STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Excent Corporation;	)	
Protest by Public Consulting Group	)	Case No. 2013-2
	)	
	)	
RFP No. 5400004448 – Automated	)	
Individual Education Program (IEP)	)	
Case Management System for the	)	
South Carolina Department of Education	)	

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review under sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Excent Corporation (Excent) appealed the February 7, 2013, decision of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) granting Public Consulting Group, Inc.'s (PCG's) protest of an intended award to Excent. At the Panel's hearing on April 19, 2013, Excent was represented by John E. Schmidt, III, Esquire. M. Elizabeth Crum, Esquire, represented PCG. Kelly B. Shelly, Esquire, represented the South Carolina Department of Education (SCDE), and William Dixon Robertson, III, Esquire, represented the CPO.

Findings of Fact

I. Facts Related to the RFP and Award

ITMO conducted this solicitation on behalf of SCDE to procure an automated Individual Education Program (IEP) case management system to replace the outdated one currently in use. *See* Request for Proposals (RFP) at pages PRP44 through PRP81 of the Record. Section I of the RFP defined the scope of the solicitation as follows:

> The [SCDE] Office of Exceptional Children (OEC) is tasked with assuring that Local Education Agencies (LEAs) and State Operated Programs (SOPs) deliver a

> Free Appropriate Public Education to students with disabilities throughout the state. The United States Office of Special Education Programs (OSEP) also requires multiple data elements to be collected at the LEA level to be reported to the OSEP at fixed intervals. The OEC will assure these requirements are met by delivering to LEA[s] and SOP[s], an automated Individual Education Program (IEP) case management system that will generate forms, reports, and IEPs for each student with a disability in the state, and will allow the collection and analysis of specific data elements as required by the OSEP. The solution must also:
>
> - Facilitate integration of data from sources and instruments other than the Statewide K-12 Assessment Management System into the data warehouse, including formative, periodic, and other data, to facilitate case management of students in compliance with IDEA[1] and state and federal regulations, statute, policies and procedures and state and federal reporting;
> - Be implemented on a statewide basis to develop IEPs, consolidate data and enable cross-district and cross-school communications;
> - This integration is expected to enhance current functionality and expand teacher and principal access to information regarding students with disabilities.

Record at PRP50. The case management system would be used in the state's 84 school districts, "includ[ing] 1,133 schools and various private agencies." *Id.*

The specifications for the software proposals were set forth in the Scope of Work/Specifications portion of the RFP. Record at PRP60 – PRP63. Included within these specifications is a section on training, which provided in pertinent part:

> The vendor must provide sufficient training to districts. The training must encompass all aspects of the solution. Individuals in districts will attend the training and must be trained to train additional individuals once they return to their perspective districts (Train-the-trainer approach). Training manuals must be provided to train the trainers). The district trainers must be trained in all aspects of the system. Vendor must be responsible for all the costs of these training, including room rental if necessary. Meals and travel reimbursements or other costs for attendees and districts shall not be part of this budget. Provide a training plan to reflect all types of training required.

[1] IDEA is the acronym for the Individuals with Disabilities Education Act, a federal law ensuring services to children with disabilities.

Record at PRP62, Section 3.7.1. Section 3.7.2 specified that the vendor "must provide training for up to 60 SCDE staff members" and established that the SCDE staff training would take place in Columbia, South Carolina. *Id.* Section 3.7.2 required vendors to "include instruction for printing reports and developing custom reports." *Id.* Finally, Section 3.7.4 provides: "If additional training can be provided at additional cost please provide a detailed breakdown of the cost of training and the options available with a timeline of completion." *Id.*

Amendment 2 to the RFP also addressed the training requirement in the following question and answer:

> 2. Items 3.7.1 and 3.7.2 indicate the requirements for training to include a train-the-trainer approach and training for up to 60 SCDE staff members as well as some unidentified number of district trainers.
>
> - How many trainers will be trained from the 84 districts? How many total trainers will be trained?
>
> **ANSWER: Trainers will be trained either regionally or in individual districts. We expect each district to send a minimum of two staff members to train, with a maximum of four staff for larger districts.**

Record at PRP85. The next question in Amendment 2 asked for an "estimated total number of staff members that will be using the system." *Id.* The State answered, "Up to 60 SCDE staff, and minimum of 168 from LEAs, with a maximum of 672." *Id.*

In addition to their software proposal and pricing proposals, the RFP required offerors to provide information to assist the State in determining responsibility. *See* Record at PRP66 ("QUALIFICATIONS – REQUIRED INFORMATION"). In particular, offerors were asked to "provide a detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which you have performed . . . ." *Id.* These references would be considered in the evaluation phase of the RFP, as explained below.

The evaluation process for this RFP involved two phases. First, offers were to be evaluated under the following factors ("stated in relative order of importance, with the first factor being the most important"):

> 1. **Proposed Solution** (Technical Proposal) – The degree, completeness and sustainability of the Offeror's proposed technical solution to meet or exceed the requirements of this RFP, to include but not limited to, software functionality, installation/work plan, user access and system integration, training plan. 1-45 points.
>
> 2. **Price Proposal** – The value of the proposed solution to meet or exceed the needs of the RFP during the development, implementation and useful life of the Offeror's proposed system; with specific respect to Total Cost of Ownership for the total 5 year contract. 1-30 points.
>
> 3. **Qualifications/References** – The Offeror's financial responsibility and financial strength must reflect sound financial stability; the Offeror's experience and references must provide evidence of successful past performance with projects of similar size and scope. 1-25 points.

Record at PRP67. Based on the total of potential points, each evaluator could award up to 100 points for Phase I. Once this evaluation was complete, the offers were to be ranked "from most advantageous to least advantageous." Then, in Phase II, those offerors "[whose] proposals ranked close enough to the highest scoring Offeror where the award of points allowed for a demonstration could shift the final ranking" were invited to demonstrate their solutions. *Id.* If multiple offerors were invited to demonstrate, the demonstrations would be scored regarding "[t]he completeness and suitability of the Offeror's demonstration to show the functional, technical and performance needs of the RFP as addressed in offeror's written response." Record at PRP68. The demonstrations were worth up to 25 points, and the demonstration scores would be added to the scores assigned in the Phase I to determine the apparent winner. *Id.* Thus, a "perfect" score for both phases would be 125 points per evaluator. All scoring for each offeror

would be added together[2] to determine which one had the highest score; the highest scorer would be the apparent winner, subject to negotiations and validation by ITMO. Record at PRP68.

The RFP was issued on July 5, 2012, and was amended three times. Record at PRP44; PRP82 – PRP83; PRP84 – PRP88; and PRP89 – PRP90. Nine offers were received on September 11, 2012, and after the initial evaluations were completed, Excent, CORE, and PCG were invited to give demonstrations. Record at PRP582. After the demonstrations, the scores from both phases of the evaluation were assembled into tables. Record at PRP284 (CORE); PRP287 (Excent); and PRP290 (PCG). Based on the information contained in those tables, Excent's proposal received the highest total score at 458 points, CORE received the second-highest total score at 442 points, and PCG received the lowest score at 385 points. The following table illustrates the three finalists' sub-scores for the criteria identified in Phase I and for the demonstrations in Phase II:

Phase I Evaluation	Excent	CORE	PCG
Criteria 1. Proposed Solution (Technical Proposal) Maximum points: 225	165	153	156
Criteria 2. Price Proposal Maximum points: 150	115	72	61
Criteria 3. Qualifications/References Maximum points: 125	101	120	67
Phase II Evaluation Demonstration Maximum points: 125	77	97	101
Grand Totals	458	442	385

A notice of intent to award the contract to Excent was posted on November 30, 2012. Record at PRP91 – PRP92. PCG protested the intended award on December 10, 2012, and the award was suspended on December 11, 2012. Record at PRP35; PRP93 – PRP94. On

[2] SCDE used a team of five evaluators to score both phases of the evaluation process. Therefore, the maximum number of points any one offeror could receive was 625. (5 x 125 = 625).

December 17, 2012, PCG's counsel filed an amended protest letter that raised numerous protest grounds, most of which the CPO denied in his decision. Record at PRP36 – PRP41 (amended protest letter); PRP3 – PRP12. However, the CPO did find that Excent's proposal was not responsive to a mandatory minimum training requirement of the RFP and that one of the evaluators improperly asked a non-PCG client for reference information regarding PCG. Record at PRP10 – PRP12. Because he granted these two grounds of protest, the CPO canceled the award to Excent and ordered re-solicitation of the contract. Record at PRP12. Excent timely appealed three issues[3] to the Panel.

II. Facts Related to Excent's Responsiveness

Excent's proposal is included in the Record before the Panel. Record at PRP 157 – PRP282. In response to Section 3.7.1, Excent's proposal offered the following:

> Our training plan encompasses all necessary training for technical staff, which includes those roles and responsibilities identified by the state of South Carolina. Technical training related to system installation and maintenance and all peripheral requirements is delivered by IT professionals and Learning Specialists to appropriate district personnel. The specific delivery method is a combination of onsite and remote learning opportunities; however, timeline, delivery, and training options will be customized to meet state needs.
>
> Enrich Special Education training components:
> - Data Validation
> - System Administration
> - Enrich Special Education Configuration
> - Enrich Special Education Train-the-Trainer
>
> Several of the training segments can be delivered virtually. Train-the-Trainer sessions are conducted onsite with hands-on experience built into the training curriculum. Our standard training rollout includes:
>
> - One 2-hour Data Validation (remotely)
> - One ½-day Sys Admin Training (remotely)
> - Two ½-day sessions for IEP configuration setup (remotely)

[3] During the course of the Panel's hearing, Excent withdrew its first issue, which asserted that the CPO lacked jurisdiction to consider the protest because PCG's amended protest letter did not reference the correct solicitation number. Therefore, the Panel need not address that issue.

- 2 days – Enrich Special Education Train-the-Trainer (onsite)

Note: Training will be conducted in a fully configured and validated state sandbox environment.

Record at PRP234.

Next, in response to Section 3.7.2, Excent offered the following:

Ideally, SCDE staff-member training sessions will be held at a designated SCDE facility in Columbia, while regional training sessions will be conducted in district facilities or conference centers. If district facilities are not an option, the cost for leasing space and necessary facility accommodations has been estimated and provided in the pricing summary.

This proposal assumes that state staff training will occur initially and subsequent regional training sessions will be co-facilitated by a subset of district SME's to address Special Education process oriented questions during training session led by an Excent trainer. The actual training rollout schedules can be modified per SCDE discretion.

Record at PRP235. This portion of Excent's proposal also includes two tables illustrating "training options [that] have been developed to accommodate 60 district staff users." *Id.* The second table, labeled "Table 3: Train-the-Trainer," is reproduced below:

# of Excent trainers	Training Sessions	Number of Participants	Training Days	*Facilities Price Estimates
1	5	12	2	$5,000
1	4	15	3	$6,500
2	2	30	3	$4,500

**Facilities pricing is based upon Columbia rates - $500/12people/day and includes meal and beverage station. This accommodation allows working lunches and/or reduced interruptions during training sessions.*

Record at PRP235.

The next page of Excent's proposal bears the heading "Regional Level District Training" and explains that "[t]o facilitate the 46 counties for Enrich Special Education training sessions

have been grouped by region." Record at PRP236. Excent explains that its "regional training model mirrors the SCDE district staff model" and that "[s]everal training facilities throughout the various regions (8) have been identified while others will be secured on an as-needed basis to accommodate other districts in the state." *Id.* Excent then states that it has identified training sites in the Pee Dee, Upper Savannah, and North Central regions "that can accommodate the broad range of district users to be trained." *Id.* Then Excent's proposal sets forth another table, labeled "Table 4: Regional Model," which is reproduced below:

# of Excent trainer	Number of Participants	Training Days	Number of Sessions	*Facilities Price Estimates
1	12	2	8	$8,000

Record at PRP236. Table 4 is followed by an explanation that Excent's "Train-the-Trainer model is based on a 1:12 teacher ratio" in which "Excent-trained power users are equipped to lead end user training sessions in their districts." *Id.* Thereafter, Excent notes that

> [p]ricing presented in this proposal is based on one session per region; however, a statement of work (SOW) can be developed for districts that require multiple team lead sessions as shown in [omitted figure drawing]. In this case, Excent-trained district leadership may opt to not deliver training sessions to additional district team leads themselves, but contract Excent training services based on the daily training rate plus T&E.

Record at PRP236.

Finally, in response to Section 3.7.4, Excent's proposal outlines the fees "for additional training requested outside the scope of this project," but notes that "training for Enrich Special Education as proposed for this project is included in our cost proposal." Record at PRP237. After listing the fees, Excent indicates it can provide "customized training options which are ideal for refresher courses and end user training." *Id.*

Excent's CEO, Scott Shickler, testified before the Panel and affirmed Excent's intention to train as many trainers as the State required, recognizing that the actual number of trainers would fluctuate because it would be set by the State. Mr. Shickler also expressed his understanding that Section 3.7.1 did not ask a vendor to offer to train a specific minimum number of trainers. Furthermore, Mr. Shickler testified that he did not think that the State's answer to Question 2 in Amendment 2 changed the RFP to require a minimum number of trainers to be trained, but rather provided information to help vendors estimate how many trainers might be trained. Finally, Mr. Shickler expressed his understanding that Question 3 in Amendment 2 encompassed not only trainers but also all users, which would be a much larger number.

II. Facts Related to PCG's References

PCG's proposal is also included in the Record before the Panel. Record at PRP293 – PRP535. In response to the Qualifications portion of the RFP, PCG identifies three statewide implementations that it is currently performing in Tennessee, New Hampshire, and Indiana. Record at PRP422. In addition, PCG indicates that "it supports 25 LEAs in North Carolina with EasyIEP™." Record at PRP423. In response to subsection (c), which asked for contact information for the offeror's "three most recent, comparable contracts," PCG provided the name of a contact person and phone number for the Tennessee Department of Education, Record at PRP426, along with names, addresses, phone numbers, and e-mail addresses for the Indiana Department of Education, Record at PRP427, and the New Hampshire Department of Education, Record at PRP428.

Michelle Bishop, who is Team Leader with the SCDE's Office of Exceptional Children, testified before the Panel. She confirmed that she was involved with the drafting of the RFP and

was a member of the evaluation panel. Ms. Bishop explained that the evaluation panel tasked her with the responsibility of contacting the references provided by the various offerors and that they decided to send e-mail questionnaires rather than telephoning each reference. Because PCG had not provided an e-mail address for its Tennessee reference and because PCG's proposal indicated it served a number of LEAs in North Carolina, Ms. Bishop testified that she sent an e-mail to Mary Watson, the Director[4] of the North Carolina Department of Public Instruction's Exceptional Children Division, asking her to complete a survey about PCG. Ms. Bishop testified that she has known Mrs. Watson professionally for many years and thought that she would have a good idea about how PCG had performed for the LEAs in North Carolina. However, Ms. Bishop admitted that she knew PCG did not have a statewide contract with North Carolina. Ms. Bishop testified that she also contacted PCG's other references, Indiana and New Hampshire, but that she did not receive any responses from them.[5]

Mrs. Watson initially responded to the reference request with a reply e-mail asking if Ms. Bishop meant to contact her about PCG because "[a]s a state, we do not use Public Consulting Group – Our State-Wide data system is with CORE ECS." Record at PRP145. Ms. Bishop replied and confirmed that she was seeking a reference for PCG. *Id.* Ms. Bishop also advised Mrs. Watson that she would be sending a separate questionnaire for CORE. Thereafter, Mrs. Watson did fill out the questionnaire for PCG and returned it to Ms. Bishop via e-mail. Record at PRP151 – PRP154. Although many of Mrs. Watson's questionnaire answers were "NA" because North Carolina did not use PCG on a state level, several other answers did not reflect PCG in a positive light. *See, e.g.,* Record at PRP152 ("12. Were any conversions of data

[4] Mrs. Watson has subsequently retired from this position.
[5] The Panel notes that Ms. Bishop admitted that the references had only a few days to complete and return the questionnaires. Therefore, the Panel takes this opportunity to encourage agencies to allow sufficient time for responses when they decide to contact references by e-mail.

required from a previous system to your current product? If so, were the conversions completed successfully? NO! What was the district required to do to prepare for conversion? Any lost data or re-entering of data required? YES").

Once she received Mrs. Watson's questionnaire answers, Ms. Bishop testified that she felt it would not be proper to get rid of the reference, so she did share it with the other panel members with the caveat that North Carolina did not use PCG on the state level. Ms. Bishop testified that she personally viewed Mrs. Watson's reference as being neutral and that she did not give it any particular emphasis when evaluating PCG's proposal. Although Ms. Bishop admitted that she was not an expert in procurement procedures, she also said that no one from ITMO informed her that she could not contact someone in North Carolina for a PCG reference. In addition to Ms. Bishop, two other SCDE evaluators, William P. James and Tarrance B. McGovern, testified before the Panel that the reference from Mrs. Watson did not affect their overall scoring of PCG's proposal. However, Mr. McGovern did admit on cross-examination that the North Carolina reference may have affected his Phase I scoring for PCG on Qualifications/References criterion, where he gave PCG only 12 out 25 points.

Conclusions of Law

I. Excent's Responsiveness to the Training Requirement

In granting PCG's protest, the CPO found that Excent was not responsive to the RFP because its proposal offered train-the-trainer training for only 96 participants. In reaching this conclusion, the CPO found that the answer to Question 2 in Amendment 2 created a mandatory minimum requirement that 168 district participants be trained and that Excent's proposal offered to train only 96 participants.[6] Excent argues that the CPO erred by failing to consider Excent's

[6] The CPO arrived at the mandatory minimum figure by multiplying the estimated minimum number of district staff participants by the number of school districts (2 attendees x 84 districts = 168). Similarly, the CPO found that

response to Section 3.7.1, which did not limit the number of training participants, and by finding that Amendment 2 changed the RFP to require training a mandatory minimum number of participants. For the reasons explained below, the Panel agrees with Excent that its proposal was fully responsive to the RFP.

The Procurement Code defines a "responsive offeror" as one "who has submitted a[n] . . . offer which conforms to all material aspects to the . . . request for proposals." S.C. Code Ann. §11-35-1410(7) (2011). Under the provisions governing RFPs, a proposal must be responsive in order to be evaluated, ranked, and considered for award. S.C. Code Ann. § 11-35-1530(7) (2011). Generally speaking, responsiveness is determined at the time an offer is opened and, unless discussions are conducted under section 11-35-1530(6),[7] is based on the information included in an offeror's proposal. In reviewing a proposal for responsiveness, the Panel conducts a *de novo* review. *See* S.C. Code Ann. § 11-35-4410(1)(a) (2011) (The Panel shall "review and determine *de novo*" requests to review a CPO's determination under section 11-35-4210(6).)

The Panel must first determine exactly what the RFP required with regard to training for district staff. Considering the language of Section 3.7.1 of the RFP, the Panel notes that offerors were required to "provide sufficient training to districts . . . encompass[ing] all aspects of the solution." In addition, vendors were required to provide training manuals, were required to bear the costs of the training, and were asked to "provide a training plan to reflect all types of training offered." As written, therefore, the Panel finds that nothing in Section 3.7.1 requires offerors to offer training for a specific number of participants in their train-the-trainer training.

Excent offered to train only 96 participants by multiplying the number of participants listed in Table 4 of Excent's proposal by the number of sessions (12 participants x 8 sessions = 96).

[7] The Record before the Panel indicates that ITMO staff did contact Excent to clarify one software issue, but that discussion did not request clarification of Excent's training proposal. Record at PRP583 – PRP584.

Next, the Panel must address whether or not the answers to Questions 2 and 3 in Amendment 2 created a mandatory minimum train-the-trainer requirement. The Panel finds that the State's answer to Question 2, which uses the word "expects" and does not identify the number of large districts, offered a range of potential participants, not a definite number of participants that a vendor must agree to train. Furthermore, the Panel agrees with Mr. Shickler's observation that the answer to Question 3 referred to total users of the system, not the number of train-the-trainer participants. Moreover, the question itself asked for an "estimated total number," and the answer again gives a range of potential users, not a definite number. Therefore, the Panel finds that neither of these answers established a mandatory minimum number of participants for the train-the-trainer training or changed the original training specifications set forth in Section 3.7.1.

Excent's response to Section 3.7.1 agrees to provide a training plan that "encompasses all necessary training for technical staff, which includes those roles and responsibilities identified by the state of South Carolina." Excent also offers to customize the training plan's delivery method "to meet state needs." Moreover, train-the-trainer training is listed as one of Excent's training components and places no limits on the number of participants. The Panel finds that Excent's response to Section 3.7.1 is fully responsive to the requirements set forth in that section. Moreover, the Panel finds that Tables 3 and 4, which were included in Excent's response to Section 3.7.2, represented models for achieving the required train-the-trainer training and gave the State the option of choosing how to configure the training that would actually take place. Therefore, the Panel does not agree with the CPO that these tables somehow limited the number of participants Excent would train.[8]

[8] However, it is curious that Excent included Table 4, which clearly applied to district participants, in its response to the State's requirement that it offer to train up to 60 SCDE staff members. The Panel encourages future offerors to

The CPO's decision also noted that "Excent's proposal offered additional training sessions at additional expense." To the extent that the CPO relied on Excent's response to Section 3.7.4 in reaching this finding, the Panel disagrees. Section 3.7.4 asked offerors to describe additional training they could provide at additional cost. Excent's response to Section 3.7.4 merely offered the information requested by the State and emphasized that the training costs for Enrich Special Education, which included the train-the-trainer training, were included in its cost proposal for the RFP.

II. The Evaluators' Consideration of a Non-Client Reference

The other protest ground granted by the CPO related to the evaluators' soliciting and considering a reference for PCG from an individual who was not a PCG client and who in fact was a satisfied customer of one of PCG's direct competitors. The CPO found that "[s]oliciting a reference from the customer of a direct competitor is capricious . . . . [and] [a]ccepting and evaluating this reference is arbitrary." For the reasons explained below, the Panel agrees with the CPO's finding that the conduct of the evaluators was arbitrary and capricious. However, the Panel also finds that PCG failed to show that this defect affected the outcome of the procurement, making it harmless error and not a basis for ordering relief.

The references requested by this RFP were to be used in determining an offeror's responsibility, as only responsible offerors were eligible for award. *See* S.C. Code Ann. § 1-35-1530(9) (2011) ("Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State . . . ."); and S.C. Code Ann. § 11-35-1810(1) (2011) ("Responsibility of the . . . offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of

review their proposals to ensure that information is included in the right place so that evaluators will not have to search for it.

the contracts and based upon past record of performance for similar contracts."). The Panel has observed that for arbitrary and capricious conduct to serve as the basis for overturning a procurement decision, "'the aggrieved bidder must demonstrate a lack of reasonable basis for the agency decision.'" *In re: Appeal by Value Options, et al.*, Panel Case No. 2001-7 at 7 (August 3, 2001) (*quoting Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt*, 516 F. Supp. 1085 (D. R.I. 1981). Thus, the question before the Panel is whether it was unreasonable for the evaluators to consider Mrs. Watson's reference in evaluating PCG's proposal.

The Panel considered the question of references with regard to an evaluation panel in the case of *In re: Appeal of ACMG, Inc.*, Panel Case No. 1990-4 (May 4, 1990). In that case, ACMG complained that one of the evaluators had been listed as a reference for the winning offeror and argued that her participation as both an evaluator and a reference placed it at an unfair disadvantage. The Panel received testimony that the evaluation committee did not contact any of the references provided by the offerors and that the challenged evaluator did not favor the winning offeror, a fact supported by her score sheets. Although the Panel noted that it might have been "preferable for the [evaluators] to contact references for all offerors, there is no evidence that failure to do so tainted the process so as to affect the outcome" and declined to reverse the intended award on this ground. 1990-4 at 13.

The instant case is factually distinguishable from *ACMG* because the evaluation panel here did decide to contact the offerors' references, and Ms. Bishop persisted in seeking a reference from Mrs. Watson even after being reminded that North Carolina did not use PCG on a statewide basis. Therefore, the Panel finds that it was unreasonable for Ms. Bishop to continue seeking a reference from the customer of a competitor under the circumstances and for the committee to consider such a reference even with the understanding that the reference was of

little value. In the future, should an evaluation panel decide to contact references, they should not contact the customers of competitors, particularly when those competitors are also participating in a solicitation.

Nonetheless, the Panel finds that there is no evidence that the evaluators' consideration of Mrs. Watson's reference affected the ultimate outcome of the procurement. The Panel has applied the doctrine of harmless error in the past. *See In re: Protest of First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11 (October 31, 1994) ("If an evaluator's score does not affect the outcome of the procurement, his conduct is *harmless error* and there is no need for review of the process.") (emphasis added). Excent argues that the conduct complained of here is harmless error, and the Panel agrees. First, the evaluators who testified before the Panel all indicated that they understood the reference was from someone who was not a PCG customer and all testified that they considered factors other than the references when awarding points for criterion 3 of Phase I. Second, the grand total point differential between Excent and PCG was 73 points. Even if PCG had been awarded a "perfect" score of 125 points for criterion 3, it would have gained only 58 additional points and would still have lost to Excent by 15 points.[9] Therefore, the Panel finds that consideration of Mrs. Watson's reference, while improper, did not affect the outcome of the award and was harmless error.

Therefore, for the reasons stated above, the Panel reverses the CPO's finding that Excent was non-responsive to the training requirement of the RFP. Furthermore, although the Panel agrees with the CPO that the evaluators' conduct was arbitrary and capricious, the Panel finds that the conduct did not affect the outcome of the procurement and was harmless error. Thus, the

[9] PCG was awarded a total of 67 points for criterion 3 (125 – 67 = 58). An additional 58 points would have given PCG a total score of 443; Excent received a total score of 458 (458 – 443 = 15).

Panel reverses the CPO's cancellation of the solicitation and remands it back to the CPO for award in accordance with the Procurement Code and consistent with the findings herein.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

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

This 15th day of May, 2013.

Columbia, South Carolina