regarding a final, unappealed order that concludes a Covered Proceeding, all Qualified Persons shall destroy all copies of Protected Information and documents containing protected information. Upon written request by the Originator, Qualified Persons shall certify to the Originator in writing that the Qualified Person has complied with the requirement this paragraph. Such certification shall be provided within ten days of receipt of the written request. Notwithstanding the foregoing, an attorney of record to the Covered Proceeding (not including in-house counsel) may retain memoranda, pleadings, testimony, discovery, or other documents containing Protected Information to the extent reasonably necessary to maintain a file of the Covered Proceeding or to comply with requirements imposed by other governmental agencies or court orders; provided that any Protected Information must be secured as required by this order.

10. By signing an Application and Consent Form, a person: (a) agrees to be bound by and to comply with the protective order, (b) acknowledges the Originator's concerns regarding the potential harm to Originator by an improper disclosure of Protected Information, and (c)

consents to the jurisdiction and enforcement of this order by the Panel, the South Carolina Circuit Court, and/or any other court of competent jurisdiction, including without limitation enforcement by issuance of an injunction. Any violation of the terms of this order may result in the imposition of such sanctions as the Panel deems appropriate, including without limitation, referral to appropriate disciplinary bodies and restricting the individual's practice before the CPO or the Panel. Any business aggrieved by violation of this order may also seek enforcement of such order or resulting damages in any available judicial or administrative forum.

11. In some cases, the Panel's written decision may include some Protected Information. In such cases, the Panel may issue two versions of the decision. (a) An Unredacted Order, which will include the complete order and bear the legend "Protected Information: Protective Order Applies," as required by Paragraph 6, and shall not be made available to the public. (b) A Redacted Order, from which all Protected Information has been expunged. This version will bear the legend "Redacted - See Protective Order" and will be publicly available.

**Protective Order Dated July 10, 2015  
List of Protected Information**

Instructions: (1) Identify every separate document individually. Provide sufficient information to reference the document unambiguously. For example, with respect to an excerpt from a proposal, identify the offeror, the solicitation number, the date the proposal was issued, the relevant section (if applicable), page number, and paragraph numbers (if applicable). Regarding an email or memo, identify the date, subject line, author, and recipient. Regarding a CD-ROM or DVD, also identify the name, date, time, file type, and file size of every computer file. (2) For all documents listed, identify the total number of pages constituting the referenced item. (3) For all documents listed, identify the Originator of the Protected Information. For example, the Originator of a proposal would be the offeror that submitted the proposal. For an email written by the procurement officer, or for a file memo regarding responsiveness, the Originator would be the offeror whose protected information was reprinted in the email or memo. (4) Do not leave blank lines on this list of protected information.

The following items are Protected Information:

#	Description	Originator
1	Pricing information—response to Tab A-10, all pages, number of pages unknown—designated for outside attorneys’ eyes only	Express Scripts, Inc. and Catamaran, LLC
2	Maximum Allowable Cost (MAC) lists—designated for outside attorneys’ eyes only	Express Scripts, Inc. and Catamaran, LLC
3	Performance Guarantee Information—response to Tab A-9, number of pages unknown—designated for outside attorneys’ eyes only	Express Scripts, Inc. and Catamaran, LLC
4	Work sheets and documents forming the basis of Mike Madalena, PEBA consultant, and anyone assisting him showing formula used to calculate the total cost for ESI—number of pages unknown – designated for outside attorneys’ eyes only	Palmetto Employee Benefit Association
5	Work sheets showing the calculations conducted by Mike Madalena and anyone assisting him in determining the total cost associated with Express Scripts, Inc.’s offer and of Catamaran, Inc.’s offer—number of pages unknown – designated for outside attorneys’ eyes only	Palmetto Employee Benefit Association
- end -		

**Protective Order Dated July 10, 2015  
Application & Consent Form**

By signing this Application & Consent Form, I certify and agree as follows:

1. I have read and agree to be bound by the terms of the Protective Order issued in this matter.
2. I am (check as applicable): an outside attorney of record representing a party to the Covered Proceeding.
3. I am not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the Protected Information.
4. There will be no significant risk of inadvertent disclosure of Protected Information.
5. A copy of a completed Application & Consent Form, exactly as submitted to the Panel, as directed by the Panel, has been received by the Originator (or the Originator's attorney of record in the Covered Proceeding, if applicable) prior to the submittal of this application to the CPO.

APPLICANT:

\_\_\_\_\_ (printed name)  
\_\_\_\_\_ (date)

\_\_\_\_\_ (signature)  
\_\_\_\_\_ (title)

\_\_\_\_\_ (employer) \_\_\_\_\_ (party  
with whom associated)

APPLICANT IS APPROVED AS A QUALIFIED PERSON:

\_\_\_\_\_  
\_\_\_\_\_ Date

Special Restrictions (See ¶ 9, General Terms):

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\_\_\_\_\_ (strike  
out if none)