STATE OF SOUTH CAROLINA	)	**BEFORE THE CHIEF PROCUREMENT OFFICER**
COUNTY OF RICHLAND	)	
	)	DECISION
In the Matter of Protest of:	)	
	)	
Huss, Inc.	)	
Triad Mechanical Contractors	)	
	)	POSTING DATE:
Medical University of South Carolina	)	
Anderson House Renovations	)	
College of Pharmacy Executive Offices	)	
State Project No. H51-9763-PG	)	August 7, 2006

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Huss, Inc. and Triad Mechanical Contractors, Inc. (Huss) With this invitation for bids (IFB), the Medical University of South Carolina (MUSC) attempts to procure construction services regarding the Anderson House, which is being renovated into executive offices for the College of Pharmacy. Huss protests the intent to award to NBM Construction Company (NBM) alleging (1) that NBM was nonresponsive by virtue of its failure to submit a qualification statement within 48 hours of MUSC's receipt of its bid, and (2) MUSC acted in a clearly erroneous, arbitrary and capricious manner, contrary to law in its determination that Huss was not responsible, and (3) waiving a forty-eight hour requirement for bidders to submit a qualification statement as to NBM.

Procedural History

MUSC's procurement activity to restore the Anderson House has been underway since at least October 2005. To date, two chief procurement officers and the Procurement Review Panel (Panel) have been involved. Initially, after receiving bids, MUSC issued an intent to award to Huss. NBM protested, arguing that Huss failed to meet the mandatory minimum experience requirements. MUSC agreed, and before a CPO ruled on the protest, rescinded its intent to award to Huss unilaterally. Huss protested this action. Mike Thomas, former State Engineer and CPO, decided that MUSC had no authority to withdraw its intent to award, struck down MUSC's rescission, and reinstated the original award to

Huss, pending his review of NBM's protest.[1] The CPO[2] then conducted a hearing March 15, 2006 regarding NBM's original protest of the award to Huss. Based on the evidence presented at that hearing, I issued a decision granting the protest and vacating the award to Huss. In the decision, I wrote, "there is compelling evidence that Triad (Huss's mechanical subcontractor) does not qualify under the IFB." Huss appealed that decision to the Procurement Review Panel, but later withdrew its appeal. With the original award vacated, MUSC determined the lowest responsive and responsible bidder and issued an intent to award to NBM. Huss protests the award to NBM, the latest legal action in this extraordinary procurement.

As noted above, the CPO conducted a hearing on March 15, 2006. NBM, Huss [both represented by legal counsel], and MUSC presented evidence and argued their positions at length during that hearing and in subsequent memoranda; accordingly, another hearing is not required.

NATURE OF PROTEST

Huss' letter of protest is attached and incorporated herein by reference.

CPO's FINDINGS OF FACT

Due to the historical significance of the Anderson House, MUSC inserted a number of special responsibility standards, i.e., specific requirements of the bidders to ensure that the contractors and their subcontractors were truly qualified to bid on the renovation of a state treasure, such as the Anderson House. The solicitation is littered with requirements bidders have to meet in order to bid for the work. For example, in its IFB, MUSC required that "[a]lterations and repairs must meet the highest standards for workmanship in keeping with The Secretary of Interior's Standards for the Treatment of

[1] As Mr. Thomas noted in his decision, Regulation 19-445.2085(C) authorizes only a CPO to cancel an award, not an agency. Procedurally, NBM appealed Mr. Thomas' decision to the Panel; however, that appeal was withdrawn before a hearing was held by the Panel. Appeal of NBM Construction Co., Inc., Case No. 2006-2.

[2] When Mr. Thomas left this office, I assumed his role in the capacity of Acting Chief Procurement Officer for Construction.

Historic Properties (1995 edition) under the oversight of the State of South Carolina Department of Archives and History and, further, as referenced in Section 1400 [(1.04)(A)]." Section 04800(1.04)(A), Unit Masonry, requires of the installer a "Company specializing in performing Work of this section with a minimum of three years documented experience." Section 04910(1.04)(A), Masonry Restoration, requires of a masonry restoration specialist: "Masonry restoration shall be performed by skilled, experience[d] masons specializing in the type of Work specified with minimum of 8 years experience in masonry restoration and repairs." Paragraph 3.01(A) of the same section requires that "Masonry work shall be done by skilled workman . . ." Section 09900(1.06)(B), Paints and Coatings, requires of an applicator: "Company specializing in performing work of this section with a minimum of five years documented experience and approved by manufacturer." Most importantly, Document 00451, Qualifications Statement for Anderson House/MUSC, paragraph 7 states:

> Only those subcontractors qualified may undertake work for the construction of this project. For each subcontractor, list their experience on no fewer than five (5) projects listed on the National Register of Historic Places, or deemed eligible for listing on the National Register of Historic Places by the State Historic Preservation Office, and of similar nature and scope to this project completed within the past eight (8) years and which were in compliance with the Secretary of Interior's Standards.

Based upon these considerable requirements, MUSC accepted bids. As already explained, Huss was the original apparent lowest bidder. As provided in the IFB, MUSC asked Huss to submit its qualifications in accordance with Section 9.4, which reads, "Contractor's Qualification Statement will be required within 48 hours of receipt of bid." [Ex. 1, p. 00201-OSE-9] According to John Malmrose, MUSC Director of Engineering and Facilities, NBM was told they did not need to submit qualifications unless and until requested as they were not the apparent low bidder.

When MUSC's architect, Whitney Powers, reviewed Huss' contractor's qualification statement, she requested additional information regarding Traid Mechanical's experience.[3] Based on Huss' contractor's qualifications statement and the additional submittal, Ms. Powers determined Huss responsible. MUSC issued an intent to award to Huss. NBM protested, questioning Huss's "responsiveness" to the experience requirements. MUSC reevaluated Huss' bid, agreed with the protestant, and rescinded its intent to award. In doing so, MUSC's Lonny Long sent a letter dated January 12, 2006, to Richard Huss writing, "MUSC has reviewed for a second time the Qualifications Statement you submitted for the referenced [project]. MUSC finds the Qualifications Statement non-responsive, and rejects your bid." MUSC rescinded its intent to award to Huss. Huss protested and Mike Thomas decided in accordance with SC Reg. 19-445.2085(c) that MUSC overstepped its authority in rescinding the intent to award. His decision was limited to that one legal issue.

Mr. Thomas resigned and this CPO assumed jurisdiction over the case. On March 15, 2006, I conducted a hearing on NBM's original allegation that Huss's contractor's qualification statement was "non-responsive" to the IFB on March 15, 2006. Concluding that "[a]t the time [Ms. Powers] made her decision she lacked sufficient objective evidence from which she could reasonably determine that Huss and its subcontractors met the special standards of responsibility established by the solicitation." I vacated the award to Huss and remanded the matter to MUSC for a determination regarding the award.[4] In doing so, I made the following observations:

> Consequently, some of the projects listed by Huss and Triad did not meet the requirements of the IFB. The information submitted for Triad Mechanical does not qualify under the requirements of the IFB in that it does not show that Triad completed no fewer than five projects listed or eligible for listing on the National Register of Historic Places within the past eight years. At the time of the bid, 5 Exchange Street in 1988, St.

[3] Huss was allowed to and did provide the additional information on December 15, 2005, which was outside the 48 hour time period allowed in the IFB for bidders to submit their qualifications statements.

[4] Again, Huss appealed this decision, but later withdrew its appeal. Appeal of Huss, Inc., Case No. 2006-5.

> Luke's Chapel in 1992, and the Cato Residence in 1993 were too old to qualify. Colcock Hall and the Colleton County Courthouse had not been completed. According to the National Register for Historic Places website, the Cato Residence at 51 East Bay Street is not listed. Consequently, according to the information submitted by Huss, Triad does not qualify under any of the projects that Huss listed as its qualifiers. Further, it appears that Huss did not qualify under the IFB as a masonry subcontractor. Finally, Electrical Design & Construction, Inc., the electrical subcontractor, did not qualify under the requirements of the IFB as the qualifying projects submitted by Huss.

Apparently, MUSC either concluded that Huss' responsibility had already been addressed[5], assumed the CPO determined NBM non-responsible, or determined anew that Huss was non-responsible, because MUSC issued an intent to award to NBM. In preparing this decision, the CPO inquired with John Malmrose, MUSC Director of Engineering and Facilities, about whether MUSC had prepared a determination concluding that Huss was a non-responsible bidder. He provided the original correspondence dated January 12, 2006 from Lonnie Long to Richard Huss. MUSC's conclusion seems obvious given that, as soon as NBM protested the award to Huss, MUSC unilaterally cancelled its original award to Huss and issued an award to NBM.

While the CPO's May 11, 2006 decision did not expressly determine that Huss was non-responsible, extensive evidence was presented regarding whether the information Huss provided to MUSC met the mandatory minimum experience requirements stated in the solicitation. As noted above, the May 11, 2006 decision observed that "there is compelling evidence that Triad (Huss's mechanical subcontractor) does not qualify under the IFB." Given that observation, and the underlying evidence presented at the first hearing, the CPO has no doubt that MUSC was justified in concluding Huss was non-responsible either on the information provided by Huss on its original submission (the qualification statement), the additional information that Huss submitted to Ms. Powers, or on the information received during the hearing. Either way, another hearing to review the same evidence is

totally unwarranted. The evidence clearly reflects that MUSC reasonably concluded that Huss failed to meet the mandatory minimum responsibility criteria, either for failure to submit information that evidenced they met the requirements or for failure, in fact, to meet the minimum requirements. Accordingly, this issue of protest is denied.

Having determined the lowest bidder non-responsible, NBM became the apparent low bidder eligible for award. Once it was determined that NBM would still honor its bid price, on June 20, 2006, MUSC asked NBM to deliver its qualifications statement within 48 hours. According to Mr. Malmrose, NBM complied with that requirement, delivering its qualifications statement to MUSC within 48 hours.

CONCLUSIONS OF LAW

Huss alleges that NBM is nonresponsive by virtue of its failure to submit a qualification statement within 48 hours of MUSC's receipt of its bid, as required by 00201-OSE paragraph 9.4. The matter is not an issue of responsiveness; it is a matter of responsibility. Responsiveness is determined at the time of opening, responsibility is not.[6] Moreover, at the time of opening, all parties knew that MUSC would inquire into the low bidder's responsibility after opening – thus the requirement to submit the qualifications statement after award and upon request. The regulations allow agencies to demand information regarding a bidder's responsibility and require bidders to respond. It reads, "The prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable." [19-445-2125(B)]

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[5] See Letter of January 12, 2006 from Lonnie Long, MUSC Project Manager, to Richard Huss, attached as exhibit "A".

The statute further provides that "The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror." At the bid opening, MUSC only requested the qualifications statement from Huss, not other bidders such as NBM because their responsibility was not at issue. Huss alleged that MUSC was arbitrary and capricious in not requiring NBM to submit the contractor's qualifications statement within 48 hours of the bid opening. The CPO disagrees.

DETERMINATION

Responsibility of a bidder only becomes a concern when the state plans to issue a contract to that bidder. Therefore, the Code only requires that a determination of responsibility be performed before awarding a contract. In its notice to bidders of the requirement of a qualifications statement, MUSC advised prospective bidders of the requirement and the speed with which it would be demanded should it be requested. According to Mr. Malmrose, after the CPO rescinded the intent to award to Huss and the appeal was withdrawn, MUSC required NBM to submit its qualifications statement within 48 hours of determining that NBM was the next lowest responsive bidder. According to Mr. Malmrose, NBM did submit its qualifications statement within 48 hours after MUSC requested it. Accordingly, Huss' protest on this issue is denied.[7]

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[6] Out of an abundance of caution, the CPO notes that a contractor subject to the Contractor's Licensing Act must have its license at the time it submits its bid; however, this requirement is mandated by the Act, which prohibits a contractor from submitting a bid or offering to enter into a contract unless it first obtains the required contractor's license.

[7] Even if the issue is a matter of responsiveness and not responsibility, the failure to submit information necessary for a determination of responsibility is a minor informality that may be waived. S.C. Code Ann. § 11-35-1520(13), Protest of Gregory Electric Co., Case No. 1989-17(II) (failure to include documents regarding vendor's qualifications is a minor informality, despite being mandatory).

Voight Shealy

R. Voight Shealy
Interim Acting Chief Procurement Officer
for Construction

8/7/06
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

EXH. # A

MUSC
MEDICAL UNIVERSITY
OF SOUTH CAROLINA

ENGINEERING & FACILITIES
97 JONATHAN LUCAS STREET
PO BOX 250190
CHARLESTON • SC 29425

(843) 792-2721
FAX (843) 792-0251
EMERGENCIES (843) 792-4119

January 12, 2006

Mr. Richard Huss
Huss, Inc.
P.O.Box 982
Mt. Pleasant, SC 29465

Re: Anderson House Restoration
State Project H51-9763-PG

Dear Mr. Huss,

MUSC has reviewed for a second time the Qualifications Statement you submitted for the referenced. MUSC finds the Qualification Statement non-responsive, and rejects your bid.

MUSC will now review the Qualifications Statement of the second low bidder, NBM Construction, Inc. If they are found to be a responsible bidder, MUSC will issue a "Notice of Intent to Award", and you will be notified.

Thank you for submitting a bid proposal.

Sincerely,

Lonnie Long, AIA
Project Manager

EXH. #6

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER**
In the Matter of Protest of:	)	DECISION
NBM Construction Company, Inc.	)	POSTING DATE:
Medical University of South Carolina Anderson House Renovations College of Pharmacy Executive Offices State Project No. H51-9763-PG	)	May 11, 2006

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from NBM Construction Company, Inc. (NBM). With this invitation for bids (IFB), the Medical University of South Carolina (MUSC) attempts to procure renovation services of the Anderson House, which is being renovated into executive offices for the College of Pharmacy. NBM protests the intent to award to Huss, Inc. (Huss) alleging that Huss was non-responsible. In order to resolve the matter, the CPO conducted a hearing on March 15,2006.[1] Appearing before the CPO were NBM, represented by W.H. Bundy, Esq.; Huss, represented by Eric B. Laquiere, Esq.; and MUSC, represented by Philip S. Mauney.

NATURE OF PROTEST

In the bid package, MUSC established several special standards of responsibility, i.e., minimum experience requirements, for prospective contractors and their subcontractors. NBM alleged that Huss and the subcontractors it listed did not qualify under these special standards of responsibility NBM's entire protest letter is attached and incorporated by reference.

RESPONDENT'S POSITION

[1] Section 11-35-4210(3) authorizes the CPO to approve mutually agreed settlements. At the conclusion of the hearing, but prior to closing arguments, all parties verbally consented to a proposed settlement. Before the CPO approved the settlement, Mr. Laquiere faxed a letter to the parties and the CPO characterizing the settlement in a manor not agreeable to the NBM. Mr. Bundy responded in writing and objected to Mr. Laquiere's explanation about the settlement, indicating no agreement existed. With the settlement collapsed, the CPO asked the attorneys to submit written closing statements to summarize their positions.

Huss argued MUSC had already determined Huss responsible, that NBM did not meet its burden of proof to establish that MUSC acted in an arbitrary and capricious manner in determining that Huss was a responsible bidder; that even if Huss failed to comply literally with the terms of the contractor qualification requirements, that failure amounts to a minor informality and does not render Huss non-responsible.

CPO's FINDINGS OF FACT

Due to the historical significance of the Anderson House, MUSC inserted specific minimum experience requirements to ensure that the contractors and their subcontractors were truly qualified to bid on the renovation of a state treasure, such as the Anderson House. These requirements appeared in the bid package in Document 00451, Qualifications Statement for Anderson House/MUSC, paragraphs 4 and 7. Acting as indicated in the solicitation, MUSC required the submission of information to show how contractors and their subcontractors would meet these requirements. MUSC required the submission of this information in accordance with Section 9.4, which reads, "Contractor's Qualification Statement will be required within 48 hours of receipt of bid." [Ex. 1, p. 00201-OSE-9]

Huss, the apparent low bidder, submitted its Qualifications Statement, as required. After reviewing the bid and Contractor's Qualification Statement, on December 19, 2005, MUSC posted its Notice of Intent to award to Huss, Inc.

On December 19, 2005, NBM filed this protest with Mike Thomas, former Chief Procurement Officer for Construction. Prior to resolution of the matter by the CPOC, MUSC cancelled its intent to award to Huss. Huss protested MUSC's action to cancel its intent to award. Mike Thomas issued a decision that MUSC acted without authority in canceling its intent to award and reinstated the intent to award to Huss. NBM appealed Mr. Thomas' decision to the Procurement Review Panel. The Panel has not yet ruled on that appeal.

CONCLUSIONS OF LAW

Considering the historical significance of the Anderson House, the IFB required certain minimum experience of the bidders and required that the low bidder must provide adequate information, on a written form entitled Contractor's Qualifications Statement, within 48 hours of the bid opening regarding their specific experience renovating historic structures. [Ex. 1, p. 00201-OSE-9, Item 9.4] The Qualifications Statement required each bidder to list previous projects in which he or his subcontractors performed specific disciplines on similar projects. [Ex. 1, p. 00451-1, items #4 & #7.]

Regarding the qualifications of the bidder itself, the IFB required bidders to provide the following information:

> List five or more projects or properties listed on the National Register of Historic Places, or deemed eligible for listing on the National Register of Historic Places by the State Historic Preservation Office, and of similar nature and scope to this project that you have completed within the past eight (8) years and which were in compliance with the Secretary of Interior's Standards."

[Ex. 1, p. 00451-1, item #4] Contractors were required to provide similar information for any subcontractors they intended to use.

> Only those subcontractors qualified may undertake work for the construction of this project. For each subcontractor, list their experience on no fewer than five (5) projects listed on the National Register of historic Places, or deemed eligible for listing on the National Register of historic Places by the State Historic Preservation Office, and of similar nature and scope to this project completed within the past eight (8) years and which were in compliance with the Secretary of Interior's Standards.

[Ex. 1, p. 00451-1, item #7]. The IFB included a Contractor's Qualification Statement and required each bidder to list projects by name, location, year, owner and telephone number. Each Contractor's Qualification Statement of his and his subcontractors' experience had to be certified and notarized.

Huss responded to this requirement by providing a Qualifications Statement listing its experience with similar projects as well as the experience of its subcontracts. [Ex. 3] Huss has made the process quite difficult in that where the qualifications statement required each bidder to list the name and location of each job being relied upon, Huss only listed project or residence names without addresses. Huss identified who would do the work as follows:

> Plumbing & HVAC – Triad Mechanical
> Plaster systems – Dillon Construction
> Lead & asbestos – Abate & Insulate, LLC
> Window repair & replacement – Shenandoah Restoration, Inc.
> Painting – Huss, Inc. (itself)
> Masonry – Huss, Inc. (itself)
> Electrical – Electrical Design & Construction, Inc.
> (Ex. 3)

NBM challenged certain of Huss' statements regarding its qualifications as follows:

(1) Triad Mechanical is not a qualified plumbing and HVAC subcontractor because:

a. Three of the five projects listed for Triad in the Qualifications Statement were not performed within the specified time period [within the past eight (8) years] (5 Exchange St., St. Luke's Chapel, and the Cato Residence).
b. One of the five is currently under construction (Colcock Hall) [therefore, it has not been "completed" within the past eight years]
c. One of the five has not commenced (Colleton County Courthouse) [therefore, it too, has not been "completed" within the past eight years]
d. Two of the five are not on the National Register of Historic Places (5 Exchange St. and the Cato Residence)
e. One of the five is new construction on a historic site, but is not a historic building (work at Trinity Episcopal Church)
f. Two of the five are not on the National Register (the Cato Residence and the Heyward Siddens House)

(2) Huss is not a qualified paint subcontractor, because Huss was not the painting contractor on three of the six projects listed as its paint experience.

(3) Huss is not a qualified masonry subcontractor, because none of the listed projects for masonry meets the eight-year requirement for Masonry restoration specialists. In addition, NBM alleged that five of the nine projects listed as qualifying Huss as the masonry subcontractor are not listed on the National Register.

(4) Electrical Design & Construction, Inc. is not a qualified electrical subcontractor as none of the listed projects are on the National Register (60 Murray Blvd. is in the historic district but is not a listed structure)

The IFB depends primarily on contractors' experience working on sites listed on or eligible for listing on the National Register of Historic Places. The National Register of Historic Places is a list of properties significant in our nation's past, which is maintained in Washington, DC. The National Historic Preservation Act of 1966 authorized the Secretary of the Interior to "expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." Properties are added to the list by nominations submitted by citizens nationwide through State Historic Preservation Offices to the Keeper of the National Register. In South Carolina, the State Historic Preservation Office is located in the Department of Archives and History. The National Historic Landmarks Program, also part of the National Park Service, recognizes historic properties that are nationally significant and possess exceptional value or quality in illustrating or interpreting the heritage of the United States.

Determinations on these allegations are complicated by the IFB's dependency on either the National Register or eligibility for listing in the National Register. As sometimes happens, an apparent perfect solution is not as perfect as it might seem. First, the IFB allows consideration of sites on the National Register as well as sites eligible for such designation. Second, the National Register is a dynamic list with properties continually added through nominations. Many more properties are determined eligible each year. Properties are occasionally removed from the list when the qualities that made them eligible for the National Register are destroyed. Archives and History maintains information about historic properties in South Carolina in a Geographic Information System; however, changes may have occurred to the properties since the System was last updated. Finally, additional research or removal of materials might have influenced the sites eligibility. Fortunately, representatives of Archives and History attended the hearing. However,

unlike Huss, in large part, the Archives staff has referred primarily to projects by street address, not name.

From their testimony, testimony of others, documentary evidence, and research, the CPO has determined the following regarding NBM's allegations:

(1) **Triad Mechanical, Plumbing & HVAC Subcontractor** – NBM alleged that

- **Allegation:** Three of the five projects listed for Triad in the Qualifications Statement were not performed within the specified time period [within the past eight (8) years] (5 Exchange St., St. Luke's Chapel, and the Cato Residence).
- **Conclusion:** According to Huss' Qualifications Statement, Triad performed work on 5 Exchange Street in 1988, St. Luke's Chapel in 1992, and the Cato Residence in 1993, all prior to the "completed within the past eight (8) years" requirement of the IFB. Therefore, these projects would not qualify under the IFB's requirement.

- **Allegation:** One of the five is currently under construction (Colcock Hall) [therefore, it has not been "completed" within the past eight years]
- **Conclusion:** For testimony during the hearing, the CPO understands that renovation of Colcock Hall is still underway. Obviously, if Colcock Hall is still underway, it would not qualify under the IFB's requirement for projects "completed within the past eight (8) years."

- **Allegation:** One of the five has not commenced (Colleton County Courthouse) [therefore, it too, has not been "completed" within the past eight years]
- **Conclusion:** According to testimony, the Colleton County courthouse project has not started. Again, if the Colleton County Courthouse project has not commenced, it would not qualify under the IFB's requirement for projects "completed within the past eight (8) years."

- **Allegation:** Two of the five are not on the National Register of Historic Places (5 Exchange St. and the Cato Residence)
- **Conclusion:** According to Elizabeth Morton Johnson, Supervisor, Compliance and Economic Incentives, 5 Exchange Street is "[l]ocated within the boundaries of the Charleston Historic District, which was listed in its current version in 1986." (Ex. 5) According to the National Register for Historic Places website, the Cato Residence at 51 East Bay Street is not listed. However, the CPO does not have the information to determine if the residence is eligible or not.

- **Allegation:** One of the five is new construction on a historic site, but is not a historic building (work at Trinity Episcopal Church)
- **Conclusion:** According to Ms. Johnson, "Trinity Episcopal Church, 1589 Highway 174, Edisto Island: Listed individually in the National Register in 1971." (Ex. 5) Certainly the site qualifies, but NBM alleged that the work performed by Triad was not on an historic

building. The CPO received no confirmation during the hearing to document that allegation.

- **Allegation:** Two of the five are not on the National Register (the Cato Residence and the Heyward Siddens House)
- **Conclusion:** As noted above, according to the National Register for Historic Places website, the Cato Residence at 51 East Bay Street is not listed. However, the CPO does not have the information to determine if the residence is eligible or not. According to Ms. Johnson, the "Heyward Siddens House, 60 Church Street, Charleston: Located within the National Historic Landmark boundaries of the Charleston Historic District." (Ex. 5)

Ms. Whitney Powers, President of Studio A and architect for the project, requested additional information from Triad regarding its experience on qualifying projects. Triad responded with a list of five projects (Cato Residence, Colcock Hall, Colleton County Courthouse, Heyward Siddens House, and Trinity Episcopal Church) that it claimed qualified Triad as the mechanical subcontractor. Ms. Powers testified that the original list of Triad's project and the supplemental list satisfied her that Triad qualified as Huss' mechanical subcontractor. However, Triad offered no dates of project completion with its supplemental list, making it very difficult to determine if they were completed within the past eight years.

Conclusion – Triad Mechanical: Triad Mechanical does not qualify under the requirements of the IFB in that the information it submitted to Ms. Powers does not show that it completed no fewer than five projects listed or eligible for listing on the National Register of Historic Places within the past eight years. At the time of the bid, 5 Exchange Street in 1988, St. Luke's Chapel in 1992, and the Cato Residence in 1993 were too old to qualify. Colcock Hall and the Colleton County Courthouse had not been completed. According to the National Register for Historic Places website, the Cato Residence at 51 East Bay Street is not listed. Consequently, according to Huss' bid, Triad does qualify under any of the projects that Huss listed as its qualifiers.

In response to a request for additional information from Ms. Powers, Triad provided projects of the Cato Residence, Colcock Hall, Colleton County Courthouse, Heyward Siddens residence, and Trinity Episcopal Church, all but the Heyward Siddens house and Trinity Episcopal Church had

already been listed for Triad in Huss' bid. Of the projects listed for Triad in Huss's original bid and in Triad's supplement, only two qualify under the requirements of the IFB, Heyward Siddens House and Trinity Episcopal Church. Therefore, neither Triad nor Huss has met the qualification requirement of the IFB for the plumbing and HVAC subcontractor.

(2) **Huss, Inc., Painting Subcontractor** – NBM alleged:

- **Allegation:** Huss is not a qualified paint subcontractor as the painting on three of the six projects was performed by other painting subcontractors (Old Slave Mart, St Mary's Church and the Housing Authority)
- **Conclusion:** Huss listed six projects (only five were required): the Sotille House, the Towell Library ceiling, Towell Library HVAC, the Old Slave Mart, St. Mary's Church, and the Housing Authority as its qualifiers for painting. During the hearing, it was alleged that although Huss was engaged in the projects, Huss did not paint the Old Slave Mart or St. Mary's Church. Rick Snyder, President, Plantation Painters, testified that Huss did not paint St. Mary's, his firm did. He testified that he did 80% of the painting at the Old Slave Mart [external painting only].
- Richard Huss, President, Huss, Inc. testified that Huss painted the front door and the back of the church of St. Mary's. He testified further that Huss was the original painting contractor on the Old Slave Mart. He did acknowledge that, after falling behind on the project, he brought in Plantation Painters (Snyder) to help Huss catch up.
- While Plantation Painters performed much of the painting on these projects, Huss did complete at least some of the painting for these projects. The relative quality of the evidence is a matter for the procurement officer.
- Huss qualifies under the IFB as the painting subcontractor.

(3) **Huss, Inc., Masonry Subcontractor** – NBM alleged that:

- **Allegation:** Huss is not a qualified masonry subcontractor, because none of the listed projects for masonry meets the eight-year requirement for Masonry restoration specialists. In addition, NBM alleged that five of the nine projects listed as qualifying Huss as the masonry subcontractor are not listed on the National Register (the Beaufort National Wall, the MUSC exterior renovation, Barber-Scotia College historic district, the Madrin Building, and the Camden Towers Shed).
- **Conclusion:** For its masonry qualifiers, Huss listed Beaufort National Wall (2002), Anderson House (2004), Slave Mart (2001), MUSC Exterior Renovation, corner of Ashley and Coming (1999), and the Housing Authority, 20 Franklin (1999), St. Mary's (1999), Barber Scotia (2002), Madrin Building (2005), and Camdin Towers (1999). According to Huss' project dates, all of the project dates listed fall within the 8-year parameter.
- Regarding the allegation that the Beaufort National Wall, the MUSC exterior renovation, Barber-Scotia College historic district, the Madrin Building, and the Camden Towers Shed are not listed on the National Register, it is virtually impossible to tell because, as noted earlier, Huss did not complete the Qualifications Statement as required in that Huss did not provide the locations of most of the projects listed as qualifiers:
- From what the CPO can determine:
- The Beaufort National Wall – there is evidence, documentary of testimonial, that the Beaufort Wall is listed in the National Register.
- The MUSC exterior renovation, corner of Ashley and Coming – Undetermined
- Barber-Scotia College (Concord) - Undetermined
- The Camden Towers - Undetermined

- According to Ms. Johnson, the Madrin Building – "Both 177 Meeting Street and 274 Meeting Street are located within the boundaries of the Charleston Historic District, which was listed in its current version in 1986."
- However, it was determined during the hearing that the Madrin Building was not "completed" at the time of the bid opening.

To the requirement that Huss list five qualifying projects, Huss listed nine projects to qualify it as the masonry subcontractor. On many of these, the CPO cannot determine with certainty whether the projects are listed on the National Register or not. However, it appears that Huss may qualify for five of the nine projects it listed. Specifically, NBM has not proven by the preponderance of the evidence that Huss does not qualify.

(4) **Electrical Design & Construction, Inc., Electrical Subcontractor** – NBM alleged:

- **Allegation:** Electrical Design & Construction, Huss' electrical subcontractor, is not a qualified electrical subcontractor as none of the listed projects are on the National Register (60 Murray Blvd. is in the historic district but is not a listed structure)
- **Conclusion:** For Electrical Design & Construction, Huss listed Herres [The CPO is unable to read the rest of this project name], 60 Murray Blvd., Madra Rue, 53 Bogard St., and Out of Hand as its qualifiers.
- For "Herres [The CPO is unable to read the rest of this project name]" listed above, the CPO is not sure of even the name written by Huss. Further, Huss provided no location, as was required by the IFB. If that first listing is for Henry's Restaurant on Market Street, the CPO believes it qualifies under the Charleston Old and Historic District.
- According to Ms. Johnson, 60 Murray blvd. is "Located within the boundaries of the Charleston Historic District, which was listed in the National Register in its current version in 1986." (Ex. 5) It qualifies.

- According to Ms. Johnson, the Madre Rue (Sp?), which is located, I believe, at 1034 East Montague Avenue, North Charleston, was "Surveyed in the 1995 *City of North Charleston Historical and Architectural Survey*, and determined not eligible for the National Register." (Ex. 5) (Emphasis added) It does not qualify.
- According to Ms. Johnson, the Out of Hand Gift Shop at 113 Pitt Street, Mt. Pleasant, "[l]ocated within the Boundaries of the Mount Pleasant Historic District, which was listed in the National Register in 1973." It qualifies.
- According to Ms. Johnson, 53 Bogard Street, Charleston is "Eligible for listing in the National Register as part of the eligible expansion of the boundaries of the Charleston Historic District." (Ex. 5)

NBM's protest alleges that 60 Murray does not qualify. NBM has not proven its allegation by the preponderance of the evidence. However, the CPO has determined that, according to Ms. Johnson, "the Madre Rue (Sp?), which is located at 1034 East Montague Avenue, North Charleston, was "Surveyed in the 1995 *City of North Charleston Historical and Architectural Survey*, and determined not eligible for the National Register."

DETERMINATION

Prior to issuing any statement of award, the Consolidated Procurement Code (Code) requires every procurement officer to determine if a bidder is responsible. [Section 11-35-1810] The Code also provides that "[u]nless there is a compelling reason to reject all bids as prescribed by regulation of the board, notice of award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location which has been specified in the invitation for bids." [Section 11-35-3020(2)(c)] A responsible bidder is defined as "a person who has the capability in all respects to perform fully the

contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(6)]

In a broad sense, the whole concept of responsibility regards an evaluation of the risk that a particular contractor might not successfully perform its obligations. Protest of Value Options, Case No. 2001-7. By its very nature, this risk analysis is an exercise in discretion. In making this determination, Regulation 19-445.2125(A) requires that the State consider a number of factors. In addition to the general factors established by regulation, the State is entitled to, and occasionally does, establish special standards of responsibility for a particular contract. Such criteria are created when the State expressly includes specific, objective, and mandatory criteria in the solicitation document. John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts 424 (3d ed. 1998) ("To qualify as definitive [special] responsibility criteria, solicitation provisions must be specific, objective, and mandatory . . .."). For example, the State might conclude that a contractor must have an employee with at least three years experience performing a particular type of work. When such criteria are established in the solicitation, the Code's deferential standard still applies; however, review of such a decision is much more clear cut. Rather than reviewing the procurement officer's exercise of discretion, the analysis usually boils down to whether the awardee submitted adequate objective evidence from which the procurement officer could reasonably conclude that the awardee met the special standards of responsibility established in the solicitation.

In this case, the IFB imposed significant special standards of responsibility. Further, MUSC required the apparent low to bidder demonstrate (prove) its qualifications to meet such stringent requirements by completing a Qualifications Statement questionnaire and listing the specific projects that qualify the contractor and the subcontractors for this particular work. For Huss, therein lies the problem. The solicitation specified a 48 hour turn around time for the qualification statement. Nevertheless, according to Richard Huss, he did not complete this questionnaire until he

was announced the apparent low bidder. Because of his delay, he was forced to complete the form quickly. According to Ronald Runyan, Executive Vice-President of Triad, Huss called him to gather his project list late on a Friday night. He stated that he gave Huss the information over the telephone without MUSC's form in front of him. Mr. Runyan stated that he was not even aware of the Qualifications Statement in the IFB. He did not know about the 8-year limitation.

Consequently, some of the projects listed by Huss and Triad did not meet the requirements of the IFB. The information submitted for Triad Mechanical does not qualify under the requirements of the IFB in that it does not show that Triad completed no fewer than five projects listed or eligible for listing on the National Register of Historic Places within the past eight years. At the time of the bid, 5 Exchange Street in 1988, St. Luke's Chapel in 1992, and the Cato Residence in 1993 were too old to qualify. Colcock Hall and the Colleton County Courthouse had not been completed. According to the National Register for Historic Places website, the Cato Residence at 51 East Bay Street is not listed. Consequently, according to the information submitted by Huss, Triad does not qualify under any of the projects that Huss listed as its qualifiers. Further, it appears that Huss did not qualify under the IFB as a masonry subcontractor. Finally, Electrical Design & Construction, Inc., the electrical subcontractor, did not qualify under the requirements of the IFB as the qualifying projects submitted by Huss.

Mr. Huss stated during the hearing that he can provide additional information on other projects that would qualify his firm for the work. However, this decision <u>must</u> be based upon an evaluation of the decision made by MUSC, not Huss' information per se. Because the procurement officer's determination of responsibility is final unless arbitrary, capricious, clearly erroneous, or contrary to law, what matters is the information that MUSC based its decision on at the time the decision was made. Otherwise, the CPO's review would no longer be limited to reviewing the procurement officer's determination. Rather, the CPO would be conducting an entirely new

determination of responsibility – which is not what the code envisions. The protest must be determined based on a "snap shot" in time.

Ms. Powers, MUSC's architect for the project testified that she was the primary decision maker in this matter. She testified that she based her decision primarily on Huss' Qualifications Statement. She also requested some additional information, which she reviewed. As the State's representative in this matter, she enjoys the deference given to the State by the Consolidated Procurement Code, in making this particular determination. However, as noted above, it appears that her decision was clearly erroneous. At the time she made her decision she lacked sufficient objective evidence from which she could reasonably determine that Huss and its subcontractors met the special standards of responsibility established by the solicitation.

Consequently, the protest is granted. The award to Huss is vacated. The matter of determining the award of this solicitation is remanded to MUSC for determination in accordance with the Consolidated Procurement Code.

Voight Shealy

R. Voight Shealy
Interim Acting Chief Procurement Officer
for Construction

5/11/06
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