UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF AND SANCTIONS DENIED: March 19, 2008

CBCA 449

NAVIGANT SATOTRAVEL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James H. Roberts, III and Carrol H. Kinsey, Jr. of Van Scoyoc Kelly PLLC, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **KULLBERG**.

KULLBERG, Board Judge.

Navigant SatoTravel (NST) has moved for summary relief in this appeal. NST has challenged the contracting officer's decision that demanded payment of industrial funding fees (IFF) in the amount of $292,609.50. Appellant has also moved for sanctions against the Government for the recovery of its legal costs. We deny both motions.

This case was docketed previously at the General Services Administration Board of Contract Appeals (GSBCA) as GSBCA 16873. On January 6, 2007, in accordance with section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the Civilian Board of Contract Appeals (CBCA) was established,[1] and this case was then docketed by the CBCA as CBCA 449.[2] The holdings of the GSBCA and other predecessor boards of contract appeals are binding on this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486.

Background

On March 24, 2004, the Federal Supply Service (FSS) of the General Services Administration (GSA) issued solicitation number FBGT-RK-040001-B (solicitation), Travel Services Solutions (TSS). Appeal File, Exhibit 28.[3] The solicitation referenced multiple award schedule (MAS) number 599. *Id*. The types of services called for under the solicitation were classified by special item numbers (SINs). *Id*. at 6. Those travel-related services under the statement of work (SOW) included: travel consultant services (SIN 599-1), travel agent services/travel management center services (SIN 599-2), new products/services (SIN 599-99), and contract support items (SIN 599-1000). *Id*. at 9-20.

The clause at solicitation paragraph C.19 was General Services Administration Regulation (GSAR) 552.238-74, Industrial Funding Fee and Sales Reporting (JUL 2003),[4] which provided in pertinent part the following:

> (a) Reporting of Federal Supply Schedule Sales. The Contractor shall report all contract sales under this contract as follows:

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[1] With the establishment of the CBCA, the GSBCA and the boards of contract appeals for the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs ceased to exist, and the cases, personnel (unless appointed to other positions within those agencies), and other resources of those former boards were transferred to the CBCA.

[2] This case was originally assigned to Judge Parker, and it was subsequently reassigned to Judge Kullberg on February 8, 2007.

[3] All exhibits are found in the appeal file, unless otherwise noted.

[4] 48 CFR 552.238-74 (2003).

> (1) The Contractor shall accurately report the dollar value, in U.S. dollars and rounded to the nearest whole dollar, of all sales under this contract by calendar quarter (January 1-March 31, April 1-June 30, July 1-September 30, and October 1-December 31). The dollar value of a sale is the price paid by the Schedule user for products and services on a Schedule task or delivery order. The reported contract sales value shall include the Industrial Funding Fee (IFF). The Contractor shall maintain a consistent accounting method of sales reporting, based on the Contractor's established commercial accounting practice. The acceptable points at which sales may be reported include–
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> (I) Receipt of order;
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> (ii) Shipment or delivery, as applicable;
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> (iii) Issuance of an invoice; or
>
> (iv) Payment.
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> (2) Contract sales shall be reported to FSS within 30 calendar days following the completion of each reporting quarter. The Contractor shall continue to furnish quarterly reports, including "zero" sales, through physical completion of the last outstanding task order or delivery order of the contract.
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> (3) Reportable sales under the contract are those resulting from sales of contract items to authorized users unless the purchase was conducted pursuant to a separate contracting authority such as a Governmentwide Acquisition Contract (GWAC); a separately awarded FAR [Federal Acquisition Regulation] Part 12, FAR Part 13, FAR Part 14, or FAR Part 15 procurement; or a non-FAR contract. Sales made to state and local governments under Cooperative Purchase authority shall be counted as reportable sales for IFF purposes.

Exhibit 28 at 35-36. Additionally, the clause provided that "[t]he fee is included in the award price(s) and reflected in the total amount charged to ordering activities." *Id*. at 36.

On May 5, 2004, GSA awarded to NST contract GS-33F-200-P (FSS contract) under the solicitation. Exhibit 29. Under the FSS contract, NST would provide services under SINs 599-2, 599-99, and 599-1000. *Id*. at 2. NST's rates for services under SIN 599-2 included an IFF rate of $1.50 per transaction, and its rates for services under SINs 599-99 and 599-1000 included an IFF rate of 0.75%. *Id*.

On September 2, 2004, the Army Contracting Agency-ITEC4 (DoD) issued request for quotations (RFQ) W91QUZ-04-T-0016 for the "acquisition of official travel management and related additional services . . . of authorized [DoD] travelers whose duty station is within Defense Travel Region 6 (DTR6)."[5] Exhibit 1 at 44, ¶ C.1.1. The various types of services to be provided were described in a SOW in section C of the RFQ. *Id*. at 44-90. The RFQ stated that "travel management services shall be provided using both traditional methods and automated methods using the Defense Travel System (DTS) web portal." *Id*. at 44. Other services to be provided under the RFQ included full- and part-time travel agents to staff certain locations and the movement of human remains. *Id*. at 59-60, ¶¶ C.7.3, C.7.7.

Paragraph L.1.2 of the RFQ stated that the "Government contemplates award of one Firm Fixed Price task order with a base period of 5 months, plus 2 option periods of 6 months and 1 months [sic]." Exhibit 1 at 78. Paragraph L.4 provided that "[a]t the time of award of any contract resulting from this solicitation, the successful Offeror's offer will be incorporated by reference as part of the contract." *Id*. at 80. An offer under the RFQ meant an "'offer' as described in FAR 2.101." *Id*. Paragraph L.5.1 of the RFQ stated that "[o]fferors shall identify all existing GSA FSS contract(s) to be used to satisfy the requirement of the Statement of Work (SOW)." *Id*.

The RFQ required submission of a technical proposal and a pricing spreadsheet with cost assumptions. Exhibit 1 at 82-83. The various services to be provided for the base and option periods were listed as numbered contract line items (CLINs). *Id*. at 2-43. The pricing spreadsheet was an attachment to the RFQ, and it required that each "[o]fferor insert a Firm Fixed Price for each Priced CLIN or subCLIN." *Id*. at 83.

On September 23, 2004, NST submitted its technical proposal and pricing spreadsheet. Exhibit 16. Attached to NST's proposal was a standard form (SF) 18 that

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[5] Before DoD issued the RFQ, NST had been providing DTR6 travel services as a subcontractor under a contract between DoD and Northrop Grumman Mission Systems. Exhibit 24 at ¶ 4. On July 26, 2004, the United States Court of Federal Claims ordered DoD to "terminate those portions of the DTS DTR6 contract and recompete that work." *CW Government Travel, Inc. v. United States*, 61 Fed. Cl. 559, 582 (2004).

referenced the RFQ number, W91QUZ-04-T-0016, in block one. *Id*. At block ten of the SF 18 was the printed instruction that stated in pertinent part: "[t]his is a request for information, and quotations furnished are not offers." *Id*. Mr. Marc Stec, NST's Vice President for Contracts and Proposals, executed that document. *Id*.

On October 29, 2004, DoD issued to NST order number W91QUZ-05-F-0005 on a SF 1449 for DTR6 travel services. Exhibit 2 at 1. Inserted at block two of the SF 1449 was NST's FSS contract number, GS-33F-0020P. *Id*. Block 28 of the SF 1449 stated the following:

> The Contractor is to sign this document and return to issuing office. Contractor agrees to furnish and deliver all items set forth or otherwise identified above and on any additional sheets subject to the terms and conditions specified herein.
>
> Ref: Quote as amended 20 Oct 04.

Id. NST did not execute the SF 1449. *Id*. Ms. Peggy Butler, DoD's contracting officer, executed the SF1449 on the date of award. *Id*. Subsequently, NST proceeded to perform DTR6 travel services under the order and invoiced DoD for those services. Exhibit 24 at 3.

During October of 2005, GSA contacted NST to arrange a contractor assistant visit (CAV). Exhibit 3. The purpose of the CAV was to "ensure the company has an adequate sales tracking system in place and that 'government' sales are properly reported, and the correct Industrial Funding Fees (IFF) remitted." *Id*.

In December of 2005, Ms. Lisa Maguire, a GSA contracting officer, contacted Ms. Butler to determine whether the order for DTR6 travel services was an order under a GSA schedule contract. Exhibit 4. Ms. Butler's response was the following:

> The DTS DTR6 requirements mirror those of the GSA contract, with more definitive information provided as outline[d] in our separate DTS Statement of Work and CLIN structure.
>
> The existing DTR6 task order also reflects SATO's schedule number.
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> The RFQ requested that offerors provide firm fixed transaction fee's [sic]. The Government did not perform a realism analysis prior to award to determine if a portion of the price included

> a[n] IF. It is the offeror's responsibility to ensure that their proposed price is appropriate.

Id. at 2. In her declaration, Ms. Butler stated that she "identified the GSA Contract No. GS-33F-0020P, in box 2 of the SF 1449 award document to reflect the fact that the Task Order was being issued against Navigant Sato Travel's GSA Schedule Contract." Exhibit 35 at 2. Mr. Stec stated in his declaration, however, that he contacted Ms. Butler during GSA's audit in December of 2005, and she advised him that "the TSS schedule was not used to procure the contract but to pre-qualify the bidders." Exhibit 24 at 4. NST, according to Mr. Stec, was to provide services under an "open market" contract as opposed to a schedule purchase. *Id*. at 2.

On January 9, 2006, representatives from DoD and GSA met to discuss the order for DTR6 travel services with NST because it had been "flagged as a potential GSA Schedule purchase and as such, subject to the performance required by the vendor's TSS contract terms and conditions." Exhibit 40 at 1. According to the minutes of the meeting, DoD representatives acknowledged that "there may have been enough ambiguity in the attending documents . . . and that . . . if there was vendor confusion, it was not readily apparent at the time of award." *Id*. Additionally, "DoD expressed concern about the amount of monies that may be due GSA as a result of the purchase being identified as a GSA Schedule should the vendor submit a claim to DoD claiming it did not fully understand that the requirement was a GSA schedule purchase." *Id*.

On March 21, 2006, GSA's contracting officer issued a decision that demanded from NST payment for IFF in the amount of $292,609.50 for transactions under its contract with DoD for DTR6 travel services. Exhibit 8. That amount represented IFF for 195,073 transactions under SIN 599-2 at a rate of $1.50 for each transaction during the period from November 29, 2004, to January 31, 2006. *Id*. NST timely appealed that decision to this Board. Subsequently, NST moved for summary relief and sanctions against GSA.

Discussion

Appellant's Motion for Summary Relief

NST moves for summary relief arguing that GSA has no grounds to claim IFF payments in that "[b]asic contract formation concepts of 'offer' and 'acceptance' prohibited DoD from accepting something that was not offered." Appellant's Motion for Summary Relief at 8. Summary relief is this "Board's analogous procedure to summary judgment in court . . . ." *GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306. It is well

recognized that granting summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. In considering summary judgment, it is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id*. at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id*. at 255. The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 324.

The requirements for a binding contract with the Government, whether express or implied-in-fact, are "mutual intent to contract including an offer, an acceptance, and consideration." *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). It is well recognized that the question of "whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances." *Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990). The GSBCA stated the following:

> There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
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> (a) neither party knows or has reason to know the meaning attached by the other; or
>
> (b) each party knows or each party has reason to know the meaning attached by the other.

Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 03-1 BCA ¶ 32,081, at 158,599 (2002) (quoting *Restatement (Second) of Contracts* § 20(1) (1981)).

In this case, DoD sought to acquire NTR6 travel services under an RFQ. The FAR defines offer and acceptance as they pertain to an RFQ as follows:

> (a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract.

> Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.
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> (b) When appropriate, the contracting officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined at 2.101. In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.

48 CFR 13.004 (2003) (FAR 13.004). The SF 18 that NST used to submit its quote clearly stated that it was not an offer. Contrary to NST's instance that it was the offeror, the SF 1449 that DoD issued was the offer. Acceptance of DoD's offer could have been accomplished either by executing the SF 1449 or by substantial performance. For reasons not explained in the record, NST did not execute the SF 1449, but instead, it appears that NST commenced performance after receiving the SF 1449.[6] NST, however, denies that it intended to provide DTR6 travel services under the referenced FSS contract number on the SF 1449 in spite of what the document states, and the Board is presented with a record in which the moving party, NST, claims that its intent is contrary to that indicated in the contract documents.

The material issue of fact before the Board, consequently, is whether NST and DoD agreed that DTR6 travel services would be provided under either an open market or FSS contract or whether they failed to reach any agreement for want of mutual assent, and we cannot grant summary relief where the record is not sufficiently developed to determine what was intended. "It is well established that a tribunal should deny summary judgment until the facts have sufficiently developed to enable it to reasonably apply the law." *GE Capital Information Technology Solutions-Federal Systems*, 01-2 BCA at 155,306 (quoting *Jo-Ja Construction, Ltd. v. General Services Administration*, GSBCA 14786, 00-2 BCA ¶ 30,964, at 152,793). Mr. Stec states in his declaration that he intended to provide travel services under an open market contract while Ms. Butler states in her declaration that she intended

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[6] During oral arguments on this motion, NST's counsel represented that Mr. Stec's declaration at Exhibit 24 did not specifically state that NST received the SF 1449, but he indicated that Mr. Stec did receive it during early November of 2004. Transcript at 6.

to acquire those services under a schedule contract. Mr. Stec has also represented in his declaration that Ms. Butler told him that the reference to schedule contracts in the RFQ was only for purposes of qualifying bidders. Additionally, the SF 1449 references NST's FSS contract number, but NST denies any intent to perform subject to its FSS contract, which required collection and payment of IFF to GSA. Although NST has argued that it did not intend to provide DTR6 travel services under its FSS contract, the Board cannot find as a matter of law that NST did not agree to provide those services under that contract or that DoD intended to obtain those services under an open market contract where the SF 1449 referenced the FSS contract number and there are conflicting statements as to the intent of the parties. Also, the Board cannot find as a matter of law that no agreement was reached between DoD and NST for a lack of mutual assent where the record is unclear as to the knowledge that each party had of the other party's intent.

NST has argued that the reference to its FSS contract number appears only once in the contract documents, which is on the SF 1449, but that argument ignores the fact that the record does not show whether NST performed DTR6 travel services aware or unaware of that reference. NST's counsel represented during oral arguments on this motion for summary relief that Mr. Stec told him that he did not notice that reference to the FSS contract number for almost a year.[7] The effort by NST's counsel to represent what Mr. Stec has said to him is not sufficient to clarify the record and establish undisputed facts.

Also, NST suggests that DoD's inserting the reference to its FSS contract on the SF 1449 was erroneous. DoD's contracting officer, Ms. Butler, states in her declaration that DTR6 travel services were to be acquired under a schedule contract. The Board cannot find as a matter of law that DoD erred by inserting NST's FSS contract number where the record contains evidence that Ms. Butler intended to do so.

Citing the January 9, 2006, memorandum of the meeting between GSA and DoD employees in which questions were raised about the RFQ, NST contends that "GSA cannot satisfy its burden of proof in this matter." Appellant's Motion for Summary Relief at 12. The issue of whether a party can sustain its burden of proof is "a genuine issue of material fact precluding the award of summary judgment." *GE Capital Information Technology Solutions-Federal Systems*, 01-2 BCA at 155,306 (quoting *Jo-Ja Construction, Ltd.*, 00-2 BCA at 152,793). That memorandum, which NST relies on, appears to summarize a discussion between GSA and DoD employees, and the views of the participants are stated

[7] NST's counsel stated, "I forwarded them all to Mr. Steck [sic] and he said–says, in response to me, 'I did not notice it until the GSA auditors came in November-December 2005 . . . .'" Transcript at 11.

in only general terms that the contract documents may have been ambiguous and that there may have been confusion among vendors. The Board cannot draw inferences in favor of the moving party nor can it weigh evidence for purposes of deciding this motion. *See Anderson*. Whether that memorandum in addition to the rest of the evidentiary record supports NST's case will have to be determined in a hearing of this appeal in which the burden of proof would be on the Government. *See Xerox Corp. v. General Services Administration*, GSBCA 15190, 01-2 BCA ¶ 31,528.

NTS also argues that it was "legally precluded from offering its GSA Schedule Contract . . . because numerous materially significant requirements in the DoD Solicitation's Statement of Work were not covered by Navigant Sato Travel's GSA Schedule Contract." Appellant's Motion for Summary Relief at 6. In an amendment to a follow-on solicitation (W91QUZ-06-R-0005) for DTR6 travel services, DoD advised prospective offerors that "this acquisition is being conducted in accordance with GSA Travel Services Solution[s] Schedule No. 599-2." Exhibit 38. NST filed an agency-level protest with DoD citing differences between its FSS contract and DoD's requirement. Exhibit 39. The fact that NST protested a subsequent solicitation by DoD, however, does not establish what type of agreement, if any, was reached between NST and DoD as to the DTR6 travel services agreement that is relevant to this appeal. To the extent that NST's subsequent agency-level protest may have relevance, it would be a matter relating to the weight of evidence, and the Board cannot weigh evidence in a motion for summary relief. *See Anderson*. Additionally, since the issue before the Board is whether DoD and NST entered into an agreement under a schedule contract, the Board deems it premature to determine whether any of the work in the SOW for DTR6 travel services would be outside of NST's FSS contract.

Citing a June 26, 2003, letter from Ms. Patricia M. Mead, an assistant commissioner at GSA, to the Coalition for Government Procurement, NST argues that the Board should examine the totality of circumstances to find that it is not liable for IFF payments. In that letter, Ms. Mead explained that determining whether a purchase was under a schedule and subject to collection of IFF payments requires looking "at the totality of the circumstances." Exhibit 50. The comments that accompanied the publication of GSAR 552.238-74 similarly stated GSA would "consider the totality of the circumstances in determining if a sale is subject to the IFF." 68 Fed. Reg. 41,286 (July 11, 2003). An examination of the totality of circumstances, however, requires that the Board have a fully developed record, and, as discussed above, we do not find the record to be sufficient to do so.

Finally, NST argues that the Board should look to the Uniform Commercial Code (U.C.C.) for guidance, and cites U.C.C. § 2-207[8] as relevant. NST argues that DoD's insertion of its FSS contract number on the SF 1449 was an acceptance that materially altered the terms of its offer. Under U.C.C. § 2-207, according to NST, the Board should exclude that reference to its FSS contract from the terms of its contract for travel services. We do not find U.C.C. § 2-207 to be applicable in that the SF 1449 was DoD's offer and not an acceptance.

Appellant's Motion for Sanctions

NST has also moved for sanctions against the Government and requests that this Board order the Government to pay for an unstated amount of legal fees because GSA did not include the January 9, 2006, memorandum in the appeal file, but instead, voluntarily provided it later in the proceedings. This Board recognizes that it does not have the authority under any statutory waiver of sovereign immunity to impose monetary sanctions against the Government. *Mountain Valley Lumber, Inc. v. Department of Agriculture*, CBCA 95, 07-2 BCA ¶ 33,611. We have also clearly stated the following with regard to our inherent authority to impose such sanctions:

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[8] The relevant portion of U.C.C. § 2-207 states the following:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
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> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
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> (b) they materially alter it; or
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> ©) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207 (2004).

> Federal courts possess inherent authority to impose sanctions–including monetary sanctions–against parties and their attorneys in appropriate circumstances. . . . A board of contract appeals is not a court, however, and therefore does not have all the inherent authority of a federal court. . . . [W]e do not have a court's inherent authority to impose monetary sanctions against a litigant.

Id. at 166,447 (quoting *A & B Limited Partnership v. General Services Administration*, GSBCA 15208, *et al.*, 05-1 BCA ¶ 32,832, at 162,445 (2004)). Our authority to award legal costs is limited to deciding matters brought under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000). *Mountain Valley Lumber, Inc.,* 07-2 BCA at 166,448. We have no authority to grant the relief NST seeks and order GSA to pay its legal costs at this stage of the proceedings.

Decision

Appellant's motion for summary relief is **DENIED**, and appellant's motion for sanctions is **DENIED**.

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H. CHUCK KULLBERG
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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CATHERINE B. HYATT
Board Judge