

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

AMENDED ORDER

IN RE:)
)
Protest of Carolina Green;)
Appeal of Carolina Green.)

Case No. 2005-10

This order was issued by the Panel on December 6, 2005. Subsequently, it came to our attention that counsel for the Chief Procurement Officer for Construction was stated incorrectly in the original order. Therefore, the order is being amended to reflect the correct counsel. That is the only change made to the December 6, 2005 order.

This matter came before the South Carolina Procurement Review Panel for a hearing on November 9, 2005. The Panel heard a request for review from the October 6, 2005, order of the Chief Procurement Officer for Construction (CPOC). Carolina Green requested review of the CPOC's order by the Panel. At the hearing before the Panel, Carolina Green was represented by Charles McDonald, Esquire. Rich Roberson, Esquire and Keith McCook, Esquire, represented the Chief Procurement Officer. George Lampl, Esquire, appeared as counsel for the University of South Carolina (USC).

Findings of Fact

This case involves a construction project on the campus of the University of South Carolina-Columbia. Specifically, the project was for USC-Columbia Campus Recreational Facilities Development – Lower Blatt/Wellness Center. Before the project was expanded, USC

was interested in improving its intramural fields. USC talked with Carolina Green directly about the design of improved intramural fields. Carolina Green is a licensed contractor in South Carolina whose business specializes in athletic facility construction. Carolina Green employs no architects or engineers. Carolina Green worked up a design for USC including suggestions on how to fix existing problems. USC had a good working relationship with Carolina Green. Carolina Green received no pay for this work, but performed the work in hopes USC would contract with Carolina Green to do the work.

The scope of the project then expanded beyond the intramural fields and USC solicited statements of qualification from interested professional services firms for the design of the project. USC ultimately contracted with Garvin Design Group to develop the construction documents for the project. Carolina Green was part of the team consulting with Garvin who provided design services. Morgan Grimbball, the landscape architect on the design project, used Carolina Green's previous plan to work up its plan. The specifications ultimately included in the Invitation for Construction Bids were based in significant part on the input provided by Carolina Green. Chad Price of Carolina Green testified that he did not intend to have the specifications written to exclude all companies except his. Instead he wrote them to exclude companies that would desire the work, but would not be able to perform the work correctly. He estimated four or five companies in the Southeast would meet the specifications as written.

When USC solicited construction bids on September 14, 2005, Carolina Green was not allowed to bid on the construction project. The Bidding Documents in the Standard Supplemental Instructions to Bidders, Paragraph 9.4 (R. at p. 204) contained this language:

9.4 Other Special Conditions of the Work, are listed below or attached as referenced. (if none, so state)

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 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.

Margaret Jordan, the responsible person for handling the bids and award of this project for the State, testified that she placed this language in the bidding documents. She also testified this is the way the statute is consistently interpreted – no person or company involved in providing architectural or engineering services on the design work of a project may bid on the construction of that project.

Conclusions of Law

This case is truly one of statutory interpretation. Carolina Green contends that the Code section cited does not apply. The section at issue in this case provides,

No architect or engineer performing design work, or construction manager performing construction management services as described in Section 11-35-2910(3), pursuant to a contract awarded under any provision of this chapter may perform 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....

Clearly, the purpose of the statute is to avoid giving a company an unfair advantage on bidding for a project that it had helped create. Carolina Green argues that it is not prohibited from bidding on the construction by the statute because it is not an architect, engineer or construction manager. The CPO argues that the only reasonable explanation of the statute is that

it include the architect's or engineer's design team. Otherwise, the potential for abuse that the statute seeks to avoid is still present. We agree. While we find it persuasive that Carolina Green accepted no payment for its work, we fail to see how the statute serves its purpose if non-architect and non-engineer members of the design team are allowed to bid on the construction project. Clearly, Carolina Green had a great deal of input on the design of the project. Although we do not believe Carolina Green intended to abuse the process, by writing the specifications to limit the number of companies who could do the work, the potential for abuse was certainly present.

Further, the CPO in his order turned to §11-35-2910 to define 'architect-engineering services.' That section is broader than the language in §11-35-3245 and includes services associated with architecture and engineering. Section §11-35-2910 does contain the definitions for the article in which §11-35-3245 is found. We do give importance to the fact that the State consistently uses the architect and engineering services interpretation of §11-35-3245. Construction of statute by agency charged with its administration will be accorded most respectful consideration and will not be overruled absent compelling reasons. Spruill vs. Richland County School District 2, 363 SC 61, 609 SE2d 524 (2005); Brown vs. SC DHEC, 348 SC 507, 560 SE2d 410 (2002); Dorman vs. SC DHEC, 350 SC 159, 565 SE2d 119 (Ct.App.2002).

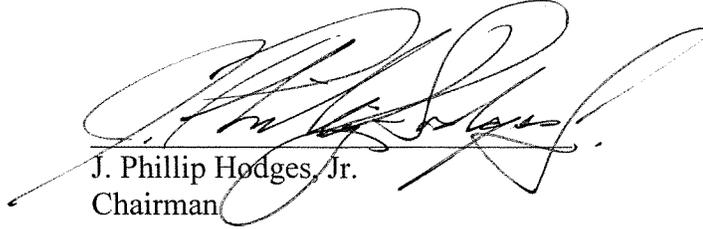
ORDER

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the decision to restrict Carolina Green from participation in the construction bid of the Columbia Campus Recreational Facilities Development – Lower Blatt/Wellness Center project is affirmed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN



J. Phillip Hodges, Jr.
Chairman

This 13th day of December, 2005