STATE OF SOUTH CAROLINA	BEFORE THE PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	RFP No. 07-S7279; CPO Decision No. 2007-219
In re: Protest of Protech Solutions, Inc. and ACS State and Local Solutions, Inc. Solicitation No. 07-S7279 Acquisition of CSES and FCCMS Services	Case No. 2007-5 **ORDER GRANTING MOTIONS TO DISMISS**

This matter came before the Panel for a hearing on June 8, 2007. The protesting parties, Protech Solutions, Inc. ("Protech") and Affiliated Computer Services, Inc. ("ACS"), appeared by counsel Henry P. Wall and E. Wade Mullins III, of Bruner, Powell, Robbins, Wall & Mullins, LLC. Keith McCook, Assistant General Counsel in the Office of General Counsel of the Budget and Control Board, represented the Chief Procurement Officer ("CPO"). Marcus A. Manos and J. David Black of Nexsen Pruet, LLC, represented the Using Governmental Units ("Agencies"). M. Elizabeth Crum of the McNair Law Firm, P.A. represented the recipient of the Intent to Award, Saber Software, Inc. ("Saber").

Prior to the Panel's hearing arguments on the motions to dismiss filed by the Agencies and Saber, Protech and ACS withdrew Ground C in the April 18, 2007 letter requesting further administrative review. The CPO joined certain of the motions.[1] The motions sought to dismiss the entire request for administrative review for three different reasons.

[1] The CPO joined in the motion to dismiss Claim A-1 discussed below. The CPO argued that, as a matter of policy, it was important to the procurement officers to be able to proceed to negotiate with other vendors without a formal termination in order to avoid undermining the State's negotiating position, i.e., to prevent providing an advantage to a higher scoring offeror should the State need to return to negotiations with that offeror. The CPO also joined in the motion to dismiss Claim B arguing that the regulation does not apply to negotiations, as a matter of law, and that as a matter of policy, application of the relevant regulation to negotiations would render the negotiations section of the

First, the Agencies and Saber argued certain of the claims by Protech/ACS were untimely under the standards articulated by this Panel. Second, certain issues raised by Protech/ACS fail to articulate claims with the required level of specificity to place the parties on notice of the error claimed. Third, as to the remaining issues, there is no provision of the Consolidated Procurement Code or regulations that would support the relief requested by Protech/ACS.

After considering the briefs and arguments of counsel, the Panel granted Agencies' and Saber's motions to dismiss the entire remaining protest for the reasons stated below.

BACKGROUND OF PROCUREMENT

On July 18, 2006, the Information Technology Management Office ("ITMO") issued Solicitation No. 07-S7279 ("RFP"). (Record, p. 177).[2] ITMO issued the RFP for the Department of Social Services, the South Carolina Judicial Department, the 46 County Clerks of Court, and the using procurement units according to RFP Section 1.7. (Record, p. 183). The Solicitation was issued pursuant to the South Carolina Consolidated Procurement Code. S.C. Code Ann. § 11-35-10 through -5270 (Supp. 2007) ("Code"). Both ACS and Saber submitted proposals.

The goal of the RFP, is to "develop, implement, maintain, and obtain federal certification of a CSES that will provide comprehensive support to the operation of South Carolina's Child Support Enforcement ("CSE") program" as required by the Family Support Act ("FSA-88") enacted by Congress in 1988. The purpose of FSA-88 is to require states receiving federal funds for child-support programs to develop and implement a statewide, automated child-support enforcement system. In addition to development of the CSES required by federal law, the RFP

Code meaningless and prevent the State from having the flexibility intended by the General Assembly.

[2] References to the "Record" refers to the Panel's initial record which was extensively referred to by the parties, without objection, in their briefs and at the hearing.

seeks "to develop, implement, maintain, and provide comprehensive support to the operation of the Family Court Case Management System." Collectively, CSES and FCCMS are referred to as CFS. (Record, p. 183).

ACS and Protech filed their Initial Protest on March 5, 2007 and their Final Amended Protest on March 9, 2007 (the "March 9 Protest Letter"). The Agencies and Saber filed Motions to Dismiss prior to the CPO hearing. The hearing was commenced before the CPO on March 29, 2007, at which time the CPO dismissed several of the protest grounds. The CPO denied the remaining grounds of protest in his Decision dated April 9, 2007. ACS and Protech filed this request for administrative review by the Panel on April 18, 2007 (the "April 18 Review Letter").

FACTS AND MATTERS SUBJECT TO REVIEW

The relevant facts as stated by Protech/ACS in the April 18 Review Letter and the March 9 Protest Letter are incorporated by reference. (Record, pp. 2-5 and 23-27). The facts are taken from the March 9 Protest Letter and the April 18 Review Letter. The facts and all reasonable inferences are assumed to be true for purposes of determining the motions to dismiss. The facts stated in this Order do not represent findings by the Panel as no additional evidence, other than the Record[3] as argued by the parties, has been received and the Agencies and Saber made clear in

[3] Prior to the hearing, the Panel sends each party a copy of its Memorandum to Participants , which provides in part as follows:

> The Panel will send each party or its legal counsel, if represented, a compilation of the physical exhibits presented to the Chief Procurement Officer, except those exhibits which are too voluminous or too large to copy. These documents are numbered sequentially in the upper right hand corner. This package, along with the exhibits too voluminous or too large to copy, constitutes the initial record before the Panel. A transcript of the testimony before the Panel is not normally available or included in the record.
>
> The parties should refer to any documents or exhibits by page number in the Panel record. Documents and exhibits in the Panel record, subject to objections under the rules of evidence, are presumed to be admissible, and may be referred to without the necessity of reintroducing these documents.
>
> A copy is available at www.gs.sc.gov/webfiles/gc/Documents/panproc.pdf

pre-hearing filings that certain of the facts would be strongly contested if the Panel proceeded to a full hearing.

The Panel conducts its reviews of CPO decisions pursuant to the requirements of S.C. Code Ann. § 11-35-4410(1)(a). While the review of the CPO's decision is *de novo*, the review is based on the factual record before the CPO and any additional evidence that the parties present to the Panel. *South Carolina Administrative Practice and Procedure*, Chapter 7, Procurement, App. A, Procurement Review Panel's Memorandum to Participants, p. 344, "Record" (2004).

ANALYSIS OF THE APPLICABLE LAW

The protest issues are set by the initial protest letter, in this case the March 9 Protest Letter. Protest of DPConsultants, Inc. and Horizon Software Systems, Inc., Case 1998-6 (Dec. 15, 2001). For ease of argument at the hearing, the issues were discussed in terms of the numbered issues in the appeal letter. Accordingly, the Panel will address the issues for review as they are lettered in the Grounds for Appeal section of Protech's and ACS's April 18 Review Letter requesting further administrative review. Since Protech/ACS withdrew protest ground C, we only address grounds A, B and D from the April 18 Review Letter.

A. The Claim That the State Conducted Improper Negotiations and Breached the Obligation of Good Faith.

Under Protest Ground A, Protech and ACS protest: (1) the State's method of closing negotiations with ACS and then moving to negotiations with the second highest-scoring offeror; (2) representatives of the Agencies sitting on the Project Executive Committee ("PEC") being involved in the decision-making process regarding negotiations and award; (3) the award criteria being improperly applied; and (4) the State violating the good-faith obligations of Sections 11-35-20(f) and -30.

Claim A-1: The State must Formally Terminate Negotiations with One Offeror Before Using its Discretion to Open Negotiations with the Next Highest Scoring Offeror.

ACS and Protech claim negotiations must be exhausted with the highest ranked competitor as a condition precedent to the commencement of negotiations with the next ranked competitor." (Record, p. 28). More specifically, Protech/ACS complain that "...ACS was not informed that the procurement officer intended to terminate the negotiations," and that "ACS was never advised that negotiations between it and the State were terminated." (Record, p. 25).

Nothing in the Code requires formal notice to an offeror that the State is moving on to the next highest-ranking offeror to conduct negotiations.

> (8) Negotiations. Whether price was an evaluation factor or not, the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:
> (a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. **If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second,** and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;

S.C. Code Ann. § 11-35-1530(8)(a) (emphasis added). The subsection does not require any formal "end" to negotiations with the highest ranking offeror – only a decision that "a satisfactory contract cannot be negotiated with the highest ranking offeror." Looking at the plain and unambiguous language of the statute, we conclude that the section does not require the procurement officer to provide the highest ranked Offeror any notice that the State is formally "ending or terminating" negotiations with it and moving on to the next ranked Offeror. Hitachi

Dat Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (Words used in statute must be given their plain and ordinary meaning).

In addition to the plain language of the statute, the very fact that Section 11-35-1530(8)(b) allows the State to reopen negotiations with an offeror undercuts Protech/ACS' argument that the statute intends for an offeror to be given an absolute right to make its very best offer after getting formal notice from the State that it intends to move on. Applying the plain and ordinary meaning of the words used by the General Assembly (as this Panel must do), there is no duty formally to terminate or give notice to the highest scoring offeror that negotiations are over and the State is moving on to the next highest-scoring offeror.[4]

Our conclusion that §11-35-1530(8) does not require the Procurement Officer formally to terminate negotiations with ACS is reinforced by a review of other provisions of the Code. Section 11-35-3220 of the Code proscribes the method of procuring architectural, engineering and land surveying services and provides: "If the governing body of the using agency or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations **must be terminated formally**." S.C. Code Ann. § 11-35-3220(7) (emphasis added). This formal termination language is conspicuously absent from Section 11-35-1530(8).

Protech and ACS ask this Panel to read into the Code a provision that does not exist This Panel cannot legally impose procedural requirements not found in the statutes or regulations. Tall Tower v. S.C. Procurement Review Panel, 294 S.C. 225, 234, 363 S.E.2d 683, 687-88

[4] Protestants cite In re: Protest of Andersen Consulting Case No. 1994-1 (Mar. 9, 1994) as holding the State to a particular negotiation procedure that includes notice of termination. Andersen, however, does not support Protestants' claims -- it confirms that this protest ground should be dismissed. Instead of creating a specific set of criteria that a procurement officer must follow, as the Protestants suggest, the Panel merely cited the various actions the attorney representing the Agencies took during negotiations. Nothing in the Panel's "Conclusions of Law" stands for the proposition that the State must take these same actions in every negotiation or that the State has to terminate formally negotiations with one offeror before moving on to another. Anderson, therefore, does not help protestants avoid the necessary dismissal of this ground.

(1987) (finding Panel erred by requiring a state agency awarding a lease to notify a prospective lessor of the evaluation criteria it will use). Taking the allegations as true—that the State did not provide Protech/ACS with notice that the negotiations session was ended and the State would proceed to negotiate with the second highest offeror—there is no provision of the Code or regulations that require such notice. As a result, this protest ground does not state a claim upon which relief may be granted and is dismissed.[5] Protest of METS Corp., Case No. 2003-9 (Feb. 3, 2004) ("We grant the Motion to Dismiss finding that the Protestant did not state a claim for which relief can be granted. Assuming arguendo that the Panel agreed with METS, there is no legal basis on which we could order the relief he seeks. There is nothing in the Code that requires a solicitation such as this to address existing equipment."); Protest of Health Systems Mgt., Inc., Case No. 1990-14 (Dec. 3, 1990).

Claim A-2: The Procurement Officer Must Make the Decision Regarding Moving to the Second Highest Ranking Offeror in Negotiations Without the Opinion or Input of the Agencies.

The March 9 Protest Letter claims that the procurement officer has a non-delegable duty regarding the negotiation process and, therefore, the participation of the Agencies taints the process. ACS and Protech allege in the March 9 Protest Letter that "… negotiations are to be at the sole discretion of the procurement officer. This is a non-delegable governmental function." (Record, p. 28). "The procurement officer was awaiting direction from the Governor's office on

[5] Protech/ACS argued at the hearing that ACS as the highest scoring offeror must be offered a contract on the same terms as those negotiated with Saber in order for the State to comply with good faith and the Consolidated Procurement Code. While not raised in either the March 9 Protest Letter nor the April 18 Review Letter and therefore, it is untimely. Alternatively, this Panel has specifically dealt with that issue. In a protest of an earlier award to build these systems we held: "Andersen's assertion that it, as the first ranked offeror, must first be offered the contract negotiated with Unisys, is not based on law. Section 11-35-1530(11) [then the negotiation provision] does not provide that once a contract is negotiated with the second ranked offeror, then it must be offered to the first ranked offeror. The law does not contain any language that could be construed that way. Neither would it be reasonable nor is it a normal business practice to allow a contract negotiated with one party to be offered first to another party." In re: Protest of Andersen Consulting, Case No. 1994-1 (March 9, 1994).

when, whether, and how to negotiate with ACS. With attention from the Governor's office, ITMO decided to raise price reduction as a possibility to ACS prior to actual negotiation." Id. The April 18 Review Letter states: "[u]nbeknownst to ACS, Protech or presumably anyone outside of the State, the ultimate decision on who would be awarded the contract was left to the discretion of an ad hoc committee of State leaders from various organizations known as the Project Executive Committee." (Record, p. 3).

Protech's and ACS' allegation that the "sole discretion" of the procurement officer means that when the procurement officer works hand-in-hand with the using agencies[6] a protest issue exists—turns procurement law on its head. Under the Code, procurement officers bring their expertise in the contracting process to a procurement and ensure fairness and consistency in the process. Further, under the Code's statutory scheme, the using agencies bring their needs and their analysis of how the solution will fit their needs. The Code contemplates a working relationship between the procurement officer and the using agencies.

Section 11-35-1010 requires the procurement officers to maintain close and cooperative relationships with using agencies and mandates that the procurement officer give each using agency a reasonable opportunity "to participate in and make recommendations with respect to procurement matters affecting the using agency." S.C. Code Ann. § 11-35-1010. We find that none of the facts alleged in the March 9 Protest Letter are anything beyond the Agencies' participating in and making recommendations with respect to the award affecting the Agencies as § 11-35-1010 clearly requires.

Nowhere does the Code prohibit the Agencies from participating in the procurement process. Reading such a requirement into the statute would violate the principles of statutory

[6] "Using agency" means any governmental body of the State which utilizes any supplies, services or construction purchased under the Code. S.C. Code Ann. § 11-35-310(36).

construction discussed above. As a result, this protest ground fails to state a claim upon which relief may be granted and is dismissed.

The challenge to the composition of the PEC as an ad hoc committee and the allegation that the decision to award was left to the PEC appear for the first time in the April 18 Review Letter. (Record p. 7). This issue is untimely under Section 11-35-4210. Protest of DPConsultants, Inc. and Horizon Software Sys., Inc., Case No. 1998-6 (Dec. 15, 2001) ("[T]he issues as stated in the appeal letter are an interpretation of the protest letters. The Panel does not agree that the protest letters raise all of the issues stated in the appeal letter. The protest letters establish the issues of the case, and any issues not established in the protest letters are untimely filed under the time constraints of S. C. Code §11-35-4210."); Protest of Steen Enterprises, Inc., Case No. 2000-9 (Sept. 14, 2000) (dismissing two issues that did not appear in an initial protest letter). This portion of the claim is dismissed as untimely.

Claim A-3: The Award Criteria Were Improperly Applied.

Protech and ACS also argue that the "influence" of the Agencies somehow changed the award criteria stated in the RFP because the original scoring of the evaluation panel was not followed. (Record p. 28). If the General Assembly wanted the award to always go to the highest-scoring offeror after the initial evaluation then, Section 11-35-1530(8) would not be in the Code. It is undisputed that the procurement officer proceeded under Section 11-35-1530(8)(a) to conduct negotiations. If an award results from those negotiations, the award is no longer based solely on the initial evaluation pursuant to the award criteria. S.C. Code Ann. § 11-35-1530(9) ("Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals**, unless the procurement officer**

determines to utilize one of the options provided in Section 11-35-1530(8)."). Thus, Protech and ACS cannot, as a matter of law, protest that the award was not made according to the evaluation of the RFP award criteria based simply on the fact ACS did not receive award.

Protech and ACS allege that "[t]he contract was steered to the lowest priced vendor based upon outside influence and in utter disregard for the stated and articulated award criteria in the RFP. Cost became the most important award criteria." Id. As we have found above, Section 11-35-1010 requires that the procurement officer afford the using agencies "reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agency." As we have already determined, Protech's and ACS' allegations regarding input from the PEC and Agencies fail to state a claim.

Protech and ACS admit that the ACS initial proposal price was almost $30 million higher than Saber's initial proposal price. (Record, pp. 3 and 25). Protech and ACS further admit that the Procurement Officer's written determination, pursuant to Section 11-35-1530(8) to begin negotiations with Saber were based upon four grounds: 1) ACS' refusal to reduce its cost; 2) the small gross difference in ACS' and Saber's total scores relative the total possible number of points available in the RFP; 3) the close average technical scores, showing that either ACS' or Saber's technical solution met the State's needs; and 4) Saber's significantly lower price. (Record, pp. 4 and 25-26). The only complaint that Protech and ACS make about the Procurement Officer's determination is that it did not "clearly indicated that she believed negotiations with ACS were at impasse or that a satisfactory contract could not be negotiated." (Record, pp. 4 and 26). The facts alleged in the record do not support the allegation that "[t]he contract was steered to the lowest priced vendor based upon outside influence and in utter disregard for the stated and articulated award criteria in the RFP."

This claim is dismissed for failure to state a claim. Protest of METS Corp., Case No. 2003-9 (Feb. 3, 2004); Protest of Health Systems Mgt., Inc., Case No. 1990-14 (Dec. 3, 1990).

Claim A-4: The State Did Not Negotiate and Award the Contract in Good Faith as Required by the Good Faith and Fair Dealing Provisions of the Consolidated Procurement Code.

A fourth, more general claim in the March 9 Protest Letter states that these acts violate the State's obligation of good faith under S.C. Code Ann. §§ 11-35-20(f) and 11-35-30. (Record, pp. 27-29). Nowhere does the March 9 Protest Letter or the April 18 Review Letter cite facts as to how the State failed to act in good faith in its negotiations with ACS other than the facts discussed in A-1 and A-2 above. (Record, pp. 27-28 and 5-7). Protech and ACS merely cite the statutory provisions and allege that the State did not comply with them. Such generic allegations do not meet the requirement that the protest place the State and Saber on notice with sufficient specificity of a particular issue with the award. Protest of Transportation Mgt. Services, Inc., Case No: 2000-2 (May 16, 2000); S.C. Code Ann. § 11-35-4210(2)(b).

B. The Claim that the State Cannot Alter Material Terms and Conditions in Negotiation.

Citing Regulation 19-445.2070,[7] Protech and ACS argue that an offeror cannot propose a change in terms and conditions as part of negotiations which, if it had been in the original offer, would have rendered the proposal non-responsive. The March 9 Protest letter states that the"[p]roposed terms of the contract to Saber clearly violate Regulation 19.445.2070" In the April 18 Review Letter, Protech and ACS add the argument that the changes in terms in conditions negotiated with Saber go outside the "general scope" of the contract in violation of Section 11-35-1530(8). (Record, p. 8). Neither position survives the motions to dismiss.

[7] Regulation 19-445.2070(D) applies to the sealed competitive proposal process through Regulation 19-445.2095(G)(3).

Claim B-1: The Terms Negotiated with Saber are Illegal Because They Violate the Responsiveness Regulation.

Regulation 19-445.2070(D) applies only to the determination of responsiveness, not to negotiations. The regulation states, in part: "...a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders." S.C. Code Reg. 19-445.2070(D). Under the Code, the determination of responsiveness is made before negotiations begin. Negotiations follow the evaluation and ranking process, and Section 11-35-1530(7) provides that "[o]nce evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State...."

Protech and ACS do not allege that Saber's offer rejected or modified provisions of the RFP. Instead, they allege that the changes made during negotiations violate the regulation. Every case this Panel has decided regarding Regulation 19-445.2070 involved the responsiveness of the original bid or offer by the vendor, not the modification of an offer during the negotiation process. As these cases make clear, Regulation 19-445.2070 applies to the initial determination to reject an offer, not to negotiations after an offer has been found responsive. See, e.g., Protest of Steen Enterprises, Inc., Case No. 2000-9 (Sept. 14, 2000) ("Regulation 19-445.2070(D)...Steen's bid, by including the additional costs for inbound freight, dealer prep & setup, parts & service manuals, & extended warranties, clearly qualified such price as being subject to 'price in effect at time of delivery.' The price of the equipment to the State could not be determined by simply reading the written bid submitted by Steen. The Panel finds Steen's bid non-responsive."); Protest of Abbott Laboratories, Case No. 1997-4 (April 30, 1997) ("Regulation 19-445.2070(A) provides that 'any bid which fails to conform to the essential

requirements of the invitation for bids shall be rejected.' Ross' statement that it will deliver the formula on a quarterly basis with a minimum order for each clinic of ten cases clearly seeks to qualify the requirements of the bid and renders Ross' bid non-responsive on this issue."); Protest of United Testing Systems, Inc., Case No. 1991-20 (Oct. 3, 1991) ("The inclusion of such unspecified additional charges is a modification of the IFB requirements which goes to the substance of the transaction and which mandates rejection of United's bid. Reg. 19-445.2070(D)."). Regulation 19-445.2070 is not applicable to negotiations between an offeror and the State. We adhere to our previous holdings.

Any other holding would render the negotiations provision of Section 11-35-1530(8) a nullity. The State could never negotiate any material term provided in the RFP. This would result in the language of a non-applicable regulation trumping the legislative authority allowing negotiations of price and/or scope so long as the changes are within the "general scope" of the RFP. This the regulation cannot, as a matter of law, do. Further, the RFP invited offerors to propose alternate terms and conditions while articulating the advantage the State would receive from such a change in Sections 6.3.2.2 and 6.3.2.3. (Record, p. 323).

The protest claim based upon violation of Regulation 19-445.2070 fails to state any claim upon which relief may be granted as a matter of law and is dismissed. Protest of METS Corp., Case No. 2003-9 (Feb. 3, 2004) ("We grant the Motion to Dismiss finding that the Protestant did not state a claim for which relief can be granted. Assuming arguendo that the Panel agreed with METS, there is no legal basis on which we could order the relief he seeks. There is nothing in the Code that requires a solicitation such as this to address existing equipment."); Protest of Health Systems Mgt., Inc., Case No. 1990-14 (Dec. 3, 1990).

Claim B-2: The Terms Negotiated with Saber Violate Section 11-35-1530(8).

Protech and ACS raise, for the first time in the April 18 Review Letter, a claim that the negotiated terms go beyond the general scope of the RFP. Under Section 11-35-4410, this Panel may not review any matter "which could have been brought before the chief procurement officers in a timely and appropriate manner . . . but was not." Protest of Steen Enterprises, Inc., Case No. 2000-9 (Sept. 14, 2000) (dismissing two issues that did not appear in an initial protest letter). ACS and Protech must raise this issue in the protest letter. Since they did not, this portion of Protest Ground B is dismissed as untimely.[8]

D. The Claim that the ACS Proposal is More Advantageous to the State than the Negotiated Saber Proposal.

Protech and ACS assert that the Procurement Officer's determination that the negotiated contract was the "most advantageous" to the State is "clearly erroneous, arbitrary and capricious." (Record pp. 9-10). Protestants allege that "[a]ny effective and objective comparison of the contract terms leads to the inescapable conclusion that the procurement officer's negotiations with Saber resulted in a far less advantageous proposed contract with the State." Id. This is nothing more than an assertion that the ACS proposal is better than Saber's. Given the size and complexity of this procurement, this protest ground falls far short of the specificity needed to state a viable protest and violates Section 11-35-4210(2)(b).

In Protest of NBS Imaging Systems, Inc., Case No. 1993-16 (Sept. 1,1993), the Panel was faced with a protest ground that read: "Unisys did not meet the RFP requirements for system design, technical specifications, technical support, and maintenance support." (Id..)

[8] Even if the claim had been made timely, it would fail to state a claim upon which relief may be granted. Protech and ACS generally claim that the State's negotiations and resulting contract terms are *ultra vires* and unenforceable. However, the Final Protest contains no supporting basis for this contention. The claim is insufficiently stated and lacks the specificity required by Section 11-35-4210(2).

Unisys moved, prior to the hearing, to dismiss this protest ground as being overly vague to the point that it violated Section 11-35-4210 and due process. In determining that the above protest ground was vague, the Panel held:

> The Panel finds that the statement of NBS' issue on the specifications of the RFP is too vague to meet the requirements of SC Code [§] 11-35-4210. ... The larger the RFP and its requirements, the more specific a protestant will need to be to state its grievance and give notice of the issues of protest. ... NBS' protest concerning the RFP specifications states only broad areas of RFP requirements. In a procurement of this size, more specificity is required to indicate the protestant's grievance and to give notice of the issues raised.

Id.

All that Protech and ACS ask for under this ground of protest is a re-evaluation by the Panel. Couching such a request in terms of "arbitrary, capricious, and clearly erroneous" does not change the analysis. Protest of Santee Wateree Regional Transportation Authority, Case No. 2000-5 (May 16, 2000) ("[T]he Panel will not re-evaluate proposals...."). "An offeror's claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee which determines the ranking of the offerors." Protest of Travelsigns, Case No. 1995-8 (Aug. 14, 1995); see also, Protest of First Sun EAP Alliance, Inc., Case No. 1994-11 (Oct. 31, 1994). This ground fails to state a claim upon which relief may be granted and is dismissed as a matter of law. Protest of METS Corp., Case No. 2003-9 (Feb. 3, 2004); Protest of Health Systems Mgt., Inc., Case No. 1990-14 (Dec. 3, 1990). The allegations are not stated with sufficient particularity to put the parties on notice of the error claimed and are, therefore, dismissed pursuant to Section 11-35-4210(2)(b).

CONCLUSION

The Panel hereby grants the motions of the Agencies and Saber and dismisses the protest of Protech and ACS in its entirety for the reasons discussed above.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS VICE-CHAIRMAN:

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Willie Franks
Vice-Chairman

June ____, 2007

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