

State of South Carolina) **Before the Chief Procurement Officer**
)
County of Richland)
) **Decision**
In Re: Determination of Probable Cause to)
Suspend Smart Public Safety Software, Inc.) **Case: 2011-203**
(SMART), Mr. Robert Sorenson,)
Mr. Mark DeGroote, and TAC 10, Inc)
) **Posted: 02/17/2011**
) **Mailed: 02/17/2011**
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Pursuant to Section 11-35-4220(1) of the South Carolina Consolidated Procurement Code (Code), the appropriate chief procurement officer may suspend a person or firm from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment. This matter is before the Chief Procurement Officer (“CPO”) for Information Technology pursuant to a recommendation by the Information Technology Management Office’s (ITMO) Procurement Manager for the suspension and debarment of Smart Public Safety Software, Inc. (SMART), Robert E. Sorenson, President of SMART, and Mark DeGroote, formerly Vice President for Development for SMART and presently President of TAC 10, Inc. (“TAC 10”), and TAC 10 as a result of the breach of contract #44000000924, for a records management system for the South Carolina Department of Natural Resources (DNR).

The CPO held a hearing on this matter on October 26, 2010. Present at the hearing were representatives of DNR, represented by Buford S. Mabry, Jr., Esquire, and ITMO. Mr. Sorenson, Mr. DeGroote, and representatives of SMART and TAC 10 did not attend.¹

¹ The CPO first scheduled a hearing for August 24, 2010, to consider the suspension and sent notice to the companies and their principals. Mr. DeGroote requested a continuance in order to be represented, which the CPO granted. The hearing was rescheduled for September 30, 2010. Neither SMART nor TAC nor either’s representatives were present on this date. However, due to a clerical error on the notice letter, the CPO postponed that hearing out of an abundance of caution. On that date, the CPO also issued a revised notice to the companies and their principals rescheduling the hearing for October 26, 2010. On October 22, 2010, TAC 10 again requested a continuance and asked that the hearing be scheduled for their convenience on November 18, 2010 instead. The CPO denied this continuance request.

Findings of Fact

On March 10, 2009, ITMO issued an Invitation for Bids (IFB), on behalf of DNR, seeking a vendor to provide and implement a fully integrated law enforcement information and records management system that would provide computer aided dispatch; summons ticket, warning ticket, arrest warrant, bench warrant, privilege suspension, investigations case management; incident reporting; daily and monthly officer activities reporting; and other mission critical law enforcement functions, and an interface to DNR's Oracle database. [IFB - Exhibit 6, p. 15.] Vendors were also required to place the software source code in escrow so DNR could access it if necessary. [IFB – Exhibit 6, p. 25.] SMART submitted an offer, and its solution included modifications to its Commercial-Off-The-Shelf (COTS) software along with custom built software and interfaces. [SMART's Bid - Exhibit 11] Following negotiations which included SMART agreeing to place the source code in escrow at its cost, ITMO awarded a contract to SMART on May 15, 2009. The cost of the software, custom programming, installation, training, and first year's warranty was \$345,074. Maintenance for years 2 through 5 totaled \$238,049, for a total contract value of \$583,123. [Record of Negotiations – Exhibit 6, response 9; Award Statement – Exhibit 5.] Based on SMART's bid, the custom programming, installation and training was to be completed by December 11, 2009. [Exhibit 11, Page 54]

According to Jim Scurry at DNR, SMART delivered the run-time version² of their COTS software on June 24, 2009, for which DNR paid \$281,800, leaving a balance of \$63,274 for the remaining first year services and warranty. During this process, Mr. Sorenson and Mr. DeGroot visited DNR and spoke with DNR project personnel. On November 13, 2009, DNR paid an additional \$4,000 for part of the remaining services. DNR began experiencing delays in the project during the Fall of 2009. On January 27, 2010, Mr. Scurry sent an email to Mr. Sorenson expressing his concern about the lack of progress with the project. Again on May 11, 2010, Mr. Scurry emailed Mr. Sorenson requesting a status update and offering SMART two options: finish the project in full or refund all monies paid to SMART. [Series of Emails – Exhibit 4]

² The Run-Time version of software is provided in machine readable form which cannot be modified or tailored to meet the unique needs of the agency. The source code is required in order to make any modifications.

According to Mr. Scurry, during a phone conversation on May 12, 2010, Mr. Sorenson informed him that SMART had secured a loan from a local bank, pledging all its assets, and the bank had demanded payment in full. Mr. Sorenson told Mr. Scurry that the company was instructed to discontinue their current projects until further notice and that it would be 10 to 14 days before the issue would be resolved. Mr. Scurry also inquired about whether the software code had been properly placed in escrow. Mr. Sorenson informed Mr. Scurry that it was not in escrow yet as of May 17, 2010. During another phone conversation on May 27, 2010, Mr. Sorenson told Mr. Scurry that the escrow was being completed. In addition, Mr. Sorenson informed him on that date that the issues surrounding the bank loan were not yet resolved.

Despite this contention, TAC 10 was incorporated on May 26, 2010, with Mr. DeGroot as President according to its Articles of Incorporation. [TAC 10 Articles – Exhibit 14] The official address for TAC 10 was the same as SMART. The Director of Business Development for TAC 10 is Mark Wooderson who previously served as Vice President of Finance for SMART. [SMART Website - Exhibit 8] David Fitzgerald, who was a Director at SMART, is also employed with TAC 10. It is believed that TAC 10 has approximately 21 employees.³ It is unknown how many more of those employees were formerly employed by SMART.

Mr. Scurry also placed a phone call to the telephone number for SMART on June 9, 2010, which was answered as TAC 10. At that time, Mr. Scurry spoke to Mr. DeGroot, who introduced himself as the President of TAC 10. Also present on the call and identified as members of TAC 10 were Mr. Wooderson and Mr. Fitzgerald, who previously were with SMART as stated above. During that call, Mr. DeGroot acknowledged that SMART's primary staff was now at TAC 10. At that time, Mr. Scurry inquired about completion of the contract and he was informed that TAC 10's attorney would respond to his inquiry. On or about June 10, 2010, Mr. Scurry received a letter from attorney David H. Mason of Redfern, Mason, Larsen and Moore on behalf of TAC 10 stating that SMART had secured a loan from a local bank (the "Bank"), defaulted on the loan, and voluntarily surrendered all assets, including the COTS software it provided DNR, to the "Bank". The letter further stated that TAC 10 had purchased substantially all of SMART's assets on June 1, 2010, including the software licensed to DNR, but none of

³ www.linkedin.com

SMART's liabilities or the contract between SMART and DNR. [June 10, 2010 Letter to Mr. Scurry – Exhibit 3]⁴

On June 29, 2010, DNR notified ITMO that SMART had failed to deliver any of the additional functionality or services required by the contract. [Series of Emails – Exhibit 4] SMART's website was active at least until June 30, 2010. [Exhibit 8] Therefore, on July 9, 2010, Michele Mahon, procurement manager with ITMO, sent a certified, return receipt requested, letter to SMART and Mr. Sorenson requesting that SMART show cause why it should not be considered in default of this contract for the following reasons:

1. SMART failed to escrow the source code and notify the State of the acceptable escrow agent as required by the contract; and
2. After the partial install, SMART failed to provide customized software that would include the following:
 - a. Computer Aided Dispatch functionality;
 - b. Forms that correspond to the SC Law Enforcement forms already in place, incorporating it into the core software and delivering it to SCNDR; and
 - c. A violations program and integrations program into Oracle.

The letter to show cause also requested the name and location of the escrow agent in possession of the software source code as required by the contract. A response was requested by July 16, 2010. [Ms. Mahon's July 9, 2010 Letter – Exhibit 3] On July 19, 2010, Ms. Mahon received a postal receipt indicating that the certified letter was accepted on July 12, 2010. On August 2, 2010, Ms. Mahon advised the CPO that neither SMART nor Mr. Sorenson had responded to her request to show cause and petitioned the CPO to begin suspension and debarment proceedings against SMART and Mr. Sorenson. In her letter, Ms. Mahon acknowledged that TAC 10 claims to be the owner of the software sold to DNR by SMART that is supposed to be in the hands of an escrow agent and recommended the debarment of TAC 10 as well based on the appearance that TAC 10 was an affiliate or successor of SMART because several of TAC 10's employees were

⁴ None of the parties, including Mr. Sorenson, SMART, TAC 10, and Mr. DeGroote, have identified the "Bank" or provided any documentary evidence of the alleged bank loan, voluntary surrender of the assets, or purchase of assets from the "Bank" by TAC 10.

former key employees of SMART and obviously aware of the requirements of the DNR contract. [Ms. Mahon's August 2, 2010 letter - Exhibit 2]. Out of an abundance of caution, Ms. Mahon also sent an amended rule to show cause letter on September 30, 2010. [Ms. Mahon's September 30, 2010 letter – Exhibit 16]

Motions to Dismiss

Mr. DeGroot, on behalf of TAC 10, filed a motion to dismiss on August 13, 2010, on the grounds that TAC 10 purchased the software, but not this contract with DNR or any of SMART's liabilities, from the "Bank", TAC 10 has no contractual relationship with the State of South Carolina (the State), and consequently any consideration of suspension or debarment should be dismissed. The motion to dismiss did acknowledge that TAC 10 was in negotiations with the South Carolina Law Enforcement Division (SLED) and University of South Carolina (USC) to support the SMART software it had acquired from the "Bank". (Mr. DeGroot's Motion to Dismiss is attached and incorporated herein by reference.)

Mr. Sorenson also filed a motion on September 24, 2010 to dismiss based on the grounds that SMART had voluntarily surrendered the assets to the "Bank", ceased doing business, that neither he nor SMART had access to the software, and consequently any consideration of suspension or debarment should be dismissed. (Mr. Sorenson's Motion to Dismiss is attached and incorporated herein by reference.)

Based on the information currently before the CPO, these motions are denied.

Conclusions of Law

Suspension of SMART Public Safety Software, Inc.

As stated previously, the Code authorizes the CPO to suspend a firm from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment. Section 11-35-4220(1). Pursuant to Section 11-35-4220(2), the causes for debarment or suspension include, but are not limited to:

(d) violation of contract provisions, as set forth below, of a character regarded by the appropriate chief procurement officer to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment and

(f) any other cause the appropriate chief procurement officer determines to be so serious and compelling as to affect responsibility as a state contractor or subcontractor, including debarment by another governmental entity for any cause listed in this subsection.

It is undisputed that SMART breached its contract with the State by failing to:

- Escrow the source code and notify the State of the acceptable escrow agent as required by the contract; and
- Provide customized software that would include:
 - a. A Computer Aided Dispatch functionality;
 - b. Forms built that correspond to the SC Law Enforcement forms already in place, incorporating it into the core software and delivering it to SCNDR; and
 - c. The development of a violations program and integrations program into Oracle.

It is also undisputed that the State has paid SMART \$285,800 and has received nothing functional. Since SMART neither escrowed the source code nor developed the software as required by the contract, DNR received and paid taxpayers' dollars for completely unusable software, which the CPO considers very serious. If SMART had fulfilled either of these contract

requirements, DNR would not be in such a dire situation. Moreover, despite Mr. Sorenson's contention to the contrary in his motion, evidence before the CPO reflects that SMART is still listed as an active corporation in the State of Iowa as of this date. [Exhibit 15] Specifically, in his motion to dismiss Mr. Sorenson alleged:

During the course of its operation, SMART obtained an operating line of credit from a local bank (the "Bank"). SMART pledged all of its assets to the Bank as collateral for the loan. SMART defaulted on the loan and the Bank demanded immediate payment in full on the loan. SMART was financially unable to comply with the Bank's demand for payment.

However, it is unclear to the CPO whether SMART in fact simply ceased doing business by surrendering its assets and walking away from its liabilities, filed bankruptcy or exercised some other option. Neither SMART nor Mr. Sorenson has shed any light on this situation. What is known is that as of this date, SMART is still listed as an active corporation in the State of Iowa.

SMART did breach its contract with the State of South Carolina. SMART claims to have surrendered its assets to the "Bank," but there is no probative evidence to support this claim. SMART claims to have ceased doing business, but there is no probative evidence to support this claim. Based on the evidence presented, the CPO finds that there is probable cause for debarment of SMART. Accordingly, in order to protect the State's best interests, the suspension of SMART is warranted until such time as an investigation into potential debarment is completed, a debarment hearing is held, and/or an order is issued either lifting this suspension order or concluding that debarment is warranted.

Suspension of Robert E. Sorenson

The Code authorizes the CPO to suspend a person from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment. Section 11-35-4220(1) Moreover, the Code also authorizes the debarring official to extend the debarment decision to include any principals of the contractor if they are specifically named and given

written notice of the proposed debarment and an opportunity to respond. Section 11-35-4220(6). The term 'principals' is defined as officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions. Section 11-35-4220(6)

SMART's Articles of Incorporation reflect that Mr. Sorenson is an officer of SMART. [Exhibit 15] In addition, the bid response submitted by SMART was signed by Robert E. Sorenson as President and Chief Executive Officer. [SMART's Bid - Exhibit 11] In this capacity, Mr. Sorenson clearly had primary responsibility for the performance of SMART; therefore, SMART's breach of contract falls squarely on his shoulders. As President, Mr. Sorenson violated the contract provisions and failed to both escrow the source code and customize the software by the stated deadline, rendering the software unusable for DNR. In addition, he continually misled DNR from the Fall of 2009 through late Spring 2010, according to Mr. Scurry. During a phone conversation on May 27, 2010, Mr. Sorenson told Mr. Scurry that the escrow "was being completed" yet there is no evidence that it was done. In this same conversation, Mr. Sorenson also claimed that the issues surrounding the bank loan were not resolved when in fact Mr. DeGroot had already presumably purchased the bank loan since TAC 10 was incorporated on May 26, 2010 at the same address and using the same phone number as SMART. It is unclear to the CPO if, and when, SMART has actually ceased doing business.

Based on the evidence presented, the CPO finds that there is probable cause for debarment of Mr. Sorenson. Accordingly, the suspension of Mr. Sorenson, as a principal of SMART, is warranted until such time as an investigation into potential debarment is completed, a debarment hearing is held, and/or an order is issued either lifting this suspension order or concluding that debarment is warranted.

Suspension of Mark DeGroot

As stated previously, the Code authorizes the CPO to suspend a person from consideration for award of contracts or subcontracts during an investigation where there is probable cause for

debarment. Section 11-35-4220(1). Moreover, Section 11-35-4220(6) authorizes the debarring official to extend the debarment decision to include any principals of the contractor. Again, the term 'principals' is defined as officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions. Section 11-35-4220(6)

The SMART bid response included biographical information on a number of key employees including Mr. Mark DeGroot, Vice President for Development for SMART. In this capacity, Mr. DeGroot was responsible for the complete development lifecycle of SMART's line of law enforcement software. He also oversaw the staff of software developers and was responsible for system design, code review, testing, and user documentation. [SMART's Bid - Exhibit 11]

SMART's contract with the State required the delivery of customized software for a computer aided dispatch program, a violations program, forms that correspond to the South Carolina law enforcement forms, and integration to the existing DNR Oracle database, all by December 11, 2009. These customizations were to be modifications to SMART's core software. According to Mr. Scurry, Mr. DeGroot, who as Vice President of Development had the primary management responsibility for the customization, traveled to South Carolina to develop this project but did not complete it by the contract deadline. Moreover, none of the customized software for which Mr. DeGroot had primary responsibility was delivered prior to the purported sale of the core software by the "Bank" to TAC 10 on June 1, 2010.⁵ In addition, there is no evidence that the source code was escrowed.

The evidence presented regarding his title of Vice President for Development and his involvement in the DNR contract reflect that Mr. DeGroot constituted a principal of SMART, as defined in Section 11-35-4220(6); therefore, debarment can be extended to him. As stated previously, it is undisputed that SMART breached its contract with DNR. Moreover, Mr. DeGroot is now the President of TAC 10, which provides the same customized software and is

⁵ SMART has claimed in its motion that the core software was surrendered to the "Bank" and subsequently sold to TAC 10.

seeking contracts with at least two other governmental bodies in South Carolina. (See Mr. DeGroote's Motion to Dismiss.) Therefore, the CPO finds that there is probable cause for debarment of Mr. DeGroote. In order to protect the State's best interests, the CPO finds that the suspension of Mr. DeGroote is warranted until such time as an investigation into potential debarment is completed, a debarment hearing is held, and/or an order is issued either lifting this suspension order or concluding that debarment is warranted.

Suspension of TAC 10

In addition to the above, Section 11-35-4220(6) of the Code also authorizes the debarring official to extend the debarment decision to include any affiliates of the contractor. This Section reads, in relevant part:

Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

If and when SMART went out of business is unknown and conflicts with the Iowa Secretary of State's records. Regardless, TAC 10 was incorporated on May 26, 2010 at the same address and using the same phone number as SMART. [Exhibit 14]⁶ As of today's date, SMART is still listed as an active corporation in the State of Iowa. Mr. DeGroote, was the former Vice President of SMART and is now President of TAC 10, which offers the same software. The evidence before the CPO is that SMART and TAC 10 shared facilities and equipment and had interlocking management or ownership for some period of time. Moreover, the evidence presented reflects that TAC 10 has the same or similar management and principal employees.

⁶ According to Mr. Scurry, TAC 10 originally used the same business address and phone number as SMART. However, by the time of the suspension hearing, TAC 10 had a different suite number for its address and had formed a separate website. Further, the record reflects TAC 10 was incorporated by the same law firm that handled the corporate filings for SMART. [Exhibits 8 and 15]

There is also an indication that other former SMART employees are employed by TAC 10.⁷ Further, TAC 10 is presently seeking to enter into agreements with other South Carolina governmental bodies concerning the same software. (See Mr. DeGroote's Motion to Dismiss.)

Based on the evidence provided, the CPO finds that TAC 10 constitutes an affiliate of SMART and thus there is probable cause for debarment of TAC 10. In order to protect the State's best interests, the suspension of TAC 10 is warranted until such time as an investigation into potential debarment is completed, a debarment hearing is held, and/or an order is issued either lifting this suspension order or concluding that debarment is warranted.

Determination

For the reasons stated above, Smart Public Safety Software, Inc., Robert E. Sorenson, President of Smart Public Safety Software, Inc., Mark DeGroote, formerly Vice President for Development for Smart Public Safety Software, Inc. and presently President of TAC 10, Inc., and TAC 10, Inc. are suspended until such time as an investigation into potential debarment is completed, a debarment hearing is held, and/or an order is issued either lifting this suspension order or concluding that debarment is warranted.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

⁷ Although it is unnecessary for a determination of whether TAC 10 constitutes an affiliate, the CPO notes that no probative evidence was presented to support TAC 10's claim that it owns this software, which was contractually obligated to be held in escrow on behalf of the State, or to justify it was not obtained by fraudulent means.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Suspension / Debarment Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4220, subsection 5, states:

(5) Finality of Decision. A decision pursuant to subsection (3) is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1), within ten days of the posting of the decision in accordance with Section 11-35-4220(4). 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 why the person disagrees 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 any affected governmental body must have the opportunity to participate fully in any review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.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 83.1 of the 2010 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain 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).