

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT OFFICER**

**DECISION**

In the Matter of Protest of:

CASE NO.: 2013-207

Public Consulting Group, Inc.

POSTING DATE: February 7, 2013

Information Technology Management  
Office

Solicitation No. 5400004448

MAILING DATE: February 7, 2013

Comprehensive Individual Education  
Program Case Management Solution  
SC Department of Education

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation, 5400004448, was issued by the Information Technology Management Office (ITMO) on behalf of the South Carolina Department of Education for a Comprehensive Individual Education Program Case Management Solution. Public Consulting Group, Inc. (PCG) protests the intended award of this contract to Excent Corporation. [Attachment 1] The Chief Procurement Officer for Information Technology (CPO) held a hearing of this matter on January 22 and 26, 2013. Present at the hearing were representatives from Public Consulting Group (PCG), Excent Corporation (Excent), the South Carolina Department of Education (DOE), and ITMO.

**FINDINGS OF FACT**

Solicitation Issued	July 5, 2012
Amendment One Issued	August 3, 2012
Amendment Two Issued	August 8, 2012
Amendment Three Issued	August 22, 2012
Bids Received	September 11, 2012
Record of Negotiations Signed	November 30, 2012
Intent to Award Issued	November 30, 2012
Initial Protest Received	December 10, 2012
Award Suspended	December 11, 2012
Amended Protest Received	December 17, 2012

**BACKGROUND**

This procurement is for an automated Individual Education Program (IEP) case management system that will generate forms, reports, and IEPs for each student with a disability in the state, and will allow the collection and analysis of specific data elements as required by the United States Office of Special Education Programs. (OSEP) Offerors were to submit proposals to

license, install, and configure a software system to meet all the requirements of the solicitation including installation, training, maintenance and support, which would be made available to all school districts throughout the State of South Carolina as a Multi-Agency Contract. Nine proposals were received in response to this solicitation to replace a contract previously awarded to Excent Corporation.

Responses to the solicitation were evaluated using a multi-phase evaluation. Proposals were initially ranked against three criteria:

1. **Proposed Solution** (Technical Proposal) - The degree, completeness and suitability of the Offeror's proposed technical solution to meet or exceed the requirements of this RFP, to include but not limited to, software functionality, installation/work plan, user access and system integration, training plan. 1-45 points
2. **Price Proposal** – The value of the proposed solution to meet or exceed the needs of the RFP during the development, implementation and useful life of the Offeror's proposed system; with specific respect to Total Cost of Ownership for the total 5 year contract. 1- 30 points
3. **Qualifications/References** - The Offeror's financial responsibility and financial strength must reflect sound financial stability; the Offeror's experience and references must provide evidence of successful past performance with projects of similar size and scope. 1- 25 points

After the evaluation of Phase 1, based on the remaining points available, all offerors with a mathematical chance of becoming the highest ranked offeror were invited to present a demonstration of their product which was evaluated against the Phase 2 criterion:

**Demonstration (1-25 Points):** The completeness and suitability of the Offeror's demonstration to show the functional, technical and performance needs of the RFP as addressed in offeror's written response.

Three offerors, Excent, Core Education and Consulting (Core), and PCG were invited to demonstrate their solution for phase 2 of the evaluation. The scores for Phase 2 were then added to the scores for Phase 1 to determine the highest ranked offeror.

## DISCUSSION

PCG's first issue of protest claims that the evaluation committee's scoring regarding Phase I of the proposals of Excent, CORE and PCG, as demonstrated in the "Evaluator Explanation Summary" sheets, is contrary to S.C. Code Ann. § 11-35-2410 and the rankings of Excent, CORE and PCG is clearly erroneous, arbitrary and capricious or contrary to law.

The American Heritage Dictionary defines an arbitrary decision as one determined by chance, whim, or impulse, and not by necessity, reason, or principle. Capricious is defined by the American Heritage Dictionary as one that is characterized by, arising from, or subject to caprice; impulsive or unpredictable. The standard for review in this and similar cases was established by

the Procurement Review Panel in *Appeal by Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16:

The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased. ... No evidence exists that the evaluation committee disregarded all or any portion of CRPTA's proposal or scored it arbitrarily or unfairly relative to the other proposals.

The evaluators for this solicitation were chosen for their expertise in the area of special needs education and represent DOE and K-12 school districts from around the State. The State received proposals from 9 offerors. Prior to receiving the proposals for evaluation, each evaluator was required to review and sign a single page of "Instructions to the Evaluation Panel." The instructions admonished the evaluator, among other things, to contact the procurement officer if he did not understand an offeror's response to a mandatory requirement of the solicitation. They also directed him to provide a brief written explanation for his scoring on each evaluation criteria, and to be prepared to support his reasoning in the event of a protest.

Each evaluator was required to document his evaluation of each offeror's proposal on an "Evaluator's Score Sheet" and an "Evaluator Explanation Summary" sheet. Evaluators gave a numerical score for each evaluation criteria on the "Evaluator Score Sheet" then dated and signed the form. The evaluators also completed the "Evaluator Explanation Summary," and dated and signed this form.

PCG points to a number of evaluator comments that it claims indicate that the evaluator lacked a clear understanding of or misunderstood various aspects of the Excent, Core and PCG proposals, and acted in an arbitrary and capricious manner by disregarding the instruction to ask the procurement officer for clarification.<sup>1</sup> Allegations that fail to identify any violation of law, or of the solicitation's requirements, fail to state grounds for the CPO to order relief. A claim that an evaluator failed to follow his instructions does not, taken alone, allege an arbitrary or capricious evaluation or otherwise state grounds for relief.

PCG also complains that the evaluators scored the proposals without understanding what they read. Conceivably, the CPO might grant relief if an evaluator arbitrarily refused to attempt to understand a clearly written offer. An offeror should hardly be heard to complain about an evaluator not understanding a proposal when the proposal itself is unclear—as each of the four evaluators testified. Besides, nothing in the Code requires every evaluator be competent to understand every aspect of the proposal. That is precisely why we use panels.

---

<sup>1</sup> By phrasing the claim in terms of an evaluator's failure to request clarification, PCG attempts to challenge the procurement officer's decision not to communicate with offerors after opening but prior to award. The Panel has unequivocally closed the door on this challenge. *Appeal of Medco Health Solutions, Inc., et al.*, Panel Case No. 2005-8, n. 2 ("We take pains to note here that a procuring agency is not required to seek clarification under this statute. The decision to seek clarification is, by statute, in the agency's sole discretion.... Offerors whose proposals are determined to be unresponsive without clarification should not be empowered by this decision to appeal a failure to seek clarification."). The CPO will not allow PCG entry through the back door.

Against this framework the CPO will review PCG's specific protest grounds.

In explaining her evaluation of Excent on the "Evaluator Explanation Summary", evaluator three commented: "Appears to be an all inclusive price for everything. However, the breakdown is vague as to what 'everything' is. What actually is included in following years is unclear." [CPO Exhibit 5] On the Core "Evaluator Explanation Summary" sheets in support of the score given for evaluation criteria one, the Proposed Solution, evaluators one, three, and five indicated that the explanation of Core's hosting plan was vague or unclear.<sup>2</sup> For evaluation criteria two, Core's Price Proposal evaluators one, two, three, and four indicated that the pricing was unclear, confusing, and did not make sense according to what was in the proposal. [CPO Exhibit 6] On the PCG "Evaluator Explanation Summary" sheets, evaluator two indicated that the PCG proposal was unclear as to how PCG's solution would integrate with PowerSchool, the state's student information system. [CPO Exhibit 4] Compatibility with PowerSchool is a mandatory requirement of the solicitation. [Solicitation page 15, specification 3.1.10]

Ideally, questions about a proposal's responsiveness to a material and essential requirement of the solicitation should be resolved prior to scoring that proposal. During the hearing, though, evaluators indicated that these comments reflected a lack of clarity and robustness in descriptive information presenting the proposed solution, not a lack of understanding. Proposals that did not convey complete and concise information were awarded fewer points. Evaluator two, an experienced teacher, explained: "When I am grading a paper that is not clearly written, I don't ask the student what she meant. I mark her down for not being clear." There is no evidence the evaluators were arbitrary or capricious in their evaluations.

PCG protests that the evaluators "misunderstood or did not comprehend the design of PCG's technical proposal, including connectivity and platform and browser compatibility," and the result of this lack of comprehension or understanding was an arbitrary and capricious evaluation of PCG's proposal. Additionally, PCG claims the evaluators clearly misapprehended that "750 hours of proposed development time was in addition to the development time required to provide a fully compliant system...."

Evaluators one and three noted on their "Evaluator Explanation Summary" that PCG's proposal limited customization assistance to 750 hours over the first two years of the contract, after which the State or LEAs would incur cost for any additional customizations. Reference to the hours available for customization are found throughout the Technical and Price proposals as follows:

PCG proposed 1,000 developer hours for the development of state requested forms, reports and documents. [PCG Technical proposal page 12]

In its transmittal letter PCG states "...we are providing a generous bank of 750 development hours to the SCDE to have the ability to enhance the system with desired functionality. [PCG Technical Proposal transmittal letter page 3]"

---

<sup>2</sup> This issue does not appear in PCG's letter of protest, but was offered during the hearing as an example of an arbitrary and capricious evaluation.

While our price is competitive, please note the following additional benefits ... A generous bank of 750 development hours enabling the SCDE the ability to enhance the system with desired functionality [PCG Price Proposal transmittal letter page 2]

Pricing Assumption 11. Following initial set up and configuration, PCG is providing the SCDE a bank of 750 hours for custom development. The SCDE will have the flexibility to use these hours for any changes to the user interface, documents or reports creation allowed by the system architecture. These hours must be utilized by the end of the year 2 of the contract. [PCG Bidding Schedule - Pricing Assumptions page 3]

Testimony before the CPO indicated that the evaluators believed the 750 hours was all that was offered for the creation and customization of state requested forms, reports and documents. The confusion created by reference to two banks of hours and the note in the Pricing Assumptions rests with PCG and the interpretation by the evaluators is not arbitrary or capricious.

PCG raises a number of issues around the evaluation committee's reliance on a subject matter expert to assist in understanding issues outside their particular areas of expertise. The committee relied on a financial accountant to explain financial information. One of the evaluators was the IT director of a school district. He explained some of the technical aspects of the proposals. All the other evaluators were experts in the area of special education, not technical and financial matters. Typically subject matter experts are limited to explaining issues in layman's terms and refrain from offering opinions or evaluative remarks. Once an evaluator has a basic understanding of the issues, that evaluator should be able to make an informed decision about the acceptability or value of what is being offered and be able to articulate their reasoning. The use of subject matter experts in this manner is a common and acceptable practice.

PCG protests that the evaluation committee reduced PCG's score on the ground that the platform and web browser are dated/outdated. In fact, the system PCG proposed has no limitation on current browser availability.

Evaluators 2, 3, and 4 commented that the platform and web browsers are dated. These three Evaluators indicated that they relied on information provided by Evaluator 5 in reaching this conclusion. Evaluator 5, the subject matter expert for technical issues, commented that the "Platform and web browser support was dated"

The PCG proposal stated that: "PCG is platform independent. All Windows, MAC, Linux, Solaris Operating Systems are fully supported. [PCG proposal at page 91] On page 92 of the proposal, PCG states that it supports Internet Explorer 6.0 and above, Firefox 2.0 and above, Safari 3.0 and above, and Opera 9.0 and above. Evaluator 5 points out that there is a contradiction with these two statements because Internet Explorer 6.0 is not supported on Windows operating systems from Windows 1 through Windows 95. This would mean that the PCG system would not operate on computers with the versions of the Windows operating system earlier than Windows 98. While technically accurate, this limitation would only apply to personal computers purchased prior to 2001. It is unlikely that even the poorest schools in South Carolina are dependent on 12 year old personal computers. During the hearing before the CPO,

Evaluator 5 said he felt that since this was a technical proposal it should have been more realistic. He said, "I was evaluating on the contradiction in that we run on all platforms but our browsers only run on certain platforms." He also expressed concern that versions of Internet Explorer prior to version 8 have known security vulnerabilities. By contrast, page 4 of Excent's Enrich Technical Specifications [CPO Exhibit 10] sets minimum browser support at Internet Explorer 8. No evaluator commented that this would be dated. In this case, the subject matter expert was also an evaluator and as such can express his observations and views to the rest of the evaluation committee during panel discussions. It is the responsibility of the other members of the evaluation committee to make an independent evaluation. There was no undue influence by the subject matter expert/evaluator.

PCG protest letter complains:

Each of the evaluators stated to the effect that they had concerns about the T1 speed connectivity. The PCG proposal does not mention or reference T1 use. PCG provides the system to which end users, be they LEA, Department or other end users connect. The speed of connectivity is solely in the province of the end user.

All five evaluators commented that the T1 speed of connectivity would be problematic for larger schools and school districts. PCG argues that the speed of connectivity is solely in the province of the end user. In discussing its hosting capacity on page 92 of its proposal, PCG states: "In the following table, each row represents one hours' worth of data from a single PCG production pool. Please note that this data represents peak hours (7 AM to 3 PM) for most school districts. Schools are connecting at T1 speeds (1.544 megabits per second)." According to testimony, the evaluators interpreted this as the speed at which PCG could receive data from the schools. In other words if PCG has a two inch pipe on its end, it doesn't matter what size pipe is on the other end, data can only flow as fast as PCG's two inch pipe will allow. The evaluators are very familiar with the amount of information exchanged with these programs and feel that T1 speeds are inadequate for larger schools and districts. This is a reasonable interpretation of the information provided. If there are multiple interpretations available, it falls on PCG to provide clarity. The evaluators were not arbitrary or capricious and there was no undue influence in reaching this conclusion.

PCG protests that the evaluators reduced its score because PCG's solution used a product called Paperclip for uploading scanned/files/images to a student record. In commenting on evaluation criteria 2, Price Proposal, evaluators 2, 4, and 5 commented that the Paperclip function was limited. In its price Proposal, PCG included Price Assumption "16. Includes use of paperclip uploading functionality with capacity limits of 15 GB per month." There was no mention of this limitation in the technical proposal. The evaluators are very familiar with the potential number and size of scanned files and images associated with these programs and expressed a reasonable concern about the limited capacity and its impact on cost. Their scoring is not arbitrary or capricious.

PCG protests that the evaluator scoring attributable to an increase in price as the result of major changes in the law is arbitrary and capricious since the solicitation required a fixed price proposal. Evaluator three made this comment in connection with the 750 additional development hours discussed above. The evaluator was not arbitrary or capricious as this concern is

attributable to the lack of clarity surrounding two banks of development hours. The Offeror must assume responsibility for the clarity of its proposal.

PCG protests that the evaluator scoring attributable to an increase in price as the result of the State’s failure to provide copies of all forms/documents and reports within the first three weeks of the contract period is arbitrary and capricious since the solicitation required a fixed price proposal. PCG submitted its price proposal which included a transmittal letter, the bidding schedule and 26 “price assumptions.” One of the price assumptions was that “[t]he SCDE will provide copies of all forms/documents and reports within the first three weeks of the contract period.” All the evaluators stated that this was not possible because all the forms are not completed. The evaluators were not arbitrary or capricious in taking this pricing assumption into consideration when evaluating PCG’s price proposal.

PCG protests that the evaluation committee members did not apply the same scoring standards to PCG, Excent and Core in scoring the offerors’ respective pricing proposals. Specifically, the cost of the Excent proposal was \$7.7M and the cost of the PCG proposal was \$6.45M Despite this difference of \$1.25M over the life of the contract, Excent consistently scored higher:

	Eval 1	Eval 2	Eval 3	Eval 4	Eval 5	Total
<b>Excent</b>	25	25	20	25	20	115
<b>PCG</b>	10	10	16	15	10	61

From CPO Exhibit 11

Under the heading of Information For Offerors to Submit – Evaluation, the solicitation required the following information:

Cost: Provide a total fixed cost to include all aspects of work associated with this RFP broken down per year for five years. Any Offeror who submits an estimate or fails to include all aspects of the project in their total cost will be deemed non-responsive. The costs of services provided must be itemized. [Solicitation at page 19]

The evaluation criteria addressing the pricing proposals asked the evaluators to consider the value of the proposed solution as follows:

**Price Proposal** – The value of the proposed solution to meet or exceed the needs of the RFP during the development, implementation and useful life of the Offeror’s proposed system; with specific respect to Total Cost of Ownership for the total 5 year contract. 1- 30 points

Evaluators were asked to score the “value” of the proposed solution. In addition to the total cost of ownership of the proposed solution, the term “value” can mean the relative worth, utility, or importance of a proposed solution. In this case the worth, utility or importance of a proposed solution was at the subjective discretion of the evaluators and not limited to the total cost of ownership. With its Price Proposal PCG included 26 “Pricing Assumptions,” several of which led evaluators to infer future price increases. There is no evidence that the evaluators were arbitrary or capricious in scoring subjectively the cost of the proposed systems or the impact of the PCG Price Assumptions.

PCG protests that evaluators were arbitrary and capricious in relying on a response to the reference questionnaire from a non-PCG customer. In scoring evaluation criteria three, evaluators were to consider the degree to which the offeror's financial responsibility and financial strength reflect sound financial stability and whether the offeror's experience and references substantiate successful past performance with projects of similar size and scope. The solicitation required offerors to provide a detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which they had performed and the general history and experience of its organization. [Solicitation at page 21]

In response to this requirement, PCG responded with "The following section provides detailed information regarding our accomplishments with three statewide special education implementations in Tennessee, New Hampshire, and Indiana. A general history of PCG follows these statewide project references." [PCG proposal at page 115] While PCG did not provide an email address for its Tennessee contact, it did provide an address and telephone number. Elsewhere in its proposal, PCG had indicated that it supported 25 LEAs (Local Education Agencies) in the State of North Carolina.

Evaluator 3 was tasked with contacting the references with a pre-defined questionnaire and reporting their responses back to the rest of the committee. Evaluator 3 decided to email the questionnaire to the references as opposed to taking the information by telephone. Evaluator 3 sent emails to three references provided by each offeror on September 24, 2012. No attempt was made to contact PCG or the Tennessee reference to get an email address. Since PCG had not provided an email address for its reference in Tennessee, had indicated support for 25 LEAs in North Carolina, [PCG proposal at page 113] and since Evaluator 3 had reference information for the North Carolina Exceptional Children Division from the Core proposal, she opted to use this contact as the third reference for PCG. Evaluator 3 offered that, Dr. Watson in her capacity as Director of the North Carolina Exceptional Children Division worked frequently with the North Carolina LEAs and was in a position to provide reference responses for PCG.

There are indications that questionnaires were received from Polk County Public Schools and Colorado for Excent, the Georgia Department of Early Care and Learning for Core, and two responses from the North Carolina Exceptional Children Division, one for Core<sup>3</sup>, and one for PCG. Based on the reference questionnaire completed by Dr. Mary Watson, the North Carolina Exceptional Children Division is a very satisfied Core customer. In responding to the reference questionnaire for PCG, Dr. Watson was very clear that her office had no contractual relationship with PCG and did not offer responses applicable to PCG. [CPO Exhibit 8, page 24] Apparently there was no attempt to follow-up with the references to get additional responses. On October 1, 2012, the evaluation committee scored and commented on the PCG reference as follows:

Evaluator 1	not a great reference
Evaluator 2	Negative report from NC DE
Evaluator 3	Reference was neutral to slightly negative. However, the reference could not answer many questions as they were not applicable to them.

---

<sup>3</sup> The response for Core from North Carolina was not offered for the record.

- Evaluator 4 Reference indicated that respondent does not work directly w/ PCG, Reference indicates not statewide product
- Evaluator 5 reference was not very promising. State reference wasn't a main user or contractor with company

North Carolina was a satisfied customer of Core, one of the competing offerors for this contract. North Carolina's PCG reference questionnaire provided no useful information about PCG. There was no articulated basis for the negative comment in the questionnaire. The evaluator's consideration of and reliance on the North Carolina PCG response was arbitrary and capricious.

PCG also protests that the apparent successful vendor, Excent, was non-responsive to the essential requirements of the solicitation. Specifically, PCG argues that Excent's proposal fails to provide training for the minimum number of trainees required by the solicitation.

Solicitation Amendment 2 includes "Q&A" from vendors. Question two asked how many district personnel would require training:

- 2. Items 3.7.1 and 3.7.2 indicate the requirements for training to include a train-the-trainer approach and training for up to 60 SCDE staff members as well as some unidentified number of district trainers.

How many trainers will be trained from the 84 districts? How many total trainers will be trained?

**ANSWER: Trainers will be trained either regionally or in individual districts. We expect each district to send a minimum of two staff members to train, with a maximum of four staff for larger districts.**

Excent provided the following response on page 69 of its proposal:

Training sites in the Pee Dee, Upper Savannah and North Central regions have been identified and can accommodate the broad range of district users to be trained.

Table 4: Regional Model

# of Excent Trainer	# of Participants	Training Days	# of Sessions	*Facilities Price Estimates
1	12	2	8	\$8,000

The standard Excent Train-the-Trainer model is based on a 1:12 teacher-trainee ratio as shown in **Figure 49**. In this scenario Excent-trained power users are equipped to lead end user training sessions in their districts. Pricing presented in this proposal is based on one session per region; however, a statement of work (SOW) can be developed for districts that require multiple team lead sessions as shown in **Figure 50**. (underlining supplied)

Excent proposed to conduct 8 training sessions with 12 participants per session or a total of 96 participants at the price stated in the proposal. Excent's proposal offered additional training

sessions at additional expense. Since the solicitation required a minimum of 168 participants be trained from the LEAs, and Excent's proposal only included training for 96, Excent is non-responsive to the requirement.

Finally, PCG protests that Excent is non-responsive to requirement 3.1.6 which requires the successful offeror must work with the current vendor to migrate data from the old solution to the new one, including placement history and IEP's housed in the current solution. Excent is the incumbent vendor and its response is based on it being both the incumbent and the successful offeror. Its proposal states on pages 22 and 23 that its existing methodology for data migration will be modified as necessary "to ensure that a comprehensive transfer process creates a smooth transition to not only the IEP forms and reports but also to the database in the existing Excent Access program already implemented throughout the state." Excent is responsive to requirement 3.1.6.

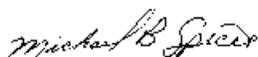
### DETERMINATION

Soliciting a reference from the customer of a direct competitor is capricious. The reference clearly indicated that they were not a customer, and responded NA to all the questions except one dealing with conversion. Accepting and evaluating this reference is arbitrary. Excent's proposal was non-responsive to the requirement to train a minimum of 168 participants from the LEAs.

The CPO believes the appropriate remedy in this case should be to cancel the award to Excent, thus allowing ITMO to proceed in accordance with the Procurement Code as though no award had been made. Unfortunately, prior binding precedent of the Procurement Review Panel requires the CPO to provide a very different remedy. In 1989, prior to the previously noted changes to the Code and Regulations governing the Request for Proposal process, the Panel issued its decision in *Protest of Carter Goble Associates, Inc.*, Panel Case No. 1989-25. *Carter Goble* reflects an earlier time when the Code and regulations required acceptance of proposals unconditionally and without alteration. None of the policies which justified this decision are applicable today. Nevertheless, *Carter Goble* is crystal clear in its holding: Where the successful offeror to an RFP is found non-responsive, "the only way to insure the State gets the most advantageous proposal is to resolicit the contract in question here." The CPO has no flexibility to order any other remedy.

Excent is non-responsive to a material and essential requirement of the solicitation. Pursuant to *Protest of Carter Goble Associates, Inc.*, Panel Case No. 1989-25, the solicitation is cancelled, the intended award to Excent is cancelled, and the State is ordered to re-solicit its requirements.

For the Information Technology Management Office



Michael B. Spicer  
Chief Procurement Officer

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**

*Protest Appeal Notice (Revised January 2013)*

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

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

-----

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

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

**FILING FEE:** Pursuant to Proviso 83.1 of the 2012 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

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

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

---

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

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

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

- 
1. What is your/your company's monthly income? \_\_\_\_\_
  2. What are your/your company's monthly expenses? \_\_\_\_\_
  3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

---

For official use only: \_\_\_\_\_ Fee Waived \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

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

**MCNAIR**  
ATTORNEYS

December 17, 2012

M. Elizabeth Crum

**VIA E-MAIL and HAND DELIVERY**

lcrum@mcnair.net  
T (803) 753-3240  
F (803) 933-1484

Michael B. Spicer  
CPO  
Information Technology  
Management Office  
1201 Main Street, 4th Floor  
Ste. 430  
Columbia, SC 29201

Re: Protest of Award of Solicitation 5300004448 to provide Comprehensive Individual Education Program (IEP) Case Management Solution to Excent Corporation

Dear Mr. Spicer:

This Firm represents Public Consulting Group, Inc. (PCG) in the protest of Solicitation 5400003804 (RFP) and the Information Technology Management Office's decision to issue its November 30, 2012 Intent to Award to Excent Corporation (Excent). On December 10, 2012, Amy W. Smith, Manager, filed a protest letter with you. Pursuant to S.C. Code Ann. § 11-35-4210(2), we are filing this amended protest which supersedes the grounds set forth in the December 10, 2012 protest.

The protest is based on the grounds that:

**EVALUATION COMMITTEE SCORING**

1. The evaluation committee's scoring regarding Phase I of the proposals of Excent, CORE and PCG, as demonstrated in the "Evaluator Explanation Summary" sheets, is contrary to S.C. Code Ann. § 11-35-2410 and the rankings of Excent, CORE and PCG is clearly erroneous, arbitrary and capricious or contrary to law. Each of the grounds in paragraphs 2 through 5 below are incorporated herein demonstrating that the scoring and ranking of PCG was in violation of § 11-35-2410. Examples contained in the Evaluators' Explanation Summary sheets of the arbitrary, capricious nature of the scoring include:

McNair Law Firm, P. A.  
1221 Main Street  
Suite 1600  
Columbia, SC 29201

Mailing Address  
Post Office Box 11390  
Columbia, SC 29211

mcnair.net

- a. In evaluating CORE, evaluators stated that the pricing breakdown was unclear;
  - b. In evaluating Excent, credit was given to the fact that Excent was the incumbent vendor and conversion would be easier. This is not an evaluation factor. Additionally, what is included in "everything" in pricing in following years is "unclear";
  - c. In evaluating PCG, evaluators stated that is unclear how PCG's system integrates with PowerSchool or that the system is limited by PowerSchool. The evaluators misapprehended the PCG proposal and the fact that its system is fully compliant with PowerSchool and the PCG solution is not limited by PowerSchool; and
  - d. In spite of the admitted issues upon which the evaluators were demonstrably unclear, they proceeded to evaluate and score the proposals without asking the procurement officer to seek clarification.
2. The procurement officer and/or the evaluation committee did not clarify the offerors' proposals, as authorized by the RFP, S.C. Code Ann. § 11-35-1520(8) and Reg. 19-445-2095 sufficiently, resulting in the committee members scoring the offerors' proposals on incomplete information and/or speculation or on factors that were not evaluation criteria resulting in the committee members misapprehending and consequently underscoring the PCG proposal. Further, the failure to seek clarification to ensure that the offerors have a full understanding can result in there not being a meeting of the minds which can result in a contract ambiguity and the contractor not being bound to meet the RFP contractual requirements as noted under the protest grounds regarding Excent's non-responsiveness to the RFP.
3. Phase 1: Criteria 1 Proposed Solution (Technical Proposal)
- a. The evaluators each misunderstood or did not comprehend the design of PCG's technical proposal, including the connectivity and platform and browser compatibility;
  - b. PCG offered a fully compliant IEP system and the 750 hours was in addition to the fully compliant system offered by PCG. The evaluators clearly misapprehended the proposal, which resulted in PCG being scored artificially low;
  - c. The evaluation committee reduced PCG's score on the ground that the platform and web browser are dated/outdated. This is an incorrect statement. The proposed system has no limitation on current browser availability. As long as the system proposed by PCG meets or exceeds all of the RFP technical

requirements, the "look" of the platform, e.g., whether it is the newest, is not an appropriate evaluation criterion;

- d. Each of the evaluators stated to the effect that they had concerns about the T1 speed connectivity. The PCG proposal does not mention or reference T1 use. PCG provides the system to which end users, be they LEA, Department or other end users connect. The speed of connectivity is solely in the province of the end user;
- e. On information and belief, the proposals were not scored independently which resulted in an undue influence on the evaluation committee members and skewed the scoring and resulting ranking; and
- f. The arbitrary, capricious and clearly erroneous nature of the evaluation Phase 1 scoring and the fact that the evaluation committee members did not understand the PCG proposal is clearly demonstrated by the ranking of PCG in the Phase 2 scoring vis-a-vis the Phase 1 scoring.

4. Phase 1: Criteria 2 Price Proposal

- a. The evaluation committee members did not apply the same scoring standards to PCG, Excent and CORE in scoring the offerors' respective pricing proposals;
- b. Evaluators misapprehended the PCG solution. Scoring does not comport with the evaluation criteria contained in the requirement. By way of example:
  - i. Evaluators state "costs could increase drastically if law changes and major development needed," yet the RPF calls for a "fixed price" over the term of the contract. PCG's pricing proposal included the provision of all mandated federal changes within its fixed fee price; and
  - ii. Evaluators concerned with PCG's request that "all documents be provided in first three weeks" and, that if documents are not provided within this time frame the price could go up, is contrary to the RPF requirement for a "fixed price" over the term of the contract.
- c. The evaluation committee reduced PCG's score because PCG's solution used Paperclip, which use was limited to 15 GB per month, apparently on the basis that the cost might be increased if the end users used more than 15 GB per month. The number of GB offered as part of PCG's fixed price meets or exceeds the needs in the RFP for the term of the contract and any extensions thereof. On

information and belief, the evaluators made no effort to determine if the GB limitation was sufficient; and

- d. PCG's fixed pricing proposal was \$250,000 less than that of Excent, yet each of the evaluators scored PCG lower on Phase 1, Criteria 2 than each did Excent.

5. Phase 1: Criteria 3 Qualifications/References

- a. PCG provided the names and contact information of three (3) references—the New Hampshire Department of Education, the Indiana Department of Education, and the Tennessee Department of Education (each of which contracts with PCG to provide state wide IEP services—as part of its proposal. The only “reference” evaluators appear to have been given was the NC DE (North Carolina Department of Public Instruction, which was: 1) NOT a reference provided by PCG; 2) not an entity for which PCG has been engaged to performed work; and 3) is a direct competitor to PCG. The evaluators’ reliance on the NC DE “reference” is arbitrary, capricious and clearly erroneous.
- b. The RFP requires that the references be submitted by the offeror. By relying on a “reference” not provided by PCG, the evaluation committee’s decision violated the terms of the RFP and is contrary to law;
- c. On information and belief, the State did not contact the references that were provided by PCG. Alternatively, if the State contacted the references provided by PCG, the evaluation committee members were not provided with those references or they impermissibly ignored the same;
- d. The evaluators knew or should have known that the reference each relied on to determine the scoring in Phase 1, Criteria 3 was not a reference submitted by PCG nor was it an entity that PCG had performed work for. For example:
  - i. One evaluator stated reference could not answer many questions since not applicable to PCG; and
  - ii. Reference indicated it did not work directly with PCG.
- e. PCG provided, as part of its proposal, a reference letter for each of its South Carolina customers. Not a single evaluator made reference to the South Carolina reference letters included as part of the PCG proposal. Either the evaluation committee arbitrarily and capriciously neglected to rely on these references, or they were not provided to the evaluation committee for review.

EXCENT'S PROPOSAL IS NON-RESPONSIVE

6. Excent's proposal is non-responsive to the essential requirements (Reg. 19-445.2070) and may not be waived pursuant to S.C. Code Ann. § 11-35-1520(13) and Reg. 19-445-2095(E). Each of the grounds in paragraphs 7 through 8 below are incorporated herein.
7. Amendment 2, questions 2 and 3 provided the estimated total number of staff members that will be using the system stating that up to 60 SCDE staff and a minimum of 168 and a maximum of 672 LEA staff will have to be trained on the system. Excent's proposal, page 69, provides that the maximum number of persons trained for purposes of the pricing proposal is 96. This number is significantly less than the minimum number of 168 LEA staff that the RFP requires. The cost of providing training to meet the minimum number of training sessions required by the RFP has more than negligible or trivial effect on the price, quality or delivery of services required by the RFP and cannot be waived as a minor informality or irregularity.
8. Section 3.1.6 of the RFP requires: "The successful offeror must work with the current vendor to migrate data from the old solution to the new one. The data includes placement history and IEP's housed in the current solution." In its proposal, Excent limited the amount of data that it would migrate from the old solution to the new solution. On page 24 Excent limited the data that it proposes to migrate to the new system when it offered: "The purpose of Data Conversion is to seed Enrich Special Education with the critical information such as the most current dates for IEP, evaluation, services, LRE and consents, as well as the disability(s) for which the student met the state requirements. All required data fields to seamlessly (sic) continue state reporting activities are also included in the transfer." Excent's limitation of the data to be migrated in contravention of the requirement that all of the old system data be migrated to the new system has more than a negligible or trivial effect on the price, quality or delivery of services required by the RFP and cannot be waived as a minor irregularity or informality.
9. The award to Excent is in violation of the purposes of the South Carolina Consolidated Procurement Code.

Based upon the arbitrary, capricious, clearly erroneous and contrary to law scoring and ranking in its totality, the CPO should grant PCG's protest, the award to Excent should be revoked and the SCDE should resolicit the RFP for "Individual Education Program Case Management." Additionally or alternatively, Excent's proposal is not responsive to the essential requirements of the RFP, the award to Excent should be revoked and the SCDE should resolicit the RFP for "Individual Education Program Case Management." Please do not hesitate to contact me if there are any questions regarding this protest.

COLUMBIA 1100110v1

Michael B. Spicer  
December 17, 2012  
Page 6

MCNAIR  
ATTORNEYS

---

With best wishes for a happy and safe holiday season.

Yours very truly,

*M. Elizabeth Crum*

M. Elizabeth Crum

*with permission by  
Aubrey Maxwell*

MEC:df

Cc: Amy Smith, Manager—via e-mail  
Agnes Copeland—via e-mail ([ACOPELA@itmo.sc.gov](mailto:ACOPELA@itmo.sc.gov))  
Dixon Robertson, Esquire—via e-mail

COLUMBIA 1100110v1