

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1986-6

IN RE:)

PROTEST BY AMDAHL CORPORATION AND)
INTERNATIONAL BUSINESS MACHINES)
CORPORATION)
_____)

O R D E R

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to South Carolina Code of Laws, Sections 11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the intent of the State to award to National Advanced Systems (NAS) the bid for the main frame computer, or central processing unit (CPU), at Clemson University. In his determination of this protest, the Chief Procurement Officer (CPO) concluded that Amdahl Corporation's protest was not timely filed pursuant to Section 11-35-4210(1) and accepted no testimony from Amdahl. Several elements of the protest by International Business Machines, Inc. (IBM) were also determined by the CPO to be untimely under §11-35-4210(1) and no evidence was received on those points. NAS, which had not filed any protest, was present at the CPO hearing and represented by counsel. During the hearing, NAS raised issues regarding the responsiveness of the IBM bid. On this oral

motion and the bid documents the CPO ruled IBM was nonresponsive (Record before Review Panel, p. 262-63).

The Panel held its hearing on October 6-7, 15 and 22, 1986. A quorum of the Panel was present. IBM, Amdahl, NAS, Clemson and the Division of General Services were present and represented by counsel. Motions were made by IBM, Clemson and General Services. These were taken under advisement. The Review Panel then requested the parties, for ease of understanding these technical issues, to limit testimony to only the issue of whether the bid of the Amdahl 5880 with a high speed floating point (5880/HSFP) as equivalent to the NAS XL-60 is a responsive bid. The parties agreed to this procedure without objection.

Evidence on this issue was heard on October 6 and 7. An interlocutory order ruling that the NAS XL-60 was not equivalent to the Amdahl 5880 and determining all motions then filed was issued on October 14. The Panel reconvened on October 15 to take testimony on the remaining issues and receive any further motions.

The Order of October 15 is hereby vacated and this order supercedes and incorporates it. This order is the final order of the Panel in this protest based on all the evidence in the hearings.

DETERMINATION OF MOTIONS BEFORE THE PANEL

I. MOTION TO DISMISS IBM

Clemson and General Services moved to dismiss IBM on the grounds that the gravamen of IBM's protest goes to determinations made and published in the invitation for bids (IFB) on July 28, 1986. Items 1, 2, 3 and 6 of the letter of August 18, 1986, are, on their face, protest of the solicitation documents. IBM wrote two letters questioning the IFB on July 21 and July 25, 1986. It certainly had knowledge at that time of its dissatisfaction with the IFB and could have protested then. The argument that these letters were, in fact, protests is specious. If these were protests, then IBM waived its right to be heard by bidding without seeking the CPO's determination on these "protests".

Under the authority of In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer, (hereinafter AT&T), those protests should have been raised when the specifications were published. Clemson and General Services, by publishing the IFB, published their determination that for their purposes the IBM 3090-200, the Amdahl 5090-200 and the NAS XL-60 were "functionally equivalent." (Item 1) The allegation of superiority of the IBM is a restatement of the allegation that the machines are not "functionally equivalent." (Item 2) The allegation that

IBM could not bid another machine is belied by Amdahl's action in bidding this solicitation and the treatment given that action in the Panel's order herein. (Item 3) The evaluation process to determine the functional equivalency of the machines was completed when the IFB was published. (Item 6) Any contest of that process and the determination had to have been made at that time.

Therefore, the Panel rules that Items 1, 2, 3 and 6 of the letter of protest of August 18 are denied as out of time under §11-35-4210(1) and the authority of the AT&T decision.

Clemson and the Division of General Services further moved that IBM be dismissed for lack of standing in that it is not the next low bidder. By their failure to oppose IBM's motion to rescind that portion of the interlocutory order of the Panel which denied IBM's right to participate in the hearing, Clemson and General Services indicated that there was no prejudice to them in allowing IBM to participate in the hearing. Absent some finding of prejudice, the participation of IBM is clearly warranted as IBM was a bidder on this contract. Its evidence and participation can be helpful to the Panel.

II. MOTION TO DISMISS AMDAHL

Clemson and the Division of General Services moved to dismiss the request for review by Amdahl on the same grounds as those discussed in Part I, above, that these were protests of

the IFB and thus untimely. On August 14, 1986, Stephen Dix, Regional Counsel for Amdahl, wrote to Harold Stewart, Information Technology Management Officer, protesting the notice of intent to award to NAS. Only one of these grounds relates to the award decision. The remainder relate to the equivalency of the three machines contained in the invitation for bid (IFB). Insofar as this letter of protest seeks review of determinations made prior to, and evident in, the IFB: 1) the equivalency of the Amdahl 5980, IBM 3090 and NAS XL-60 and 2) the lack of adequate testing to determine equivalency, the protest is untimely under Section 11-35-4210(1) (cited on page 2 above).

The Review Panel concludes that Amdahl had knowledge giving rise to the protest when Vaughn Wahl, Account Executive with Amdahl, wrote Harold Stewart on July 22, 1986, to "offer suggestions for modification of stated IFB which would alleviate Amdahl's concern." This knowledge was further reinforced in Jim Clark's (ITMO) letter of July 28, 1986, responding to Amdahl, when he stated that "[t]his office sees no need for any change to the specifications as presented in the IFB".

A protest of matters contained in the specifications must be raised within ten days of the knowledge giving rise to the protest. Mr. Dix's letter of protest was dated August 14, 1986, over ten days after the IFB was published and more than ten days after Mr. Wahl's letter of July 22, 1986.

Therefore, the motion to dismiss Amdahl's protest as to the following grounds listed in the Dix letter of August 14 is granted: (1) that the three configurations of computers are not functionally equivalent; and (2) that the determination of equivalency was not properly made because it did not include performance testing.

III. PROTESTS OF THE DETERMINATION BY THE CPO

Sections 11-35-4210 and 11-35-4410 provide for a further protest of awards by protest to the Procurement Review Panel. These protests by Amdahl and IBM are contained in letters by counsel dated September 5, 1986, and September 4, 1986, respectively. These protests of the CPO decision rendered on August 29, 1986, are timely. However, these timely protests cannot revive grounds earlier waived by a failure to protest. To allow the protestants to first sit on their rights and then revive them after an intervening proceeding would vitiate the policy of finality embodied in §§11-35-4210 and 11-35-4410. Therefore, the Panel grants the motions to dismiss those protests in these letters of Amdahl and IBM, referenced above, as follows:

(1) Amdahl letter of September 5, 1986 - dismissing items numbered: 3 and 7; dismissing so much of items 6 and 8 as are protests of the specifications in the IFB, as detailed in Section II above.

(2) IBM letter of September 4, 1986 - dismissing items numbered: 1, 2, 3, 6, 12, 13, 14.

IV. IBM MOTIONS FOR REVIEW OF THE AWARD

A. IBM moved for review of this award pursuant to Section 70, Part II, of Act 201 of 1985. This act provides that:

The State Budget and Control Board by regulation shall develop and implement a policy whereby this State, and its agencies, departments, institutions of higher learning, boards, commissions, and committees in procuring necessary products to perform their assigned duties and functions must obtain products made, manufactured, or grown in South Carolina if available or must obtain products made, manufactured, or grown in the United States if similar South Carolina products are not available before any foreign made, manufactured, or grown products may be procured. (Emphasis added).

The clear and literal language of this act expresses the intent of the General Assembly: that the Budget and Control Board shall develop and implement a policy for granting a preference to South Carolina or American products before purchasing foreign made products. The future tense, "shall" imparts the General Assembly's intent that this is legislation which creates a duty for the Budget & Control Board to act. Until the Board has acted, the General Assembly's will has not been effectuated. This legislation is not self-executing and the Review Panel so concludes. The expression of legislative intent is the principle of first order in statutory interpretation. McMillen Feed Mills, Inc. of S. C. v. Mayer, 265 S.C. 500, 220 S.E.2d 221 (1975).

Section 70 is essentially legislation that is not effective until the happening of a stated contingency, i.e. the promulgation of regulations. The act becomes operative upon the effective date of the regulation.

"Legislation may be made to take effect upon the happening of a specified contingency, provided the contingency is germane to the subject of the legislation." Sutherland Statutory Construction, Sands 4th Edition, Vol 1A, §20.24, p. 110.

"A statute may take effect upon the happening of a contingency, such as the passage of a law in another jurisdiction, a vote of the people, or the passage of a constitutional amendment." Sutherland Statutory Construction, Sands 4th Edition, Vol 2, §33.07, p. 16-17.

The Review Panel concludes that, as a matter of law and by the express provisions of the act, there is no rule, policy or decision which it can enforce until the regulations have been promulgated under authority of this statute.

As additional grounds for its decision, the Panel finds that to enforce this statutory provision as it is written would grant an absolute preference to certain vendors which violates the Commerce Clause, Article 1, §8, of the United States Constitution. Absent regulations promulgated pursuant to §70 this statute would, thus, be unconstitutional. The General Assembly is presumed to act constitutionally. Bradley v. Hullander, 277 S.C. 327, 289 S.E.2d 140 (1982) It has done so by allowing this statute to be carried out through regulation. Statutes carried out in a constitutional manner are not made unconstitutional because a contrary interpretation, an absolute preference, would be unconstitutional. Casey v. S. C. State

Housing Authority, 264 S.C. 303, 215 S.E.2d 184 (1975).

Further, to execute this §70 as an absolute preference will directly repeal §11-35-1520, the resident vendor preference. As provided in the law of South Carolina, such repeal is disfavored unless no other reasonable construction can be applied. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). Because reasonable construction can be applied in the case at hand, absolute preference is disfavored and the statute should not be considered as self-executing. Indeed, where two statutes are in apparent conflict, they should be construed, if reasonably possible, as to allow both to give force and effect to each. Stone and Clamp v. Holmes, et al., 217 S.C. 203, 605 S.E.2d 231 (1950).

B. IBM has made a further motion under §11-35-4410(1) to be heard on a protest of the "procedure used in this case." (Emphasis in original.) Memo of IBM, 10/6/86. It asks the Panel "to order the use of an alternative methodology of procurement or to reevaluate a bid using the appropriate methodology and then order a reward or rebid of the contract." Id. It asserts that the Panel "can...address procurement policies or procedures whether or not those policies are brought to the panel by a formal bid protest." Id.

It is clear in the text of the IBM motion that it is the choices of Clemson & ITMO embodied in this solicitation which they seek to protest here. IBM states it "will prove...that in

order for the procurement to have been most advantageous to this State, the RFP method should have been used, rather than the IFB method." This is either a protest of the solicitation and, therefore, untimely as discussed in part I, or it is a protest as to the system designed and developed by ITMO for high tech purchases. If it is the former, it is untimely, and is, therefore, dismissed. If it is the latter, it is much broader than this hearing and involves more parties than are now before the Panel.

Therefore, the Panel rules that this challenge to ITMO's determination of the relative merits of the RFP and the IFB in high tech procurements is reserved until such time as all parties interested in the method of high tech procurement may be notified. If IBM determines to proceed in this matter to challenge the use of RFP's and IFB's, the Panel will, upon petition of IBM, set a hearing date and invite all interested parties.

Therefore, the Panel rules that this portion of the IBM protest discussed above is severed from the protest of the Clemson computer protest and reserved to a later date. IBM has 50 days from the date of this order to petition the Panel for a date for this hearing as outlined in the memo of October 6. Further, any petition by IBM should state with particularity other vendors or classes of vendors which may have an interest in the hearing and should, thus, receive notice of an opportunity to be heard.

V. DUE PROCESS GROUNDS OF IBM'S PROTEST DATED SEPTEMBER 4

Two grounds of protest listed in IBM's letter of September 4, 1986, are allegations of due process violations by the CPO, items 9 and 11.

Item 9 is an allegation of a lack of due process in having the CPO participate in the award of the contract and then judge whether it was properly awarded. This has been determined conclusively against IBM's position by the U.S. Supreme Court and the S.C. Supreme Court in Withrow v. Larkin, 421 U.S. 35 (1975); Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976) and Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 542, 340 S.E. 2d 144 (1986). In these cases, it has been held that a school board acting as a quasi-judicial body under state law to review its own decision to dismiss a teacher does not violate the due process rights of the teacher. As in the process under challenge herein, there are subsequent levels of review to protect any alleged infringement of the teacher's rights or, herein, the protestant's rights.

As to item 9, the Panel rules as a matter of law that no due process rights of IBM have been impaired in following the procedure set out in the Code wherein the CPO first reviews the award of the contract.

Item 11 of IBM's letter of September 4 asserts that the CPO exceeded his authority in concluding that IBM was

nonresponsive in its bid. It appears from the order that the CPO ruled on an oral motion by NAS, examining only the bid documents and refusing testimony. The Panel rules, as a matter of law, that acceptance of oral motions to protest a bid after the time to protest has run is in excess of the CPO's authority. NAS knew, or should have known, the circumstances of the IBM bid when the intent to award was published on August 5, 1986. It cannot on August 25, 1986, protest that this bid is nonresponsive. Therefore, the Panel rules as a matter of law that the CPO's determination in his order of August 29, 1986, that IBM is a nonresponsive bidder is vacated as in excess of the CPO's authority because it violates § 11-35-4210.

DETERMINATION OF THE EVIDENCE BEFORE THE PANEL

I. EQUIVALENCE OF THE XL-60 AND THE 5880

The Panel requested, and all parties consented, that the hearing would be bifurcated. The Panel would first hear and determine the question of whether Amdahl was correct in its assertion that the Amdahl 5880 computer with the high speed floating point (5880/HSFP) is substantially equal to the NAS XL-60 computer configuration listed in the bid. Amdahl presented three witnesses on this point: Vaughn Wahl, the Account Executive who handles the Clemson account; Eddie Wachter, an Amdahl manager in charge of marketing support in the area of which Clemson is a part; and Dick Schardt, a manager for IBM who performs performance analyses on IBM

machines and on the machines of IBM's competitors. At the close of Amdahl's presentation, the Panel took the evidence as on a summary judgment motion to rule whether Amdahl has carried its burden of proof to show that the XL-60 configuration is equaled by the Amdahl 5880/HSFP.

Summary of the Testimony of Wahl

Mr. Wahl is the Amdahl employee who made personal contact with Clemson, the purchaser of this mainframe computer (CPU), and the state through ITMO. As early as April, 1986, he was in contact with personnel at one or both of these agencies to understand the needs of the Clemson environment and to prepare his bid. In his words, "Clemson was looking for a 3090-class machine." He testified at length about Clemson's need to buy computer capacity to sustain at least a 10% growth level for each of the five years of the contract. There was also some discussion of capacity to sustain a 19% per year growth level. At the 19% rate, the computer capacity would have to be doubled in four years and increased by a factor of 2.5 for the fifth year. According to Wahl's testimony at a meeting in June, 1986, Clemson reduced its growth estimate to 10% a year for the five years of the contract.

As a result of the discussions on growth and the relative uncertainty of the growth projections, Mr. Wahl submitted two of his four bid submissions (both for 5880/HSFP) with a guaranteed upgrade option. Such an offer to upgrade was not a

requirement of the bid documents. The offer was to replace the 5880/HSFP with a 5890-300 for 2.4 million dollars. The 5890-300 is a "detuned" 5890-200, meaning it is slower in performance than the -200. The -200 was the requested configuration in the IFB.

In these discussions, prior to the publication of the IFB, all vendors took the opportunity to investigate Clemson's needs and its computing environment. Wahl was apparently successful in persuading Clemson and ITMO that the integrated vector processor was an unnecessary item for Clemson. The item was not a requirement in the final specifications. Had it remained in the IFB, no Amdahl machine could have been bid because none have that function. Wahl also requested that Clemson use a performance benchmark to determine the function and performance of the computer purchased. Of the three configurations listed in the bid, only the IBM 3090-200 had been in multiple production environments at the time the IFB was issued. The Amdahl 5890-200 will not be delivered until the first quarter of 1987. The NAS XL-60 has only recently been placed in a production environment.

No performance benchmark was placed in the IFB. Clemson could not have run benchmarks until its machine was in place except by obtaining access to another owner's computer of the same type. At the time the bid was let, none of the Amdahl or NAS machines were available for benchmarking. Clemson chose to rely on the function and performance ratings published for

these computer configurations in the trade magazines. Mr. Wahl agreed that there is no bias in relying on industry reports to determine machine performance. However, he stated his belief that reports of XL-60 performance are wrong. Clemson chose to rely on the published MIPS ratings for the configurations. MIPS is a measure of speed and capacity. The acronym stands for million instructions per second. It is a measure of how many tasks per second a computer can perform.

Wahl also attempted after the IFB was published to have it amended to include the 5880/HSFP configuration as an alternative. He was unsuccessful in seeking an amendment but determined to his satisfaction after conversations with employees of ITMO, Harold Stewart and Jim Clark, that he could submit a bid for that configuration if he wished, bearing the burden of proof to show his conclusion was correct as to the equivalency of the 5880/HSFP. He based his conclusion on his conversation with Stewart and Clark concerning the MIPS rating of the machines. The 5880/HSFP is in the same MIPS range as the three listed configurations. The 5880/HSFP is a 5880 modified with a high speed floating point for greater speed on scientific programs. Scientific programs and research are rated as one-third of the Clemson computer usage. The HSFP is, thus, an enhancement to the CPU for speed of functioning.

In discussing the function and performance of the XL-60 and the 5880/HSFP, Wahl testified that incremental processing power cannot be added to the 5880/HSFP, but can be added to the

XL-60. The 5880/HSFP is enhanced and expanded to its limits. It cannot be enhanced to handle a 19% growth rate. Its MIPS rating, a measure of capacity, cannot be increased further. The three CPU configurations listed in the IFB are expandable and upgradable beyond the specifications set in the IFB as minimums: 192 megabytes of expanded storage and 48 channels. The 5880/HSFP is, however, expandable to the level set in the bid specifications. Wahl further testified that in the industry press of which he was aware the IBM 3090-200, the Amdahl 5890-200 and the NAS XL-60 are compared as the latest technology of the three competitors. Both the industry and the manufacturers invite comparison among these machines. He further testified that the 5880/HSFP is not in the 3090 class and is not considered so by the industry.

Summary of the Testimony of Eddie Wachter

Mr. Wachter had no direct contact with the State during this procurement. He testified on the technical aspects of the computer configurations. In his opinion, the 5880/HSFP is the "latest technology" (a phrase from the IFB) because it uses the same type of technology, "ECL" as the listed configurations. He concludes that the 5880/HSFP is equal to the NAS XL-60 in function and performance. The 5880/HSFP is not equal to the XL-60 in expandability and upgradability. Expandability is the adding of features and functions. Upgrading is the addition of processing units. Under his interpretation, the IFB did not

require expandability and upgradability. He further testified that the 5880 and 5890 differ in their internal architecture though both are IBM compatible. Because of the differences, however, the 5880/HSFP is at the limit of its expansion and upgrade. The company has no plans to further enhance the 5880/HSFP. Because the 5880/HSFP can not be upgraded or enhanced except by replacement, he testified that the three configurations in the bid would be cheaper to an owner who projects growth in his needs. The XL-60 can be upgraded by adding hardware. Its switching time and gates per chip are appreciably higher than that of the 5880/HSFP and its main memory is 4 times larger.

Mr. Wachter testified that he had not done any performance measures comparing the NAS XL-60 to any of the Amdahl machines. He stated that he based his conclusion that the XL-60 is not equal to the Amdahl 5800/HSFP on reading the trade press and the documentation of vendors.

Under cross-examination, Wachter testified that the following features are the current or "latest technology" in computers: (1) the chip fabrication technique, ECL being most current; (2) the heat output, less heat output being more current; (3) power usage, less power usage being more current; (4) smaller size of CPU, by cubic measure the smaller is more current; (5) fewer component parts, the more current machines having more functions built in; (6) higher chip density; (7) greater main memory; (8) greater number of data paths; (9)

weight, lighter being more current; (10) improvements in high speed buffer; (11) the quicker switching speeds; and (12) the number of gates per chip, higher being more current. In all these measures, he testified that the 5890 was more current than the 5880/HSFP.

Summary of the Testimony of Dick Schardt

Mr. Schardt is the manager of IBM's performance analysis center in Maryland. In September, 1986, he ran a series of performance tests on a machine, the M680 manufactured by Hitachi, modified as the XL-60. In his opinion, the machine he has in his possession is an XL-60. He compared its performance and functions to the IBM 3090-200. His tests showed the NAS XL-60 is equivalent in function to the IBM 3090 but 20% to 50% less in performance, a measure of speed, than the IBM 3090. He has made no measurement in MIPS of either computer. He has not tested a 5880/HSFP or an Amdahl 5890-200. The latter is still not available in production. In his opinion, the XL-60 will reach its maximum capacity in three years at Clemson with a 10% growth rate. He has not, however, visited Clemson, and did not testify to the baseline he set from which to measure the 10% increments.

FINDINGS OF FACT

1) The specifications solicited a 3090 class machine which was the "latest technology" of the company bidding.

Latest technology is determined by the following factors: Chip fabrication process, heat output of the processor, power usage, cubic size of the CPU, weight of the CPU, number of component parts, chip density, switching time, the gates per chip measure and the internal architecture of the machine.

2) Clemson needed an increase in computer capacity. It was attempting to plan for its growth over the life of the contract (5 years). It projects a 10% to 19% growth rate in computer usage. All bidders were aware of the growth projections of Clemson.

3) The configurations listed in the IFB were all the latest technology of their manufacturer. The configurations were equivalent in function. Function is a determination of the tasks the computer can do. All of the listed configurations can perform the functions required by Clemson. Each was expandable and each was upgradable.

4) Clemson chose to rely on publications of vendors and industry trade press to determine which CPU's could perform in the Clemson environment in light of their projected growth. Clemson further relied on this information to determine equivalency among vendor's machines. At the time the IFB was let, the Amdahl 5890 and NAS XL-60 were not available to Clemson for performance benchmarks.

5) The specifications listed in the IFB were minimums to be met for function and capacity. Thus, no machine for which these levels of function and capacity were maximums could meet the specifications.

6) Performance, a measure of speed, is not equal among the configurations in the IFB. No measure of speed is required in the IFB.

7) Industry sources compare the IBM 3090-200, the Amdahl 5890-200 and the NAS XL-60 as the latest technology of each manufacturer. These sources do not place the Amdahl 5880/HSFP in this category.

8) The Amdahl 5880/HSFP uses the latest in chip fabrication technology but its internal architecture is such that it has been expanded and upgraded to its limits. The internal architecture of the 5880/HSFP differs from the 5890-200. The manufacturer has no plans to further modify the 5880/HSFP. In all measures listed above in part 1, the 5880/HSFP is exceeded by the Amdahl 5890-200.

9) The NAS XL-60 uses the latest technology of its manufacturer and is expandable and upgradable in place without replacement. Expandability means features and functions can be added to the CPU. Upgrading means that additional processing capacity can be added to the CPU. The XL-60 exceeds the requirements of the specifications.

10) The Amdahl 5880/HSFP is expandable and upgradable only by means of replacement of the CPU. It can perform the functions required by Clemson. It cannot perform these functions at a 19% growth rate for the term of the contract. The 5880/HSFP cannot accept incremental processing power. The XL-60 can accept incremental processing power. The 5880/HSFP is at its maximum to meet the specifications.

CONCLUSIONS OF LAW

1) This bid was a brand name or equivalent bid. Therefore, Amdahl or any vendor could, at its discretion, bid any product it believed to be equivalent to one of the named configurations in the specifications. The specifications were minimum requirements.

2) Amdahl has not carried its burden of proof to convince the trier of fact that the 5880/HSFP is equivalent to the XL-60 in the Clemson environment where the level of growth is between 10 and 19% and the need for latest technology is required to provide for expandability and upgradability. The 5880/HSFP is at its maximum to meet the specifications while the XL-60 exceeds the specifications.

Therefore, the Panel rules against the protestant Amdahl that its bid on the 5880/HSFP is the lowest responsive bid and upholds the termination of ITMO that the bid of the 5880/HSFP is nonresponsive.

II. REVIEW OF THE NAS BID

The issues remaining after the determinations above focus on the responsiveness of the NAS bid and NAS's compliance with statutory provisions on the prohibition of gratuities. (Amdahl letter of 9/5/86, items 5, 6, 8; IBM letter of 9/4/86, items 4, 7; and IBM letter of 8/29/86) These may be summarized in detail based on argument of counsel as follows:

- (1) The NAS bid is alleged to be nonresponsive because
 - (a) it fails to comply with the requirement for 90%

of spare parts in the Greenville area;

(b) it fails to comply with the 48-hour installation requirement because the chiller has been installed;

(c) it fails to comply with the requirement to have 100% of the parts available within 24 hours;

(d) it fails to comply with the 7-year parts availability requirement;

(e) the NAS references were insufficient to allow ITMO to evaluate the XL-60 performance.

(2) It is alleged to violate the prohibition against gratuities because

(a) the chiller has been installed prior to signing a contract;

(b) addenda 1 to the bid is an inducement or offer for products without charge.

The testimony in this bifurcated proceeding was by consent of all parties considered cumulatively. The testimony of Amdahl's witnesses on October 6 and 7, 1986, was relied on in reaching these determinations. Further testimony was elicited on the remaining issues.

Summary of Testimony of Cary Smith

Cary Smith is the IBM branch manager in Columbia, South Carolina, and the senior state executive for IBM. He has

worked for IBM since 1966 and was for three years in charge of the Clemson account. He has some experience in performance measurement of computers. In his opinion, the NAS bid is unresponsive because: the NAS equipment has not been in a production environment for long enough to evaluate its performance and reliability; its references were insufficient to determine performance and reliability; the statement that a spares kit would be available does not in his opinion equal 90% of parts; and the addenda was an unsolicited offer from NAS.

The references were requested to be in the United States. NAS listed only three, one of which was in Australia, one of which had not been shipped at the time the IFB was let, and one of which had been in production only two weeks at the time of bid opening. The ITMO Manual for High Tech Acquisition, in his opinion, requires that a system be installed and working 90% of the time for 30 days before it is "accepted." Further, of NAS references only Grumman was using the MVS/XA, an IBM software system which Clemson uses and which is specified in the bid for use. However, he agreed that no number of references, period of installation or type of facility for references was specified in the IFB.

As to the equivalence of the spares kit to 90% of the parts, Mr. Smith testified he had never examined a NAS spares kit. He believed it wasn't 90%, because the NAS bid didn't say it was.

The addenda of NAS, he testified, implied an agreement between NAS and Clemson on workload. However, the current

Clemson computer is an IBM 3081K, and IBM has complete access to current and historical data on Clemson's workload. He further testified, corroborating Mr. Wahl, that all parties visited Clemson for discussions on workload and projected workload.

He also testified that the NAS bid was ambiguous, in his opinion, concerning the installation of the CPU and the chiller within 48 hours. The NAS bid references only the CPU as within the 48 hours.

Summary of Testimony of Tony DePuma

Mr. DePuma is the district manager for Amdahl in the southeast. He did not testify to any direct involvement in the Clemson bid. He testified that, in his opinion, the NAS responses on parts and installation were modifications of the bid specifications and were not in compliance. However, he has not examined a NAS spares kit. He testified that Amdahl intended to install the same chiller as NAS and would have done it in the same 48-hour period in which it installed the CPU.

Amdahl did not bid an upgrade on its 5890 series, he stated, because it was not requested. However, the list price for the upgrade of the 5890-200 is \$675,000. In contrast, the list for the NAS upgrade of the XL-60 is \$2.9 million.

Summary of Recall of Eddie Wachter

Mr. Wachter was recalled to testify as to various workload projections and the capacity of the IFB configuration of NAS and Amdahl. Using the 15 MIPS capacity of the 3081K which Clemson now has as its baseline, he projected the capacity of the machines at 10%, 14.5% and 19% annual growth rates. For the MIPS capacity of the machines he relied on trade publications. By his calculations, none of the configurations would carry a 19% or 14.5% growth for the five years of the contract, and at 10% growth, all would. He stated that at 10% after five years the XL-60 would be at capacity and the 5890-200 would have remaining capacity.

Summary of Testimony of James Hopkins

Mr. Hopkins has, since 1978, been the administrator for data processing at Clemson. With regard to this bid, Hopkins was the person designated for consultation on the environmental aspects of the computer purchase. He was contacted on August 6 by Tom Collins, a representative of NAS, who inquired whether there would be any objection to the installation of the chiller and what the most convenient date would be for installation of the CPU. This was the day after ITMO issued a notice of intent to award. He stated that installation of the CPU for the last week in August would be the most convenient date for Clemson based on their computer usage. NAS had offered September 28 in its bid. Clemson took the position that, within the stated parameters, the installation date was

negotiable. However, the installation date and the chiller installation had to be authorized by ITMO.

ITMO authorized the chiller installation with the understanding that all risk to the chiller remained on NAS. Hopkins believes that the contractor has not yet been paid by NAS. The chiller has, however, been installed except for the electrical input, which is to be secured from lines leading to the current computer. From Hopkins' viewpoint, the prior installation of the chiller is "insurance" that the CPU installation can be completed in 48 hours or less. The less down time of the system, the better for Clemson.

Hopkins testified he had never inventoried a NAS spares kit. However, he was satisfied that the NAS bid was responsive. He has been assured by NAS that the kit has 90% of the parts.

As to the addendum, Hopkins is not aware of any agreement between Clemson and NAS. He believes that this refers to a future agreement.

Summary of Testimony of Jim Clark

Jim Clark has been a technical analyst with ITMO for approximately three years. He was in computer maintenance before with Wang, NAS and IBM. On this procurement he, under the supervision of Harold Stewart, was the chief analyst. He prepared the IFB, received, opened, compared and recalculated the bids. He checked the bids and contacted the reference accounts. He was able to reach only Grumman of the NAS

references. At the time of his call, Grumman had been in production with the NAS computer for one month and had run MVS/XA for two weeks. Performance was satisfactory according to Grumman.

In reviewing the bids, he was satisfied that NAS was responsive on parts and installation. He interprets NAS's comments on parts as a reiteration of the guarantee. The early installation of the chiller was "insurance" of greater likelihood that Clemson would be "down" only 48 hours or less. To install the chiller to the extent it is now does not require taking Clemson down. Reducing "down" time is beneficial to Clemson, in his opinion. Further, there is only 4 to 6 hours for installation after removal of the machine now in place. The chiller installation gives a margin of error for the CPU installation. He first knew of the possibility of early installation of the chiller by a call from Hopkins. He referred the question of early chiller delivery to Stewart who approved it if done at no risk to Clemson. He did not understand that it was not to be installed, only delivered.

Clark evaluated the bids for award along with three persons from Clemson. He did not include addendum 1 in his evaluation of bids. His contacts in evaluating the performance of the XL-60 were NAS employees and the inquiry at Grumman. However, he has never seen an XL-60 and does not personally know the contents of their spares kit.

In Clark's opinion, the NAS bid is the lowest responsive and responsible bid. If NAS later fails to comply with the bid

specifications, then Clemson can take action to enforce the contract. From his perspective, unless a bidder makes a specific exception to a bid requirement, the signature on the bid binds the bidder to the conditions set forth in the bid.

In response to questions concerning the ITMO high tech acquisition manual, Clark explained it is a teaching tool, not a manual for procurement. He used nothing from the manual in preparing the bid. ITMO has a procurement manual of standard contract paragraphs which is continually updated in consultation with the Attorney General. This was the source of the IFB language.

Summary of Testimony of Michael Guirilli

Mr. Guirilli is the district manager for NAS. He has been employed by NAS for eleven years and was previously employed by IBM. He prepared the NAS bid for this IFB. He wrote the NAS response to parts availability. He did not intend to modify the parts requirement of the IFB and does not believe his response does so.

The NAS response to the installation requirement and the installation of the chiller were not intended to modify the 48-hour requirement for installation. The delivery and partial installation of the chiller were done to increase the likelihood that the Clemson CPU would be down less than 48 hours. The chiller has been delivered and partially installed at NAS's risk. The environmental equipment was bid in the

dollar figure quoted on the bid sheets. It is necessary to the function of the CPU. He understands his 48-hour installation commitment to be a limit on the down time of the Clemson computer.

Addendum 1 is the NAS response to the written inquiries of the other vendors. Pursuant to rules and statutes, the communication between vendors and the state subsequent to publication of the IFB must be written and must be distributed to all vendors. He did not understand this offer to be an attempt to modify the bid requirements. He understood it as an offer in reply to questions of other vendors concerning the needs of Clemson. He testified there is no extra agreement between NAS and Clemson. This is an offer to work out in advance a contingency plan to cover Clemson if the growth estimates are too conservative.

The NAS spares kit is a standard item, he testified. It contains almost a whole new computer. It is a composite of spares for a particular machine. In his opinion, the NAS XL-60 will fulfill Clemson's computer needs for the term of the contract. NAS' bid is low because it wants the contract, and it will comply with all requirements at the price offered.

Summary of Testimony of Harold Stewart

Mr. Stewart is the CPO for ITMO. Collins of NAS contacted him for permission to deliver the chiller on August 7 or 8. He gave three people his permission to deliver the chiller, if done at no risk to Clemson: Jim Clark, Jim Hopkins

and Tom Collins. Collins called him after Hopkins informed Collins it would require ITMO's consent to deliver the chiller at that time.

FINDINGS OF FACT

(1) Clemson evaluated the three listed computer configurations based on industry publications. At the time the IFB was being prepared, only the IBM configuration was in a production environment. If ITMO and Clemson had required of bidders what IBM now argues for as appropriate evaluation tools, only IBM would have been able to bid. The proposed IBM requirements -- 30 days in production environment, benchmarks, three or more references, would freeze out all but IBM.

(2) Clemson solicited bids on the latest technology in terms of function. Its specifications were minimums to be offered. The configurations vary in speed or performance but all can perform Clemson's required functions.

(3) Based on NAS's testimony under oath, all of its responses on the bid documents are deemed to be explanations of, and not limitations on, its performance under the contract. It has stated an inclusive price for all parts, maintenance, warranties and equipment requested by the IFB. It has bound itself to perform the removal of Clemson's current computer and the installation of the NAS computer within a 48-hour period of "down time" for Clemson. It has bound itself to maintain an inventory of 90% of the parts in the Greenville

area and to provide 100% replacement within 24 hours. It has bound itself to provide 24-hour maintenance and to maintain parts availability for seven years. It has bound itself to provide maintenance, without additional charge to those stated in the IFB for labor, parts, or other costs for a period of five years after installation. It has bound itself to perform these requirements at the price stated in the bid and without increase.

(4) The cost of the installation of the chiller is included in the bid price. Addendum 1 is an offer to negotiate for further equipment at a future date. It was not considered in ITMO's evaluation of the bids.

(5) The NAS XL-60 will provide capacity for Clemson's computer needs for five years at a 10% annual growth rate. None of the configurations could carry a 19% annual growth rate without additional processor capacity.

(6) Clemson and ITMO were contacted by NAS subsequent to the notice of intent to award was published and prior to the signing of a contract for the installation of the CPU. The IFB prohibits contact between vendor and vendee prior to finality of award. NAS sought permission to deliver the chiller which was given by ITMO. ITMO required assurance that the delivery was at no risk to Clemson. NAS sought information on what was the preferred installation date for Clemson. The date given was the last weekend in August. NAS had offered September 28 in its bid.

(7) Installation of the chiller prior to the CPU gives Clemson a higher likelihood that the installation will be

completed in 48 hours. It reduces the likelihood that NAS will fail to comply with this requirement.

(8) Purchase of high tech equipment without performance testing involves risk to the buyer. However, where the purchase involves the newest products, such testing was an impossibility for certain of the vendors, and testing would have reduced competition and thereby increased the price to the State.

CONCLUSIONS OF LAW

(1) The NAS bid is the lowest responsive and responsible bid.

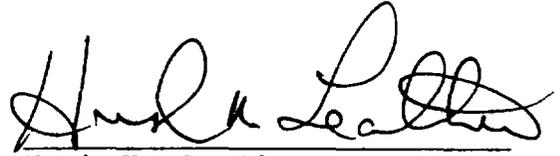
(2) NAS will be contractually bound to provide maintenance without additional charge to those stated in the IFB for labor, parts or other costs for a period of five years from the date of installation of the CPU.

(3) When ITMO issues a Notice of Intent to Award there has been a meeting of the minds and the terms of the contract have been determined. Only signature on a document remains to make the contract enforceable against the state. Offer and acceptance have been completed and only payment and performance remain. No material terms of the contract can be varied after the notice of intent to award. Thus, the purpose served by the prohibition on communication has been fulfilled and there is no continuing need to prohibit communication further between vendor and vendee.

(4) NAS has not offered any gratuities inducing the award of this bid.

Therefore, ITMO's notice of intent to award to NAS is final and a contract should be awarded to NAS.

IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "Hugh K. Leatherman". The signature is written in black ink on a white background.

Hugh K. Leatherman

November 6th, 1986