

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In Re: Data Recognition Corporation

CASE NO. 2015-210

Protest of Intent to Award to ACT, Inc. for
Statewide Education Assessment – Grades
3-11, Solicitation No. 5400008105

POSTING DATE: December 18, 2014
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The South Carolina Consolidated Procurement Code (the Code) grants any actual bidder the right to protest the award or intended award of a contract, except that a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This Request for Proposals was issued by the Information Technology Management Office (ITMO) on behalf of the South Carolina Department of Education (DOE) for Statewide Education Assessment – Grades 3-11. Data Recognition Corporation (DRC) protests the intended award of a contract to ACT, Inc. (ACT) on September 29, 2014 [Attachment 1] and amended its protest on October 6, 2014 [Attachment 2]. The Chief Procurement Officer held a hearing to address this matter on October 23, 2014. Present at the hearing were representatives from DRC represented by E. Wade Mullins, III, Esquire, and Jennifer Eastman, Esquire; ACT, represented by David Summers, Esquire and Faye Flowers, Esquire; DOE, represented by Shelly Kelly, Esquire; and ITMO represented by Keith McCook, Esquire and David Avant, Esquire.

Findings of Fact

Invitation For Bids Published	06/30/2014
Amendment 1 Issued	07/17/2014
Proposals Opened	08/11/2014
Permission Granted to Conduct Discussions	08/12/2014
Panel Charging	08/14/2014
Scoring and Final Ranking	08/21/2014
“Points Needing Clarification”	08/25/2014
ACT’s Response to Points	08/26/2014
Record of Negotiation Signed	09/19/2014
Intent to Award Posted	09/19/2014
Initial Protest Letter	09/29/2014
Intent to Award Suspended	09/30/2014
Amended Protest	10/06/2014

Background

In response to legislation enacted in spring 2014 (Acts 155 and 200) ITMO¹ issued this Request for Proposals to procure summative assessment(s) of English/language arts (English, reading, and writing skills) and mathematics that measure each student's progress toward college and career readiness for students in grades three through eight beginning in spring 2015. If funds are available, the assessment will be administered to students in grades 9 and 10. The state also sought a college and career readiness assessment in grade 11. The assessment(s) administered in spring 2015 must be aligned to the current state standards (the Common Core State Standards or CCSS). New college and career readiness standards are to be adopted by early 2015; therefore the assessment(s) for 2016 and beyond must be updated to align to these new standards. The assessments are to be administered to students in a paper-based format in 2014-2015, in both a paper-based format or computer-based format in 2015-2016, and in a computer-based format only by school year 2016-2017. Only two proposals were received: one from ACT and one from DRC. ACT's proposal was determined to be the most advantageous to the State and an Intent to Award was issued on September 19, 2014.

DRC filed a timely protest and timely amended its protest alleging many discrete grounds. First, DRC claims that ACT's proposal was non responsive to fifteen (15) material and essential requirements of the solicitation (a through o) at the time of final ranking, in violation of the Code. Second, DRC contends ITMO submitted a non-responsive offer to the evaluation committee for evaluation; then improperly used the clarification, discussion, and negotiation provisions of the Code to fix the error. Third, DRC protests the evaluation committee's scoring, alleging its consideration of a non-responsive proposal was arbitrary and capricious; that it did not follow the published award criteria by considering the inclusion of ACT's science assessment, and that one evaluator had a disqualifying conflict of interest. Fourth, DRC alleges a material misrepresentation made in bad faith by ACT. Finally, DRC alleges that negotiations with ACT were improper. During the hearing, DRC withdrew non-responsiveness issues k, n, and o, and the allegation of misrepresentation.

¹ In Act 200, the General Assembly charged the Executive Director of the South Carolina Budget and Control Board with conducting the procurement with the advice and consent of a "Special Assessments Panel," of which the Department of Education was a member. The legislation otherwise removed the Department from the procurement process and provided that its involvement as using agency began once a contract was awarded. On its face, though, the RFP identified the Department as the "using governmental unit." The precise role ITMO played—whether it acted on behalf of the Department, or the Office of the Executive Director—is not relevant to the issues raised in this protest.

Discussions in Competitive Sealed Proposals

This Request for Proposals was issued under Section 11-35-1530 and Budget and Control Board Regulation 19-445.2095. In competitive sealed proposals, only proposals from responsive offerors are evaluated, ranked, and considered for award. The Procurement Code provides:

Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals.

S.C. Code Ann. § 11-35-1530(7) (2011). The Code defines a “responsive offeror” as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” S.C. Code Ann. § 11-35-1410(7) (2011). Responsiveness is determined at the time an offer is opened, and, unless discussions are conducted under § 11-35-1530(6), is based on the information included in the proposal. *Appeal by Excent Corporation*, Panel Case No. 2013-2; *Appeal by Heritage Community Services*, Panel Case No. 2013-1.

Regulation 19-445.2095(E) makes applicable to competitive sealed proposals the provisions of §§ 11-35-1520(8) and (13). The former section allows limited communications with “apparent responsive bidders.” The latter provides for the correction- or waiver of “minor informalities and irregularities in bids:”

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

§ 11-35-1520(13). Discussions under § 11-35-1520(8) are limited to persons whose offers “obviously conform[] in all material aspects to the solicitation.” Reg. 19-445.2080. They can only be used to resolve ambiguities in an offer that has been determined to be responsive, or to provide an opportunity to cure or waive minor informalities under § 11-35-1520(13).

The Procurement Review Panel has recognized the Code affords additional flexibility to requests for proposals:

The current statutory and regulatory scheme governing competitive sealed proposals expressly allows discussions with offerors “for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.” S.C. Code Ann. § 11-35-1530(6)....

Appeal by Qualis Health, Panel Case No. 2010-4, note 8 (emphasis added). In other words, discussions under § 11-35-1530(6)—unlike those conducted pursuant to § 11-35-1520(8)—may be used to cure issues of non-responsiveness.

There are limits to this flexibility. First, discussions may only be conducted if authorized by the chief procurement officer, Reg. 19-445.2095(I)(4), and only if the solicitation documents alert offerors to the possibility of discussions, Reg. 19-445.2095(I)(3).

Second, discussions may only be conducted with “offerors who submit proposals determined to be reasonably susceptible of being selected for award,” § 11-35-1530(6). Regulation 19-445.2095(I)(1) requires, for purposes of conducting discussions, that the procurement officer classify each proposal in writing as:

- (a) acceptable (i.e., reasonably susceptible of being selected for award);
- (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
- (c) unacceptable.

Third, all offerors whose proposals are classified as acceptable or potentially acceptable must be treated fairly and equally. Reg. 19-445.2095(I)(3). For each such offeror, the procurement officer must:

- (a) Control all exchanges;
- (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;
- (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
- (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror’s attention.
- (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

Reg. 19-445.2095(I)(2).

Finally, since only responsive proposals can be ranked, discussions “to assure...responsiveness to the solicitation requirements” must occur *prior to* final ranking.² “[O]nce the proposals have been evaluated and ranked, it is too late for such clarification, and allowing it after those stages would be unfair to the other offerors.” *Qualis Health, ante*, Panel Case No. 2010-4, note 8. This timing is critical.

² Discussions to assure responsiveness may be conducted after final ranking where they are directed at responsiveness of “best and final offers” submitted pursuant to 11-35-1530(8)(c), but those discussions must occur prior to final ranking of the best and final offers.

Responsiveness insures comparability. That is, it allows the State to compare offers fairly. If an offer is not responsive, it does not meet the State's requirements and it cannot be compared with the criteria in the solicitation or to other offers. If the State cannot compare, there is no meaningful competition. And without competition there is no way to determine if the State is accepting the most advantageous offer. Responsiveness is the baseline. By evaluating only responsive offers, the State can be sure it is fairly comparing proposals, each of which meets its mandatory and essential requirements.

While Regulation 19-445.2095(I)(3) states that "Ordinarily, discussions are conducted prior to final ranking," only responsive offers are evaluated and ranked which precludes any post-final-ranking discussions to correct issues of responsiveness. Generally, communications after final ranking are limited to clarifying the language of the highest ranked offer or negotiations. Section 11-35-1530(8) authorizes the procurement officer, after final ranking, to "negotiate with...offeror[s] on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both."

These sections of the Code and Regulations taken together create a labyrinth for procurement managers to navigate to assist offerors in preparing clear, concise and responsive proposals and to minimize ambiguities and misinterpretations in the resulting contracts. Assuming the solicitation includes language allowing discussions, and the chief procurement officer's authorization, a buyer may steer the following course after opening competitive sealed proposals:

- Review offers for conformity to the material and essential requirements of the RFP
- Conduct discussions with apparent responsive offerors pursuant to § 11-35-1520(8)
- Cure or waive minor informalities or irregularities under Section 11-35-1520(13)
- Classify proposals in writing as acceptable, potentially acceptable, or unacceptable
- Conduct discussions with all offerors whose proposals are classified as acceptable or potentially acceptable, pursuant to § 11-35-1530(6) and Reg. 19-45-2095(I)
- Submit responsive proposals to the evaluation panel for scoring according to the criteria in the RFP³
- Rank all responsive offers
- Clarify language in the highest ranked offer
- Negotiate with the highest ranked and other offerors

³ The procurement officer may conduct additional discussions, prior to final ranking, to resolve any concerns over responsiveness raised by an evaluator.

- Determine responsibility
- Award to the responsible offeror whose proposal is most advantageous to the State
- Document for the contract file the basis on which the award was made

In South Carolina public procurement the Request for Proposals establishes the State's requirements. To be responsive, an offer must conform in all material aspects to the mandatory provisions of the RFP. Stated differently, an offeror must agree to perform all the mandatory and essential obligations of the contract.

Procurement Services Division and most State agencies issue solicitations through SCEIS, the State's enterprise information system. SCEIS generates documents based on a uniform solicitation format, or USF. Part III of a USF solicitation is titled "Scope of Work/Specifications." This section should identify all performance requirements of the contract to be awarded, and contain all the State's mandatory and essential requirements. A bidder's objection to, or qualification of its acceptance of, a Part III, material and essential requirement will usually make its offer non-responsive. If, after award, a contractor fails without excuse to provide a requirement of Section III it will be in breach of the contract. Part IV of the USF is titled "Information for Offerors to Submit." In an RFP, Part IV should be drafted to provide vendors with a structure or outline within which they can explain how they would comply with the Scope of Work and Specifications. An offeror's failure to provide information requested in Part IV may affect its score, but it should not result in rejection of its offer as non-responsive.

Unfortunately, the distinction between Parts III and IV is not always so clear in practice. Items in Part IV may be stated in mandatory terms. Sometimes performance requirements migrate from Part III to Part IV, creating exceptions to the general rule that failing to comply with a Part IV "requirement" should affect only the scoring of a proposal. Vendors often confuse the two parts: a disappointed bidder may complain that its rival's incomplete or missing response to a "mandatory" Part IV item is a matter of responsiveness.

On the other hand, Part III performance requirements are nearly always written using "shall," "must," and "require." However, stating a solicitation specification in mandatory terms does not necessarily create a material or essential requirement:

In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP....[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being

procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

In re: Protest of National Computer Systems, Inc., Panel Case No. 1989-13.

Part VI of the RFP, “Award Criteria,” sets forth the factors used to evaluate each proposal. The evaluation criteria are designed to provide the evaluators with a baseline, established by the material and essential requirements listed in the solicitation, against which to compare the offerors proposals and determine which is most advantageous to the State. All proposals are evaluated against this same baseline and necessarily against each other.⁴ Regulation 19-445.2095(I)(2)(b) allows for modification of an offeror’s proposal to bring it into compliance with the material and essential requirements listed in the solicitation. Discussions under the regulation to assure responsiveness necessarily result in material changes--those having more than a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. A material change to a proposal after it has been evaluated and scored changes the proposal’s relationship to the material and essential requirements of the solicitation. It invalidates the evaluators’ scores for that proposal, since the evaluators did not consider the material change. It also calls into question the scores for any other proposals, since none was compared to the modified response. When a material change — one affecting responsiveness — is made to a proposal after scoring, all proposals must be resubmitted to the evaluation panel for reconsideration.

Responsiveness

In this case, DRC alleges material changes were made to ACT’s proposal after scoring, but the evaluation panel was not reconvened to consider the impact of those changes with regard to the evaluation criteria or the other proposal. DRC’s entire protest hinges on its claims that the proposal ACT submitted was non-responsive. It relies in part on correspondence from the procurement officer, purporting to identify deficiencies in ACT’s proposal that would result in its rejection as non-responsive unless corrected. [Exhibit 7A, pages DRC0001, 002, 0029, and 0069] The procurement officer’s characterization of the proposal as non-responsive is not binding on the CPO, just as the CPO’s decision as to responsiveness receives no extraordinary deference from the Panel on appeal. *Appeal by Excent Corporation*, Panel Case No. 2013-2 (“In reviewing a proposal for responsiveness, the Panel conducts a *de novo* review.”) Accordingly, the CPO will examine each of the fifteen responsiveness grounds to determine first whether the requirement was material and, if so, whether ACT’s proposal was responsive to that material

⁴ See *In Re: Protest of Carter Goble Associates, Inc.*, Panel Case No. 1989-25.

requirement. *Appeal by Arkansas Foundation for Medical Care; Appeal by Keystone Peer Review Organization, Inc.*, Panel Cases Nos. 2011-6 and -7.

DRC's protest issue I(a) alleges that ACT included the development and assessment for science throughout its proposal in violation of the requirements of the Request for Proposals rendering its proposal non-responsive.

The solicitation states that:

The SCPASS science and social studies test and the EOCEP tests in Algebra 1/ Mathematics for the Technologies 2, English 1, Biology 1 / Applied Biology 2, and U.S. History and the Constitution will continue to be administered under existing contracts.

[Solicitation, Page 16]

On August 21, 2014, Mr. Jason Evans, the ITMO Procurement Manager, inquired about the science component and if it was integrated in the system or if it could be excluded. On the same day, ACT indicated that the science component could be excluded.

The solicitation sets forth the State's minimum requirements. There is nothing in the solicitation that prohibits an offeror from including additional assessments and any associated costs in its proposal. ACT knew the State would not include the science assessment in the award. Including the science assessment in its proposal did not violate any provision of the solicitation. This issue of protest is denied.⁵

DRC's protest issue I(b) alleges that "ACT failed to commit to providing test forms for year 2 and beyond in which 100% of the test items align to the new state standards" and "ACT's response regarding

⁵ In a further clarification on September 2, 2014, ACT stated:

Pricing for ACT Aspire includes access to the ACT Science assessment. While the state does not require the Science assessments, it would be advisable for the state or districts to offer the Science assessments for the following reasons:

- 1) Students taking the ACT must take the ACT Science exam in order to obtain a fully "college reportable" ACT composite score (the ACT Composite is the average of the ACT English, ACT Reading, ACT Math, and ACT Science exams). The ACT Writing exam is scored separately.
- 2) For students in grades 9 and 10 to obtain predicted ACT Composite Scores, students must take the ACT Aspire English, ACT Aspire Reading, ACT Aspire Math, and ACT Aspire Science exams.
- 3) In order for students in grades 3-10 to obtain STEM Readiness Scores, students need to take the ACT Aspire Math and ACT Aspire Science exams.

[Exhibit 7A, Page DRC0037] It is not clear why the procurement officer believed he needed to clarify the language of ACT's original proposal, since it was responsive to the RFP requirements. Since this exchange occurred after final ranking, it could only be negotiations, pursuant to § 11-35-1530(8); or a discussion not related to responsiveness, pursuant to either § 11-35-1520(8), or § 11-35-1530 and Reg. 19-445.2090(I).

updating assessments when the state standards change and the resulting costs was non-responsive and reflected an effort to modify an essential requirement of the RFP.”

DRC’s protest issue I(d) alleges that “ACT was non-responsive and sought to modify the essential requirements of the RFP in that it failed to properly complete and submit Attachments #2 and #3 of the Business Proposal.” Because these two grounds are closely related the CPO treats them together.

The State does not know to what extent, if any, standards will change after the current school year. Consequently, the RFP requested (i) a commitment by the offeror to align to future revisions in standards, and descriptive information about methodology the offeror proposed to align test items to any changes; and (ii) an estimate, for planning purposes, of anticipated cost changes associated with changes. Recognizing that neither the number nor the nature of changes is known, the State did not include an offeror’s estimated cost impact in its evaluation criteria.

The solicitation requirements are:

The assessments to be administered in 2015–16 must align to the revised state content standards while continuing to conform to the requirements of Acts 155 and 200 as listed above.

[Solicitation, Page 17]

3.0 Assessments

The Offeror must propose assessments for spring 2015 in which 100% of the items align to the CCSS in ELA (English, reading, and writing skills) and mathematics. The Offeror must commit to providing test forms for the remaining years in which 100% of the test items align to the new college and career readiness standards in ELA and mathematics state standards.

- **Note:** In 2010, South Carolina adopted the Common Core State Standards for English Language Arts/Literacy and for Mathematics. As of the release of this RFP, these standards were scheduled to be reviewed further by South Carolina’s stakeholders. The degree to which the standards, and by extension the assessments, will be adjusted is to be determined. South Carolina plans for the South Carolina Standards Assessments to be operational beginning in 2015-16.

[Solicitation, Page 22 (emphasis added)]

Section IV of the RFP, Information for Offerors to Submit, included the following:

Alignment to South Carolina Revised Content Standards for spring 2016

1. Describe the procedure(s) used to ensure item alignment with the revised standards.

[Solicitation, Page 43]

ACT’s response to this was:

ACT develops test forms to conform to carefully crafted test specifications. Once constructed, forms are reviewed by ACT staff and external content panelists. These panelists evaluate items for content accuracy and evaluate the test form for context appropriateness and representation. They also confirm that the form will collect the necessary evidence to support the intended inferences from scores. In order to provide the validity, reliability, and the empirical data for references related to accountability, ACT does not modify existing operational test forms with replacement items. ACT has successfully worked with several states using an augmented testing model to supplement ACT tests if needed.

[ACT Proposal, Pages 34-5 (emphasis added)]

Section IV also included the following:

Effects of Changing State Standards:

1. Describe the effect of changing the State standards to include the timeline and other factors. Offer should describe the effect of cost on the Business Proposal.

[Solicitation, Page 46]

ACT's proposal included the following corresponding response:

ACT develops test forms to conform to carefully crafted test specifications. Once constructed, forms are reviewed by ACT staff and external content panelists. These panelists evaluate items for content accuracy and evaluate the test form for context appropriateness and representation. They also confirm that the form will collect the necessary evidence to support the intended inferences from scores. In order to provide the validity, reliability, and the empirical data for references related to accountability, ACT does not modify existing operational test forms with replacement items. ACT has successfully worked with several states using an augmented testing model to supplement ACT tests if needed.

[ACT Proposal, Page 62 (emphasis added)]

On August 19, 2014, the State sought clarification, pursuant to § 11-35-1520(8), of the underlined portion of ACT's proposal. [Exhibit 7A, Page DRC0005] The procurement officer's reference to § 11-35-1520(8) necessarily reflected his judgment that the language of ACT's proposal was responsive. On August 21, ACT sent the following response:

ACT products reflect the knowledge, skills and abilities which are most relevant for each grade and content domain as reflected in most standards based documents, including ACT's college and career readiness standards (citation). ACT test forms are also constructed to conform to carefully crafted test specifications so that scores are nationally comparable across administrations and years. ACT tests produce scores that are highly reliable, accurate indicators of college and career readiness. In this way, ACT scores provide valuable trend data for states, schools, educators, and students. Scores can be compared over time and across states because national forms are administered across all participating schools and the content frameworks do not shift substantially from year-to-year.

ACT will conduct an alignment study or assist SC in conducting such a study when standards change to ensure that ACT products meet federal requirements for accountability uses. When SC does change its standards in 2015/16, ACT will conduct an alignment study and assist the state in determining areas where gaps may exist. ACT does not modify national forms for state specific contracts because it could interrupt national and state trend data and render state scores as non-comparable with scores in other states. In addition, if unique forms of ACT tests were developed for SC the vertical scale, college and career readiness benchmarks, and performance levels would no longer apply to the state specific test. Recognizing state requirements for accountability, ACT has worked with states to augment national forms with additional content required to improve alignment for state specific standards. ACT has successfully worked with several states using an augmented testing model to supplement ACT tests as needed. Augmentation allows a state to include additional test items as part of a separate test administration, while maintaining the integrity and structure of the core national form. In this way, the same content and standardization process required to maintain trend data, permit cross-state comparisons, and ensure national benchmarks and validation data is maintained in the core national form, while a section may be appended to the test administration which serves the specific needs of SC.

In such instances, two separate scores would be provided: (a) a national score, and (b) a state specific score (which includes items from the national test and any supplemental items). All such customized item development, reporting and psychometric work would need to be priced separately.

[Exhibit 7A, Page DRC0006 (emphasis added)]

In response to the requirement to provide assessments that are aligned with changes in South Carolina standards, ACT proposed to augment national forms with additional content as required to align to state specific standards. Nowhere did ACT refuse to comply with the requirement. Additionally, it told the State that developing specific test items and reporting for alignment may cost more money—something the State already knew.⁶ As the procurement officer recognized when he requested “clarification,” ACT’s proposal was responsive to the solicitation and its solution was evaluated and scored by the evaluation committee. This issue of protest is denied.

⁶ Basically ACT’s response was that the solicitation lacked sufficient information for it to provide the requested information. The solicitation puts Offerors on notice to thoroughly review the solicitation and advise the State of any ambiguities, discrepancies, errors, omissions, or conflicting statements:

Offerors are expected to examine the Solicitation thoroughly and should request an explanation of any ambiguities, discrepancies, errors, omissions, or conflicting statements in the Solicitation. Failure to do so will be at the Offeror’s risk.

[Solicitation, Page 11] Prior to opening, ACT neither submitted any questions to the State about the alleged lack of information, nor protested the inclusion of Attachment #2. While the CPO does not suggest any bad faith on the part of ACT, bidders who recognize an ambiguity in the specifications should ask questions or protest, not attempt to gain some competitive advantage from the ambiguity. See *Qualis Health, ante*, Panel Case No. 2010-4, note 5.

Four separate spreadsheets were attached to the solicitation. The first, Attachment 1, requested per pupil and annual total costs of assessments for the ELA and Math components, including scoring, development, and administration. The second two, Attachment 2, included two spreadsheets asking for the percentage increase in the total cost for modifying the ELA and Math assessments if the standards are changed in 5 percent increments for years 2 – 5:

2. ELA and Math Changes (Attachment #2) – Submit the projected percentage increase provided on both ELA and Math worksheet tabs.
 - Offerors must provide the State information about costs to change assessments if standards change on the tab entitled, “ELA and Math Changes,” in Attachment 2. For example, if standards change by less than 10%, there may be no additional cost(s). If standards change 10-25%, there may be a specific percentage increase to costs and so on. Your response to this request will allow State leaders to understand the costs associated with changing standards and their effect upon the assessments. Although these projected percentage increases must be submitted with your offer, they will not be calculated in the evaluation of cost.

[Solicitation, Page 60] The RFP provided no explanation how the percentage of standards changes will be calculated. Finally, Attachment 3 asked for the itemized costs of specific activities included in the assessments costs identified in Attachment #1:

Unit Pricing (Attachment #3) – Submit the itemized costs as it pertains [*sic*] to the assessments costs identified in attachment #1.

[Solicitation, Page 60]

Attachment 2 asked for projected percentage increases for both the ELA and Math assessments based on the percentage that the assessment is changed due to changes in the standards. This information would “allow State leaders to understand the costs associated with changing standards and their effect upon the assessments.” *Id.* While the information provided in Attachment 2 was required, it was not to be calculated in the evaluation of cost. ACT provided no percentages in its initial response. Instead, ACT returned these spreadsheets with the following note:

ACT assessments have never been static. Gradual updates and enhancements based on research and evidence are integral to our philosophy of continuous improvement. ACT assessments form our organization’s legacy of expertise and help drive excellence in assessment delivery across the nation and around the world. Those regular updates and enhancements are part of our business and included in our unit price. Should there be any specific scope changes in this contract, ACT will provide pricing based on the nature and scope of that work if necessary.

[ACT Business Proposal (emphasis added)] The procurement officer did not seek any additional information about the Attachment 2 costs before final ranking.⁷

⁷ On August 25, 2014, the procurement officer sent ACT a list of sixteen “Points Needing Clarification.” [Exhibit 7A, Pages DRC 0013-14] ACT was asked to complete and return these spreadsheets to which it responded:

A general percentage change in standards alone will not provide ACT with the necessary detail needed to accurately provide specific changes in pricing *as the change in price will be contingent upon the change in scope, and the level of expertise required to properly change the assessment to meet the unique needs of South Carolina.*

[Exhibit 7A, Page DRC0024 (emphasis added)] In response to a second of the sixteen points, ACT wrote

ACT assessments have never been static. Gradual updates and enhancements based on research and evidence are integral to our philosophy of continuous improvement. ACT assessments form our organization’s legacy of expertise and help drive excellence in assessment delivery across the nation and around the world. Those regular updates and enhancements are part of our business and included in our unit price. *To be clear, should there be any changes in this contract relative to South Carolina specific changes in scope or requirements, ACT will provide additional pricing based on the nature and scope of that work if necessary.*

[Exhibit 7A, Page DRC0023 (emphasis added)] The additional language did not change the substance of ACT’s original response.

On August 29, 2014, after negotiations began, the procurement officer sent ACT a letter purporting to be “discussions” under § 11-35-1530(6):

We have identified the following deficiency in your proposal that will result in rejection as nonresponsive unless corrected. You may address this deficiency by submitting revisions to any aspect of your proposal, but only to the extent such revisions are necessary to resolve the deficiency identified.

1. Complete and return the following attachments that were included with the solicitation;
 - a. Unit Pricing
 - b. ELA and Math Changes

[Exhibit 7A, Page DRC0029 (emphasis added)]

On September 2, ACT returned the spreadsheets populated with zeros (0) for all changes in the standards, up to and including a 100% change in the standards, and added the following footnote:

ACT assessments have never been static. Gradual updates and enhancements based on research and evidence are integral to our philosophy of continuous improvement. ACT assessments form our organization’s legacy of expertise and help drive excellence in assessment delivery across the nation and around the world. Those regular updates and enhancements are part of our business and included in our unit price. When SCDE updates their standards, ACT is willing to engage in an alignment discussion to ensure that ACT and ACT Aspire are testing to those standards. *If those discussions determine that further augmentation is needed, ACT would be happy to engage further to ensure that ACT is testing to those standards.*

[Exhibit 7A, Page DRC0030 (emphasis added)] As with the previous exchange, ACT’s position remained the same. Its offer, likewise, remained responsive.

It is not clear why the procurement officer made these requests, nor under what authority, since by then the proposals had been ranked, the negotiation team had met, and the parties were, in fact, in negotiations. While the CPO does not suggest any bad faith on the part of the State, procurement officials are cautioned not to use “discussions” as a bargaining tool. Overtly threatening to disqualify an offeror in order to exact changes in its proposal or other contract concessions cannot be a fair negotiating tactic. *See also Appeal by CollegeSource, Inc.*, Panel Case No. 2008-4, n. 3 (“[T]he Panel cautions the State that the proper procedure for clarifying issues of

By the express terms of the RFP, the information on Attachment 2 was not a basis for evaluating proposals. Neither did the estimates affect ACT's performance obligations under the contract. While the solicitation requirement is stated in mandatory terms, during the hearing the procurement officer testified that the requested percentages were for information purposes only. In *Protest of National Computer Systems, Inc.*, Panel Case No. 1989-13, the Panel stated that "... a requirement is not 'essential' simply because the RFP states that it is mandatory." In *In re: Protest of Coastal Rapid Public Transit Authority*, Panel Case No. 2000-4, the Panel observed that:

In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP....[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

The "projected percentage increases," not to be used in the cost evaluation, do not have a significant effect on the price, quantity, quality, or delivery of the supplies or performance of the services being procured and are a minor informality under Section 11-35-1520(13). See *American Spare Parts, Inc.*, B-224745, 87-1 CPD ¶4, January 2, 1987 (bidder's failure to furnish a schedule of price lists for vehicle parts should not have rendered bid nonresponsive, since schedule was not relevant to bid evaluation and failure did not affect bidder's promise to perform as specified.) The requirement was not material and essential, so ACT's failure to enter values in Attachment 2 does not affect the responsiveness of its offer. This issue of protest is denied.⁸

ACT's Attachment 1 was fully completed. ACT's initial Attachment 3 was blank, with a footnote as follows:

All costs associated with ACT's proposal are included in our unit price as listed in Attachment #1

responsiveness in competitive sealed proposals is outlined in section 11-35-1530(6); such issues should not be addressed in negotiations pursuant to section 11-35-1530(8).").

⁸ The State is encouraged to again heed the Panel's previous admonitions regarding stating requirements in mandatory terms:

The Panel takes this opportunity to reiterate it's [*sic*] statement in *Protest of Gregory Electric Company*, Case No. 1989-17(II) and once again cautions the State's procuring agencies to review solicitation documents carefully to insure that only essential requirements are stated in absolute or mandatory terms so as not to reduce the effect of such language upon the offerors.

In RE: Appeal of PS Energy, Panel Case No. 2002-9

While the accuracy of this response may be suspect, it is a response as required by the solicitation. This issue of protest is denied.

DRC's protest issue I(c) alleges "ACT sought to modify essential requirements of the RFP and impose conditions on the State limiting its liability to the State as set forth in Exhibit 1 to its proposal."

In its cover letter, ACT stated:

To the extent, if any, that the South Carolina Department of Education is willing to consider exceptions to its Terms and Conditions, ACT respectfully requests that the State consider those submitted by ACT, attached hereto as Exhibit 1.

Rather than imposing conditions on acceptance of its offer, ACT expressly recognized that the State's terms would control unless the State determined to entertain exceptions during negotiations. On August 13, 2014, one of the ITMO Procurement Managers asked ACT to remove Exhibit 1 from its proposal. While unnecessary based on the statement in its cover letter, ACT agreed to remove Exhibit 1 from its response. ACT never conditioned its offer on changes to the Terms and Conditions and this issue of protest is denied.

DRC's protest issue I(e) alleges that:

ACT failed to properly respond and otherwise qualified its response to the requirements set forth in Section 5.25 (RFP p.27) regarding the provision of documents required for the alignment study for the state to conduct an alignment study that conforms to US Department of Education.

The solicitation requirement is:

5.25 Alignment Study

By February 1, 2015, the contractor must provide the necessary materials to the Department for an independent study of the alignment of each item on the assessment(s) as required for federal Peer Review....The Offeror must provide the test items and data for this review.

[Solicitation, Page 27]

ACT initial response was:

ACT can support the data requirements for the independent alignment study that are allowed within the published policy document Guidelines for the Release of Data from ACT's Testing Programs Under State Testing.

[ACT Proposal, Page 33]

ACT's response met the State's requirement and was thus properly submitted to the evaluators. This issue of protest is denied.⁹

DRC's protest issue I(f) alleges that:

ACT was non-responsive and failed to comply with the essential requirements of Section 6.5 (RFP p. 28) in that its proposal failed and refused to comply with the requirements regarding seating charts. ACT was improperly permitted to supplement and enhance its proposal with regards to this requirement. Nevertheless, such additional information did not cure that non-responsiveness.

The solicitation requirement was:

6.5 Seating Charts

The contractor must provide one seating-chart for each test administrator. At a minimum, the heading of the chart should list the titles of the following elements:

- Name of Test
- District Name
- School Name
- Test Administrator Name
- Date

The Contractor should preprint this information on the sheet, if possible. Below the heading the Contractor should provide a classroom and laboratory rendering with blank seats shown. TAs will assign student seating as appropriate. The TA will record the names of the students in the blank seats on the template. Seating charts will be returned to

⁹ On August 25, 2014 the procurement manager sent ACT multiple "Points Needing Clarification" that included:

Alignment Review - Need confirmation that ACT will provide the documents required for the alignment study as listed in section 5.25 (page 27) of the RFP for the state to conduct an alignment study that conforms to US Department of Education requirements.

[Exhibit 7A, DRC0014] ACT responded:

ACT recognizes that educational institutions must meet accountability requirements. Such requirements will often dictate an independent analysis as a prerequisite for commitment to a particular assessment. ACT welcomes independent evaluations of its assessments as opportunities to discuss the goals and contents of its products.

ACT can support the data requirements for the independent alignment study that are allowed within the published policy document *Guidelines for the Release of Data from ACT's Testing Programs Under State Testing*. ACT can provide, in the format requested by the state, all items to be included in operational testing for a selected year. This will include applicable text, illustrations and graphics, the item stem, answer choices, and an item identification number for all items under review. ACT can also provide scoring guides and sample training papers for items that are not selected-response. ACT can also provide alignment indicators, the level of cognitive and language complexity, as well as other selected data elements that conform to ACT policy. ACT can provide all non-disclosure and indemnification agreements. To protect the integrity and security of the form(s), ACT policy does allow us to provide keys to operational forms to any customers.

[Exhibit 7A, DRC0018] Nothing in this exchange altered ACT's initial response.

the Contractor and used, if necessary by the Contractor and the Department staff in a forensic analysis of the test data.

[Solicitation, Page 28] The requirements in ¶6 applied to testing both for grades 3-10 and for grade 11.

ACT's response to ¶6.5 read:

ACT Aspire

Seating charts are not required for ACT Aspire. ACT Aspire administration manuals provide guidelines for test set-up and seat arrangement.

The ACT

The ACT Seating Diagram can be found in each Test Coordinator Manual. The Room Supervisor is to complete the form during Test 1 and again during the Writing Test, even if there is only one student in the room. The Room Supervisor shows occupied seats by writing each student's test booklet serial number in the square that corresponds to the student's seat in the room. Empty seats are shown by drawing an "X" in the square. The ACT Seating Diagram page is perforated for easy removal from the Test Coordinator Manual. The ACT Seating Diagram is one of many administrative forms that is required to be returned to the Test Coordinator by each Room Supervisor.

[ACT Proposal, Page 66]

On August 25, 2014, ACT was asked to clarify its response to which it responded:

The standard deliverables for ACT Aspire and the ACT regarding seating charts were provided in the RFP response. ACT has spent years studying test security and best practices for test administration. In addition, the sheer volume of ACT testing mandates standardized processes nationwide for all our customers on security and documentation in order to ensure the highest quality standards for assessments. As a result, customization of these is currently not offered.

[Exhibit 7A, Page DRC0018] By failing to offer seating charts for testing in grades 3 through 10, ACT's proposal was technically non-responsive to this requirement. However, the undisputed testimony before the CPO was that providing the seating charts would cost no more than \$2500. ACT, in fact, furnishes a seating chart form for its ACT (grade 11) testing. In the context of a contract price exceeding \$58 million, this is a textbook example of an immaterial variation that has "merely a trivial or negligible effect on price." This issue of protest is denied.¹⁰

¹⁰ On August 29, 2014, ACT was asked to:

Confirm that ACT will fully comply with the Seating Charts requirement (Item 6.5) found in Section III - Scope of Work/Specifications and that all associated costs for seating charts are included.

[Exhibit 7A, Page DRC0029]

ACT responded on September 2, 2014:

DRC's protest issue I(g) alleges that:

ACT fails [*sic*] to respond to the material requirements of Section 8.0 (RFP p.31) regarding handscoring specifications. This section requires procedural, design and implementation requirements for scoring student writing and performance tasks. ACT was allowed to improperly enhance its proposal with regards to handscoring but its response remains nonresponsive in that it modifies the requirements regarding the submission of handscoring statistical data in an electronic file.

The solicitation included about a two-page detailed description of an acceptable hand scoring system while allowing Offerors to propose alternate processes:

Respondents may propose other processes and procedures that accomplish the tasks in an equally reliable and valid manner, and are at least as efficient as those outlined below.

[Solicitation, Page 31] The contractor was not required to submit detailed handscoring specifications until three months before the first test administration. *Id.*

ACT's initial proposal included this text:

The proposed solution is a comprehensive system that has been developed, implemented, and independently certified to provide quality performance scoring services. This proprietary system has been internationally recognized for quality assurance. It is used to continually monitor and maintain the accuracy of constructed response or essay scoring for both group and individual levels.

[ACT Proposal, Page 73] The solicitation allowed Offerors to propose other processes and procedures to accomplish the requirement.¹¹ While sparse, this paragraph is literally responsive to the requirement of the solicitation. This issue of protest is denied.

ACT Aspire

While seating charts are not required for ACT Aspire, ACT is willing to work with the state of South Carolina to create a seating chart template that meets its needs for this assessment. This seating chart template will be posted as a PDF to the ACT Aspire Avocet site along with other critical documents regarding the assessment such as manuals, checklists, etc. that will assist in South Carolina test administration and preparation. ACT will also work with the state to create a customized electronic communication to schools and districts clarifying the expectation the state has around the use and completion of seating charts for ACT Aspire, and instructions for returning them along with other nonscorable test materials to ACT.

THESE SEATING CHART TEMPLATES AND THE ABOVE NOTED SERVICES WILL BE INCLUDED AT NO EXTRA CHARGE TO SCDE.

[Exhibit 7A, Page DRC0030]

The issue of the seating charts was finally laid to rest in the Record of Negotiations:

2. Offeror agrees to provide seating charts as required in Section III. Scope of Work/Specifications (Item 6.5) at no additional cost to the State.

¹¹ On August 25, 2014, ACT was sent a list of Points Needing Clarification that included the following:

DRC's protest issue I(h) alleges that:

ACT's response with regards to Section 17 (RFP p. 38-39) was non-responsive and sought to modify essential requirements of the RFP. This section set forth the Data Files and Electronic Storage Media Requirements. The section required customized data files following each test administration and set forth how they were to be made available to the State. ACT's proposal refused to agree to comply with the customized requirements and the delivery requests in contravention of the material requirement of the RFP.

The solicitation required:

The Contractor will produce state and district data files following each test administration. All data files will be in Word, Microsoft Excel, and/or ASCII text file format. The Department will provide the Contractor with a data file layout that will be the model for the layouts under this contract. The Department is aware that data file layouts must be modified when assessment program changes are made; however all data file layouts must be approved by Department. In addition, the Department may require additional information or changes to the files for each administration.

The Contractor will provide files containing classical and modern item analysis variables. In addition to the fields noted in the data file layouts, the Contractor will provide flags for perfect scores in each subject. The files will include the following:

A non-exclusive list of twenty-six separate items followed. [Solicitation, Page 38] The requirement also included, for pricing purposes,

Standard classical and non-classical item analyses should be provided for all students and several demographic categories (e.g., gender, ethnicity, disability groups). In addition, classical standard errors of measurement for total scores in all subjects and subscale scores, as designated by the Department, must be provided. The Department requires a data file that contains the item statistics derived from the item analyses and classical standard errors of measurement for total scores and subscale scores. In the past, data files received from the Contractor have been in the form of Excel files or plain text files for loading into Access databases and/or into SAS datasets. The Department will provide the

9) Hand-scoring - Need further explanation from ACT on their process and agreement to section 8.0 on pages 31-32.

ACT responded on August 26, 2014, with approximately 2 1/2 pages of additional detail that included the following statement at the end:

Any additional services outlined in the RFP but not included above would be custom work with additional costs. ACT is open to further discussions with SCDE on how best to support these requirements.

[Exhibit 7A, Page DRC0020] DRC contends this constituted an improper enhancement of ACT's proposal. Since ACT was initially responsive to the requirement and the evaluation committee had already scored the proposal as written, the need for additional information and its intended use are questionable. Any error on the part of the procurement officer in accepting the additional information was harmless. *See Appeal by College Source, Inc.*, Panel Case No. 2008-4, note 3 ("Because the Panel finds that AcademyOne's proposal was responsive as initially submitted, it need not address CollegeSource's argument that the State used the negotiations process to allow AcademyOne to 'fix' a non-responsive proposal.").

Contractor with the complete list of demographic categories, the complete list of item analyses results fields (e.g., distractor analysis, difficulties, correlations, DIF analysis), and the data file format for the student data file.

[Solicitation, Page 39]

ACT's entire initial response to Section 17 was:

ACT provides a standard file output to clients. A sample of the ACT Aspire Student Performance File data layout and The ACT Student Level Data File layout is included as Exhibit 19.

[ACT Proposal, page 86] The standard reports to which ACT referred include many of the twenty-six listed items, but not the statistical information the Department requested, which it needs to perform its own alignment research.

Previously, in its response to Section 15 (Technical Reports), ACT wrote:

ACT will provide psychometric analyses on South Carolina data including industry-standard measures of reliability of all reported scores and summary statistics for the reported scores as well as summary item statistics such as averages of item difficulty, item discrimination, and DIF statistics, standard error of measurement, classification consistency, and correlational data. All procedures, analyses, and results related to producing South Carolina student score files will be described in detail in the Technical Report. Also, ACT will provide sections for the Technical Report that will provide well-documented evidence for validity. All validity evidence will relate back to the purposes and uses of the assessments.

Because the ACT is an established measurement procedure, much of the requested work, such as descriptions of psychometric procedures, has been done, or is carried out regularly. Some types of work will need to be done after the contract work begins, or data become available. For example, ACT reliabilities are regularly calculated on samples of ACT examinees, whereas South Carolina [sic] state item statistics can be calculated after administration and scoring.

ACT will deliver a standard ACT Technical Manual, which is included in Exhibit 9. ACT will also provide a psychometric technical manual for the ACT Aspire tests that outlines test and item development procedures, scoring procedures, benchmark and metric development, and score interpretation and growth measures. This technical manual is in development currently and will be updated annually and provided online for easy access for all clients. These publications will contain much of the information that the SCDE will need. Information for federal and state reporting is included in ACT's technical manuals, or can be included in yearly state reports. State reports can include state-specific norms, percents meeting performance level cut scores, trends over time, and Annual Yearly Progress. Other South Carolina specific information for the state reports can include summary results, by subject and grade, reliability measures, by subject and grade, DIF results, conducted for Caucasian, African-American, and Hispanic racial/ethnic groups and by gender, item statistic information, as well as other information South Carolina may deem pertinent. ACT will work with the SCDE to define and finalize state reports.

[*Id.*, page 85]

Taken together, ACT's written responses to Sections 15 and 17 establish that it will provide the data the Department requires. The precise parameters for the data files will be provided to the contractor after award. ACT's proposal is responsive to the solicitation requirements in Section 17. This issue of protest is denied.¹²

DRC's protest issue I(i) alleges:

ACT's response with regards to Section 19.0 (RFP p. 40) was non-responsive and sought to modify essential requirements of the RFP. This section set forth that Act 200 requires that assessments establish at least four student achievement levels. The RFP indicated

¹² On September 3, 2014, the Procurement Manager asked ACT:

I want to confirm that ACT will comply with the following requirements listed in Section III - Scope of Work/Specifications. The response provided by ACT was a little vague.

- 1) 15.0 - Technical Reports
- 2) 17.0 - Data Files and Electronic Storage Media Requirements (Note: The last bullet in this section is titled "Actual Item Grade". This is the score item response. I just wanted to make sure this was clear.)

On September 3, 2014 ACT responded:

17.0- Data Files and Electronic Storage Media Requirements: ACT will only be in partial compliance with this requirement. A standard output for our reporting system is a "Student Performance File". It follows a file layout that is standard for all ACT Aspire customers - it is not a custom file layout. It is provided at the school, district and state levels. It is provided online within the portal, we do not produce CD's. A copy of the Student Performance File layout was included in our proposal and is attached here for SCDE review. We do not provide an item analysis report for any customer as part of normal reporting or as part of the data file we deliver. However, ACT would be willing to discuss other types of possible psychometric analysis on the state level data based on South Carolina's needs should ACT be awarded this business.

Later that same day the Procurement Manager sent ACT a letter that included the following:

We have identified the following deficiency in your proposal that will result in rejection as nonresponsive unless corrected. You may address this deficiency by submitting revisions to any aspect of your proposal, but only to the extent such revisions are *necessary* to resolve the deficiency identified.

1. Confirm that ACT will fully comply with the Data File and Electronic Storage Media Requirement (Item 17.0) found in Section III - Scope of Work/Specifications and all associated costs for this requirement is included in the proposal submitted.

On September 3, 2014 ACT responded:

I am writing to confirm that ACT will fully comply with the Data File and Electronic Storage Media Requirement (Item 17.0) found in Section III- Scope of Work/Specifications and all associated costs for this requirement is included in the proposal submitted.

As with the handscoring issue, it is difficult to understand why the procurement officer felt compelled to clarify or discuss an area of the proposal that was in fact responsive to the State's requirements. The parties were well into negotiations at this point. Also like the handscoring issue, any error on the procurement officer's part was harmless. *See* nn. 5, 7, and 11, *ante*.

that the State would compile a committee to participate with the Offeror in reviewing and setting these achievement levels in 2015 and future years. All costs associated with setting these achievement levels were to be borne by the Offeror. ACT refused to comply with this requirement and indicated it had not included costs for this. Moreover, ACT boldly stated that if such efforts were required, a separate contract with ACT or another vendor would be required. This refusal reflects a material non-compliance with the RFP.

The solicitation requirement states:

19.0 Setting Achievement Levels

Act 200 requires that the assessment(s) in grades 3-11 establish at least four student achievement levels that demonstrate degrees of college and career readiness. The Offeror must describe the criteria and methodology used to demonstrate college and career readiness. The Offeror must also propose criteria and methodology to be used to set at least four achievement levels required in Act 200. The State will establish a committee to participate in setting, reviewing, and approving achievement levels in the summer of 2015. Depending on the magnitude of the changes to the content standards, additional committees may need to be convened in future years.

The state will identify all standard setting committee members. All other activities (e.g., writing drafting [*sic*] the initial Performance Level Descriptors, assembling ordered item booklets, facilitating the committee meetings) and costs associated with setting achievement levels are the responsibility of the Contractor.

[Solicitation, Page 40 (emphasis added)]

In Part IV, offerors were asked to:

Provide a description of achievement levels, achievement descriptors, and cut scores developed for the proposed assessment program. How were each of these elements developed? The Offeror must provide a detailed description of the process, including the rationale and procedures used to determine each level. The Offeror must provide exemplars of student work that illustrate the range of achievement within each achievement level.

[Solicitation, Page 45]

In the Executive Overview to its proposal, ACT stated:

Meaningful Achievement Levels

ACT Aspire is comprised of four readiness levels—two readiness levels below the benchmark and two readiness levels above the benchmark. The four readiness levels are: In Need of Support, Close, Ready, and Exceeding. The ACT focuses on two levels of achievement: Ready or Not Ready. As the capstone assessment, the ACT benchmarks are the culmination of the assessment progress and the two levels provide insight and direction for stakeholders on level of preparedness.

[ACT Proposal, Page 2] Act's proposal to provide only two readiness levels for the ACT (grade 11) assessment is not responsive to the requirements of the RFP or of Act 200.

Beginning on page 47 of its proposal, ACT described the achievement levels it has established on a national basis, including its methodology and links to the academic research supporting the achievement levels. In other words, ACT represented that it had already completed the work necessary to set achievement levels:

ACT's recommendation is for the SCDE to use the pre-established ACT Readiness Benchmark cut scores with four achievement levels. Through extensive research, ACT has empirically tied these cut scores with eventual success in college and the workforce. By using the ACT Readiness Benchmarks, the SCDE can be secure in the knowledge that their achievement levels have been meaningfully derived to correspond to student readiness, and also can save the time and expense of conducting a separate standard setting meeting. However, if circumstances require the SCDE to conduct a standard setting meeting in summer of 2015, the SCDE can benefit from ACT's standard setting expertise....

At additional cost, ACT research staff can work with the SCDE to establish and implement standard setting plans that include South Carolina stakeholders.

[ACT Proposal, Page 48 (emphasis added)] The solicitation unequivocally requires the contractor to convene and fund a committee of South Carolina educators to develop appropriate achievement levels. By stating it would provide this service only at additional cost, Act's proposal is not responsive to the requirements of the RFP.

The State did not address this issue further before evaluation and final ranking. Communications after negotiations began only confirmed that ACT did not intend to involve a South Carolina committee in setting standards without a price increase.¹³ The Record of Negotiation has no mention of the South Carolina committee. ACT's proposal is non responsive to both the requirement of four achievement levels

¹³ On August 25, 2014, the procurement manager sought the following clarification:

- 11) Standards Setting - Need further explanation of what was proposed by ACT with regard to standards setting in the summer of 2014 and how this was reflected in the business proposal schedule?

ACT responded on August 26, 2014, as follows:

ACT Response:

As discussed in the proposal, ACT's recommendation is for the SCDE to use the pre-established ACT Readiness Benchmarks cut scores with four achievement levels. For this reason, no standard setting meeting was costed in the proposal. If, instead, the SCDE decides to determine cut scores through a standard setting meeting for summer 2015, a separate contract with ACT or another vendor will be required. Following award of contract ACT will work with the SCDE to determine the best course of action for South Carolina.

[Exhibit 7A, DRC0023 (emphasis added)]

for the grade 11 assessment and the requirement that the costs associated with setting achievement levels are the responsibility of the contractor. This issue of protest is granted.¹⁴

DRC's protest issue (j) alleges that ACT failed to provide online student reports for grade 11 and that paper reports for all students delivered to the districts are not included in its Business Proposal.

The Solicitation requirements are:

The Contractor must provide score reports and data files by the dates specified in section 1.3.

[Solicitation, Page 33, Paragraph 10.0] Section 1.3 requires, among other things, that "Paper copies of Individual Student Reports and labels must be in district offices on or before July 15" each year. [*Id.*, Page 20]

In responding to this RFP, the Offeror must propose formats for each of the following types of reports and data files:

- Individual Student Reports (electronic and paper)....

[Solicitation, Page 33, Paragraph 10.0]

The Contractor, working with the Department, will provide a paper-based and online data management system to report assessment results for students, schools, districts and the State. This should be a secure site that requires usernames and passwords and accounts should be customized based on the access a user will have (state-level, district-level, and school-level).

For each student, the Offeror shall describe and provide evidence that the following information will be communicated to students and parents:

- ...
- **One (1) hard copy shipped to districts, packaged by schools printed front and back**

[*Id.*, Paragraph 10.1 (emphasis added)]

Section IV, Information for Offerors to Submit, asked vendors to

¹⁴ During the hearing, the parties estimated the cost for conducting a standard setting meeting at between \$100,000 and \$300,000. Counsel for the Board suggested that this be considered a minor informality under Section 11-35-1520(13) which states that a minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The CPO need not decide if \$300,000 in a \$58,434,000 contract is trivial or negligible. The standards setting meetings are material and essential requirements that go to the performance of the contract and cannot be waived as a minor informality.

1. Propose dates by which score reports (student, class, school, district, and state) and data files can be delivered electronically (in a secure fashion) **and in hard copy format** by the dates specified.

[*Id.*, Page 42, “Score Results and Reporting Deadlines” (emphasis added)] The obligation in the RFP to provide paper reports extends the entire term of the contract.

ACT proposed its ACT Aspire product for grades 3 – 10 and its ACT product for grade 11. In ACT’s offer under “Score Results and Reporting Deadlines” was a chart including the following text:

All ACT Aspire reporting is online and available to class, schools, district and states.
Optional paper reports are available for additional fee.

Schools receive the ACT High School Score Report and labels, **Districts do not receive student level reports.**

Students will receive a score report sent directly to their home.

[ACT Proposal, Chart on Page 4, Row Labeled “District paper student report and labels” (emphasis added)]

The solicitation required the offeror “provide a paper-based and online data management system to report assessment results.” ACT’s proposed system includes both online and paper-based reporting. A strict reading of the requirement does not support DRC’s interpretation that the RFP requires both online and paper-based reporting for all grade levels. This aspect of the protest is denied.

The solicitation did require, however, that the contractor furnish one hard copy of individual student reports, “shipped to districts, packaged by schools printed front and back.” ACT did not provide evidence that it would meet this requirement. The additional cost to provide hard copies of the Aspire assessment results (grades 3 – 10) is over one half million dollars a year¹⁵ after the first year and according to the Record of Negotiations will be borne by the State.¹⁶ The additional cost to the State is slightly more than

¹⁵ ACT agreed to provide paper reports for grade 11 but not grades 3-10. Assuming 325,616 students in year two (2) and 327,751 in year three (3), from page 21 of the solicitation and the lowest rate for ACT to provide the reports after year one:

$$325,616 \times \$1.75 = \$569,828$$

$$327,751 \times \$1.75 = \$573,564$$

¹⁶ The Record of Negotiations reflects the following:

f. Offeror confirms that the cost for providing paper copies of student score reports for both ACT Aspire and ACT is included in the price proposed to the State for year 1 of the contract....

3. Following year one, and at the State’s option on a district-by-district basis, ACT will deliver a paper report for each individual student to the applicable student’s district office for the following price:

three percent of the three year, \$32,837,355, evaluated cost of ACT's proposal. ACT's initial proposal was non responsive and should not have been evaluated and ranked until the deficiency was removed. This issue of protest is granted.¹⁷

DRC's protest issue (I) alleges that

[t]he RFP required Offerors to describe the procedure(s) used to ensure item alignment with the CCSS. The Offerors were required to include alignment study links or papers in the response. DRC protests that ACT's proposal was non-responsive to this material requirement and did not provide the procedures used to ensure alignment. ACT references an alignment study attached as an Exhibit but that document was redacted and not provided to DRC. Upon information and belief, ACT is not capable of complying with this requirement.

Part IV of the solicitation asked:

Alignment to Common Core State Standards (CCSS) for spring 2015

1. Describe the procedure(s) used to ensure item alignment with the CCSS. The Offeror must include alignment study links or papers in the appendices of the technical response.

[Solicitation, Page 43]

ACT's response covered nearly two pages:

Math: In order to convey the alignment to each South Carolina Standard, ACT compared South Carolina's groups of standards to the domain of the ACT Aspire exam. Each standard was carefully analyzed by two ACT content specialists. The pair came up with a percentage that reflects how completely the ACT Aspire domain assesses this group of South Carolina Standards. For example, a 100% means the ACT Aspire domain assesses the entire group. The pair of content specialists then collaborated with the Senior Director

a. \$1.75 per report, for the twenty-five districts with the highest percentage of students receiving free lunch; and

b. \$2.25 per report, for any remaining districts.

[Record of Negotiation, Exhibit A]

All ACT Aspire reporting is online and available to class, schools, district and states. For year one, ACT will deliver a paper report for each Individual student to the applicable student's district's office. After year one, optional paper reports are available for an additional fee. ACT will provide approximately 85 Paper District level reports for ACT Aspire at no additional fee by August 1, 2015 for year 1 only.... District reports are shipped and not available online.

[Record of Negotiation, Exhibit B]

¹⁷ While the Code provides that cost need not be an evaluation factor in a RFP, the practice of awarding a five year, \$58,434,000, contract based on a three year cost evaluation of \$32,837,355, where the unevaluated annual amounts are significant and an increase over any of the evaluated annual amounts is an open invitation to accusations of corruption and maleficence. If cost is an evaluation factor, it should include the total potential value of the contract including any option years and not just the initial acquisition. It also should be a significant factor, at least 20%, in the evaluation. There were four evaluation criteria and cost was the least significant at 10% of the total evaluation.

of Mathematics and the Director of Mathematics Content to come up with a final percentage.

English Language Arts: In order to ensure alignment with South Carolina Standards for English/Language Arts & Literacy, ELA development experts reviewed the content of the standards, focusing on the core knowledge and skills articulated by each standard. The standards were then compared with those constructs covered by the ACT Aspire Reading domain, as outlined by ACT's Reading item taxonomy. Percentage matches were determined by the degree to which a given standard is assessed by the range of ACT Aspire Reading items and tasks.

Details about the alignment results for ACT Aspire and the ACT are provided in Exhibit 12.

Alignment Study

Traditionally, alignment methodologies have been based on content alignment. This can be item-to-standard alignment or standard-to-standard alignment. Current definitions of alignment have expanded to include comparing content coverage between an assessment and other curriculum documents. Alignment in the context of No Child Left Behind (NCLB) focuses on content agreement between state curriculum standards and state assessments. There are several well-documented methodologies in support of this definition, including the one developed by Norman Webb.

ACT's response complies precisely with the solicitation's request for a description of its procedures for ensuring alignment. It apparently included a study that detailed specific alignment results. ACT's Exhibit 12, referenced in the response, was redacted from its proposal. No one asked that the full Exhibit 12 be produced at the hearing. The CPO cannot speculate whether the exhibit fails to comply with the RFP, since it is DRC's burden to prove its allegations. This issue of protest is denied.¹⁸

¹⁸ The solicitation required 100% of the Spring 2015 test items to align to the CCSS in ELA (English, reading, and writing skills) and mathematics. ACT's proposal indicates that alignment is very close. By its own admission, though, ACT's assessment does not meet the requirement as written. *DRC did not protest this issue*. Its protest is directed squarely at the adequacy of ACT's description of its alignment methodology. The CPO lacks jurisdiction to entertain issues not raised in the protest letters.

Ultimately, however, ACT agreed to the 100% alignment requirement:

Alignment. In grades 3 through 8, every assessment for the 2015 administration must be 100% aligned to the current South Carolina standards, excluding science. In subsequent years, the assessments will continue to be 100% aligned to standards fully implemented in all South Carolina public schools during the applicable school year or Contractor will augment the assessments sufficiently to meet federal peer-review requirements. For grade 11, the assessment must be sufficiently aligned to meet federal peer-review requirements.

[RON, Exhibit B, Item 2(a)]

DRC's protest issue (m) alleges:

The RFP required Offerors to demonstrate how Offerors *[sic]* assessment will pass a federal peer review. (RFP p.42) ACT's proposal was non-responsive to this material requirement and did not demonstrate how ACT's proposed assessment would pass peer review. Upon information and belief, ACT has not and is not capable of complying with this requirement.

Section 5.26 of the Scope of Work provided:

The Contractor must develop and provide to the Department all documentation needed for submission to the US Department of Education for Peer Review. The documentation will be required for the assessment(s) administered in spring 2015 and for the new assessment(s) administered to align to the new standards. The documentation required for Peer Review is detailed on the US Department of Education's website.

[Solicitation, Page 27] The RFP required each proposal to place "special emphasis" on the peer review requirement:

Federal Peer Review – Must demonstrate how offeror's assessments will pass a federal peer review

[Solicitation, Page 42]

ACT's entire response to this requirement is as follows:

Federal Peer Review

ACT recognizes the importance of high quality psychometric support while building and implementing a new statewide assessment system. The SCDE will have the support and expertise of Dr. Thompson throughout the necessary Peer Review processes. To support the SCDE, ACT has considerable resources of experience, procedures, and facilities that can be used to meet the state's responsibilities for federal accountability. In addition to Dr. Thompson, ACT can bring its full expertise and experience to bear in offering psychometric support to the SCDE. ACT has worked with multiple states to meet federal Peer Review requirements.

[ACT Proposal, Program Management Plan, Page 16]

ACT provided a response to the requirement. The degree to which that response meets the requirement is a subjective determination for the evaluation committee. This issue of protest is denied.

Communications, Evaluation, and Negotiation

ACT's initial submission was non-responsive and the State entered into discussions under Regulation 19-445.2095(I) to resolve these issues and clarify other statements in ACT's proposal. The evaluation panel received the proposals on August 14, 2014 and gathered on August 21, 2014 to finalize the evaluation.

During the evaluation, multiple evaluators identified issues in ACT's proposal needing additional clarification, including some of the issues of responsiveness DRC has raised in its protest. The evaluators

scored the proposals without the benefit of the identified clarifications or resolution of the issues of non-responsiveness. At the hearing, two of the evaluators indicated that their scores reflected the lack of clarity and responsiveness in ACT's proposal. The score sheets were amended to reflect the points allocated for the Business Proposal,¹⁹ totaled, and signed on August 21, 2014. The evaluation committee had no further involvement in the procurement until their appearance at the CPO's hearing. In an email, the procurement officer indicated that the determination of the highest ranked offeror would be determined the same day the evaluation committee met:

Today we will be scoring the above referenced procurement. The scoring meeting will begin at 10:00 AM. I anticipate the scoring to take between 2-3 hours to complete. I have spoken with David Avant in regards to holding debriefing meeting once the scoring meeting is complete and the highest ranked offeror has been identified.

[Exhibit 11]

The procurement officer testified that final ranking was completed on August 21 and the evaluation team met with the negotiation team later that same day.

On August 25, 2014, the procurement manager sent ACT a list of sixteen (16) "Points Needing Clarification." [Exhibit 7A, Page DRC0014] ACT provided seven pages of response to these issues. On August 29, the state identified two issues with ACT's proposal that would result in a determination that its proposal was non-responsive. [Exhibit 7A, Page DRC0029] On September 3, 2014, the State identified another issue with ACT's proposal that would result in a determination that its proposal was non-responsive. [Exhibit 7A, Page DRC0070] ACT's proposal was modified to bring it into compliance with most of the material and essential requirements of the solicitation after evaluation.

DRC's protest issue II(a) attacks the sequence of the scoring, clarifications, and discussions. The CPO has determined that ACT's proposal was non-responsive in at least two material aspects at the time of evaluation and final ranking.

Section 11-35-1530(7) states that:

Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals.

(Emphasis added)

In the present case, the evaluator's score sheets reflecting the evaluators' scores for the first three criteria were amended to reflect the points allocated for the Business Proposal, totaled, and signed by the

¹⁹ These points were allocated by the procurement manager through a long accepted formula for calculating cost.

evaluators on August 21, 2014. The record and testimony reflect that final ranking and identification of the highest ranked offeror occurred on August 21, 2014. ACT was non-responsive to material and essential requirements of the solicitation at the time of final ranking. This issue of protest is granted.

DRC's protest issue II(b) challenges the use of Code Section 11-35-1520(8) to clarify ambiguities in ACT's proposal. The procurement officer's characterization of ACT's proposal as responsive or not is not binding on the CPO. Once properly authorized, the procurement officer may address issues of responsiveness through discussions. In the RFP setting, all discussions dealing with responsiveness necessarily occur under authority of Code Section 11-35-1530(6) and Regulation 19-445.2095. To the extent that DRC suggests Section 11-35-1520(8) prohibits such proposal modifications, this issue of protest is denied.

DRC's protest issue II(c) alleges the "discussions" conducted on August 29 and September 3, 2014, allowed ACT to modify its proposal beyond the scope authorized by Section 11-35-1530(6). The negotiation committee assumed control of the procurement after evaluation and final ranking on August 21. Modifications to ACT's proposal after final ranking, however designated by the procurement officer, are negotiations, not discussions. Under Section 11-35-1530(8)(a) the procurement officer can negotiate "price, matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both." This could include changes to material and essential requirements of the solicitation that are within the general scope of the request for proposals. As such, the modifications made after final ranking that are memorialized in the Record of Negotiations are authorized and this aspect of the protest is denied.

DRC's protest issue III(a) alleges that the Evaluation Panel's scoring was arbitrary and capricious:

...[T]he ACT proposal was non-responsive in many respects. Indeed, it necessitate *[sic]* numerous communications and discussions to attempt to "clarify" the proposal or correct material non-conforming items. These efforts were undertaken after the evaluation panel had completed its scoring. At a minimum, certain evaluators scores did not reflect the significance of ACT's refusal to comply with the requirements of the RFP or the failure to address significant items in the RFP. Whether that was a result of evaluators not fully understanding the requirements of the RFP or ACT's proposed response, the result is that the scoring was arbitrary and did not reasonable *[sic]* reflect a full and complete application of the award criteria to the proposals. By way of example, one of the evaluators assigned a perfect score to ACT for the technical proposal. It is inconceivable, with the numerous areas of the ACT proposal where ACT boldly indicated that it would not comply with the requirements and the numerous areas where ACT did not provide the information requested in the RFP, that a reasonable and deliberate review of ACT's proposal by an evaluator could result in a perfect score.

DRC has the burden to prove its issue by a preponderance of the evidence.

S. C. Code Ann. Section 11-35-2410 provides for the finality of determinations under the RFP process unless “clearly erroneous, arbitrary, capricious, or contrary to law.” The Procurement Review Panel and the CPOs have consistently held that they will not substitute their judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

The American Heritage Dictionary defines an arbitrary decision as one determined by chance, whim, or impulse, and not by necessity, reason, or principle. Capricious is defined by the American Heritage Dictionary as one that is characterized by, arising from, or subject to caprice; impulsive or unpredictable. The two evaluators that testified at the hearing indicated that they were aware of the shortcomings in ACT’s proposal and those issues were reflected in their scoring. Their scoring was reasoned and not impulsive or unpredictable. DRC questions the score of an evaluator who awarded ACT the maximum points available of the technical proposal criteria but the evaluator was not available to provide insight into that scoring and it is not possible for the CPO to determine that there was not reason and consideration in the points awarded. DRC has failed to carry its burden of proof and this issue of protest is denied.

DRC’s issue of protest III(b) alleges that the Evaluation Panel did not follow the published award criteria and considered matters outside the RFP—specifically, science assessments. This is a reprise of DRC’s complaint that ACT’s inclusion of science testing made its proposal non-responsive. This issue was addressed above and the CPO finds that there is nothing in the solicitation that would prohibit an Offeror from including additional assessments and any associated costs in its proposal. The first evaluation criterion requires the evaluators to judge:

The degree, completeness, and suitability of the offeror’s proposed solution and their ability to meet or exceed all requirements of the Request for Proposal.

[Solicitation, Page 49 (emphasis added)] The evaluators’ consideration of ACT’s offer of additional assessments above and beyond the requirements of the RFP is appropriate. This issue of protest is denied.

DRC’s protest issue III(c) alleges that the Evaluation Panel’s scoring was tainted by conflict of interest.

The scoring by the evaluation panel was further tainted by the fact that one of the evaluators possessed a significant conflict of interest. This evaluator had a direct relationship with ACT in that the evaluator serves as a member of the South Carolina ACT council and is listed as such on ACT’s website.

DRC alleges that evaluator Dr. Janelle Rivers’ participation in the South Carolina ACT state council creates a conflict of interest that should have precluded her participation as an evaluator in this

procurement. Dr. Rivers herself raised the issue of her participation in the ACT council with the procurement manager prior to the receiving the proposals. After careful investigation and consideration, the procurement manager determined that there was no conflict of interest that would prevent Dr. Rivers participation in the evaluation. Dr. Rivers' doctorate is directly related to the measuring and testing of students. While Dr. Rivers scored ACT's proposal higher than DRC's, hers was not the highest score for ACT. A higher score for one proposal over another is, in and of itself, not sufficient evidence of bias. There is no evidence that Dr. Rivers had a conflict of interest that tainted her scoring of the proposals or was actually biased. *See Protest of Cathcart and Associates*, Panel Case No. 1990-13 (“[A]n evaluation committee member’s business relationship with one of the vendors being evaluated, which arises solely by reason of his or her state employment, does not by itself warrant the conclusion that the committee was tainted by improper influence.”); *Protest of ACMG, Inc.*, Panel Case No. 1990-4 (an evaluator’s state-related past business relationship with an offeror did not render the procurement process unfair.) This issue of protest is denied.

DRC withdrew its protest issue IV at the hearing.

DRC’s protest issue V alleges in part that the flawed determination that ACT was the highest ranked offeror invalidated subsequent negotiations. Section 11-35-1530(7) requires ranking of responsive offerors. Section 11-35-1530(8) authorizes negotiation with the highest ranking offeror. Necessarily, the highest ranking offeror must be responsive. As indicated above, ACT was not responsive at the time of ranking and consequently could not be the highest ranking offeror. This issue of protest is granted.

DRC also alleges that the negotiations did not result in the best value to the State. The Code only requires that award be made to the “responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals.” (Emphasis added) There is no requirement in the Code that negotiations result in the best value. The value of an acquisition is determined by the using agency and those receiving benefit from the goods or services acquired. The CPO lacks jurisdiction to rule on the value derived from a negotiation. This issue of protest is denied.

Determination

For the reasons stated above, the protest of DRC is granted.

Remedy

Act 200 required the Executive Director of the State Budget and Control Board, with the advice and consent of the special assessment panel, to direct the procurement of a college and career readiness

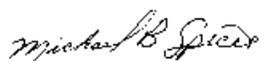
assessment. The Act required that the procurement be completed before September 30, 2014 to assure that testing would occur in the spring of 2015. Due to delays in the procurement process and considering the timelines necessary to assure testing in the spring of 2015 and after consulting with the Executive Director of the State Budget and Control Board, the CPO lifted the stay imposed under Section 11-35-4210(7) and a contract was awarded to ACT on November 1, 2014.

Having granted DRC's protest on its merits, the CPO has necessarily determined that the Intent to Award a contract to ACT based on Solicitation No. 5400008105 was made in violation of law. Section 11-35-4310(3) provides the following remedies for awards in violation of law:

- (3) If, after an award of a contract, it is determined that the solicitation or award is in violation of law;
 - a. the contract may be ratified and affirmed, provided it is in the best interests of the State; or
 - b. the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

For the reasons outlined in my determination to lift the automatic stay, and in light of the urgency to have a testing protocol in place for the students of the State for Spring 2015, the CPO finds that it is in the best interests of the State to ratify the contract. However, since the award to ACT was in violation of the Code the CPO directs that the contract be terminated at the end of the first year, in lieu of the three year term provided for in the solicitation. The Budget and Control Board is ordered to resolicit these requirements and award a contract in compliance with the Code.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2014)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2014 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public for South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____

Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

BRUNER, POWELL, WALL & MULLINS, LLC

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AUTHOR'S E-MAIL:
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September 29, 2014

VIA EMAIL protest-itmo@itmo.sc.gov
AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
1201 Main Street, Suite 601
Columbia, South Carolina 29201

**Re: Protest of Award of Contract for Solicitation No. 5400008105
S.C. Department of Education - Statewide Education Assessment –
Grades 3-11
Our File No.: 7-2608.100**

Dear Mr. Spicer:

This firm has been retained to represent Data Recognition Corporation (“DRC”) in connection with the above referenced solicitation. On behalf of DRC, we hereby protest the intent to award the Contract for the S.C. Department of Education Statewide Education Assessment – Grades 3-11 to ACT, Inc. (“ACT”) and request a hearing and/or administrative review. DRC was an Offeror in the above referenced procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), DRC has standing to pursue a protest. The protest is based upon the following factual and legal basis:

On June 30, 2014, the Office of Information Management Technology (“ITMO”) issued specifications for Solicitation No. 5400008105. The solicitation sought proposals on behalf of the South Carolina Department of Education (“Department”) for the administration, scoring, and reporting services of statewide, standards-based summative assessment(s) for students in grades 3-8 and 11. The RFP indicated that assessments for grades 9 and 10 will be included if funds are available. The assessment program will include the subjects of English/language arts (“ELA”) and mathematics; and all items for these content areas must be aligned with South Carolina’s standards.

The solicitation required prospective vendors to submit a technical proposal, qualifications, a program management plan and a separate business or price proposal. After submission, each Offeror's Technical Proposals was to be, first, judged by ITMO for responsiveness and, after responsiveness was determined, evaluated and scored by an evaluation panel pursuant to the published criteria in the RFP. Likewise, the Business Proposals were to be, first, judged for responsiveness by ITMO and, after responsiveness was determined, evaluated and scored by ITMO according to published criteria in the RFP.

According to the RFP, the following evaluation factors were listed in relative order of importance with the first factor being the most important:

- (1) Technical Proposal
- (2) Qualifications
- (3) Program Management Plan
- (4) Business Proposal

The deadline for proposal submission was August 11, 2014. Upon information and belief, the only two Offerors to submit proposals were DRC and ACT. ACT submitted a price for the full five years of \$58,434,000 while DRC submitted a price for \$35,668,623.¹ At some point, ITMO transmitted the technical proposals to an evaluation panel for scoring; and, when the scoring for the Business Proposals were applied to the panel scoring, ACT received a score of 728.29 and DRC received a score of 701. Upon information and belief, subsequent to the submission of the proposals and throughout the evaluation period, numerous communications occurred between ITMO and ACT. These communications were conducted as requests for clarifications and discussions. As a result, ACT submitted significant additional information and revisions to its proposal. Upon information and belief, ITMO and the Department elected to enter into negotiations with ACT. On September 19, 2014, negotiations with ACT were concluded and the Notice of Intent to Award, reflecting the proposed award to ACT.

DRC filed a request with ITMO pursuant to the South Carolina Freedom of Information Act to review documents relevant to the ITMO's evaluation and determination to issue the Notice of Intent to Award to ACT. Unfortunately, DRC was not provided a meaningful opportunity to review documents responsive to this request prior to its deadline for filing a protest of the proposed award pursuant to the Procurement Code. As such, in order to protect its right to a meaningful review of this procurement, DRC hereby protests the award by ITMO of the Contract as set forth in the Notice of Intent to Award to ACT.

DRC contends the proposed award to ACT is improper and contrary to the Procurement Code.

First, DRC contends that ACT presented non-responsive technical and price proposals which materially deviated from the requirements of the RFP. ACT's proposal should have, therefore, been rejected.

¹ The Business Proposals were scored based on the first three years with ACT submitting a price of \$32,837,854.70 and DRC submitting a price of \$25,659,343.00.

Mr. Michael Spicer
September 29, 2014
Page 3 of 3

Second, DRC contends that the means and methods in which the evaluation process was conducted and award determination made were in violation of the Procurement Code. The integrity of the entire evaluation process was, therefore, tainted and unfairly prejudiced DRC.

Third, the evaluation panel did not follow the published award criteria in making their determination.

Finally, the negotiations that occurred were conducted in violation of the Procurement Code. The award to ACT is, therefore, improper.

For the foregoing reasons, the notice of award to ACT should be cancelled. DRC contends that ACT's bid should have been rejected as non-responsive. With the rejection of ACT, DRC, therefore, would be the highest ranked Offeror. As such, DRC is requesting the Chief Procurement Officer issue a decision to award the Contract to DRC.

DRC will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We are requesting an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof.

Sincerely,



E. Wade Mullins, III

EWM/rdd
cc: Jennifer Eastman

BRUNER, POWELL, WALL & MULLINS, LLC

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October 6, 2014

VIA EMAIL, protest-itmo@itmo.sc.gov
AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
1201 Main Street, Suite 601
Columbia, South Carolina 29201

Re: Protest of Award of Contract for Solicitation No. 5400008105
S.C. Department of Education - Statewide Education Assessment -
Grades 3-11
Our File No.: 7-2608.100

Dear Mr. Spicer:

As you know, this firm has been retained to represent Data Recognition Corporation ("DRC") in connection with the intent to award the Contract for the S.C. Department of Education Statewide Education Assessment – Grades 3-11 to ACT, Inc. ("ACT"). Pursuant to S.C. Code Ann. § 11-35-4210, DRC hereby supplements its protest filed September 29, 2014. DRC reiterates and incorporates by reference its protest grounds set forth in the protest letter of September 29. DRC would assert the following factual and legal basis for the protest:

In response to legislation enacted in spring 2014 (Acts 155 and 200), on June 30, 2014, the Office of Information Management Technology ("ITMO") issued specifications for Solicitation No. 5400008105. The solicitation sought proposals on behalf of the South Carolina Department of Education ("Department") for the administration, scoring, and reporting services of statewide, standards-based summative assessment(s) of English/language arts (English, reading and writing skills) and mathematics that measure each students progress toward college and career readiness for students in grades 3-8 beginning in 2015. The RFP indicated that assessments for grades 9 and 10 will be included if funds are available. The solicitation also sought to secure a college and career readiness assessment in grade 11. The assessment(s) conducted in 2015 must be aligned to the current state standards ("Common Core State Standards"). The assessments for 2016 and beyond are required to adhere to new college and career readiness standards that are required to be adopted by early 2015.

The solicitation required prospective vendors to submit a technical proposal, qualifications, a program management plan and a separate business or price proposal. After submission, each Offeror's Technical Proposals was to be, first, judged by ITMO for responsiveness and, after responsiveness was determined, evaluated and scored by an evaluation panel pursuant to the published criteria in the RFP. Likewise, the Business Proposals were to be, first, judged for responsiveness by ITMO and, after responsiveness was determined, evaluated and scored by ITMO according to published criteria in the RFP.

Section III, Scope of Work/Specifications of the RFP set forth the scope and detailed requirements of the Contract, including numerous mandatory requirements. Section IV, Information for Offerors to Submit specified all of the information that was required to be submitted with the proposal. Section IV clearly admonished Offerors that proposals which imposed conditions that modified the requirements of the solicitation risked being deemed non-responsive and rejected.

Section VIII Price-Business Proposal set forth the requirements for the submission of the Business Proposal and directed the Offerors to provide **all** the information in this section. Offerors were required to complete a pricing matrix (attachment #1) that would include the annual total costs of assessment, including scoring, development and administration. The solicitation also required Offerors to complete ELA and Math Changes (attachment #2). This attachment required Offerors to provide the percentage increase in the total cost across all grade levels based on the changes in the state standards that were expected to occur in early 2015. Attachment #2 allowed the Offeror to propose different cost increases based on the percentage of the standards that would be changed. The solicitation specified that this information was required to allow the state to understand the cost impact of the changes to the standards. Section VIII also required Offerors to submit unit pricing (attachment #3) for itemized costs as it pertained to the assessment costs set forth in attachment #1.

According to the RFP, the following evaluation factors were listed in relative order of importance with the first factor being the most important:

- (1) Technical Proposal
- (2) Qualifications
- (3) Program Management Plan
- (4) Business Proposal

The deadline for proposal submission was August 11, 2014. The only two Offerors to submit proposals were DRC and ACT. ACT submitted a price for the full five years of \$58,434,000 while DRC submitted a price for \$35,668,623.¹ ACT failed to submit a completed Business Proposal in that it failed to submit pricing required in attachments #2 and #3. On or about August 14-15, ITMO charged an evaluation panel of 9 individuals to score the technical proposal. In accordance with ITMO policy, the panel members were provided instruction as to the rules governing evaluation of the proposals and asked to sign representations agreeing to comply with the requirements and to affirm that no conflicts of interest existed in connection with their respective evaluation. Subsequent thereto, ITMO transmitted the technical proposals

¹ The Business Proposals were scored based on the first three years with ACT submitting a price of \$32,837,854.70 and DRC submitting a price of \$25,659,343.00.

to the evaluation panel. On August 21, the panel met and scored the proposals and completed their scoresheets. There was great disparity in the scoring of the ACT and DRC proposals with 4 evaluators giving DRC a higher score and 5 evaluators giving ACT a higher score. When the scoring for the Business Proposals were applied to the panel scoring, ACT received a score of 728.29 and DRC received a score of 701.

Upon information and belief, subsequent to the submission of the proposals and throughout the evaluation period, numerous communications occurred between ITMO and ACT wherein ACT was given the opportunity to correct material issues of non-compliance and/or enhance its proposal. For example, on August 13, ITMO contacted ACT via telephone and asked them to remove a section in its proposal wherein ACT took exceptions to numerous terms and conditions set forth in the solicitation. On August 19, ITMO forwarded via email a written request for clarification under S.C. Code Ann. § 11-35-1520(8), regarding the impact of the changes to the state standards. ACT responded to that request for clarification on August 21. It is unclear whether this response was provided to the evaluators. On August 25, after the proposals had been scored by the evaluation panel, ITMO forwarded another email request for clarification that included an expansive list of 16 items the State wanted “clarified.” On August 26, ACT responded to ITMO’s request. The response included expansive substantive information that sought to modify ACT’s proposal in many respects.

On August 29, ITMO forwarded written notice that the state was electing to conduct discussions pursuant to S.C. Code Ann. § 11-35-1530(6) and S.C. Reg. 19-445.2095(I). Upon information and belief, this was the first instance in which ITMO had engaged in discussions pursuant to the Code. The notice listed deficiencies in the ACT proposal that would result in rejection unless corrected. The deficiencies related to ACT’s failure to submit completed attachments #2 and #3 in its Business Proposal and ACT’s exception taken to the Seating Chart requirements (Item 6.5 in Section III – Scope of Work/Specifications.) ACT was requested to complete and return Attachments #2 and #3. ACT responded to the request on September 2 wherein it provided a narrative response to each deficiency listed. ACT also resubmitted Attachments #2 and #3 but the pricing matrix was not completed. On September 3, ITMO forwarded another request to engage in discussions pursuant to the Code. The request again listed a deficiency that would result in ACT’s proposal being rejected as non-responsive unless corrected. This deficiency related to the Data File and Electronic Storage Media Requirement (Item 17 in Section III – Scope of Work/Specifications.) On September 3, ACT responded to this request acknowledging that it would only be partially compliant with this requirement.

As the timeline of events above reflect, most of the communications between ITMO and ACT, which were conducted as requests for clarifications and discussions, occurred after the scoring of the proposals were completed. Despite the fact that the results of these communications reflected that ACT remained materially non-compliant with the RFP, at some point thereafter, ITMO elected to enter into negotiations with ACT. On September 19, 2014, negotiations with ACT were concluded and the Notice of Intent to Award, reflecting the proposed award to ACT.

DRC contends the proposed award to ACT is improper and contrary to the Procurement Code. First, DRC contends that ACT presented non-responsive technical and price proposals which materially deviated from the requirements of the RFP. ACT’s proposal should have,

therefore, been rejected. Second, DRC contends that the means and methods in which the evaluation process was conducted and award determination made were in violation of the Procurement Code. The communications, clarifications and discussions were not conducted in accordance with the Code. ACT was afforded disparate and improper opportunity to enhance its proposal. Furthermore, the evaluation, scoring and ranking of the proposals did not comply with the process, policies and procedures established by the State and was in violation of the Code. The integrity of the entire evaluation process was, therefore, tainted and unfairly prejudiced DRC. Third, the evaluation panel's scoring was arbitrary and capricious; did not follow the published award criteria in making the determination; and otherwise considered matters outside of the RFP. Furthermore, the evaluation panel scoring was tainted in that certain members of the panel possessed conflicts of interest with regards to this procurement. Fourth, ACT's proposal contained material misrepresentations that were made in bad faith and/or designed to materially influence a determination or evaluation. Finally, the negotiations that occurred were conducted in violation of the Procurement Code. The award to ACT is, therefore, improper.

I. ACT's proposal is non-responsive in that it fails to comply with the essential requirements of the RFP pursuant to S.C. Reg. 19-445.2070(A) and/or seeks to modify or impose conditions upon the State in violation of S.C. Reg. 19-445.2070(D)

a. The RFP was clear in that the purpose of the solicitation was to procure an assessment program for the subjects of ELA and math. (RFP p.16.) The RFP also was clear that science and other subjects would continue to be administered under existing contracts. Despite the clear parameters of the RFP, the reference and inclusion of the development and assessment for science was included throughout ACT's proposal and was interwoven throughout its proposed program. The failure to understand and/or abide by the intent of the RFP by including science reflects a non-responsive bid that seeks to modify essential requirements of the RFP. The inclusion also is non-responsive to the requirements of the RFP regarding the structure of the proposal for those items that exceed the specifications of the RFP.

b. ACT failed to commit to providing test forms for year 2 and beyond in which 100% of the test items align to the new state standards. The RFP contains numerous provisions that require the Offeror to articulate and emphasize how it will handle the requirement to modify the assessments to comply with the new state standards (See, eg. RFP p.22 & 43). ACT in numerous instances boldly stated that it does not modify its testing materials. It did indicate that it would have discussions regarding "augmenting" their off-the-shelf test forms with a second test to be appended and that this would require additional costs, which were not provided. No details regarding how this would occur were provided. This lack of information reflected a void in a significant component of the assessment program once new standards are updated. The costs associated with this are undefined and could be significant. ACT's response regarding updating assessments when the state standards change and the resulting costs was non-responsive and reflected an effort to modify an essential requirement of the RFP.

c. ACT sought to modify essential requirements of the RFP and impose conditions on the State limiting its liability as set forth in Exhibit I to its proposal. The efforts to remove those conditions were undertaken improperly and the proposal should have been rejected.

- d. ACT was non-responsive and sought to modify the essential requirements of the RFP in that it failed to properly complete and submit attachments #2 and #3 of the Business Proposal.
- e. ACT failed to properly respond and otherwise qualified its response to the requirements set forth in Section 5.25 (RFP p.27) regarding the provision of documents required for the alignment study for the state to conduct an alignment study that conforms to US Department of Education.
- f. ACT was non-responsive and failed to comply with the essential requirements of Section 6.5 (RFP p. 28) in that its proposal failed and refused to comply with the requirements regarding seating charts. ACT was improperly permitted to supplement and enhance its proposal with regards to this requirement. Nevertheless, such additional information did not cure that non-responsiveness.
- g. ACT fails to respond to the material requirements of Section 8.0 (RFP p.31) regarding handscoring specifications. This section requires procedural, design and implementation requirements for scoring student writing and performance tasks. ACT was allowed to improperly enhance its proposal with regards to handscoring but its response remains non-responsive in that it modifies the requirements regarding the submission of handscoring statistical data in an electronic file.
- h. ACT's response with regards to Section 17 (RFP p. 38-39) was non-responsive and sought to modify essential requirements of the RFP. This section set forth the Data Files and Electronic Storage Media Requirements. The section required customized data files following each test administration and set forth how they were to be made available to the State. ACT's proposal refused to agree to comply with the customized requirements and the delivery requests in contravention of the material requirement of the RFP.
- i. ACT's response with regards to Section 19.0 (RFP p. 40) was non-responsive and sought to modify essential requirements of the RFP. This section set forth that Act 200 requires that assessments establish at least four student achievement levels. The RFP indicated that the State would compile a committee to participate with the Offeror in reviewing and setting these achievement levels in 2015 and future years. All costs associated with setting these achievement levels were to be born by the Offeror. ACT refused to comply with this requirement and indicated it had not included costs for this. Moreover, ACT boldly stated that if such efforts were required, a separate contract with ACT or another vendor would be required. This refusal reflects a material non-compliance with the RFP.
- j. The RFP required the Offeror to provide individual student reports in both electronic and paper based format. (RFP p.33) ACT's proposal modifies this essential requirement and is non-responsive in that it states that student reports are not available online for grade 11. It further stated that paper reports were not included in its Business Proposal.
- k. The RFP required Offerors to provide a report that compares performance of students in South Carolina to other students' performance on comparable standards in other states.

(RFP. p. 42). ACT failed to commit to this requirement, indicating that the requirement was not appropriate but could be discussed. ACT was non-responsive as to this requirement.

l. The RFP required Offerors to describe the procedure(s) used to ensure item alignment with the CCSS. The Offerors were required to include alignment study links or papers in the response. ACT's proposal was non-responsive to this material requirement and did not provide the procedures used to ensure alignment. ACT references an alignment study attached as an Exhibit but that document was improperly redacted and not provided to DRC. Upon information and belief, ACT is not capable of complying with this requirement.

m. The RFP required Offerors to demonstrate how Offerors assessment will pass a federal peer review. (RFP p.42) ACT's proposal was non-responsive to this material requirement and did not demonstrate how ACT's proposed assessment would pass peer review. Upon information and belief, ACT has not and is not capable of complying with this requirement.

n. The RFP required Offerors to submit dates of first publication for each assessment and test administration manual. ACT's proposal was non-responsive in that it did not reference in any way test revisions for ACT or ACT Aspire or dates.

o. ACT's proposal contained numerous other additional items of non-compliance or evidence of its intent to modify the requirements set forth in the RFP.

II. The means and methods in which the evaluation process was conducted and award determination made was in violation of the Procurement Code. The communications, clarifications and discussions were not conducted in accordance with the Code.

a. Sequence of the Scoring and Clarification and Discussions.

As set forth above, the scoring of the Proposals was completed by the evaluation panel on August 21. As such, the determination of the highest ranked Offeror and the proposal that was deemed most advantageous to the State was concluded at that time. Inexplicably significant communication occurred in the form of requests for clarification and discussions after the scoring had been completed. The communications reflect that ITMO had concerns about the responsiveness of ACT's proposal as it related to many items. Indeed, the discussion request (engaged in after the clarification requests) expressly state that the ACT proposal was deemed non-responsive on August 29 and as late as September 3, despite the fact that the scoring had already been completed. It is improper and in contravention of the Code for the panel to undertake and complete the scoring of a non-responsive proposal with that scoring being the basis of the determination of award.

b. The Clarification process was conducted in violation of the Code.

ITMO issued several clarification requests pursuant to S.C. Code Ann. § 11-35-1520(8) that was not concluded until August 26, five days after the scoring was completed. Clarifications are an exchange of information conducted to facilitate the State's understanding of a proposal – as originally submitted – by resolving substantial ambiguities in the proposal.

Clarifications may be conducted only with Offerors who have submitted proposals that are obviously responsive to the solicitation's material requirements. That must be conducted only to resolve ambiguities and cannot involve an opportunity for proposal revisions. In this case, ACT's proposal as submitted possessed patent and indisputable items of material non-compliance with the essential requirements of the RFP. It is inconceivable that the State made any meaningful determination that ACT's proposal was obviously responsive. Furthermore, the items requested for clarification included items that were not ambiguities. Rather, ACT was afforded an opportunity to submit revisions and enhancements to its proposal. The clarification process was conducted outside of the parameters of S.C. Code Ann. § 11-35-1520(8).

c. The Discussions engaged in by and between ITMO and ACT was in violation of the Code.

On August 29 and again on September 3, ITMO chose to engage in discussions with ACT pursuant to S.C. Code Ann. § 11-35-1530(6) and S.C. Reg. 19-445.2095(I). DRC contends that these discussions were improper given that they were conducted after the scoring had been completed. Discussions are conducted to advise offerors of deficiencies, resolve uncertainties concerning the cost and price or technical proposal or resolve suspected mistakes. Discussions are conducted for the purpose of clarification, not to allow enhancements to or further development of a proposal. Furthermore, discussions are not to be used to coach or lead an Offeror to enhance its proposal; nor can it be used for the conduct of negotiations. In this case, the discussions were conducted in such a way as to permit enhancements to ACT's proposal. The modifications to the proposal were beyond the scope of those intended in the Code and it would appear that the process was used to engage in negotiations over certain items. This provided an unfair advantage to ACT and severely prejudiced DRC in the evaluation.

III. The evaluation panel's scoring was arbitrary and capricious; did not follow the published award criteria; considered matters outside of the RFP and was tainted by material conflicts of interest.

a. Evaluation Panel's scoring was arbitrary and capricious.

As set forth above, the ACT proposal was non-responsive in many respects. Indeed, it necessitate numerous communications and discussions to attempt to "clarify" the proposal or correct material non-conforming items. These efforts were undertaken after the evaluation panel had completed its scoring. At a minimum, certain evaluators scores did not reflect the significance of ACT's refusal to comply with the requirements of the RFP or the failure to address significant items in the RFP. Whether that was a result of evaluators not fully understanding the requirements of the RFP or ACT's proposed response, the result is that the scoring was arbitrary and did not reasonable reflect a full and complete application of the award criteria to the proposals. By way of example, one of the evaluators assigned a perfect score to ACT for the technical proposal. It is inconceivable, with the numerous areas of the ACT proposal where ACT boldly indicated that it would not comply with the requirements and the numerous areas where ACT did not provide the information requested in the RFP, that a reasonable and deliberate review of ACT's proposal by an evaluator could result in a perfect score.

b. Evaluation Panel did not follow the published award criteria and considered matters outside the RFP.

As set forth above, the development, assessment and scoring for science was not in any way included in this RFP. Indeed, the needs of the State are currently being met through other existing contracts. The proposal submitted by ACT refers to Science Assessments not requested or covered by this RFP in numerous locations throughout the proposal. Some examples of the inclusion of non-covered assessments in the RFP are as follows:

- i. Sample report includes Science– Executive Overview, p. 3;
- ii. STEM score that ACT clarified requires a Science assessment for a South Carolina student to get a STEM score –Executive Overview, p. 3, Technical Proposal, p. 1;
- iii. ACT Aspire Science – Grades 3-5, Grades 6-10 - Technical Proposal, p. 8-9;
- iv. The ACT Science Test – Grade 11, Technical Proposal, p. 10;
- iv. Reference ACT Aspire science assessments at grade 3-7 - Technical Proposal, p. 17;
- v. Exhibit 7– Includes Science Test Content Information;
- vi. Exhibit 8 – Includes Prototype Reports with Science;
- vii. Additional Science reference(s) –Technical Proposal, pp. 1,2,16,17,21, 23;
- ix. Exhibit 9 – ACT Technical Manual.
- x. Exhibit 13 – ACT Profile Report – State.

DRC contends that the inclusion of this information in the manner in which it was provided materially prejudiced this evaluation. It is impossible for the evaluators not to have considered this information as it was interwoven throughout the proposal. It is further impossible for the evaluators to have understood what services would be provided to the schools and students if Science was excluded. By allowing ACT to include this information for consideration, which was currently being performed under existing contracts, under the guise that these services would be provided as part of the RFP, ACT was afforded an unfair competitive advantage. Consideration by the panel of the RFP reflected improper consideration of matters outside of the RFP.

c. Evaluation Panel's scoring was tainted by conflict of interest.

The scoring by the evaluation panel was further tainted by the fact that one of the evaluators possessed a significant conflict of interest. This evaluator had a direct relationship with ACT in that the evaluator serves as a member of the South Carolina ACT council and is listed as such on ACT's website. Given this relationship it was improper for the evaluator to have been charged with evaluation panel or participated in any way in this procurement. To allow this award to stand in light of this clear conflict of interest would undermine the purposes and intent of the Procurement Code. It would not reflect fair and equitable treatment of those participating in the procurement process; thwart public confidences and represent a breakdown of those safeguards that the Code seeks to impose.

IV. ACT's proposal contained material misrepresentations that were made in bad faith and/or designed to materially influence a determination or evaluation.

Misrepresentation is a matter of good faith. Where a misrepresentation is made in bad faith or materially influences a determination or evaluation, the proposal should be rejected. The RFP required an Offeror to provide a narrative discussing its qualifications and prior experience performing tasks similar to those required in this RFP. The discussion was to include a description of the Offeror's background and relevant experience that qualified it to provide the services required by the RFP. (RFP p. 46) In its proposal, ACT provided a map and list highlighting "ACT's **statewide adoption partners** that assess their students using ACT's College and Career Readiness Assessments." ACT included in this map the use of ACT Aspire in grades 3-8 in Wisconsin. This was an inaccurate and misleading representation. Upon information and belief, Wisconsin does not have a statewide adoption of ACT Aspire in grades 3-8. Rather, ACT only participates in a statewide adoption of ACT Aspire in one state – Alabama.

V. The negotiations that occurred were conducted in violation of the Procurement Code.

The process for negotiations are set forth in S.C. Code Ann. § 11-35-1530(9). Negotiations are to be conducted with the highest ranked responsive Offeror. For the reasons set forth above, it was error for the State to engage in negotiations with ACT as its proposal was non-responsive and improperly determined to be the highest ranked Offeror. Furthermore, the procurement file reflects that negotiations were conducted by and between ITMO and ACT prior to the scoring and ranking of the Offerors in violation of the Code. Lastly, negotiations are required by the Code to be meaningful and with the purpose of maximizing the State's ability to obtain the best value. The Record of Negotiations ("RON") reflect that the proposed Contract provides a significant fee to ACT in year three if the State does not obtain 100% CBT. Under the RFP, ACT would be required to perform the services regardless of the percentage CBT. In addition, the RON reflects that ACT is only required to provide paper copies of student reports for Year 1 of the Contract. The RFP clearly required paper copies of student reports throughout the life of the Contract. Both of these negotiated terms pass on significant cost to the State does not reflect the results of a negotiation that achieved the best value to the State.

DRC does not invoke its rights to protest under the Procurement Code lightly. Its review of the ACT and the means and methods of the proposed award has raised serious concerns that the award of this Contract was done in such a way to ensure that the ACT proposal was most advantageous to the State. For the foregoing reasons, the notice of award to ACT should be cancelled. DRC contends that ACT's bid should have been rejected as non-responsive. With the rejection of ACT, DRC, therefore, would be the highest ranked Offeror. As such, DRC is requesting the Chief Procurement Officer issue a decision to award the Contract to DRC.

Mr. Michael Spicer
October 6, 2014
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DRC will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We are requesting an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof.

Sincerely,



E. Wade Mullins, III

EWM/rdd

cc: William Dixon Robertson, Esquire
Norma Hall
Jason Evans
Shelly Kelly
Georgia Gillens
Mike DiNicola
Jennifer Eastman, Esquire

Attachment 3