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Determination to Lift Automatic Stay

Matter of: Intralot, Inc.

Case No.: 2017-16

Posting Date: August 8, 2017

Contracting Entity: South Carolina Education Lottery

Solicitation No.: 5400013044

Description: Lottery Systems & Other Services

DIGEST

Request to Lift Automatic Stay is granted pursuant to S.C. Code Ann. §11-35-4210(7) which is included by reference. [Attachment 1]

ANALYSIS

By way of background, Division of Procurement Services, on behalf of South Carolina Lottery Commission (SCEL) seeks to procure lottery systems and other services for the South Carolina Education Lottery. Intralot, Inc., protested the intent to award to IGT Global Solutions Corporation (IGT), and the Chief Procurement Officer (“CPO”) has denied the protests. SCEL has requested that the automatic stay of procurement during protests be lifted based on Section 11-35-4210(7) of the South Carolina Consolidated Procurement Code (“Code”). See request from SCEL Interim Executive Director Hogan Brown, attached.

Briefly, according to Mr. Brown, the lottery generates well over \$1 million every day to support educational purposes and programs pursuant to the South Carolina Education Lottery Act, S.C. Code Ann. §§ 59-150-10, *et seq.* The total award for this contract is \$77.5 million over ten years.

Mr. Brown's request was submitted to the CPO after he completed an extensive administrative review of the protest. The review provided the CPO an insight into the complexity of lottery operations and the work involved with transitioning to a new contractor. Mr. Brown notes that, while the incumbent's contract may be extended, there are a number of reasons this would not provide the optimal circumstances for ongoing operations.

SCEL has planned a "cutover" date of March 15, 2018, when IGT should be positioned to assume all operations for the Education Lottery. According to Mr. Brown, there are a number of tasks IGT must accomplish by the cutover date, including:

- building a primary and backup data center
- converting millions of data records for the accurate and secure processing of both instant and draw game claims and retailer billing
- customizing IGT's propriety gaming and back office systems to meet the specific needs of SCEL
- training SCEL employees on the new system
- installing new terminals and necessary internet, cellular and satellite technology
- training over 3,800 retailers on the operation of the new equipment
- securing a warehouse to locate the data center and storage facility
- establishing security operations
- relocating numerous IGT employees to South Carolina

All this work must be completed weeks in advance of the cutover date to allow for testing the new system. Because of the protest and anticipated appeal, implementation of the project is already three weeks behind schedule.

Perhaps the most important reason to permit the contract with IGT to go forward, though, is the introduction of a new Powerball game, “Winner Take All,” on April 15, 2018, one month after the planned cutover. As Mr. Brown points out, South Carolina must offer this new game or stop offering Powerball tickets at all. It is imperative for the successful rollout of Winner Take All that the cutover date is achieved. Otherwise, SCEL may have to pay two vendors—Intralot and IGT—to add this game to their systems. The request describes what will happen:

To add this “game within a game” with one vendor for a few weeks and then switch to a new vendor will add complexity and costs to the conversion process. That scenario will require programing and testing for the old system while transactional data is being converted from one vendor to the new vendor. New play slips would have to be developed and printed for the old system, then thrown away, and replaced with new play slips that can only be read by the new vendor's system. Retailer training would be further complicated with training taking place for the new game on the old vendor's terminals only to require retraining of the employees on how to sell that game on a new vendor's system a few weeks later.

Regarding the automatic stay, the Consolidated Procurement Code reads,

In the event of a timely protest pursuant to subsection [11-35-4210](1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

S.C. Code Ann. § 11-35-4210(7).

Determination

After careful consideration of the request and based on consultation with Mr. Brown, my administrative review in connection with the protest, and the decision in that protest, I find that the award of the contract without further delay is necessary to protect the best interests of the State. Therefore, the automatic stay is lifted, and SCEL may proceed with the award of the contract without delay.

Written Determination, page 4

Case No. 2017-216

August 8, 2017

For the Information Technology Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer

Chief Procurement Officer



August 3, 2017

VIA EMAIL

Michael B. Spicer (mspicer@cio.sc.gov)
Chief Procurement Officer for Information Technology
1201 Main St., Suite 600
Columbia, SC 29201

Via U.S. Mail and email to Michael Spicer, Chief Procurement Officer

Re: In the Matter of the Protest of Intralot, Inc., Case 2017-151

Dear Mr. Spicer,

As Interim Executive Director of the South Carolina Education Lottery (SCEL), I am writing to request that the automatic stay be lifted in the above referenced matter pursuant to S.C. Code Ann. § 11-35-4210(7) so that the SCEL can meet its objective to promote economy and efficiency with regard to this procurement. We ask that this request be reviewed expeditiously pursuant to the General Assembly's mandate that all actions and proceedings for review involving the SCEL, including appeals regarding lottery vendor contracts, must be given priority of hearing in all courts and reviewing entities over all other causes, with the exception of elections cases. See S.C. Code Ann. §59-150-300(F). The contract termination date for the current vendor, Intralot, is March 14, 2018. The cutover date for the new contract is March 15, 2018. The RFP called for an eight (8) month implementation period. If the notice to proceed were issued today, the eight (8) month period would end April 4, 2018.

FACTS IN SUPPORT OF LIFTING THE STAY

The protest filed with the Chief Procurement Officer relates to a solicitation process that has

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been ongoing since October, 2016 when SCEL issued an RFP. Based upon a change in specifications, MMO withdrew the solicitation. A new RFP was issued on March 10, 2017, and an Intent to Award was posted on May 26, 2017.

The purpose of this solicitation was to acquire a lottery vendor Contractor to provide services and supplies and/or equipment for the operation of the SCEL as provided by the Lottery Act (Act 59 of 2001, as may be amended). As noted above, the current contract, awarded to the Protestant, concludes on March 14, 2018. Although the current contract allows SCEL to seek extension with the incumbent in case of factors beyond the control of SCEL, it is unclear as to whether the contract can be extended without approval of the State Fiscal Accountability Authority (SFFA) pursuant to S.C. Code Ann. § 11-35-2030 (4). There is absolutely no guarantee that the SFFA would approve the extension of the current vendor contract.

Even if the current contract could be extended, it is not fair to allow the incumbent vendor to benefit from the delay caused by its protest through additional payments of approximately \$565,000 per month. Intralot's protests cited to virtually no violations of the South Carolina Consolidated Procurement Code or regulations, complained about the solicitation belatedly (although Intralot has previously been a participant in the South Carolina procurement process), was based on long odds and speculation, and offered no proof that the actions it challenged were clearly erroneous, arbitrary, capricious or contrary to law. As you stated in your Decision:

This was an incredibly complex and expensive acquisition, conducted by a team of professionals who were highly skilled and knowledgeable about state lottery games. Perhaps there were imperfections—unsurprising for a process so detailed and complicated. There is nothing, however, impugning (sic) the fairness of this evaluation and award.

Further delay potentially allows Intralot to benefit by receiving additional fees based upon a delay in the implementation of the new on-line lottery system and services. Certainly, the potential harm to the State and its citizens, as discussed below, greatly outweighs any potential harm to Intralot, given the facts of this case.

Funds generated by SCEL are vitally important to the citizens of this State. Last year (FY 2016), SCEL turned over approximately \$405 million dollars of revenue to the State and this year (FY 2017) it has turned over approximately \$400 million. This amounts to well more than a \$1 million dollars per day being provided to the State for educational purposes and programs pursuant to S.C. Code Ann. § 59-150-350 and 355. Given the magnitude of this program and the important benefits it provides to the citizens of this State, it's necessary that the SCEL's efficiency be maintained through a smooth transition to the new vendor. Accordingly, SCEL does not believe that extending the current contract would be in the best interest of the State.

Additionally, the proposed new system will be much more efficient and operate with significantly more speed than the almost ten (10) year old technology.¹ The increase in speed is particularly important whenever a jackpot is more than \$500 million as the number of wagers increases exponentially.

In light of the issues discussed above, lifting the automatic stay is necessary for the SCEL to move forward as expeditiously and efficiently as possible with implementation of the contract so that IGT can use its best efforts to meet the cutover date of March 15, 2018. Because of the delay caused by this protest, project implementation is already behind schedule by approximately 21 days. Among other items, the major tasks that must be accomplished within this eight (8) month time period are: (1) the buildout for a primary and backup data center; (2) the conversion of millions of data records for the accurate and secure processing of both instant and draw game claims as well retailer billing; (3) customize their propriety gaming and back office systems to meet the specific needs of SCEL; (4) train SCEL employees on the new system; (5) the installation of new terminals and necessary internet, cellular and satellite technology; (6) train over 3,800 retailers on the operation of the new equipment; (7) secure a warehouse to locate the data center and storage facility; and (8) establish security operations, and the relocation of numerous employees to South Carolina. The new system must actually be subject to final testing and dual processing of data weeks before the official cutover date. The current lottery system, supplies and/or equipment are outdated and the terminals, for example, are having to be repaired or replaced more and more frequently. As the attached chart demonstrated, the rate of repair and the response time has increased significantly over the last year. See Attachment A.² The new system is necessary to ensure SCEL can continue our mission to provide proceeds to the Education Lottery Account for appropriation to education by the South Carolina General Assembly.

Additionally, overall performance on the current contract is likely to diminish as the employees of the incumbent are probably already looking for new employment. Field technicians, who ensure the retail terminals are fully operational, are most likely to leave and the least likely to be retained by the new vendor. When field service suffers, sales can suffer as well and thereby reduce the funds available to be allocated to education.

At this point, SCEL anticipates the conversion of the new supplies and/or equipment to take the entire eight months after notice to proceed has been given. Any delay jeopardizes the success of the project and the proposed transition to a new contract beyond the target date of March 15, 2018. As it stands now, we are losing time to a protest by the third-ranked offeror on the technical proposal and stand to lose many more months awaiting the resolution through the procurement appellate process. An expeditious lifting of the stay will mitigate the harm that would be caused to SCEL and students of South Carolina who rely on the General Assembly appropriations for scholarships and tuition assistance.

¹ The CPO for information technology can take notice of the fact that 10 years is an eternity in technology and significant advances have occurred.

² The data for the weeks from the October 2015 Flood and the October 2016 Hurricane were removed in order to not skew the trends.

Finally and importantly, to further support our request for lifting the automatic stay, on June 14, 2017, the Powerball Game Group voted to add a feature to Powerball, "Winner Take All", that adds two new draw dates and offers a new play option. In order to continue offering Powerball tickets for sale, South Carolina, like all states will be required to provide this new feature beginning April 15, 2018. This factor alone makes it imperative that the conversion is completed by March 14, 2018. To add this "game within a game" with one vendor for a few weeks and then switch to a new vendor will add complexity and costs to the conversion process. That scenario will require programming and testing for the old system while transactional data is being converted from one vendor to the new vendor. New play slips would have to be developed and printed for the old system, then thrown away, and replaced with new play slips that can only be read by the new vendor's system. Retailer training would be further complicated with training taking place for the new game on the old vendor's terminals only to require retraining of the employees on how to sell that game on a new vendor's system a few weeks later. The review of this request must be prioritized to carry out the necessary adaptations to continue offering sales of Powerball tickets and the generation of additional revenue through the new game.

CONCLUSION

We understand that the procurement review process exists for good reasons, and the requirements of the Procurement Code must be followed. However, the State and SCEL must be able to conduct its business without undue delay as necessary to protect the substantial interests of the state of South Carolina. Accordingly, we believe given the exigencies and circumstances in this case that the interests of the State are best served by lifting the stay so that the award of the contract may proceed without further delay.

With best regards,



Hogan Brown
Interim Executive Director

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Written Determinations Appeal Notice (Revised July 2017)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b), states:

- (1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:
- (b) requests for review of other *written determinations*, decisions, *policies*, and *procedures* arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(Emphasis added.) *See generally Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc.*, Case Nos. 1996-4 & 1996-5, *Protest of Charleston County School District*, Case No. 1985-5, *Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

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 111.1 of the 2016 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

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

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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.