

State of South Carolina)
County of Richland)

In the Court of Common Pleas
Fifth Judicial Circuit
2011-CP-40-3174

Monroe Construction Co., LLC,)
Plaintiff,)
vs.)
University of South Carolina,)
Defendant.)

Transcript of Record

August 14, 2014
Columbia, South Carolina

RECEIVED

JUL 08 2016

SC Court of Appeals

B E F O R E:

The Honorable Alison Renee Lee, Judge

A P P E A R A N C E S:

D. Ryan McCabe, Esquire
Attorney for Plaintiff

George W. Lampl, III, Esquire
Attorney for Defendant

W. Dixon Robertson, III, Esquire
Attorney for Budget and Control Board

Christian M. Emanuel, Esquire
Attorney for Procurement Review Panel

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Proceedings 4
Certificate Page 32

EXHIBITS

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
------------	--------------------	-------------	--------------

No Exhibits Introduced.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 2:37 p.m.)

THE COURT: Going back on the docket to 2011-CP-40-3174, *Monroe Construction, LLC v. the University of South Carolina*. The plaintiff, *Monroe Construction*, is represented by Ryan McCabe; is that correct?

MR. MCCABE: Yes, Your Honor.

THE COURT: The Budget and Control Board is represented by Dixon Robertson; is that correct?

MR. ROBERTSON: Yes, ma'am.

(Off the record briefly.)

THE COURT: USC is represented by George Lampel; is that correct?

MR. LAMPL: Yes, Your Honor.

(Off the record briefly.)

THE COURT: The Department of Labor Licensing and Regulation is represented by Barroll; is that correct? Or that -- they're no longer involved? Ms. Molly Crum? Are you Molly Crum?

MS. EMANUEL: No, ma'am. I'm Christie Emanuel; I represent the Procurement Review Panel.

THE COURT: I'm sorry?

MS. EMANUEL: Christie Emanuel ---

THE COURT: Thank you.

MS. EMANUEL: --- Procurement Review Panel.

1 THE COURT: Yes, ma'am. Procurement Panel. Anyone
2 else that needs to be recognized for the record?

3 MR. ROBERTSON: Just for clarification, Judge Lee, my
4 understanding is Ms. Barroll formerly represented Monroe,
5 not -- not the LLR. The LLR has never been a party to the
6 case.

7 THE COURT: I'm just going by the notices that are
8 here in the file. And we're here on an -- I guess an
9 appeal from the procurement panel about a bid contest or
10 protest; is that correct?

11 MR. MCCABE: Correct, Your Honor.

12 THE COURT: Okay. I have a -- I guess a record from
13 the procurement panel, which I have not had the opportunity
14 to review. There is an appellant's brief in here in the
15 file. And I don't have any other documents beyond that.
16 So yes, sir. You may proceed.

17 MR. MCCABE: Your Honor, may it please the Court:
18 This is an appeal from the Procurement Review Panel. The
19 -- it involves a construction project at USC. It was a
20 lab-upfit project. And it's a rather old case now.

21 THE COURT: Very.

22 MR. MCCABE: The -- the -- this stems back from 2011.
23 There was a original appeal. It was first heard by the
24 chief procurement officer for the state construction -- the
25 state engineer. That was then appealed to the Procurement

1 Review Panel.

2 And in October 2010, USC solicited bids for a
3 construction project. The project involved the upfit of
4 some laboratories, offices, and support spaces for Horizon
5 I building. And the project involved some specialty-
6 process piping equipment, because there were some gases
7 that were under pressure that were being piped into this
8 lab.

9 To do that work, it required a specialty license to do
10 that work. And unless a contractor has that license, they
11 may not bid to do that work. So back in -- on December
12 3rd, 2010, USC posted a notice of intent to award the
13 contract to the lowest bidder, which was Rogers Builders.

14 They indicated that Hill Plumbing would do the work.
15 There's some confusion, probably for you in the record,
16 where some of the facts get a little difficult to
17 understand. But to place things in context, state law
18 requires that any subcontractor that -- whose scope of work
19 is more than 3 percent of the total of the contract to be
20 listed as a contractor.

21 The specialty-piping work was in the plumbing
22 specifications and on the plumbing drawings. So Monroe
23 Construction identified a plumber and identified a company
24 to do the process piping on the plumbing line. And that
25 was one of the grounds for the original appeal, because the

1 -- the plumbing work -- plumbing scope of work included
2 this specialty process that you had to have somebody
3 licensed to do that work.

4 Hill identified -- excuse me -- Rogers Construction
5 identified Hill Plumbing, who did not possess a pressure-
6 piping license. On December 3rd this -- excuse me -- on
7 October 19th, Monroe Construction sent an e-mail to USC,
8 advising them of this.

9 On December the 3rd, they posted an intent to award
10 the bid contract to Rogers, despite this notice. On
11 December 13th, 2010, Monroe timely protested. On February
12 the 14th, 2011, the chief procurement officer for
13 construction conducted a hearing and denied Monroe's
14 protest.

15 On February 23rd Monroe timely appealed. And I can
16 pass Your Honor up a copy of the decision from the chief
17 procurement officer. The appellant's brief attached --
18 Exhibit B has the -- the wrong decision. The decision that
19 was attached was actually one that involved lifting the
20 stay so that USC could proceed with the work.

21 If I may approach, I'll hand you a copy.

22 THE COURT: Yes, sir.

23 (Whereupon, Mr. McCabe and Mr. Robertson conferred.)

24 THE COURT: So you're saying that what's attached as
25 Exhibit A is not the correct?

1 MR. MCCABE: Oh, sorry. I'm about to hand you the
2 wrong one again. I'm sorry. I'm sorry, Judge.

3 THE COURT: I'm looking at the order in which it said
4 that the motion to dismiss was untimely. Is that the one?
5 It's a six-page order?

6 MR. MCCABE: It is ---

7 THE COURT: That's an order of motion to dismiss and
8 the ---

9 MR. MCCABE: Actually ---

10 THE COURT: --- motion to quash the subpoena?

11 MR. MCCABE: Okay. Actually -- actually, I'm handing
12 ---

13 MR. ROBERTSON: Ryan ---

14 MR. MCCABE: Mr. Dixon talked me out of it. But
15 actually, it is the correct order.

16 (Whereupon, Mr. McCabe and Mr. Robertson conferred.)

17 MR. MCCABE: This is actually the decision of the CPOD
18 right here. And here's two copies, one for you and your
19 law clerk.

20 And so the original grounds, if I summarize the
21 original decision from the -- CPOD was that the definition
22 of plumbing did not include process piping. And the second
23 ground was that there was a burden of proof on Monroe to
24 prove that Hill bid the work and did not have a license.

25 At that stage there was no discovery, no way to compel

1 witnesses to testify or to obtain documents. Based on that
2 decision, Monroe then appealed on February the 23rd, 2011.
3 That appeal was timely. And on March 10th, 2011, the panel
4 issued a subpoena to Hill Plumbing. And this was done at
5 the request of Monroe Construction.

6 Hill filed a motion to quash the subpoena, and another
7 motion to dismiss was filed. The panel issued two orders
8 on April 26th. The first one granted the -- the chief
9 procurement officer's motion to dismiss the appeals as
10 untimely and granted Hill's motion to quash the subpoena.
11 And the ground for -- for the subpoena -- quashing the
12 subpoena was that the issue was not raised timely.

13 This -- and if I may, I'll pass up a copy of the
14 original protest letter. If I may approach?

15 THE COURT: Yes, sir.

16 MR. MCCABE: It's the original and two copies.
17 Attached was an affidavit and another copy of the October
18 19th e-mail raising the -- the issue. And additionally,
19 the -- the letter referenced the October 19th e-mail on the
20 second page. And the letter speaks for itself.

21 But on the second page, last paragraph, it clearly
22 states that South Carolina Code 40-11-200(b) makes it a
23 criminal offense for any awarding authority to enter or
24 even consider a bid from an unlicensed contractor. And
25 this was raised in a letter on December 13th, 2010.

1 And really, if you get to the heart of this case and
2 this appeal, it revolves around the notice contained in
3 this letter. Originally, they chief procurement officer
4 found that sufficient notice was given under this document.
5 But when it was appealed, the chief procurement officer
6 moved to dismiss on the grounds that this was not timely
7 notice.

8 So originally, the ruling was notice was timely;
9 however, Monroe Construction did not prove its case, did
10 not meet its burden -- no discovery, no ability to compel
11 witnesses to testify, that sort of thing.

12 So when -- move to the appeal stage, the Procurement
13 Review Panel has the authority to issues subpoenas, which
14 it initially did. It later quashed its own subpoena. And
15 so at the time of the hearing, Monroe wasn't even able to
16 offer any testimony on this issue that the Procurement
17 Review Panel was supposed to hear *de novo*. Didn't even
18 hear it because they said it wasn't relevant because it
19 wasn't timely filed.

20 And the e-mail of October 19th that was sent to USC
21 was attached to this letter, which referenced in the
22 affidavit and was specifically mentioned -- additionally,
23 the issue was spelled out in this letter. And USC and the
24 Procurement Review Panel say that the issue was not timely
25 raised.

1 And we believe that it's clearly erroneous decision.
2 Client believes it's clearly erroneous based -- to look at
3 this document and say that the issue was not timely raised.
4 On its face it clearly raises the issue. And under the
5 statute 40-11-200(b), not only does it -- was it timely
6 raised, but the statute creates an independent obligation
7 on the state and any awarding authority when an issue of
8 hiring and nonlicensed -- or a contractor that is not
9 properly licensed submits a bid, they have an independent
10 obligation to investigate that issue when it is raised.
11 And it was raised in -- on October 19th.

12 Additionally, I -- Monroe asserts that the panel
13 applied the wrong standard. Look -- when it reviewed the
14 statute, the panel looked at, you know, a clearly erroneous
15 (phonetic) -- erroneous, arbitrary, contrary-to-law
16 determination. But that's the standard that applies to
17 nonresponsibility.

18 Only -- I think, when this -- this statute is
19 absolutely clear that USC may not entertain a bid from an
20 unlicensed contractor on a state project. They knew
21 October 19th. They knew December 3rd. They knew December
22 23rd. They awarded the contract anyway. Thank you.

23 THE COURT: Thank you. Mr. Robertson?

24 MR. ROBERTSON: Thank you, Your Honor. May it please
25 the Court: As Your Honor noted, this is a very old case.

1 And at the risk of repeating some of the things that Mr.
2 McCabe mentioned, I'd like to add that when he started his
3 recitation of the facts, he, I think, left off 2010.
4 That's when this started, 2010.

5 In the fall of 2010, USC issued an invitation for
6 bids. It was opened in October of 2010. It was awarded to
7 Rogers Builders in December of 2010. It was protested by
8 Monroe in December of 2010.

9 The CPO heard the bid protest -- the bid protest.
10 Monroe protested the award of this contract to Rogers
11 Builders under the procurement code, which is designed in
12 Section 11-35-4210 to provide the exclusive remedy for a
13 bidder who believes that the state did not follow its rules
14 in awarding a contract.

15 So the CPO heard that in January of 2011. The CPO is
16 right behind me, John -- Mr. John White, who is also the
17 state engineer. Mr. White also practiced law in South
18 Carolina for several years, doing construction litigation.
19 So he's not a bad guy to have for a hearing officer.

20 He heard it in January; issued his decision. In the
21 following month, Monroe appealed that decision to the
22 Procurement Review Panel on February 23rd. A week later
23 the University of South Carolina requested that the CPO
24 lift the automatic stay.

25 There's only so much relief that the panel, the CPO, a

1 court can grant to a contractor, a disappointed bidder, if
2 the contract is awarded. So the procurement code provides
3 that while a case is on appeal to the Procurement Review
4 Panel, that no further proceedings, with regard to that
5 procurement, can occur. In other words, you can't award a
6 contract while it's on appeal to the panel.

7 That stay terminates once the panel has issued its
8 decision. The exception is that when, in the best
9 interests of the state, the contract ought to go forward,
10 then the chief procurement officer can issue a written
11 determination to lift the stay. He did that in this case.

12 That determination itself is appealable to the panel.
13 So as this window of opportunity for a remedy for Monroe
14 Construction is beginning to slam shut, because the CPO
15 lifted the stay, the reason being that the university was
16 going to lose, I think, a couple million dollars in grant
17 money -- all of this is attached to his original
18 appellant's brief as Exhibit B -- Monroe didn't appeal.
19 They didn't appeal the order lifting the stay.

20 As a result Rogers Builders was awarded the contract
21 while the case was pending appeal at the panel. I think --
22 I'm not sure. But I -- I think that happened on March 5th
23 of 2011.

24 First panel hearing was a month later. It was by the
25 -- on the phone over this subpoena issue and the timeliness

1 issue. And with -- I -- I don't really want to get into
2 the weeds about the timeliness issue because I'm not sure
3 that that's really at the heart of the case.

4 And they held a second hearing on the merits on the
5 13th. They issued two separate orders: on the 26th of
6 April, 2011, which Monroe appealed in May of 2011. About
7 three months after that, Mr. Lampl wrote to Kate Barroll,
8 who at the time was lead counsel for Monroe, and said:
9 "Ms. Barroll, you filed a notice of appeal, but it doesn't
10 have any grounds there. Could you please let us know what
11 the basis of your appeal is."

12 Now, this should be in Your Honor's record, because I
13 raised it by motion two years ago on a motion to dismiss
14 the appeal, which was denied. To my knowledge, there was
15 no response to that letter. So about a year later, in June
16 of last year, I wrote to Monroe Construction's lawyer. I
17 can't remember whether it was Mr. -- Ms. Barroll or Mr.
18 McCabe.

19 And I said: "You know, you won't say what your
20 grounds for appeal are. If you aren't -- aren't expecting
21 to prosecute the thing, why not dismiss it? Here's a
22 stipulation of dismissal. We can go on about our
23 business."

24 Because, of course, by this time the project was
25 finished. Rogers Construction had finished building out

1 all of the work that had been awarded to it by USC.

2 I got no answer to that letter. So I filed a motion
3 to dismiss, which was heard in August of last year, not
4 quite a year ago today. And 22 minutes ---

5 THE COURT: I got ---

6 MR. ROBERTSON: --- 22 minutes ---

7 THE COURT: I -- there's an order in here that's dated
8 September 2012; is ---

9 MR. ROBERTSON: Correct.

10 THE COURT: --- that incorrect?

11 MR. ROBERTSON: Yes.

12 THE COURT: Okay.

13 MR. ROBERTSON: Yes, ma'am.

14 THE COURT: Okay.

15 MR. ROBERTSON: Last year.

16 THE COURT: No. Two years -- two years ago.

17 MR. ROBERTSON: Oh, two years ago? I'm sorry.

18 THE COURT: Yeah.

19 MR. ROBERTSON: I'm ---

20 THE COURT: I just wanted to make sure I wasn't
21 missing something.

22 MR. ROBERTSON: Two years ago. And 22 minutes before
23 that hearing two years ago, Monroe filed this -- this
24 appellant's brief. Okay?

25 For the first time in two years, we now know the basis

1 of the appeal. Judge -- I think it was Judge James denied
2 my motion.

3 THE COURT: Who? Tell me again?

4 MR. ROBERTSON: I -- was it ---

5 THE COURT: I can't read the -- I can't read the
6 handwriting. That's why ---

7 MR. ROBERTSON: I -- I ---

8 THE COURT: --- I'm asking.

9 MR. ROBERTSON: --- couldn't either. And it was --
10 it's been two years, and I've forgotten. I'm sorry ---

11 THE COURT: Okay.

12 MR. ROBERTSON: --- Your Honor. But we had a hearing.
13 We argued it. He -- and he disagreed with my analysis and
14 denied the motion. That was two years ago.

15 We got a notice of hearing about two or three months
16 ago, which didn't get to all of us. So the hearing was
17 continued. And now here we are today on the 14th of August
18 of 2014: almost four years after the invitation for bids,
19 more than three years after Rogers Builders started work on
20 the project, over two years after it was finished, three
21 years and three months after Monroe filed the circuit court
22 appeal, almost two years since my motion to dismiss was
23 denied. And not once in all of that period had Monroe ever
24 asked the circuit court: Can I have a hearing on my
25 appeal? Not once.

1 Now, even now that we're here, if Your Honor decides
2 Mr. McCabe's right -- we didn't follow the rules; my CPO
3 didn't analyze the case properly; the Procurement Review
4 Panel messed it up somehow -- what are you going to do for
5 Mr. McCabe? You can't award his client the contract. It's
6 been performed.

7 According to the procurement code, the only remedy
8 that's available to Monroe at this point is reasonable
9 reimbursement of its costs, including bid-preparation
10 costs. Well, he's never asked for that, not one time.
11 That's in 11-35-4310, if Your Honor is looking for it.

12 Not once has that form of relief been requested by
13 Monroe. Now, understandably, when it first appealed to the
14 panel -- because at that point, it was still arguing that I
15 should be awarded the contract, that Monroe should be
16 awarded the contract. But once the CPO had lifted the stay
17 and they didn't appeal, they knew that their relief was
18 going to be limited to basically bid-preparation costs.

19 And they still didn't ask the panel: Oh, by the way,
20 if you rule in our favor, how about give us our bid-
21 preparations costs? They've never presented any evidence
22 of their bid-preparation costs. And they've never -- in
23 their pleadings here, they've not asked the circuit court
24 to award that relief, which is the exclusive remedy under
25 Section 11-35-4310 for a disappointed bidder once a

1 contract's been awarded.

2 So even if you remand this case to the panel, the
3 panel is still going to be limited by what it was asked to
4 do in the appeal letter. It has never been asked to award
5 bid-prep costs.

6 And so the CPO urges the Court to dismiss this appeal
7 as moot because there is no meaningful relief that the
8 circuit court can award to Monroe, nor is there any
9 meaningful relief that the Procurement Review Panel could
10 award to Monroe if the case is remanded.

11 Now, what's really at stake here? What -- what
12 Monroe's complaint is, is that the University of South
13 Carolina awarded a contract to a bidder who was not
14 responsible. Responsibility is a procurement-code concept.
15 It means that a contractor is -- has the capability to
16 perform the contract in every respect: that he's got the
17 financial wherewithal, that he's qualified to business with
18 the state; that he's properly licensed.

19 And in this case the proper licensure that we're
20 talking about is Rogers Builders. Rogers Builders holds
21 unlimited building-division license. BD5 is the shorthand
22 for it.

23 We're conflating two different concepts in the merits
24 of the appeal. The first concept is we have a statute, 11-
25 35-3020, which is intended as sort of a social engineering,

1 if you will, to prevent bid-shopping by prime contractors.
2 Has nothing to do with the way that the state purchases
3 stuff. It seeks to enforce a policy that we're not going
4 to tolerate bid-shopping or bid-peddling by prime
5 contractors.

6 And so it requires the state to put in their bid form,
7 identify every specialty-trade subcontractor who will
8 perform more than 3 percent of the estimated value of the
9 work. So what did USC do? Well, their architect had a --
10 an estimate -- and estimate of the probable costs. The
11 three specialty trades that had more than 3 percent were
12 plumbing -- plumbing, not process-piping, but plumbing --
13 electrical, and what the architect called mechanical, but
14 what is really heating and air conditioning.

15 And those were the three specialty trades on the bid
16 form that USC required to be identified. And that bid form
17 -- it appears in a couple of places, but one of them is at
18 our 50. That's -- do you have -- I -- you -- I don't know
19 that I need you to take a look at it. But this is -- this
20 was the record on appeal to the panel. And there's an
21 example of the bid -- I think it's Rogers' bid form on our
22 50.

23 So we had a dispute of fact before the CPO and before
24 the panel. And that is what did USC mean when they said:
25 "Identify the plumbing subcontractor."

1 Monroe said: "Well, it's easy. They -- they -- they
2 wanted us to identify everyone who was going to do any work
3 that was shown on the plumbing drawings." And they offered
4 testimony before the CPO and before the panel that that was
5 what Monroe understood the -- the listing requirement to
6 be.

7 USC testified -- about three or four witnesses in
8 front of the CPO, but their architect in front of the panel
9 -- testified: "No; the only work that I expected to be
10 identified by that subcontractor is work that could be
11 performed by somebody with a plumbing license, not a
12 process-piping license, just plumbing."

13 The CPO and the panel heard that evidence, conflicting
14 testimony. Longtime estimator for Monroe says: "Oh, no.
15 It includes both."

16 And 20-year architect for the university says: "No.
17 It only includes plumbing. The process piping is not
18 listed. We're not requiring listing for the process
19 piping."

20 And based on that conflicting testimony, both the
21 panel and the CPO concluded: No. You only had to list a
22 plumber. And since you only had to list a plumber and
23 since Rogers Builders is qualified to contract for the work
24 as the prime contractor, then Rogers Builders was a
25 responsible contractor.

1 Rogers Builders possessed the necessary license, the
2 necessary qualifications to contract with the state. And
3 that's what the case was all about.

4 Now, we can talk about, "Oh, the standard of review
5 was wrong," or, "Oh, they wouldn't let me raise the -- the
6 criminal statute in the LLR title." We can talk about,
7 "Oh, I should've been able to subpoena this information."

8 But none of that matters. The only thing that matters
9 is was Rogers Builders a responsible contractor? Did the
10 university act arbitrarily and capriciously when it awarded
11 the contract because it should have found that they were
12 not responsible?

13 And there is no facts -- there are no facts that Mr.
14 McCabe can present that would establish that. And in fact,
15 he has tried twice now and failed.

16 And with all due respect to the Court, your job here
17 today is not to decide whether he was right or wrong, but
18 to decide, as you said earlier in one of these cases, was
19 there sufficient evidence to support the ruling below.
20 It's just like a workers' comp appeal.

21 So unless you're -- unless the Court's prepared to say
22 that the decision that USC acted properly in determining
23 that Rogers Builders was responsible and awarding it the
24 contract, unless the Court is prepared to say that that's
25 clearly erroneous in light of the substantial evidence on

1 the record below, then you must affirm the decision of the
2 panel. Thank you, Judge.

3 THE COURT: Mr. Lampl, anything you want to add?

4 MR. LAMPL: Thank you, Your Honor. Just briefly, I --
5 the university concurs with the arguments advanced by
6 counsel for the Budget and Control Board.

7 I'll -- I'll just add a little bit about the
8 background of -- of this project. Because I -- I -- I
9 think it's important to kind of put -- put some of this
10 into context a -- a bit.

11 It was in October of 2012 when the university sought
12 bids for the first-floor laboratory upfit project in the
13 university's Horizon I research building in the Innovista.
14 The -- the way that building essentially has -- has taken
15 shape over the years has been the university initially
16 constructed the shell of the building and then subsequently
17 built out the -- the -- the floors of the building -- I
18 believe there are four of them -- separately, kind of
19 piecemeal. When money became available, the university
20 would -- would seek bids and build out a floor at a time.

21 Even though this was the first floor of the Horizon
22 building, it was actually the third such project to go
23 forward in the Horizon building. And interestingly, in the
24 two previous lab-upfit projects in the Horizon building,
25 Monroe bid for those projects, won the bids, and performed

1 the work.

2 So they -- they were familiar with -- with the
3 process, very familiar with the building, and attempted to
4 get -- attempted to go 3 for 3 with this project in October
5 of 2010 by submitting a bid. And that's kind of -- kind of
6 the -- the -- the backstory here.

7 And again, as -- as Mr. Robertson indicated, it may be
8 unclear in the record -- and page 7 of the appellant's
9 brief mentions awarding the contract to Monroe. That --
10 that -- that's -- that's just not possible. And I -- I --
11 I don't want to replot that.

12 But the -- the -- the -- the work is -- is over and
13 done. The project is complete. Rogers Builders is not
14 here. They were here initially because it mattered whether
15 or not they could proceed with the work.

16 But the -- they're no longer here because it -- it --
17 it doesn't matter to them. And I -- I suggest it's -- it's
18 moot pretty much for all of at this point. But Rogers
19 isn't -- isn't here.

20 Mr. McCabe on -- during his remarks candidly admitted
21 that -- really, the -- the -- the central issue here around
22 which all of the other issues in the -- in the brief
23 revolve is the listing issue: the pressure- and process-
24 piping licensure and the obligation to list such a
25 contractor on the bid form. That's -- that's the heart of

1 it, as -- as Mr. McCabe said.

2 Now, the university received 19 bids for this
3 contract, 19 bids. That's -- that -- that's a significant
4 number of bids for a job like this. And of those 19 bids,
5 one -- one bidder submitted on its bid form -- identified a
6 -- a contractor with a pressure- and process-piping
7 license, one out of -- out of 19 bids.

8 The other bidders didn't believe there was and
9 obligation to do it, so they didn't do it. Only -- only
10 one bidder felt that way, and that's Monroe. And
11 interestingly, they didn't do that on the two prior jobs in
12 the building, but they did it on this one.

13 Now, almost immediately after the university opened
14 the bids, Monroe contacted the university and raised this
15 issue -- almost immediately. It was fairly clear that it
16 was a gotcha situation. They -- they felt like this ace in
17 the hole, so to speak, and that they were -- they weren't
18 going to mention it. They weren't going to ask a question,
19 which is allowed and expected, actually, during the -- the
20 -- the prebid period, before the bids are -- are submitted.

21 If there is anything unclear or anything needs to be
22 clarified, you ask the question. Then, everybody is on
23 equal footing. You have a level playing field on bid day.

24 Well, they didn't want that. They -- they wanted to
25 spring this on the other bidders and on the university in

1 the event they weren't the low bidder, which is -- which is
2 what happened. So they -- they -- they wanted -- they
3 wanted a gotcha, and that's what the -- still to this day,
4 they're -- they're holding to that position that, on the
5 bid form, there was an obligation to -- to list a pressure-
6 and process-piping contractor with -- who had that license.

7 The university -- first, we had the other 18 bidders.
8 They didn't think there was an obligation there. The
9 university considered Monroe's position on that subject
10 when it -- when it raised it after the bids were opened,
11 considered it, and disagreed, rejected, and went ahead and
12 awarded the contractor -- issued an intent to award to
13 Rogers Builders, who was the low bidder.

14 And the history from there is -- is as has already
15 been described: the appeal to the chief procurement
16 officer for construction, who also considered the listing
17 question very thoughtfully, very carefully; issued a -- a
18 -- a -- a -- an opinion, very detailed on the subject, and
19 disagreed with Monroe. Same thing with the panel.

20 So that's our tally. We have 18 other contractors.
21 The University of South Carolina, the chief procurement
22 officer for construction, and the Procurement Review Panel
23 have all considered this issue and disagreed with Monroe,
24 which is -- is quite a tally.

25 Briefly, the issues on appeal, as identified in the

1 appellate brief, to me, it -- it kind of reminds -- reminds
2 me of the ancient question of how many angels can dance on
3 the head of a pin at this point. It's -- it's largely
4 moot, as Mr. Robertson suggested.

5 The first and second grounds outlined in the -- in the
6 brief were considered carefully by the -- by the panel.
7 And there's substantial evidence in the record to support
8 the ruling. Same applies for the third. There's some
9 question on -- on the -- the third issue in the appellate
10 brief about the standard.

11 But the panel did not misapply a standard. It simply
12 refused to consider the issue because it was not timely
13 raised in the original protest letter.

14 And I would emphasize that again to the Court that the
15 issues that the -- the -- the key document in this case, as
16 Mr. McCabe conceded, is that December 2010 protest letter
17 to the chief procurement officer. That's the key. Now,
18 you -- you don't get a -- the -- the -- Monroe doesn't get
19 a second bite at the apple in front of the panel on what
20 issues to raise, nor does it get a -- a -- another
21 opportunity here to raise issues. Those issues were
22 considered or -- or -- considered by the panel, and also
23 during the hearing by the chief procurement, and they said:
24 "No. You have not raised these issues in your protest
25 letter."

1 And I'll -- I -- I think it's fair to say that the
2 protest letter was not particularly carefully drafted. If
3 the Court reviews that protest letter from December of
4 2010, you'll see that the word responsibility or
5 responsible does not appear in that letter.

6 And that's really what we're here talking about today.
7 It's a responsibility issue. It's not mentioned in the
8 letter.

9 There was some confusion on the part of the author of
10 the letter with confusing responsibility with
11 responsiveness. The lack of responsiveness is what is
12 argued in that letter. And that was raised by the
13 university and by Rogers Builders before the chief
14 procurement officer, saying: "Look, the -- the -- the bid
15 of Rogers Builders is clearly responsive; dismiss this
16 protest."

17 Then -- and the chief procurement officer said:
18 "Well, no. We'll look at the context of it" -- I'm
19 paraphrasing here, of course. And -- and generally, it's
20 clear that the issue they're attempting to raise is a
21 responsibility issue and not a responsiveness issue, even
22 though they didn't specifically mention responsibility.

23 So there was flexibility there, but not so much
24 flexibility as to allow Monroe to raise issues that simply
25 were not articulated in the letter to the extent they need

1 to be articulated to provide notice. And they -- they --
2 they simply can't continue to -- to attempt to raise those
3 issues if they didn't do it in the -- in the protest
4 letter.

5 So for this reason, there again, there's substantial
6 evidence in the record to support the Procurement Review
7 Panel's decision in this matter. And the university
8 requests the Court to deny the -- the appeal. Thank you.

9 THE COURT: Thank you. Ms. Emanuel, you don't have
10 anything to add, do you?

11 MS. EMANUEL: No, ma'am. Thank you.

12 THE COURT: Thank you. Mr. McCabe?

13 MR. MCCABE: Thank you, Your Honor. First of all,
14 Rogers was not qualified to do the process-piping work. He
15 had a -- he did not have a process-piping license. He had
16 -- or it had a general contractor's license. And 40-11-410
17 says that a general contractor's for building license
18 includes this subclassifications as follows: wood-frame
19 structures, Class II interior renovation, masonry,
20 preengineered metal buildings, general roofing, and
21 structural shapes, not handling dangerous gases. The state
22 requires a special license to handle those.

23 The issue -- the arguments that have been made have
24 nothing to do with the issue. They have to do with
25 changing the issue or blaming me for the way I did the

1 appeal or the way the letter was drafted.

2 And the issue is whether they had notice. Was the
3 word responsibility used? No. Does the statute require
4 it? No. Does it say it's illegal to enter into this
5 contract? Absolutely, yes.

6 If that doesn't give them notice that there is a
7 problem with doing it, I don't know what does.

8 THE COURT: So, Mr. McCabe, what's your remedy at this
9 particular point? What happens if -- if I were to agree
10 with you?

11 MR. MCCABE: Judge, what we would ask -- we agree. We
12 -- we would ask that you would remand the case back to
13 award the costs under -- excuse me -- under 11-35-4310. We
14 acknowledge that that is the remedy. We'd ask that the
15 Court remand the case back for hearings on -- on what
16 Monroe would be entitled to.

17 As far as -- we recognize that. As far as when the
18 chief procurement officer agreed to lift the automatic
19 stay, we agreed that we wouldn't object to that. We
20 understood that Monroe Construction was not going to get
21 the work. It was clear.

22 Monroe did not object to it. But Monroe did not waive
23 its appeal as to the responsibility issue that it raised.

24 Rogers was not qualified to do the work. Hill was not
25 qualified to do the work. As to this position that they

1 waited till the last minuted and played gotcha, that's just
2 not supported by the record. The e-mail was sent on
3 October 19th. It was about six weeks later when USC
4 awarded the contract on December the 3rd.

5 So -- and -- and -- and it was ten days after the --
6 ten days after that when Monroe appealed.

7 THE COURT: So, Mr. -- Mr. McCabe, I -- if your -- if
8 -- if your client understood that it would not get the job,
9 then what was the purpose for continuing on in agreeing for
10 the stay to be lifted? I mean, if -- if the whole idea was
11 to bring forth the -- the -- that there -- there will be
12 the -- an improper or illegal contract being allowed to go
13 forward, something that was against state law, then -- then
14 why would you agree to -- to let the work go forward with
15 -- with a contractor you claim was not qualified to do the
16 business?

17 MR. MCCABE: Well -- well, several reasons. In order
18 to object to the stay, it's a pretty tough standard for
19 Monroe Construction to meet. Additionally, a very large
20 bond would have to be posted. So what Monroe decided to do
21 was to maintain its appeal. And if it prevails, it's
22 entitled to costs and damages under 11-35-4310.

23 So Monroe made an election, essentially, to just
24 pursue its costs. It's not entitled -- I do not believe,
25 as I read 11-35-4310, it is not entitled to profits. But

1 it is entitled to certain costs.

2 And so what we would ask the Court to do is to rule
3 that the contract -- to remand it back, pursuant -- for
4 findings pursuant to 11-35-4310.

5 THE COURT: All right. I'll review the information
6 you have provided and issue an order from there. Thank
7 you.

8 MR. MCCABE: Thank you.

9 (Whereupon, the proceeding was concluded at 3:24 p.m.)

10 --- END OF TRANSCRIPT OF RECORD ---

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 14TH
DAY OF AUGUST, 2014.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 28, 2016