

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:)

Manhattan Construction Company)

Project No. H34-9532-GW-B

University of South Carolina)

POSTING DATE:

Health Education Complex-USC Upstate)

November 13, 2006

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Manhattan Construction Company (Manhattan). With this invitation for bids (IFB), the University of South Carolina (USC) attempts to procure construction services to build a health education complex at USC Upstate. In the letter, Manhattan protested USC's intent to award to Oscar J. Boldt Construction (Boldt) alleging that: (1) USC negotiated a contract with Boldt for \$26,800,000, which is more than ten percent (10%) higher than the project budget of \$22,000,000, in violation of South Carolina Code Ann. Section 11-35-3020(2)(d)(1); (2) USC officials misrepresented the project budget at the pre-bid conference and told all prospective bidders that if the bids exceeded the budget of \$22,000,000, the project would be rebid; (3) Boldt bid in the name of the Oscar J. Boldt Construction Company, not the Boldt Company, as it is licensed, which is a violation of SC Code Ann. Section 40-11-200(B); and (4) USC failed to promptly send a copy of the bid tabulation to all bidders, in violation of SC Code Ann. Section 11-35-3020(2)(d).

In order to resolve the matter, the CPO conducted a hearing on October 31, 2006. Appearing before the CPO were Manhattan, represented by Robert deHoll, Esq.; Boldt, represented by Steven Ouzts, Esq.; and USC, represented by George Lampl, Esq.

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. USC issued its invitation for bids.
2. On June 26, 2006, the project was advertised in *South Carolina Business Opportunities* (SCBO). Regarding the project budget, the advertisement read "Construction Cost Range: More than \$20,000,000."
3. On July 6, 2006, USC conducted a pre-bid conference.
4. On July 10, 2006, USC issued Addendum No. 1. (Ex. 2.)
5. On July 24, 2006, USC issued Addendum No. 2. (Ex. 24)
6. On July 28, 2006, USC issued Addendum No. 3. (Ex. 25)
7. USC opened the following bids:

<u>Bidder</u>	<u>Bib Amount</u>
Boldt	\$26,800,000
Manhattan	26,998,000
Contract Construction (Ex. 13)	28,332,000

8. On September 20, 2006, USC posted an intent to award to Boldt. (Ex. 16)
9. On September 28, 2006, the CPO received the protest letter.

MOTIONS TO DISMISS

At the outset of the hearing, Boldt and USC offered certain motions asking the CPO to dismiss three issues of protest. Specifically, Boldt and USC asked the CPO to dismiss Protest Issues 1 and 2, as untimely filed asserting that if Manhattan felt aggrieved by the statements regarding the project

budget that it alleges were made by USC officials at the pre-bid, Manhattan had fifteen days from the date the statements were made to file its protest. They argued Manhattan failed to meet the filing requirement.

In Issue No. 1, Manhattan alleged that USC improperly negotiated with Boldt in a manner that violated SC Code Ann. Section 11-35-3020. Regarding protest Issue No. 1, Mr. Lampl advised Manhattan that its assumption that USC negotiated with Boldt was wrong. He stated that USC did not negotiate with Manhattan. Instead, USC identified additional funds, obtained approval to add the additional funds to the project, and awarded the contract to Boldt at its original bid price. Manhattan withdrew this Issue No 1. Therefore, the motion to dismiss is rendered moot.

In Issue No. 2, Manhattan alleged that USC misrepresented the project budget to the bidders as \$22,000,000 when USC knew the budget should be much more, thereby denying the bidders a fair opportunity to compete for the project and denying USC the benefit of competitive bids. Manhattan alleged that a USC official actually stated at the pre-bid conference that if the bids exceeded \$22,000,000 (which they did), USC would rebid. USC denied that allegation. After hearing arguments, the CPO held the motion to dismiss Issue No. 2 in abeyance and proceeded with the hearing.

USC offered a motion asking the CPO to dismiss Issue No. 4, arguing that it states no material issue of fact to be decided. In Issue 4, Manhattan alleged that when USC sent notice of the intent to award to all bidders, USC did not include the bid tabulation. USC acknowledged that the tabulation was not originally sent with the intent to award to the bidders, but argued that it immediately corrected that oversight when notified by the bidders. Manhattan withdrew Issue 4. Therefore, the motion to dismiss is rendered moot.

WITHDRAWAL OF PROTEST ISSUES

As noted above, during the hearing, Manhattan withdrew Issues 1 and 4. The remaining protest issues are that USC officials misrepresented the project budget at the pre-bid conference and told all prospective bidders that if the bids exceeded the budget, the project would be rebid and that Boldt bid in the name of the Oscar J. Boldt Construction Company, not the Boldt Company, in violation of SC Code Ann. Section 40-11-200(B)

Item No. 2 - USC officials misrepresented the project budget at the pre-bid conference and told all prospective bidders that if the bids exceeded the budget, the project would be rebid

In the protest letter, Manhattan alleged, “a representative of USC-Upstate advised all bidders at the pre-bid conference that the absolute upper limit for (the) budget for the project was \$22,000,000.” Manhattan wrote further, “it became obvious that the bids would grossly exceed \$22,000,000.” Manhattan asserted in the protest letter and at the hearing that someone stated at the pre-bid that if the bids came in over \$22,000,000, USC would rebid the project.

Manhattan argued that “many contractors obviously concluded that this project would be resolicited since the budget number was grossly low for the design of the project and this resulted in a small number of contractors (three) actually submitting bids.” Most grievous, Manhattan alleged that USC has misrepresented the facts in the procurement to the prospective bidders. They argued that the “situation was not fair” to USC-Upstate or the prospective bidders.

Essentially, Manhattan alleged that USC violated the “good faith” requirement of the Consolidated Procurement Code (Code), which reads, “Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty

in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.” [11-35-30]

To support its contention, Manhattan officials offered testimony from John Colacioppo, its Project Manager, and Mack Woods, its Division Manager and Vice President.

John Colacioppo, Project Manager of Manhattan, testified that he heard someone say at the pre-bid “if it kind of went over that number (\$22,000,000), the job wouldn’t go.” He testified further that he was, “told if it went over \$22,000,000, the job would be rebid.” However, he could not recall the source of these statements. Mr. Colacioppo testified that he could place one statement with Robert Luhrs, Project Engineer for USC, who said, according to Mr. Colacioppo, “USC hopes to get (bids) close to \$20,000,000”, but he said he did not recall verbatim what Mr. Luhrs said.

Mack Woods, Division Manager and Vice President of Manhattan, testified that he called the architect for the project, McMillan, Smith & Partners Architects, and told them that he estimated the project bids to be “around \$27,000,000.” He stated that the architect responded, “I was afraid of that.” However, Mr. Woods did not call the architect until the morning of the bid opening. Further, Manhattan did not formally raise in writing its concern that the budget was inadequate for the project.

Woods alleged that the bids Manhattan received from subcontractors were artificially high because “the rumor on the street” was that the project would have to be rebid. Manhattan offered into evidence an Affidavit by James L. Champion, Project Manager for Waldrop Heating & Air Conditioning, Inc. Mr. Champion wrote:

While attending the pre-bid conference, representatives of the University of South Carolina represented that the maximum budget for the construction of the Project was \$22,000,000.00 and that the University did not have any additional funds beyond the \$22,000,000 to construct the Project. University representatives also made statements at the pre-bid that the University would not proceed with the Project if the bids exceeded \$22,000,000.00 and further made statements that bids exceeding \$22,000,000.00 was not an option. (Ex. 22)

Mr. Champion failed to identify the source of the statements asserted in his affidavit and did not attend the hearing to testify or respond to questions.

Neither of the witnesses could identify the source of the alleged misrepresentations. Mr. Colacioppo testified the statements above were made, but he could not recall who made them. He acknowledged that there had been “nothing in writing on the project budget” and that “Manhattan did not seek clarification” of the matter before bidding. Mr. Woods could not testify to what was said at the pre-bid because he did not actually attend. Mr. Colacioppo signed him in at the pre-bid as one of two representatives of Manhattan, but according to Mr. Woods’ testimony, he was not there.

Manhattan alleged that the state did not receive reasonable bids for the project. However, according to Mike Quilty, Boldt’s Vice President – Southeast Office, he had “no sense that he was not getting good pricing from subs.”

USC acknowledged that it hoped the bids would be under \$22,000,000. However, according to Michael Thomas, Manager of Construction Administration for USC, a project budget is “target funding based on internal estimates or outside estimates.” In this case, the estimates were low. According to Mr. Thomas, once the bids were opened, USC explored all its options. When USC-Upstate identified more money available for the project, it amended the A-1, the Budget and Control Board – Permanent Improvement Project Request, obtained the requisite approvals, and proceeded with the award. This is common practice in state government.

USC denied the allegation that any of its officials stated that if the bids exceeded \$22,000,000, the project would be rebid. USC offered as witnesses three officials who attended the pre-bid to confirm that no representative of USC made the alleged statement.

Rick Puncke, Director of Facilities Management, USC-Upstate, testified, “I don’t remember anything being said about how much the budget was.” Regarding the allegation about a rebid being guaranteed if the bids exceeded \$22,000,000, he testified, “that statement was not made in the conference.”

According to Lind Johnson, USC Construction Project Administrator, “no statements on the budget were made.” She stated further that she “did not recall” any rebid guarantee being made by USC.

Robert Luhrs, USC Project Engineer, who attended the pre-bid, said that he stated that the project budget was “around \$22,000,000”, but that he did not guarantee a rebid if the bids exceeded \$22,000,000. He stated further that he had “no reason to believe \$22,000,000 was unreasonable.” He added that no one asked the question, “What would happen if bids exceeded \$22,000,000?”

USC argued that the IFB states no absolute construction budget for the project. USC also argued that the IFB is clear that only written instructions are binding on the procurement process.

DETERMINATION

The \$22,000,000 budget figure is nowhere to be found in the IFB or any other bidding documents shared with the bidders.¹ The SCBO ad reads that the project budget was “More than \$20,000,000.” (Ex. 7) The solicitation cautioned bidders that oral instructions would not govern the procurement process. The IFB, in the Instructions to Bidders, reads, “[b]idders and sub-Bidders requiring clarification or interpretation of the Bidding Documents shall make a written request which shall reach the A/E at least ten (10) days prior to the date for receipt of Bids. No oral interpretations in regard to the meaning of the Plans and Specifications will be made and no oral instructions will be

given prior to the award of the Contract.” (Ex. 1, p. 00201-OSE-3, Item 3.2.2) (Emphasis added) Addendum No. 1 reads, in pertinent part, “[b]idders are not to assume anything that is not written in Construction Documents, specifications or subsequent addenda.” (Ex. 2, p. 2) Addendum No. 1, which included the minutes of the pre-bid meeting where the alleged statements were to have been made, reads further, “[a]ttendees were reminded that the Bid Documents were what the bid was to be based upon, and not representations made during the conceptual presentations.” (Ex. 2, p. 3)

No witness on behalf of Manhattan could identify a source for the alleged misrepresentation that USC would rebid the project if the bids exceeded \$22,000,000.² The minutes of the pre-bid meeting do not reflect that the budget was discussed. The witnesses proffered by USC all refuted the alleged misrepresentations. According to the testimony of Rick Puncke, Lind Johnson, and Robert Luhrs, USC did not represent to the bidders that that if bids exceeded \$22,000,000, USC would rebid the project. Finally, Gary Wolford, Project Manager, Office of the State Engineer, who’s unconnected from any part in the protest, testified that he attended the pre-bid conference and did not hear such a representation by USC or anyone at the pre-bid.

In a protest, the standard for review is that an allegation must be proven by the preponderance of the evidence. Manhattan alleged that USC misrepresented the project budget. The preponderance of the evidence received by the CPO refutes that allegation. Manhattan alleged that the bidders had inflated their bids. That allegation was proven as fact in regard to only one bid – Manhattan’s. Mr. Woods stated on the record that he “added money to the bid at the bottom” and that Manhattan’s bid was “not his best bid.”

Issue No. 2 is denied.

¹ The State Invitation for Construction Bids, Form SE-310, on page two, reads that the initial total approved construction budget was \$24,500,000 and the final estimate of construction cost was \$22,000,000. However, page two of this document was not included with the IFB .

² According to Mr. Woods, he did not attend the pre-bid although the sign in sheet reflects his name.

Item No. 3 - The Boldt bid in the name of the Oscar J. Boldt Construction Company, not the Boldt Company, violated of SC Code Ann. Section 40-11-200(B)

In this protest issue, Manhattan alleged that Boldt violated SC Code Ann. Section 40-11-370(B), by not bidding in the exact same name it is licensed. The referenced statute reads:

It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. "Engaging in construction" includes marketing, advertising, using site signs, and submitting contracts. This requirement does not include advertising on vehicles, which may use an abbreviated version of the license name so long as the advertising is not misleading.

At issue in this case is how Boldt submitted its bid - as "Oscar J. Boldt Construction" not "The Boldt Company." Manhattan has not alleged that Boldt (being used hereafter to refer to either Oscar J. Boldt Construction or the Boldt Company) is not a licensed contractor.

According to Boldt, its corporation was originally chartered in South Carolina as the Oscar J. Boldt Construction Company in 1988. The Oscar J. Boldt Construction Company was licensed by the State Contractor's Licensing Board under license number 10792. In 2001, the Oscar J. Boldt Construction Company applied to the Secretary of State's Office to amend its corporate name to The Boldt Company, specifically The Boldt Company d/b/a Oscar J. Boldt Construction Company. Boldt submitted a similar request to the South Carolina Department of Labor, License, and Regulation (LLR). Boldt is licensed, as of the date of the hearing, under license number 10792, as The Boldt Company. According to Mike Quilty, Boldt's Vice President - Southeast Office, who signed Boldt's bid, he "was not aware of the license change to the Boldt Company."

The Office of the State Engineer has a long-standing agreement with the Contractors Licensing Board of LLR to advise this office on matters of contractor licensure, which LLR administers. Ron

Galloway, Administrator, Contractors Licensing Board, stated that Michael Thomas of USC had inquired with his office regarding Boldt's licensure as a general contractor. Mr. Galloway stated that his office had reviewed Boldt's license history and found that Boldt is licensed as a general contractor with a BD5 classification, which qualifies Boldt to receive this contract.

Mr. Galloway provided written documents and oral testimony regarding Boldt's licensure history with the State of South Carolina. According to Mr. Galloway, The Boldt Company is a properly licensed general contractor. In an email to the CPO, dated October 11, 2006, Mr. Galloway copied the CPO on an email response that he sent to Mr. Thomas, in which he wrote:

I have reviewed the past applications and current application of the Boldt Company. It appears that the Boldt Company currently holds the general contractor's license with a BD5 classification and apparently submitted a bid for the USC project in the name of Oscar J. Boldt Construction Company, which previously held the license. Mike Quilty, VP of the Boldt Company, states the company requested a name change from the Secretary of State's Office on July 25, 2001, and apparently submitted the bid in the wrong name other than the name that appears on their general contractor's license. The bid contains the same license number and federal ID number used by both entities. This appears to be a violation of Section 40-11-370 (B) for engaging in construction under a name other than the exact name that appears on the license. We usually issue a \$500 citation for this violation of the contracting statutes and close the case upon payment of the citation. I would not recommend to the Investigative Review Committee (IRC) to send this bid violation to the Board for consideration of a sanction of unlicensed practice since it appears to be a case of bidding in the wrong name, not practicing without a license." (Ex. 3) (Emphasis added)

In a later email to the CPO, Mr. Galloway added, "[t]his is what I see unless someone can prove the two companies are two separate entities with two separate federal ID numbers."

DETERMINATION

The Boldt Company submitted its bid as Oscar J. Boldt Construction. That is contrary to the State Engineer's Manual (Manual), which reads, "[a]ll attendees (at prebid conferences) shall provide the name of the firm they represent on the sign in sheet. This shall be the same name shown on their SC Contractor's License, and this shall be the same name that will be shown on the Bid Form." It may not be contrary to the instructions to bidders that read, in pertinent part, "A prospective Contractor shall be considered as meeting the State's standards or responsibility when the firm has: Is qualified legally to contract with the State." (Ex. 1, p. 00201-0SE-9, Contractor's Qualifications, Standards of Responsibility)

The Boldt Company, formally the Oscar J. Boldt Company, is licensed by the Contractor's Licensing Board as a general contractor under license number 10792. When The Boldt Company offered its bid as the Oscar J. Boldt Company (Ex. 11), it listed state license number 10792 and Federal Employer's Identification Number (FEIN) 39-0174 190. According to testimony, primarily of Mr. Galloway, both the contractor's license number and the FEIN are legitimate. Boldt signed in at the pre-bid as "The Boldt Company." Boldt offered its bid bond in the name of "The Boldt Company", and is therefore bound by its bid to USC.

While a technical violation of law, Mr. Galloway testified "no action has been taken against Boldt's license" and that "if they (LLR) address it, it would be an administrative matter." He stated that this was "not a licensing matter" and that Boldt does "have a valid license." Mr. Galloway stated further that Boldt is "competent to contract with the State" and characterized Boldt's mistake as a "minimum violation." He stated that as far as the Contractor's Licensing Board was concerned, the decision to enter in to the contract was up to the owner and the contractor. Near the culmination of the hearing, the CPO inquired with USC whether it was still willing to enter the contract. USC officials

indicated they were satisfied that Boldt (Oscar J. Boldt Construction/The Boldt Company) is properly licensed to receive the contract. USC requested authority to proceed with the award.

The Code recognizes that minor informalities and irregularities in bids may be waived or cured under certain circumstances. It reads:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. [11-35-1520(13)]

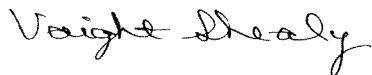
While it is quite uncommon that a minor informality or irregularity in a bid would involve a violation of law, in this case it does. Ron Galloway, Administrator of the Contractor's Licensing Board, which is charged with the authority and responsibility for enforcing the contractor's licensing statutes, has testified that Boldt is "competent to contract with the State." He stated that he considered Boldt's mistake a "minimum violation" that he characterized as an "administrative violation only."

Therefore, the mistake by Boldt is determined to be a minor informality or irregularity according to SC Code Ann. Section 11-35-1520. It does not affect the total bid price, quality, quantity, or delivery of the supplies or performance of the contract because Boldt is a properly licensed and qualified contractor according to the administrator of the Contractor's Licensing Board. Section 11-35-1520 offers two examples of a minor informality or irregularity that bear mentioning. The first, reads, in pertinent part, that "failure of a bidder to sign its bid (is a minor informality or irregularity), but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization, and the

bid carries such a signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee (a bid bond) with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself.” [11-35-1520(c)] Boldt submitted a bid bond in the name of The Boldt Company. The second, reads, “notwithstanding Section 40-11-180, the failure of a bidder to indicate his contractor's license number or other evidence of licensure (is a minor informality), provided that no contract shall be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.” According to Mr. Galloway, Boldt is “properly licensed under the laws of South Carolina.” The minor informality or irregularity is waived.

Mr. Galloway stated that the decision to enter into the contract or not would be left to the owner and the contractor. The owner, USC, stated that it was satisfied with Boldt’s licensure. Therefore, the award should proceed.

Issue No. 4 is denied.



R. Voight Shealy
Interim Acting Chief Procurement Officer
for Construction

November 13, 2006

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

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

(6) Finality of Decision. 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 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:
www.procurementlaw.sc.gov

FILING FEE: Pursuant to Proviso 66.1 of the 2005 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." 2005 S.C. Act No. 115, 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). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm

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September 28, 2006

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By fax (803) 737-0639
Fed Ex 8542 1802 4279 0215
and U.S. Mail

Re: Protest of Notice of Intent to Award
University of South Carolina-Upstate Health Education Complex
Project Number: H34-9532-GW-B

Dear Mr. Shealy:

Pursuant to South Carolina Code § 11-35-4210, Manhattan Construction Company, Inc., (hereinafter referred to as "Manhattan") hereby protests the Notice of Intent to Award a construction contract to the Oscar J. Boldt Construction Company that issued by the University of South Carolina-Upstate (hereinafter referred to as "USC-Upstate") for the University of South Carolina-Upstate Health Education Complex designated as Project Number: H34-9532-GW-B (hereinafter referred to as the "Project"). The principal bases for this protest of the Notice of Intent to Award are outlined as follows:

1. The construction contract for the Project was required to be awarded by competitive sealed bidding pursuant to South Carolina Code Section 11-35-1520 as modified by South Carolina Code Section 11-35-3020. The publication of the project in the South Carolina Business Opportunities publication dated June 28, 2006 stated that the projected cost range for the Project was more than \$20,000,000. At the pre-bid conference that was held at USC-Upstate on July 6, 2006, a representative of USC-Upstate stated that the upper limit of the budget for the project was \$22,000,000. Competitive sealed bids were received from Oscar J. Boldt Construction, Contract Construction Company and Manhattan. The bid of Oscar J. Boldt Construction was \$26,800,000, the bid for Manhattan was \$26,998,000 and the bid of Contract Construction was \$28,800,000. All of the bids exceeded the upper limit budget for USC-Upstate. After the bids were opened, USC-Upstate representatives negotiated with Oscar J. Boldt

Construction and then issued the Notice of Intent to Award. In doing so, USC-Upstate violated South Carolina Code Section 11-35-3020 (2) (d).

South Carolina Code Section 11-35-3020 (2) (d) (1) provides as follows:

(1) When bids received pursuant to an invitation for bids exceed available funds and it is determined in writing by the agency that circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder, provided that this base bid, less any deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work. The using agency may change the scope of the work to reduce the cost to be within the established construction budget but shall not reduce the cost below the established construction budget more than ten percent without a written request by the agency and the written approval of the chief procurement officer based on the best interest of the State.

All of the bids exceeded the budget established by USC-Upstate for the Project. To the best information of Manhattan, USC-Upstate did not make a written determination that the circumstances would not permit the delay required to resolicit competitive seal bids. Even if a written determination was issued that determination could not be justified given the nature of this project which is a health education complex. This type of project should not have any degree of urgency that would justify not resoliciting competitive sealed bids especially when all bids exceeded the budget for the project.

Another condition to authorizing USC-Upstate to negotiate the contract under South Carolina Code Section 11-35-3020 (2) (d) (1) was that base bid not exceed the available funds by an amount greater than ten percent of the construction budget. In this case, USC-Upstate represented that its available funds and budget were the same amount at \$22,000,000. Ten percent of the budget would have been \$2,200,000. The bid of Oscar J. Boldt Construction Company was \$26,800,000 which exceeded the budget by \$4,800,000 or approximately 22%. USC-Upstate did not have the authority to negotiate the contract with Oscar J. Boldt Construction Company under South Carolina Code Section 11-35-3020 (2) (d) for the reasons discussed above.

2. As indicated above, a representative of USC-Upstate advised all bidders at the pre-bid conference that the absolute upper limit for budget for the project was \$22,000,000. During the course of preparing the bid for the Project, it became obvious that the bids would grossly exceed

\$22,000,000. In fact, Manhattan was advised by a number of trade subcontractors that were considering the Project that they had also come to the conclusion that the bids would exceed \$22,000,000, that they anticipated that the Project would be rebid and that they were not giving their best prices because of the effect that a rebid would have on their pricing. Manhattan advised the project architect, McMillan Smith & Partners Architects, prior to the time that the bids were opened that Manhattan and some of its major subcontractors had concluded that the bids for the Project would clearly exceed the \$22,000,000 budget and that subcontractors were not providing their best pricing. The project architect acknowledged to Manhattan that he knew or suspected the bids would grossly exceed the budget.

In light of the fact that the bidders knew that the project would grossly exceed the budget which resulted in two things occurring. First, the three contractors who actually submitted bids did so knowing that the project would most likely be redesigned to reduce costs to bring it within the budget and then USC-Upstate would resolicit competitive sealed bids. This in turn resulted in Manhattan and its subcontractors or perhaps other bidders and other subcontractors not submitting their lowest bids since they were concerned that if they disclosed their best figures on the initial bid that it would hurt them on the rebid. Second, many contractors obviously concluded that this project would be resolicited since the budget number was grossly low for the design of the project and this resulted in a small number of contractors actually submitting bids for this project. Eleven (11) general contractors attended the pre-bid conference but only three (3) general contractors submitted bids.

The announcement of the upper limit of the budget for this project at the pre-bid conference that was grossly less than the amounts that should have been reasonably anticipated for bids on this project violated some of the basic purposes of the South Carolina Consolidated Procurement Code as established under South Carolina Code Section 11-35-20 including, but not limited to: (a) providing increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and (b) ensuring the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement. (South Carolina Code Sections 11-35-20(a) and 11-35-20(f)). This situation was not fair to USC-Upstate since it did not get the best pricing for the Project and it was not fair to the prospective bidders since they had concluded that the Project have to be rebid.

3. The Notice of Intent to Award was issued indicating USC-Upstate's intention to enter into a construction contract for the project with Oscar J. Boldt Construction Company. It is our understanding that the low bid for this project was submitted in the name of "Oscar J. Boldt

Construction Company”, however, Oscar J. Boldt Construction Company is not a licensed general contractor in the State of South Carolina according to the records of the South Carolina Department of Labor, Licensing and Regulation. As a result, the bid submitted by Oscar J. Boldt Construction Company should have been rejected because of the failure to maintain the required contractor’s license under South Carolina Code Section 40-11-200 (B). An inspection of the records of the South Carolina Secretary of State reveals that the Oscar J. Boldt Construction Company filed articles of amendment changing its name in 2001 to The Boldt Company and that company does have a general contractor’s license. However, if the Boldt Company submitted a bid in the name of Oscar J. Boldt Construction Company, then its bid should have been rejected since South Carolina Code Section 40-11-370 (B) makes it unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. In this case, the exact name on the general contractor’s license is “The Boldt Company” and not “Oscar J. Boldt Construction Company.”

4. South Carolina Code Section 11-35-3020 (2)(c) requires that USC-Upstate promptly send a copy of the notice of intended award and a copy of the bid tabulation to all responsive bidders. Although USC-Upstate did send copies of the Notice of Intent to Award to the bidders, it did not send out copies of the bid tabulation. As a result of the Notice of Intent to Award should be withdrawn.

In light of the fact that neither the bid tabulation nor any written determination by USC-Upstate that was required under South Carolina Code Section 11-35-3020 (2) (d) have been provided to the bidders and since very little in the way of public information has been provided regarding the bids, the basis for negotiating the contract after the bids were opened or the decision to issue the Notice of Intent to Award to the Oscar J. Boldt Construction Company, there may be additional grounds for this protest. To that end, we are submitting a request for documents and records under the South Carolina Freedom of Information Act, and are hereby reserving the right of Manhattan to provide additional bases for this protest after there has been an adequate opportunity to review those documents and records.

The primary forms of relief that Manhattan is seeking in this protest are:

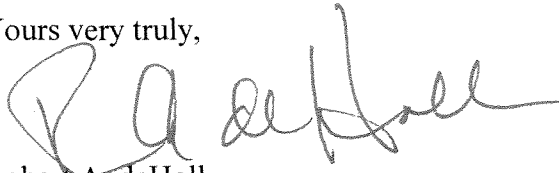
- A. That the bid submitted by Oscar J. Boldt Construction Company be rejected as being nonresponsive or that Oscar J. Boldt Construction Company be determined not to be a responsible bidder for the reasons cited above, that the Notice of Intent to Award issued by USC-Upstate on September 20th be withdrawn and cancelled and that the construction contract for the Project be awarded to Manhattan as the next responsive and responsible bidder ;

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- B. That Notice of Intent to Award the construction contract be withdrawn and cancelled, that all of the bids be rejected by USC-Upstate for the reasons cited above and that USC-Upstate be directed to resolicit competitive sealed bids for the Project within a reasonably short period of time;

If you have any questions with regard to either the bases for this protest or relief being sought under this protest, please do not hesitate to contact me.

Yours very truly,



Robert A. deHoll
Construction & Surety Practice Group
Leatherwood Walker Todd & Mann, P.C.

RAAd:gwm

cc: Mr. J. Mack Woods, Jr.
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