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## Protest Decision

**Matter of:** Worldwide Interactive Network, Inc.

**Case No.:** 2022-124

**Posting Date:** March 11, 2022

**Contracting Entity:** State Fiscal Accountability Authority

**Solicitation No.:** 5400022194

**Description:** Career Ready Assessment Services

### DIGEST

Protest challenging non-responsibility determination is denied. Protest of the nonresponsiveness of the apparent successful offeror is granted. Protest of a flawed evaluation is granted. The protest letter of Worldwide Interactive Network (WIN) is included by reference. (Attachment 1)

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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<sup>1</sup> The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## BACKGROUND

Solicitation Issued:	10/12/2021
Amendment 1 Issued	10/29/2021
Intent to Award Posted	01/05/2022
Intent to Protest Received	01/14/2022
Protest Received	01/20/2022

On February 5, 2018, the State Fiscal Accountability Authority (SFAA) awarded a contract for career ready assessment services to WIN. Available extensions would have made these services available through February 4, 2023. ACT, an unsuccessful offeror for the 2018 contract, obtained a copy of WIN's proposal. After reviewing the proposal ACT sued WIN for copyright infringement in Tennessee.<sup>2</sup> After several years of litigation, complicated by the COVID-19 pandemic, that court granted ACT's motion for summary judgment. Specifically, the judge ruled that in its proposals for the South Carolina contract and similar contracts in three other states, WIN had copied verbatim the "Learning Objectives" from ACT's propriety materials, thereby infringing on ACT's copyright in those materials. In a second order, the court issued a preliminary injunction prohibiting WIN from further infringing on ACT's copyrights.<sup>3</sup> Since the South Carolina contract included the material that WIN was enjoined from using, SFAA was obliged to cancel that contract effective December 31, 2021, and issue the current solicitation.<sup>4</sup>

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<sup>2</sup> ACT, INC. v. Worldwide Interactive Network, et al., Case No. 3:18-cv-186 (United States District Court for the Eastern District of Tennessee)

<sup>3</sup> The first order, dated March 10, 2020, granted summary judgment on ACT's claims that the "test blueprint" in WIN's RFP response infringed ACT's copyrights. In a second order dated August 18, 2021, the court ruled that WIN's subsequent attempt to revise its program for career ready assessments also infringed ACT's copyright and granted ACT's motion for a preliminary injunction. References to the second order will be to the "Injunction."

<sup>4</sup> At the court's invitation all four states affected by the injunction submitted materials establishing the administrative and financial burdens that cancelation and reprocurement of the contracts would cause. In its response, Kentucky also requested the court "clarify the WIN products that are affected by the Order" and (2) "grant an extension to December 31, 2021, for the Order to take effect." The court extended the effective date of the injunction to allow South Carolina and the other states to procure a replacement contract. It also clarified the scope of the injunction:

... WIN is ENJOINED, as of September 21, 2021 (Doc. 586), from knowingly infringing ACT's copyrights in its Skill Definitions, including by distributing, copying, reproducing, displaying, creating derivative works from, or engaging in any other activity deemed infringing by 17 U.S.C. § 106 involving ACT's Skill Definitions with regard to any materials or contracts outside of its

SFAA issued this Request for Proposal (RFP) to establish a new state term contract for these services on October 12, 2021. Amendment 1 was issued on October 29, 2021. Amendment 1 reproduced the entire solicitation with modifications. Proposals from WIN, ACT, and Data Recognition Corporation (DRC) were opened on November 15, 2021. The procurement officer determined that WIN was not a responsible offeror and did not submit its proposal for evaluation. The evaluation committee determined ACT's proposal to be the most advantageous to the State and an Intent to Award was posted to ACT on January 5, 2022.

WIN filed an intent to protest on January 14, 2022, followed by its formal protest on January 20, 2022. WIN alleges that the determination of non-responsibility was improper, that ACT's proposal was not responsive to the requirements of the solicitation, and that the evaluation was not conducted in accordance with the Code.

## ANALYSIS

**WIN protests that the determination of non-responsibility was arbitrary, capricious, and in violation of the Code and regulations, and stripped WIN of its due process rights.**

Section 11-35-1810(1) requires a determination of responsibility for each contract awarded by the State:

Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

The State Standards of Responsibility are found in Regulation 19-445.2125(A) and sets forth the factors to be considered in determining if an offeror is responsible:

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

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existing contracts with these States—including bidding on new contracts with Arizona, Florida, Kentucky, or South Carolina.

Order, September 21, 2021 (emphasis supplied).

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

Regulation 19-445.2125(D)(1) clarifies that for an Offeror to be considered for award, the procurement must be satisfied that the offeror is responsible:

Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

The Code does not require the procurement officer to prove that an offeror is nonresponsible, only that he be satisfied that the offeror is responsible or explain his inability to reach that conclusion in a written determination of nonresponsibility. On December 1, 2021, the procurement officer issued a determination of non-responsibility explaining that, based on the facts recited in the Injunction order, he was unable to conclude that WIN was a responsible bidder.

WIN first challenges the procurement officer's finding regarding its record of past performance.

The procurement officer's determination explains:

Record of Past Performance. While there is nothing in the contract file to indicate that WIN failed to perform, the only reason the State is having to process the subject solicitation is because of the preliminary injunction ordered by the Court. The fact that the injunction ordered the State to cease performance with WIN under the existing contract is enough for the State to have legitimate concerns about WIN's ability to perform.

WIN argues that the basis for concern is erroneous and lacks a rational basis:

In the Determination, the PO specifically notes that there is nothing in the contract file to indicate that WIN failed to perform the existing contract. Instead, it notes that the injunction ordered the State to cease performance with WIN under the existing contract causing the State to have concerns about WIN's ability to perform. This finding is clearly erroneous as the injunction did not order the State to cease performance with WIN under the existing contract....



The specific language in the Order is directly tied to "knowingly infringing ACT's copyrights in its Skill Definitions ... ". The injunction does not order the State to "cease performance with WIN under the existing contract." Thus, this finding by the PO is erroneous and lacks a rational and reasonable basis.

WIN's interpretation of the impact of the injunction is inconsistent with the findings and arguments expressed in the injunction. The services provided by WIN under the previous contract were determined to infringe on ACT copyrights:

The Court has already held, as a matter of law, that: (1) ACT has valid copyrights covering the Skill Definitions; (2) the original selection, arrangement, and description of skills in the Skill Definitions are subject to copyright protection; and (3) WIN's original Learning Objectives infringe these copyrights.

[Injunction, Page 3]

WIN was enjoined from continuing to provide the infringing services it contracted to provide:

Worldwide Interactive Network, its officers, directors, agents, servants, employees, attorneys, successors, and assigns are preliminarily **ENJOINED** from knowingly infringing ACT's copyrights in its Skill Definitions, including by distributing, copying, reproducing, displaying, creating derivative works from, or engaging in any other activity deemed infringing by 17 U.S.C. § 106 involving ACT's Skill Definitions.

[Injunction, Page 27]

WIN's own argument against the injunction confirms the effect of the injunction on the prior contract:

WIN also asserts that the public interest weighs against granting an injunction "because South Carolina, Arizona, Kentucky and Florida would be unable to offer WIN's Foundational Career Ready Assessments." (Doc. 534, at 3.)

[Injunction, Page 26]

Finally, the September 21, 2021, order clarified that the injunction "include[ed] bidding on new contracts with Arizona, Florida, Kentucky, or South Carolina." *See* n. 4 above. The procurement officer's paraphrase of the injunction's effect is hardly erroneous—it is the same as WIN's own reading in its arguments to the court. It would be difficult to interpret the court's orders in any other way. There was a rational basis for the procurement officer to question WIN's ability to perform.

WIN also argues that the determination was arbitrary and capricious:

Additionally, at no time did the PO attempt to communicate, contact, or gather any information from WIN concerning its ability to perform the current contract or the contract being solicited in this procurement as permitted by the Code and accompanying regulations. The only information the PO relied upon to make this responsibility determination was contained in the Chapman Letter.<sup>5</sup> The PO's determination that the State had "legitimate concerns about WIN's ability to perform," without any requests for information or communication, or any review of WIN's proposal was arbitrary and capricious and in direct contradiction of the Code.

As noted in WIN's letter of protest, the Code and Regulations impose a duty on offerors to supply information requested by the procurement officer concerning its responsibility. However, there is no statutory requirement that the procurement officer contact the offeror prior to making a responsibility determination.

WIN's court ordered inability to perform under the previous contract provides a rational basis for the procurement officer to question WIN's past performance and that concern is neither arbitrary nor capricious.

WIN next takes exception to the procurement officer's observations about WIN's record of integrity. Specifically, the procurement officer explained:

Satisfactory Record of Integrity. The accusations against WIN in the preliminary injunction, and the Court's willingness to issue the injunction, question the integrity of WIN's offer for and performance under the existing contract. While the State is not questioning WIN's integrity specifically, the issue has been raised and the State is not able to make an informed determination as to the legitimacy of those claims until they have been resolved by the court system.

WIN argues that withholding judgement on its integrity until a final ruling by the court is arbitrary and capricious:

It is arbitrary and capricious for the State to acknowledge that it does not question WIN's integrity specifically but find that it is incapable of determining WIN's integrity while the action is pending without providing WIN any opportunity to

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<sup>5</sup> Laura Chapman is a lawyer in San Francisco who represents ACT. On September 15, 2021, she wrote SFAA general counsel a ten page letter alleging numerous material misrepresentation in WIN's response to the 2017 RFP. Nothing in the written determination indicates that the procurement officer considered these claims. His only reference to the letter is that it notified the State of the injunction, presumably because Ms. Chapman included the August 18, 2021, order among its attachments,

demonstrate that its actions with the State both past and present reflect a satisfactory record of integrity.

The court already found that WIN infringed on ACT's copyrights in providing the services under the previous contract. When WIN attempted to redesign its materials so as not to infringe on ACT's copyrights, the court found it very likely that ACT will succeed in showing that WIN's redesigned works infringe on its copyrights. (Injunction, Page 21) In addition, the court commented on ACT's likelihood of prevailing at trial:

Thus far in the litigation, WIN has presented much more evidence that its tests do incorporate ACT's copyrighted selection (which skills ACT chose to test for) and arrangement (which skills are tested in each test at each level) than evidence that WIN's assessments do not incorporate these elements. Based on this evidence, it is likely that ACT will successfully show that WIN's assessments violate its copyrights.

[Injunction, Page 24] Describing WIN's conduct, the judge wrote:

This is the rare case in which there is direct evidence of copying. WIN previously admitted that it copied its original Learning Objectives from ACT.

[Injunction, Page 13]

The summary judgment and the court's findings in the Injunction order certainly cast enough of a cloud over WIN's business practices to provide a rational basis for the procurement officer's hesitation to make a determination about WIN's integrity that is not arbitrary or capricious.

WIN also takes exception to the procurement officer's findings regarding its financial capability.

The procurement officer determined:

Financial Capability. The injunction is preliminary and, by its nature, only "preserves the relative positions of the parties until a trial on the merits can be held." Furthermore, in its order, the Court indicates that it "will wait for a jury verdict before entering permanent equitable relief." While not specifically indicated in the Court's order, "equitable relief" can include restitution which may or may not include financial recompense. Since the procurement officer cannot estimate what type of, if any, restitution may be imposed by the court, he cannot determine whether WIN has the financial capability to satisfactorily perform during the full five-year term of the resulting contract.

WIN argues that the procurement officer did not review or request of any financial information from WIN, did not review the proposal, never provided WIN with any opportunity to explain its financial capability:

Without any information regarding the potential damages or WIN's financial capabilities, the PO's decision to speculate on equitable relief is not judgement made on fact, but instead amounts to an arbitrary, capricious, and erroneous decision devoid of a reasonable or rational basis.

There is no statutory requirement that the procurement officer consult with WIN about its financial future. It is unlikely any additional information would overcome the pall created by WIN's own words attesting to the seriousness of this litigation and potential impact on its future viability in arguing against the injunction:

WIN argues that the balance of equities is in its favor "because WIN will likely go out of business if the Court issues the broad preliminary injunction ACT seeks." (Doc. 534, at 3.)

[Injunction, Page 26]

The regulations require that the procurement officer be satisfied that an offeror is responsible. Based on the summary judgement, temporary injunction, the pending trial, the court's assessment of WIN's likelihood of success, and WIN's own concern about its future viability, the procurement officer indicated that he is not satisfied that WIN is a responsible bidder. The procurement officer's determination that WIN is not responsible is well reasoned and not arbitrary or capricious.

WIN also protests that the procurement officer lacked authority to make the determination of non-responsibility and denied it due process:

The PO rejection of the WIN Proposal and Non-Responsibility Determination amounts to a De Facto Suspension and Debarment in violation of the Code and WIN's Constitutional Due Process Protections.

WIN proposes that the determination of non-responsibility is a de facto suspension and debarment that is governed by Section 11-35-4220. From this position, WIN alleges that the CPO, rather than the procurement officer, must make the non-responsibility determination, and WIN that was denied the right to be heard prior to the suspension or debarment.

The Panel has never opined on a de facto debarment. In federal procurement jurisprudence a de facto suspension or debarment “occurs when an agency bars a contractor for a certain period of time without following the applicable debarment procedure found in the Federal Acquisition Regulations.” *TLT Construction Corp. v. United States*, 50 Fed.Cl. 212, 215 (2001). Further, “A finding of de facto suspension is not justified at the time of the first determination(s) of non-responsibility unless there is evidence that the procuring body had decided that from that point forward it would award no further contracts.” *Shermco Indus., Inc. v. Sec’y of the Air Force*, 584 F. Supp. 76, 91 (N.D. Tex. 1984). These circumstances are not present here.

The Code requires a determination of responsibility for each contract awarded by the State and a written determination of non-responsibility if the procurement officer cannot be satisfied that the offeror is responsible. S.C. Code §§11-35-1810(1) and (2). Regulation 19-445.2125(E) requires that the written determination of non-responsibility be prepared by the procurement officer and that it “shall be made part of the procurement file.” The determination relates to a single procurement and is typically not publicized in any way other than providing a copy to the affected offeror. In fact, the determination in this case expressly provides:

This determination is limited to this solicitation only and does not preclude WIN from responding to a future solicitation.

As the determination is specifically limited to the instant procurement and absent any allegation that the State has decided to bar WIN from future procurements, there has been no de facto debarment.

WIN claims to have been denied its due process by appropriating a right to be heard based on a ruling from a federal court<sup>6</sup>, addressing federal procurement practices. While federal

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<sup>6</sup> *Old Dominion Dairy Prods., Inc. v. Sec’y of Defense*, 631 F.2d 953, 963-68 (D.C. Circuit 1980) (holding that due process requires that a contractor receive notice of the charges impugning its integrity and an opportunity to be heard). The court specifically declined to consider if the government’s action constituted a *de facto* debarment, *id.* at 962 n. 17.

procurement practices and related court decisions can be informative when the Code is silent, they are not binding on the State and cannot amend South Carolina law.

The Code and Regulations authorize the procurement officer to gather any information necessary to be satisfied that the prospective contractor is responsible. The Code and Regulations impose a duty on the offeror to provide that information. While a right to be heard is expressly granted in Section 11-35-4220 regarding suspensions and debarments, there is no statutory right to be heard prior to a responsibility determination. An offeror's due process right to be heard regarding a responsibility determination is found in Section 11-35-4210, which WIN is exercising with this protest. WIN's claim that it was denied the due process right to be heard is denied.

WIN also protests that it was denied prompt notice required by Regulation 19-445.2125(E), arguing that the procurement officer withheld notification of the determination of non-responsibility for 35 days. The procurement officer made his determination on December 1, 2021, and that determination was provided to WIN on January 5, 2022, the same day the Intent to Award was posted to ACT.

Regulation 19-445.2125(E) provides:

If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the procurement officer. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

(emphasis added)

The only vehicle for an aggrieved party to challenge a responsibility determination under the Code is through the protest process set forth in Section 11-35-4210. The protest rights set forth in Section 11-35-4210 are only available within 15 days of the issuance of a solicitation document or within seven business days of the posting of an award or intent to award.

Regardless of when the procurement officer makes a determination of non-responsibility, the offeror's due process rights to challenge that determination are not effectuated until the award or intent to award is posted in accordance with the Code and any delay until that time does not deny an offeror due process.

The determination of non-responsibility was not arbitrary or capricious and has a rational basis. WIN was not denied its due process rights. This issue of protest is denied.

WIN's second issue of protest alleges:

**ACT's proposal was non-responsive to material, essential and mandatory requirements of the RFP in ways that affected price, quality, quantity and delivery of services; and, as such, ACT's proposal should have been rejected.**

WIN argues that ACT failed to provide paper-based assessments in violation of the clearly expressed requirements of the RFP as follow:

**Testing Format**

The career readiness assessment must be available in both online and paper-based formats. Both forms must be available to ensure the assessments are accessible to all students and adult examinees, and available to all testing sites. It is estimated that more than 60 percent of the SCDE students will participate in the online administration.

**Online Assessment System**

The Contractor must provide an online assessment system that has already been developed, tested, and applied successfully with a comparable large-scale assessment program. This assessment system must be able to be used for all sites under this contract. The contractor must allow each district, school, or SCDEW site to choose whether to administer tests via paper or online. If an entity chooses online testing, the contractor will be required to provide paper testing for any student at that location who cannot test online because of a disability.

[Amendment 1, Page 18] (bold emphasis in original, underlining added)

ACT clearly states that one of its assessments is only available online:

*ACT has stringent rules that must be followed to provide for a high level of integrity for our test. This includes policies about who can administer the test as well as who has access to the test materials. The link provides details on administering paper assessments. **The Talent Assessment is available for online administration only. There is not a paper-based form available for this assessment.***

[ACT Proposal, Page 40] (emphasis in original)

In Exhibit 1 attached to the Record of Negotiations, ACT confirms that it does not provide paper testing for any student with a disability and suggest several alternatives:

The Talent assessment is currently only available in an online format. To provide examinees with disabilities access to the Talent assessment, the test site can

provide locally approved and provided accommodations which may include a human reader, a sign-language interpreter, and/or scribe. The local test administrator can determine the appropriate assessment accommodations needed for an examinee.

As WIN points out in its letter of protest, this is a material requirement:

Lest there be any confusion as to the State's expectation that providing a paper-based format was a critical component to the Contract, the Pricing Proposal required Offerors to assume 40% of the tests would be administered on paper and provided separate line items for costing paper-based tests and online tests. See RFP, Appendix F.

ACT's proposal is non-responsive to the requirement to make tests available on paper.

WIN also protests:

ACT's Proposal was non-responsive in that it failed to identify or provide qualifications and experience of key personnel as required by the RFP.

WIN argues:

The RFP requires the Offeror to submit detailed information on a program management plan that included the identity and specific information regarding the key personnel, including qualifications and experience....

The ACT proposal failed to list the project coordinator that would be dedicated the South Carolina contract. **ACT Proposal, p. 57-59.** The State clearly considers this to be one of the most important positions for contract performance and, as such, required detailed information regarding the key personnel. ACT's failure to identify and provide detailed qualifications and experience information in its proposal is a material noncompliance with the RFP that impacts performance.

Section IV of the solicitation states:

In addition to information requested elsewhere in this solicitation, offerors should submit the following information for purposes of evaluation:

[Amendment 1, Page 27] (emphasis added)

A program management plan was one of the items to be submitted:

**14. Program Management Plan**

- Submit a staffing plan that clearly delineates the management structure for this project.
- Submit the hours that key personnel will be committed to the South Carolina project.
- Provide the name; address; and resume, including qualifications and experience with large scale projects, of the key personnel, including all staff who will be assigned to work with SCDEW, SCDE, the District Test Coordinators, UGUs and staff who will conduct training.
- Clearly state how project management staff will communicate with SCDEW, SCDE and other UGUs.



- For high school testing in spring 2022, provide a schedule of key dates. The schedule of key dates will include dates for training, ordering test materials, online test set-up, test administration, the delivery and return of test materials, scoring, reporting, and data files.
- Describe the overall quality control of the entire project, including that of any subcontractors, and ensuring that timelines are met, and deliverables are error-free.
- Discuss the requirement for separate invoicing of the SCDE, SCDEW and UGUs.

[Amendment 1, Page 31] (emphasis and highlighting in original)

ACT responded to this requirement in pertinent part:

**ACT's South Carolina Career Readiness Staffing Plan**

ACT's South Carolina Career Readiness Program Team, led by Donna Mason (Director, State Partnerships) and John Cernohous (Senior Program Manager) has over 25 years of combined experience implementing and managing large-scale assessment programs. The key personnel are responsible for program management, delivery, administration, scoring, reporting, and customer service for the ACT and WorkKeys assessment for South Carolina. These key personnel are as follows:

- John Cernohous, Senior Program Manager
- Donna Mason, Director, State Partnerships
- Sean Palmer, Senior Operations Manager, Customer Care
- Rick Harris, Lead Product Implementation Management
- To be named, Project Coordinator

Each key person named has clearly documented roles and responsibilities and the educational background and experience, in their respective field, needed to successfully support this program.

The solicitation states that this is information that “should” be included in the proposal. And, while it asked for all staff who will be assigned to work with SCDEW, SCDE, the District Test Coordinators, UGUs and staff who will conduct training, it was not a mandatory requirement. This issue of protest is denied.

WIN's third issue of protest alleges:

**The means and methods by which the evaluation process was conducted and award determination made was arbitrary and capricious and in violation of the Procurement Code.**

Proposals were evaluated and scored by consensus of the evaluation committee rather than the traditional individual evaluation and scoring by each evaluator. Win argues:

WIN has been provided no documentation that would explain how the evaluation was conducted using consensus scoring. The Total Score in this procurement was very close. The records reflect that the limited direction and abandonment of the

Panel-approved practice of scoring in favor of consensus scoring has diluted the protections and benefits of independent evaluators and is arbitrary, capricious and undoubtedly impacted the determination of which proposal was most advantageous to the State. WIN contends that the use of consensus scoring did not result in a reasonable and rational determination as to the highest ranked offeror and, thus, was contrary to law and the purposes of the Procurement Code.

Neither the Code nor Regulations prescribe a particular evaluation methodology providing the State with flexibility to tailor the evaluation to determine the most advantageous solution for each procurement. However, the Code does require that the contract file contain the basis on which the award is made and must be sufficient to satisfy external audit. S.C. Code §11-35-1530(10) The only meaningful documentation in the record is a spreadsheet in which the evaluation committee made comments about the offerors strengths and weaknesses and awarded points for each evaluation criteria. There is nothing that would provide any insight into the rationale behind the scoring. Notably, the columns headed “Consensus Rating Comments” and Dissenting Rating Comments” have no information.

Price was evaluated subjectively and the points for price were awarded by consensus. WIN points out that while ACT submitted a total price of \$26,181,001.50 and DRC submitted a total price \$7,699,753.00, ACT was awarded 19 points and DRC was awarded 20 points. There is nothing in the file that would provide a rational explanation of the disparity between the prices evaluated and points awarded.

WIN also protests that the evaluation panel considered evaluation criteria not published in the solicitation. Four evaluation criteria were published in the solicitation. The evaluation score sheet provides a number of subfactors for each published factor and provides the evaluation committee the opportunity to score and comment on each subfactor. These subfactors were considered in the evaluation but not published in the solicitation. Section 11-35-1530(9) requires that “The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.” This issue of protest is granted.

## DECISION

Worldwide Interactive Network's protest of the procurement officer's determination of non-responsibility is denied. Worldwide Interactive Network's protests that ACT's proposal was not responsive, and that the evaluation was flawed are granted. The award to ACT is cancelled.

Because the evaluators considered factors not published in the solicitation, this procurement is cancelled. The procurement is remanded to the State Fiscal Accountability Authority for resolicitation.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

Attachment 1

BRUNER, POWELL, WALL & MULLINS, LLC

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January 20, 2022

**VIA EMAIL- [protest-itmo@itmo.sc.gov](mailto:protest-itmo@itmo.sc.gov)**

**AND HAND DELIVERY**

Michael B. Spicer, Chief Procurement Officer  
Information Technology Management Office  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

**Re: Protest of Award of Contract for Solicitation No. 5400022194, STC  
Career Ready Assessments  
Our File No.: 7-1641.103**

Dear Mr. Spicer:

As you know, this firm has been retained to represent the interests of Worldwide Interactive Network, Inc. ("WIN") in connection with the above-referenced solicitation. On behalf of WIN, we hereby submit this protest of the State's intent to award Contract No. 4400028124, STC Career Ready Assessments to ACT, Inc. ("ACT") and request a hearing and/or administrative review. The Intent to Award arises from Solicitation No. 5400022194 and was posted on January 5, 2022. WIN was the incumbent contractor and an offeror in the above-referenced solicitation. As an Offeror, and pursuant to S.C. Code Ann. § 11-35-4210(1), WIN has standing to pursue this protest. WIN's protest is timely filed within 15 days of the posting of the Intent to Award.

WIN is aware of the CPO's preference to conduct administrative reviews without a hearing; however, in this instance, WIN maintains that it would be in the best interest of the State to conduct a hearing to allow for the presentation of facts, evidence and arguments relating to the protest grounds set forth below. As set forth more fully below, the allegations in this protest involve claims that the State took very unusual and unique actions with regards to responsibility determinations and evaluation of the proposals that were violative of the Code and constitutional protections. To the extent that the CPO determines not to conduct a hearing or meeting with the interested parties, WIN requests that the CPO provide it with a copy of all additional information considered by the CPO as part of the administrative review upon receipt so that WIN would have an opportunity to review and provide any additional information in response in order to ensure that no further due process rights are violated. Moreover, WIN would also request to be notified of any deadlines for the submission of prior to any decision rendered on the protest. The protest is based upon the following factual and legal basis:

## BACKGROUND

On October 12, 2021, the State Fiscal Accountability Authority (“SFAA”), Division of Procurement Services, ITMO (“ITMO”) issued specifications for Solicitation No. 5400022194. The solicitation sought proposals to establish a State Term Contract to provide the administration, scoring and reporting of an assessment of career readiness skills and aptitudes. Administration of this career readiness assessment would include, but not be limited to, the South Carolina Department of Education (“SCDE”) eleventh and twelfth grade students and the South Carolina Department of Employment Workforce (“SCDEW”) job-seeking adults and will provide scores that are valid indicators of career readiness and soft skills. The proposed assessment must be available for large-scale administration beginning in Spring of 2022 and include both online and paper administrations.

The solicitation required prospective vendors to submit a Technical Proposal, Qualifications and a Program Management Plan, and a separate Price Proposal with a per student price in an Excel worksheet. After submission, each Offeror’s Proposal was to be, first, judged by the procurement officer (“PO”) for responsiveness and, after responsiveness was determined, evaluated and scored by an evaluation panel along with the Qualifications and Program Management Plan pursuant to the published criteria in the RFP. Presumably, in accordance with established ITMO policy, the RFP contemplated that the Price Proposal was to be, first, judged for responsiveness by the PO and, after responsiveness was determined, evaluated and scored by PO. However, upon information and belief, despite the long-established evaluation process, it would appear that the proposals were not scored by evaluators independently. Rather, it appears a single score was determined after the evaluators collaborated. Moreover, rather than the PO assigning the points for the Price Proposal using the long-accepted formula, it appears that the evaluators scored the priced proposal in a collaborative fashion.

Section III, Scope of Work/Specifications of the RFP set forth the scope and detailed requirements of the Contract, including numerous mandatory requirements. Section IV, Information for Contractors to Submit, specified all of the information that was required to be submitted with the proposal. Section IV clearly admonished Offerors that proposals which imposed conditions that modified the requirements of the solicitation or failed to respond to the information requested risked being deemed non-responsive and rejected. Section IV.C. Price Proposal set forth the requirements for the submission of the Price Proposal and directed the Offerors to provide a per student price in an Excel spreadsheet that was included in the solicitation with the prices provided for both paper and online assessments broken out by fiscal year.

According to the RFP, the Offers were to be evaluated using only the evaluation factors listed below. The evaluation factors were listed in relative order of importance with the associated possible points:

1. **Price Proposal (C)** – See Section VIII (1-25 points)
2. **Technical Proposal(A)** - The degree of responsiveness, accuracy, completeness and ability of the Offeror to meet the requirements in the RFP (1-20 points)

3. **Qualifications (B)** - The Offeror's corporate experience and evidence of successful past performance with projects of this similar size and scope. The qualifications of proposed staff. (1-20 points)
4. **Program Management Plan (C)** - The Offeror's overall descriptions of the approach to manage, implement, and support this assessment program. (1-15 points)

On November 21, 2021, proposals were received. There were three Offerors that submitted proposals – WIN, ACT, Inc. (“ACT”) and Data Recognition Corporation (“DRC”). Just prior to submission, WIN discovered that its Vendor Number was disabled. Concerned about the ability to submit its proposal electronically, WIN contacted the PO who appeared to be familiar with the situation and indicated that WIN could file a hard copy proposal as the State could not prohibit WIN from submitting a proposal. However, it would appear that the first action that the procurement officer took subsequent to receipt of the proposals was to deem WIN a non-responsive bidder. The PO made no effort to communicate any concerns to WIN. Upon information and belief, the PO never even reviewed or considered in any way WIN’s proposal. Rather, after rejecting WIN’s proposal, the PO transmitted the Proposals submitted by ACT and DRC to an evaluation panel for scoring.

Despite the State’s longstanding policy of having the evaluation panel independently score the proposals, it appears the evaluators were instructed to provide a single score presumably after reaching a consensus. See Consensus Scoring attached as **Exhibit A**. Moreover, despite the longstanding policy of having the PO score the Price Proposals using a formula that awards the Offeror submitting the lowest price the total possible points allowed for Price and the other Offerors a pro rata portion of the points based on the difference in Price from the Offeror submitting the lowest Price, it appears that the evaluation panel scored the Price Proposals, using some form of undefined method. The Consensus Score Sheet reflects that the evaluation panel considered evaluation factors that were not identified in the RFP. See **Exhibit A**.

For purpose of scoring the Price Proposal, DRC submitted a total price for the Contract of \$7,699,753.00 and ACT submitted a total price for the Contract of \$26,181,001.50. Inexplicably, DRC received a score for its Price Proposal of 20 out of a possible 25 while ACT received a score of 19 out of a possible 25. In other words, ACT received a score for price one point less than DRC despite that fact that ACT’s price was nearly 3.5 times higher than DRC’s price. The procurement file provided in response to the FOI request failed to provide any explanation for such an arbitrary scoring of price. The total scores from the evaluators reflected that ACT was deemed the highest ranked offeror by 2 points. The scoring summary was as follows<sup>1</sup>:

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<sup>1</sup> Section VI Award Criteria indicates that the Total Potential Points is 100; however, the total potential points assigned to the evaluation factors listed in Section VI only totals 80 points.

Michael B. Spicer, Chief Procurement Officer

January 20, 2022

Page 4 of 15

	ACT	DRC
Points Awarded for Technical Proposal (Max of 20)	16	12
Points Awarded for Qualifications (Max of 20)	17	16
Points Awarded for PMP (Max of 15)	11	13
Points Awarded for Price/Business Proposal (Max of 25)	19	20
	<b>63</b>	<b>61</b>

Upon information and belief, the evaluation panel completed their scoring on December 6, 2021, and ACT received a total score of 63 and DRC received a total score of 61. The PO determined that ACT was the highest ranked Offeror and the State began negotiations with ACT on December 7, 2021, by forwarding a list of negotiation points. On or about December 27, 2021, negotiations with ACT were concluded. The Notice of Intent to Award was issued on January 5, 2022, reflecting the proposed award to ACT.

WIN contends the proposed award to ACT is improper and contrary to the Procurement Code. The State's determination that WIN was a non-responsible offeror was arbitrary, capricious and clearly erroneous. The evaluation and scoring of the proposal was conducted in an arbitrary and capricious manner and violated the Code and deviated from the longstanding methods of scoring proposals. Moreover, it is apparent from the documents provided to date that ACT's proposal was wholly non-responsive and, further, that the process for selection of ACT as the highest ranked offeror for negotiations was legally and materially flawed.

## ISSUES OF PROTEST

### **I. The Procurement Officer's failure to consider WIN's proposal and issuance of the Non-Responsibility Determination was arbitrary, capricious and in violation of the Code and accompanying regulations and stripped WIN of its due process rights.**

As stated, the Notice of Intent to Award was issued on January 5, 2022. On that same day, WIN learned for the first time that the PO had determined that WIN was a non-responsible offeror when the PO emailed to WIN a copy of his Non-Responsibility Determination (the "Determination"). See email from Michael Speakmon and Determination attached as **Exhibit B**. The written Determination was dated December 1, 2021, 35 days prior to the date it was

provided to WIN<sup>2</sup>. WIN was shocked to learn of the determination as it had received no communication or inquiry or any indication of concern regarding WIN's status as an offeror. The Determination noted that on September 15, 2021, the State was notified by Laura Chapman, Esq., counsel for ACT, that a preliminary injunction had been issued on August 18, 2021, against WIN by the U.S. District Court for the Eastern District of Tennessee in the case of *ACT, Inc. v. Worldwide Interactive Network, et. al*, Case No. 3:18-cv-186. (the "Chapman Letter"). The litigation involves disputed claims asserted by ACT and counterclaims asserted by WIN and there have been no final determination concerning the merits of the claims. The preliminary injunction, which is currently being appealed, enjoined WIN from *knowingly infringing ACT's copyrights of its Skill Definitions of ACT's career-readiness test*. The injunction did not enjoin WIN from participating in current or future state contracts of any kind including, but not limited to, career readiness assessment procurements. The letter from Ms. Chapman contained a number of what WIN considers factually and legally incorrect statements and unsupported allegations and misinformation. It also included a copy of the injunction and other information. The first time that WIN became aware that such a letter was sent to the State and considered by the State was the date it received the Determination. WIN was not able to review the contents of the letter until it received a copy in response to a recent FOIA request. A copy of the Chapman Letter and Preliminary Injunction are attached as **Exhibit C and D**.

Based on the documents provided in the procurement file, the PO was taking steps to reject WIN's proposal and issue the Determination deeming WIN a non-responsible bidder essentially immediately after receipt of proposals. At no time did the PO attempt to communicate or request additional information from WIN regarding any concerns. Upon information and belief, the PO never even reviewed or considered in any way WIN's proposal. Moreover, the procurement file reflects that the only written information that the PO relied upon in making the Determination was contained in an email from Stacy Adams, Director of Statewide Sourcing for the Office of State Procurement, to the PO (Michael Speakmon) that attached the Chapman Letter. Adams specifically directed that the PO should not focus on whether or not there is a copyright infringement, as that is still pending a ruling in court, but instead to focus on the temporary restraining order (injunction) that will prohibit WIN from performing until the matters are handled in court. See Adams Email attached as **Exhibit E**. The matters handled in court deal specifically with copyright infringement and do not deal with WIN's responsibility and ability to perform under Solicitation No. 5400022194.

The statutory and regulatory framework governing responsibility determinations as well as the State's guidance documents contemplate an exchange of information by and between the PO and the Offeror in order to make such a determination. The State's practice also generally involves responsibility determinations occurring only with apparent successful offerors after evaluation unless a solicitation contains special standards of responsibility.<sup>3</sup> As noted, in the

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<sup>2</sup> SC Reg 19-445.2125(E) required the PO to send a copy of the Determination promptly to WIN when it is issued.

<sup>3</sup> See The SFAA "Competitive Sealed Proposals: Required Procedures and Guidance for Communications After Opening but Prior to Award" dated September 2021.



present non-responsibility determination, the CPO never requested any information or clarification from WIN prior to issuing the Determination. It appears, instead, that the PO immediately began issuance of the Determination and never reviewed or considered in any way WIN's proposal. The PO never had any intention on giving WIN a fair opportunity for the contract award.

**A. The PO rejection of the WIN Proposal and Non-Responsibility Determination amounts to a De Facto Suspension and Debarment in violation of the Code and WIN's Constitutional Due Process Protections:**

The summary rejection of WIN's proposal based on the submission of one of WIN's competitors without ever communicating any concerns or requesting any information from WIN regarding its responsibility it is operates as a de facto suspension and debarment in violation of the Code and WIN's constitutional due process protections. See *Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953, 963-68 (D.C. Circuit 1980)(holding that due process requires that a contractor receive notice of the charges impugning its integrity and an opportunity to be heard). In *Old Dominion*, the aggrieved bidder had been found non-responsible based on governmental audits of its performance on prior federal contracts. The bidder was not advised that the procurement officer had found it to be non-responsible until award was made. There were no efforts to communicate or solicit information from the bidder. The Court found that Old Dominion's due process rights had been violated in that at no point was it provided an opportunity to respond to those charges and to present whatever facts and argument it had to persuade the procurement officer that the allegations were without merit. See, *Old Dominion Dairy Prods.* at 386.

In this case, the State never intended on providing WIN a fair opportunity to be awarded the contract. WIN was never provided an opportunity to present any information to address any concerns or uncertainty the PO may have possessed regarding the responsibility factors. In addition, it appears that there was an affirmative effort to conceal the PO Determination until the award was made. S.C. Reg 19-445.2125(E) requires the PO to promptly notify the offeror when a non-responsibility determination has been made. Despite this requirement, the PO withheld notice to WIN of his Determination for 35 days until the Notice of Award was posted. The actions and inactions of the PO can lead to no other result than WIN was de facto debarred, which is in violation of the Code and of WIN's constitutional due process protections.

The Code grants authority to suspend or debar a contractor exclusively to the appropriate chief procurement officer. S.C. Code Ann. § 11-35-4220(1). The CPO is only authorized to debar or suspend persons from contracting with the State "[a]fter reasonable notice to the person or firm involved, and a reasonable opportunity for that person or firm to be heard." *Id.* The Code defines "debarment" as "the disqualification of a person to receive bids, or requests for proposals, or the award of a contract by the State, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance. S.C. Code Ann. § 11-35-310(14). Additionally, debarment is a determination that the person is presently not

responsible. In the Matter of *Consensus Construction & Consulting, Inc.*, et al., Case 2015-010 citing *Caiola v. Carroll*, 851 F.2d 395, 398-99 (D.C. Cir. 1998).

In this instance, the PO made a determination that WIN is presently not responsible without considering WIN's proposal or providing WIN with an opportunity to be heard or provide any clarifications. The State having no intention to award WIN the contract and the effect of a non-responsibility determination based solely on the preliminary injunction effectively amounts to a de facto debarment until that matter is resolved in court. The email from Stacy Adams to Michael Speakmon evidences the same stating that, "...a temporary restraining order (injunction) that will prohibit WIN from performing until said matters are handled in court." Given the requirements of 19-445.2125, WIN will not be able to demonstrate responsibility until the merits of that case are decided according to the PO's determination. The de facto debarment was in direct violation of S.C. Code Ann. § 11-35-4220(1).

The PO was required by law to provide notice to WIN and provide WIN an opportunity to be heard. The failure to adhere to the Code effectively violated WIN's due process rights and consequentially resulted in WIN's de facto debarment. The Determination lacks a reasonable or rational basis, and was arbitrary, capricious and violative of WIN's constitutional due process protections. As such, the award to ACT was tainted.

**B. The stated bases for the Determination was devoid of reason in that the PO improperly applied the factors to be considered when determining responsibility.**

The PO identified three factors he considered as supporting the conclusion that WIN was a non-responsible offeror: (1) Record of Past Performance; (2) Satisfactory Record of Integrity; and (3) Financial Capability. The PO conclusions reached regarding each of these factors were arbitrary, capricious and in violation of the Code, accompanying regulations, and WIN's constitutional protections. The enumerated purposes of the enactment of the Code includes to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed and to foster effective broad-based competition. S.C. Code Ann. § 11-35-20.

**(1) Record of Past Performance.**

Each finding made by the PO is in direct relation to the preliminary injunction issued on August 18, 2021. Nothing in the Determination demonstrates any review or even consideration of WIN's proposal. In the Determination, the PO specifically notes that there is nothing in the contract file to indicate that WIN failed to perform the existing contract. Instead, it notes that the injunction ordered the State to cease performance with WIN under the existing contract causing the State to have concerns about WIN's ability to perform. This finding is clearly erroneous as the injunction did not order the State to cease performance with WIN under the existing contract. Rather, the Court ordered that,

“Worldwide Interactive Network, its officers, directors, agents, servants, employees, attorneys, successors, and assigns are preliminarily **ENJOINED** *from knowingly infringing ACT’s copyrights in its Skill Definitions*, including by distributing, copying, reproducing, displaying, creating derivative works from, or engaging in any other activity deemed infringing by 17 U.S.C. § 106 involving ACT’s Skill Definitions.” (See **Exhibit D**)

The specific language in the Order is directly tied to “knowingly infringing ACT’s copyrights in its Skill Definitions...”. The injunction does not order the State to “cease performance with WIN under the existing contract.” Thus, this finding by the PO is erroneous and lacks a rational and reasonable basis.

Additionally, at no time did the PO attempt to communicate, contact, or gather any information from WIN concerning its ability to perform the current contract or the contract being solicited in this procurement as permitted by the Code and accompanying regulations. The only information the PO relied upon to make this responsibility determination was contained in the Chapman Letter. The PO’s determination that the State had “legitimate concerns about WIN’s ability to perform,” without any requests for information or communication, or any review of WIN’s proposal was arbitrary and capricious and in direct contradiction of the Code.

**(2) Satisfactory Record of Integrity.**

The PO’s statements and conclusions regarding WIN’s satisfactory record of integrity are conflicting and confusing at best. The PO indicates that the State does not question WIN’s integrity specifically. However, he concludes that since the issue was raised in court, the State could not make an informed determination as to the legitimacy of those claims. While the PO chose not to speculate on the legitimacy of the claims, at no time did the PO attempt to request any information or attempt to engage in any communications with WIN concerning the preliminary injunction and WIN’s responsibility in accordance with the Code and S.C Reg. 19-445.2125(B) and (C) in order to provide clarity to the issue and to allow him to exercise sound judgment his decision. Rather, the PO concludes that the mere existence of allegations that have not been ruled on by the court with finality is sufficient for the State to conclude it cannot make a determination of WIN’s integrity until the legitimacy of those claims have been decided. It is arbitrary and capricious for the State to acknowledge that it does not question WIN’s integrity specifically but find that it is incapable of determining WIN’s integrity while the action is pending without providing WIN any opportunity to demonstrate that its actions with the State both past and present reflect a satisfactory record of integrity.

**(3) Financial Capability.**

The PO concluded that he could not determine whether WIN has the financial capability to satisfactorily perform during the entire term of the resulting contract. The PO cited as support

for this conclusion that “equitable relief can include restitution which may or may not include financial recompense” and that “the procurement officer cannot estimate what restitution may or may not be imposed by the court.” On its face, the PO is engaging in pure speculation. Even if the prospect of a damage award in the litigation was a valid factor to consider, the Determination reflects no effort to determine the potential scope of damages in this case. There is no evidence that the PO made any request of damages claimed, which would eliminate his need to estimate. Moreover, the PO made no review or request of any financial information from WIN, did not review the proposal, and never provided WIN with any opportunity to explain its financial capability. Without any information regarding the potential damages or WIN’s financial capabilities, the PO’s decision to speculate on equitable relief is not judgement made on fact, but instead amounts to an arbitrary, capricious, and erroneous decision devoid of a reasonable or rational basis.

**II. ACT’s proposal was non-responsive to material, essential and mandatory requirements of the RFP in ways that affected price, quality, quantity and delivery of services; and, as such, ACT’s proposal should have been rejected.**

ACT was non-responsive to the material, essential and mandatory requirements of the RFP as detailed below. These material deviations from the requirements of the RFP clearly affected price, quality and delivery of services at issue and required rejection of the ACT proposal. The State’s failure to determine the ACT proposal as non-responsive was arbitrary, capricious and in violation of the applicable provisions of the Code and regulations.

**A. ACT failed to provide paper-based assessments in violation of the clearly expressed requirements of the RFP.**

The express intent of the RFP was to deliver assessments that would provide scores that are valid indicators of career readiness and soft skills. Soft skills assessments are critical to workforce practitioners in their goal to link jobseekers with employers to meet the business needs of the state. Businesses have identified multiple types of soft skills that make effective employees including problem solving, teamwork/collaboration, communication, initiative, flexibility, and interpersonal skills. RFP, p.16.<sup>4</sup>

The RFP contains numerous provisions that required the assessments to be available both online and in paper-based formats. For example:

**A. Testing Format**

**The career readiness assessment must be available in both online and paper-based formats. Both forms must be available to ensure the assessments are accessible to all students and adult examinees, and available to all testing sites. It is estimated that more than 60 percent of the SCDE students will participate in the online administration.**

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<sup>4</sup> Amendment 1 to the Solicitation reissued the RFP in its entirety. References to “RFP” is to Amendment 1.

**B. Online Assessment System**

The Contractor must provide an online assessment system that has already been developed, tested, and applied successfully with a comparable large-scale assessment program. This assessment system must be able to be used for all sites under this contract. **The contractor must allow each district, school, or SCDEW site to choose whether to administer tests via paper or online. If an entity chooses online testing, the contractor will be required to provide paper testing for any student at that location who cannot test online because of a disability.**

RFP, p. 18

Lest there be any confusion as to the State's expectation that providing a paper-based format was a critical component to the Contract, the Pricing Proposal required Offerors to assume 40% of the tests would be administered on paper and provided separate line items for costing paper-based tests and online tests. See RFP, Appendix F.

ACT's proposed assessment included four components: (1) Applied Math; (2) Graphic Literacy; (3) Workplace Documents; and (4) Talent. ACT proposed its Talent product as its soft skills solution. However, ACT was clear in its proposal that it would not provide its Talent Assessment in a paper-based format.

*ACT has stringent rules that must be followed to provide for a high level of integrity for our test. This includes policies about who can administer the test as well as who has access to the test materials. The link provides details on administering paper assessments. The Talent Assessment is available for online administration only. There is not a paper-based form available for this assessment.*

ACT Proposal, p. 40.

The RFP required that the assessments administered under the contract must comply with applicable federal and state laws governing such assessments, including Individuals with Disabilities Education Improvement Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973. Both require students with disabilities be offered accommodations, including the provision of paper-based tests or large-print or Braille, if necessary. See RFP, pp. 16, 19 & 28.

ACT's failure to offer a critical component of its assessments in a paper-based format was a material deviation from the requirements of the RFP. The requirement that the assessments be offered in a paper-based format were mandatory and non-waivable. The on-line only offering of ACT's Talent assessment imposes conditions upon the State in violation of the Code and S.C. Reg.

19-445.2070(D). These conditions have an indisputable, significant and material effect on price and performance. ACT's Proposal must be rejected as non-responsive.<sup>5</sup>

**B. ACT's Talent Assessment failed to offer a "locked down" browser or proctor necessary to meet the RFP security requirements for online assessments.**

The RFP contains several provisions that emphasizes required security components for the online assessments. In connection with the online assessments, the RFP states:

**F. Online Assessment System**

.....

The system must allow for both wired and wireless connections for all eligible testing devices. The system must support the use of assistive technology for use with students who require accommodations. The computer-based system must:

- Be robust and secure enough to dissuade, quickly identify, and respond to potential instances of hacking;
- Deliver test forms securely to student workstations or devices that are "locked down;"
- Be flexible enough to allow for continuous improvement;
- Support the most current web browser technology;
- Ensure ongoing security following updates for the duration of the contract; and
- Prevent inappropriate access (e.g., student) to the test outside of the testing session.

.....

The Contractor must train district technology coordinators and other identified testing sites to temporarily disable features, functionalities, and applications that could present a security risk during test administration. **Students must not have the ability to gain access to the test outside of the testing session or be able to do any of the following while testing:**

- Print test items;
- Make screen captures of any test items (live and recorded);
- Make videos of any test items;
- View web pages (e.g., HTML source);

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<sup>5</sup> It would appear that the State possessed concern about the Talent assessment's compliance with the requirements of the RFP and attempted clarification during the negotiation stages. However, the Panel has determined once the proposals have been evaluated and ranked it is too late for such clarification, and allowing it after those stages would be unfair to the other offerors. IN RE: *Protests of Qualis Health and Georgia Medical Care Foundation d/b/a Alliant ASO*, Case No. 2010-4. Nevertheless, the Record of Negotiation clearly reflects that the State sought to award the Contract to ACT despite the fact that the Talent Assessment would only be offered online in violation of the RFP.

- Save secure content to any electronic format (e.g., HTML source);
- Use cameras (still and video);
- Access e-mail, instant messaging, etc.;
- Access other software, apps, and programs during testing (e.g., word processing, calculators); and/or
- Access the Internet or Intranet (outside the access deliberately provided by the test delivery application or caching system).

RFP, p. 18.

On pages 13, 34 and 39 of its Proposal, ACT clearly states that its Talent assessment will only be administered online and will not be proctored or timed. Without the use of a proctor, it is impossible for ACT to meet the requirements for the Online Assessment System set forth above. Lock down browsers and proctored assessments are the only mechanism to ensure that the security requirements can be met. ACT's modification to the online assessment system affects price and delivery of the services and reflects a violation of a material term of the RFP. As such, ACT's Proposal must be rejected.

**C. ACT's Proposal was non-responsive in that it failed to identify or provide qualifications and experience of key personnel as required by the RFP.**

The RFP requires the Offeror to submit detailed information on a program management plan that included that identity and specific information regarding the key personnel, including qualifications and experience.

**14. Program Management Plan**

- Submit a staffing plan that clearly delineates the management structure for this project.
- Submit the hours that key personnel will be committed to the South Carolina project.
- Provide the name; address; and resume, including qualifications and experience with large scale projects, of the key personnel, including all staff who will be assigned to work with SCDEW, SCDE, the District Test Coordinators, UGUs and staff who will conduct training.
- Clearly state how project management staff will communicate with SCDEW, SCDE and other UGUs.

RFP, p.31.

The ACT proposal failed to list the project coordinator that would be dedicated the South Carolina contract. **ACT Proposal, p. 57-59.** The State clearly considers this to be one of the most important positions for contract performance and, as such, required detailed information regarding the key personnel. ACT's failure to identify and provide detailed qualifications and experience information in its proposal is a material noncompliance with the RFP that impacts performance.

**III. The means and methods by which the evaluation process was conducted and award determination made was arbitrary and capricious and in violation of the Procurement Code.**

**A. Upon information and belief, the scoring of the Evaluation Panel was flawed in that the scoring was not determined using independent scoring from the evaluators.**

In this solicitation, the PO elected to pursue the competitive sealed proposal method of procurement set forth in S.C. Code Ann. § 11-35-1530. The procurement file and Consensus Scoring document reflects that the State abandoned its method of evaluation and ranking that has been used for competitive sealed proposals for decades. The CPO and the Procurement Review Panel (the "Panel") have embraced the method of evaluation by independent subjective scoring from the members of an evaluation panel that is then either added together or averaged to determine the highest ranked offeror pursuant to S.C. Code §11-35-1530. Indeed, the instructions that evaluators are provided during panel charging emphasize independent scoring and admonish evaluators from scoring in any manner that does not reflect independent scoring. The Panel has considered issues raised in protests regarding the need for collaborative scoring and specifically held "[c]ollaborative Scoring, which is not required by the Procurement Code or any regulation, would dilute the benefit derived from independent evaluators and has not been used in South Carolina." See *In Re Protest of Intralot*, Panel Case No. 2017-8, p.43.

The Consensus Scoresheet reflects that the evaluators did not independently score the proposals. Rather, the proposals were given a single collaborative score by the evaluation panel. There do not appear to be any written instructions or directives provided to the evaluation panel as to how such scoring should be accomplished. The lack of independent scoring created an opportunity for bias and consideration of evaluation factors beyond those identified in the RFP.

WIN has been provided no documentation that would explain how the evaluation was conducted using consensus scoring. The Total Score in this procurement was very close. The records reflect that the limited direction and abandonment of the Panel-approved practice of scoring in favor of consensus scoring has diluted the protections and benefits of independent evaluators and is arbitrary, capricious and undoubtedly impacted the determination of which proposal was most advantageous to the State. WIN contends that the use of consensus scoring did not result in a reasonable and rational determination as to the highest ranked offeror and, thus, was contrary to law and the purposes of the Procurement Code. Given that there is no documentary support for this scoring anomaly, this issue alone supports a CPO decision to conduct a hearing to develop further evidence regarding the propriety of the scoring of the proposals.

**B. The scoring of the Price Proposals was arbitrary, capricious and lacked any rational or reasonable approach and was otherwise conducted in violation of the Code.**



The Consensus Scoresheet reflects that the scoring process for the Price Proposal was conducted by the evaluation panel. If this occurred, it would have represented yet another departure from the time-tested and Panel-approved approach to having the PO score the Price Proposal. Regardless of who scored the Price Proposals, the scoring of the Price Proposals was done using an unexplained subjective scoring method rather than the objective formula that provided the lowest total evaluated price would receive the maximum points allowed. This represents yet another unexplained departure from the decades-old policy of scoring the proposals. Under the formulaic approach, the other proposals would receive a percentage of the points available based on their price relationship to the lowest. For decades, this was determined by applying the following formula:  $\text{Lowest Price} / \text{Price Being Evaluated}) \times \text{Maximum Price Points Available} = \text{Awarded Price Points}$ .

In this case, DRC submitted a total price \$7,699,753.00 and received a score of 20 out of 25. ACT submitted a total price of \$26,181,001.50 and received a score of 19. There were no evaluation factors or description in the RFP that would indicate in any way that Price would not be scored using the traditional method that has been used as a matter of course. It is incomprehensible that a price difference of that magnitude would result in a 1 point score differential. Had this solicitation been scored the way hundreds of solicitations have been scored in the past using the formula above, DRC would have received 25 points and ACT would have received 7.35 points. There is no rational explanation to explain such a divergence in the scoring of the Price Proposals. The Consensus Scoring suggests that price reasonableness analysis was performed on both ACT and DRC price proposals and that each were deemed reasonable. If there was error in the application of the traditional scoring process, the award was not made to the highest-ranking offeror. If the scoring of the Price Proposals involved a subjective scoring, such scoring was arbitrary and capricious and directly impacted the determination of the highest ranked Offeror. Such a determination could only be achieved by applying evaluation factors for price that were not specified in the solicitation in direct violation of the Code. In addition to the obvious irrational result in applying a 1 point differential for Price to the two proposals that were \$18,481,248.50 apart, given the tight score associated with the other evaluation factors, it is impossible for the State to support the position that the Intent to Award was made to the proposal that was most advantageous to the State.

There is nothing in the procurement file that provides any conclusion other than the scoring of the Price Proposal was arbitrary capricious and contrary to the Code. If the award is not overturned on this basis, the purposes of the Code to maximize the purchasing values of funds while ensuring that procurements are most advantageous to the State and to foster broad-based competition for public procurement and ensure fair and equitable treatment of all stakeholders will be eviscerated.

**C. The scoring of the Proposals erroneously or arbitrarily considered evaluation factors that were not specified in the solicitation in violation of the Code.**

The Panel has long held, and the Code is clear, that the scoring and subsequent award must be based on the evaluation factors specified in the solicitation. S.C. Code Ann. § 11-35-1530(9).

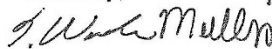
Michael B. Spicer, Chief Procurement Officer  
January 20, 2022  
Page 15 of 15

The Consensus scoring reflects that the evaluators were instructed to score the technical proposals using subfactors that did not appear in the evaluation factors set forth in the RFP. Specifically, the Consensus Scoresheet reflects that (1) Reporting & Spend Analytics Capability; (2) Integration/Interfaces and (3) Training Plan were subfactors considered by the evaluation panel in the subjective scoring of the Technical Proposal. These subfactors were not specified as evaluation factors in the solicitation. As such, the scoring was violative of the Code. Moreover, as set forth above, to the extent the evaluation of the Price Proposals involved some subjective application of the factors specified in the Consensus Scoresheet or some other unidentified factors, those evaluation factors were not specified in the solicitation. This is additional evidence of the arbitrary and capricious nature of the scoring in violation of the Code.

For the foregoing reasons, the notice of award to ACT should be cancelled. The PO's Non-responsibility Determination was arbitrary, capricious and contrary to law. The Determination was made without proper inquiry and in reliance on erroneous misinformation. The Determination can only be construed as a de facto suspension and/or debarment issued in contravention of WIN's due process rights. WIN further contends that ACT's Proposal should have been rejected as non-responsive. WIN also contends that the evaluation process was egregiously flawed and resulted in an award that was made in violation of the Code. As such, WIN is requesting the Chief Procurement Officer issue a decision to mandate re-solicitation under the governing authority set forth in the Code and the regulations.

WIN will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We are requesting an administrative review and believe that, under these circumstances, a hearing of this protest is in the best interests of the State. To the extent that the CPO determines he will not hold a hearing, we are requesting copies of all materials provided to you and an opportunity to review and provide comment on such submissions. Furthermore, to ensure due process, we would request that the CPO provide all interested parties a deadline by which to produce evidence for the CPO to consider in reaching a decision, and the date on which the CPO's review will be completed.

Sincerely,



E. Wade Mullins, III

cc: Steve Fain

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised May 2020)*

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.

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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>

FILING FEE: Pursuant to Proviso 111.1 of the 2020 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**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

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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: \_\_\_\_\_

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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.**