

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT</b>
<b>COUNTY OF RICHLAND</b>	)	<b>OFFICER FOR CONSTRUCTION</b>
	)	
	)	
<b>IN THE MATTER OF: CANCELLATION</b>	)	<b>WRITTEN DETERMINATION</b>
<b>OF AWARD</b>	)	
<b>SOUTHEASTERN INSTITUTE OF</b>	)	
<b>MANUFACTURING AND</b>	)	
<b>TECHNOLOGY—SITE WORK</b>	)	
<b>STATE PROJECT H59-9852-RC-C</b>	)	<b>POSTING DATE: June 3, 2005</b>
	)	
<b>FLORENCE-DARLINGTON</b>	)	
<b>TECHNICAL COLLEGE</b>	)	
_____	)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request (“the Request for Cancellation”), dated May 31, 2005, from Florence-Darlington Technical College (“the College”) under the provisions of §11-35-1520(7) of the South Carolina Consolidated Procurement Code (“the Code”) for a determination of appropriateness regarding FDTC’s intent to cancel a proposed award of a contract for construction with Cherokee, Inc. (“Cherokee”) for the construction of the Southeastern Institute of Manufacturing and Technology—Site Work project (“the Project”). This request is appended to and hereby made a part of this determination.

This request arises out of a prior request (“the Richardson request”), dated March 18, 2005, from Richardson Construction Company of Columbia (“Richardson”), under the provisions of §11-35-4210 of the Code, for an administrative review on the award of the contract to Cherokee. That request is appended to and hereby made a part of this determination. A hearing on the Richardson request was held on April 25, 2005 and a decision issued on May 5, 2005. The CPOC’s decision (“the CPOC decision”) is appended to and hereby made a part of this determination. On May 16, 2005 Richardson appealed the CPOC decision to the South Carolina Procurement Review Panel, where it now resides. For clarity of presentation in this determination, any exhibits to this written determination will be referred to by letter. Any exhibits referred to by number are those exhibits included in the record for the CPOC decision on the Richardson request.

## **BASIS OF THE REQUEST**

By way of background, the subject procurement is, broadly speaking, for the site work (e.g. grading, underground utilities and road work) to support a larger building project. That larger project includes the construction of two buildings called, respectively, the IT/POD Building and the AMC Building. An overall site plan is shown in Exh. A. On February 7, 2005 the College advertised the Project in *South Carolina Business Opportunities* [Exh. 1], soliciting bids from qualified contractors. On March 3, 2005 the College received sealed bids from five bidders. On March 8, 2005 the College posted a Notice of Intent to Award in favor of Cherokee, Inc. [Exh. 5].

The College now seeks, under the provisions of S. C. Regulation 19-445.2085.C, to cancel the Notice of Intent to Award for the purpose of resolicitation. The College asserts: (1) that inadequate or ambiguous specifications were included in the original solicitation; (2) that the specifications have been revised; (3) that the solicitation did not provide for consideration of all cost factors; and (4) that cancellation and resolicitation are in the best interests of the State.

In support of these assertions, the College states that:

1. The Project's drawings are incomplete or inaccurate in several respects:
  - a. Site utilities for the IT/POD Building were omitted from the advertised scope of work.
  - b. Electrical service for the AMC Building was omitted from the advertised scope of work.
  - c. The locations of the site utilities for the Project were not properly coordinated with the locations shown on the corresponding drawings for the IT/POD and AMC Buildings.
  - d. Site topographical features were vaguely defined on the Project drawings, leading to large variations (500%) in the bidders' estimated quantities of fill required.
  - e. The location for topsoil storage was incorrectly shown on the Project drawings leading to a lower-than-expected estimate for sediment control measures.

2. The scope of the Project has been increased by the transfer of irrigation and landscaping work from the solicitations for the IT/POD and AMC Buildings into the scope of the Project.
3. The scope of the Project has been decreased by the transfer of a portion of the underground data and communications work from the Project to the solicitations for the IT/POD and AMC Buildings. This will ensure a single point of responsibility for communications work for connection of the new site to the existing campus facilities.

The CPOC is normally reluctant to approve the cancellation of an award of a contract, and even more so when that award decision is under appeal to the Panel. Essential fairness, the touchstone principle of the Code, dictates that all parties to a public procurement have an opportunity for effective redress of legitimate grievances. Cancellation of an award under appeal clearly denies the successful appellant an opportunity to receive an award. However, the CPOC is also mindful of the fact that the Code exists not to protect the interests of the vendor community, nor to protect the state agency that may have erred. Rather, the Code exists to protect, above all, the interests of the public who deserves to see its money spent wisely, impartially and to its best effect. The Code provisions that offer the opportunity to cancel a solicitation after award, but prior to performance is, in the opinion of the CPOC, intended to provide one final opportunity to acknowledge an error in either judgment or execution and thereby avoid the waste of public funds on what is now recognized to be a flawed contract.

The existence of a seriously flawed contract is precisely what has been presented to the CPOC by the FDTC request for cancellation. During the course of the hearing on the Richardson protest, all focus was on whether Cherokee's bid was responsive to what can be generously termed a garbled Bid Form. In the Decision on the Richardson request the CPOC considered cancellation of the solicitation and ultimately rejected this course of action for the reasons stated in the Decision and reproduced below.

*Further, and despite the multiple missteps made by the College in constructing the Bidding Documents and by Cherokee in responding, as discussed in this decision, the CPOC believes that it would be inappropriate and an unnecessary waste of public and private resources to overturn this procurement now. In reaching this conclusion, the CPOC notes that by completing the Bid Tabulation Sheets the bidders have revealed not only their lump sum price but also details of their internal cost structure and bidding strategies. Cancellation of the award will require either a significant restructuring of the scope of the solicitation or a substantial waiting period before rebidding will be allowed, in order for sensitive pricing information to grow stale.*

At no point in the hearing was there any discussion that the scope of work solicited by the College was anything other than what was required or desired by the College. Rather, all discussion was on whether the Cherokee bid was in fact responsive to the solicited scope of work.

Now the College, by its request for cancellation, has stated that the originally solicited scope of work differs in a material way from the intended scope of work and acknowledges its responsibility for the ambiguities, errors and omissions. To achieve the correct, desired and required scope of work under the currently awarded contract, the College would be required to negotiate substantial change orders to Cherokee using some of the unit prices quoted by Cherokee and accepted by the College. If the current award is consummated, the hypothetical scenario painted by Richardson of exorbitant change order costs will become much more realistic.<sup>1</sup>

*Richardson then argued that if Cherokee proceeded with the actual construction they would find that some quantity requirements exceeded their underestimated values. According to Richardson's scenario, Cherokee would then claim entitlement to a change order at the inflated unit prices shown on the Bid Tabulation.*

The cost implications of the errors and omissions in the Bidding Documents are substantial in that they will allow the contractor to engage in price renegotiations on a significant portion of what the College asserted at the hearing was a lump sum contract. In reviewing the potential impact of the College's identified change order items, the CPOC referred to the pre-bid estimates prepared by the College's consultant, Wilbur Smith Associates ("WSA"). Exh. B.

- Items 1A and 1B, above, will potentially affect the cost of line items 16-29, 35 and 39 as shown on page 1 of Exh. B. The estimated cost of these line items is \$1.3 million or about 22% of the total estimated cost of the Project.
- Without further definition, it is not possible to assess the cost implications of item 1C, above, but it is clear that changes will have to be made to properly coordinate the work of the site work contractor with the work of the building contractor.
- Item 1D, above will potentially affect the cost of line item 32 as shown on sheet 1 of Exh. B. The estimated cost of this line item is \$532,000, or about 9% of the total estimated cost of the Project.

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<sup>1</sup> It stating this, the CPOC is not imputing to Cherokee any intent to deceive or act in any way other than in good faith. Rather, the CPOC is affirming the unfortunate consequences of the poorly constructed bidding documents issued by the College.

- Without further definition, it is not possible to assess the cost implications of item 1E, which is a relatively small cost item, \$75,000 as shown in line item 33 of Exh. B. What is more troubling is that the College has received stormwater and erosion control permits based in part on an incorrect design. Construction cannot be permitted to start until a correct design has been approved by the S.C. Department of Health and Environmental Control.
- The College has stated that the landscaping and irrigation work (item 2, above) is valued at \$450,000. This is supported by page 2 of Exh. B and increases the potential value of the contract by approximately 7.6%.
- Item 3, above, is an apparently small cost item (line item 45 on Exh. B) , but given the tangled organization of BF-4 it will be difficult for the College to ensure that it is in fact receiving full credit for the value of the deleted work.

Given that the errors and omissions in the Bidding Documents will require renegotiation of nearly on-third of the contract value and that to properly coordinate the work of two prime contractors, the value of the site work contract will increase by over 7%, the CPOC believes the financial risk to the State is simply unacceptable. If this contract is allowed to proceed the ultimate victim will be the State, i.e. the public, which has lost the opportunity for obtaining a price arrived at by a properly conducted procurement process. For this reason, the CPOC concludes that it is in the best interests of the State to grant the request for cancellation and to direct the College to resolicit for the desired scope of work. In making this Determination, the CPOC notes that, while Richardson would obviously prefer to have received the contract, it is receiving the alternative form of relief requested in both its original Request for Resolution and in its appeal to the Panel.

**DETERMINATION**

It is the determination of the Chief Procurement Officer for Construction that the solicitation issued by Florence-Darlington Technical College for the Project contained erroneous, ambiguous or incorrect specifications; that consummation of this contract poses a substantial risk of manifest injury to the best interests of the State; and that in order to achieve the desired intent, it is in the best interests of the State to cancel this solicitation and direct Florence-Darlington Technical College to revise those specifications in accordance with its request and to resolicit forthwith, consistent with its programmatic needs.

IT IS SO ORDERED



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Michael M. Thomas  
Chief Procurement Officer  
for Construction

June 3, 2005  
Date

STATEMENT OF THE RIGHT TO APPEAL

This Written Determination is issued pursuant to Section 11-35-1520(7) and Regulation 19-445.2085(C). The South Carolina Procurement Code, under 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 as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, **within fifteen days of the date of such written determination, decisions, policies, and procedures.**

Additional information regarding the protest process is available on the internet at the following web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

FILING FEE: Pursuant to Proviso 66.1 of the 2004 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(4). . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2004 S.C. Act No. 248, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain 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).



May 31, 2005

Mr. Michael Thomas, PE  
 State Engineer  
 1201 Main St. Suite 600  
 Columbia, SC 29201

Dear Mr. Thomas:

*Mike*

In accordance with Section 19-445.2085.C. of the South Carolina Consolidated Procurement Code, we are requesting to resolicit pricing for State Project No. H59-9852-RC-C. This project is for the site work portion of the new Southeastern Institute of Manufacturing and Technology located behind the existing Florence-Darlington Technical College. It is our understanding that the South Carolina Consolidated Procurement Code allows for "Cancellation of award prior to performance" if one of the eight items listed in the aforementioned paragraph apply. The paragraph reads:

**C. Cancellation of Award Prior to Performance.**

Cancellation of award prior to performance. When it is determined after an award has been issued but before performance has begun that the State's requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either reawarded or a new solicitation issued, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies or services being procured are no longer required;
- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
- (7) Administrative error of the procuring agency discovered prior to performance, or
- (8) For other reasons, cancellation is clearly in the best interest of the State.

The project was awarded to Cherokee, Inc. on March 8, 2005. We believe a resolicitation is in order due to the following as it applies to items 1, 2, 4, and 8:

1. The Civil drawings, which comprise the majority of the bid documents, are incomplete or ambiguous:
  - A. The drawings failed to indicate any site utilities for the IT/Pod Building. These utilities included fire water service, domestic water service, sanitary sewer, natural gas and primary electrical service.
  - B. The Civil drawings do not indicate primary electrical service to the AMC Building.

- C. The site utilities that are shown on the Civil drawings do not correspond to the utility locations indicated on the Architectural and M.E.P. drawings for State Project No.'s H59-9852-RC-A and H59-9852-RC-B.
  - D. The topographical data indicated on the various sheets were missing information which led to too a wide a range in calculated borrow fill. The contractors who bid the project identified borrow quantities between 30,000 CY to 150,000 CY.
  - E. The location of the topsoil stockpile and associated silt fencing does not concur with the location provided to the building contractor, Choate Construction Company. The Civil drawings should reflect a larger quantity of silt fence.
2. There is information that was inadvertently included in State Project No.'s H59-9852-RC-A and H59-9852-RC-B that should have been included in State Project No. H59-9852-RC-C.
- A. The landscaping and irrigation were placed into State Project No.'s H59-9852-RC-A and H59-9852-RC-B in lieu of State Project No. H59-9852-RC-C. The value of this scope alone is budgeted to be near \$450,000.00.
  - B. The telephone and data conduits which interconnect the existing campus to the new campus, as well as between the two buildings (including below the new slab on grade at both the AMC Building and IT/Pod Building), were placed into State Project No. H59-9852-RC-C in lieu of State Project No.'s H59-9852-RC-A and H59-9852-RC-B. It was always the intent to have this under one General Contractor's responsibility instead of breaking it into the two General Contractors part for the Site and the other portion for the Building General Contractors.

We believe that the points described in Items 1 and 2 above are also relevant to Items 4 and 8.

In conclusion, with the above mentioned discrepancies and necessary changes we feel it is in the best interest of Florence-Darlington Technical College and the state of South Carolina to re-solicit for bid the site package. We request approval from the State Engineers office to move forward with this re-solicitation and re-bid.

We appreciate your time and attention to this matter and please don't hesitate contacting me regarding any questions.

Sincerely,



Dr. Charles W. Gould, President  
Florence-Darlington Technical College

3-18-05

*mobile 360-2595*

Mr. Bob Chartier  
State Engineer's Office  
SC Budget and Control Board  
Materials Management Office  
1201 Main St.  
Suite 600  
Columbia, SC 29201

Dear Mr. Chartier,

We are writing to protest the bid process and award for the site work on the Southeastern Institute of Manufacturing and Technology at Florence Darlington Technical College pursuant to the South Carolina Procurement Code §11-35-4210(1).

We are informed and believe that the bids of both Cherokee Construction Company and Palmetto Paving Company were non-responsive. If these bids were non-responsive, our bid would be the lowest responsive bid.

The bases of our protest include but are not limited to the following sections of the Instructions to Bidders and Supplemental instructions to Bidders provided in the Bid Documents and the South Carolina Procurement Code as a whole.

**Instructions to Bidders**

- |           |           |
|-----------|-----------|
| a. §2.1.1 | g. §4.1.7 |
| b. §2.1.2 | h. §4.3.2 |
| c. §3.1.3 | i. §4.4.1 |
| d. §4.1.1 | j. §5.2   |
| e. §4.1.2 | k. §5.3.1 |
| f. §4.1.5 | l. §5.3.2 |

**Supplemental Instructions To Bidders**

- |             |             |
|-------------|-------------|
| m. §3.20    | r. §5.1     |
| n. §4.1.5   | s. §5.3.2.3 |
| o. §4.1.5.1 | t. §5.3.2.5 |
| p. §4.1.5.2 | u. §5.4.2   |
| q. §4.1.8   | v. §5.4.3   |

We hereby formally request reconsideration of the bids submitted for this project and further request that we be provided with copies of the bids of Cherokee and Palmetto prior to any hearing or decision by the State Engineer and as soon as is possible so that we may further define the grounds of our protest. Finally, we request that Richardson Construction Company be declared the lowest responsive bidder and awarded the contract for this project

Very Truly Yours,



**Robert M. Richardson** - President and Owner, Richardson Construction Company of Columbia, SC



responsive. On March 8, 2005 the College posted a Notice of Intent to Award in favor of Cherokee, Inc. [Exh. 5]. On March 18, 2005 Richardson filed its protest of the intended award, alleging without further explanation, violation of the following sections of the A701 and the 00201-OSE (paragraph numbers refer to the original or amended paragraphs in the A701). In this decision these alleged violations shall be referred to as “protest elements.”

1. A701, §2.1.1 and §2.1.2—Bidder’s representations that the Bidder has read and understood the Bidding Documents; that the Bid has been made in compliance with the Bidding Documents.
2. A701, §3.1.3—Bidder shall use complete set of Bidding Documents.
3. 00201-OSE, §3.4.6—Failure to acknowledge Bid Addenda by number renders a bid non-responsive, with exceptions.
4. A701, §4.1.1 and §4.1.2—Bids shall be submitted on the forms included in the Bidding Documents; that blanks shall be filled in with non-erasable media.
5. A701, §4.1.5 and 00201-OSE. §4.1.5—Bid Alternates must be bid.
6. A701, §4.1.7—Bids shall be in the legal name of the bidder and conform to other requirements to establish a binding bid.
7. 00201, §4.1.8—Unsigned bids must be rejected, with exceptions.
8. A701, §4.3.2—Bids must be timely submitted.
9. A701, §4.4.1—Bids may not be modified, withdrawn or canceled by the Bidder after submission.
10. 00201-OSE, §5.1—Bids shall be made in accordance with the Instructions to Bidders, i.e., the A701, as amended by the 00201-OSE.
11. A701, §5.2—A bid not accompanied by the required bid security; not including required information; or otherwise irregular or incomplete shall be rejected.
12. A701, §5.3.1—Agency intends to award to the lowest qualified bidder, with authority to waive irregularities.
13. A701, §5.3.2—Agency has the right to award Bid Alternates in any order or combination, with the process of determining the low bidder defined.
14. 00201-OSE, §5.3.2.3—Bids shall be rejected for failure to comply with bid security requirements, with exceptions.
15. 00201-OSE, §5.3.2.5—Bids shall be rejected for failure to bid an alternate.
16. 00201-OSE, §5.4.2—Process for evaluating Bid Alternates.

17. 00201-OSE, §5.4.3—Agency has the right to reject Unit Prices; to waive informalities or irregularities.

On April 11, 2005 Richardson submitted a self-titled “clarification” of their initial protest. This document is likewise appended to and is hereby a part of this decision.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Basis of Protest**

§11-35-4210(2) of the Code requires that protests “...shall set forth the grounds of protest and the relief requested with enough particularity to give notice of the issues to be decided.” While Richardson clearly stated its requested relief (the rejection of the Cherokee and Palmetto bids with subsequent award to Richardson), it was less forthright about the bases for its protest. A mere listing of paragraphs in the Bidding Documents where otherwise undefined irregularities may have occurred does not facilitate an agency’s or the CPOC’s evaluation of the merits of the protest. Nevertheless, the Panel has held that such a submission does meet the minimum standards of the statute, and will be considered.<sup>2</sup>

In its second submission Richardson is substantially more specific in stating its grounds for protest. Richardson states that the details its April 11, 2005 letter are the result of its analysis of the Bid Forms submitted by Cherokee and Palmetto Paving [see paragraphs 2 and 3]. This letter is clearly untimely as a protest based on the chronology of the post-bid opening activities: March 8, 2005—Posting of the Notice of Intent to Award; March 18, 2005—Richardson protest received, including a request for copies of the Bid Forms of Cherokee and Palmetto; March 18, 2005—Bid Forms sent to Richardson as requested [Exh. 10]; March 23, 2005—Protest period expires; April 11, 2005—Richardson submits second letter. Again the Panel has established clear guidelines regarding a protestant’s right to perfect its claim. In short, those guidelines state that a protestant may provide additional evidence supporting its original claim, but such evidence cannot introduce new grounds for protest.<sup>3</sup> Accordingly, the CPOC will consider the second

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<sup>2</sup> See, *In Re: Protest of Andersen Consulting; Appeal by Andersen Consulting*, Panel Case No. 1994-1. The Panel allowed argument on violation of one provision of the Code cited in the original letter of protest, but declined to hear argument on two additional provisions that were not cited in the original letter of protest..

<sup>3</sup> See, for example, *In Re: Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.; Appeal by DPConsultants, Inc. and Horizon Software Systems, Inc.*, Panel Case No. 1998-6. “The protest letters establish the issues of the case and any issues not established in the protest letters are untimely filed under the time constraints of S. C. Code §11-35-4210.”

Richardson letter as a memorandum or brief, but the second letter may not be used to raise any issues of protest.

### **Burden of Proof and Abandonment of Issues**

The protestant bears the burden of proof by the preponderance of the evidence.<sup>4</sup> To meet this burden at a hearing, evidence or testimony on the issues must be submitted to the CPOC. Failure to submit such evidence or testimony constitutes abandonment of the issue. Of the protest elements listed above, Richardson failed to provide specific evidence or testimony on protest elements 1, 2, 5, 6, 8, 9, 10, 11-13,<sup>5</sup> 15 and 16. Given the total lack of evidence provided on these protest elements, the CPOC finds that Richardson has failed to meet its burden of proof on these elements, which are hereby denied.

The CPOC notes that four of the 17 protest elements filed by Richardson relate to the evaluation of bid alternates. This solicitation included no alternates. Richardson was clearly aware of this fact. To then include multiple protests of non-existent features of a solicitation suggests intent to frustrate the procurement process and does much to undermine the credibility of the remainder of Richardson's protest.

Rather than maintain the structure of its protest letter, Richardson's April 11, 2005 letter presented its supporting evidence in terms of alleged defects on pages of the Project Bid Form. Again this is not particularly helpful to an orderly evaluate of the actual issues of protest. Cherokee provided an itemized response to each of the alleged errors. These will be discussed in turn.

### **Bid Form Errors**

#### ***Page BF-1***

1. Failure to Properly Acknowledge Addenda—Protest Element 3.

Richardson alleges that Cherokee did not properly complete its Bid Form by failing to include the dates of issuance for each of the four Addenda to the Bidding Documents.

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<sup>4</sup> See, *In Re: Protest of Johnson Controls, Inc.*, Panel Case No. 1989-8. "Instead the burden of proof lies with the protestant, which must sustain its allegations by the weight or preponderance of the evidence."

<sup>5</sup> These provisions of the A701 have been deleted in their entirety and replaced by the provisions of the 00201-OSE, a fact which should have been readily apparent to Richardson.

Cherokee responds that the Addenda were properly acknowledged by number in the appropriate space on page BF-1.

The Supplemental Instructions to Bidders, in §3.4.6, define the requirements for acknowledgment of Addenda to the Bidding Documents, as follows:

*Bid Forms wherein the Bidder fails to acknowledge all issued Addenda by number shall be rejected as non-responsive, except for the following:...* [emphasis added]

The Cherokee Bid Form [Exh. 6] acknowledges each of the four issued Addenda by number. The Supplemental Instructions to Bidders make it patently obvious that insertion of the date(s) of issue is not required. This is not a question of failure to carry its burden of proof—Richardson is simply wrong.

#### PROTEST DENIED

##### 2. Qualification of the Cherokee Bid.

Richardson alleges that Cherokee included an impermissible qualification of its bid by referring to an “Attachment A” that was submitted as part of the Cherokee bid. This was not an issue raised in the original letter of protest and, following the Panel’s ruling in *DPCconsultants*, the protest is dismissed as untimely.

#### PROTEST DENIED

While not properly raised in its letter of protest, the CPOC believes that Richardson has identified an issue that merits discussion.

Cherokee counters that its Attachment A is not a “qualification” of its bid, but a “clarification” as expressly envisaged by the Bidding Documents. [see Exh. 4, last page] Cherokee argues that these clarifications do not alter the final Bid Amount quoted by Cherokee.

Included in the original issue of the Bidding Documents was a form entitled “Bid Tabulation Sheet”. The Bid Form (SE-330) refers to “Attachment Sheet BF-4A.” [See Exh. 2, second tab 3, ¶6.1 of SE-330] Subsequent to the mandatory pre-bid meeting, the College issued Addendum 1, which included the following: [see Exh. 3, DCA memo dated February 21, 2005, page 3]:

[Question]	[Answer]
<p><i>12. A bid tabulation form has been provided that will be used in the bid opening.</i></p>	<p><i>12. Please use this bid tabulation to provide your numbers and not just a lump sum for the entire project. Use this form for your bid submittal. See Attachment E, also the electronic version in on the ftp site when you pull all documents off.</i></p>

Finally, Addendum 3 to the Bidding Documents included a modified Bid Tabulation Sheet. [see Exh. 3, pg. 5] From the totality of the evidence available, the CPOC concludes that, while it was clearly labeled as such, it was the intent of the Bidding Documents that the Bid Tabulation Sheet was part of the Project’s SE-330 as sheet BF-4A. Therefore, and along with the remainder of the Bid Form, the full and proper completion of the Bid Tabulation Sheet is an element in the College’s evaluation of the responsiveness of the bidder.

The College clearly solicited bid breakdown information in a structure that allowed for no adjustments in the line items to better comport with an individual bidder’s approach to organizing the work and estimating the Project. The College clearly recognized that individual bidders might need to communicate specific details of how other, unnamed costs had been allocated to the mandatory list of cost elements.

The College testified that its intent in asking for the data was to: (1) provide assurance that bidders had addressed the full scope of the Project; and, (2) in the event bids exceeded the budget, to provide an indication of high-cost portions of work in the event the Agency needed to either negotiate the scope of a final contract or revise the design to bring costs down. [testimony of Jack Roach, project director]. While a request for such information at the time of bidding is highly unusual for State projects and seriously questionable value, the CPOC finds that the form and manner of the request permissible. While the issue is not before the CPOC, based on the evidence and testimony presented, the CPOC does not believe Cherokee’s response to the State’s expectations is an impermissible qualification of its bid.

***BF-1A***

3. Unit Prices and Quantities—Protest Element 17.

Richardson contends that the unit prices quoted on page BF-1A [see Exh. 6] are exorbitant and the quantities estimated are greatly underestimated. Cherokee rejects Richardson's statement as, "irrelevant, subjective and not a valid basis for protest." [Exh.7]

The CPOC disagrees with Cherokee's response, but notes that the issue raised by Richardson addresses only the three items of unit price work listed in ¶6.3 of BF-1A. Richardson submitted no evidence or testimony concerning these three items. CPOC finds that Richardson has failed to meet its burden of proof on this protest element.

PROTEST DENIED

***BF-2***

4. Missing Subcontractor Pricing—Protest Element 4

Richardson claims that page BF-2 of the Cherokee Bid Form is improperly completed because no amount is provided for what Richardson terms "subcontractors." [see Exh. 6]

This section of the Bid Form is intended to collect information on proposed subcontractors pursuant to §11-35-3020(2)(b)(i) of the Code. In reviewing the as-issued Bid Form it is clear that the College had misguided intentions of using this section for another purpose, specifically to document the total price offered by a single bidder for three distinct major phases of the total construction program. In fact, only the "Site" line item is the subject of this solicitation, therefore the line items labeled "AMC" and "Pod/IT" are irrelevant, as is the line labeled "Total \$", to the stated purpose of this section." During the hearing Richardson was asked if it was protesting Cherokee's failure to enter information in the "AMC", "Pod/IT" and "Total \$" line items. Richardson responded in the negative. [testimony of R. Joseph Richardson]. Accordingly, this protest element is considered to be withdrawn by Richardson and is hereby dismissed.

PROTEST DENIED

***BF-4***

5. Failure to Provide Required Information and Sign Bid—Protest Elements 4 and 7.

Richardson contends that Cherokee's bid is non-responsive for failure to provide the requested identifying information (FEIN and license information) and to sign the bid.

The Agency and the OSE Project Manager, R. L. Chartier, evaluated these errors and determined them to be immaterial informalities that could be waived. This evaluation was documented on the Cherokee Bid Form, page BF-4, which Mr. Chartier annotated by stating:

*3-4-5. Based on 00201-OSE §5.3.3.9 recommend acceptance of bid as responsive. /s/ R. L. Chartier. Proj. Mgr./OSE*

Paragraph 5.3.3 of the Instructions to Bidders enumerates several reasons which have been determined to be minor informalities. Sub-paragraph 5.3.3.9 specifically refers to the conditions under which an unsigned bid may be accepted. This sub-paragraph states that a bid shall not be rejected for:

*5.3.3.9 Failure of the Bidder to sign the Bid, provided it is accompanied by a properly prepared Bid Security, or other information, as required by this Section...*

The CPOC agrees with the College's determination, which is clearly based on the information available to the College within the four corners of the material submitted by Cherokee. Cherokee's general contractor's license number was provided both on BF-2 and also on the outside of the bid envelope. [Exh. 9] Cherokee's TIN/FEIN was also provided on the outside of the envelope. Cherokee's legal name is provided on the bid envelope, on page BF-2 of the Bid Form, "Exhibit A" and on the Bid Bond. While the CPOC is not much impressed with the sloppy way Cherokee submitted its bid, the "attached Exhibit A" and "Bid Tabulation Sheet" discussed above, coupled with a properly executed Bid Bond (see below) are persuasive indicia of just who is Cherokee, Inc. and of Cherokee's intent to be bound by the terms of the Bid Form. [see §11-35-1520(13)(c) of the Code] Accordingly,

PROTEST DENIED

***SE-335***

6. Invalid Bid Bond—Protest Element 14

Richardson contends that Cherokee's Bid Bond is invalid because it references an incorrect project number.

While there was some initial misdirection in the Bidding Documents and Addenda, contrary to Richardson's assertion, the project number cited by Cherokee is the correct number. [see Exh. 3, pg. 3] Accordingly,

## PROTEST DENIED

### *Bid Tabulation Sheet Errors*

While not raised in its protest letter and therefore untimely raised, Richardson believes that there are significant discrepancies in several of the Cherokee line items, either due to high unit prices or low quantities. Richardson argues that these discrepancies were of such magnitude as to render Cherokee's bid non-responsive to the solicitation requirements. Richardson [testimony of Mr. Robert M. Richardson] offered considerable testimony regarding the "Bid Tabulation Sheet"<sup>6</sup> and its intended use. Richardson characterized the solicitation as a hybrid of lump sum and unit price. Richardson claimed that the Lump Sum bid amount shown on BF-1 was in fact the extension of the quantity and unit price values provided in the Bid Tabulation Sheet. Richardson then argued that if Cherokee proceeded with the actual construction they would find that some quantity requirements exceeded their underestimated values. According to Richardson's scenario, Cherokee would then claim entitlement to a change order at the inflated unit prices shown on the Bid Tabulation. Richardson produced a recapitulation of the Bid Tabulation Sheets for itself and Cherokee. [Exh. 8] The most glaring examples of underestimated quantities, as stated in Richardson's April 11, 2005 clarification of its protest, are 3 line items in the Offsite Roadway Connector Unit, 3 line items in the Onsite Roadway Unit and 3 items in the Remaining Site Work Unit. The net result, according to Richardson, and assuming that Richardson's quantity estimates were correct, would be an increase in the Contract Sum of just over \$ 1 million.

Mr. Gerald Ringer, Richardson estimator primarily responsible for developing the estimated quantities for the Richardson bid, testified to the process used by his firm to develop Richardson's values and also his analysis of the Cherokee Bid Tabulation Sheet as it related to the Offsite Roadway Connector Unit. Considerable time was devoted to discussing the apparent omission of some 4,250 sq. yards of paving in the Offsite Roadway Connector. There was no testimony concerning the other alleged discrepancies.

Cherokee and the College reject Richardson's characterization of the solicitation as some form of hybrid bid. Both argue that the contract offered is a lump sum contract for the scope of work as shown defined in the Project plans and specifications. As to the differences in the Offsite Roadway Connector Unit, Cherokee admitted the inadvertent omission of the estimated quantities

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<sup>6</sup> This choice of terminology is particularly unfortunate because it is not a recognized term of art and the Code and the OSE Manual expressly define a Bid Tabulation Sheet, which is used for an entirely different purpose.

for the paving for some 1500-1600 feet of asphalt roadway. Cherokee stated this was a bid compilation error and that their bid, based on the clarification contained in “Exhibit A” made clear their intent and commitment to fully construct the road as designed and shown on the plans. At the hearing Cherokee’s vice-president affirmed its commitment to undertake the full scope of the Project, as shown in the plans and specifications, for the lump sum price tendered in their bid, not limited by the so-called Bid Tabulation Sheet.

For its part, the College’s intended use for the Bid Tabulation Sheet was to verify the scope of each bid and to provide budget information for possible scope reductions in the event of unacceptably high bids.

In reviewing this issue, the CPOC must first comment that responsibility for this issue rests fully on the College and is primarily due to the unnecessary lack of clarity in the Bidding Documents as to the purpose and status of the ill-named Bid Tabulation Sheet. The Bidding Documents contained only an implied reference to the Sheet and there were no instructions regarding its completion beyond those on the Sheet itself, the guidance from Addendum 1 cited above and the following exchange at the pre-bid meeting. When asked at the pre-bid meeting to clarify the nature of the bid—lump sum or unit price—the response from Mr. David Brandes, Project Civil Engineer, was a masterpiece of obfuscation [see Exh. 3, Attachment B, page 2]. To wit,

*Q: Is it a lump sum or do you have units?*

*A: I believe it is a lump sum, but you bid in units. There will be units for pricing, but this will be a lump sum, but paid in unit prices for payment and if there are a few change orders there will be a place for that.*

It is axiomatic in public contracting that oral statements made at pre-bid meetings are not binding unless reduced to writing and issued to all prospective bidders by addendum.<sup>7</sup> In what is yet another unique approach to contract management, the College issued a transcript of the pre-bid meeting, which made both the contents and consequences of any misspoken or cryptic comments, such as those of Mr. Brandes, binding on the College.

While the CPOC is sympathetic to the position now espoused by Mr. Roach, it is not relevant to Richardson’s complaint, which arises out of the ambiguous status and actual usage of the Bid Tabulation Sheet. The Bid Tabulation Sheet was clearly a part of the as-issued Bidding

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<sup>7</sup> See, for example, ¶3.2.3 of the A701. (“Interpretations, corrections and changes of the Bidding Documents will be made by Addendum. Interpretations, corrections and changes of the Bidding Documents made in any other manner will not be binding and Bidders shall not rely upon them.”)

Documents; it was revised in Addendum 3 and it was used by the College as justification for declaring the Palmetto Paving bid non-responsive. Simply put, the Bid Tabulation Sheet and its completion was a material factor in the College's evaluation of the bids and the determination of the lowest responsive and responsible bidder. Bidders were clearly puzzled by the form; hence the question at the pre-bid meeting and Mr. Brandes' notably unclear clarification. This response apparently satisfied the bidders, as no prospective bidder, including Richardson, raised any formal concern about the form or its status until after an award was made. Protests regarding the form and content of a solicitation are untimely unless submitted within 15 days of the date the relevant solicitation document is issued. Had a timely protest been raised, the CPOC could have addressed any ambiguities or other concerns before bidding. But the CPOC lacks the jurisdiction under §11-35-4210 to hear untimely protests.

Further, and despite the multiple missteps made by the College in constructing the Bidding Documents and by Cherokee in responding, as discussed in this decision, the CPOC believes that it would be inappropriate and an unnecessary waste of public and private resources to overturn this procurement now. In reaching this conclusion, the CPOC notes that by completing the Bid Tabulation Sheets the bidders have revealed not only their lump sum price but also details of their internal cost structure and bidding strategies. Cancellation of the award will require either a significant restructuring of the scope of the solicitation or a substantial waiting period before rebidding will be allowed, in order for sensitive pricing information to grow stale.

### **DECISION**

It is the decision of the Chief Procurement Officer for Construction that the protest of Richardson Construction Company is denied. Florence-Darlington Technical College may proceed with the award of the contract for Site Work, consistent with its programmatic needs.

IT IS SO ORDERED



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Michael M. Thomas  
Chief Procurement Officer  
for Construction

May 5, 2005  
Date

## STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

*A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.*

Additional information regarding the protest process is available on the internet at the following web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

**FILING FEE:** Pursuant to Proviso 66.1 of the 2004 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(4). . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2004 S.C. Act No. 248, Part IB, § 66.1. **PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."**

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain 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).

**RICHARDSON  
CONSTRUCTION CO.**  
OF COLUMBIA, SOUTH CAROLINA, INC.

P.O. Box 3506  
Columbia, S.C. 29230  
Phone 803/786-9741  
Fax 803/735-1581

3-18-05

*mobile 360-2595*

Mr. Bob Chartier  
State Engineer's Office  
SC Budget and Control Board  
Materials Management Office  
1201 Main St.  
Suite 600  
Columbia, SC 29201

Dear Mr. Chartier,

We are writing to protest the bid process and award for the site work on the Southeastern Institute of Manufacturing and Technology at Florence Darlington Technical College pursuant to the South Carolina Procurement Code §11-35-4210(1).

We are informed and believe that the bids of both Cherokee Construction Company and Palmetto Paving Company were non-responsive. If these bids were non-responsive, our bid would be the lowest responsive bid.

The bases of our protest include but are not limited to the following sections of the Instructions to Bidders and Supplemental instructions to Bidders provided in the Bid Documents and the South Carolina Procurement Code as a whole.

**Instructions to Bidders**

- |           |           |
|-----------|-----------|
| a. §2.1.1 | g. §4.1.7 |
| b. §2.1.2 | h. §4.3.2 |
| c. §3.1.3 | i. §4.4.1 |
| d. §4.1.1 | j. §5.2   |
| e. §4.1.2 | k. §5.3.1 |
| f. §4.1.5 | l. §5.3.2 |

**Supplemental Instructions To Bidders**

- |             |             |
|-------------|-------------|
| m. §3.20    | r. §5.1     |
| n. §4.1.5   | s. §5.3.2.3 |
| o. §4.1.5.1 | t. §5.3.2.5 |
| p. §4.1.5.2 | u. §5.4.2   |
| q. §4.1.8   | v. §5.4.3   |

We hereby formally request reconsideration of the bids submitted for this project and further request that we be provided with copies of the bids of Cherokee and Palmetto prior to any hearing or decision by the State Engineer and as soon as is possible so that we may further define the grounds of our protest. Finally, we request that Richardson Construction Company be declared the lowest responsive bidder and awarded the contract for this project

Very Truly Yours,



**Robert M. Richardson** - President and Owner, Richardson Construction Company of Columbia, SC

**R. JOSEPH RICHARDSON**

6806 Monticello Road  
Columbia, South Carolina 29203  
P.O. Box 3506  
Columbia, South Carolina 29230  
(803) 530-3139

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**4-11-05**

Mike Thomas, P.E., SC State Engineer  
SC Budget and Control Board  
Materials Management Office  
1201 Main St.  
Suite 600  
Columbia, SC 29201

Dear Mr. Thomas,

The following is a clarification of our original protest of the site work bid and award for the Southeast Institute of Manufacturing Technology at Florence Darlington Technical College. Richardson Construction relied on the information that was communicated in the bid package, the Site Specifications and Drawings prepared by Daniel Cook, Architect, and various addenda and prepared its bid in accord with the intent of the bid package despite the disjointed and confusing nature of the information available.

As you are aware, at the time of our protest we were not in possession of the bid(s) of Palmetto Paving Corporation and Cherokee, Inc. which we allege were non-responsive and otherwise insufficient under the bid requirements including the Site Specifications prepared by Daniel Cook, Architect, the site work drawings and the South Carolina Procurement Code. We have now received copies of these bids and analyzed them.

It is our understanding that your office had already decided to reject the bid of Palmetto Paving and award the job to Cherokee at the time of our protest. However, in the interest of being thorough we now address the non-responsiveness and insufficiency of both Palmetto's and Cherokee's bids.

**Palmetto Paving**

The fatal omission in the Palmetto bid was Palmetto's failure to quote the Roadway "(Off-Site Connection to US-62)" line item on the bid form. Palmetto's bid did not include in a proposal to complete the work described by the line item and therefore did not address the full scope of the project and was non-responsive.

**Cherokee, Inc.**

Cherokee's bid contains multiple qualifications and was not filled out completely

- 1. Bid Form 1**
  - a. No dates are included on the addenda acknowledgment
  - b. Reference is made to an attachment (Exhibit A) which qualifies the bid
- 2. Bid Form 1(a)**
  - a. Quotes exorbitant and unconscionable unit prices while grossly underestimating the actual quantities for the corresponding unit price work
- 3. Bid Form 2**
  - a. No total amount is provided for subcontractors
- 4. Bid Form 4**
  - a. No federal tax I.D. or Social Security Number is provided
  - b. No license classification, limitation or number is provided
  - c. There is no signature
  - d. There is no legal name of the corporation
- 5. Bond**
  - a. The bond references an incorrect project number. The bond is for project number H-59-9852 – RC- C
- 6. Bid Tabulation Sheet –**

Exorbitant unit prices coupled with gross underestimates of the actual quantities mask the actual cost of completing the project under Cherokee's proposal

- a. **Item 1** – stated quantity is less than the actual quantity by 4250 s.y. lowering the bid price by \$130,900.00
- b. **Item 2** – stated quantity is less than the actual quantity by 4250 s.y. lowering the bid price by \$34,000.00
- c. **Item 3** – stated quantity is less than the actual quantity by 4250 s.y. lowering the bid price by \$27,625.00
- d. **Item 7** – stated quantity is less than the actual quantity by 6944 s.y. lowering the bid price by \$62,496.00
- e. **Item 8** – stated quantity is less than the actual quantity by 6944 s.y. lowering the bid price by \$132,543.00
- f. **Item 9** – stated quantity is less than the actual quantity by 14,727 s.y. lowering the bid price by \$132,543.00
- g. **Item 11** – stated quantity is less than the actual quantity by 14,727 s.y. lowering the bid price by \$95,725.00
- h. **Between Items 26 and 27** – an amount of \$345,000.00 is entered in a space entitled "Remaining Sitework" which does not require a price.
- i. **Items 30 and 34** – scope of work is qualified so as not to include all work required by the plans and specifications
- j. **Item 35** – the construction of a fountain in item 35 is specifically excluded from Cherokee's bid by attachment "Exhibit A"

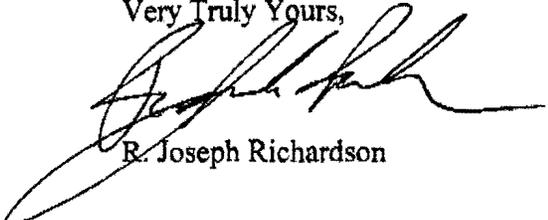
We believe that Cherokee's proposal, when properly analyzed will require significantly more payment than their total bid of \$6,999,732.30. If the unit prices above are applied to the gross underestimates made by Cherokee for the corresponding work items, their bid totals \$8,441,258.30.

**Relief Requested**

1. Richardson requests that Palmetto Paving's bid be rejected as non-responsive for failure to quote the full scope of work required by the bid requirements, plans and specifications
2. Richardson requests that Cherokee, Inc's bid be rejected as non-responsive for failure to quote the full scope of work required by the bid requirements, plans and specifications
3. Richardson requests that Cherokee, Inc's bid be rejected as non-responsive for failure to comply with the form requirements in the submission of its bid in violation of the Instructions to Bidders, the Supplemental Instructions to bidders, and the South Carolina Procurement Code general form requirements for the submission of competitive sealed bids
4. Richardson requests that Cherokee, Inc's bid be rejected for non-responsiveness because various items of the bid are qualified and certain work items are specifically excluded from its bid
5. Richardson requests that Cherokee, Inc's bid be rejected because it is not the low bid when tabulated using Cherokee's unit prices as applied to the accurate quantities for the corresponding work items
6. Richardson requests that Richardson Construction Company, Inc. be awarded the contract for the project because it is the lowest responsive and responsible bidder for the reasons stated hereinabove.

Please call me as soon as possible to set a date for a hearing on this matter.

Very Truly Yours,



R. Joseph Richardson