

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-000715

Monroe Construction Company, LLC..... Appellant,

v.

University of South Carolina, Respondent.

INITIAL BRIEF OF RESPONDENT
(University of South Carolina)

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the Procurement Review Panel's ruling that the Appellant's protest letter fails to allege that Hill Plumbing and Electric Company, Inc. bid outside the scope of its license is supported by substantial evidence.
2. Whether the Procurement Review Panel's ruling that the Appellant's protest letter fails to allege that the Respondent had a duty to investigate whether a violation of S.C. Code Ann. § 40-11-200(B) occurred is supported by substantial evidence.
3. Whether the Procurement Review Panel abused its discretion when it granted Hill Plumbing and Electric Company's motion to quash.
4. Whether the Procurement Review Panel applied the wrong standard of review to the question of whether the Respondent had a duty to investigate whether a violation of the Contractor's Licensing Act had occurred.
5. Whether the Procurement Review Panel's determination that the Respondent's inquiry into whether Rodgers was a responsible bidder satisfied the requirements of the Procurement Code is supported by substantial evidence.

COUNTER-STATEMENT OF THE CASE¹

This appeal from the Circuit Court's Order dated February 29, 2016 constitutes the Appellant's third appeal arising from the Respondent's award of a construction contract to another contractor, Rodgers Builders, Inc. ("Rodgers"), on December 3, 2010. The Court of Appeals is the fourth tribunal to address this case.²

The Appellant initiated this action on December 13, 2010 when it filed a protest letter with the State of South Carolina's Chief Procurement Officer for Construction (CPOC) pursuant to the South Carolina Consolidated Procurement Code ("the Procurement Code").³ (Protest Letter, p. 1.) The Appellant protested the Respondent's posting of a Notice of Intent to Award a construction contract for a laboratory upfit project on the first floor of the Horizon I Building on the Respondent's Columbia campus ("the Project") to Rodgers.⁴ (*Id.*)

¹ The Respondent does not consent to be bound by the Statement of the Case and the Statement of Facts contained in Appellant's brief, and, pursuant to Rule 208(b)(2), SCACR, submits its own Counter-Statement of the Case and Statement of Facts.

² The State's Chief Procurement Officer for Construction (CPOC) dismissed the Appellant's protest of the award in a written Decision dated February 14, 2011. (CPOC Decision.) The Appellant appealed the CPOC's decision to the South Carolina Procurement Review Panel ("the Panel"), which denied the Appellant's protest and upheld the decision of the CPOC in a written decision dated April 26, 2011. (Panel Order No. 2.) The Appellant appealed the Panel's decision to the Court of Common Pleas for the Fifth Judicial Circuit, which affirmed the Panel's denial of the Appellant's protest in a written decision dated February 29, 2016. (Circuit Court Order.)

³ S.C. Code Ann. § 11-35-10 *et seq.*

⁴ The Respondent posted the Notice of Intent to Award pursuant to S.C. Code Ann. § 11-35-1520(10).

The Appellant's protest letter asserted that Rodgers' bid was not responsive⁵ and that S.C. Code Ann. § 40-11-200(B)⁶ "makes it a criminal offense for the University to even consider a bid if the work is not performed by a properly licensed contractor." (Protest Letter, p. 2.)

The CPOC conducted an administrative review by hearing on January 27, 2011 pursuant to S.C. Code Ann. §11-35-4210(4). The CPOC granted the Respondent's and Rodgers' motions to dismiss the Appellant's protest on the issue of responsiveness. (CPOC Decision, p. 3.) However, the CPOC interpreted the protest letter to state a protest of "USC's determination that Rogers was the lowest responsible bidder."⁷ (CPOC Decision, pp. 3-4.) The CPOC found that the allegations set forth in the Appellant's letter were "sufficient to alert the parties that [the Appellant] was protesting both Rodgers' and Hill Plumbing and Electric Company's ("Hill")⁸ responsibility because they lack the appropriate license to perform all of the alleged plumbing work" despite the Appellant's failure to specifically allege that Rodgers and Hill were not responsible in its protest letter. (CPOC Decision, p. 4.)

In his Decision, CPOC noted that the bid form used by the Respondent required bidders to list three different subcontractor specialties: mechanical, electrical, and plumbing. (CPOC

⁵ A bid is responsive if it "conforms in all material aspects to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(7).

⁶ "It is a violation of this chapter for an awarding authority, owner, contractor, or an agent of an authority, owner, or contractor 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. Bids or contracts submitted by contractors may not be reconsidered or resubmitted to an awarding authority, contractor, or owner if the contractor was not properly licensed at the time the initial bid or contract was submitted." S.C. Code Ann. § 40-11-200(B).

⁷ "Responsible bidder or offeror" means 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. S.C. Code Ann. § 11-35-1410(6).

⁸ Rodgers listed Hill as its plumbing subcontractor on its bid form.

Decision, p. 6.) The Procurement Code requires governmental bodies to “identify by specialty in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors’ contracts are each expected to exceed three percent of the prime contractor’s total base bid.” S.C. Code Ann. §11-35-3020(b)(i). (CPOC Decision, p. 6.)

During the hearing, the Appellant “argued that the scope of ‘plumbing’ on the bid form includes the work of a licensed pressure and process piping contractor...” (CPOC Decision, p. 8.) However, the Respondent “presented testimony and arguments showing that its intended meaning of the term ‘plumbing’ was coextensive with the scope of work a licensed plumbing subcontractor could perform..., not [Appellant’s] understanding of the term... Moreover, [Respondent] presented testimony and evidence that... pressure and process piping constituted less than 3% of the total estimated project cost; therefore, [Respondent], in consultation with its architect, decided not to list the pressure and process piping subcontractor specialty on the bid form.” (CPOC Decision, p. 8.)

The CPOC concluded that “[Respondent’s] intended meaning for the term ‘plumbing’ was reasonable, and was not clearly erroneous, arbitrary, capricious, or contrary to law; that the bidder’s [sic] consistently had an understanding of the meaning of this term compatible with [Respondent’s] intended meaning; and [Respondent] applied its intended meaning for this term reasonably and consistently in making its responsibility determination. Moreover, the CPOC finds that [Respondent’s] application of the scope of ‘plumbing’ was not clearly erroneous, arbitrary, capricious or contrary to law. Therefore, [Respondent’s] decision that Rodgers’ [sic], 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 Decision, p. 10.)

The Appellant appealed the CPOC's decision to the South Carolina Procurement Review Panel ("the Panel") on February 23, 2011. (Appellant Letter dated 2/23/11.) For the first time on appeal, the Appellant alleged that Hill improperly offered to perform work outside the scope of its plumbing license in its sub-bid to Rodgers. (Appellant Letter dated 2/23/11, p. 2.) This allegation was distinct from the Appellant's original argument that challenged Rodgers' responsibility because Hill allegedly lacked "the required specialty license to perform the specialty plumbing work" on the Project. (Protest Letter, p. 1.)

On March 10, 2011, at the Appellant's request, the Panel's attorney prepared a subpoena directed to Francis L. Hill of Hill Plumbing and Electric Company. The subpoena compelled Mr. Hill's attendance at the Panel's hearing scheduled for April 13, 2011 and also compelled the production of copies of Hill Plumbing and Electric Company's complete file relating to the Project. (Panel Order No. 1, p. 3.)

The CPOC moved to dismiss the new issue of whether Hill improperly offered to perform work outside the scope of its plumbing license in its sub-bid to Rodgers. (Panel Order No. 1, p. 4.) Hill moved to quash the subpoena on the grounds that the evidence sought was not relevant to the issues to be decided by the Panel and that the evidence sought contained confidential and trade secret information. (Panel Order No. 1, p. 6.)

On April 4, 2011, the Panel Chairman heard arguments on the CPOC's motion to dismiss and Hill's motion to quash by telephone conference call. After hearing the arguments of the parties, the Chairman orally granted both motions and subsequently issued a written Order dated April 26, 2011 that addressed the motions (Panel Order No. 1). (Panel Order No. 1.)

Also for the first time on appeal to the Panel, the Appellant alleged that the Respondent had a duty to investigate whether a violation S.C. Code Ann. § 40-11-200(B) had occurred. (Appellant Letter dated 2/23/11, p. 2.) The Respondent moved to dismiss this allegation at the Panel hearing on April 13, 2011. (Panel Order No. 2, p. 3.) The Appellant contended at oral argument that the allegation was not a new issue because the protest letter cited S.C. Code Ann. § 40-11-200(B) and consequently the argument regarding the Respondent's duty to investigate was implicit in the letter. (Panel Order No. 2, p. 3.)

The Panel found that although the Appellant cited S.C. Code Ann. § 40-11-200(B) in its protest letter, the protest letter did not allege that the Respondent had a duty to investigate whether a violation of the statute had occurred. (Panel Order No. 2, p. 5.) The Panel granted the Respondent's motion to dismiss this issue. (Panel Order No. 2, p. 5.)

The hearing then proceeded in order to resolve the remaining issues of whether Rodgers was a responsible bidder and whether the Respondent fulfilled its duties under the Procurement Code when it determined that Rodgers was a responsible bidder. (Panel Order No. 2, p. 5.) The Panel ruled that Rodgers was a responsible bidder and that the Respondent's determination of Rodgers' responsibility was not clearly erroneous, arbitrary, capricious, or contrary to law. (Panel Order No. 2, p. 7.) The Panel issued a second Order dated April 26, 2011 that addressed its rulings on the Respondent's motion and its denial of Appellant's protest (Panel Order No. 2). (Panel Order No. 2.)

The Appellant filed a Notice of Appeal in the Court of Common Pleas for the Fifth Judicial Circuit on May 13, 2011. (Notice of Appeal.) The Appellant's Notice of Appeal indicated that it was appealing both Panel Order No. 1 and Panel Order No. 2. (Notice of Appeal.) The Appellant

subsequently identified the issues on appeal in a brief it filed with the Court on September 11, 2012. (Appellant's Circuit Court Brief.)

The Court of Common Pleas heard oral arguments on August 14, 2014. The Court issued an Order on February 29, 2016 and affirmed the Panel's Order but modified it with respect to the standard of review applicable to agency determinations of responsibility under the Procurement Code. (Circuit Court Order, p. 13.)

The Appellant filed its Notice of Appeal of the Circuit Court's February 29, 2016 Order on April 4, 2016.

STATEMENT OF FACTS

The Respondent advertised for bids to construct the Project on September 13, 2010. (CPOC Decision, p. 2.) Bidders were initially required to submit their bids on or before October 12, 2010, but the date for receipt of bids was subsequently extended to October 19, 2010. (CPOC Decision, p. 2.)

The bid form required bidders to list the mechanical, electrical, and plumbing subcontractors they intended to use on the Project. (CPOC Decision, p. 2.) S.C. Code Ann. § 11-35-3020 sets forth bidding procedures for construction procurement. The statute provides in part, "The governmental body, in consultation with the architect-engineer assigned to the project, shall identify by specialty in the invitation for bids all subcontractors who are expected to perform work for the prime contractor... when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid... A bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids." S.C. Code Ann. § 11-35-3020(b)(i).

The Respondent received nineteen (19) bids in response to its solicitation. (CPOC Decision, p. 2.) Rodgers submitted a low bid of \$3,149,000 for base bid two.⁹ (CPOC Decision, p. 2.) The Appellant submitted the third low bid of \$3,230,000 for base bid two. (CPOC Decision, p. 2.) Of the nineteen contractors that submitted bids, the Appellant was the *only bidder* that listed both a licensed plumbing subcontractor *and* a licensed pressure and process piping subcontractor in the space on the bid form that required bidders to list a plumbing subcontractor. (CPOC Decision, pp. 8-9.)¹⁰

It is important to note that “plumbing” and “pressure and process piping” are distinct subclassifications under the Contractor's Licensing Act.¹¹ The Project did include work that only a properly licensed pressure and process piping contractor could lawfully perform. However, the Respondent did not require bidders to list a pressure and process piping subcontractor on their bid forms because the pressure and process piping component of the work was not “expected to exceed three percent of the prime contractor's total base bid.”¹² (CPOC Decision, p. 8.) The Respondent’s intended meaning of the term “plumbing” on the bid form was coextensive with the scope of work a

⁹ The solicitation documents and bid form provided for two base bids. (CPOC Decision, p. 2.)

¹⁰ The Appellant’s decision to list a pressure and process piping subcontractor on its bid form deviated from its prior practice when bidding on other lab upfit projects for the Respondent’s Horizon I Building. The Respondent awarded similar lab upfit contracts to the Appellant for both the second and third floors of Horizon I. (CPOC Decision, p. 9.) Both prior projects required pressure and process piping work to be performed. (CPOC Decision, p. 9.) However, neither the Appellant nor any of the other bidders listed pressure and process piping subcontractors together with plumbing subcontractors on their bid forms in connection with those prior Horizon I projects. (CPOC Decision, pp. 9-10.)

¹¹ The Contractor’s Licensing Act describes the plumbing subclassification at S.C. Code Ann. § 40-11-410(5)(f). The Contractor’s Licensing Act describes the pressure and process piping subclassification at S.C. Code Ann. § 40-11-410(5)(g).

¹² S.C. Code Ann. § 11-35-3020(b)(i).

licensed plumbing subcontractor could perform and did not include pressure and process piping work. (CPOC Decision, p. 8.)

Rodgers listed Hill as its plumbing subcontractor on its bid form. (CPOC Decision, p. 2.) The architect for the project, Ms. Regina Floyd, investigated whether Hill possessed a valid plumbing license as part of her efforts to determine whether Rodgers was a responsible bidder.¹³ (Panel Order No. 2, p. 7.) She confirmed that Hill possessed a valid plumbing license and the Respondent ultimately concluded that Rodgers was a responsible bidder. (Panel Order No. 2, p. 7.) She did not investigate whether Hill possessed a valid pressure and process piping license because the bid form required bidders to list only plumbing subcontractors. (Panel Order No. 2, pp. 6-7.)

The Respondent posted a Notice of Intent to Award a contract to Rodgers for base bid two on December 3, 2010. (CPOC Decision, p. 2.) The Appellant filed its protest with the CPOC on December 13, 2010. (CPOC Decision, p. 2.)

STANDARDS OF REVIEW

The South Carolina Consolidated Procurement Code provides in part that “the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court. The standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act.” S.C. Code Ann. § 11-35-4410(6).¹⁴

¹³ “Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible.” S.C. Code Regs. 19-445.2125(D).

¹⁴ S.C. Code Ann. § 1-23-600(A) contains a general grant of appellate jurisdiction to the Administrative Law Court to review various final decisions of state agencies and department boards. However, appeals arising under the Consolidated Procurement Code are explicitly excluded from the Administrative Law Court’s jurisdiction. S.C. Code Ann. § 1-23-600(A)(1).

The South Carolina Administrative Procedures Act ("APA") establishes the following standard of review: "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5).

Under the APA, judicial review of administrative agency decisions is "limited to a determination of whether they are supported by substantial evidence." *Roper Hosp. v. Board of S.C. Dep't of Health and Envtl. Control*, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991). After considering the entire record, the appellate court "need only find... evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

Regarding the Appellant's argument that the Panel should have denied Hill's Motion to Quash Subpoena, "[t]he rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Osborne v. Adams*, 338 S.C. 82, 525 S.E.2d 268 (Ct.App.1999). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d

565 (1987); *Osborne, supra.*” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001).

ARGUMENT

1. **The Panel’s ruling that the Appellant’s protest letter fails to allege that Hill Plumbing and Electric Company, Inc. bid outside the scope of its license is supported by substantial evidence.**

In Panel Order No. 1, the Panel granted the CPOC’s motion to dismiss the issue of whether Hill improperly offered to perform work outside the scope of its plumbing license in its sub-bid to Rodgers. The Panel ruled that the Appellant did not raise the issue in its protest letter and dismissed it for lack of jurisdiction. (Panel Order No. 1, p. 5.)

The Panel cited well-established law for the proposition that the protest letter establishes the issues of the case, and that the Panel lacks jurisdiction to consider any issues not established in the protest letter. (Panel Order No. 1, p. 5.) “The Panel has consistently held that the issues to be decided by the CPO and the Panel are established by the protest letter, and that issues raised for the first time in an appeal letter are untimely under the time constraints of S.C. Code Ann. section [sic] 11-35-4210.” (Panel Order No. 1, p. 5.)

The Appellant does not challenge the Panel’s interpretation of the statute, which provides in pertinent part, “A protest, including amendments, must set forth both 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 Appellant simply disagrees with the Panel’s conclusion that the protest letter did not allege that Hill improperly offered to perform work outside the scope of its plumbing license with enough particularity to give notice of the issue.

“[W]hether an agency correctly applied the facts of a case to a statute is a question of fact, subject to the substantial evidence standard.” *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 483,

646 S.E.2d 162, 167 (Ct.App.2007), *aff'd* by 383 S.C. 310, 680 S.E.2d 1 (2009). The “possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence.” *Palmetto Alliance, Inc. v. South Carolina Public Service Commission*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Rather, the Court need only find, considering the record as a whole, evidence that “would allow reasonable minds to reach the conclusion that the administrative agency reached.” *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 203, 314 S.E.2d 327, 328 (1984).

The Panel examined the Appellant’s protest letter and noted that the protest letter “complained of Rodgers’ action in listing a plumbing contractor that did not possess the pressure and process piping license on its bid form under the category for plumbing.” (Panel Order No. 1, p. 5.) However, the Panel concluded that “[n]othing in [Appellant’s] protest letter suggested that Hill Plumbing had acted improperly or bid outside the scope of its license.” (Panel Order No. 1, p. 5.)

The Panel’s conclusion that the Appellant’s protest letter did not raise the issue of whether Hill improperly offered to perform work outside the scope of its plumbing license is subject to the substantial evidence standard. Given that both the CPOC, who moved to dismiss the issue before the Panel, and the Circuit Court concluded that the protest letter failed to raise the issue, it is evident that reasonable minds may reach the conclusion that the Panel reached on this issue. The Court should therefore affirm the Panel’s ruling that the Appellant’s protest letter fails to allege that Hill bid outside the scope of its license and affirm the Panel’s dismissal of the issue for lack of jurisdiction.

2. The Panel's ruling that the Appellant's protest letter fails to allege that the Respondent had a duty to investigate whether a violation of S.C. Code Ann. § 40-11-200(B) occurred is supported by substantial evidence.

In Panel Order No. 2, the Panel granted the Respondent's motion to dismiss the issue of whether Respondent had a duty to investigate whether a violation of S.C. Code Ann. § 40-11-200(B) occurred. The Panel rejected the Appellant's argument that the issue was "implicit in its initial protest letter" because the protest letter cited the statutory provision. (Panel Order No. 2, p. 3 and p. 5.) Instead, the Panel concluded that the Appellant had raised the issue for the first time in its appeal to the Panel and dismissed it as being untimely. (Panel Order No. 2, p. 5.)

Once again, the Appellant does not challenge the Panel's interpretation of the relevant statute, which provides in pertinent part, "A protest, including amendments, must set forth both 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 Appellant simply disagrees with the Panel's conclusion that the protest letter did not allege that the Respondent had a duty to investigate whether a violation of S.C. Code Ann. § 40-11-200(B) occurred with enough particularity to give notice of the issue.

"[W]hether an agency correctly applied the facts of a case to a statute is a question of fact, subject to the substantial evidence standard." *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 483, 646 S.E.2d 162, 167 (Ct.App.2007), *aff'd* by 383 S.C. 310, 680 S.E.2d 1 (2009). The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. South Carolina Public Service Commission*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Rather, the Court need only find, considering the record as a whole, evidence that "would allow reasonable

minds to reach the conclusion that the administrative agency reached.” *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 203, 314 S.E.2d 327, 328 (1984).

The Panel examined the allegations set forth in the protest letter and noted that although the protest letter cited S.C. Code Ann. § 40-11-200(B), the protest letter did not allege that the Respondent had a duty to investigate whether a violation of the statute occurred. (Panel Order No. 2, p. 5.)

The record as a whole, and the plain language of the protest letter in particular, contain substantial evidence that supports the Panel’s decision to dismiss this issue. Reasonable minds may reach the conclusion that the Panel reached with respect to the protest letter’s failure to allege that the Respondent had a duty to investigate whether a violation of S.C. Code Ann. § 40-11-200(B) occurred with enough particularity to give notice of the issue. The Court should therefore affirm the Panel’s dismissal of the issue as untimely raised.

3. The Panel did not abuse its discretion when it decided to grant Hill’s motion to quash.

At the Appellant’s request, the Panel’s attorney prepared a subpoena directed to Francis L. Hill of Hill Plumbing and Electric Company on March 10, 2011. The subpoena compelled Mr. Hill’s attendance at the Panel hearing scheduled for April 13, 2011 and also compelled Hill to produce copies of its complete file materials relating to the Project. (Panel Order No. 1, p. 3.)

Hill moved to quash the subpoena on the grounds that the evidence sought was not relevant to the issues to be decided by the Panel and that the evidence sought contained confidential and trade secret information. (Panel Order No. 1, p. 6.)

On April 4, 2011, the Panel Chairman heard arguments on the CPOC’s motion to dismiss as well as Hill’s motion to quash by telephone conference call. After hearing the arguments of the

parties, the Chairman orally granted both motions and subsequently issued Panel Order No. 1, which addressed the motions. (Panel Order No. 1.)

The Panel first granted the CPOC's motion to dismiss the issue of whether Hill improperly offered to perform work outside the scope of its plumbing license in its sub-bid to Rodgers. The Panel then granted Hill's motion to quash and explained that "[b]ecause the Panel has dismissed the appeal issues relating to Hill Plumbing's sub-bid for lack of jurisdiction, the evidence sought by the subpoena is clearly irrelevant to the issues remaining before the Panel...." (Panel Order No. 1, p. 6.)

"The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Osborne v. Adams*, 338 S.C. 82, 525 S.E.2d 268 (Ct.App.1999). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); *Osborne, supra.*" *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001).

The Appellant does not allege that the Panel abused its discretion in granting Hill's motion to quash. The Appellant simply argues that the Panel wrongly granted the CPOC's motion to dismiss, and that if the Panel had denied the motion to dismiss then the evidence sought by the subpoena would have been relevant to the issues remaining before the Panel. (Initial Brief of Appellant, p. 12.)

As indicated above, the Panel's decision to grant the CPOC's motion to dismiss is supported by substantial evidence. Therefore, the evidence sought by the subpoena was not relevant to the issues before the Panel. It follows that the Panel did not abuse its discretion when

it decided to grant Hill's motion to quash the subpoena, and the Court should affirm the Procurement Review Panel's decision to grant Hill's motion to quash.

4. The Panel did not apply the wrong standard of review to the question of whether the Respondent had a duty to investigate whether a violation of the Contractor's Licensing Act had occurred.

The Appellant asserts that "[t]he Panel Applied the Wrong Standard of Review to USC's Obligation to Comply With the Contractor [sic] Licensing Act...." (Initial Brief of Appellant, p. 13.) It further asserts that the Panel erroneously applied a clearly erroneous, arbitrary, capricious, or contrary to law standard of review to the Contractor's Licensing Act issue. *Id.*

The Appellant is incorrect. The Panel applied no standard of review to the Contractor's Licensing Act issue. Rather, the Panel granted the Respondent's motion to dismiss the issue as untimely raised and did not substantively review the issue at all (see Section 2 above).

The Circuit Court addressed the Appellant's contention that the Panel had applied the wrong standard of review to the Contractor's Licensing Act issue as follows: "Upon review of the record, the Court determines that the Panel explicitly did not decide whether USC complied with Section 40-11-200(B). The Panel dismissed the issue as untimely... The Court, thus, cannot review a decision that expressly was *not made* by the Panel." (Circuit Court Order, pp. 9-10.)

The Appellant asserts that "[t]he Panel's application of the clearly erroneous, arbitrary, capricious, or contrary to 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." (Initial Brief of Appellant, p. 13.) If the Appellant is seeking an advisory opinion from the Court, then the Court should decline to issue such an opinion. "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

5. The Panel's determination that the Respondent's inquiry into whether Rodgers was a responsible bidder satisfied the requirements of the Procurement Code is supported by substantial evidence.

The Appellant contends that the Panel incorrectly applied the clearly erroneous, arbitrary, capricious, or contrary to law standard of review when it considered the question of whether the Respondent properly determined that Rodgers was a responsible bidder. (Initial Brief of Appellant, p. 13.) The Circuit Court agreed with the Appellant that the clearly erroneous, arbitrary, capricious, or contrary to law standard does not apply to determinations of responsibility under the Procurement Code. (Circuit Court Order, pp. 12-13.) However, the Circuit Court also examined the actions the Respondent took to ascertain Rodgers' responsibility and concluded that "[t]he [Panel's] finding that USC properly made its determination of responsibility under Section 11-35-1810 would have been proper under any standard of review." (Circuit Court Order, p. 13.)

Even assuming *arguendo* that the Panel applied an incorrect standard of review to the Respondent's determination of responsibility, the Panel's mistake was harmless error. Under the APA, judicial review of administrative agency decisions is "limited to a determination of whether they are supported by substantial evidence." *Roper Hosp. v. Board of S.C. Dep't of Health and Envtl. Control*, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991). After considering the entire record, the appellate court "need only find... evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

The Panel determined that the Respondent's inquiry into Rodgers' responsibility "satisfied the requirements of the Procurement Code" and specifically noted the investigation performed by the Respondent's architect, Regina Floyd, into both Rodgers' and Hill's licenses in order to confirm that Rodgers was a responsible bidder. (Panel Order No. 2, p. 7.)

The Panel's ruling that the Respondent properly determined that Rodgers was a responsible bidder is supported by substantial evidence and would have been proper under any standard of review. The Court should therefore affirm the Panel's ruling that the Respondent's inquiry into whether Rodgers was a responsible bidder satisfied the requirements of the Procurement Code.

CONCLUSION

For the foregoing reasons, Respondent University of South Carolina respectfully requests the Court to affirm both Panel Order No. 1 and Panel Order No. 2.

Respectfully submitted,

UNIVERSITY OF SOUTH CAROLINA

By: _____



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October 28, 2016

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-000715

Monroe Construction Company, LLC..... Appellant,

v.

University of South Carolina..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he/she served counsel for the Appellant, counsel for the South Carolina Procurement Review Panel, and counsel for the State Fiscal Accountability Authority with copies of Respondent's Initial Brief and Designation of Matter to be Included in Record on Appeal by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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October 28, 2016



UNIVERSITY OF
SOUTH CAROLINA

Office of the General Counsel

October 28, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
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SC Court of Appeals

Re: Monroe Construction Company v. University of South Carolina
Appellate Case No. 2016-000715

Dear Ms. Kitchings:

Enclosed herewith are an original and two copies of Respondent's Initial Brief, Designation of Matter to be Included in Record on Appeal, and Proof of Service. Please file the originals and one copy of each and return one clocked-in copy to the courier.

Thank you for your assistance.

Sincerely,

George W. Lampl, III
Associate General Counsel

Enclosures

cc: Christine M. Emanuel, Esq. (w/Enclosures via U.S. Mail)
William Dixon Robertson, III, Esq. (w/Enclosures via U.S. Mail)
D. Ryan McCabe, Esq. (w/Enclosures via U.S. Mail)