

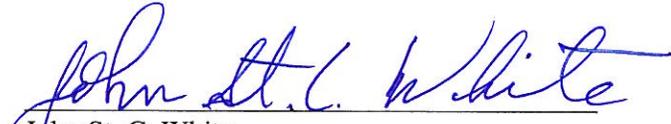
STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
IN THE MATTER OF: CONTROVERSY)	
)	CASE NO. 2010-003
WILBUR SMITH ASSOCIATES, INC.)	
vs.)	ORDER APPROVING SETTLEMENT
SOUTH CAROLINA DEPARTMENT OF)	
AGRICULTURE)	POSTING DATE: OCT. 13, 2009
ENGINEERING SERVICES)	
STATE FARMER'S MARKET RELOCATION)	
<u>PROJECT NO. P16-9509-MJ</u>)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a joint request from Wilbur Smith Associates, Inc. (Wilbur Smith), and the South Carolina Department of Agriculture (Department) under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (“the Code”), for an administrative review of a contract controversy over engineering services for the relocation of the State Farmers Market from its current location on Bluff Road in Richland County to a new site on Shop Road in Richland County. (“the Project”). The request for resolution of a contract controversy is attached as Exhibit “A.”

On or about August 11, 2005, the Department and Wilbur Smith entered into a contract under which Wilbur Smith agreed to provide certain engineering services for the Project. The parties subsequently executed at least three amendments to the initial contract. The Project was cancelled in late 2007 for reasons beyond the control of the parties and the Department terminated the contract. A controversy arose concerning several matters, including the final amount Wilbur Smith is due for its work on the Project. Following mediation, Wilbur Smith and the Department resolved all disputes by mutual agreement. The agreement between Wilbur Smith and the Department is attached as Exhibit “B.”

DECISION

Under the authority granted by §11-35-4230(3) of the Code, the CPOC hereby approves the settlement agreement as set forth in Exhibit “B”. Based on the parties’ mutual good faith commitment to perform as set forth in the settlement agreement, the CPOC dismisses the joint request for resolution of a contract controversy.



 John St. C. White
 Chief Procurement Officer for Construction

 13 Oct 09

 Date

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 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." 2008 S.C. Act No. 310, Part IB, § 83.1. 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).

BEFORE THE CHIEF PROCUREMENT OFFICER
FOR CONSTRUCTION, STATE OF SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA)
 BUDGET & CONTROL BOARD, on)
 behalf of The South Carolina Department of)
 Agriculture, and WILBUR SMITH)
 ASSOCIATES, INC.,)
)
 Joint Petitioners.)
)
 IN THE MATTER OF:)
)
 Columbia Farmer’s Market Relocation)
 Project)
 State Project No. P16-9509-MJ)
 _____)

**JOINT REQUEST FOR
RESOLUTION OF CONTRACT
CONTROVERSY**

This is a request for resolution of contract controversy pursuant to S. C. Code Ann. § 11-35-4230 (Thomson West Supp. 2008). The Joint Petitioners are The South Carolina Budget and Control Board, acting on behalf of The South Carolina Department of Agriculture (collectively referred to as the “Department”) and Wilbur Smith Associates, Inc. (“Wilbur Smith”).

On or about August 11, 2005, the Department and Wilbur Smith (collectively, the “Parties”) entered into a contract under which Wilbur Smith agreed to provide certain engineering services for the relocation of the South Carolina Farmer’s Market from its current location on Bluff Road in Richland County, South Carolina to a new site on Shop Road in Richland County, South Carolina (the “Project”). The Parties subsequently executed at least three amendments to the initial contract. The initial contract and all subsequent amendments are referred to collectively as the “Contract.”

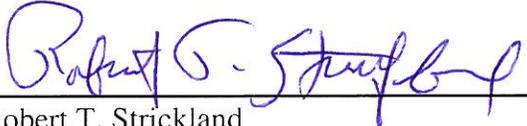
The Project was cancelled in late 2007 for reasons beyond the control of the Parties, and the Department terminated the Contract for convenience.

A controversy arose concerning several matters, including the final amount Wilbur Smith is due for its work on the Project. Following mediation, the Parties resolved all disputes by mutual agreement, as reflected in the attached "Project Wrap-Up Agreement for the South Carolina Farmer's Market Shop Road Relocation Project."

NOW, THEREFORE, the Parties ask that the Chief Procurement Officer for Construction approve the attached "Project Wrap-Up Agreement for the South Carolina Farmer's Market Shop Road Relocation Project" and authorize its execution as the resolution of this controversy.

BARNES, ALFORD, STORK & JOHNSON, LLP

By:



Robert T. Strickland
1613 Main Street
Post Office Box 8448
Columbia, SC 29202
Phone: (803) 799-1111
Fax: (803) 254-1335

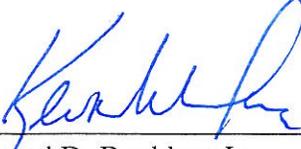
Attorneys for Wilbur Smith Associates, Inc.

August 27, 2009
~~July~~

Columbia, South Carolina

YOUNG CLEMENT RIVERS, LLP

By: _____


for Edward D. Buckley, Jr.

28 Broad Street
Post Office Box 993
Charleston, SC 29402-0993
Phone: (843) 577-4000
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Attorneys for the State of South Carolina
Budget & Control Board, on Behalf of the
South Carolina Department of Agriculture

July 23, 2009

Charleston, South Carolina

PROJECT WRAP-UP AGREEMENT FOR THE SOUTH CAROLINA FARMER'S MARKET SHOP ROAD RELOCATION PROJECT

This Project Wrap-Up Agreement ("Agreement"), dated September 28, 2009, is between WILBUR SMITH ASSOCIATES, INC. ("Wilbur Smith"), a Delaware corporation, and THE SOUTH CAROLINA DEPARTMENT OF AGRICULTURE, a political subdivision of the State of South Carolina (the "Department").¹ Wilbur Smith and the Department may be referred to herein individually as "Party" and collectively as the "Parties."

RECITALS

On or about August 11, 2005, the Parties entered into a contract under which Wilbur Smith, in exchange for payment by the Department, would provide engineering services related to the relocation of the South Carolina Farmer's Market from its current location on Bluff Road in Richland County, South Carolina to a new site located on Shop Road in Richland County, South Carolina (the "Project"). The Parties subsequently executed at least three amendments to the initial contract; the initial contract and all subsequent amendments are referred to collectively as the "Contract."

The Project was cancelled in late 2007 for reasons beyond the control of the Parties, and the Department terminated Wilbur Smith's Contract for convenience.

The Parties now wish to enter into this Agreement to wrap up and close out the Project.

All parties understand and agree that the execution and performance of this agreement is contingent upon the approval by the Chief Procurement Officer of the State Budget & Control Board, in accordance with S.C. Code § 11-35-4230.

TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the promises and covenants contained herein, and such other valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree as follows:

¹ Joint Resolution R 240, passed by the South Carolina General Assembly and delivered to the Secretary of State on June 25, 2008, authorized the Commissioner of Agriculture to terminate the Project that is the subject of this Agreement and to resolve any related disputes.

1. Partial Refund to the Department by Wilbur Smith.

In recognition of the Project's cancellation for reasons beyond the Parties' control, and as a courtesy to the Department, Wilbur Smith agrees to refund Forty Thousand and no/100 (\$40,000.00) Dollars of its fee to the Department. The Department acknowledges receipt of Wilbur Smith's check number 1044215 for that amount. Wilbur Smith shall retain all other payments received, whether for fees, costs, or otherwise.

2. Use of Work Product Created for the Project.

A. Building Plans

Plans, drawings, and specifications for the buildings that were to be a part of the finished Project were prepared by GMK, Inc., an architectural firm Wilbur Smith utilized as a subcontractor on the Project. Any authorization to utilize any work product, plans, drawings, specifications, concept, design materials and other documents concerning the Project's buildings ("GMK Design Documents") must be obtained directly from GMK, Inc. Wilbur Smith has no objection to the Department obtaining any such authorization from GMK, Inc.; provided, however, the Department and its assignees assume the risk of any loss, injury, or damage resulting from the use of the GMK Design Documents and agree Wilbur Smith shall have no liability whatsoever arising from such use.

B. Site Engineering Plans.

The Department acknowledges that Wilbur Smith did not furnish signed and sealed site plans ready for construction, as the Project was terminated by the Department for convenience before those plans were completed. Wilbur Smith agrees to allow the Department to utilize the incomplete work product, drawings, concept, design materials and other documents pertaining to the site preparation, drainage, access, utilities and roadways ("Wilbur Smith Site Plans") for the sole purpose of establishing the general nature and extent of improvements made to the subject property during the term of the Farmer's Market Project in connection with the ongoing litigation between the Department and Richland County. Wilbur Smith makes no warranties or other representation as to the accuracy or completeness of the Wilbur Smith Site Plans. The Department and its assignees further assume the risk of any loss, injury, or damage resulting from any use of the Wilbur Smith Site Plans and agree Wilbur Smith shall have no liability whatsoever arising from such use.

3. Termination of Contract.

The Parties acknowledge that all work and other services required of Wilbur Smith for the Project, whether under the Contract or otherwise, have been performed, or else performance

has been waived. The Parties agree that no further work or other services are required of Wilbur Smith concerning the Project, and the Contract is hereby deemed terminated by the Department for convenience.

4. Mutual Release of Claims.

The Parties wish to confirm that there are no remaining unresolved claims by and between them related to or arising from the Project. Any and all claims, whether real or imagined, actual or threatened, have been amicably resolved. Pursuant to that agreement, the Parties hereby execute the following releases:

a. Release of Claim by Wilbur Smith.

For and in consideration of the releases of claims by the Department under Section 4(b) of this Agreement, the receipt and sufficiency of which are acknowledged, Wilbur Smith hereby releases and forever discharges the Department and its subdivisions, officers, representatives, servants, and past and present employees (the "Department Released Parties") from any and all suits, demands, actions, causes of action, and/or claims of any kind or nature whatsoever that are in any way related to or arise from the Project. The consideration expressed herein constitutes compensation in full to Wilbur Smith for any and all alleged damages, losses, and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, related to or arising from the Project.

b. Release of Claims by the Department.

For and in consideration of the release of claims by Wilbur Smith under Section 4(a) of this Agreement, and the refund recited in Section 1, the receipt and sufficiency of which are acknowledged, the Department hereby releases and forever discharges Wilbur Smith and its predecessors in interest, successors, assigns, agents, officers, directors, shareholders, partners, parent companies, subsidiary and affiliated companies, representatives, servants, and past and present employees (the "Wilbur Smith Released Parties") from any and all suits, demands, actions, causes of action, and/or claims of any kind or nature whatsoever that are in any way related to or arise from the Project. The consideration expressed herein constitutes compensation in full to the Department for any and all alleged damages, losses, and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, related to or arising from the Project.

5. Denials of Liability.

The delivery and acceptance of the consideration expressed herein and the execution of this Agreement are purely for the purpose of wrapping up and closing out the Project. Neither the execution of this Agreement nor the delivery and acceptance of any consideration given under this Agreement shall be construed as an admission of liability by any Party, as the Parties expressly deny liability to one another.

6. Miscellaneous.

- (a) This Agreement shall be binding on and inure to the benefit of the Parties, their agencies, subdivisions, insurers, sureties, officers, directors, agents, representatives, servants, employees, shareholders, partners, parent companies, subsidiary and affiliated companies, successors, and assigns.
- (b) All Parties have participated in negotiating and drafting this Agreement. This Agreement is to be construed as if the Parties had drafted it jointly, as opposed to being construed against a Party because it was responsible for drafting one or more provisions of this Agreement.
- (c) The numberings and headings preceding the text of each Section of this Agreement are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement.
- (d) This Agreement may be executed on separate signature pages which may be combined to make a complete agreement.

7. Governing Law.

This Agreement and any dispute, claim, or controversy relating to the Agreement shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. The Parties agree that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United States Constitution.

8. Entire Agreement.

This Agreement sets forth the entire agreement and understanding between the Parties relating to the subject matter hereof and may not be amended except in a writing signed by the

Parties' authorized representatives. There are no other agreements, understandings, representations, or warranties, express or implied, statutory or otherwise, in any way limiting, extending, defining, or relating to the provisions hereof. Any prior negotiations, correspondence, memoranda, or other agreements relating to the subject matter hereof are superseded in total by this Agreement.

9. Signatory Representations.

Each signatory to this Agreement warrants and represents as follows:

- (a) He or she has read this Agreement, fully understands its terms, and understands it to be a full, final, and binding agreement;
- (b) He or she has sought and received the advice of legal counsel prior to executing this Agreement; and
- (c) He or she is fully authorized to execute this Agreement on behalf of the Party for whom he or she signs.

IN WITNESS HEREOF, the parties have executed this Agreement on the date appearing next to the signature affixed by their duly authorized agents.

WITNESSES:

WILBUR SMITH ASSOCIATES, INC.

Jessica C. Arneson

James E. Ferrini

By: *M. Stevenson Smith* (SEAL)
M. Stevenson Smith, P.E.
Chairman and CEO

Date: *September 23*, 2009

SIGNATURES CONTINUE ON NEXT PAGE

WITNESSES:

**THE SOUTH CAROLINA DEPARTMENT OF
AGRICULTURE**

Marie H. Lybrand

Raymond R. Pike

By: Hugh E. Weathers (SEAL)
Hugh E. Weathers
Commissioner

Date: Sep 28, 2009

END OF SIGNATURES AND END OF AGREEMENT