THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

Honorable Alison Renée Lee, Circuit Court Judge

Appellate Case No. 2016-000715

Monroe Construction Company, LLC,

Appellant,

v.

University of South Carolina,

Respondent.

FINAL BRIEF OF RESPONDENT CHIEF PROCUREMENT OFFICER

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II. **The circuit court's holding, that affirmative determinations of contractor responsibility are not entitled to deference, is unnecessary to its decision and should be disregarded.**

III. **As an additional sustaining ground, the decision of the Procurement Review Panel should be affirmed because Appellant's purported bid protest was nothing more than a challenge to the University's decision as to what subcontractors to list pursuant to S.C. Code Ann. § 11-35-3020(b)(i) (2012 and Supp. 2015), and such a protest is explicitly prohibited by that statute.**

STATEMENT OF THE CASE

This is an appeal by a disappointed bidder for a construction contract, under the provisions of the Consolidated Procurement Code, S.C. Code Ann. §§ 11-35-10, *et seq.* (2012 and Supp. 2015). Monroe Construction Company ("Monroe") appeals from a February 29, 2016, circuit court order that denied Monroe's appeal from an unsuccessful protest of a contract award.

In 2009 Respondent University of South Carolina ("USC" or the "University") completed the structure and exterior of its Horizon I academic research building. Over the next two years USC sought bids to finish out the first, second, and third floors of Horizon I. The University conducted those solicitations pursuant to the Procurement Code (the "Code").

The Code creates three chief procurement officers, each to manage a designated area. The State Engineer is the designated chief procurement officer for

construction ("CPOC" or simply "CPO"). S.C. Code Ann. § 11-35-830 (2012). Among other responsibilities, the chief procurement officers administratively review protests of solicitations and of contract awards. S.C. Code Ann. § 11-35-4210 (2012).

In September 2010 the University invited bids to complete the first floor of Horizon I. (R. p. 322) The invitation included Base Bid 1 and Base Bid 2. Base Bid 2, which is involved in this dispute, sought a contractor to:

> [p]rovide general construction, mechanical, electrical, and plumbing at existing 5 Story Building as required to upfit 22,670 s.f. First Floor for use as labs, offices, and support spaces with 2,500 s.f. of laboratory and office space (Rooms 114A - 117B, 118B and 199B) left as shell space for future expansion.

(*Id.*) The solicitation required bidders to list their subcontractors for mechanical, electrical, and plumbing, pursuant to S.C. Code Ann. § 11-35-3020(b)(i) (2012).

Rodgers Builders, Inc. ("Rodgers"), submitted the lowest price of nineteen bidders for Base Bid 2. (R. p. 42.) Monroe was third lowest. (*Id.*) Rodgers identified Hill Plumbing and Electric Co. as its plumbing subcontractor. (R. p. 338, 340.) Monroe listed two subcontractors for "plumbing:" Walker White Mechanical, who, like Hill, holds a plumbing license; and Douglas Fluid Technologies. (R. p. 343, 345.) Although the bid form does not indicate, Douglas holds a license in the sub-classification for "pressure and process piping." None of the other eighteen bidders, including Rodgers, listed a subcontractor with a pressure and process piping license

sub-classification. The Horizon I first floor project includes work requiring both "plumbing" and "process piping" license classifications.

On December 3, 2010, USC posted notice of its intent to award a contract for the first floor of Horizon I to Rodgers. (R. p. 348.) Monroe timely protested the award by filing a letter with the CPO. (R. p. 1.) *See* S.C. Code Ann. § 11-35-4210(1)(b) and -4210(2)(b) (2012).

In its protest letter, Monroe challenged the award based on the failure of either Rodgers or its plumbing subcontractor to hold a mechanical contractor's license with a "pressure and process piping" sub-classification. This was a problem, according to Monroe, because the University's meaning of "plumbing" in the listing requirement included pressure and process piping. It alleged that Rodgers' bid was "nonresponsive and disqualified because Ro[d]gers listed Hill as the plumbing subcontractor and neither Ro[d]gers nor Hill ha[d] the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications." (R. p. 1.) Monroe also claimed it was "the lowest bidder that identified a properly licensed subcontractor...for the specialty piping work." (*Id.*) Likewise, Monroe challenged the award because "USC issued a notice of award of the bid to a contractor that listed a subcontractor for this part of the work that does not have the required specialty license." (R. p. 2.) Finally, Monroe cited S.C. Code Ann. § 40-11-200(B) (2011) (part of the contractor's licensing act) and asserted that it was "a criminal offense for the

University to even consider a bid if the work is not to be performed by a properly licensed contractor." (R. p. 2.)

The CPO conducted an administrative review of Monroe's protest on January 27, 2011. (R. p. 9.) He posted his decision on February 14, 2011. (*Id.*) He dismissed so much of the protest as claimed Rodgers' bid was not responsive. Monroe did not appeal that aspect of the CPO's decision. He also denied the claim Rodgers was not a responsible bidder, because he found the University had a reasonable basis not to include pressure and process piping in its meaning of "plumbing" on the bid form. (R. p. 10.)

The Code created the Procurement Review Panel to review, among other things, protest decisions by the CPO. S.C. Code Ann. § 11-35-4410(1)(a) (2012). Monroe requested the Panel review the CPO's decision by letter dated February 23, 2011. (R. p. 23.) The appeal letter alleged that Hill Plumbing had submitted a bid to Rodgers for process piping that was illegal, because Hill did not have the required license. Monroe's original protest claimed only that neither Rodgers nor Hill was licensed to perform work described as "plumbing" on the bid form; it did not accuse Hill of acting improperly or in violation of law, nor did it question what work was included in Hill's bid to Rodgers.

During the pendency of a protest the Code provides an automatic stay of procurements, until such time as the Panel issues a final order. S.C. Code Ann. § 11-35-4210(7) (2012). The CPO, after consultation with the agency head, may lift the stay

in the best interest of the State, and allow the contract to go forward. *Id.* On March 2, 2011, Dr. Pastides requested the CPO lift the stay. (R. p. 49.) The CPO posted his written determination granting the request the following day. (R. p. 44.) Monroe did not appeal from the March 3 determination, and USC signed a contract with Rodgers. Rodgers completed its work at Horizon I several years ago.

At Monroe's request, the Panel issued a subpoena to Hill Plumbing and its president on March 10, 2011. (R. p. 221, 223.) Counsel for Mr. Hill and his company moved to quash the subpoena on March 21, 2011. (R. p. 134.) A week later, the CPO moved to dismiss so much of the appeal as attacked Hill's subcontract bid to Rodgers, on the ground that the claim had not been included in the protest letter. (R. p. 139.) After a hearing, the Panel granted both motions. (R. p. 221.)

The Panel convened on April 13, 2011, to hear the merits of Monroe's appeal. At the beginning of the hearing counsel for USC orally moved to dismiss portions of the appeal as untimely. (R. p. 214, 215; R. p. 187, line 2-p. 190, line 4.) After hearing the motion, the Panel proceeded to Monroe's remaining issues. In its order dated April 26, 2011, the Panel granted USC's motion to dismiss certain parts of the appeal and ruled against Monroe on the merits of the remaining claims. (R. p. 214.)

Section 11-35-4410(6) provides that decisions of the Procurement Review Panel "may be appealed only to the circuit court." On May 13, 2011, Monroe filed with the Richland County Clerk of Court a document styled "Notice of Appeal." (R. p. 227.) It described each order (and attached a copy of each).

On August 14, 2014, the circuit court heard argument on the merits of Monroe's appeal (R. p. 322.) The Court issued an Order on February 29, 2016, that 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. (*Id.*)

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

STATEMENT OF FACTS

When it published the Invitation for Bids the University required each bidder to identify its proposed subcontractors for "mechanical," "electrical," and "plumbing." Those listings were required by S.C. Code Ann. § 11-35-3020(b)(i), which provides in pertinent 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 to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid[.]

The terms "mechanical," "electrical," and "plumbing" are not defined in the bidding documents. (*See generally* R. p. 197, line 4-p. 198, line 10.) However, there was specific testimony about what the term "plumbing" included.

Regina Floyd was the University's project architect. She testified that "The plumbing work is part of division 15 [of the project manual] and it's the work that

requires the licensed plumber." (R. p. 198, lines 14-15.) When Monroe's counsel pressed the point, this exchange occurred:

> Q. Did you prepare the bid form?
>
> A. Yes.
>
> Q. When you prepared the bid form and you don't, you just testified that you don't know of any place in this document or in the project manual where the process piping is listed independently from plumbing. When you put plumbing down on the bid form, what was included?
>
> A. Work that had to be done by a contractor holding a plumbing subcontractor license.
>
> Q. So you treated it differently on the bid form than you did in all the other documents that your firm prepared?
>
> A. Well, the bid form was referring to the license of contractor specialties, not division of work by drawing number or section number.

(R. p. 201, lines 4-18.) Later Ms. Floyd explained why the process piping was not included in the plumbing specialty listing:

> Q. Tell me why again that USC or through Watson Tate, your firm, required bidders to list a plumbing, mechanical and electrical sub? Why did you do that?
>
> A. The procurement code we are required to list on the bid form any licensed sub subspecialty that we anticipate the work to be more than 3 percent of the bid.
>
> Q. The estimate was that the plumbing work would exceed 3 percent of the prime's base bid?
>
> A. That's correct.
>
> Q. But what about process piping?

A. No, that only, according to our estimate for Base Bid 1, that was 84,000 something and that was like 2.3 percent of the total of the job.

Q. 2.3 percent, that under the code does not mean that they're required to list a pressure process piping sub?

A. That's correct.

Q. Again I think you have already explained this in response to Mr. McCabe's questions, what was your intention when you asked perspective bidders to list the plumber subcontractor on the bid form? What was the intent?

A. To have them list the plumbing subcontractor who had the PB license who was going to do the plum[b]ing work that didn't require a specialty license for process piping, because they're separate licenses.

(R. p. 206, line 20-p. 207, line 19.)

Ms. Floyd also explained the distinction between which trades she wanted listed on the bid form, and what license was actually required to perform the work. In questioning by Monroe's counsel, she acknowledged that fire protection systems are listed under "plumbing" in the cost estimate. (R. p. 200, lines 7-17.) A contractor installing those systems, though, must be separately licensed by the Contractors Licensing Board. *See generally* Fire Protection Sprinkler Systems Act, S.C. Code Ann. §§ 40-10-05, *et seq.* (2011). She also noted that the contractor who performs the plumbing work does not have to be the same as the process piping contractor:

Q. It's been alleged that a contractor would have to have a process piping, pressure and process piping license, to do the work, to install the piping, is that correct?

A. That's correct.

Q. But it's not essential that the same contractor necessarily construct the pressure and process piping as the plumbing?

A. No, it's not.

(R. p. 205, line 23-p. 206, line 5.)

The University determined that Rodgers was a responsible bidder, *i.e.*, one who was capable of performing the contract successfully. Section 11-35-3020(c)(i) requires "award of a [construction] contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids...." Section 11-35-1410(6) defines "responsible bidder or offeror" as

> a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

A contractor's legal qualifications to perform the contract, like licensure or authorization to conduct business, are also matters of responsibility. Monroe's protest purported to challenge the University's determination by alleging that Rodgers was not legally qualified to perform because neither Rodgers nor Hill had a process piping license.

Ms. Floyd testified about her role in determining whether Rodgers was a responsible contractor:

Q. Did you assist USC with checking Rodgers' responsibility in this case?

A. I did check their license, yes. License they listed.

Q. Have you worked with Rodgers before?

A. I have not, no.

Q. Do you know if anyone else was familiar with Rodgers?

A. Familiar with their reputation.

Q. What was their reputation?

A. Haven't heard of any issues with them. They do quality work. They're financially sound.

Q. You mentioned that you checked licenses. Did you check that before you made the award?

A. Yes. We actually -- we check the license of the low bid that afternoon in our office the day after the bid, the day of the bid.

Q. When you check the licenses, you check the prime's licenses, correct?

A. Correct.

Q. You also check the listed subcontractors' licenses, correct?

A. That's correct.

Q. In this case for Hill Plumbing, who was listed under the plumbing portion of the bid form, what kind of license were you looking for?

A. Plumbing.

Q. You weren't looking for pressure and process piping?

A. No.

Q. Hill obviously has a plumbing license, right?

A. They do.

Q. It's not in dispute. Based on Hill having a plumbing license and presumably the rest of the licenses being okay, did you advise USC that Hill was properly licensed to do the work?

A. Yes, we did.

([Transcript 50:13 to 51:24] R. p. 209, line 13-p. 210, line 24.)

STANDARD OF REVIEW

The circuit court in its order succinctly and accurately described the standard for reviewing decisions of the Procurement Review Panel:

> A person adversely affected by the Panel's decision may appeal to the circuit court. S.C. Code Ann. § 11-35-4410(6) (1976). "The standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act [APA]." *Id.* "In reviewing a final decision of an administrative agency under [the APA], the circuit court essentially sits as an appellate court to review alleged errors committed by the agency." *Kiawah Resort Associates v. South Carolina Tax Comm'n*, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995). The circuit court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2014). The Court, moreover, may not substitute its judgment for that of the Panel as to the weight of the evidence on questions of fact. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 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 Court may reverse or modify the decision of the Panel only 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.

Id.

(R. pp. 326-7.)

ARGUMENT

Summary of Argument

With limited exceptions not pertinent to this case, the Procurement Code grants plenary authority over State purchasing to the Chief Procurement Officers:

> All rights, powers, duties, and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by a state governmental body pursuant to the provisions of law relating thereto, and regardless of source of funding, are hereby vested in the appropriate chief procurement officer....

S.C. Code Ann. § 11-35-510 (2012). The State Engineer is the chief procurement officer for construction. S.C. Code Ann. § 11-35-830 (2012). In addition to his role as the primary administrator for construction procurement, the CPOC acts in a quasi-judicial capacity when he hears protests under Section 11-35-4210; contractor suspension and debarment proceedings under Section 11-35-4220; and contract controversy claims under Section 11-35-4230. *Hass Const. Co. v. Thomas*, 183 F.Supp.2d 800 (2001) (State Engineer entitled to absolute judicial immunity when acting within

his jurisdiction to determine breach of contract claims and debarment matters). He is also empowered to ratify or terminate illegal contracts, regardless how they may come to his attention. S.C. Code Ann. § 11-35-4330(3) (2012). His position necessarily involves decisions about procurement policy, not just the process of letting and administering contracts.

The legislature has granted the CPO the right to participate in all appeals to the Procurement Review Panel and beyond:

> The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully as a party in a matter pending before the Procurement Review Panel and in an appeal of a decision of the Procurement Review Panel, whether administrative or judicial.

S.C. Code Ann. § 11-35-4420 (2012). In this case, the CPO has an interest not in whether Monroe's protest is ultimately granted, but in matters affecting procurement policy. The CPO has identified two policy issues in this matter. First, the government's affirmative determination of contractor responsibility—its considered business judgment about the risk of non-performance—must be accorded the same deference as its determination that a contractor is non-responsible. Second, Section 11-35-3020(b)(i) explicitly prohibits bidders from protesting the decision of the State and its design professional regarding what specialties to list:

> The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another provision of this code.

No contractor should be able to avoid this prohibition by manufacturing a listing requirement that the State did not include in its solicitation.

I. THE CIRCUIT COURT CORRECTLY AFFIRMED THE DECISION OF THE PROCUREMENT REVIEW PANEL, DENYING APPELLANT'S BID PROTEST.

A. The Chief Procurement Officer joins in the arguments raised by the University of South Carolina in its brief and adopts them by reference.

Pursuant to Rule 208(b)(6), SCRAP, the CPO joins in the brief of the University and adopts by reference the specific arguments made in that brief.

B. The Panel's decision was based on its evaluation of conflicting testimony, and must not be disturbed unless unsupported by the substantial evidence in the record.

At its heart, this case is not about licensing at all. It turns on the University's intent as to what work was included in the "plumbing" specialty for which it required bidders to list their subcontractors. The Procurement Code required the University, in consultation with its architect, to identify subcontractors "by specialty" whose work was expected to exceed three percent of the contract price. S. C. Code Ann. § 11-35-3020(b)(i) (2012).

As the CPO wrote in his decision, "Since the Code does not define what a subcontractor specialty is, the scope of any particular subcontractor specialty an agency chooses to list on the bid form is really a matter of the intent of the agency." The only evidence in the record of that intent is the testimony of Regina Floyd, the University's project architect. She prepared the bid form. She testified that the

plumbing specialty on the bid form included only work to be done by a contractor with a plumbing license. (R. p. 201, lines 4-12.) She explained that the pressure and process piping work was only two and a half percent of the expected contract price. Since that work was less than three percent, she did not require the subcontractor to be listed. (R. p. 206, line 20-p. 207, line 19.) Finally, Ms. Floyd confirmed that she checked licenses for both Rodgers (general contractor) and Hill (plumbing) to assist the University in making its responsibility determination. ([Transcript 50:13 to 51:24] R. p. 209, line 13-p.210, line 24.)

The Panel expressly found "that USC intended to include only work which could be performed by a subcontractor holding a general plumbing license under the 'plumbing' category on the bid form." (R. p. 219.) This is the only finding necessary to the disposition of Monroe's protest. There is no question that it is supported by substantial evidence. In fact, the only competent evidence of the University's intent was the testimony of its architect. Since USC intended to require only a plumber to be listed under "plumbing," and Hill is a licensed plumber, Rodgers is the lowest responsive and responsible bidder and was properly awarded the contract.

C. Appellant has conflated requirements of the contractors' licensing act with the subcontractor listing requirements of the Consolidated Procurement Code.

Monroe has confused two issues. After contract formation, the contractor who actually installs the pressure and process piping must hold a license to perform that work. But this is a matter of contract administration, not responsibility. If Rodgers (or

Hill) installs the specialty piping without a license, Rodgers is in breach of its contract with the University and has violated the contractors' licensing act. Prior to contract, during the bidding process, the bid form requires listing specialties that the government and its architect, in their non-reviewable discretion, have identified. It does not necessarily involve an issue of licensing sub-classifications, and in this case it does not.

Section 11-35-3020 is not a licensing statute. Rather, "a primary objective of the bid listing provisions, particularly regarding subcontractors, is to prevent bid shopping and peddling." *Ray Bell Const. Co., Inc. v. School Dist. of Greenville County*, 331 S.C. 19, 26, 501 S.E.2d 725, 729-30 (1998). The *Ray Bell* court continued:

> Section 11-35-3020(2)(b) [now 11-35-3020(b)] is a bid **listing** statute. Although the legislature could have written a statute directly prohibiting bid shopping, it chose instead to adopt preventive measures regulating conduct which provides the opportunity to engage in unethical practices.
>
> ***
>
> The statute has uniform listing requirements which, when followed, greatly diminish the opportunity to shop bids. Eradicating opportunities to engage in unethical behavior is clearly what the legislature has decided to police.

Id. at 30-31, 501 S.E.2d at 731-2 (emphasis in original). *See generally* Keith C. McCook and Boyd B. Nicholson, Jr., "Public Construction Projects – State and Local," in SOUTH CAROLINA CONSTRUCTION LAW HANDBOOK 71, at 139 (A. Bright Ariail and Calvin T. Vick, Jr., eds., S.C. Bar-CLE Div. 2013).

Commercial contractors are licensed pursuant to Chapter 11 of Title 40 of the 1976 Code. That chapter distinguishes between "general contractors" and "mechanical contractors." *Cf.* S.C. Code Ann. §§ 40-11-20(8) and (9) (2011) (defining the former) *with* §§ 40-11-20(14) and (15) (defining the latter). Section 40-11-410 creates thirty-three classifications and sub-classifications. "Mechanical contractors" include sub-classifications for air conditioning (§ 40-11-410(5)(a)), heating (§ 40-11-410(5)(b)), electrical (§ 40-11-410(5)(d)), plumbing (§ 40-11-410(5)(f)), and pressure and process piping (§ 40-11-410(5)(g)). Contractors are prohibited from performing or bidding work in a classification for which they are not licensed. S.C. Code Ann. § 40-11-270(a) (2011).[1] Section 40-11-340 authorizes a "General Contractor-Building" licensee to bid and act as the sole prime contractor if at least forty percent of the work falls within her license classification. It does not, though, allow her to perform work for which she is not licensed.

There is interplay between the contractor's licensing act and the bid listing statute. Where a bidder lists a subcontractor whose license does not permit the subcontractor to perform the specialty work identified by the State, the bidder is not responsible. That is, because her subcontractor lacks the required license, the bidder is not qualified legally to perform the work. *Appeal by Burkwood Construction Co., Inc.*,

[1] Section 40-11-260 also limits the dollar value of contracts a licensee can perform based on her net worth. Those limitations are not at issue in this case.

Procurement Review Panel Case No. 1997-8;[2] *see* S.C. Code Ann. Reg. 19-445.2125(A)(4) ("Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor [is]...qualified legally to contract with the State...."). *See also* McCook and Nicholson, *ante*, n. 319 at 140.

Thus, if USC had identified pressure and process piping as a "specialty" that required listing subcontractors, Rodgers must have listed a subcontractor with that license, or be declared non-responsible. But the University did not do that. It only required Rodgers to identify the subcontractor who would perform work authorized by a plumbing license. Rodgers did exactly that.

II. THE CIRCUIT COURT'S HOLDING, THAT AFFIRMATIVE DETERMINATIONS OF CONTRACTOR RESPONSIBILITY ARE NOT ENTITLED TO DEFERENCE, IS UNNECESSARY TO ITS DECISION AND SHOULD BE DISREGARDED.

1. Determinations of responsibility are uniquely within the government's business judgment.

The Code requires an affirmative determination that a contractor is responsible before making an award:

> Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full

[2] Decisions of the Procurement Review Panel are available on Westlaw in the database "scpd" (short for South Carolina Procurement Decisions). Copies of appellate decisions are also maintained on the Division of Procurement Services website, at http://procurement.sc.gov/PS/legal/PS-legal-panel-orders.phtm(.) The *Burkwood* decision is posted at http://procurement.sc.gov/PS/legal/decisions/97-8.pdf (last viewed October 28, 2016.)

> disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

S.C. Code Ann. § 11-35-1810(1) (2012). A regulation establishes general guidelines for determining if standards of responsibility for contracting with the government have been met:

> State Standards of Responsibility.
>
> Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:
>
> (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
>
> (2) a satisfactory record of performance;
>
> (3) a satisfactory record of integrity;
>
> (4) qualified legally to contract with the State; and
>
> (5) supplied all necessary information in connection with the inquiry concerning responsibility.

S.C. Code Ann. Reg. 19-445.2125(A). The same regulation commits the decision regarding responsibility to the procurement officer—not the CPO or Panel:

> 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 Ann. Reg. 19-445.2125(D) (emphasis supplied).

The Procurement Review Panel has recognized that determinations of responsibility—who the government's contracting partner will be—are risk assessments involving the exercise of business judgment and discretion:

> The Panel finds that State agencies also have broad discretion in making responsibility determinations for procurement contracts.

Appeal by Value Options, et al., Panel Case No. 2001-7.[3] In reaching this conclusion, the Panel looked to federal law.

> A contracting agency has broad discretion in making responsibility determinations since it must bear the brunt of difficulties experienced in obtaining the required performance. Responsibility determinations are of necessity a matter of business judgment and such judgment must, of course, be based on fact and reached in good faith.

News Printing Co., Inc. v. U.S., 46 Fed.Cl. 740 (2000). The Supreme Court has expressly recognized that the Panel's construction of the Code is entitled to most respectful consideration and should not be overruled without cogent reasons. *William C. Logan & Associates v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986).

2. There is no rational basis for holding a decision to award a contract to a higher standard than a decision to disqualify a contractor from competition.

A primary policy underlying the Procurement Code is expanding competition for government business. S.C. Code Ann. § 11-35-20(b) (2012). A determination that a contractor is *non*-responsible makes that contractor ineligible for award. In other

[3] The *Value Options* decision is posted at http://procurement.sc.gov/PS/legal/decisions/01-7.pdf (last viewed October 28, 2016).

words, it limits competition. A determination of responsibility, on the other hand, does not decrease the number of competitors. It is inconsistent with the goal of increased competition to require a higher standard for a decision that furthers that goal, while affording the deferential "clearly erroneous, arbitrary, capricious, or contrary to law" standard to decisions eliminating competitors.

3. Deferring to the government's business judgment is consistent with longstanding precedent of the Procurement Review Panel, current practice of the United States General Accounting Office, and federal appellate decisions reviewing affirmative responsibility determinations.

Since at least 2001, the Procurement Review Panel has deferred to an agency's affirmative determination of responsibility. *Value Options, ante.* Until 2003, the Government Accounting Office refused to entertain any challenge to an affirmative responsibility finding, absent a showing that the contracting officer acted fraudulently or in bad faith. *E.g., Ventura Petroleum Serv., Inc.*, Comp. Gen. B-281278, 99-1 CPD ¶ 15; *Palmetto Constr. Co.,* Comp. Gen. Dec. B-237534, 89-2 CPD ¶ 447.[4] The GAO now considers protests where "in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation." *Verestar Government Services Group*, Comp. Gen. No. B-291854 (April 3, 2003).

[4] The GAO would also entertain claims that a contracting officer had misapplied "definitive responsibility criteria," a concept that is irrelevant to this matter.

In 2001 the Court of Appeals for the Federal Circuit announced the *Impresa* doctrine. It held that a contracting officer's finding of responsibility will not be disturbed so long as there is a rational basis for the determination. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001). The circumstances in *Impresa* are nearly identical to South Carolina procurement practice, in that the decision is not required to be in writing, but is inferred from the contract award.

> Under the Federal Acquisition Regulation, "[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." 48 C.F.R. § 9.103(b). In making the responsibility determination, the contracting officer must determine that the contractor has "a satisfactory record of integrity and business ethics." 48 C.F.R. § 9.104–1(d). Furthermore, "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility." 48 C.F.R. § 9.103(b). FAR 9.105–2(b) requires that "[d]ocuments and reports supporting a determination of responsibility or nonresponsibility ... must be included in the contract file." However, the contracting officer is not required to explain the basis for his responsibility determination, and he has not done so here. Rather, the contracting officer signed the contract thereby making the required determination according to FAR 9.105–2(a) and in conclusory fashion determined that JVC had "a satisfactory record of performance, integrity, and business ethics."

Id. at 1334. The Court continued, observing that

> [c]ontracting officers are "generally given wide discretion" in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination. But this discretion is not absolute.

Id. at 1334-5 (citations omitted). Ultimately, the *Impresa* court required the protester to offer "record evidence suggesting that the agency decision is arbitrary and capricious." *Id* at 1338.

The policy reasons articulated in all these decisions support the Panel's approach, to defer to an agency's determination of responsibility unless "clearly erroneous, arbitrary, capricious, or contrary to law." Inasmuch as the circuit court's modification of the Panel's longstanding rule was not necessary to its decision, the CPO respectfully urges that it be disregarded.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE DECISION OF THE PROCUREMENT REVIEW PANEL SHOULD BE AFFIRMED BECAUSE APPELLANT'S PURPORTED BID PROTEST WAS NOTHING MORE THAN A CHALLENGE TO THE UNIVERSITY'S DECISION TO LIST SUBCONTRACTORS PURSUANT TO S.C. CODE ANN. § 11-35-3020(b)(i), AND SUCH A PROTEST IS EXPLICITLY PROHIBITED BY THAT STATUTE.

The Chief Procurement Officer, the Procurement Review Panel, and the circuit court all recognized that Monroe's protest focused on the University's decision to require a "plumbing" subcontractor to be listed on the bid form. (R. pp. 9, 14-5; R. pp. 214, 218-9; [Order filed February 29, 2016] R. pp. 322, 331.) Monroe claimed that the University's "intent" in identifying the plumbing specialty was to include pressure and process piping. There was no evidence to support this claim. In fact, the only evidence bearing on the University's intent was exactly contrary to Monroe's assertions. But by spinning its claim as a responsibility issue, Monroe successfully brought the procurement process to a halt.

Until the CPO posted his determination to lift the automatic stay, the University was paralyzed. As detailed in its request and supporting papers, it stood to lose millions of dollars in grant funding if the schedule for the Horizon I building slipped. (R. p. 44, 46.) This is precisely the kind of circumstance the legislature intended to avoid when it prohibited protests of an agency's decision to list subcontractors. *See* S.C. Code Ann. § 11-35-3020(b)(i). The circuit court recognized this in its order. (R. 322, 333.)

Every one of Monroe's protest grounds attempts to evade the protest bar. Hill didn't have a specialty piping license? It doesn't need one, because the University did not require listing a process piping subcontractor. The project specifications included pressure and process piping systems? It doesn't affect Rodgers' ability to bid, because at least forty percent of the work fell under its general building license. Besides, whoever performed the specialty work would have to be licensed appropriately. Monroe specially advised USC of the pressure and process piping work? Regina Floyd was well aware that it was included in the project, and that whatever contractor installed it would need a specialty license. Finally, the University *committed a crime* by considering Rodgers' bid? No one challenged Rodgers' authority to bid; if Rodgers could not bid the project with its general building license, neither could Monroe. Neither Rodgers nor Hill ever claimed to be licensed for pressure and process piping. The University expressly considered and declined to require a listing for that specialty. That told Rodgers (and the other eighteen bidders who interpreted the bid form in

exactly the same way) that USC did not expect to see a listing for a process piping subcontractor.

The bid protest was effectively a challenge to the University's decision about what specialties to list, which is prohibited. The CPO is concerned that, by entertaining serial appeals from a protest that should never have been brought, the bidding process for construction will be slowed and obstructed exactly as it was here. The Panel's result should be affirmed, because Section 11-35-3020(b)(i) barred Monroe from ever raising this as a protest.

CONCLUSION

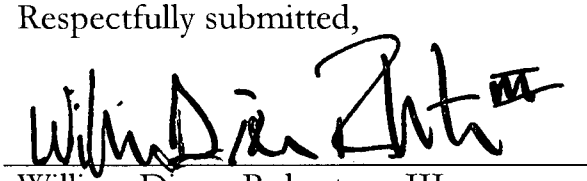
The Chief Procurement Officer urges this Court to affirm the two orders of the Procurement Review Panel, for the reasons argued in the University's brief and because the Panel's decision was supported by the overwhelming weight of evidence. Just as importantly, the CPO asks the Court to consider the policy concerns raised in this brief.

The courts of this state do not need to review considered business decisions of State agencies assessing contract performance risks, so long as those decisions have rational bases. This has been the standard followed by the Procurement Review Panel for many years. Federal authorities also recognize the need for agencies to make the ultimate decisions who their contracting partners will be, so long as that decision is not arbitrary or capricious. The circuit court found this long-standing policy of deference to agency business judgment to be contrary to statute. This ruling, however,

is unnecessary to the result reached by the court. The CPO respectfully asks this Court to disregard only so much of the circuit court order as unnecessarily pries into government decisions about contracting risks, and affirm the result it reached.

Finally, the Court should recognize Monroe's protest for what it is: an attempt to avoid a plain legislative mandate that subcontractor listing decisions are not protestable. No matter how cleverly its protest grounds are crafted, Monroe sought to re-write the University's decision about what subcontract trades should be identified in the bid. This is another alternative reason to affirm the orders of the Panel.

Respectfully submitted,



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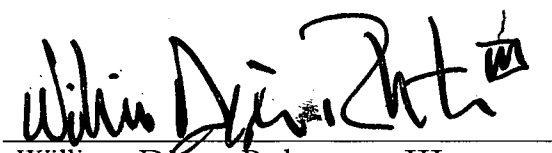

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