

determined that sections of the documents were ambiguous enough to cause confusion among the bidding parties. Specifically, these were the sections concerning the specialty roofing. On January 31, 2006, the CPOC issued a written determination allowing MUSC to cancel the award. On February 10, 2006, Midwest Maintenance appealed that written determination to the Panel.

MMI's appeal included grounds from the original protest as well as from the cancellation order. The CPOC moves to dismiss the grounds stemming from the original protest. The CPOC contends that the Panel has no jurisdiction because the CPOC never ruled or issued a written determination on the protest. We agree.

The jurisdiction of the Panel is limited by S.C. Code Ann. §11-35-4410. Pursuant to §11-35-4410 (1)(a), the Panel has jurisdiction to review written determinations of the chief procurement officer concerning protests of solicitations or awards, debarments and contract controversies. There is no such written determination from the CPOC for the Panel to review here. Under §11-35-4410 (1)(b), the Panel has jurisdiction to review other written determinations, decisions, policies and procedures as arise from of concern the procurement of supplies, service, or construction procured in accordance with the provisions of this code and the ensuing regulations. This is the authority granted to the Panel to hear the cancellation of the award. The Panel has no authority to hear the issues regarding the protest.

CANCELLATION OF THE AWARD

Findings of Fact

This project involves the exterior waterproofing of buildings at the Medical University of South Carolina. The ambiguity which led to the cancellation concerned the need for either the contractor or a subcontractor to hold a specialty roofing license.

The project was announced in the November 3, 2005 issue of *South Carolina Business Opportunities* (SCBO). In that announcement, the description of the project included the following language: Eligible bidders shall include general contractors with the license sub-classification of specialty roofing or subcontractors with the general contractors-specialty sub-classification license of specialty roofing.¹

The Invitation for Construction bids and the Bid Form SE-330 included the same language. However, in the project manual, the scope of work included nothing about roofing. There was some mention of the roof as it related to the sealant, but nothing that would have required someone with a specialty roofing license. The maps at the end of the project manual did not include anything about roofing. The technical requirements did not include roofing.

There was a pre-bid meeting held on November 17, 2005. A question referencing the roofing was asked and answered as follows:

Q. The SE-310, Invitation for Construction Bids, states that eligible bidders shall include General Contractors with the license sub classification of specialty roofing or sub-contractors with the General Contractors specialty sub classification license of specialty roofing. Is this required since no roofing work is included in the Contract Documents?

A. Yes. If the General Contractor does not have the sub classification of specialty roofing, the General Contractor will be required to provide a sub-contractor with the appropriate license. This will only be necessary if the roof system is damaged by the work and requires repairs.

As previously mentioned, the Intent to Award went to Assurance Waterproofing on December 2, 2005. On January 31, 2006, the CPOC cancelled that award. Assurance chose not to appeal the cancellation or to participate as a party in this appeal by MMI.

¹ When asked why roofing would be mentioned in a project such as this, Jeff Myers, vice president for MMI, explained in his testimony the roof can sometimes get damaged when performing waterproofing work. If that happens, there is a need for a specialty roofer to be available quickly to avoid damage to the building's interior.

Conclusions of Law

S.C. Code Ann. Section 11-35-1520 (7) authorizes a CPO to cancel an award or contract prior to performance, in accordance with regulations promulgated by the board, and requires such a decision to be supported by a written determination of appropriateness. Procurement Regulations at 23 S.C. Code Ann. Regs. 19-445.2085 (C) states, in pertinent part:

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;

...

(8) For other reasons, cancellation is clearly in the best interest of the State.

It does appear from the written record and the testimony before us that the documents issued in this matter are confusing. The announcement in SCBO and the Invitation for Bids contain language about requiring a specialty roofer. Then the project plans, including the maps, mention nothing about roofing. During what is supposed to be the clarification period, the answer to the question asked makes it unclear whether a specialty roofer is need at the time of the bid or only if there is a problem.

Under S.C. Code Ann. Section 11-35-2410, the CPO's decision is "final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law." Based on the foregoing, the

Panel finds that the decision of the CPO to cancel the procurement in this case is not erroneous, arbitrary, capricious, or contrary to law.²

Post Hearing Issue

After a decision in this case was announced by the Panel on March 22, 2006, but before this order was issued, MMI sought to withdraw its request for review before the Panel. The Chief Procurement Officer objected, questioning among other issues whether the Panel still had jurisdiction to allow a withdrawal since it had ruled.

As it did on March 22, 2006, at the hearing of this case, the Panel usually takes a public vote on the issues presented pursuant to the South Carolina Freedom of Information Act, §30-4-10 *et seq.* However, the South Procurement Code simply requires the Panel to record its determination within thirty days and communicate its decision to those involved. There may be times that the Panel wishes to take its vote on the thirtieth day. That is to say that just because the Panel takes a vote pursuant to the Freedom of Information Act, it still retains jurisdiction of the case until it issues its written determination. Therefore, the Panel believes considering MMI's request to be within its discretion. In its discretion, the Panel determines that it heard the testimony and received evidence in the case, rendered a decision based on that and therefore, wishes to issue a written determination in which it finds facts and reaches conclusions of law.

ORDER

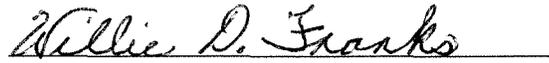
For the reasons stated above, we uphold the written determination of the CPO to cancel

² Recognizing that cancellation is at times imperative to protect the fairness of the procurement process, the Panel nevertheless continues to caution agencies to give great consideration before requesting cancellation and resolicitation, especially when a protest has been filed.

the award to Assurance Waterproofing.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS VICE CHAIRMAN:

A handwritten signature in cursive script, reading "Willie D. Franks", is written over a horizontal line.

Willie D. Franks
Chairman

This 20th day of April, 2006