

reload and restart were completed at 4:50 P.M. and the EBT system resumed processing benefit transactions at this time. At approximately 7:00 P.M. on August 8, Mr. Andrew Calsmer, the Citibank Project Manager for the SC EBT system, called Ms. Robin Verenes, the DSS representative, and informed her that Citibank planned to shut the system down at 2:00 A.M. on August 9. Ms. Verenes informed Mr. Calsmer that she would need to check with her technical staff to ensure that the downtime would not interfere with the batch processing of their files. Ms. Verenes called Mr. Calsmer back approximately twenty minutes later and informed him that he could proceed. After a conversation between Ed Koslow, Citibank's EBT services manager, and Mike Hopkins, DSS' technical representative, Citibank moved the downtime from 2:00 A.M. to 1:00 A.M. at DSS' request in order to work around DSS' batch processing schedule. Citibank proceeded to shut the system down between the hours of 1:08 A.M. and 3:44 A.M. EST for a total of 156 minutes to upgrade the security package associated with the EBT system. Under the contract between Citibank and DSS, Citibank is required to pay liquidated damages to DSS for any unscheduled downtime of the EBT system. At the hearing, Citibank stipulated that the August 8, 1996, outage was unscheduled downtime and was prepared to remit the liquidated damages owed in the amount of \$40,000. Citibank claims, however, that the August 9, 1996, downtime was scheduled and is therefore not subject to the liquidated damages clause. DSS claims that the August 9th outage was also unscheduled downtime and that Citibank owes an additional \$307,000 in liquidated damages. The only issue before the Panel is whether the downtime on August 9, 1996, was

scheduled or unscheduled downtime under the terms of the contract between Citibank and DSS.

CONCLUSIONS OF LAW

The contract agreement between Citibank and DSS comprises the Agreement document, any amendments thereto, the Request for Proposals (RFP), the negotiations document, and the Questions and Answers (Q&A). Under the contract, Citibank is allowed scheduled downtime for routine maintenance during non-peak transaction periods pursuant to the following provisions:

The EBT system shall provide access to client benefits 24 hours per day, 7 days per week....Any routine maintenance on all EBT system components shall be scheduled between the hours of 1:00 A.M. and 6:00 A.M. § 4.6.3.47.1. [Record p. 243]

The EBT system central computer shall be available 99.9 percent of scheduled up-time, 24 hours a day, seven days per week. Scheduled up-time shall mean the time the database is available for transactions excluding scheduled downtime for routine maintenance....Scheduled downtime for routine maintenance shall occur during non-peak transaction periods. § 4.6.3.52.2.1 [Record p. 246]

The following question and response from the Q&A portion of the RFP is also relevant:

- Q. Will the state require that the contractor give at least authorizations when the system is down for scheduled down time?
- R. The Offeror is advised that the EBT system shall provide access to client benefits 24 hours per day, 7 days per week. When it is necessary to perform system maintenance, the Contractor shall provide backup procedures to continue to authorize transactions. The Offeror shall propose these procedures. [Record p.306]

It is undisputed that the August 8th outage was unscheduled because it was not between the hours of 1:00 A.M. and 6:00 A.M., it was not for routine

maintenance, and backup procedures were not in place at the time the system went down. Citibank claims, however, that the August 9th downtime was scheduled downtime because it complied with all the requirements of the contract relating to scheduled downtime. Citibank argues that the downtime was (1) between the hours of 1 A.M. and 6 A.M., (2) was for routine maintenance, and (3) it provided for backup procedures. DSS contends that the August 9th downtime was unscheduled, however, because Citibank did not obtain its approval to shut the system down and it therefore owes DSS an additional \$307,000 in liquidated damages. The liquidated damages clause provides for penalties according to the following schedule:

The maximum acceptable level of unscheduled downtime for the system is 1%. (With the system accessible to the clients for 168 hours per week, the maximum allowable downtime is 100 minutes per week). The maximum unscheduled downtime during one episode before backup systems must be put into effect is 30 minutes. Failure to meet these requirements shall result in the following penalties:

100-120 minutes	\$1,000 per each minute over 100
120-140 minutes	\$1,500 per each minute over 120
Over 140 minutes	\$2,000 per each minute over 140

Occurrences per week for each downtime of 30 minutes or longer:

1 st occurrence	\$ 5,000
2 nd occurrence	\$10,000
3 rd occurrence	\$15,000 [Record p. 217]

In support of its claim that Citibank owes liquidated damages for the August 9th downtime, DSS points to the course of dealing between the parties. DSS argues that for scheduled outages, Citibank's practice was to obtain its consent and approval by sending letters requesting downtime which had a line for DSS' signature. The letters, found on pages 68-75 of the Record, were sent anywhere

from twenty four hours to one month in advance of the downtime. DSS argues that the letters established a course of dealing between the parties to which Citibank must now adhere. It claims the August 8th telephone call was not sufficient to obtain its consent and approval. Citibank argues that nothing in the contract requires it to give notice by letter to DSS for scheduled downtime. The Agreement document between Citibank and DSS contains the following integration clause:

This agreement, as stated above, is the entire agreement between the parties with respect to the furnishing of the products and services hereunder and supersedes all prior agreements, proposals, or understandings either written or oral. The terms and conditions of this Agreement shall prevail notwithstanding any variance in the terms and conditions of any purchase or change orders submitted by the STATE to CONTRACTOR. [Record p. 61].

On examination of the agreement between Citibank and DSS, the Panel finds no clause in the contract requiring Citibank to provide notice by letter to DSS for scheduled outages. The Panel must interpret the contract as written and finds Citibank complied with the terms of the contract governing scheduled downtime. The outage was between the hours of 1:00 A.M. and 6:00 A.M., it was for routine maintenance, and prior to the commencement of the outage, both the State and the high volume retail chains were notified and backup procedures were put in place. On the issue of whether DSS' consent was obtained, the Panel is convinced by the testimony at the hearing that Citibank obtained the consent of DSS to proceed with the downtime by telephone on August 8. The Panel is also convinced that had Citibank not obtained DSS' consent on August 8th, it would not have proceeded to shut the system down on August 9th.

For the foregoing reasons, the Panel finds that the August 9, 1996, downtime of the EBT system was scheduled downtime under the terms of the contract and is not subject to the penalties under the liquidated damages clause.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: Gus J. Roberts (by Sue C. Anderson)
Gus J. Roberts, Chairman

Columbia, South Carolina

November 18, 1997