

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCURMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 2000-13
)
In re:) **ORDER**
Protest of)
Cannon Associates, Inc.;)
Appeal by)
Kingsmore Construction)
Company, Inc.)
)

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on January 24, 2001 on appeal by Kingsmore Construction Company, Inc. of a decision by the Chief Procurement Officer (CPO). Present and participating in the hearing before the Panel were Kingsmore Construction Company, Inc. (Kingsmore), represented by Gary T. Frost Esquire, Cannon Associates, Inc. (Cannon), represented by Joseph Hudgens, Esquire, and the Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire. George W. Lampl, III, Esquire from the Office of General Counsel at the University of South Carolina, was present but did not participate.

FINDINGS OF FACT

On September 7, 2000 the University of South Carolina (USC) advertised the Truluck Activity Center Project (Project) in South Carolina Business Opportunities. On October 5, 2000 USC received and opened bids for the Project. Five bids were received as follows:

	CANNON	CLAYTON	KINGSMORE	MORRIS	TYLER
Base Bid	\$423,400.00	\$444,000.00	\$470,270.00	\$452,000.00	\$458,000.00
Alt. 1	+\$3,995.00	+\$5,000.00	-\$4,467.80	+\$6,130.00	+\$3,830.00
Alt. 2	+\$4,200.00	+\$5,500.00	-\$8,875.00	+\$5,700.00	+\$2,884.00
Alt. 3	+\$13,345.00	+\$15,500.00	-\$8,770.00	+\$16,500.00	+\$8,652.00
Alt. 4	+\$48,790.00	+\$56,000.00	-\$57,170.00	+\$52,600.00	+\$52,600.00

On October 12, 2000 USC posted a Notice of Intent to Award the contract for the Project to Kingsmore. The Notice called for the acceptance of the Base Bid and Alternates 1, 2, and 3. On October 18, 2000 Cannon protested the Notice of Intent to Award. On October 24, 2000 Cannon submitted an amended letter of protest. On November 21, 2000 the Chief Procurement Officer (CPO) issued a decision finding Kingsmore non-responsive, directing USC to rescind the Notice of Intent to Award to Kingsmore and to award the contract to the lowest responsive and responsible bidder. On November 30, 2000 Kingsmore appealed the CPO's decision to the Panel.

CONCLUSIONS OF LAW

Kingsmore asserts that the State's construction bid form was properly filled out, with the "deduct from" option clearly chosen. [Record p. 2] South Carolina Consolidated Procurement Code §11-35-1410 (7) provides the following: *"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.* The Panel finds that Kingsmore's bid appeared to conform in all material aspects to the invitation for bids before USC sought clarification.

South Carolina Consolidated Procurement Code §11-35-1520(8) provides in part the following: *As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids.* After the bids were opened, USC called Kingsmore for clarification of their bid. Kingsmore responded by informing USC that Kingsmore's base bid price included all alternates and that any alternate chosen not to be performed should be deducted from the base bid. Kingsmore

produced documents at the hearing before the Panel to verify the structure of their bid through the testimony of David Barber, Kingsmore's estimator. The Panel does not doubt Kingsmore's assertions as to the structure of their bid as stated in their written clarification (See Record p. 18), however, the Panel is concerned with Kingmore's statement that "any alternate chosen not to be performed should be deducted from the base bid." The Panel has decided in several cases that contacting a bidder to seek clarification of substantive portions of his bid injects the potential for abuse into the procurement process. The Panel has stated that once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives award of the contract.¹

At the hearing before the Panel, General Services introduced into evidence the American Institute of Architects Document A701 Instructions to Bidders. This document contains provisions that are complementary with the General Conditions of the Contract for Construction and is designed to be used together in the Project Manual

¹ See *In re: Protest of Miller's of Columbia, Case No. 1989-3*, and *In re: Protest of United Testing Systems, Inc., Case No. 1991-20*.

for competitively bid projects. The instructions are intended for use by bidders as well as owners/agencies. Mr. Monty Kingsmore testified that he was aware of the Instructions to Bidders document, but did not refer to it when submitting this bid. Article 5.3.2 of the Instructions to Bidders provides the following: *The owner shall have the right to accept Alternates in any order or combination, unless otherwise specifically provided in the Bidding Documents, and to determine the low Bidder on the basis of the sum of the Base Bid and Alternates accepted.* USC accepted Alternates 1, 2, and 3. On USC's bid tabulation form (See Record pp. 33,34) all bids except that of Kingsmore were tabulated according to the instructions by adding the price of the alternates accepted to the base bid. USC determined Kingsmore to be the low bidder by deducting the price of Alternate 4, which was not accepted, from the base bid.

South Carolina Consolidated Procurement Code §11-35-1520(7) provides in part the following: ... *After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted.* Kingsmore's clarification made it impossible to evaluate all the bids the same in

determining the low bidder. The Panel finds that USC's acceptance of Kingsmore's clarification in determining the low bidder constituted a change in other provisions of bids prejudicial to fair competition.

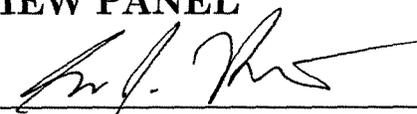
CONCLUSION

For the foregoing reasons, the Panel finds that the bid of Kingsmore is not responsive. USC is hereby directed to rescind the Notice of Intent to Award and determine the lowest responsive and responsible bidder consistent with the instructions of the IFB. The decision of the CPO is upheld in as much as it is consistent with this order.

IT IS SO ORDERED.

**SOUTH CAROLINA PROCUREMENT
REVIEW PANEL**

BY:



Gus J. Roberts, Chairman

Columbia, SC

May 11, 2001