

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-03174

Monroe Construction
Company, LLC,

Appellant,

v.

University of South Carolina,

Respondent.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT INCORRECTLY AFFIRM AND MODIFY THE DECISION OF THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL?

STATEMENT OF CASE

In 2010, Appellant Monroe Construction Company, LLC protested the decision of Respondent, University of South Carolina (“USC”), to award Rodgers Builders, Inc. (“Rodgers”) a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, SC, based on Rodgers’ bid of \$3,149,000.00. (Protest Letter at p. 1). On December 13, 2010, Appellant mailed its protest letter and request for administrative review to the Office of the State Engineer. (*See* Protest Letter). Appellant’s basis for protest and review was that neither Rodgers nor its subcontractor had the requisite license to perform the specialty plumbing work as provided in the Project Specifications. (Protest Letter at p. 1-2). On February 14, 2011, the Chief Procurement Officer for Construction (“CPOC”) issued his decision. (*See* CPOC Feb. Decision). The decision provides in pertinent part as follows:

[T]he CPOC finds that USC’s intended meaning for the term “plumbing” was reasonable, and not clearly erroneous, arbitrary, capricious or contrary to law [. . .] [m]oreover, the CPOC finds that USC’s application of the scope of “plumbing” was not clearly erroneous, arbitrary, capricious or contrary to law. Therefore USC’s decision that Rodgers’, having listed for “plumbing” a subcontractor with a plumbing license, was a responsible bidder was not clearly erroneous, arbitrary, capricious or contrary to law. (CPOC Feb. Decision at p. 10)

...

It is the decision of the Chief Procurement Officer for Construction that Monroe has failed to prove upon the preponderance of the evidence that the USC's determination regarding Rodger's responsibility was "clearly erroneous, arbitrary, capricious, or contrary of law." (CPOC Feb. Decision at p. 11).

Subsequently, pursuant to a request for administrative review, Appellant's protest of USC's intended award of a construction contract to Rodgers went before the South Carolina Procurement Review Panel ("Panel") for a hearing. An automatic stay of the award of the construction contract resulted when Appellant appealed the decision. On March 3, 2011, the CPOC issued an order, finding that it is in the best interests of the state that the contract award of Respondents to Rodgers should not be delayed. (See CPOC Mar. Decision). Following the hearing, the Panel's order, dated April 26, 2011, provides in pertinent part as follows:

A review of Monroe's initial protest letter reveals that Monroe did not cite section 11-35-3020 in its protest letter, nor did it allege that USC failed to list any required subcontractors on its bid form. Rather Monroe asserted that the bid form, Project specifications, and drawings required bidders to list both a plumbing and a pressure process piping subcontractor on the bid form. Therefore, the Panel concludes that Monroe's challenge in its appeal letter that the bid form did not comply with section 11-35-3020 is an issue raised for the first time on appeal and must be dismissed for lack of jurisdiction. (Panel's Order Denying Appellant's Protest at p. 4).

...

The Panel also finds that Monroe's allegation that USC had a duty to investigate an alleged violation of section 40-11-200(B) of the Contractor's Licensing Act was also raised for the first time on appeal. Although Monroe did cite section 40-11-200(B) in its protest letter, Monroe never suggested that USC had a duty to investigate whether a violation of that statute had occurred.

Therefore, the Panel also dismisses that issue as being untimely under section 11-35-4210(1)(b) and Panel precedent. (Panel's Order Denying Appellant's Protest at p. 5).

Pursuant to S.C. Code Ann. § 1-23-380 and S.C. Code Ann. § 11-35-4410, Appellant appealed the decision of the South Carolina Procurement Review Panel to the Richland County Court of Common Pleas. On appeal to the Circuit Court, Appellant claimed that its protest letter to the Panel sufficiently raised the issue of responsibility concerning USC and Rodgers' subcontractor and thus should not be dismissed. (Appellant's Brief at p. 3). Additionally, Appellant claimed that the Panel applied the wrong standard of review to USC's determinations of responsibility under the procurement code. (*Id.* at p. 5). Lastly, Appellant argued that the Respondent's motion to quash the subpoena for records of its bid on the Project should be denied because the evidence sought was relevant to resolve the responsibility issue. (*Id.* at p. 7). Circuit Court Judge Alison Renee Lee heard arguments on the matter and issued an Order Affirming and Modifying the Procurement Review Panel's decision on February 29, 2016. (*See* Circuit Court Order). This appeal followed.

FACTS

The underlying dispute concerns a bid for a construction project solicited by USC. On October 19, 2010, USC solicited bids for a construction project ("Project") to upfit laboratory, office, and support space on the first floor of the Horizon 1 building. (Appellant's Brief at p. 1). On the same day bids were open, Monroe raised the responsibility issue in an email to USC and the Office of the State Engineer stating "contractors are required to be properly licensed to bid and

perform work in the state of South Carolina. The plumbing contractor should have a process and pressure piping license to do all the gases on this project.” (*Id.* at 2). Further, Monroe notified USC that subcontractor Hill Plumbing (“Hill”) did not possess the requisite process and pressure piping license. Monroe requested that USC review this responsibility issue. (*Id.*)

On December 3, 2010, USC posted an Intent to Award the bid contract to the lowest bidder, Rodgers, who listed Hill as its plumbing subcontractor. (*Id.*) Monroe timely protested USC’s Notice of Intent to Award a contract to Rodgers, on December 13, 2010, because neither Rodgers nor Hill possessed the requisite pressure and process piping license to perform the work for USC. (*Id.*)

Subsequently, on February 14, 2011, the CPOC conducted a hearing and denied Monroe’s protest. (*Id.*) Monroe timely appealed the CPOC decision to the Panel for administrative review. (*Id.*) On March 10, 2011, the Panel issued a subpoena to Hill, and on March 23, 2011, Hill filed a motion to quash said subpoena. (*Id.*) The CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill’s sub-bid on March 29, 2011. (*Id.*) On April 26, 2011, the Panel issued two orders. (*Id.* at 2-3). The First order granted the CPOC’s motion to dismiss appeal issues as untimely and granted Hill’s motion to quash the subpoena. (*Id.*) The Second order denied Monroe’s appeal, holding USC had fulfilled its duties under the Procurement Code in determining that Rogers was a responsible bidder. (*Id.*)

Appellants petitioned the Circuit Court to reverse the two orders of the South Carolina Procurement Review Panel on the grounds that the protest letter

sufficiently raised the responsibility issue concerning Hill and sufficiently raised USC's obligation to comply with S.C. Code Ann. § 40-11-200. (*See* Appellant's Brief). Furthermore, Appellants argued that the motion to quash should be denied because the evidence was relevant to the responsible bidder issue. (*Id.*) Lastly, Appellants argued that the Panel applied the wrong standard of review to USC's obligation to comply with the Contractor Licensing Act and applied the wrong standard of review to USC's determinations of responsibility under the Procurement Code. (*Id.*) The Circuit Court affirmed and modified the orders. (*See* Circuit Court Order). This appeal followed.

STANDARD OF REVIEW

Appellant has standing to pursue its bid protest despite the fact that the project has already been completed. As an actual competing bidder who complied with the contractor licensing laws and who filed a timely protest when it was not awarded its bid, Appellant was an aggrieved bidder who had standing at the time it brought the protest on December 13, 2010. *See* S.C. Code Ann. § 11-35-4210(1)(b). The subsequent mootness does not bar its continued standing to assert the important public interest of requiring compliance with procurement and contractor licensing laws in the construction of public projects because that conduct is capable of repetition on other public projects. *See Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 167-68, 666 S.E.2d 236, 239-40 (2008).

“The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. 1-23-380(5) (Supp. 2014); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 433, 458

S.E.2d 76, 78 (Ct. App. 1995). The Court may affirm the decision of the Panel or remand the matter for further proceedings. S.C. Code Ann. § 1-23-380(5) (Supp. 2014). “The review must be conducted by the court and must be confined to the record.” S.C. Code Ann. § 1-23-380(4) (Supp. 2014). “The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: [. . .] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or [] arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 1-23-380(5)(e)-(f) (Supp. 2014).

ARGUMENT

I. THE CIRCUIT COURT INCORRECTLY AFFIRMED THE DECISION OF THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL BECAUSE THE INITIAL PROTEST LETTER SUFFICIENTLY RAISED THE ISSUE OF RESPONSIBILITY.

The Panel dismissed the responsibility issues concerning USC and Hill based on a determination that the issues were not raised in Monroe’s protest letter. The motion to dismiss as untimely should be reversed and remanded because the protest letter sufficiently raised the responsibility issue concerning USC and Hill.

A. The Initial Protest Letter Sufficiently Raised the Responsibility Issue Concerning Hill.

The Panel erroneously dismissed the responsibility issue concerning Hill because the Panel concluded this issue was not raised in the initial protest letter. “A protest [. . .] must set forth the grounds of the protest and the relief requested

with enough particularity to give notice of the issues to be decided.” S.C. Code Ann. § 11-35-4210(2)(b). The specificity of a protest is not judged by highly technical or formal standards, but must “alert the parties to the general nature of the grounds for protest.” *Protest of Sterile Services Corporation*, Case No. 1983-17; see also *Protest of the Megg Corporation of Greenville*, Case No. 1992-9.

The initial protest letter alleged the Hill responsibility issue with enough particularity to give notice of the issues to be decided. On December 13, 2010, Monroe protested USC’s Notice of Intent to Award a contract to Rodgers (Appellant’s Brief at p. 2). In its protest letter, Monroe stated that section 40-11-200(B) of the South Carolina Contractor Licensing Act “makes it a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor.” (*Id.* at p. 3). Further, Monroe stated that “neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work.” (*Id.*) As such, “Monroe was the lowest bidder that identified a property licensed subcontractor [. . .] for the specialty piping work.” (*Id.* at p. 4). Additionally, Monroe referenced the October 19th email that placed USC on inquiry notice that Hill, in addition to any contractor using Hill as a subcontractor, had bid beyond the scope of its license. (*Id.*)

Possession of the proper contractor license, either by the bidder or one of the bidder’s listed subcontractors, is an issue of responsibility. *Protest of Burkwood Construction Company, Inc.*, Case No. 1997-8; *Protest of Roofco, Inc.*, Case No. 2000-14(I). A responsible bidder is one 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.” S.C. Code Ann. § 11-35-1410(6). The State must determine responsibility prior to the award of any contract. S.C. Code Ann. § 11-35-1810(1). When at the time of bidding, neither the subcontractor nor the general contractor possessed the proper license for performing work, neither the general contractor nor the subcontractor are responsible bidders. *Protest of Complete Building Corporation*, Case No. 2011-013; *Protest of Atrium Builders, Inc. & Triad Mechanical Contractors, Inc.*, Case No. 2008-0011.

The Appellant’s initial protest letter cites the Contractors Licensing Act, which requires a contractor to possess the proper license at the time of bidding. S.C. Code Ann. § 40-11-30; S.C. Code Ann. § 40-11-200(B). The statute precludes a contractor from submitting or considering a bid if the contractor or subcontractor does not possess the proper license at the time of bidding. *Id.* A contractor means a general or mechanical contractor regulated under this chapter. S.C. Code Ann. § 40-11-20(4). Thus, these provisions implicate responsibility issues concerning Rodgers and Hill, general and mechanical contractors respectively.

Even though the letter never used the word “responsibility,” the protest letter clearly indicates that Monroe was protesting the fact that neither Rodgers nor Hill was properly licensed to perform pressure and process piping work. The CPOC concurred, “[a]t issue is the responsibility of Rodger’s plumbing subcontractor, which effects Rodgers’ responsibility.” (Appellant’s Brief at p. 4). Further, the CPOC stated, “Monroe’s letter is sufficient to alert the parties that

Monroe was protesting both Rodgers' and Hill's responsibility because they lack the appropriate license to perform all of the alleged plumbing work. Indeed, all parties were fully prepared to present testimony, other evidence, and arguments on the merits of Monroe's protest at the hearing." (*Id.* at p. 4-5).

The initial protest letter explicitly states Monroe's concern that neither Hill nor Rodgers was properly licensed. (*See* Protest Letter). The initial protest letter even referenced the Contractor Licensing Act implicating the responsibility of Hill. (*Id.*) Thus, the parties cannot claim that the protest letter failed to notify them that the issue was licensure, and consequently, responsibility. Accordingly, the protest letter sufficiently raised the Hill responsibility issue with sufficient particularity to give notice to all parties about the protested issues.

B. The Initial Protest Letter Sufficiently Raised the Issue Concerning USC's Obligation to Comply With S.C. Code Ann. § 40-11-200.

The Panel erroneously dismissed the issue concerning USC's independent duty to investigate the responsibility of bidders because the Panel concluded the issue was not raised in the initial protest letter, and the Circuit Court improperly affirmed the Panel's decision. "A protest [. . .] must set forth the grounds of protest and the relief requested with enough particularity to give notice of the issues to be decided. S.C. Code Ann. § 11-35-4210(2)(b). The specificity of a protest is not judged by highly technical or formal standards, but must "alert the parties to the general nature of the grounds for protest." *Protest of Sterile Services Corporation*, Case No. 1983-17; *see also* *Protest of the Megg Corporation of Greenville*, Case No. 1992-9.

The protest letter sufficiently raised the issue concerning USC's independent duty to investigate the responsibility of its bidders. The protest letter specifically referenced the Contractor Licensing Act, which precludes an awarding authority from considering a bid if the contractor or subcontractor does not possess the proper license at the time of bidding. S.C. Code Ann. § 40-11-30; S.C. Code Ann. 40-11-200(B). The protest letter stated, "S.C. Code 40-11-200(B) makes it a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor." This provision requires that USC ensure its bidders are responsible at the time of bidding. In order to comply with the statute, USC has an independent duty of inquiry concerning the responsibility of its bidders. The protest letter sufficiently raised the issue of USC's obligation to comply with S.C. Code Ann. § 40-11-200(B).

Additionally, the protest letter referenced an October email that placed USC on advance notice inquiry that Hill, and consequently any contractor using Hill as a subcontractor, was not a responsible bidder. (*See* Protest Letter). The email, sent on the same day bids opened, October 19, 2010, stated "Please Be [sic] advised that pursuant to chapter 11 of the South Carolina Code of Laws, contractors are required to be properly licensed to bid and perform work in the state of South Carolina. The plumbing contractor should have a process and pressure piping license to do all the gases on this project." Monroe specifically requested review of this issue "as opposed to a formal protest being submitted." In effect, Monroe requested that USC comply with S.C. Code Ann. § 40-11-200(B) and determine whether Rodgers and Hill were in-fact responsible bidders. The

protest letter expressly referenced this email and stated, “Monroe specially advised USC’s procurement officer for this project of the specialty license requirement [. . .] [n]otwithstanding the advance notice, USC issued a notice of award of the bid to a contractor that listed a subcontractor for this part of the week that does not have the required specialty license.” (*See* Protest Letter).

If the email was insufficient to give USC notice of the general nature of Monroe’s grounds for protest, then the letter certainly provided sufficient notice of the issues to be decided. S.C. Code Ann. § 11-35-4210(2)(b). Even though the protest letter never used the word “responsibility,” Monroe cited the Contractors Licensing Act in the protest letter and email, directly implicating compliance by USC as an awarding authority. USC had a statutory obligation to investigate the responsibility of its bidders, especially once it was placed on inquiry notice that an identified subcontractor did not have the requisite pressure and processing piping license. Together, the initial protest letter and email provide sufficient notice and particularity to all parties concerning the issue of USC’s compliance with § 40-11-200(B).

C. The Motion To Quash Should Have Been Denied Because the Evidence Sought Was Relevant to Resolve the Issue of Whether Hill and Rodgers Were Responsible Bidders.

Monroe sought relevant evidence concerning the responsibility of Hill, and consequently Rodgers. Since the Panel erroneously dismissed the Hill responsibility issue as untimely, the Panel concluded the evidence sought by Monroe was no longer relevant. (*See* Panel’s Order). The Circuit Court likewise

upheld the Panel's decision to quash the subpoena because the Court found that the Panel properly dismissed Monroe's issue concerning Hill's sub-bid. (*See* Circuit Court Order). However, the evidence is relevant to determine whether Hill and Rodgers were responsible bidders. If Hill's sub-bid included pressure and process piping work, then Hill was not a responsible bidder and the contract should have been awarded to Monroe.

The Panel, affirmed by the Circuit Court, erroneously dismissed any issue challenging the scope of Hill's sub-bid by concluding that Monroe's protest letter did not raise the responsibility issue. However, Monroe's protest letter specifically cited the Contractors Licensing Act, which precludes a contractor from submitting a bid if the contractor or subcontractor does not possess the proper license at the time of bidding. S.C. Code Ann. § 40-11-220(B). Hill is a mechanical contractor with a plumbing license. S.C. Code Ann. § 40-11-410(5)(f). Thus, this provision implicates the responsibility of Hill and requires that Hill have the proper license for the Project in order to submit a bid. The CPOC agreed stating, "[a]t issue is the responsibility of Rodgers' plumbing subcontractor (Hill), which effects Rodgers' responsibility." (*See* CPOC Feb. Decision). Nevertheless, the Panel concluded the subpoena sought irrelevant evidence since the issue had been dismissed. (*See* Panel's Order). However, since the issue was raised in Monroe's protest letter, the Panel's decision, and the Circuit Court's affirmation of that decision, to quash the subpoena was erroneous because the evidence is relevant to the Hill responsibility issue.

D. The Panel Applied the Wrong Standard of Review to USC's Obligation to Comply With the Contractor Licensing Act and the Procurement Code.

USC must comply with the Contractors Licensing Act or otherwise face criminal penalties. S.C. Code Ann. § 40-11-200(B). "It is a violation of this chapter for an awarding authority [. . .] to consider a bid, sign a contract, or allow a contractor to begin work unless the bidder or contractor has first obtained the licenses required by this chapter." *Id.*

USC has two independent and distinct obligations concerning determinations of responsibility. First, USC had a non-discretionary obligation to comply with S.C. Code § 11-40-200(B). However, the Panel erroneously applied a "clearly erroneous, arbitrary, capricious, or contrary to law" standard of review despite the plain language of the statute. Second, USC must make determinations of responsibility and non-responsibility prior to any award of any contract under the Procurement Code. S.C. Code Ann. § 11-35-1810(1)-(2). Likewise, the Panel extended the lenient standard of review to USC's determination of responsibility, when that standard of review only applies to determinations of non-responsibility.

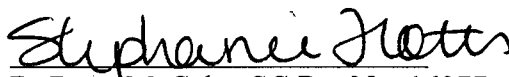
The Panel's application of the clearly erroneous, arbitrary, capricious, or contrary of law standard of review is incongruent with the plain language of the statutes and creates confusion for state agencies and bidders who need guidance about the degree of compliance necessary. The Circuit Court's Order affirming the Panel's determination of responsibility in this case, despite the application of an irrelevant standard of review, requires resolution. Therefore, this Court should review these determinations and reverse the Circuit Court's affirmation of the

Panel's decision and determine the responsibility of Hill, Rodgers, and USC under S.C. Code § 11-40-200(B).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court, confirming the South Carolina Procurement Review Panel's decision in favor of Respondent, and modify accordingly in favor of Appellant.

Respectfully submitted,

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