

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	CASE NO. 2000-12
In re:	)	
Protest of B&D Marine and	)	
Industrial Boilers, Inc.	)	ORDER
	)	
Appeal by C&C Boiler Sales &	)	
Services, Inc.	)	
	)	

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This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on January 25, 2001 on appeal by C&C Boiler Sales & Services Inc. of a decision by the Chief Procurement Officer (CPO). Present and participating in the hearing before the Panel were C&C Boiler Sales & Services Inc. (C&C) represented by John E. Schmidt, III, Esquire, B&D Marine and Industrial Boilers, Inc. (B&D), represented by Arnold Goodstein, Esquire and Alice Paylor, Esquire as well as the Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire. George W. Lampl, III, Esquire from the University of South Carolina (USC), was present but did not participate.

**FINDINGS OF FACT**

On April 6, 2000 the Materials Management Office (MMO) issued an invitation for bids (IFB) to procure a steam boiler and pressurized dearator/surge system for the University of South Carolina (USC). On April 20, 2000 MMO issued Amendment No. 1. Amendments Nos. 2 and 3 followed respectively on May 12 and May 15, 2000. On May 31, 2000 MMO opened the bids received. On June, 14, 2000, MMO issued a notice of

intent to award to C&C. On June 29, 2000 the Chief Procurement Officer (CPO) received B&D's protest. On October 6, 2000 the CPO dismissed B&D's protest as untimely, but issued a written determination pursuant to §11-35-1520 (7) and Regulation 19-445.2085 (C) canceling the award prior to performance and ordering MMO to resolicit the procurement. On October 16, 2000 C&C appealed the CPO's written determination to the Panel.

## CONCLUSIONS OF LAW

### MOTION TO DISMISS

General Services and B&D submitted a motion to dismiss C&C's first issue on appeal which states *the CPO erred in ordering this solicitation to be rebid because all issues raised in the letter of protest by B&D were dismissed as untimely filed.* The CPO in this case did dismiss B&D's protest issues as untimely filed, but proceeded to make a written determination in this case pursuant to his authority under SC Code of Laws §11-35-1520 (7) and SC Code of Laws Regulation 19-445.2085 (C)(1) and (6).<sup>1</sup> Therefore, the Panel finds that the CPO did not grant relief pleaded in a defective protest, but made an independent written determination, the merits of which will be addressed further in the body of this order. The motion to dismiss C&C's first issue is granted.

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<sup>1</sup> SC Code of Laws §11-35-1520 (7) provides in part the following: Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal or inadvertently erroneous bids after award, or cancellation and reward of awards or contracts, after award but prior to performance may be permitted in accordance with regulations promulgated by the board. SC Code of Laws Regulation 19-445.2085 (C) provides in part the following: 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 ... (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.

ISSUE II: WHETHER THE SPECIFICATIONS WERE “UNDULY RESTRICTIVE”

C&C’s issues 2, 3, and 4 are addressed as one issue on appeal because each of them deal with the CPO finding the specifications “unduly restrictive.” [Record pp. 1-2] SC Code of Laws §11-35-2730 (Assuring competition) provides the following:

All specifications shall be drafted so as to assure cost effective procurement of the state’s actual needs and shall not be unduly restrictive.

The original specifications in the present case provided the following: “The firetube steam boiler shall be Cleaver-Brooks Model CBLE200-800-150ST or approved equal by Kewanee or Burnham.” [Record p. 147] Mr. Crowder, the consultant used by USC to assist in drafting the specifications, testified at the hearing before the Panel that the specs were drafted by using a Cleavers-Brooks manual known as *The Boiler Book*. Mr. Crowder also testified that at the time the original specs were drafted he had no knowledge as to whether an approved equal by Kewanee or Burnharm existed. Mr. Crowder further acknowledged that he subsequently learned that neither of the named alternative boiler manufacturers offered an approved equal. Amendment No. 1 to the IFB provided in part the following: *Prospective bidders may submit alternative manufacturer’s products for approval by forwarding technical data to USC*. Amendment No. 2 informed the bidders that the alternate products submitted were not approved. Consequently, there were no approved equals considered in this solicitation. The Panel finds that specifications of this nature clearly do not assure cost effective procurement of the state’s actual needs when they were drafted to effectively favor a product without

giving due consideration to other comparable products. There is no evidence from which to determine cost effectiveness when as here a sole source, Cleaver-Brooks, was the only approved product considered throughout the bidding process. The Panel further finds that the specifications were unduly restrictive not because the consultant used a Cleaver-Brooks publication in drafting the specifications, but because the consultant and USC failed to draft specifications which actually could be construed to include the opportunity for approved equals to be bid.

**ISSUE III: CPO'S AUTHORITY UNDER SC CODE REGULATION 19-445.2085 (C)**

SC Code of Laws §11-35-1520 (7) provides in part the following:

Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal or inadvertently erroneous bids after award, or **cancellation and reward of awards or contracts, after award but prior to performance may be permitted in accordance with regulations promulgated by the board.**

SC Code of Laws Regulation 19-445.2085 (C) provides in part the following:

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 ... (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.**

C&C contends that SC Code of Laws Regulation 19-445.2085 (C) does not apply in this case because no determination was made that the States requirements for the goods or services have changed or have not been met. The Panel finds that in the present case SC Code of Laws Regulation 19-445.2085 (C) is clearly applicable.<sup>2</sup> The Panel's finding that the specifications in this case are unduly restrictive in violation of SC Code of Laws §11-35-2730 is indicative of the fact that the States requirements for the goods or services have not been met because of the agencies failure to assure competition. In support of the agencies failure to assure competition, the Panel notes that a pre-bid conference was not held, only one prospective bidder was allowed to assist in the development of the specifications and a site visit by prospective bidders was not held.<sup>3</sup> Further, the Panel finds that the specifications were inadequate and that the bids were not independently arrived at in open competition.

### CONCLUSION

For the foregoing reasons, the Panel finds that C&C failed to meet their burden of proof. The appeal is dismissed and the decision of the CPO canceling the award prior to performance and directing MMO to resolicit the procurement pursuant to SC Code of Laws Regulation 19-445.2085 (C) (1) and (6) is upheld.

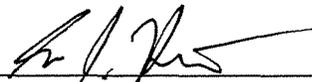
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<sup>2</sup> The Panel previously addressed the CPO's authority under SC Code of Laws Regulation 19-445.2085 (C) in Case No. 1996-3, *Protest of Blue Cross Blue Shield of South Carolina and Public Consulting Group, Inc.* and Case No. 1999-1, *Protest of Analytical Automation Specialists, Inc.* The Panel found cancellation and resolicitation appropriate in both cases.

<sup>3</sup> C&C asserted in issue 5 of their appeal that the CPO erred in finding that the bidding process was flawed because a site visit was not held, a pre-bid conference was not held, and other manufacturers were not allowed to provide any input into the specifications. The Panel finds that the CPO merely stated these observations in the written determination as supportive dicta and did not find that the bidding process was flawed because of them (See, Record p. 109), therefore, the Panel declines to address this issue further.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:   
Gus J. Roberts, Chairman

Columbia, SC

*February 23, 2001*

APPENDIX

The Panel declined to find that any collusion took place in this case. Charles Stevenson, Assistant Director Facility Services for USC, was involved in developing the specifications for this solicitation. Mr. Stevenson testified at the hearing before the Panel that he discussed this procurement with Mr. Melson, C&C's Cleaver-Brooks representative, but had no such discussions with other prospective bidders or boiler manufacturers. Mr. Stevenson further testified that he knew representatives of C&C from an ongoing working relationship developed over the years while C&C did boiler work for USC not related to this solicitation. Based on a relationship such as this, the Panel cautions agencies to avoid the appearance of impropriety or collusion in Invitations For Bids by affording all prospective bidders the same opportunities for pre-bid discussions and participation in drafting specifications. The Panel further suggests that in solicitations such as this with space and design considerations, a site visit as well as a pre-bid conference would facilitate the needs of the State. The Panel declines to comment on who an agency should or should not use as consultants when drafting specifications, but suggests that agencies work closely with consultants to assure proper research is done and to assure that open competition is promoted.