

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

KAE Paving Consultants, Inc.

Budget and Control Board
IFB No. 5400006440
Pavement Rejuvenation Maintenance
For the State Aeronautics Commission

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-138

POSTING DATE: February 21, 2014
MAILING DATE: February 21, 2014

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated November 4, 2013, from KAE Paving Consultants, Inc. (KAE). With this invitation for bids (IFB), the South Carolina Budget and Control Board (BCB) attempts to procure Pavement Rejuvenation Maintenance for the runways at Barnwell County Airport, Dillon County Airport, Saluda County Airport, and Lee County Airport on behalf of the State Aeronautics Commission (Aeronautics). KAE protested the specifications included in Amendment # 5 to the IFB alleging: (1) The current specification includes a requirement that cannot be met; See Page 3 2.2.2, Table 4; (2) Specification 2.3(b) (that) adds “or upon certification by the Contractor that the data from certain of these test periods are not available, such testing information that Contractor has otherwise meets this requirement...is...nonsensical;” (3) “We further request that the specification Section 2.3(b) be changed back to the original November 2012/April 2013 requirement.” In summary, KAE asked the CPO to grant the protest by eliminating the “allowance of the Trust-the-Contractor clause” regarding product certification.

In order to resolve the matter, the CPO conducted a hearing February 11, 2014.¹ Appearing before the CPO were KAE, represented by Arthur McGovern; HASCO, a prospective bidder, represented by Michael Harper; and Aeronautics, represented by John Hodge, Esquire.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On October 30, 2013, the BCB issued Amendment No. 5 (Ex. 2), which included the attachment entitled South Carolina Aeronautics Commission Maintenance Specifications for Pavement Rejuvenations. (Ex. 3)
2. On November 4, 2013, the CPO received KAE’s protest.

DISCUSSION

This protest by KAE follows a protest of Amendment # 3 by HASCO. HASCO withdrew the protest following Aeronautics’ agreement to relax the specification requirements of Section 2.2.2, Table 4. That change occurred with the BCB’s issuance of Amendment #5, as follows:

Test Property	Requirements	
	Amendment # 3	Amendment #5
Light Aromatic Solvent Naphtha		
API Gravity @ 60 F	11-30	11-30
Specific Gravity @ 60/60 F	0.876-0.993	0.876-0.993
Distillation Range F		
Initial Boiling Point (IBP)	310-450	310-450
Dry Point (DP)	350-550	350-550
Flash Point F TCC (Tag Closed Cup)	110-250	110-250
Coal-tar Solvent Naphtha		
Specific Gravity @ 60/60 F	0.94-0.99	0.94-1.06
Distillation Range F		

¹ The hearing was continued twice, as requested by the parties.

Initial Boiling Point (IBP)	250-385	No requirement
Flash Point F (Tag Closed Cup)	92-108	No requirement

KAE protests the revised specifications.

MOTION TO DISMISS/SUMMARY JUDGEMENT²

The CPO received a motion from Aeronautics asking the CPO to dismiss the protest of arguing: (a) KAE does not have standing because KAE is a material supplier, not a prospective bidder, offeror or subcontractor and (b) KAE is not aggrieved by the specifications in that even as a material supplier, KAE's product still meets the specifications. Aeronautics argued the specifications, as amended, relaxed the requirements in order to maximize competition; therefore, the specifications were not unduly restrictive.

CONCLUSIONS OF LAW

The Consolidated Procurement Code provides prospective bidders the privilege of protesting solicitations. It reads: "A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer." [11-35-4210(1)(a)] Mr. McGovern acknowledged that KAE is not a licensed contractor in the State of South Carolina. Title 40 of the Code requires a general contractors license for "rehabilitation and repair of ... airport runways and aprons," whether concrete (S.C. Code Ann. § 40-11-410(2)(a)) or asphalt (§ 40-11-410(2)(c)). Since KAE lacks a license it is ineligible to submit a bid, § 40-11-30, and therefore cannot be a prospective bidder or offeror. *Cf. In Re: Protest of ACMG, Inc.*, Panel Case No. 1990-4 (only one who will become contractually bound to the State can be an actual offeror).

² Although Aeronautics offered the motion as one of dismissal, during discussion of the motion, the CPO accepted statements from both KAE and HASCO. Therefore, the motion is more appropriately considered as a motion for summary judgment.

Mr. McGovern also stated KAE represents Applied Polymetrics. Applied Polymetrics manufactures products for asphalt pavement rejuvenation, which may be used by a successful bidder for this contract. It does not actually install or apply those products. The Code defines a subcontractor as “any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body.” [§ 11-35-310(30)] The Procurement Review Panel has consistently applied this definition in the context of standing to protest. *E.g., In Re: Architectural Services Procurement for Replacement of Central Correctional Institution Project*, Panel Case No. 1989-5; *Protest of Cathcart & Associates*, Case No. 1990-13. At least one jurisdiction has expressly ruled that a material supplier has no

vested right to manufacture and supply materials utilized in construction. We find no basis for appellants’ contention on this point. They were only indirectly involved in the bidding process [and] never became parties to the [prime] contract....

Wolf Ridge Plastics, Inc. v. Jacksonville Electric Authority, 388 So.2d 1298, 1300 (Fla. 1st DCA 1980). Since Applied Polymetrics does not meet the statutory definition of “subcontractor,” it cannot claim standing to protest the solicitation.

Even if Applied Polymetrics is considered a “prospective subcontractor,” it must still show that it is “aggrieved in connection with the solicitation of a contract.” Code Section 11-35-4210(1)(a). Mr. McGovern acknowledged that the Applied Polymetrics product KAE intended to sell for use on the project would meet the specifications as written. Since the revised specifications in amendment 5 do not prohibit the use of Applied Polymetrics’ product, neither it nor KAE is aggrieved by those specifications and thus do not meet the “aggrieved” requirement imposed by the Code.

DETERMINATION

For the foregoing reasons the protest is denied.

R. Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

2/21/14

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised June 2013)

The South Carolina Procurement Code, in Section 11-35-4210, 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 by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (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 for disagreement 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 an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.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 108.1 of the 2013 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...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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing.” PLEASE MAKE YOUR CHECK PAYABLE TO THE “SC PROCUREMENT REVIEW PANEL.”

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.



P. O. Box 1126
Wexford, PA 15090
(412) 721-9212
Fax: (724) 935-4367

kaepaving@consolidated.net

November 4, 2013

Ms. Kimber Craig, CPPO
State of South Carolina
Budget and Control Board - Internal Operations
1201 Main Street
Suite 600
Columbia SC 29201

Re: In the Matter of Letter of Protest - IFB No.; 5400006440

Ms. Kimber:

On behalf of K.A.E. Paving Consultants and Applied Polymetrics, we file a Protest in the above referenced matter. In support of this Protest, we provide the following information:

- 1) The current specification includes a requirement that cannot be met ; see Page 3, 2.2.2 Table 4.

The specification allows for a production choice of Coal Tar Solvent Naphtha, with a specific gravity at 60/60° F of 0.094-1.06. Coal Tar Solvent Naphtha, synonyms being 31 Still Solvent, Naphthalene Feedstock, BXT, and Solvent Naphtha (coal).

The original requirements, i.e., Specific Gravity @ 60/60° F, being 0.94-0.99, with an IBP of 250-385 and Flash Point F, TCC of 92-108 is correct.

The latest SC iteration is incorrect; the specification differs from chemical reality.

2) This specification, 2.3(b) adds "or upon certification by Contractor that the data from certain of these test periods are not available, such testing information that Contractor has otherwise meets this requirement and that Contractor shall...".

The FAA specification for the rejuvenation of airport pavements was based on data from 3 years of testing of recovered asphalt binder, treated and untreated, to assure long-term improvement in viscosity and penetration, with no significant change in skid resistance. The testing was independent, by and for user agencies.

This addition to the verification requirements is, in our opinion, nonsensical in that it dilutes even the FAA, Item P-632 specification requirement for "field testing by/for using agencies as to the required change in recovered asphalt binder properties. Testing data must be submitted indicating such product performance from at least two projects, representative of two different HMA mix designs, each being tested for a minimum of two years to insure reasonable longevity of the treatment..".

FAA specification Item P-632 published in 2008 cited in the original Hasco protest has at a minimum two years of viscosity testing and the requirement of independence.

3) This protest requests an immediate change in the Materials Requirement to reflect current organic chemistry reality (2.2.2). We further request that the specification Section 2.3(b), be changed back to the original November 2012/April 2013 requirement. Neither dated specification received negative comment.

This Request for Relief will be satisfied by a return to the SC, M-632 Specification dated November 2012.

This Request for Relief will be satisfied by the elimination of the allowance of the Trust-the-Contractor clause.

We look forward to your timely response to this Protest. Feel free to contact me if you have any questions.

Very truly yours,



Arthur J. McGovern
President

Via e-mail and Fax (803/737-0639)

CC: R. Voight Shealy
Materials Management Officer
Via e-mail and Fax (803/737-0639)

Paul Werts, Executive Director
SC Aeronautics Commission
Via e-mail and Fax (803/896-6266)