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June 4, 2007

**via Hand Delivery**

Procurement Review Panel  
Solomon Blatt Building  
1105 Pendleton Street, Suite 203  
Columbia, SC 29201

Re: In Re: Protest of Protech Solutions, Inc. and ACS State and Local Solutions, Inc.  
Solicitation No. 07-S7279  
Case No. 2007-219

Dear Madame or Sir:

Enclosed herewith for filing please find the original Hearing Brief and Motion to Dismiss and Memorandum in Support of Saber Software, Inc. in the above-captioned matter. Please stamp received the additional copies and return them to our courier.

By copy of this letter, I am serving all parties of record by hand-delivery.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,



M. Elizabeth Crum

Enclosures

cc: Keith C. McCook, Esquire  
Marc A. Manos, Esquire  
E. Wade Mullins, III, Esquire  
Henry P. Wall, Esquire  
Paul Koch, Esquire

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

Before the Procurement Review Panel  
RFP No. 07-S7279  
CPO Decision No. 2006-161  
Case 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 )  
\_\_\_\_\_ )

**MOTION OF  
SABER SOFTWARE, INC.  
TO DISMISS PROTEST AND  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

Saber Software, Inc. ("Saber") hereby moves, on separate and independent bases, to dismiss each of the individual grounds of the protest and request for further administrative review that ACS State and Local Solutions, Inc. ("ACS") and Protech Solutions, Inc. ("Protech") (collectively, "Protestants") have filed following the Chief Procurement Officer's ("CPO") April 9, 2007 decision denying their March 9, 2007 protest in every respect.

**INTRODUCTION AND FACTUAL BACKGROUND**

**A. The State Issues An RFP And Conducts Negotiations As Provided For In The Procurement Code.**

South Carolina has been trying since 1993 to procure and implement a Child Support Enforcement System ("CSES") that will satisfy the State's obligations under the Federal Family Support Act of 1988.<sup>1</sup> South Carolina is the only state in the union that has not yet implemented a CSES. As a result, the State has been paying penalties to the federal government of approximately \$1 million a month and it will continue to do so until a CSES is implemented.

This appeal involves South Carolina's most recent attempt to enter into a contract with a qualified vendor to supply a CSES. In early 2006, the State, acting through the Information

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<sup>1</sup> Saber requests that the Procurement Review Panel (the "Panel") take judicial notice of the history of South Carolina's efforts to procure a CSES system pursuant to Rule 201, SCRE. See In Re: Protest of Andersen Consulting; Appeal by Andersen Consulting, Case No. 1994-1, SCPD 1994-1, 1994 WL 16006490.

Technology Management Office ("ITMO"), issued a request for proposals ("RFP") seeking a qualified contractor to implement a CSES and a Family Court Case Management System ("FCCMS") (collectively, "CFS"). ITMO issued this RFP pursuant to the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10 (Supp. 2006) ("Code"). Exhibit 2, RFP, pp. 000177-000452. On September 27, 2006, both ACS and Saber submitted proposals as prime contractors. Protech, the other Protestant in this matter, is a subcontractor to ACS.

Consistent with South Carolina procurement law, the Evaluation Committee identified in the RFP and charged with selecting the most appropriate vendor to complete the CFS project (the "Committee"), evaluated and scored the submitted proposals. Based on this initial evaluation, the Committee identified ACS as the highest ranked offeror. Record, pp. 20 and 24; Exhibit 8, pp. 000507-000511. As a result, Ms. Tammy Blackwell, the Procurement Officer for this solicitation, opened negotiations with ACS, as required by S.C. Code Ann. § 11-35-1530(8)(a).

Prior to face-to-face negotiations, Blackwell notified ASC that its price was "substantially higher than the other proposals [ITMO] had received" and asked ACS to "tell us how and or where you can reduce your cost." Record, p. 634, e-mail from Ms. Blackwell to Amy Kearney dated December 6, 2006. On December 10, ACS notified Ms. Blackwell in writing that it would not agree to reduce its price proposal to the State. Record, p. 635, emails dated December 10, 2006 from Ms. Kearney to Ms. Blackwell.

The face-to-face negotiations between ACS and the State took place on December 12 and 13, 2006. Record, pp. Exhibit 8, pp. 507-511. During these negotiations, ACS refused to give the State any price concessions. As a result, Blackwell and the Committee reasonably concluded that a satisfactory contract could not be negotiated with ACS, and they determined to begin negotiations with Saber—the next highest ranked offeror. Before doing so, however, the State

specifically informed ACS that this was an option available to the State. As ACS acknowledges, “[a]t the end of the negotiation session [on December 13], the Procurement Officer advised ACS that it had the option to continue negotiations with ACS or move on to the second-ranked vendor.” Appeal Letter, p. 3.

After the ACS negotiations were unsuccessful, Ms. Blackwell exercised the “sole discretion” granted to her by Section 11-35-1530(8) and opened negotiations with Saber. On December 21, 2006, Blackwell sent Saber a negotiation questionnaire initiating negotiations. Saber responded to the State's questionnaire on December 26, 2006, and the State and Saber conducted face-to-face negotiations on January 8 and 9, 2007. During these negotiations, Saber and the State mutually agreed to a series of compromises and concessions that resulted in what Blackwell and the Committee determined to be a satisfactory contract. On February 23, 2007, the State issued its formal Notice of Intent to Award the contract to Saber. Record, Exhibit 11, p. 585.

**B. The Chief Procurement Officer Denies ACS And Protech's Protest In Its Entirety And Protestants File This Appeal.**

Protestants filed their Initial Protest on March 5, 2007 and their Final Protest on March 9, 2007. On March 6, 2007, the CPO order the Protestants to submit a protest bond in the amount of one percent (1%) of the project cost of \$89,230,897.00 and on March 26, 2007 Protech submitted the requisite Protest Bond. On March 26, 2007 the Using Governmental Units (“UGU”) and Saber filed Motions to Dismiss certain Final Protest grounds. The CPO held his hearing on March 29, 2007. At the beginning of the hearing, the CPO dismissed Protestants' Final Protest grounds II.B and II.D, and Protestants withdrew Final Protest ground II.C. The CPO issued his Decision denying the protest on April 9, 2007. Protestants filed this Appeal on April 18, 2007 (“Appeal Protest”).

In this appeal, Protestants attack the State's decision to award Saber a contract for the CFS on four (4) grounds: (A) that the procurement officer did not properly negotiate to conclusion with ACS, did not act independently and misapplied the award criteria stated in the RFP due to external pressure; (B) that the terms and conditions of the negotiated proposed Saber contract impermissibly limit Saber's liability to the State of South Carolina, (C) that Saber's initial proposal should have been rejected as it contained material misrepresentations regarding the schedule and Saber's proposal was improperly scored ; and (D) that Saber's revised proposal does not result in any betterment to the State as compared with ACS's original proposal. Record p. 000001-000010. None of these grounds have merit, and Protestants' appeal is only causing the State to incur continuing penalties as the CFS implementation is delayed. Specifically, Protestants' protest grounds A.1-A.4 fail because, as the Chief Procurement Officer held, the State's actions during its negotiations with ACS were entirely consistent with the plain language of the Procurement Code. Protestants' protest ground B fails because, it relies upon an inapplicable regulation, Regulation 19-445.2070, it is not stated with sufficient specificity to pass muster under Section 11-35-4210(2)(b), and it is untimely. Third, Protestants' ground C fails for lack of specificity and because their statements as to future events cannot support their claim of misrepresentation. Similarly, Protestants' protest ground D fails for lack of specificity. For these reasons, Saber requests that each ground of Protestants' appeal be dismissed.

#### **APPLICABLE LAW**

##### **A. Relevant Principles Of Statutory Construction**

The question the Panel must decide in this case is whether ITMO acted consistent with South Carolina procurement law in deciding to award the contract for the CFS project to Saber. In order to answer this question, the Panel will need to interpret and apply the statutory

provisions that govern this procurement. It is black letter law that an administrative agency "is a creature of statute and its authority is dependent upon statute." Brooks v. South Carolina State Bd. of Funeral Service, 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). In a case involving the interpretation of South Carolina law, the federal courts have said that "the general rule of administrative law [is] that a duly promulgated regulation has the force and effect of law and becomes an integral part of the enabling statute." Pritchett v. Lanier, 766 F. Supp. 442, 447 (D.S.C. 1991), *aff'd. sub nom Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992). In construing statutes, the terms used therein must be taken in their plain and ordinary meaning. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964); Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). "When such terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County v. Lee County, 308 S.C. 23, 28, 416 S.E.2d 641, 644 (1992), citing Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Catawba Indian Tribe of South Carolina v. State of South Carolina, \_\_\_\_\_ S.C. \_\_\_\_\_, \_\_\_\_\_, 642 S.E.2d 751, 754 (2007).

Another principle of statutory construction that is central to this matter is the well-established rule of *expressio unius est exclusio alterius*—the rule that a statute listing specific things or characteristics is evidence that the Legislature specifically intended to exclude all other

things and characteristics not mentioned in that list. State v. Burton, 301 S.C. 305, 307, 391 S.E.2d 583, 584 (1990); Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 553, 320 S.E.2d 458, 463 (Ct. App. 1984). In other words, the Panel should not add requirements to the procurement statutes that the Legislature elected not to add.

B. Standards For Granting A Motion To Dismiss For Failure To State A Claim

In evaluating whether Protestants' appeal should be dismissed for failure to state a claim, the Panel should apply the same standards that South Carolina courts apply in deciding motions to dismiss. See In Re: Protest of Health Systems Management, Inc., Case No. 1990-14, 1990 WL 10008028. The fundamental test is whether, based solely on the allegations set forth in the protest, viewed in favor of the protestant, the facts alleged "entitle the [protestant] to relief on any theory of the case." Chewning v. Ford Motor Co., 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)); FOC Lawshe Ltd. P'ship v. International Paper Co., 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002) (citing Rule 12(b)(6), SCRCPP). If the protestant fails to allege facts sufficient to support a claim for relief, the protest must be dismissed. Id. Because, as established below, most of the protest grounds at issue here do not state a claim upon which relief can be granted, those grounds should be dismissed.

C. Standards For Granting A Motion To Dismiss For Vagueness

The Panel has addressed the issue of vagueness on numerous occasions. S.C. Code Ann. § 11-35-4210(2)(b) (Supp. 2006) provides:

A protest pursuant to subsection (1)(a) must be in writing, filed with the appropriate chief procurement officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the appropriate chief procurement officer within the time provided in subsection (1).

(Emphasis added). In In re: Protest By J&T Technology, Inc., Case No. 1987-3, 1987 WL 863241 (July 13, 1987), the CPO found that "implicit under § 11-35-4210 is the requirement that protestants state their grievance with enough specificity to put all parties on notice of the issues to be decided by the CPO and the Panel. ... The state is under no obligation to reformulate or perfect a protestant's grievance." (Emphasis added.)

In In re: Protest of NBS Imaging Systems, Inc.; Appeal by NBS Imaging Systems, Inc., Case No. 1993-16, 1993 WL 13005237 (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." (NBS, p. 3.) 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.

In re: Protest of NBS Imaging Systems, Inc.; Appeal by NBS Imaging Systems, Inc. As discussed below, a number of the protest grounds are overly vague in contravention of the requirements of Section 11-35-4210(2)(b) and, therefore, must be dismissed.

D. Standards For Granting A Motion To Dismiss For Lack Of Timeliness

It is well-settled procurement law in South Carolina that a protestant cannot introduce new protest grounds at the Panel that were not raised before the CPO. See, e.g., In re: Protest of Atlas Food Systems and Services, Inc., Case No. 1997-6, 1997 WL 33477961 (June 5, 1997), p.

3 (dismissing for lack of jurisdiction an attempt to raise new allegations in an amended protest letter that was not timely filed); In re: Protest of Blue Cross and Blue Shield of S.C., Case No. 1996-9,1996 WL 33404908 (July 5,1996), p. 2 (“The ... issue in the protest letter is an attempt ... to raise more issues of nonresponsiveness at a later time, which is not permitted...”). See S.C. Code Ann. § 11-35-4210(1)(b) and § 11-35-4210(2)(b) (Supp. 2006). This Panel has repeatedly held that this deadline is a jurisdictional requirement that cannot be waived. See In re: Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.; Appeal by DPConsultants, Inc. and Horizon Software Systems, Inc., Case 1998-6, 2001 WL 340588950 (Dec. 15, 2001) (“The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.” Id., p. 2. As demonstrated below, at least one of ACS’ protest grounds is untimely and should be dismissed as such.

## ARGUMENT

**A. APPEAL GROUNDS A -- PROTESTANTS’ ALLEGATION THAT THE “PROCUREMENT OFFICER DID NOT PROPERLY NEGOTIATE TO CONCLUSION WITH ACS, DID NOT ACT INDEPENDENTLY AND MISAPPLIED THE AWARD CRITERIA STATED IN THE RFP DUE TO EXTERNAL PRESSURE” SHOULD BE DISMISSED.**

The principal basis for Protestants’ appeal is that, as they argued unsuccessfully to the Chief Procurement Officer, the State somehow failed to make it sufficiently clear to ACS that the State intended to terminate its negotiations with ACS and begin negotiations with Saber. This ground of appeal -- stated in several ways in grounds A.1.-A.4. -- should be dismissed for failure to state a claim and for vagueness.

Protestants specific allegations are as follows:

The proposed award to Saber passed upon revised contract terms is improper and contrary to the procurement code for the following reasons:

- 1) The Procurement Officer did not comply with the requirements of S.C. Code Ann. § 11-35-1530(8) (Supp. 2006) in its negotiations with ACS and Saber and award to Saber;
- 2) The Procurement Officer did not comply with the requirements of S.C. Code Ann. § 11-35-30 (Supp. 2006) in its negotiations with ACS and Saber and award to Saber;
- 3) The Procurement Officer did not comply with the requirements of S.C. Code Ann. § 11-35-20(f) (Supp. 2006) in its negotiations with ACS and Saber and award to Saber;
- 4) The duties of the Procurement Officer are non-delegable and representatives of the Governor's office impermissibly interjected and applied alternate award criteria which resulted in the premature negotiation of a contract with Saber.

Record, p. 000005. No matter how Protestants may phrase their complaint, it has no merit. As the Chief Procurement Officer held, the State's actions during its negotiations with ACS were entirely consistent with the plain language of the Procurement Code. As a result, each of these grounds should be dismissed for failure to state a claim.

**1. Protestants' Allegation That "The Procurement Officer Did Not Comply With The Requirements Of S.C. Code Ann. § 11-35-1530(8) In Its Negotiations With ACS And Saber And Award To Saber" Should Be Dismissed. (Protest Ground No. A. 1.).**

The State's decision to negotiate with Saber without notifying ACS that it was "moving on" does not violate the Code. Protech and ACS contend that the State had a statutory duty to give ACS notice that the State was going to negotiate with the next ranked offeror. There is no such requirement in the Code, either expressly or by necessary implication. Instead, the Code gives the State broad discretion to determine whether and when to start negotiating with the next-highest offeror. Moreover, this discretion is not subject to review. Specifically, Section 11-35-1530(8) of the Code, which governs negotiations in this solicitation, provides as follows:

(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. . . :

(a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion . . . .

(Emphasis added). Applying the clear and unambiguous language of this section, the Procurement Officer holds the exclusive right to determine how to negotiate with multiple vendors and whether and when it is appropriate to open negotiations with the second highest ranked vendor. Importantly, the Procurement Officer's decisions are not subject to review under Article 17. For this reason alone, Protestants' appeal on this point can and should be dismissed without any further proceedings. Based on the plain language of Section 11-35-1530(8), the Panel is not empowered to review the Procurement Officer's decision that a satisfactory contract could not be negotiated with ACS or the decision to start negotiating with Saber when and how she did. Even if these decisions were subject to review. Nothing in Protestants' appeal, even if taken as true, could carry the heavy burden of demonstrating that Ms. Blackwell somehow abused her broad discretion over these matters.

The conclusion that Protestants cannot complain about the Procurement Officer's alleged failure to formally terminate negotiations with ACS is reinforced by a review of other provisions of the procurement code. Specifically, Section 11-35-3220 of the Code proscribes the method of procuring architectural, engineering and land surveying services. Section 11-35-3220(7), which governs the negotiation of contracts with these professionals, specifically provides that negotiations with the highest ranked vendor must be formally terminated before moving on: "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." (Emphasis added). Regarding professionals, the Legislature clearly intended that negotiations must be formally terminated before opening negotiations with the next vendor. The "formal termination" language, however, is conspicuously absent from Section 11-35-1530(8). If the Legislature had intended that the negotiations with a party be formally terminated, it could and would have said so.

In essence, Protestants are asking the Panel to impose an additional requirement on the State that does not exist in the Code. As the South Carolina Supreme Court has previously made clear, this is something the Panel cannot do. See Tall Tower v. S.C. Procurement Review Panel, 294 S.C. 225, 234, 363 S.E.2d 683, 687-88 (1987) (invalidating the Panel's imposition of a procedural requirement that was not provided by statute or regulation). Thus, this protest ground must be dismissed for failure to state a claim upon which relief can be granted.

Protestants cite In re: Protest of Andersen Consulting; Appeal by Andersen Consulting, Case No. 1994-1, 1994 WL 16006490 (Mar. 9, 1994) in support of their position. 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 Andersen Panel merely cited the various actions the State took during negotiations as part of its "Findings of Fact." 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.

**2. Protestants' Allegation That "The Procurement Officer Did Not Comply With The Requirements Of S.C. Code Ann. §§ 11-35-30 And 11-35-20(F) In Its Negotiations With ACS And Saber And Award To Saber" Should Also Be Dismissed. (Protest Grounds No. A. 2 and 3.)**

This allegation consists of nothing more than references to Sections 11-35-30 and 11-35-20(f) of the Code with an accusation that the State violated these sections. Nowhere do Protestants explain how the State failed to act in good faith in its negotiations with ACS. Record, pp. 000005-000007. Instead, this Appeal merely cites these statutory provisions and alleges that the State did not comply with them. Protestants cannot seriously expect that generic allegations that a particular code section was violated are sufficient to put the State and Saber on notice of a particular issue with the award. See In Re: Protest of Transportation Management Services, Inc., Case No: 2000-2, 2000 WL 33956155 (May 16, 2000).

Both the Final Protest and the Appeal letters are some nine (9) pages long with a "factual" description of complaints unattached to any protest ground. Under the Code's clear mandate, as previously interpreted by this Panel, it is unreasonable to require that either the State or Saber guess as to which of the broad complaints go to this protest ground. For this reason alone, protest grounds A.2 and A.3 should be dismissed.

In any event, to the extent Protestants' allegation that "ACS was simply asked to bid against itself during the two day face to fact [sic] negotiations" can be construed as an allegation of "bad faith" negotiation by the State, this issue is settled squarely by *Andersen*.

The State negotiated with each party based on the suggested terms and language provided by that party. The State took the suggestions of the negotiating party and either accepted or rejected it. The State's duty is to negotiate clarifications and terms that are favorable to the State. The facts show that Unisys had more suggestions than Andersen during the negotiating process. Different negotiating styles and areas of interest will naturally provide different results. The Panel believes Andersen painted themselves into a corner on the liability issue. Andersen has not proven that the State did not act in good faith in the negotiation process of this procurement.

Andersen, Case No. 1994-1, 1994 WL 16006490 (Mar. 9, 1994).

Similarly, even taking the allegations of Protestants' appeal at face value, nothing they have alleged constitutes bad faith. As *Andersen* makes abundantly clear, the State had a duty to try to negotiate the best deal it could with ACS. When ACS "painted itself into a corner" by refusing to make any concession on price, it was well within the State's good faith options and discretion to see if it could negotiate a better deal with Saber before deciding to accept ACS' significantly higher priced proposal.<sup>2</sup>

**3. Protestants' Allegation That "The Duties Of The Procurement Officer Are Non-Delegable And Representatives Of The [Project Executive Committee] And Third Parties Outside The [Project Executive Committee] Impermissibly Interjected And Applied Alternate Award Criteria And Otherwise Directed The Negotiations, Which Resulted In The Premature And Improper Negotiation Of A Contract With Saber" Should Be Dismissed. (Protest Ground Nos. A. 2 and 3.)**

Although Protestants now complain loudly about the Committee's involvement in contract negotiations, this complaint does not support any legally cognizable ground for interfering with the State's decision to award the CFS contract to Saber. As an initial matter, the Project Charter for the CFS project, which was available to all bidders in the procurement library and specifically referenced in the RFP (Record, p. 000183, ll. 258-262), clearly lists the five (5) agencies, including the Governor's Office, as the agencies jointly managing this project as the UGU. It is entirely appropriate for the Procurement Officer to seek input from these evaluators, the negotiation team, and project management concerning whether and what to negotiate. Protestants have not cited any legal authority to the contrary. Certainly in terms of the needs and objectives of the UGU, the Procurement Officer does not operate in a vacuum, but must consult the using agency, whether it be one or five.

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<sup>2</sup> Although the Code prohibited the State from disclosing exactly how much higher ACS' price was than Saber, it was approximately \$32 million dollars higher. Record p. 000013.

In any event, Protestants should be estopped from raising this ground. Prior to the beginning of negotiations between the State and ACS in December, ACS was aware of the Project Executive Committee. The Project Executive Committee consists of the following: the Director of the Department of Social Services; a representative of the Judicial Department (The Honorable Jean Toal); a representative of the Governor's Office (the Governor's Chief of Staff—Henry White or Tom Davis at all relevant times); a representative of the Clerks of Court (the Honorable Beulah Roberts); and a representative of the Budget and Control Board (Steve Osborne or James Bryant at all relevant times). The Project Executive Committee provides its recommendations and suggestions to the procurement officer based upon privileged material received from project-team members and counsel belonging in the realm of intra-governmental evaluation. The law recognizes and requires that input from the Project Executive Committee and ACS was fully aware of the Project Executive's Committee existence and involvement. It cannot be heard to complain now that there was an impermissible delegation of authority by the Procurement Officer when it knowing and willingly participated in the negotiations.

**B. APPEAL GROUNDS B -- PROTESTANTS' ALLEGATION THAT THE TERMS AND CONDITIONS OF THE NEGOTIATED SABER CONTRACT IMPERMISSIBLY LIMIT SABER'S LIABILITY TO THE STATE OF SOUTH CAROLINA SHOULD BE DISMISSED FOR VAGUENESS AND FAILURE TO STATE A CLAIM.**

Citing 23 S.C. Code Reg. § 19-445.2070, Protestants claim that the State impermissibly agreed during negotiations to limit aspects of Saber's potential liability to the State. Record, p. 000008. The clear and unambiguous language of Regulation 19-445.2070 does not apply to negotiations, but only to bids or proposals that, as submitted in response to a solicitation, attempt to impose conditions not contained in the solicitation. Specifically, Regulation 19-445.2070(D) provides: "Ordinarily 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." (Emphasis added).

As required by the RFP, Saber's proposal specifically agreed to comply with all terms of the RFP, including the liability provisions, and Protestants have not alleged to the contrary. In other words, Saber's proposal did not attempt to limit its liability in any way, and Regulation 19-445.2070 is inapplicable. Protestants contend that the negotiations "revised" the Saber proposal, but this makes no sense. It is axiomatic that a proposal is a unilateral offer to perform by an offeror. The record of negotiation ("RON") contains the terms negotiated by the State and Saber. Record, Exhibit 9, pp. 000512-000578. Clearly this does not constitute a proposal. Protestants' second challenge, therefore, should also be dismissed for failure to state a claim.

Protest Ground B should also be dismissed on vagueness grounds. Aside from the inapplicable Regulation 19-445.2070, Protestants generally claim that the State's negotiations and the resulting proposed contract terms are ultra vires and per se unenforceable. However, the Final Protest gives no hint as to the basis of the claim that the contract terms allegedly limiting the State's liability are ultra vires or unenforceable. Because this claim is not stated with sufficient specificity to pass muster under Section 11-35-4210(2)(b), it should be dismissed.

Finally, Protestants' allegation that the negotiated limitation of liability reflected in the RON is outside the general scope of the RFP should also be dismissed for the simple reason that it is untimely. Protestants raised this issue for the first time in their April 18, 2007 Appeal Letter. For the convenience of the Panel, attached is a DeltaView document showing a comparison of the Final Protest Letter to the Appeal letter. The issue of whether the negotiations were outside the general scope of the RFP in violation of § 11-35-1530(8) was not raised in

Protestants' initial protest. As this Panel has repeatedly held, issues not raised in the initial protest before the CPO cannot later be raised before the Panel. See In re: Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.; Appeal by DPConsultants, Inc. and Horizon Software Systems, Inc., Case 1998-6.

**C. APPEAL GROUNDS C – PROTESTANTS' ALLEGATION THAT SABER'S INITIAL PROPOSAL SHOULD HAVE BEEN REJECTED BECAUSE IT CONTAINED A MATERIAL MISREPRESENTATION REGARDING SCHEDULE AND WAS IMPROPERLY SCORED SHOULD BE DISMISSED.**

Protestants' Final Protest letter and its Appeal Protest allege only that "it is impossible for Saber to implement the Project in the manner and under the initial schedule identified in its proposal." The RFP implementation schedule consists of twelve (12) project components described in the RFP. Record, p. 217, § 3.1.2; p. 218, § 3.1.11. Within the twelve components, there are multiple deliverables, the description of which requires 32 pages within the 276 page RFP. Record, p. 218 § 3.2 through p. 250, 3.13.6.18. See also the Contract Deliverable Requirements List ("CRDL"), Record, pp. 372-376.

At no time prior to the CPO hearing did Protestants identify any specific project schedule component that Saber allegedly materially misrepresented its ability to complete timely. Further, the Appeal Protest fails to identify either a component or a deliverable that was "misrepresented" or what the "misrepresentation" was other than it was impossible for Saber to implement the project in the time and in the manner proposed. Certainly the very broad allegation of material misrepresentation in the implementation schedule and alleged impossibility of performance within some 32 pages of the RFP does not put the parties on notice of the issues to be decided.

At the CPO hearing, Protestants identified § 3.3 "System Validation Component". Record, pp. 226-228. Obviously, Protestants should have and could have identified this component as part of its Final Protest.

Furthermore, the naked allegation that the Evaluation Panel's scoring of the technical and business proposal was arbitrary and capricious, however, is precisely the sort of allegation that the Panel has rejected as being insufficiently detailed. The allegations in this ground are clearly overly vague and lack the specificity as required by S.C. Code Ann. § 11-35-4210( ) (Supp. 2006). See discussion as to the vagueness standard supra at pp.6-7, See also, In re: Protest By J&T Technology, Inc., Case No. 1987-3, 1987 WL 863241 (July 13, 1987) and In re: Protest of NBS Imaging Systems, Inc.; Appeal by NBS Imaging Systems, Inc. This protest ground should be dismissed as overly vague in violation of § 11-35-4210(2)(b) in that it does not state the grounds of protest "with enough particularity to give notice of the issues to be decided."

Protestants claim that Saber lied when it said that it could complete the CFS project according to the schedules included in its proposal. The statements upon which this Appeal Ground relies, however, are not statements of fact. Rather, they are statements as to future events. As such, they cannot support a successful protest on the grounds of misrepresentation. The CPO properly concluded that "[o]nly statements of fact can give rise to a protest on the grounds of misrepresentation. There cannot be misrepresentation of a promise of future performance." In Re: Protest of PS Energy; Appeal by PS Energy, Case No. 2002-9, 2002 WL 31955058 (July 3, 2002). The CPO based this conclusion on the following analysis by the Panel in granting a motion to dismiss a protest alleging misrepresentation:

No present or pre-existing fact was presented at the hearing before the Panel that supported this allegation of misrepresentation. The Panel found that this issue was predicated on unfulfilled promises or statements as to

future events and in the absence of any evidence that [an offeror] intentionally made false statements of fact this argument must fail.”

PS Energy. Because Protestants’ allegations of misrepresentation cannot support a claim for relief, they should be dismissed before hearing.

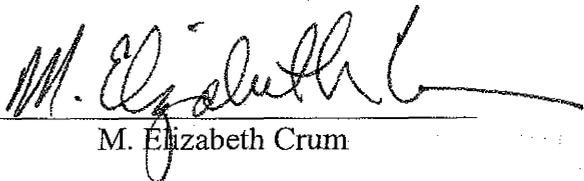
**D. APPEAL GROUND D -- PROTESTANTS’ ALLEGATION THAT SABER’S REVISED PROPOSAL DID NOT RESULT IN ANY BETTERMENT TO THE STATE AS COMPARED WITH ACS’ ORIGINAL PROPOSAL SHOULD BE DISMISSED FOR LACK OF SPECIFICITY**

Protestants’ Appeal Ground D asserts 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. 000009-000010. 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.” Record pp. 000009-000010 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 should be dismissed as overly vague and broad in violation of Section 11-35-4210(2)(b) (Supp. 2006). See S.C. Code Ann. § 11-35-2410 (providing that specified procurement decisions are “final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law”); In re: Protest of Santee Wateree Regional Transportation Authority, Case No. 2000-5 (“[T]he [Procurement Review] Panel will not re-evaluate proposals or substitute its judgment for that of the evaluators.”) (citations omitted).

## CONCLUSION

Saber adopts and supports the Using Governmental Units Motion to Dismiss ("UGU Motion"). For the foregoing reasons and the reasons set forth in the UGU Motion, Saber respectfully requests that this appeal be dismissed in its entirety. In the alternative, Saber respectfully requests that each of Protestants' grounds of appeal be dismissed individually in order to narrow the issues to be addressed at hearing.

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June 4, 2007

Columbia, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

Before the Procurement Review Panel  
RFP No. 07-S7279; CPO Decision No. 2006-161  
Case 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 )  
 )

SABER SOFTWARE, INC.'S  
HEARING BRIEF

Saber Software, Inc. ("Saber") hereby submits this hearing brief in opposition to ACS State and Local Solutions, Inc. ("ACS") and Protech Solutions, Inc. ("Protech") (collectively referred to as "Protestants") appeal of the Chief Procurement Officer's ("CPO") April 9, 2007 decision ("Decision") denying their March 9, 2007 protest in every respect. Saber has submitted its Motion to Dismiss ("Motion") with the Procurement Review Panel ("Panel"). If the Panel does not dismiss each ground of Protestant's appeal, the Decision should be sustained as outlined herein because ITMO acted consistent with South Carolina Consolidated Procurement Code §§ 11-35-10, et seq. (Supp. 2006) ("Code") and all applicable regulations in awarding the contract for the CFS project to Saber.

In order not to be repetitive, Saber adopts the positions, including the factual background discussion, contained in its Motion and adopts the facts and arguments contained in the Using Governmental Units ("UGU") Pre-Hearing Brief ("UGU Brief") and Motion to Dismiss ("UGU Motion") before the Procurement Review Panel ("Panel").

#### **BURDEN OF PROOF**

The determination to award a contract pursuant to S.C. Code Ann. § 11-35-1530(9) (Supp. 2006) is "final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law...."

S. C. Code Ann. § 11-35-2410(A) (Supp. 2006). The award in this case was made pursuant to S.C. Code Ann. § 11-35-1530(9). Protestants bear the burden of proving their protest issues by a preponderance of the evidence that the award was clearly erroneous, arbitrary, capricious, or contrary to law. In re Protest of Beckman Instruments, Inc., Appeal by Beckman Instruments, Inc. SCPD 1995-6C, 1997 WL 33477968, Civil Action No. 95-CP-40-2120 ("The court finds that the Panel correctly applied the preponderance of the evidence standard at the hearing and correctly determined that Beckman did not meet its burden of proof.") "Preponderance of the evidence" means the greater weight of the evidence, Pike v. S.C. Dep't of Transp., 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (citing 2 McCormick on Evidence § 336 (5th ed. 1999)), or "evidence which is more credible and convincing to the mind," Black's Law Dictionary, 1182 (6th ed. 1990):

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

In re Protest of Value Options, Magellan Behavioral Health, et al., Case No. 2001-7, p. 7, 2001 WL 34058932 (citation omitted) (emphasis added).

Moreover, contrary to the request of Protestants, the Panel has long ruled that it will not to re-evaluate the proposal and "second-guess" or substitute its judgment for the determination of the evaluators in this matter:

[A] determination by the State as to which proposal is the most advantageous considering price and the other evaluation criteria is final and conclusive unless such determination is "clearly erroneous, arbitrary, capricious, or contrary to law." The [Procurement Review] Panel has held numerous times that this section dictates that the Panel will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators.

In re Protest of Santee Wateree Regional Transportation Auth., Case No. 2000-5, pp. 4-5 (citations omitted). To prevail in this *quasi de novo, quasi appellate* action, Protestants must prove by the preponderance of the evidence that the determination to award the contract to Saber was clearly erroneous, arbitrary or contrary to law. Because Protestants cannot carry this burden, their protest should be denied.

## DISCUSSION

**A. Appeal Grounds A—Protestants’ allegation that the “procurement officer did not properly negotiate to conclusion with ACS, did not act independently and misapplied the award criteria stated in the RFP due to external pressure”—should be denied.**

It is uncontested that the price proposal submitted by ACS was almost \$32,000,000 more than Saber's. Protestants' burden is to prove that the Procurement Officer's discretionary decision to begin negotiations with Saber was clearly erroneous, arbitrary, capricious, or contrary to law.<sup>1</sup> As fully explained in the motion to dismiss, the decision is not contrary to the Code. Further, the decision to negotiate with Saber was neither clearly erroneous nor arbitrary or capricious.

The determination to begin negotiations with Saber was not clearly erroneous or arbitrary or capricious. Prior to the Procurement Officer making the determination to begin negotiations with Saber, the State undertook the following:

- December 6, 2006 the State sends an e-mail following up on the telephone request to ACS as to how and where it can reduce its price proposal. Record, p. 634;
- December 10, 2006, ACS refused to reduce its price. Record, p. 635.
- December 12 and 13, ACS and the State's negotiating team met with the ACS team. Record, p. 3.
- During these two full days of negotiations, the State was willing to concede major issues that ACS wanted, yet ACS was unwilling to give any price concession to the State.

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<sup>1</sup> Saber contends that the Procurement Officer's decision to begin negotiations with Saber is not subject to protest. The argument contained herein is in the alternative in the event the Panel finds that the determination to begin negotiations with the next ranked offeror is subject to protest.

- At the end of the two-day negotiation session, the State again ask ACS for additional concessions which could result in a lower cost to the State and ACS again refused.

In the face of ACS's persistent refusal to provide the State with any price concessions before and during two full days of unproductive negotiations, the Procurement Officer reviewed and shared with the UGU:

- the results of the negotiations with ACS and ACS's inflexibility on price reductions
- the Evaluators' scoring and comments
- a financial responsibility analysis prepared by a CPA working for the UGU's attorney
- the Evaluators' scoring on ACS' and Saber's technical proposals and the fact that out of a possible 50 points, ACS received 42.6 and Saber 41, only a 1.6 point differential

After briefing the UGU and receiving their input, the Procurement Officer made the determination that the State should negotiate with the second ranked vendor<sup>2</sup> because: 1) ACS refused to reduce its price, 2) the small<sup>3</sup> difference in total scores between the first and second ranked proposals; 3) the very close average technical scores; and 4) and almost \$32,000,000 lower price offered by Saber.

Record, pp. 508-510.

The Procurement Officer properly concluded that “a satisfactory contract [could] not be negotiated with the highest ranking bidder,” and exercised her discretion under § 11-35-1530(8)(a) to begin negotiations with Saber. Unquestionably, the Procurement Officer had a reasonable and rational basis for her decision and there is no evidence of bad faith on the part of the Procurement Officer or clear and prejudicial violation of relevant statutes and regulations that would be tantamount to a lack of reasonable or rational basis.

**B. Appeal Grounds B—Protestants’ allegation that the terms and conditions of the negotiated Saber contract impermissibly limit Saber’s liability to the State of South Carolina—should be denied.**

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<sup>2</sup> Saber was the only other offeror because the third offeror submitted its proposal after the bid opening deadline and was disqualified.

<sup>3</sup> Out of a possible 700 points, ACS received 570 and Saber received 555, only a 15 point or 2.6 percentage difference.

Saber renews the arguments contained in its Motion and joins in the arguments contained in the UGU Brief.

**C. Appeal Grounds C—Protestants' allegation that Saber's initial proposal should have been rejected because it contained a material misrepresentation regarding schedule and was improperly scored should be denied.**

The thrust of Protestants' claim here is that Saber lied<sup>4</sup> when it said that it could complete the CFS project according to its proposal schedule because it is impossible to do so. It is silly for Protestants to argue that it would be impossible for Saber to complete the CSES project within the timelines Saber has proposed, especially when the timelines that ACS has proposed are *nearly identical* to Saber's. Clearly, if ACS can implement the system in a substantially similar time frame to Saber's, Saber's schedule is not "impossible" and the proposed schedule is not a material misrepresentation.

Assuming for purposes of this Brief<sup>5</sup> that Protestants are again complaining of the System Validation Component, Saber understands that this component is critical for project success. So Saber looked for ways to shorten not just that component, but the whole project development cycle. To reduce total elapsed time and improve quality, Saber has proposed an iterative development methodology.<sup>6</sup> See Saber – Section 9.3.8, line 10602. An iterative development methodology is used to create a product incrementally, taking advantage of the experience derived from the development and use of earlier, deliverable versions of the system. The iterative development

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<sup>4</sup> *In Re: Protest of PS Energy; Appeal by PS Energy*, Case No. 2002-9 the Panel accepted the parties' stipulation that misrepresentation "was not a matter of responsiveness, not a matter of responsibility, and not a matter that makes the evaluators' actions arbitrary or capricious. Instead, misrepresentation is a matter of Good Faith and should result in rejection of a bid/proposal when the misrepresentation is made in bad faith or materially influences an agency determination or evaluation." ACS does not even allege that Saber's schedule was proposed in bad faith.

<sup>5</sup> Only during the CPO hearing did Saber or the UGU learn that Protestants complained about alleged material misrepresentation concerning § 3.3, System Validation Component. Yet again, Protestants have failed or refused to put the Panel, the UGU or Saber on notice as to what the material misrepresentation is regarding Saber's implementation schedule.

<sup>6</sup> ACS also proposed the Iterative Development Methodology. See ACS -- Section 03 Technical Solution, line 2734.

methodology allows for tasks to overlap or be done simultaneously, thus shorten the entire project development cycle.

Applying the iterative development methodology, a project starts with a small scope, goes through the requirements validation and verification, general system design ("GSD"), detailed system design ("DSD"), development, and test cycles multiple times. At the end of each iteration, the scope is expanded and the requirements, GSD, DSD development, and test cycle repeats. Iterations continue until all of the required scope is encapsulated in the new system. As the iterations continue, the process becomes more efficient as all participants adapt to the process.

As an example, because the project goes through the GSD cycle multiple times, it would be artificial to say where GSD starts and stops once the project begins. The lines between components blur using this methodology. The lines between the twelve "scheduled" components are just as blurry for ACS as they are for Saber. Thus, any discussion of individual components of the schedule and days assigned for completion for each becomes less relevant. What matters is the ultimate completion date after all iterations. As noted above, ACS has proposed an earlier, and to extend their logic, less likely, completion date compared to Saber.

Although Protestants may argue that ACS will be able to complete the project earlier because it already has access to some components of the project, this is also true for Saber. Among other things, Saber has access to at least two significant System Validation Components--the federal requirements and the RFP requirements. Saber has already loaded these requirements into its development tools and is cross referencing them for consistency. Other components already available to Saber include the GSD and DSD artifacts from the prior Unisys CSF project work, which the State made available to all offerors. Although the technology is different, the main user interactions and business process (the screen, form, and report layouts) is still valid and useable.

These data base elements form at least a starting point and the State has indicated no business process reengineering effort as part of the System Validation Component. Despite any cry by Protech and ACS to the contrary, therefore, ACS does not enjoy any advantage in terms of pre-existing materials that will make it "impossible" for Saber to complete the CFS project as outlined in the proposed schedule.

**D. Appeal Ground D—Protestants' allegation that Saber's revised proposal did not result in any betterment to the State as compared with ACS' original proposal—should be denied.**

The evidence at hearing will not support Protestants' Appeal Ground D—that the Procurement Officer's determination that the negotiated contract was the "most advantageous" to the State is "clearly erroneous, arbitrary and capricious." The average Evaluation Committee members' technical scores were only 1.6 points different between ACS and Saber. The concern expressed by the Evaluators regarding the financial strength of Saber was addressed with the Guaranty Agreement in the amount of \$15,000,000 "absolutely, unconditionally and irrevocably guarant[ing] the full and timely performance of all obligations . . . ." Record, p. 657. Given this guaranty and the lack of any substantive different between the parties' technical scores, the almost \$32,000,000 lower cost of the Saber project, it enough by itself to make Saber's proposal the most advantageous to the State.

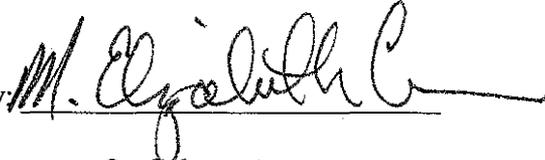
**CONCLUSION**

For the foregoing reasons, Saber respectfully requests that this appeal be denied and that the Panel uphold the Decision of the CPO.

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Respectfully submitted,

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June 4, 2007

Columbia, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

Before the Procurement Review Panel  
RFP No. 07-S7279  
CPO Decision No. 2006-161  
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ACS State and Local Solutions, Inc. )  
 )  
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Acquisition of CSES and FCCMS Services )  
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**CERTIFICATE OF  
SERVICE**

I, ElizaBeth A. Blich, do hereby certify that I have this date served one (1) copy of the Hearing Brief and the Motion to Dismiss and Memorandum in Support of Saber Software, Inc. upon the following counsel of record by causing said copies to be deposited with the United States Postal Service, first class postage prepaid and attached thereto, and addressed as follows:

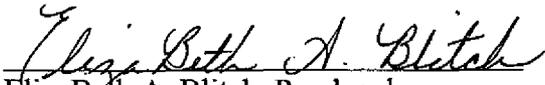
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