

**BEFORE THE DESIGNATED HEARING OFFICER  
STATE OF NORTH CAROLINA  
DEPARTMENT OF INFORMATION TECHNOLOGY  
Proceeding No. 000-1000A**

AMPLIFY EDUCATION, INC.,            )  
  )  
                          Petitioner,        )  
  )  
                  v.                            )  
  )  
NORTH CAROLINA DEPARTMENT        )  
OF PUBLIC INSTRUCTION,            )  
  )  
                          Respondent,        )  
  )  
                  and                            )  
  )  
IMAGINATION STATION, INC.,        )  
  )  
                          Respondent-Intervenor.    )  
\_\_\_\_\_                                    )

**ORDER  
UPHOLDING STAY OF  
CONTRACT AWARD  
AND  
DENYING MOTION TO  
ENFORCE STAY WITH  
REGARDS TO THE  
MEMORANDUM OF  
AGREEMENT**

THIS MATTER came on to be heard before the undersigned Hearing Officer of the North Carolina Department of Information Technology (“NCDIT”) on 1 October 2019 and 3 October 2019 in accordance with Article 15 of Chapter 143B of the North Carolina General Statutes and Subchapter 6B of Section 9 of the North Carolina Administrative Code upon the Notice of Oral Argument regarding Motions to Reconsider filed by Respondent North Carolina Department of Public Instruction (hereinafter, “NCDPI” or “Respondent”) and Respondent-Intervenor Imagination Station, Inc. (hereinafter, “Istation” or “Respondent-Intervenor”) and Petitioner Amplify Education, Inc.’s (hereinafter, “Amplify” or “Petitioner”) Responses to these motions. Attorney Mitchell Armbruster represented Amplify at this hearing. Tiffany Lucas, Special Deputy Attorney General, represented NCDPI. Attorneys Kieran Shanahan and Andrew Brown represented Istation.

After reviewing and considering the parties' filings and supporting briefs, as well as the arguments of counsel at this hearing, the undersigned makes the following determinations:

### **I. STATEMENT OF JURISDICTION**

Pursuant to Article 3A of Chapter 150B of the North Carolina General Statutes and 09 NCAC 06B .1102, *et seq.*, NCDIT has jurisdiction over the parties and Request for Proposal ("RFP") No. 40-RQ20680730, which is the subject matter of the above-captioned contested case.

### **II. PROCEDURAL HISTORY**

On 20 August 2019, the parties received the previous Hearing Officer's order granting Amplify's Motion to Stay, thereby staying implementation the Read to Achieve contract awarded to Istation on 7 June 2019. On 21 August 2019, Istation filed a Motion for Reconsideration of the stay order. On 22 August 2019, NCDPI filed a Motion for Reconsideration of the stay order. On 22 August 2019, Amplify responded Istation's Motion for Reconsideration. On 29 August 2019, Amplify responded to NCDPI's Motion for Reconsideration and also filed a motion to enforce the stay against NCDPI, which has entered into a separate Memorandum of Agreement with Istation to provide its services at no cost. The undersigned held a hearing on the motions on 1 October 2019 and 3 October 2019. On 3 October 2019, the undersigned orally granted the motions to reconsider the stay order and set the date for the administrative hearing on 9 December 2019. On 19 November 2019, the undersigned continued the hearing date until 13 January 2020 at the request of NCDPI and Istation. Amplify's Motion to Stay is now pending before the undersigned.

### III. FINDINGS OF FACT

1. The undersigned finds the following factual basis solely for the purpose of deciding this Motion. These facts are not binding at a final hearing on the merits.<sup>1</sup>

2. Petitioner Amplify is a New York corporation that provides education curriculum and assessment services nationwide.

3. Respondent NCDPI is a state agency of North Carolina. The Superintendent of Public Instruction, along with the North Carolina State Board of Education, is the constitutionally designated administrator of the state's free public school system. See N.C. Const. art. 9, § 4(2); N.C. Gen. Stat. § 115C-19.

4. Respondent-Intervenor Istation is a Texas corporation that provides education curriculum and assessment services nationwide.

5. North Carolina's Read to Achieve law, N.C. Gen. Stat. § 115C-83.1 *et seq.*, requires the NC State Board of Education to make valid, reliable, formative, and diagnostic reading assessments available to local school administrative units in order to assess kindergarten, first, second, and third grade students.

6. On 25 August 2016, NCDPI awarded a contract to Amplify to provide the diagnostic and assessment services required by the Read to Achieve legislation at that time.

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<sup>1</sup>See Scarborough v. Dillard's, Inc., 363 N.C. 715, 722, 693 S.E.2d 640, 644 (2009); White v. White, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979).

7. In the 2017 legislative session, the North Carolina General Assembly passed legislation directing NCDPI to issue an RFP for a statewide diagnostic reading assessment instrument. N.C. Sess. Law. 2017-57, § 7.27.(b).

8. The legislation directed the State Superintendent to assemble an evaluation panel of NCDPI employees tasked with evaluating all bid proposals to select one vendor to provide the assessment instrument or instruments with approval from the State Superintendent. Id. at §7.27.(c).

9. The session law instructed the evaluation panel to consider, at a minimum, the following factors when evaluating bid proposals:

- (1) The time required to conduct formative and diagnostic assessments with the intention of minimizing the impact on instructional time.
- (2) The level of integration of assessment results with instructional support for teachers and students.
- (3) The timeliness in reporting assessment results to teachers and administrators.
- (4) The ability to provide timely assessment results to parents and guardians.

Id.

10. In the same legislative session, the North Carolina General Assembly enacted Session Law 2017-127, which sought to ensure students with learning disabilities, including dyslexia and dyscalculia, receive “necessary and appropriate screenings, assessments, and special education services to provide interventions for learning difficulties.” N.C. Sess. Law. 2017-127 § 1. The session law required the State Board of Education to develop and make available information regarding the characteristics of dyslexia, educational methodologies, and screenings to parents, educators, and other interested parties. Id. at §3. Finally, local boards of education were instructed to, “review diagnostic tools and screening instruments used for dyslexia, dyscalculia, or other specific learning disabilities to ensure that they are

age-appropriate and effective and shall determine if additional diagnostic and screening tools are needed.” Id. at §4.

11. On 6 December 2017, NCDPI issued an RFP for the Read to Achieve initiative, which was publicly opened on 11 January 2018.

12. The 6 December 2017 RFP included the requirement for the assessment tool to screen for learning disabilities, including dyslexia and dyscalculia, in order to satisfy the requirements of N.C. Sess. Law 2017-127. (RFP No. 40-RQ20680730)

13. On or around 21 March 2018, NCDPI cancelled the 6 December 2017 RFP with the intention to rebid the project. Reasons cited for the cancellation included that it was in the best interest of the State to cancel, the project would be rebid with clarified specifications, and rebidding the project would allow for time for implementation for the 2019-2020 school year.

14. On 6 September 2018, NCDPI issued a second RFP for the Read to Achieve program. The RFP indicated that a “tradeoff method of source selection” would be used to evaluate all bid proposals. The evaluation criterion were listed in relative order of importance as follows:

- 1) Substantial Conformity to specification
- 2) RtAD Desired Specifications
- 3) Proof of Concept/Demonstration
- 4) Vendor Cost Proposal
- 5) Strength of References
- 6) Vendor Financial Stability

(RFP No. 40-RQ20680730, p. 14)

15. The RFP included “Project Management Specifications” and required the vendors to comply with and support NCDIT project processes as set out by the Enterprise Project Management Office. (RFP No. 40-RQ20680730, pp. 31-33)

16. On 2 October 2018, NCDPI publicly opened the RFP.

17. NCDPI received four bid proposals in response to the RFP from the following vendors: Amplify, Curriculum Associates, Istation, and NWEA.

18. The State Superintendent appointed the following NCDPI employees to serve as voting members on the evaluation panel:

- 1) Berry, Erika
- 2) Belcastro, Rebecca
- 3) Day, Kristi
- 4) Dewey, Cynthia
- 5) Gossage, Chloe
- 6) Hoskins, Matt
- 7) Jablonski, Amy
- 8) Johnson, Mia
- 9) Karkee, Thakur
- 10) Laney, Susan
- 11) Loeser, Lynne
- 12) Parrish, Tonia
- 13) Pond, Karl
- 14) Shue, Pamela
- 15) Whitford, Abbey

(Amplify Request for Hearing, Read to Achieve Diagnostics – Software as a Service, Proposal Evaluation KickOff Meeting, Tab 4)

19. On 5 October 2018, NCDPI held the proposal evaluation kickoff meeting.

20. On 22 October 2018 and 23 October 2018, the evaluation panel held vendor demonstrations at NCDPI.

21. On 19 November 2018 and 20 November 2018, the evaluation panel held two meetings to rank the bid proposals based on the evaluation criteria. During the meetings, committee members were directed to vote “yes,” “no,” or “maybe” on each specification. “Yes” votes awarded a vendor points for ranking purposes. “Maybe” votes indicated the team was unsure about conformity, and further clarification may occur during negotiations. “No” votes awarded no points. The panel noted that a vendor would be chosen based on consensus

among the evaluation panel, and consensus meant “general agreement and not unanimity.” (Amplify Request for Hearing, Read to Achieve 2018 (RtAD) Evaluation Consensus Meeting notes, 11/19/2018 – 11/20/2018, Tab 4)

22. The evaluation panel ranked Amplify first, Istation second, Curriculum Associates third, and NWEA fourth. (Amplify Request for Hearing, Read to Achieve 2018 (RtAD) Evaluation Consensus Meeting notes, 11/19/2018 – 11/20/2018, Tab 4)

23. On 8 January 2019, the evaluation panel members attended a meeting to recommend a finalist for negotiations. Six voting members recommended negotiating with Amplify only. Three voting members recommended negotiating with Istation only. One voting member recommended negotiating with both Amplify and Istation. The meeting notes reflect that the evaluation panel discussed conducting negotiations with both Amplify and Istation following the vote. (Amplify Request for Hearing, Read to Achieve 2018 (RtAD) Evaluation Consensus Meeting notes, 01/08/19, Tab 4)

24. On 8 March 2019, the NCDPI General Counsel informed the evaluation panel that a voting member breached the confidentiality of the procurement process and also noted that the panel did not reach unanimous consensus in recommending one vendor. (Amplify Request for Hearing, Read to Achieve 2018 (RtAD) Evaluation Consensus Meeting notes, 3/8/19, Tab 4)

25. On 21 March 2019, NCDPI Procurement Section Chief, Tymica Dunn, submitted a document entitled “Request for RFP Cancellation” to Patti Bowers, Deputy State CIO and Chief Procurement Officer at NCDIT. The document requested NCDIT’s approval for NCDPI to move to negotiations with two vendors: Amplify and Istation. The document states that both vendors appear capable of satisfying NCDPI’s business needs and lists the offer price for both vendors without specifying the length of the contract term. The offer prices were noted to be \$12,102,096.08 for Amplify’s product and \$3,098,606.17 for

Istation's product. The document further states that soliciting offers again "would serve no valuable purpose" and that negotiations with the two vendors would "maximize the State's ability to obtain best value based on the evaluation factors set form [sic] in the solicitation." No reason for the requested cancellation was given. (Amplify Request for Hearing, Exhibit C to Tab 3)

26. On or about 21 March 2019, Ms. Dunn notified Amplify and Istation in a letter misdated February 21, 2019 that NCDPI cancelled the RFP and that NCDPI intended to engage in negotiations with their companies. In doing so, NCDPI established the negotiation criteria when it provided Amplify and Istation with the following "Negotiation Needs/Agenda" and "Software Service Requirements":

#### Cost Proposal

Deployment of a formative and diagnostic assessment service that allows teachers to monitor the development of each student's foundational reading skills and reading comprehension levels; provides instant analysis and reporting that identifies the needs of each student with recommended next steps to provide appropriate interventions and enhance student's reading skills and translates classroom and student level reports into customized instruction.

Ability to highlight patterns for detailed analysis and targeted instruction and generate progress reports for parents.

Initial training for end users.

Deep dive training for NCDPI appointed representatives for ongoing end user training.

SaaS solution should meet NCDPI's obligations under the foregoing state laws, which can be found at N.C.G.S. 115C-83.1, et. seq.

RtAD -SaaS will assess kindergarten through third grade students with valid, reliable, formative and diagnostic reading assessments.

RtAD -SaaS solution will assess student progress, diagnose difficulties, inform instruction and remediation, and yield data that can be used with the Education Value-Added Assessment System (EVAAS).

(Amplify Request for Hearing, Amplify Protest Letter and Request for Protest Meeting, Exhibit B to Tab 2)

27. On 27 March 2019, NCDIT completed a form entitled “Statewide IT Procurement Office Purchase Transaction Approval (PTA) Form for Cancellation” memorializing the approval of the cancellation. NCDIT noted that NCDPI intended to conduct negotiations with the vendors, “based on the evaluation factors set forth in the solicitation.” The PTA Form for Cancellation included the following reason for the cancellation request: “the prices were at a disparate price range.” (Amplify Request for Hearing, Amplify Follow-up from Protest Meeting, Exhibit B to Tab 3)

28. In April 2019, Amplify offered a reduced bid proposal of \$3.8 million annually (plus professional development costs). Istation offered a bid of \$2.8 million annually (plus professional development costs). (Amplify Request for Hearing, NCDPI Final Decision in Response to Amplify’s Protest, Attachment C to Tab 1)

29. In May 2019, the evaluation panel consisted of the following voting members:

- 1) Berry, Erika
- 2) Craver, Nathan
- 3) Karkee, Thakur
- 4) Shue, Pam[ela]

(Amplify Request for Hearing, NCDPI Contract Award Recommendation, Exhibit F to Tab 1)

30. The evaluation criteria listed in the Recommendation for Award “in order of importance” were:

- Cost
- Vendor Financial Stability
- Formative and Diagnostic Assessment
- Personalized Learning

(Amplify Request for Hearing, NCDPI Contract Award Recommendation, Exhibit F to Tab

1)

31. These criteria are not the same as those listed in the 21 March 2019 negotiation letter. (Amplify Request for Hearing, Amplify Protest Letter and Request for Protest Meeting, Exhibit B to Tab 2)

32. In Section 5 of the Contract Award Recommendation, NCDPI stated, “Pursuant to the definition of ‘Negotiation’ in 9 NCACGB.0102, DPI conducted negotiations with two (2) of the four (4) vendors to maximize the State's ability to obtain best value **based on the evaluation factors determined appropriate.**” (Amplify Request for Hearing, Exhibit F to Tab 1 (emphasis added))

33. This evaluation panel recommended the Read to Achieve contract be awarded to Istation. The evaluation panel presented this final recommendation to the State Superintendent.

34. On 23 May 2019, with the State Superintendent’s approval, the evaluation panel recommended Istation to the State Board of Education, and the State Board of Education approved that recommendation.

35. On 23 May 2019, NCDPI submitted the Award Recommendation to NCDIT requesting an award to Istation.

36. On 7 June 2019, NCDIT approved the Read to Achieve contract award to Istation. The procurement was reviewed and approved by NCDIT’s Enterprise Project Management Office. (Statewide IT Procurement Office Purchase Transaction Approval (PTA) Form, Attachment 4 to Istation’s Prehearing Statement)

37. On 24 June 2019, Amplify sent a letter to NCDPI formally protesting the contract award to Istation and the procurement process.

38. On 18 July 2019, NCDPI held a protest meeting with Amplify.

39. On 24 July 2019, NCDPI notified Amplify that it was not going to change the procurement award, and provided reasons for the RFP cancellation as follows:

- a. breach of confidentiality agreement;
- b. unfair and improper ranking procedures;
- c. misstatements of fact leading to improper rankings;
- d. improper weights leading to improper rankings; and
- e. lack of consensus and unclear basis for comparison

(Amplify Request for Hearing, NCDPI Final Decision in Response to Amplify's Protest, Attachment B to Tab 1)

40. The letter from NCDPI also stated that the change in evaluation criteria did not result in a material change to scope or intent of the solicitation. (Amplify Request for Hearing, NCDPI Final Decision in Response to Amplify's Protest, Attachment C to Tab 1)

41. On 26 July 2019, Amplify sent a supplemental letter to NCDPI containing more information regarding the procurement process.

42. On 2 August 2019, Amplify filed a Request for Hearing and Motion to Stay with NCDIT.

43. On 19 August 2019, NCDIT granted the Motion to Stay the contract award to Istation based on the parties' filings.

44. On 24 August 2019, the contract awarded to Amplify for the Read to Achieve program in 2016 expired by its own terms.

#### IV. CONCLUSIONS OF LAW

1. Subchapter 6B of Section 9 of the NC Administrative Code provides the State CIO, or his designated Hearing Officer, the authority to hear and rule on information technology procurement protest hearings.

2. Pursuant to 09 NCAC 06B .1102(c)(3), after an offeror submits a protest to a purchasing agency and "if" the State CIO determines that the protest is valid, the following outcomes "may" occur:

- (A) The award and issued purchase order shall be canceled and the solicitation for offers to contract is not re-bid;
- (B) The award and issued purchase order shall be canceled and the solicitation for offers to contract is re-bid;

(C) The award and issued purchase order shall be canceled and the contract shall be awarded to the next lowest priced, technically competent, qualified offeror, if that offeror agrees to still honor its submitted bid.

3. The inclusion of the word “if” prior to a list of possible actions to be taken signifies a condition precedent, where an action should not be performed unless a specified event has taken place. See Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 351, 298 S.E.2d 357, 362 (1983) (“The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event.’ ... Use of the words ‘whether’ and ‘if’ obviously are words of ‘the like’ which give ‘clear indication that a promise is not to be performed except upon the happening of a stated event,’ the definition of a condition precedent.”) (emphasis omitted) (citing Jones v. Palace Realty Co., 226 N.C. 303, 37 S.E. 2d 906 (1946)).

4. Additionally, the outcomes presented in 09 NCAC 06B .1102(c)(3) are not required to be taken by the State CIO; rather, the listed outcomes “may” occur following a determination by the State CIO that a protest is valid.

5. The term “may” has long been interpreted by North Carolina courts to be permissive, not mandatory, and that, “the power granted can be exercised in the actor’s discretion, but the actor need not exercise that discretion at all.” Silver v. Halifax Cty. Bd. of Comm’rs, 371 N.C. 855, 864, 821 S.E.2d 755, 761, 2018 (citing State v. Johnson, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)); In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978); Felton v. Felton, 213 N.C. 194, 195 S.E. 533 (1938); Rector v. Rector, 186 N.C. 618, 120 S.E. 195 (1923).

6. NCDIT and the State CIO have the explicit authority in statute to review and approve information technology projects and set procurement standards (N.C.G.S. § 143B-1321(a)(8)); to review financial resources of State agencies for information technology

(N.C.G.S. § 143B-1321(a)(15)); to manage information technology resources to facilitate efficient and economic use (N.C.G.S. § 143B-1321(a)(27)); to review and approve information technology projects and provide for the procurement of information technology resources by agencies (N.C.G.S. § 143B-1322(c)(14)); to review, approve and monitor information technology projects and to cancel or suspend approval of projects (N.C.G.S. § 143B-1340); to approve procurements and to establish consistent procurement processes, specifications, and standards (N.C.G.S. § 143B-1350(a)); to review and approve procurements and award recommendations (N.C.G.S. § 143B-1355); and to approve information technology contracts for storage, maintenance and use of State data by a private vendor (N.C.G.S. § 143B-1378(c)).

7. NCDIT's administrative rules also provide the State CIO and NCDIT with broad authority to review, modify, deny, or approve purchasing agencies' actions during the procurement process and to cancel procurement awards. See 09 NCAC 06B .0101 (purchasing agency must request authorization for procurement that exceeds its delegated authority from the State CIO); 09 NCAC 06B .0201 and .0202 (NCDIT can modify or approve of a purchasing agency's solicitation specifications); 09 NCAC 06B .0301(c)(1) (State CIO may approve of alternative methods to advertise solicitations under an agency's delegation); 09 NCAC 06B .0301(d)(4) (State CIO shall review and must approve a purchasing agency's solicitation documents prior to the agency continuing with the procurement process); 09 NCAC 06B .0301(d)(4)(C) (State CIO shall review and either approve or direct modification of an agency's final recommendation for award, including cancelling the award); 09 NCAC 06B .0301(d)(5) (State CIO must give prior approval for contract terms to exceed three years); 09 NCAC 06B .0302(1)(b) (State CIO may approve different types of solicitations other than those listed in the rules and must approve of alternative best value source selection methodologies); 09 NCAC 06B .0303 (State CIO must approve limitations to

electronic procurement methods set by purchasing agencies); 09 NCAC 06B .0309 (State CIO must approve offeror's participation in the evaluation process after submitting or clarifying offers or negotiations); 09 NCAC 06B .0314 (purchasing agency can request a waiver of the required methods to advertise, publish, and notify the public of solicitations, addenda, modifications, and notices of awards); 09 NCAC 06B .0316(a) and (d) (purchasing agency must request prior approval from State CIO to enter into direct negotiations with one or more vendors and to modify solicitations during negotiations); 09 NCAC 06B .0901(a) (purchasing agency shall submit a written request to limit or waive competition to the State CIO for approval); 09 NCAC 06B .1102(c)(3) (State CIO has the discretion to cancel contract awards if a valid protest has been filed by an unsuccessful offeror); 09 NCAC 06B .1004 (Written approval of the State CIO is required before an agency can purchase goods or services from or through an agency employee); 09 NCAC 06B .1302 (prior verbal approval from the State CIO required for emergency purchased unless state offices are closed) 09 NCAC 06B .1304 (State CIO can approve an increase to an agency's general delegation); 09 NCAC 06B .1305 (State CIO may conduct compliance reviews of purchasing practices and records from any purchasing agency).

8. State CIO approval, limitation or determination, as used within the NCDIT rules, is defined as, "the judgment applied to the particular factual basis for the procurement decision under the rule or rules, utilizing the knowledge and qualifications of the office, the needs of the State, and information provided by the agencies involved." 09 NCAC 06A .0102(26).

9. The State CIO or Hearing Officer also possess the authority to rule on motions and issue orders as deemed to be appropriate during the hearing process. 09 NCAC 06B .1107(a).

10. NCDIT statutes, like others, must be construed with the primary goal of aligning the interpretation with the intent of the legislature. See Stevenson v. Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972) (“In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.”)

11. NCDIT’s statutes, being *in pari materia*, must be construed and applied together in this case, just as North Carolina courts have done in innumerable cases since their establishment in the 18th century. See Bell v. Hill, 2 N.C. 72 (1794); (“Of course, section 7 and section 10 [of Public Law 1921-Chapter 2 regarding public road construction], being *in pari materia*, must be construed together.”) Cameron v. State Highway Com., 188 N.C. 84, 89, 123 S.E. 465, 467 (1924); In re Brownlee, 301 N.C. 532, 549, 272 S.E.2d 861, 871 (1981) (“Statutes which deal with the same subject matter must be construed *in pari materia*... and harmonized, if possible, to give effect to each.” (citing Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967) and Jackson v. Guilford County Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969)).

12. In reviewing the State CIO’s authority under the relevant statutes and rules *in pari materia*, the State CIO and his designated Hearing Officer have the discretion to cancel a contract award or stay an award pending further action by NCDIT, including further investigation into a protested procurement.

13. There is sufficient information before the undersigned presented in the parties’ filings and during oral argument to indicate that NCDPI failed to fully consider the minimum required factors listed in N.C. Sess. Law. 2017-57 § 7.27.(c), and instead, relied on other evaluation factors.

14. There is sufficient information before the undersigned presented in the parties’ filings to indicate that NCDPI evaluated different negotiation criteria than what was

provided to the parties in the 21 March 2019 negotiation letter in violation of 09 NCAC 06B .0302(1) and (2), which require notification to vendors and consistent utilization of evaluation criteria in the procurement process.

15. There is sufficient information before the undersigned presented in the parties' filings to indicate that NCDPI not only changed the evaluation criteria, but altered the ranking of the importance of remaining criteria in a way that benefited Istation.

16. There is sufficient information before the undersigned presented in the parties' filings and oral arguments to indicate that NCDPI did not notify the parties of changes to the solicitation documents in violation of 09 NCAC 06B .0314.

17. According to NCDPI's Request for Cancellation completed on 21 March 2019, NCDPI communicated to NCDIT that it would use the evaluation criteria contained in RFP No. 40-RQ20680730 in its negotiations with Amplify and Istation. There is sufficient information before the undersigned presented in the parties' filings and oral arguments to indicate that NCDPI materially altered the intent or scope of the solicitations during negotiations and did not notify NCDIT of these changes in violation of 09 NCAC 06B .0316.

18. There is sufficient information before the undersigned presented in the parties' filings and oral arguments to indicate that NCDPI removed all evaluation panel members who voted for Amplify in the fall of 2018 during the RFP process, and in selecting a vendor during subsequent negotiations, NCDPI retained only those evaluation panel members who had previously voted for Istation.

19. In sum, the evidence and arguments of record presented thus far are sufficient to indicate that NCDPI failed to comply with applicable statutory law and information technology procurement rules promulgated in 09 NCAC 06B and jeopardized the integrity and fairness of the procurement process.

20. In this matter, the State CIO could have exercised his discretion to summarily cancel the contract award. Instead, he chose an alternative measure to temporarily stay the award for the duration of the requested administrative hearing.

21. In light of the evidence presented and in accordance with NCDIT's statutory and regulatory responsibility to ensure information technology procurements are properly awarded and State funds are appropriately expended on information technology procurements, the State CIO's stay of the contract award on 19 August 2019 was proper.

22. In addition, the undersigned was designated by the State CIO to be the Hearing Officer as to the protest of the procurement process and contract award to Istation. The authority and matters under the purview of the undersigned rest solely in the protest of the subject procurement. The undersigned does not have jurisdiction to review, approve, suspend, or cancel the no-cost Memorandum of Agreement that was entered into by NCDPI and Istation.

## V. CONCLUSION

It is therefore ORDERED that:

1. Petitioner Amplify's Motion for Temporary Stay is UPHELD and DPI shall cease implementation of the 7 June 2019 contract award pending a full evidentiary hearing and decision on the merits.

2. Petitioner Amplify's Motion to Enforce the Stay as it pertains to the no-cost Memorandum of Agreement entered into by NCDPI and Istation is DENIED.

This the 9<sup>th</sup> of December, 2019

/s/ Jonathan D. Shaw  
Jonathan D. Shaw  
Hearing Officer

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Department of Information Technology sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

J. Mitchell Armbruster  
Edward F. Roche  
Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, L.L.P.  
P.O. Box 2611  
Raleigh, NC 27602  
marmbruster@smithlaw.com  
eroche@smithlaw.com

Tiffany Lucas  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, NC 27602  
tlucas@ncdoj.gov

Ryan Boyce  
Philip Thomas  
North Carolina Department of Public Instruction  
301 N. Wilmington Street  
6301 Mail Service Center  
Raleigh, NC 27699-6301  
Ryan.boyce@dpi.nc.gov  
Philip.thomas@dpi.nc.gov

Kieran J. Shanahan  
Brandon S. Neuman  
Andrew D. Brown  
Shanahan Law Group, PLC  
128 E. Hargett Street, Suite 300  
Raleigh, NC 27601  
kieran@shanahanlawgroup.com  
bneuman@shanahanlawgroup.com  
abrown@shanahanlawgroup.com

This the 9<sup>th</sup> day of December, 2019.

/s/ Jonathan D. Shaw  
Jonathan D. Shaw  
Hearing Officer