

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1999-4

In re: )  
Protest of Koch Industries, Inc. )  
Appeal by Koch Industries, Inc. )

This case is an appeal to the South Carolina Procurement Review Panel (Panel) by Koch Industries, Inc., (Koch) of a decision of the Chief Procurement Officer (CPO) for Goods and Services. As the facts are not in dispute and the issue raised is a legal issue, the Panel did not conduct a hearing but issues this decision based on the record. The record includes the decision of the CPO of the Office of General Services and the written protest and appeal of Koch.

#### FINDINGS OF FACT

On February 9, 1999, General Services' Materials Management Office (MMO) issued an Invitation For Bid (IFB) to procure statewide contracts for cold laid and emulsified bituminous paving mixtures. The IFB contains a form to claim "SC Resident Vendor & SC/US preferences". The form states, underlined and bolded: "All bidders requesting this preference must place your initials here. \_\_\_\_\_." The form then requests information concerning South Carolina offices. Koch did not initial the form in its bid, but did provide the location of offices in South Carolina. On March 3, 1999, MMO opened bids and on March 17, 1999, MMO posted the statement of intent to award. MMO did not apply the resident vendor preference to Koch's bid, which would have made Koch the low bidder for three counties. Koch filed a letter of protest on March 31, 1999.

Koch protests MMO's decision not to allow Koch the resident vendor preference. It is undisputed that Koch did not initial the bid form requesting the South Carolina Resident Vendor Preference, although Koch did submit other information concerning resident offices as directed on the bid form.

### CONCLUSIONS OF LAW

S. C. Code Ann. Section 11-35-1524(E)(2) states "[i]f a bidder has not requested the preference he will neither be entitled to claim any preference against another bidder nor will he be protected from application of another bidders' claim to preference against his bid in determining contract award." General Services argues that the Code clearly requires the bidder to request the preference, and Koch did not initial the form requesting the preference as required by the IFB. General Services notes that the statutory requirement to explicitly request a preference is new language added to the Consolidated Procurement Code in 1997. General Services contends it cannot allow Koch the resident vendor preference without violating S. C. Code Ann. Section 11-35-24(E)(2) and the IFB.

Koch argues that although it did not initial the form requesting the resident preference, it did fill out information on the form that indicates its intention to request the preference. Koch contends the failure to initial the form as required is a minor informality under S. C. Code Ann. Section 11-35-1520(13), and requests that the error be waived or corrected. S. C. Code Ann. Section 11-35-1520(13) states that

a minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

The statute also gives examples of minor irregularities, which include "failure of a bidder to sign his bid...[when] the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned documents...." Koch contends that the resident vendor preference form is unsigned, but accompanied by other indications of Koch's intention to request the preference, including street addresses and phone numbers of resident offices as required on the form.

Based on the foregoing, the Panel finds that Koch is not entitled to the resident vendor preference. S. C. Code Ann. Section 11-35-1524(E)(2) unambiguously states that a bidder is not entitled to a preference if the bidder does not request it. The IFB clearly states how to request the resident vendor preference. Koch did not request the preference and is not entitled to receive the preference

The Panel further finds that Koch's failure to initial the appropriate place to request the resident vendor preference is not a minor informality under S. C. Code Ann. Section 11-35-1520(13). A minor informality must have "no effect or merely a trivial or negligible effect on total bid price", such as the example of the failure to sign a bid. Allowing correction of Koch's failure to initial the request for a preference thereby allowing Koch the preference will have more than a trivial

effect on Koch's bid price. Correction of the failure to sign a bid does not effect bid price, unlike this case concerning preferences, which will certainly affect the bid price.

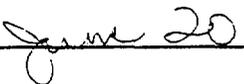
Koch's failure to initial the appropriate place to request the resident vendor preference is not a minor informality. Koch did not properly request the resident vendor preference and therefore is not entitled to the preference in accordance with S. C. Code Ann. Section 11-35-1524(E)(2). Koch's appeal is denied.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:   
Gus J. Roberts, Chairman

Columbia, SC

, 1999.