



USC solicited construction bids on September 14, 2005 [Ex. 9] The Bidding Documents [Ex. 10] included the form 00201-OSE, *Standard Supplemental Instructions to Bidders*, which stated in paragraph 9.4:

*“Contractor must provide qualifications related to installation of field turf and drainage system as indicated in the specifications. Section 02790 Sports Fields.*

*Section 11-35-3245 of the SC Code of Laws prohibits design consultants on a project from performing work on the same project as a contractor or subcontractor. Carolina Green Corporation from Indian Trail, NC (SC General Contractor License #104134) has served as a design consultant for this project. Therefore, if Carolina Green Corporation bids this project as a prime contractor, their bid will be rejected as non-responsible. Also, if Carolina Green Corporation is listed as a subcontractor on any other bid for this project, that bid will be rejected as non-responsible.”*

On September 16, 2005 CG submitted a Request for Resolution [Ex. 15], disputing the applicability of this statute to itself and seeking to be allowed to bid for the construction of the Project.

## **DISCUSSION**

### **PROTESTANT’S POSITION**

CG’s position is well-stated in its June 21, 2005 letter, which is appended to their Request for Resolution. In essence, CG contends that §11-35-3245 is inapplicable to CG because CG is neither a registered architect, licensed engineer nor a registered construction manager. CG also contends that a lack of a contract with Garvin also exempts CG from the statute. CG further argues that allowing CG to submit a bid for the Project does not violate the spirit of the statute, which is directed at conflicts of interest and anti-competitive practices in public procurement.

### **RESPONDENT’S POSITION**

For its part, USC acknowledges that the issue before the CPOC is one of statutory interpretation and will be guided by the outcome of the protest.

## **CPOC FINDINGS**

There is no dispute that construction management services are not at issue in the instant case and so will not be discussed further. Accordingly, §11-35-3245 of the Code states in relevant part:

*No architect or engineer performing design work...pursuant to a contract awarded under any provision of this chapter may perform other work on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.*

The focus of this statute is the performance of design-related services pursuant to an existing contract. The parties are correct that the resolution of this issue necessarily involves statutory interpretation, applying the statute to the factual context and the conduct of the parties.

- There is no dispute that Garvin and Woolpert (another short-listed design firm) listed CG as a member of the team of consultants who would provide design services for the Project. [testimony of Chad Price and Ann Derrick]
- There is no dispute that Chad Price, President of CG, was an active participant in the Selection Committee's interviews on behalf of Garvin and Woolpert. [testimony of Chad Price and Scott Garvin]
- There is no dispute that Garvin was selected for a contract to perform design work. When questioned, at least three of the Selection Committee members (Jerry Brewer, USC's Director of Student Life, Herbert Camp, USC's Director of Campus Recreation and Veda Sargent, USC's Associate Director of Campus Recreation) stated that USC's prior positive experience with CG was a significant consideration in their evaluation of the qualifications of the four design firms. "We knew who the best contractor in South Carolina was before we started this whole process." [testimony of Jerry Brewer]
- There is no dispute that Garvin was awarded a contract to provide professional services and that Garvin's contract listed CG as a consultant.
- There is no dispute that between September of 2004 and September of 2005, Garvin performed design services and prepared bidding documents for the Project pursuant to that contract.

CG's involvement in the development of this Project has been both extensive and closely entwined with those of USC and the Garvin design team. According to the testimony of Chad Price and confirmed by Camp, USC's recreational staff contacted CG in late 2003 to discuss the Blatt intramural fields. In response CG submitted a priced proposal dated April 6, 2004, including two pages of design details and drainage layouts. [Ex. 12] This submission to USC was

only 17 days before USC solicited proposals from prospective design firms for a broad scope of recreational design services. [Ex. 1] According to Chad Price, before the design firm was selected for the Project, both Garvin and Woolpert contacted CG, soliciting them to serve as a “field consultant” for the Project. CG provided each a copy of its priced proposal for the Blatt intramural fields [Ex. 12], provided resumes and descriptions of CG’s completed projects, discussed the Project with the lead designers and participated in separate short-list interviews on behalf of both Garvin and Woolpert. CG is variously identified in Garvin’s statement of qualifications as a member of Garvin’s design team; as a first-tier subconsultant; and as the design team’s “Athletic Field Consultant.” [Ex. 5, pp. 1, 6, among others] The Garvin statement of qualifications includes seven pages of CG’s experience, comparable to that devoted to Garvin itself.

Some six months later USC and Garvin entered into the contract for design services for the Project. Subsequent to the interviews CG provided Grimball Cotterill, the Garvin team’s landscape architect with additional design and cost information. [Ex. 11] Notable in this document is that CG is clearly projecting itself as a designer and specification writer, not a contractor.

*“We solve the drainage problem by...”* [Ex. 11, pg. 1, para. 2, wherein CG defines their engineering solution to the drainage problems described in paragraph 1]

*“Prior to work beginning by sports field contractor...”* [Ex. 11, pg. 1, para. 4]

It is clear to the CPOC that CG’s input was well-received. On June 15, 2005 USC solicited bids for the construction of the Blatt sports fields [Ex. 16] but cancelled that solicitation in favor of a solicitation combining the Blatt and Wellness Center fields into the project as it now stands.<sup>1</sup> The current Bidding Documents present a design approach and details that differs only slightly from those shown in Ex. 11 and 12. [Ex. 10, drawing sheets L4.1 and WL4.1 and Technical Specification 02790].

Finally, on January 3, 2005 CG provided Garvin’s cost estimating subconsultant with a discussion of a detailed cost estimate provided earlier by CG for the renovation of the Blatt

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<sup>1</sup> The Garvin design team, including CG, was ultimately selected as the design firm for this project and was responsible for preparation of bidding documents for both solicitations.

intramural fields [Ex. 13]. This discussion clearly reflects CG's close working relationship with other members of the Garvin design team throughout the development of the Project.

CG would have the CPOC conclude that simply because CG is not licensed by the State as an architect, engineer or construction manager, CG is, *ipso facto*, exempt from the restrictions §11-35-3245. Further, CG believes the statute would exempt CG because, as CG claims, CG and Garvin never signed a contract between them. The CPOC disagrees.

CG's position ignores both the reality of the current structure of the design industry as well as the definition of "architect-engineer services" in the Code. We no longer build as we used to. Facilities, even recreational facilities, are complex, multi-component tools that must meet a variety of demands. Rarely does a single firm possess all of the expertise required to perform all of the services required by any given project with its own employees. This expertise must be brought to bear through an assemblage of specialists such as those presented in the Garvin proposal, which in addition to CG, employed outside firms to provide landscape architecture; civil engineering; electrical engineering; structural engineering; mechanical, plumbing and fire protection engineering; and cost estimating. The Code recognizes this reality in the definition of architect-engineering services. Section 11-35-2910(1) of the Code states:

*'Architect-engineer and land surveying services' are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.* [emphasis added]

The Code's definition of services clearly encompasses the broad range of expertise required to successfully perform modern facility design, much of which expertise does not require an architect's or engineer's license to perform—landscape architecture, interior design, cost estimating, scheduling, specification writing, technical writing, inspections, acoustics experts, pest control specialists, just to name a few.

To accept the narrowly-construed argument offered by CG would be to say that while it is not acceptable for an architect or engineer to construct a project it designed, it is acceptable for a

non-architect or engineer, in association with the licensed professional, to define the design solution (the “modified soil Cambridge drainage system”); to define the scope of the work [see Ex. 12 and 13]; to define very specifically the means and methods of accomplishment [see Ex. 10 and 11]; to help define the owner’s budget expectations [see Ex. 12 and 13]; and finally to bid on that same work in what is supposed to be a fair and open competitive sealed bidding process. The conflict of interest is obvious.

The CPOC addressed the intent of §11-35-3245 and the issue of conflict of interest in 2003.<sup>2</sup>

*As with an individual, a firm may not serve two masters. The reality of organizational conflict of interest is addressed in §11-35-3245 of the Code, wherein A/Es and construction managers are, under certain circumstances, forbidden to perform the construction work of a project for which they have design or construction management responsibilities. While not all-inclusive, some additional examples where an organizational conflict of interest may arise, and must be addressed and mitigated, include:*

- 1. The A/E's services involve the preparation and furnishing of complete or essentially complete specifications which are to be used in the competitive acquisition of products or services. The primary concern in this case is that an A/E so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competitors.*
- 2. The A/E's services involve the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive acquisition. Again, the primary concern in this case is that an A/E so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competitors.*
- 3. The A/E's services involve access to internal information not available to the public concerning agency plans or programs and related opinions, clarifications, interpretations, and positions. Such an advantage could easily be perceived as unfair by a competitor who is not given similar access to the relevant information.*
- 4. The A/E's services involve either self-assessment, or the assessment of another business division or a subsidiary of the same corporation, or of another entity with which it has a significant financial relationship. The concern in this case is that the A/E's ability to render impartial advice to the agency could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated.*

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<sup>2</sup> *In the Matter Of: Complex for Industrial and Economic Development–Phase II, State Project H59-9851-PG, Trident Technical College, 10/15/03.*

In 2004, the South Carolina Attorney General in discussing the applicability of this statute to a potential prohibition of alternative forms of project delivery, quoted with approval the CPOC's interpretation of the statute's prohibitions, saying:

*[The statute prohibits]...a professional performing design related services on a project pursuant to an existing contract from performing brick and mortar work on that project pursuant to a different contract. The mischief to be avoided is obvious: any firm that participates in developing a project's design specifications would have an unfair advantage in bidding on those specifications. Such mischief is only possible when there are two contracts and only when the contractor on the first contract bids on the second contract. Prior to 1991, the Procurement Code did not prohibit such mischief; however, given the frequent use of design-bid-build as a project delivery method in the construction context, such a restriction is particularly appropriate. S.C.A.G., 2004 WL 2247471 (Oct. 1, 2004)*

The Attorney General's Opinion further cites with approval the CPOC's summarizing how the statute should be construed:

*Thus, the statute should be read not to prohibit a particular form of project delivery, but rather to address the potential for conflicts of interest and self-service and to promote the integrity of public contracting.* [emphasis added]

While CG may not be licensed as an architect or engineer, it provided key design and design-related services to licensed architects to assist with design work under a contract (Garvin's) awarded pursuant to the Code. The CPOC believes the clear intent of the Legislature is to prohibit those firms or individuals who, by virtue of a contract awarded for architectural or engineering services, occupy a position that affords the opportunity to gain superior knowledge or to influence the project design from profiting unfairly by bidding on a project on which they had performed design work. CG clearly occupied such a position and is bound by the restrictions of the statute. Accordingly,

**PROTEST DENIED**

**DECISION**

It is the decision of the Chief Procurement Officer for Construction that the protest of Carolina Green Corporation is denied and the restriction on their participation in the construction of the Columbia Campus Recreational Facilities Development—Lower Blatt/Wellness Center project contained in the Instructions to Bidders shall remain.

*Michael M. Thomas*

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Michael M. Thomas  
Chief Procurement Officer  
for Construction

October 6, 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).