

HENRY MCMASTER, CHAIR  
GOVERNOR

CURTIS M. LOFTIS, JR.  
STATE TREASURER

RICHARD ECKSTROM, CPA  
COMPTROLLER GENERAL



HUGH K. LEATHERMAN, SR.  
CHAIRMAN, SENATE FINANCE COMMITTEE

W. BRIAN WHITE  
CHAIRMAN, HOUSE WAYS AND MEANS COMMITTEE

GRANT GILLESPIE  
EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.  
DIVISION DIRECTOR  
(803) 734-8018

MICHAEL B. SPICER  
INFORMATION TECHNOLOGY MANAGEMENT OFFICER  
(803) 737-0600  
FAX: (803) 737-0639

## Protest Decision

**Matter of:** Intralot, Inc.

**Case No.:** 2017-215

**Posting Date:** August 3, 2017

**Contracting Entity:** South Carolina Lottery Commission

**Solicitation No.:** 5400013044

**Description:** Lottery Systems & Other Services

### DIGEST

Protest of award alleging unfairness in the evaluation process and specific violations of the South Carolina Consolidated Procurement Code and Regulations is denied. Intralot's (Intralot) initial and amended letters of protest are included by reference. [Attachment 1 and Attachment 2]

### AUTHORITY

The Chief Procurement Officer (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on a review of the procurement file, applicable law, precedents, and submittals.

## BACKGROUND

<i>Event</i>	<i>Date</i>
Solicitation Issued	03/10/2017
Amendment 1 Issued	03/20/2017
Amendment 2 Issued	04/07/2017
Proposal Opening	04/25/2017
Charging Meeting	04/26/2017
Intent to Award Posted	05/26/2017
Initial Protest Received	06/05/2016
Amended Protest Received	06/12/2017

The State Fiscal Accountability Authority (SFAA) issued this Request for Proposals by on behalf of the South Carolina Lottery Commission (SCEL<sup>1</sup>) to acquire a Contractor to provide services and supplies and/or equipment for the operation of the Lottery as provided in the South Carolina Education Lottery Act (S.C. Code Ann. §§ 59-150-10, *et seq.* (Supp. 2016). Two amendments to the RFP were issued on March 30, 2017 and April 4, 2017 respectively. Responses were due on April 25, 2017. A panel of six SCEL employees were selected to evaluate proposals: Anthony Cooper, Chief Operating Officer ; Ann Scott, Director of Sales and Retailer Relations ; Alan Wilson, Database and Development Manager ; Daniel Beatty, Chief Compliance Officer ; Elizabeth Leber, Security Manager ; and Veda Jeffcoat, Senior Systems Analyst .

Proposals were received from Scientific Games International, Inc., IGT Global Solutions Corporation (IGT), and the incumbent Intralot. The Procurement Officer charged and briefed the Evaluators regarding their responsibilities in evaluating the proposals, including instructions outlining the process. Each evaluator executed a copy of the Evaluator General Instructions acknowledging receipt of written instructions and indicating their understanding of and intent to comply with their obligations as Evaluators, including the required disclosures regarding any conflict of interest. The Evaluators also signed the appropriate non-disclosure forms to maintain the integrity and confidentiality of the RFP process.

The Evaluators gave the IGT technical proposal the most points followed by Scientific Games and Intralot. Intralot's total technical score trailed IGT by nearly 500 of a possible 8100 points.

---

<sup>1</sup> Both the solicitation and the lottery agency itself refer to the Commission as "South Carolina Education Lottery."

Intralot offered the lowest priced proposal and received the maximum points available for cost. Nevertheless, it was unable to overcome the advantage IGT enjoyed from the technical proposal evaluation. IGT was scored the highest ranked offeror and after successful negotiations was determined the offer most advantageous to the State taking into consideration price and the evaluation factors set forth in the request for proposals. An Intent to Award was posted to IGT on May 26, 2017. Intralot filed its initial protest on June 5, 2017, and amended its protest on June 12, 2017.

In its initial protest letter Intralot included the following paragraph:

Intralot requests due notice and a hearing at which it will present facts, evidence and argument on these issues. If for any reason a hearing will not be held, Intralot requests that the Chief Procurement Officer (“CPO”) promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration and a copy of all materials (other than any submitted by Intralot) reviewed by the CPO as a part of his review as they are submitted or reviewed, so that Intralot may review and comment on them as appropriate. Intralot also asks that the CPO advise it of any deadlines for the submission of evidence and argument regarding this matter and in reply to the protest, in advance of the issuance of a decision on the protest.

In both the initial and amended letters Intralot asked “that the CPO provide all interested parties a deadline by which to provide evidence for the CPO to consider in reaching its decision...” The CPO responded by email on June 30, 2017:

Consistent with Interlot’s *[sic]* request to set a deadline for parties to offer material for consideration in reaching a decision in this matter, please provide any evidence or argument supporting your position to the Chief Procurement Officer and the other parties by the close of business on July 7, 2017.

By consent of the parties the CPO extended the deadline to July 10.

Intralot responded with a three-volume appendix including documents from the procurement file and email correspondence, and the declarations of J. Michael Nesser, and William Egan. Mr. Nesser is a Certified Public Accountant with expertise in financial, economic, and quantitative analyses. Mr. Egan<sup>2</sup> has extensive experience in the lottery industry, including previously

---

<sup>2</sup> In his declaration Mr. Egan concluded that “the evaluation criteria in the RFP does not meet [industry] best practices[.]” Specifically, the “lack of definition and weighting of the evaluation criteria render it difficult for the

holding the position of Assistant Executive Director/General Counsel for the Massachusetts State Lottery Commission.<sup>3</sup>

Both SCEL and IGT submitted motions styled as “Motion to Dismiss and Alternatively for Summary Judgment.” SCEL included Affidavits from all six of the evaluators and from four other SCEL employees: Mr. Hogan Brown, Interim Executive Director , Ms. Dolly Garfield, Senior Legal Service Manager, Ms. Petrina Marsh, Senior Procurement Specialist, and Mr. Jorge Bravo, Director of Information Technology. ITG submitted affidavits from Larry King, its Vice President for Strategic Sales, Peter Daniels, its General Counsel for North American Lottery , and Richard Wheeler, its Vice President, North American Lottery.

The CPO will treat all materials signed by counsel as “argument supporting [her client’s] position,” as requested in his June 30 email message. The CPO expressly declines to rule on the motions and will instead address the merits of the protest taking into consideration the information submitted.<sup>4</sup>

---

Evaluation Team to ensure that its evaluations are consistent and objective as well as compliant with the requirements of South Carolina law and procurement principles, i.e., not arbitrary and capricious.” Furthermore, Mr. Egan’s observations and comments concerning the evaluation criteria might have been useful at the issuance of the solicitation when a timely protest could have addressed his concerns, but serve no purpose at this point in time and will not be considered. Mr. Egan also comments that while the Evaluation Panel General Instructions requests evaluation panel members to provide a brief written explanation to support the points awarded, many of the evaluation panel members’ written explanations lacked any factual basis and did not provide adequate support. The CPO has addressed these concerns. *See* n. 8, *post*, and accompanying text.

<sup>3</sup> Under a letter dated July 18, 2017, Intralot submitted the Declaration of Mitesh Patel, owner of SAI Food Mart located in Greenwood, South Carolina. The import of Mr. Patel’s statement is not clear to the CPO, except that Intralot appears to rely on it to support its request to take depositions. Since the CPO will determine this protest on its merits, and will not address the parties’ arguments under Rule 56, SCRCPP, he need not consider Mr. Patel’s declaration. *See* n. 4, *post*, and accompanying text.

<sup>4</sup> In response to the Motions for Summary Judgment, Intralot requested that the CPO permit Intralot to take the depositions of individuals who submitted affidavits in support of SCEL’s and IGT’s submissions under Rule 56(f), South Carolina Rules of Civil Procedure (SCRCPP). Local counsel for Intralot simultaneously served deposition notices for these witnesses on SCEL and IGT. Unsurprisingly, SCEL and IGT objected to the depositions, precipitating an exchange of argument about the requirements of SCRCPP Rules 12 and 56.

The South Carolina Procurement Code ("Code") is devoid of any statutory structure for the conduct of discovery, including depositions, during a protest that is pending before the CPO pursuant to S.C. Code Ann. §11-35-4210(1)(b). Moreover, while the Panel and the CPO have found that the South Carolina Rules of Civil Procedure can be instructive, the Code in no way mandates that either the CPO or the Panel follow those Rules. Simply put, the Rules of Civil Procedure are not applicable to an administrative review by a Chief Procurement Officer or the Procurement Review Panel. The protest process is intended to be an informal and expeditious procedure to determine if a procurement has been conducted in compliance with the Code, applicable law, and precedents.

## ANALYSIS

Intralot alleges three specific violations of the Code and Regulations and various procedural missteps by the evaluation committee and during the evaluation resulting in an arbitrary and capricious evaluation of Intralot's proposal. Intralot, as the protestant, bears the burden of proving its allegations by a preponderance of the evidence. *See In Re: Protest of Johnson Controls, Inc.*, Panel Case No. 1989-9; *In Re: Protest of Morganti National, Inc.*, Panel Case No. 1995-11. Mere speculation and conjecture do not meet the preponderance of the evidence test.

Intralot's initial allegation of a violation of the Code asserts that confidential information about its proposal was divulged to IGT during negotiations:

Although the Chief Procurement Officer may elect to negotiate price with the highest ranked offeror, "in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed." S.C. Code § 11-35-1530(8). Here, contrary to this statutory provision, it appears that IGT was provided with the confidential amount of Intralot's price proposal. IGT's original price proposal was \$80,472,480.00 (fixed monthly fee of \$670,604.00), while Intralot's price proposal was substantially lower at \$77,499,960.00 (fixed monthly fee = \$645,833.00). After price negotiations, however, IGT essentially matched Intralot's offer with a new price proposal of \$77,500,000 (fixed monthly fee = \$645,833.33). Intralot respectfully submits it is not plausible that IGT matched Intralot's price proposal – within \$40 on a \$77 million contract – unless IGT was alerted to the amount of Intralot's price proposal (whether unintentionally, indirectly or otherwise). This constitutes a direct violation of S.C. Code.

[Initial Protest, Ground V] Intralot relied on two things to support this claim: first, that the final price negotiated with IGT was nearly identical to the price offered by Intralot; and second, the opinion of J. Michael Nesser, whose affidavit Intralot submitted on July 10, 2017. In the affidavit Mr. Nesser concluded "that it is highly improbable IGT could have arrived at a revised cost within \$40.00 (13.5 parts per million) of Intralot's initial cost proposal, without first having learned, directly or indirectly, the amount of Intralot's initial cost proposal." This evidence, such as it is, proves nothing. If the CPO were to accept Intralot's first argument, the State could never negotiate a price near the lowest proposed cost. Nothing in the Code prohibits aggressively

negotiating on price. Intralot's second argument is nothing more than long odds and speculation that information about its price proposal may have been released during negotiations. The odds on winning the Powerball Lottery are 1 in 292,201,338, yet invariably someone wins several times a year. Long odds and speculation are not evidence.

Even if the CPO were to entertain this claim on its merits, Intralot failed to prove its case.

Negotiations involved SFAA procurement manager Michael Dalton; Mr. Hogan Brown, Interim Executive Director for SCEL; Ms. Dolly Garfield, Senior Legal Service Manager for SCEL; Mr. Jorge Bravo, Director of Information Technology for SCEL; Mr. Larry King, Vice President for Strategic Sales for IGT; Mr. Peter Daniels, Assistant General Counsel for IGT; and Mr. Richard Wheeler, Regional Vice President for IGT. Every one of them, with the exception of Mr. Dalton, provided an affidavit that specifically and unequivocally denied any Intralot pricing information was revealed to IGT during negotiations.

Intralot bears the burden of proof by a preponderance of the evidence. It failed to produce any evidence supporting its claim; and pointed to no documentation or other information that would suggest that all six affiants lied under oath. This issue of protest is denied.

Intralot also alleges a violation of Regulation 19-445.2095 during negotiations as follows:

South Carolina law provides that "Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals." S.C. Code of Regulations § 19-445.2095(I)(3). Here, the Procurement Officer allowed IGT to make a material modification to its proposal without providing the same opportunity to Intralot. Specifically, the Record Of Negotiation reflects a change to the side panels for the terminals described in IGT's proposal. Although the Record Of Negotiation states that the change in side panels will not result in any changes to the overall footprint of the terminals, this ignores the fact that the overall footprint of the retailer installations will increase. In IGT's proposal, the pictures of the "Standard Retailer Configuration" show a rear shelf for the printer or player advertising display. In the pictures attached to the Record Of Negotiation, however, no rear shelf is shown. *Cf.* IGT Proposal at pp. 335-336; Record Of Negotiation. Without the shelf, the printer will need to be placed on the counter along with the display, thereby increasing the overall footprint of the installation. This is a material change from, and outside the scope of, what IGT originally proposed. Intralot was not provided with a similar opportunity to make material changes to its proposal.

[Amended Protest, Ground I] For the following reasons, this claim fails as a matter of law.

Discussions are authorized under Section 11-35-1530(6) following the processes and procedures set forth in Regulation 19-445.2095(I). Section 11-35-1530(6) provides:

As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

Regulation 19-445.2095(I)(2) only allows the procurement officer to:

- (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.

Regulation 19-445.2095(I)(3) limits the application of the Regulation:

Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(emphasis added) The discussions described in Regulation 19-445.2095(I) “are [ordinarily] conducted prior to final ranking.” *Id.* Once a proposal becomes susceptible of being selected for award it can be evaluated and ranked in accordance with Section 11-35-1530(7):

Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. 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. If price is an initial evaluation factor, award must be made in accordance with Section 11-35-1530(9) below.

Intralot does not claim that the State allowed IGT to make impermissible revisions to its proposal prior to scoring. Its reliance on the regulation is misplaced.

Once the final ranking is determined the procurement officer may proceed under Section 11-35-1530(9) as follows:

Award must 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, unless the procurement officer determines to utilize one of the options provided in Section 11-35-1530(8).

Section 11-35-1530(8) allows changes within the general scope of the request for proposals:

(a) negotiate with the highest ranking offeror 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. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;

(emphasis added) Negotiations are only authorized once the final ranking is complete.

Negotiations cannot negate the final ranking that precipitated the negotiation. If during negotiations it is determined that changes to the scope would require significant changes to the offerors' proposals, the procurement officer may cancel the solicitation, revise the requirement and issue a new solicitation; or request "best and final" offers under Section 11-35-1530(8)(c):

the procurement officer may make changes within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers.

The change in the retailer terminals is well within the scope of the solicitation. Nothing—besides the bare, conclusory allegation in IGT's amended protest—suggests that altering the terminals' side panels is a material change to the requirements of the RFP. There was thus no need to revise the specifications and request "best and final" offers. Nor does the Code require that changes made during *negotiations* be offered to the other competitors. The Procurement Review Panel (Panel) observed in *Appeal by Andersen Consulting*, Panel Case No. 1994-1:



Section 11-35-1530(11)<sup>5</sup> does not provide that once a contract is negotiated with the second ranked offerer, then it must be offered to the first ranked offerer. The law does not contain any language that could be construed that way. Neither would it be reasonable nor is it a normal business practice to allow a contract negotiated with one party to be offered first to another party. This would certainly put a chilling effect on any negotiations with the State, as an offerer would not wish to negotiate a favorable contract for a competitor.

This issue of protest is denied.

Intralot next alleges that the evaluator's independent scoring violated the solicitation which required the evaluation panel to reach a collective, consensus technical score for each offeror in each category. [Initial Protest, Ground I] Intralot points to paragraph 6.1 in the solicitation as the basis for its allegation:

**6.1 Criteria for Award.** Each Offeror will be evaluated as specified in Part IV and scored by an Evaluation Panel for purpose of award for items as listed below.

[Solicitation, Page 67]

Paragraph 6.1 must be read in conjunction with paragraph 6.0 of the RFP to fully understand the published evaluation process. Section 6.0 provides:

## **VI. Award Criteria.**

**6.0 Award Criteria.** Proposals will be evaluated using the factors as stated herein. The two primary categories in Section 6.1 are the Technical Solution and the Price, which are stated in the relative order of importance. The items listed within Section 6.1(a) are also listed in order of importance within i, ii, and iii. The members of the RFP Evaluation Panel as discussed in (b) below will rate the factors, other than cost, subjectively, for purpose of award. The Procurement Officer will score the cost proposals as specified in Section 6.2 and (c) below.

(Emphasis added)

(b) The Offeror's Proposal, as specified in Section 6.1 (a) will be scored based upon the subject matter areas listed. Each member of the Evaluation Panel will review the material submitted using the standards provided at the beginning of

---

<sup>5</sup> Section 11-35-1530(11) was moved to Section 11-35-1530(8) in the 2006 changes to the Code.

each respective Section, beginning with Section 4.5. The Panelists may also consider the relative merit of each Proposal.

[Solicitation, Page 66] (Emphasis added)

The evaluation process was further clarified in Amendment 1 to the solicitation:

**15. IGT (9), RFP 6.1(a)(iii), page 66:**

**Q:** Will SCEL please confirm that the 300 points associated with the System Architecture and Gaming solution will be distributed evenly among the five sections noted to be included?

**State's Response:** The 300 points will be allocated as each panelist deems appropriate.

[Amendment 1, Page 5]. (Emphasis added).

In addition, the Evaluator General Instructions, acknowledged by each evaluator at the beginning of the evaluation process, required independent evaluation:

**Q. Scoring Independently:** Remember, you were chosen to serve as an evaluator because your expertise is valued. To take advantage of your unique expertise, you must arrive at your scores independently.

1. Do not allow others, or prior knowledge of an offeror's past performance, to influence your evaluation.
2. Do not discuss the evaluation process among yourselves outside of this forum. In addition to other problems, such communications could violate FOIA's open meetings rules and threaten the legality of the entire process.
3. You may not consider the scores of any other evaluator. You should neither seek to learn another evaluator's score nor share your scores with any other evaluator.
4. At a subsequent meeting, you may have the opportunity to hear the opinions of other evaluators and to discuss the proposal received. They may have caught something significant that you missed, or/vice versa. While you may adjust preliminary scores at any time prior to finalizing them in ink, your score must ultimately be your own.

[Evaluator General Instructions, Page 4]

While the paragraph relied upon by Intralot does indicate that proposals would be scored by a panel of evaluators; it does not indicate how the panel will score or state that the panel must reach a consensus. There is no statute or regulation requiring a single score from the evaluation panel. There is no statutory requirement that the evaluation panel reach a consensus. In fact, Intralot does not allege any violation of the Code in this protest ground. This issue of protest is dismissed.

Intralot next alleges that the Evaluator Scoring Guide, a document sent to the evaluators by the procurement officer two days prior to final scoring, violated the law by introducing evaluation criteria that were not published in the solicitation.

As noted, proposals must be evaluated based on the factors set forth in the RFP. *See* S.C. Code § 11-35-1530(9); RFP § 6.0. The Evaluator Scoring Guide, however, contains evaluation factors that are not set forth in the RFP. The Evaluator Scoring Guide, for example, provides that a score in the “Excellent” range is warranted where a proposal not only meets requirements but also “exhibits outstanding knowledge” and “creativity.” There is nothing in the RFP alerting offerors to the fact that proposals will be evaluated based on such factors. Furthermore, such non-specific factors are themselves arbitrary and incapable of any meaningful definition. Accordingly, ITMO’s determination and intent to award the Contract to IGT is contrary to law because it is based on evaluation factors not contained in the RFP.

[Initial Protest, Ground II]

At the initial meeting of the evaluation committee on April 26, 2017, each evaluator received a copy of the RFP, offerors proposals, scoring forms, and each signed a copy of the Evaluation Panel General Instructions and the Procurement Integrity Representations and Restrictions. The procurement manger emailed an Evaluator Scoring Guide to the evaluators on May 17, 2017, two days before the evaluation committee met to finalize its scores on May 19, 2017. The Scoring Guide offered evaluators a grading scale as an example of how to refine evaluation scoring. The email included two tables as follows:

**Evaluator Scoring Guide**

Score	Quality of Response	Description	Strengths Relative to Requirements	Weaknesses
(5) 90-100	Excellent	Proposal addresses requirements completely, exhibits outstanding knowledge, creativity, innovation or other factors to justify this rating	Meets requirements-numerous strengths in key areas	None
(4) 80-89	Good	Proposal addresses requirements completely and addresses some elements of the requirements in an outstanding manner	Meets requirements-some strengths in key areas	Minor-not in key areas
(3) 70-79	Moderate	Proposal addresses most elements of the requirements	Meets most requirements-minimal strengths provided in their response	Moderate-- does not outweigh strengths
(2) 60-69	Marginal	Proposal meets some of the RFP requirements	Meets some of the requirements with some clear strengths	Exist in key areas-outweighs strengths
(1) 0-59	Unacceptable	Proposal meets a few to none of the RFP requirements	Meets a few to none of the requirement with few or no clear strengths	Significant and Numerous

Evaluator Scoring Guide					
Score	Quality of Response	Description	Strengths Relative to Requirements	Weaknesses	Confidence in Proposed Approach
(5) 90-100	Excellent	Proposal addresses requirements completely, exhibits outstanding knowledge, creativity, innovation or other factors to justify this rating	Meets requirements--numerous strengths in key areas	None	Very High
(4) 80-89	Good	Proposal addresses requirements completely and addresses some elements of the requirements in an outstanding manner	Meets requirements--some strengths in key areas	Minor--not in key areas	High
(3) 70-79	Moderate	Proposal addresses most elements of the requirements	Meets most requirements--minimal strengths provided in their response	Moderate--does not outweigh strengths	Moderate
(2) 60-69	Marginal	Proposal meets some of the RFP requirements	Meets some of the requirements with some clear strengths	Exist in key areas--outweighs strengths	Low
(1) 0-59	Unacceptable	Proposal meets a few to none of the RFP requirements	Meets a few to none of the requirement with few or no clear strengths	Significant and Numerous	No Confidence

The scoring guide was accompanied with an example of how it might be utilized:

Example: Section 4.11 (Retailer Network Environment Design, Functionality, Services, and Supplies) is worth a maximum of 450 points. So...

If you think that an Offeror’s proposal “meets requirements and exhibits some strengths in key areas”, you could score them as “Good”, which is 80-89% of the maximum of 450 points. Let’s assume you score them as an 84....

**(450 maximum points) x (0.84 for a “good” quality of response) = 378 points for section 4.11**

The goal of the RFP evaluation is to determine the proposal most advantageous to the State. The Code and Regulations do not mandate the use of a particular evaluation process or scoring mechanism allowing the evaluation to be tailored to the particular solicitation and the goods or services being procured. There was nothing in the procurement officer’s communication mandating the use of this guide. The Scoring Guide did not introduce new evaluation criteria.<sup>6</sup> Providing evaluators with a grading scale to serve as an example of how to refine evaluation scoring does not violate the Code or Regulations. This allegation fails to state any violation of the Code.

Even if the CPO were to entertain this claim on its merits, Intralot again failed to prove its case. The evaluators provided affidavits indicating that they scored the proposals using only the criteria published in the solicitation. Some of the panelists had already completed their scores prior to receiving the "guide". Others did not use the guide at all; or they found it a helpful reference but did not use it in scoring the proposals aside from borrowing some of its verbiage. This issue of protest is denied.

Intralot next complains that while the RFP stipulated that the subsections of the technical evaluation criteria were listed in relative order of importance, the scoring forms do not provide separate scoring for the subsections resulting in arbitrary scoring:

The actual technical scoring of Intralot’s Proposal was also arbitrary and capricious because the Evaluator Scoring Guide and scoring forms are themselves arbitrary and capricious. Specifically, the RFP lists three evaluation categories for

---

<sup>6</sup> Intralot complains, among other things, that the scoring guide introduced nebulous concepts of creativity and knowledge into the evaluation process. However, the solicitation specifically called for offerors to leverage their expertise to propose creative solutions:

Unless expressly stated as such, the minimum requirements established in Part III are not intended to be restrictive or limit an Offeror’s ability to offer *varied and innovative solutions* to create a System that it believes is well-suited to meet SCEL’s needs and to ensure SCEL is operating a first-class lottery throughout the term of this Contract. *SCEL is relying on the expertise of the Offerors* to use the flexibility afforded in this RFP to explain how their hardware, software, and services will be most advantageous to SCEL

RFP, p. 48 (emphasis supplied).

the “Technical Solution,” with at least fifteen separate subsections (and some 37 pages of corresponding technical criteria in the RFP). *See* RFP § 6.1. The RFP expressly provides that these evaluation categories and their subsections are “listed in order of importance[.]” *See* RFP § 6.0. The scoring forms, however, do not provide for separate scoring for the subsections, let alone any manner for taking into account that the subsections are listed in order of importance. Rather, the scoring forms require the Evaluation Panel members to arbitrarily assign an overall score for each category without any guidance whatsoever regarding weighing the individual importance of the subsections. Ignoring the importance of specific subsections versus other subsections will unavoidably lead to a skewed score. For example, if an evaluator likes the “creativity” in a less importance subsection, that evaluator’s score could mask deficiencies in the more important subsections.

[Initial Protest, Ground III]

This claim does no more than suggest the possibility that, because the scoring form did not include a blank for every evaluation subdivision, the evaluators were left to provide a score without thought or reason. Intralot offers no evidence, direct or circumstantial, that the scores reflected on the evaluation forms do not reflect consideration of the evaluation factors and subsections in their order of relative importance. Intralot does not allege or imply that the evaluators were negligent in their responsibility to consider the relative importance of the evaluation factors and subsections in assigning scores. The evaluators are, in fact, very knowledgeable and experienced in the subject matter. In addition, the evaluation factors and point values were published in the solicitation and the score sheets mirrored the evaluation process set forth in the solicitation.

The evaluation criteria were published in the solicitation and included 1350 points assigned to the Technical Solution. The Technical points were divided between three criteria. Points for the first criteria were divided between two sub criteria.

**6.1 Criteria for Award.** Each Offeror will be evaluated as specified in Part IV and scored by an Evaluation Panel **for purpose of award** for items as listed below.

**Total Available points.....2,000.**

**(a) Technical Solution.....1350 Available Points  
(67.5% of Total pts.)**

**i) SCEL Retail Environment and Support.. 650 pts. (32.5% of Total pts.)**

**4.11 Retailer Network Environment Design, Functionality, Services, and Supplies..... 450 pts.**

- (a) Retailer Outlet Configuration and Equipment;
- (b)i Ticket Checkers and ADUs;
- (d) Communication from the Sales Terminals to the Data Center; and
- (e)i Contractor Duties and Responsibilities with Consumables.**

**NOTE:** 4.11(b)ii, Additional Ticket Checkers and ADUs; and  
4.11(c), In-Store Digital Jackpot Signage; and  
**4.11(e)ii, SCEL Duties and Responsibilities with Consumables, will not be evaluated for purpose of award.**

**4.12 Retailer Maintenance and Support Services. .... 200 pts.**

- (a) Field Operations;
- (b) Central Repair Facility; and
- (c) Help Desk Support.

**ii) SCEL Administrative Support ..... 400 pts.**

**4.10 Requirements for SCEL Administrative, Back-Office Support and Software.**

- (a)(1) Back-Office Design;
- (a)(2) Back-Office User Experience;
- (b) Internal Access Control; and
- (c) Ongoing Business Needs.

**iii) System Architecture and Gaming..... 300 pts.**

- 4.5 System Architecture and Capacity;
- 4.6 Data Center Operations;
- 4.8 Maintenance Releases, Game Modifications, New Game Releases, and Predetermined Winner Games; and
- 4.9 UAT Environment.
- 4.14(a) Games Offered in the Fixed Monthly Fee.

**NOTE:** 4.14(b), Games Not Included in the Fixed Monthly Fee, will not be evaluated.

**(b) Cost Proposal..... 650 pts. 32.5%**

**(c) Conversion and Business Continuity ..... Pass/Fail**

- 4.7 ICS; and
- 4.13 Conversion and Business Continuity Plan

[Solicitation, Page 67] (formatting in original<sup>7</sup>)

The Technical Solution section of the evaluator’s score sheet duplicated the evaluation criteria and point assignments published in the solicitation as follows:

		Points Available	Points Awarded
<b>TECHNICAL SOLUTION</b>	<b>Retailer Network Environment Design, Functionality, Services, and Supplies (4.11)</b> (a) Retailer Outlet Configuration and Equipment; (b)i Ticket Checkers and ADUs; (d) Communication from the Sales Terminals to the Data Center; and (e)i Contractor Duties and Responsibilities with Consumables.	<b>450</b>	
	<b>Retailer Maintenance and Support Services (4.12)</b> (a) Field Operations; (b) Central Repair Facility; and (c) Help Desk Support.	<b>200</b>	
	<b>Requirements for SCEL Administrative, Back-Office Support and Software. (4.10)</b> (a)(1) Back-Office Design; (a)(2) Back-Office User Experience; (b) Internal Access Control; and (c) Ongoing Business Needs.	<b>400</b>	
	<b>System Architecture and Gaming</b> 4.5 System Architecture and Capacity; 4.6 Data Center Operations; 4.8 Maintenance Releases, Game Modifications, New Game Releases, and Predetermined Winner Games; 4.9 UAT Environment; and 4.14(a) Games Offered in the Fixed Monthly Fee.	<b>300</b>	

The solicitation included the following explanation of the evaluation process:

**6.0 Award Criteria.** Proposals will be evaluated using the factors as stated herein. The two primary categories in Section 6.1 are the Technical Solution and the Price, which are stated in the relative order of importance. The items listed

---

<sup>7</sup> A previous solicitation was canceled. The specifications were revised and SFAA reissued the RFP. The highlighted portions in the revised solicitation were intended to indicate changes from the first RFP’s scope of work. The shaded text was intended to indicate modifications reflecting changes in response to vendor questions. See Solicitation, page 8.



within Section 6.1(a) are also listed in order of importance within i, ii, and iii. The members of the RFP Evaluation Panel as discussed in (b) below will rate the factors, other than cost, subjectively, for purpose of award. The Procurement Officer will score the cost proposals as specified in Section 6.2 and (c) below.

[Solicitation, Page 66]

The points assigned to the major factors were published in the solicitation along with points for two subsections and the subsections were listed in the relative order of importance. The scoring forms reflected the same weighted factors. The fact that all the subsections were not assigned points was known to Offerors when the solicitation was published on March 10, 2017. If Intralot was concerned that all the criteria subdivisions were not assigned points, it should have raised that issue at the time the solicitation was issued. This issue of protest is denied.

Intralot next complains that the Scoring Guide contributed to arbitrary and capricious scoring by the evaluators as it provided no guidance for applying the grading scale to the evaluation subsections.

The Evaluation Scoring Guide further exacerbates the arbitrary and capricious nature of the scoring. Generally, the Guide provides for different scoring ranges based on whether or not the proposal “addresses requirements completely,” “addresses most elements,” or meets only “some of the RFP requirements.” There is no guidance provided, however, regarding how to apply these scoring ranges to the various subsections in the Technical Solutions category, or how to arrive at a total point score for a particular category while taking into account the subsections. In short, the subsections – and the fact that they are listed in order of importance – is entirely ignored in both the scoring forms and the Evaluation Scoring Guide.

Furthermore, although the Guide provides for several different ranges of scoring, there is no guidance provided for how to determine a specific score within a range. For example, a percentage score of 90-100% falls within the “Excellent” range. There is no guidance provided, however, regarding how to score within this range, and the evaluator is left with no choice but to make an arbitrary determination regarding the points to be awarded. Here, for example, a total of 450 points are available in the “Retailer Network Environment Design, Functionality, Services, and Supplies” category. Applying the “Excellent” percentage range to 450 points yields a 45 point spread – from 405 points (90%) to 450 points (100%). Evaluators 1, 2 and 3 all scored Intralot in the “Excellent” range for this category, but gave Intralot widely disparate point totals (from a low of 409.5 to a high of 440). These scores are completely arbitrary. There is no

guidance provided, and no factual basis, for one Evaluator to give Intralot 409.5 points and another Evaluator to give Intralot 440 points. The fact that Intralot has requested, but has not received any documentation whatsoever supporting any factual basis for the scoring discrepancies, underscores the failure of the process to have any rational basis and leaves only one conclusion – that the process was arbitrary.

[Initial Protest, Ground III] As stated earlier, the Scoring Guide was provided as reference material two days before final scoring. The evaluators indicated that the guide was not relied upon in evaluating the proposals. Intralot suggests that, based on the fact that the Evaluation Scoring Guide did not speak to the evaluation criteria subdivisions, the evaluators, who are very knowledgeable and experienced in the subject matter, were left to provide a score without thought or reason. Intralot points to the variation in scores awarded by evaluators 1, 2, and 3 as evidence of arbitrary scoring attributable to the lack of guidance in the Scoring Guide concerning the evaluation subsections. However, evaluators each have different backgrounds, different occupational specialties, and different educational and occupational levels of achievement. In short, each evaluator is different and it is reasonable to assume that each would view the same material differently and score that information differently. If fact if all the evaluators provided the same score, that would certainly be an indication of collusive, arbitrary or capricious behavior in violation of the Code. In reviewing the evaluator's scores, there are no outliers. The evaluators were consistent from proposal to proposal and there were no significant deviations from evaluator to evaluator. Four evaluators scored IGT highest on the technical proposal, one evaluator scored Intralot the highest, and one evaluator gave IGT and Intralot the same technical score. Overall the evaluators determined IGT the highest ranked technical proposal followed by SGI and Intralot in that order. Intralot had the lowest proposed price and received the maximum points allowed for price followed by IGT and SGI in that order. When the technical and price scores were combined, IGT became the highest ranked offeror.

Intralot also alleges that there is no documentation supporting any factual basis for the scoring discrepancies and consequently the process was arbitrary. [Initial Protest, Ground IV] There is no statutory requirement that evaluators provide any detailed factual basis to support their

scoring. The Legislative Audit Counsel<sup>8</sup> and this CPO agree that some insight into the thinking of the evaluators and the decision making process is appropriate in the public procurement process and to that end following steps were implemented. The Evaluation Panel General Instructions include the following:

**R. Documentation of Scoring:** For each proposal you score, you must provide a brief written explanation for the points awarded for each evaluation criteria. This explanation will be included in the official file and subject to public review under the Freedom of Information Act. In the event of a protest, each member of the evaluation panel may be called upon to support their reasoning before the Chief Procurement Officer, the Procurement Review Panel, or in a Court of Law. Evaluators should not include scratch pads, informal notes, preliminary working papers, or extraneous comments with the evaluation information returned to the Procurement Officer.

Each Evaluator Score Sheet is accompanied by an Evaluator Explanation Summary which includes a brief description of each evaluation criteria with a space for comment and the following statement:

In an effort to support my evaluation of this RFP, I hereby provide a brief explanation for each score given to each evaluation criteria.

Unfortunately in this procurement, the explanations provide little insight into the thoughts of the evaluators while evaluating the proposal. Evaluator Elizabeth Leber provided the same comment for every score awarded: "They met the requirements of the RFP and did a great job." Evaluator Anthony Cooper also provided the same comment for every score awarded: "Excellent Proposal." Evaluator Ann Scott varied her comments slightly: "Met requirements," "Met requirements and exceeded in many areas," or "Met requirements and exceeded in some areas." The procurement officer should have pressed for better explanations before accepting these evaluations. While these comments fail to shed much light on the evaluators' thinking, they do indicate that the evaluators were, in fact, thinking. As stated above, in reviewing the scoring, there is no indication of arbitrary or capricious scoring. This issue of protest is denied.

---

<sup>8</sup> See S.C. Legislative Audit Council, "An Audit of the South Carolina Education Lottery," February 2010, at 5-8, available at [http://lac.sc.gov/LAC\\_Reports/2010/Documents/SCCEL.pdf](http://lac.sc.gov/LAC_Reports/2010/Documents/SCCEL.pdf) (last viewed August 2, 2017).

In this protest ground Intralot also alleges that the scoring of Intralot's Proposal was arbitrary and capricious because the Evaluation Panel members gave scores to Intralot (and the other offerors) that were not consistent with the Evaluator Scoring Guide. As stated earlier, the Scoring Guide was provided as reference material two days before final scoring. Its use was not required. The evaluators indicated that the guide was not relied upon in evaluating the proposals. A protest that the evaluators did not comply with a process they were not required to comply with lacks merit and is dismissed.

Intralot next alleges that the decision to award the contract to IGT is clearly erroneous, arbitrary and capricious, and contrary to law because of numerous irregularities involving the Evaluation Committee. [Generally, Amended Protest, Ground II.] In reviewing claims that the actions of the procurement officer or evaluation committee were arbitrary, capricious or contrary to law, the CPO looks to the following:

Section 11-35-2410(A) provides that:

The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: ... Section 11-35-1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section 11-35-1530(9) (Competitive Sealed Proposals Award), Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding) ...

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 standard for review in this and similar cases was established by the Procurement Review Panel in *Appeal by Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16:

The Panel will not substitute its 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.

In *Protest of Travelsigns*, Panel Case No. 1995-8, the Panel found that "the variation of Evaluators' scores alone is only proof of the subjective nature of the evaluation aspect of the RFP

Process." In *Protest of Santee Wateree Regional Transportation Authority*, Panel Case No. 2000-5 the Panel observed that the evaluation process need not be perfect as long as it is fair. The Panel also explained that subjectivity is the hallmark of the RFP process and does not equate with arbitrariness. In reviewing the appeal of *Protest of Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield; Appeal by Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield*, Panel Case 2001-7, the Procurement Review Panel pointed to the following in setting the standard of proof necessary to overturn procurement decisions:

The burden of proof is on the appellants to demonstrate by a preponderance of the evidence that the determination made by the procurement officer is clearly erroneous, arbitrary, capricious or contrary to law. "To prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis." *Robert E. Derektor of Rhone Island, Inc. v. Goldschmidt*, 516 F.Supp. 1085.

Intralot bears the burden of proof concerning its allegations of arbitrary or capricious actions by the evaluation committee.

Intralot's first issue involves the participation of Ann Scott in the evaluation:

Participation Of Ann Scott. The Evaluation Panel General Instructions provide that "If you have any prior experience with an offeror, you need to advise the procurement officer immediately." Here, Ms. Scott is a former employee of the West Virginia Lottery, where IGT was the West Virginia Lottery's vendor. In her role there, Ms. Scott had substantial experience with IGT. Despite her prior experience with IGT, no document reflects compliance with the requirement that she notify the procurement officer of this prior experience. In other words, it appears that Ms. Scott did not disclose to the Procurement Officer her prior experience with IGT and therefore should not have been a member of the Evaluation Panel. This violation, by itself taints the procurement and renders the contract award to IGT clearly erroneous, arbitrary and capricious and contrary to law.

Furthermore, the Evaluation Panel General Instructions provide "In performing your duties, you cannot use your prior knowledge of that particular offeror's history of past performance, if any, unless you are selected as a reference check." As noted, however, Ms. Scott has prior, undisclosed experience with IGT. She also has had substantial experience with Intralot's work for the South Carolina

Education Lottery. Given this substantial experience, it is not possible for her to separate her “prior knowledge” of Intralot from her evaluation of its proposal. Accordingly, Ms. Scott should not have been a member of the Evaluation Panel for this reason as well.

[Amended Protest, Ground II(1)]

Intralot only quoted part of the instruction to the evaluators. The full statement reads:

If you have any prior experience with an offeror, you need to advise the procurement officer immediately. For example, if your agency has contracted with this offeror before. Such experience does not automatically exclude you from participating, but the procurement officer does need to know right away.

[Evaluator General Instruction, Page 1]

Everyone working for SCEL has prior knowledge of at least one of the bidders--Intralot, the incumbent. The Procurement Review Panel noted in *Protest of Cathcart and Associates, Inc.*, Panel Case No. 1990-13:

The Panel has previously found as a matter of law that an 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. See, In re: Protest of ACMG. Inc., Case No. 1990-4.

Some employees have experience with multiple lottery providers. These instructions do not require the evaluator to notify the procurement officer of prior experience in writing. There is nothing in the file to indicate which, if any, evaluator advised the procurement officer of their prior experience. There is no statutory requirement that the evaluator notify the procurement officer of prior experience.<sup>9</sup> General Instructions specifically state that “Such experience does not automatically exclude you from participating.” There is no statutory requirement to automatically disqualify an evaluator with prior knowledge of the subject matter they are being asked to evaluate.

---

<sup>9</sup> Each evaluator provided an affidavit, and each affidavit includes a substantially similar averment that the procurement officer acknowledged that most panel members had a long history working in the lottery industry for governmental entities running state lottery programs. Even if there were no written disclosure, the procurement officer was certainly aware of panel members’ experience. He could not have known this without disclosure from the evaluators themselves.

Intralot goes on to allege that because of this prior, undisclosed substantial experience with IGT and Intralot, it was not possible for Ms. Scott to separate her “prior knowledge” of Intralot<sup>10</sup> from her evaluation of its proposal. Intralot provides no evidence that Ms. Scott’s prior experience influenced her evaluation. Ms. Scott’s scoring is in line with other evaluators. Apparently Intralot would have these proposals evaluated by a committee that had no prior experience in the lottery industry. This issue of protest is denied.

Intralot next alleges:

The Evaluation Panel Consisted Of The Same Members As The Evaluation Panel Members For The Prior Cancelled RFP.

A prior version of the RFP was issued, but then was cancelled. The RFP was then modified and re-issued. With respect to the prior RFP, the Evaluation Panel had been selected and the evaluation process was well underway before the RFP was cancelled. At a minimum, the evaluation process had proceeded to the site visit stage. When the new RFP was issued, the same persons who had served on the prior Evaluation Panel were selected to serve on the Evaluation Panel for the new RFP. This is problematic because, as already discussed, Evaluation Panel members are not supposed to use prior knowledge of an offeror in evaluating the offerors’ proposals. Yet, here all of the Evaluation Panel members had already begun evaluating and reviewing the offerors’ proposals for the prior RFP. To ensure that this prior knowledge did not influence the procurement, new and different persons should have been selected for the Evaluation Panel. The failure to do so renders the procurement clearly erroneous, arbitrary and capricious. Evaluation Panel members are not supposed to use prior knowledge of an offeror in evaluating the offerors’ proposals. The Evaluation Panel Consisted Of The Same Members As The Evaluation Panel Members For The Prior Cancelled RFP.

To ensure that this prior knowledge did not influence the procurement, new and different persons should have been selected for the Evaluation Panel. The failure to do so renders the procurement clearly erroneous, arbitrary and capricious.

[Amended Protest, Ground II(2)] Intralot provides nothing besides speculation and conjecture that the evaluators may have been influenced by prior experience with or knowledge of the offerors. There is no requirement to disqualify the offerors simply because they were involved in the evaluation of a prior procurement for the same services. This issue of protest is denied.

Intralot next alleges:

---

<sup>10</sup> It does make one wonder what prior experience Ms. Scott had that would cause Intralot such concern.

The Evaluation Panel Members Were Not Timely Provided Scoring Instructions. The panel members were provided with the offerors' proposals at the "Panel Charging" meeting on April 26, 2017. Yet, the panel members were not provided with the criteria for scoring the proposals until May 17, 2017. In other words, the Evaluation Panel members conducted the bulk of their evaluation – from April 26, 2017 until May 17, 2017 – without having the criteria for scoring of the proposals. Furthermore, the final scoring meeting occurred on May 19, 2017 – only two days after receiving the scoring instructions. This left virtually no time for the panel members to conduct any meaningful evaluation of the proposals in light of the actual criteria they were supposed to use to score the proposals. This renders the panel's evaluation of the proposals arbitrary and capricious.

[Amended Protest, Ground II(3)] At the charging meeting on April 27, 2017 the evaluators were provided with a copy of the solicitation, the proposals and a score sheet. In the General Instructions, the evaluators were advised to use the criteria listed in the solicitation:

*Evaluation Criteria & Weightings: Consistent with our legal mandate, you must score each and every proposal by using only the criteria stated in the RFP, and you must adhere to any weightings assigned to each criteria.*

As discussed above, the Evaluator Scoring Guide was a reference for the evaluators and its use was optional. There is no basis in fact to support Intralot's allegation. This issue of protest is denied.

Intralot next alleges:

**Non-Panel Members Participated In The Evaluation Process.**

The Evaluation Panel General Instructions state that panel members are not to discuss the procurement with anyone other than Procurement Officer Michael Dalton. Yet, the attendance sheets for the Panel Charging and Panel Scoring meeting reflects the participation of individuals other than the panel members and Mr. Dalton. Specifically, the attendance sheet for the charging meeting reflects the attendance of non-panel members Dolly Garfield and Petrina Marsh. The attendance sheet for the scoring meeting, in turn, reflects the attendance of nonpanel member Dolly Garfield.

Furthermore, the Evaluation Panel General Instructions generally require each person involved in the procurement, including non-voting members of the evaluation committee, to sign the Procurement Integrity Representations And Restrictions agreement. While each of the panel members signed the requisite Procurement Integrity Representations And Restrictions agreement, it appears that neither Ms. Garfield nor Ms. Marsh signed this agreement (no such agreements for Ms. Garfield or Ms. Marsh have been produced to Intralot). In short, Ms.



Garfield and Ms. Marsh should not have attended and participated in the charging meeting or scoring meeting (or any other aspect of the procurement evaluation or negotiations). This renders the procurement clearly erroneous, arbitrary and capricious and contrary to law.

[Amended Protest, Ground II(4)] Dolly Garfield is the Senior Legal Services Manager for SCEL and in that capacity has legitimate professional reasons to attend these meetings. Pertina Marsh is a procurement manager for SCEL and likewise has reason attend these meetings. Since they were not evaluators, there was no need in them executing the Procurement Integrity Representations And Restrictions agreement, however both signed non-disclosure agreements. There is no statutory provision prohibiting the attendance of an agency's legal or procurement staff from attending evaluation committee meetings and Intralot does not allege a violation of such a statute. It is not arbitrary or capricious for an agency's legal or procurement staff to participate in these meetings. This issue of protest is denied.

Intralot next alleges:

Panel Member Beatty Improperly Participated In Answering Questions Regarding The RFP. The Evaluation Panel General Instructions generally provide that panel members are not to communicate with offerors and that all communications with offerors "must be strictly controlled by the procurement officer." Despite these prohibitions, panel member Daniel G. Beatty was involved in and/or responsible for preparing the RFP Amendments, which contain offeror questions regarding the RFP and the SCEL's responses to the questions – responses which constituted formal clarifications to the RFP. In short, it was improper for Mr. Beatty to respond to questions from offerors (and to clarify aspects of the RFP) on behalf of SCEL, and also serve as an Evaluation Panel member. Accordingly, Mr. Beatty's participation as an Evaluation Panel member renders the procurement clearly erroneous, arbitrary and capricious and contrary to law.

[Amended Protest, Ground II(5)] The answers to questions from potential offerors were communicated to the offerors through an amendment issued by the procurement officer, a communication strictly controlled by the procurement officer. Mr. Betty serves as Chief Compliance Officer of the SCEL and in that capacity would be best qualified to provide answers to certain questions. Mr. Beatty's participation in preparing answers to questions from potential offerors does not constitute direct communications with the offerors. The Evaluator General Instructions guide conduct during the evaluation. Intralot appears to suggest that anyone

involved in the creation of a solicitation or its amendments should be prohibited from evaluation the proposals received in response to that solicitation. There is no statutory provision to that effect and Intralot does not allege violation of such a statute. This issue of protest is denied.

Intralot next alleges:

Participation Of Anthony Cooper. ITMO discourages state agencies from selecting panel members who are supervisors and those they supervise. Contrary to this policy, the Evaluation Panel included supervisor Anthony Cooper. Although Mr. Cooper signed an "Evaluation Panel Affidavit" stating that he would not influence any other scores, such an affidavit is not sufficient to prevent such influence from occurring. Indeed, the scoring process included a scoring meeting on May 19, 2017 at which "each evaluator presented their subjective opinion" regarding scoring to the group for discussion. See Written Determination. It is not plausible that supervisees would not be influenced (for better or worse) by the participation of a supervisor in the evaluation and/or scoring process. Accordingly, the procurement was clearly erroneous, arbitrary and capricious, and contrary to law for this reason as well.

[Amended Protest, Ground II(6)] Intralot offers no evidence that Mr. Cooper unduly influenced other evaluators. In fact a review of the evaluation would suggest that, if Mr. Cooper intended to influence the other evaluators, he was unsuccessful. Mr. Cooper was one of two evaluators to give Intralot the highest technical score while four other evaluators gave IGT the highest technical score. While there is the possibility of a supervisor influencing subordinate evaluators, there are situations when the supervisor has specific knowledge or experience that the subordinates lack and the failure to apply that specific knowledge or experience to the evaluation process would be detrimental to the state. The Evaluation Panel Affidavit assists in mitigating any undue influence and bring transparency to the process and putting the procurement officer on notice to be extra vigilant during the evaluation process. There is no statute prohibiting a supervisor from participating on an evaluation panel that includes his or her subordinates and Intralot does not allege violation of such a statute. This issue of protest is denied.

## **DECISION**

The Procurement Review Panel has consistently held that the evaluation process does not have to be perfect but has to be fair and the Panel will not substitute its judgment for that of the evaluators.

In the Coastal Rapid Public Transit Authority case, the Panel established the basic framework for review of challenges to evaluators' conduct:

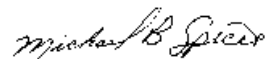
The determination by the State who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law.... The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws.... The Panel will not substitute its 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 Panel has held that the evaluation process does not need to be perfect so long as it is fair. NBS Imaging Systems, Inc., cited above.

*In re: Protest of Transportation Management Services, Inc., Appeal by Transportation Management Services, Inc., Panel Case No. 2000-3.*

In nearly every part of its initial and amended protest letters, Intralot failed even to allege a violation of the Code and Regulations. In no instance did it offer proof that any of the challenged actions were clearly erroneous, arbitrary, capricious, or contrary to law. This was an incredibly complex and expensive acquisition, conducted by a team of professionals who were highly skilled and knowledgeable about state lottery games. Perhaps there were imperfections—unsurprising for a process so detailed and complicated. There is nothing, however, impugning the fairness of this evaluation and award. For the reasons stated above, the protest of Intralot, Inc. is denied.

For the Information Technology Management Office



---

Michael B. Spicer  
Chief Procurement Officer

## Attachment 1



Via Email to [protest-itmo@itmo.sc.gov](mailto:protest-itmo@itmo.sc.gov)

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

RE: Initial Protest of Intent to Award to IGT Global Solutions Corporation  
Solicitation Number 5400013044  
Solicitation For Lottery Systems And Other Services  
Purchasing Agency: South Carolina Education Lottery

Dear Chief Procurement Officer:

The undersigned represents Intralot, Inc. ("Intralot") in connection with the above referenced matter and submits on behalf of Intralot this initial protest of the Notice of Intent to Award a contract to IGT Global Solutions Corporation ("IGT") first posted on May 26, 2017. The grounds of this initial protest are set forth below.

In accordance with applicable law, this initial protest letter is intended to provide notice of issues to be decided as required by law and as such it does not purport to set forth all facts and evidence in support of the protest issues.

Intralot has requested a copy of all relevant public records as described further below. Intralot requests that all such records, un-redacted, be made a part of the Record for review and provided to Intralot promptly to the extent not already provided. Intralot reserves the right to offer new issues, facts, evidence and argument in support of the protest at any time as may be permitted by law.

Intralot requests due notice and a hearing at which it will present facts, evidence and argument on these issues. If for any reason a hearing will not be held, Intralot requests that the Chief Procurement Officer ("CPO") promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration and a copy of all materials (other than any submitted by Intralot) reviewed by the CPO as a part of his review as they are submitted or reviewed, so that Intralot may review and comment on them as appropriate. Intralot also asks that the CPO advise it of any deadlines for the submission of evidence and argument regarding this matter and in reply to the protest, in advance of the issuance of a decision on the protest.

### **Background**

The South Carolina Information Technology Management Office ("ITMO") issued a Request For Proposal, Solicitation Number 5400013044 on or about March 10, 2017 (the "RFP"). Generally, the RFP solicited proposals "to acquire a Contractor to provide services and supplies and/or equipment for the operation of the Lottery[.]" See RFP § 1.1. Intralot has been the provider of these services to the South Carolina Education Lottery (the "Lottery") since 2008. The current contract is set to expire on March 14, 2018. See RFP § 1.5.

Intralot timely submitted its Proposal in response to the RFP on or about April 20, 2017. On or about May 26, 2017, ITMO completed its Written Determination recommending the issuance of the Intent to Award to



IGT. The Intent to Award the Contract to IGT was posted May 26, 2017. Intralot has timely filed this initial protest within ten days of the posting of the Intent to Award.

Furthermore, on May 29, 2017, Intralot submitted a public records request to ITMO pursuant to Title 30 - Public Records, Chapter 4-Freedom of Information Act, South Carolina Code of Laws. Generally, in the public records request, Intralot has requested the production of "all books, papers, notes, drafts, memoranda, email communications, and other documentary materials" relating to the RFP, process, evaluation, selection and award. Intralot received certain documents from ITMO on May 30, 2017, June 1, 2017 and June 5, 2017. Intralot is continuing its review of these documents and reserves the right to supplement this protest based on information contained in the public records provided in response to its FOIA request, including any public records produced after the submission of this protest.

#### **Grounds of the Protest**

Pursuant to S.C. Code § 11-35-2410(A), ITMO's determination to award the Contract is final unless "clearly erroneous, arbitrary, capricious, or contrary to law." Here, ITMO's determination is clearly erroneous, arbitrary, capricious, and contrary to law because (1) the scoring of Intralot's Proposal was not consistent with the Evaluator Scoring Guide; (2) the Evaluator Scoring Guide itself led to arbitrary and capricious scoring; (3) the Evaluation Panel members did not reach a consensus score; (4) the Evaluator Scoring Guide contains evaluation factors that are not disclosed in the RFP; and (5) it appears that Intralot's price proposal was improperly disclosed to IGT in the price negotiation process. Each of these grounds for protest is discussed in further detail below.

#### **I. The Scoring Of Intralot's Proposal Was Clearly Erroneous And Arbitrary And Capricious Because The Scoring Was Not Compliant With The RFP.**

Pursuant to S.C. Code § 11-35-1530(9), the most advantageous offeror must be determined based on price and "the evaluation factors set forth in the requests for proposals." See also RFP § 6.0 ("Proposals will be evaluated using the factors as stated herein."). Here, the scoring of Intralot's Proposal was clearly erroneous, arbitrary and capricious, and contrary to law. The scoring was not compliant with the terms of the RFP. Specifically, the RFP calls for scoring "by the Panel" and provides for "total available points" of 2,000. See RFP § 6.1. The Evaluation Panel members' individual scores, however, were simply totaled, yielding total scores in excess of 10,000 points for each offeror. The RFP makes no reference to totaling individual Evaluation Panel member scores in this manner. To the contrary, the Evaluation Panel as a collaborative whole was to render a technical score of 0 to 1350 for each proposal. The Evaluation Panel here did not render such a collectively determined technical score. This is prejudicial to Intralot inasmuch as totaling the scores in this manner leads to arbitrary results. As discussed further below, Panel members were not provided adequate guidance to determine the number of points to award within the various scoring ranges for each category, and were instead left to make arbitrary guesses as to the number of points to award within a particular range. If the Panel members had been required to reach a collective, consensus technical score to give each offeror in each category, the total technical points would not have exceeded 1,350 (as contemplated in the RFP), and the clearly erroneous and arbitrary and capricious scoring discussed below would have been avoided. Accordingly, the scoring of Intralot's Proposal was clearly erroneous, arbitrary and capricious, and contrary to law.



## **II. ITMO's Use Of The Evaluator Scoring Guide Was Contrary To Law.**

As noted, proposals must be evaluated based on the factors set forth in the RFP. See S.C. Code § 11-35-1530(9); RFP § 6.0. The Evaluator Scoring Guide, however, contains evaluation factors that are *not* set forth in the RFP. The Evaluator Scoring Guide, for example, provides that a score in the "Excellent" range is warranted where a proposal not only meets requirements but also "exhibits outstanding knowledge" and "creativity." There is nothing in the RFP alerting offerors to the fact that proposals will be evaluated based on such factors. Furthermore, such non-specific factors are themselves arbitrary and incapable of any meaningful definition. Accordingly, ITMO's determination and intent to award the Contract to IGT is contrary to law because it is based on evaluation factors not contained in the RFP.

## **III. The Evaluator Scoring Guide And Scoring Forms Are Arbitrary And Capricious.**

The actual technical scoring of Intralot's Proposal was also arbitrary and capricious because the Evaluator Scoring Guide and scoring forms are themselves arbitrary and capricious. Specifically, the RFP lists three evaluation categories for the "Technical Solution," with at least fifteen separate subsections (and some 37 pages of corresponding technical criteria in the RFP). See RFP § 6.1. The RFP expressly provides that these evaluation categories and their subsections are "listed in order of importance[.]" See RFP § 6.0. The scoring forms, however, do not provide for separate scoring for the subsections, let alone any manner for taking into account that the subsections are listed in order of importance. Rather, the scoring forms require the Evaluation Panel members to arbitrarily assign an overall score for each category without any guidance whatsoever regarding weighing the individual importance of the subsections. Ignoring the importance of specific subsections versus other subsections will unavoidably lead to a skewed score. For example, if an evaluator likes the "creativity" in a less importance subsection, that evaluator's score could mask deficiencies in the more important subsections.

The Evaluation Scoring Guide further exacerbates the arbitrary and capricious nature of the scoring. Generally, the Guide provides for different scoring ranges based on whether or not the proposal "addresses requirements completely," "addresses most elements," or meets only "some of the RFP requirements." There is no guidance provided, however, regarding how to apply these scoring ranges to the various subsections in the Technical Solutions category, or how to arrive at a total point score for a particular category while taking into account the subsections. In short, the subsections - and the fact that they are listed in order of importance - is entirely ignored in both the scoring forms and the Evaluation Scoring Guide.

Furthermore, although the Guide provides for several different ranges of scoring, there is no guidance provided for how to determine a specific score within a range. For example, a percentage score of 90-100% falls within the "Excellent" range. There is no guidance provided, however, regarding how to score within this range, and the evaluator is left with no choice but to make an arbitrary determination regarding the points to be awarded. Here, for example, a total of 450 points are available in the "Retailer Network Environment Design, Functionality, Services, and Supplies" category. Applying the "Excellent" percentage range to 450 points yields a 45 point spread - from 405 points (90%) to 450 points (100%). Evaluators 1, 2 and 3 all scored Intralot in the "Excellent" range for this category, but gave Intralot widely disparate point totals (from a low of 409.5 to a high of 440). These scores are completely arbitrary. There is no guidance provided, and no factual basis, for one Evaluator to give Intralot 409.5 points and another Evaluator to give Intralot 440 points. The fact that Intralot has requested, but has not received any documentation whatsoever supporting any factual basis for the scoring discrepancies, underscores the failure of the process to have any rational basis and leaves only one conclusion - that the process was arbitrary.



The arbitrariness of these scores is further highlighted by contrasting Intralot's scores to the scores given to IGT in the same category. As with Intralot, three Evaluators (3, 5 and 6) also scored IGT in the "Excellent" range for the "Retailer Network Environment Design, Functionality, Services, and Supplies" category. Yet, those three Evaluators gave IGT *more* points – 423, 430 and 450 – than Intralot. There is no guidance provided, and no factual basis, for Evaluators to determine that both IGT's and Intralot's Proposals are "Excellent" but then give IGT more points than given to Intralot. Similar scoring discrepancies exist in each of the scoring categories among the three offerors.

Such arbitrary scoring is particularly prejudicial where the final scores among offerors are close, as occurred here. Intralot's average score was 1,812 points compared to IGT's average score of 1,870.2 points.<sup>1</sup> This point total, however, is arbitrary and capricious inasmuch as no guidance is given to Evaluators concerning how to award points within a given range, and inasmuch as the Evaluators have no choice but to make an arbitrary award of points to each offeror. Whether one offeror has the highest score depends not on whether it was scored in a particular range (e.g., "Excellent" or "Good") but rather based on an arbitrary assignment of points. The point totals are also arbitrary and capricious because, as already discussed, the subsections within the Technical Solution categories (and their listing in order of importance) is ignored entirely in the scoring. Had the scoring been conducted in a proper, non-arbitrary manner, it is possible and likely that Intralot would have received a higher average score than IGT and prevailed in the procurement. Indeed, an increase of less than 5% in Intralot's technical score would result in Intralot being the winning offeror. This arbitrary and capricious scoring renders ITMO's determination and intent to award the Contract to IGT arbitrary and capricious.

#### **IV. The Scoring Of Intralot's Proposal Was Arbitrary And Capricious Because The Scores Are Not Consistent With The Evaluator Scoring Guide.**

The Evaluation Panel's scoring of Intralot's Proposal was arbitrary and capricious because the Evaluation Panel members gave scores to Intralot (and the other offerors) that were not consistent with the Evaluator Scoring Guide. For example, Evaluator Number 5 (Ann Scott) gave Intralot 300 out of a possible 450 points for "Retailer Network Environment Design, Functionality, Services, and Supplies." See Scott's Intralot Score Sheet. In her Evaluator Explanation Summary, Ms. Scott explained this score by stating "met requirements." See Scott's Intralot Evaluator Explanation Summary. Pursuant to the Evaluator Scoring Guide, a proposal that "meets requirements" should have been scored in the "Good" or "Excellent" category with a percentage score of 80-89% (Good) or 90-100% (Excellent). Yet, the score that Ms. Scott gave to Intralot – 300 out of 450 points – is a percentage of only 67%. Under the Evaluator Scoring Guide, this percentage falls into the "Marginal" scoring range in which the proposal meets only "some" of the RFP requirements. See Evaluator Scoring Guide. In short, Ms. Scott – who determined that Intralot's Proposal "met requirements" – was required to give Intralot a higher score in the "Good" or "Excellent" range in accordance with the Evaluator Scoring Guide. Her failure to do so was arbitrary and capricious to Intralot's prejudice.

Similarly, for each of the other scoring categories, Ms. Scott determined that Intralot's Proposal "met requirements." See Scott's Intralot Evaluator Explanation Summary. Accordingly, for each of these categories, Ms. Scott should have scored Intralot in the "Good" or "Excellent" range. In two further

---

<sup>1</sup> These average scores were calculated by Intralot. They are not contained anywhere in the contract file documents produced to Intralot to date. The scoring reflected in the contract file documents is not compliant with the terms of the RFP as discussed above.



instances, however, Ms. Scott failed to give Intralot an appropriate score. Specifically, for the “Retailer Maintenance and Support Services” category, Ms. Scott only gave Intralot 150 out of 200 possible points. See Scott’s Intralot Score Sheet. This is a percentage score of 75% – below the “Good” or “Excellent” range in the Evaluator Scoring Guide. And, for the “Requirements for SCEL Administrative, Back-Office Support and Software” category, Ms. Scott only gave Intralot 280 out of 400 possible points. *Id.* This is a percentage score of 70% – again below the “Good” or “Excellent” range in the Evaluator Scoring Guide. These scores are also arbitrary and capricious to Intralot’s prejudice.

In each of these instances, Ms. Scott improperly gave Intralot a score *lower* than what Intralot should have received according to the Evaluator Scoring Guide. Compounding this error, Ms. Scott gave the winning offeror, IGT, at least one score that was *higher* than what was called for by the Evaluator Scoring Guide. Specifically, for the “Systems Architecture and Gaming” category, Ms. Scott gave IGT 270 out of 300 possible points. This is a percentage score of 90%, which falls into the “Excellent” range on the Evaluator Scoring Guide. Yet, Ms. Scott determined that IGT’s Proposal in this category “met requirements” and “exceeded in some areas.” See Scott’s IGT Evaluator Explanation Summary (emphasis added). Under the Evaluator Scoring Guide, however, proposals that exceed requirements in only “some” areas fall in the “Good” range of 80-89% – not in the “Excellent” range. Accordingly, Ms. Scott’s scoring for IGT was also arbitrary and capricious (to Intralot’s prejudice) because she gave IGT a score higher than what it was entitled to receive under the Evaluator Scoring Guide. In sum, these scoring inconsistencies render ITMO’s determination and intent to award the Contract to IGT arbitrary and capricious.

**V. The Price Negotiations With IGT Were Contrary To Law.**

Intralot’s price proposal was substantially lower than that of the winning offeror, IGT. Intralot’s ten year total price was \$77,499,960.00 – \$3 million below IGT’s price. This resulted in Intralot receiving the maximum available points of 650 (24 points ahead of IGT on price). The Chief Procurement Officer subsequently elected to negotiate price with IGT but not with Intralot.

Although the Chief Procurement Officer may elect to negotiate price with the highest ranked offeror, “in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed.” S.C. Code § 11-35-1530(8). Here, contrary to this statutory provision, it appears that IGT was provided with the confidential amount of Intralot’s price proposal. IGT’s original price proposal was \$80,472,480.00 (fixed monthly fee of \$670,604.00), while Intralot’s price proposal was substantially lower at \$77,499,960.00 (fixed monthly fee = \$645,833.00). After price negotiations, however, IGT essentially matched Intralot’s offer with a new price proposal of \$77,500,000 (fixed monthly fee = \$645,833.33). Intralot respectfully submits it is not plausible that IGT matched Intralot’s price proposal – within \$40 on a \$77 million contract – unless IGT was alerted to the amount of Intralot’s price proposal (whether unintentionally, indirectly or otherwise). This constitutes a direct violation of S.C. Code § 11-35-1530(8) and renders ITMO’s determination contrary to law.

**Conclusion and Relief Requested**

Based on the grounds set forth herein, as well as any others added or amended in accordance with law, Intralot requests a hearing and that the State honor the automatic stay, cancel the intent to award the contract to IGT, and re-solicit under the governing authority set forth in the Procurement Code and Regulations.





Intralot also asks that, to the extent not already provided, the CPO immediately require that the entire procurement file be provided to the undersigned on behalf of Intralot as required by S.C. Code § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.

If the CPO determines that he will not hold a hearing, Intralot requests that the CPO promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration, and a copy of all materials (other than those submitted by Intralot) reviewed by the CPO as a part of his review as they are submitted or reviewed. Intralot asks that it be permitted to review and comment on such materials and submissions as appropriate. Intralot also asks that the CPO provide all interested parties a deadline by which to provide evidence for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Jay M. Lapine". The signature is written in a cursive, flowing style.

Jay M. Lapine, Esq.  
Chief legal Officer  
Intralot, Inc.  
[Jay.lapine@intralot.us](mailto:Jay.lapine@intralot.us)  
678.473.7230

Jeffery A. Lipps, Esq.  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
[lipps@carpenterlipps.com](mailto:lipps@carpenterlipps.com)  
614.365.4100

John Schmidt, Esq.  
Schmidt & Copeland LLC  
1201 Main Street Suite 1100  
Columbia, South Carolina 29201  
[John@schmidtcopeland.com](mailto:John@schmidtcopeland.com)  
803.348.2984



Via Email to [protest-itmo@itmo.sc.gov](mailto:protest-itmo@itmo.sc.gov)

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

RE: Protest of Intent to Award to IGT Global Solutions Corporation  
Solicitation Number 5400013044  
Solicitation For Lottery Systems And Other Services  
Purchasing Agency: South Carolina Education Lottery

Dear Chief Procurement Officer:

The undersigned represents Intralot, Inc. ("Intralot") in connection with the above referenced matter and submits on behalf of Intralot this amended and supplemental protest of the Notice of Intent to Award a contract to IGT Global Solutions Corporation ("IGT") first posted on May 26, 2017. Intralot submitted its initial protest on June 5, 2017 and incorporates that initial protest herein by reference. In addition to the documents referenced in its initial protest, Intralot received documents in response to its May 29, 2017 FOIA request on June 2, 2017. Intralot also submitted a second FOIA request on June 12, 2017. Intralot is continuing its review of the documents received to date and reserves the right to supplement this protest based on information contained in the public records provided in response to its FOIA requests, including any public records produced after the submission of this amended and supplemental protest. The grounds of this amended and supplemental protest are set forth below.

**Amended And Supplemental Grounds of the Protest**

**I. The Price Negotiations With IGT Were Contrary To Law.**

As an initial matter, Intralot notes that its initial protest refers to price negotiations by the "Chief Procurement Officer." Intralot intended to reference, and so amends its protest to reference, the price negotiations conducted by Procurement Officer Michael Dalton as reflected in the Record Of Negotiation.

In addition to the grounds set forth in Intralot's initial protest, the price negotiations with IGT were also contrary to law, arbitrary and capricious for other reasons as well. South Carolina law provides that "Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals." S.C. Code of Regulations § 19-445.2095(1)(3). Here, the Procurement Officer allowed IGT to make a material modification to its proposal without providing the same opportunity to Intralot. Specifically, the Record Of Negotiation reflects a change to the side panels for the terminals described in IGT's proposal. Although the Record Of Negotiation states that the change in side panels will not result in any changes to the overall footprint of the terminals, this ignores the fact that the overall footprint of the retailer installations will increase. In IGT's proposal, the pictures of the "Standard Retailer Configuration" show a rear shelf for the printer or player advertising display. In the pictures attached to the Record Of Negotiation, however, no rear shelf is shown. *Cf.* IGT Proposal at pp. 335-336; Record Of Negotiation. Without the shelf, the printer will need to be placed on the counter along with the display, thereby increasing the overall footprint of the installation. This is a material change from, and outside the scope of, what IGT originally proposed. Intralot was not provided with a similar opportunity to make material changes to its proposal.



Furthermore, IGT's proposal was not re-scored after this material change to its proposal. It is entirely possible, and likely, that the Evaluation Panel members would have scored IGT lower on its technical proposal if they had been aware of the material change to IGT's proposal. The footprint is a significant issue inasmuch as terminals that take up excessive counter space is a concern of most retailers. Accordingly, the price negotiations with IGT were contrary to law, arbitrary and capricious for this reason as well.

**II. ITMO's Decision To Award The Contract To IGT Is Clearly Erroneous, Arbitrary And Capricious, And Contrary To Law Because Of Numerous Irregularities Involving The Evaluation Panel.**

The following irregularities, both individually and considered together, render the procurement clearly erroneous, arbitrary and capricious and contrary to law:

(1) Participation Of Ann Scott. The Evaluation Panel General Instructions provide that "If you have any prior experience with an offeror, you need to advise the procurement officer immediately." Here, Ms. Scott is a former employee of the West Virginia Lottery, where IGT was the West Virginia Lottery's vendor. In her role there, Ms. Scott had substantial experience with IGT. Despite her prior experience with IGT, no document reflects compliance with the requirement that she notify the procurement officer of this prior experience. In other words, it appears that Ms. Scott did not disclose to the Procurement Officer her prior experience with IGT and therefore should not have been a member of the Evaluation Panel. This violation, by itself taints the procurement and renders the contract award to IGT clearly erroneous, arbitrary and capricious and contrary to law.

Furthermore, the Evaluation Panel General Instructions provide "In performing your duties, you cannot use your prior knowledge of that particular offeror's history of past performance, if any, unless you are selected as a reference check." As noted, however, Ms. Scott has prior, undisclosed experience with IGT. She also has had substantial experience with Intralot's work for the South Carolina Education Lottery. Given this substantial experience, it is not possible for her to separate her "prior knowledge" of Intralot from her evaluation of its proposal. Accordingly, Ms. Scott should not have been a member of the Evaluation Panel for this reason as well.

(2) The Evaluation Panel Consisted Of The Same Members As The Evaluation Panel Members For The Prior Cancelled RFP. A prior version of the RFP was issued, but then was cancelled. The RFP was then modified and re-issued. With respect to the prior RFP, the Evaluation Panel had been selected and the evaluation process was well underway before the RFP was cancelled. At a minimum, the evaluation process had proceeded to the site visit stage. When the new RFP was issued, the same persons who had served on the prior Evaluation Panel were selected to serve on the Evaluation Panel for the new RFP. This is problematic because, as already discussed, Evaluation Panel members are not supposed to use prior knowledge of an offeror in evaluating the offerors' proposals. Yet, here all of the Evaluation Panel members had already begun evaluating and reviewing the offerors' proposals for the prior RFP. To ensure that this prior knowledge did not influence the procurement, new and different persons should have been selected for the Evaluation Panel. The failure to do so renders the procurement clearly erroneous, arbitrary and capricious.

(3) The Evaluation Panel Members Were Not Timely Provided Scoring Instructions. The panel members were provided with the offerors' proposals at the "Panel Charging" meeting on April 26, 2017.



*See Written Determination.* Yet, the panel members were not provided with the criteria for scoring the proposals until May 17, 2017. *See* May 17, 2017 Email From Michael Dalton To Evaluation Panel Members. In other words, the Evaluation Panel members conducted the bulk of their evaluation – from April 26, 2017 until May 17, 2017 – without having the criteria for scoring of the proposals. Furthermore, the final scoring meeting occurred on May 19, 2017 – only two days after receiving the scoring instructions. This left virtually no time for the panel members to conduct any meaningful evaluation of the proposals in light of the actual criteria they were supposed to use to score the proposals. This renders the panel’s evaluation of the proposals arbitrary and capricious.

(4) Non-Panel Members Participated In The Evaluation Process. The Evaluation Panel General Instructions state that panel members are not to discuss the procurement with anyone other than Procurement Officer Michael Dalton. Yet, the attendance sheets for the Panel Charging and Panel Scoring meeting reflects the participation of individuals other than the panel members and Mr. Dalton. Specifically, the attendance sheet for the charging meeting reflects the attendance of non-panel members Dolly Garfield and Petrina Marsh. The attendance sheet for the scoring meeting, in turn, reflects the attendance of non-panel member Dolly Garfield.

Furthermore, the Evaluation Panel General Instructions generally require each person involved in the procurement, including non-voting members of the evaluation committee, to sign the Procurement Integrity Representations And Restrictions agreement. While each of the panel members signed the requisite Procurement Integrity Representations And Restrictions agreement, it appears that neither Ms. Garfield nor Ms. Marsh signed this agreement (no such agreements for Ms. Garfield or Ms. Marsh have been produced to Intralot). In short, Ms. Garfield and Ms. Marsh should not have attended and participated in the charging meeting or scoring meeting (or any other aspect of the procurement evaluation or negotiations). This renders the procurement clearly erroneous, arbitrary and capricious and contrary to law.

(5) Panel Member Beatty Improperly Participated In Answering Questions Regarding The RFP. The Evaluation Panel General Instructions generally provide that panel members are not to communicate with offerors and that all communications with offerors “must be strictly controlled by the procurement officer.” Despite these prohibitions, panel member Daniel G. Beatty was involved in and/or responsible for preparing the RFP Amendments, which contain offeror questions regarding the RFP and the SCEL’s responses to the questions – responses which constituted formal clarifications to the RFP. In short, it was improper for Mr. Beatty to respond to questions from offerors (and to clarify aspects of the RFP) on behalf of SCEL, and also serve as an Evaluation Panel member. Accordingly, Mr. Beatty’s participation as an Evaluation Panel member renders the procurement clearly erroneous, arbitrary and capricious and contrary to law.

(6) Participation Of Anthony Cooper. ITMO discourages state agencies from selecting panel members who are supervisors and those they supervise. Contrary to this policy, the Evaluation Panel included supervisor Anthony Cooper. Although Mr. Cooper signed an “Evaluation Panel Affidavit” stating that he would not influence any other scores, such an affidavit is not sufficient to prevent such influence from occurring. Indeed, the scoring process included a scoring meeting on May 19, 2017 at which “each evaluator presented their subjective opinion” regarding scoring to the group for discussion. *See* Written Determination. It is not plausible that supervisees would not be influenced (for better or worse) by the participation of a supervisor in the evaluation and/or scoring process. Accordingly, the procurement was clearly erroneous, arbitrary and capricious, and contrary to law for this reason as well.



### **Conclusion and Relief Requested**

Based on the grounds set forth herein, as well as the grounds set forth in Intralot's initial protest, which is incorporated herein by reference, Intralot requests a hearing and that the State honor the automatic stay, cancel the intent to award the contract to IGT, and re-solicit under the governing authority set forth in the Procurement Code and Regulations.

Intralot also asks that, to the extent not already provided, the CPO immediately require that the entire procurement file be provided to the undersigned on behalf of Intralot as required by S.C. Code § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.

If the CPO determines that he will not hold a hearing, Intralot requests that the CPO promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration, and a copy of all materials (other than those submitted by Intralot) reviewed by the CPO as a part of his review as they are submitted or reviewed. Intralot asks that it be permitted to review and comment on such materials and submissions as appropriate. Intralot also asks that the CPO provide all interested parties a deadline by which to provide evidence for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

Respectfully Submitted,

A handwritten signature in black ink that reads "Jay M. Lapine". The signature is fluid and cursive, with the first name "Jay" and last name "Lapine" clearly legible.

Jay M. Lapine, Esq.  
Chief legal Officer  
Intralot, Inc.  
[jay.lapine@intralot.us](mailto:jay.lapine@intralot.us)  
678.473.7230

Jeffery A. Lipps, Esq.  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
[lipps@carpenterlipps.com](mailto:lipps@carpenterlipps.com)  
614.365.4100

John Schmidt, Esq.  
Schmidt & Copeland LLC  
1201 Main Street Suite 1100  
Columbia, South Carolina 29201  
[john@schmidtcopeland.com](mailto:john@schmidtcopeland.com)  
803.348.2984

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised July 2017)*

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 111.1 of the 2016 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  
1205 Pendleton Street, Suite 367, 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 of 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.**