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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

RECEIVED

DEC 28 2016

SC Court of Appeals

Monroe Construction
Company, LLC,

Appellant,

v.

University of South Carolina,

Respondent.

RECORD ON APPEAL

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December 13, 2010

VIA FACSIMILE 737-0639 & HAND DELIVERY

Mr. John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of intent of the University of South Carolina to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC),

Dear Mr. White:

On behalf of Monroe Construction Company ("Monroe"), this firm protests and requests an administrative review pursuant to S. C. Code §11-35-4210(4) of the attached University of South Carolina's December 3, 2010 notice of intent to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC), based on Rogers' Base Bid 2 of \$3,149,000. Rogers' bid is nonresponsive and disqualified because Rogers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Rogers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications. Hill has PB5 and HT5 licenses.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license. See attached affidavit of Eric Monroe.

Monroe was the lowest bidder that identified a properly licensed subcontractor (Douglas Fluid Integrated Technologies) for the specialty piping work. Its bid for the Base bid 2 was \$3,230,000.

Section 15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air. Installation of piping to transport these gasses requires a specialty license, i.e. a pressure and process piping license. Pressure and process piping "includes the installation, maintenance, repair, alteration, or extension of a system

4389127

RECORD ON APPEAL 001

Mr. John St. C. White, P.E.

Page 2 of 2

December 13, 2010

of piping, tubing, vessels, containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these." See S.C. Code 40-11-410(g). These do not come under the exception for "boilers, boiler piping, piping used to convey potable water, sanitary sewage, liquefied petroleum, manufactured or natural gas or refrigeration, air conditioning and comfort heating piping" that do not require a pressure and process piping license. *Id.*

On October 19, 2010, Monroe specifically advised USC's procurement officer for this project of the specialty license requirement, the same day bids were opened, of the requirement for a specialty license. See e-mail attached to Mr. Monroe's affidavit. Notwithstanding that advance notice, 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

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:

(B) 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. (emphasis added).

Monroe is the lowest responsive bidder and should be awarded the bid.

Yours very truly,



Katherine B. Barroll

KBB/ush

cc: Monroe Construction Company

4389127-1

RECORD ON APPEAL 002



SE-370 Notice of Intent to Award

2010 Edition

AGENCY: University of South Carolina
(Agency Name)

PROJECT: H27-6071-LC Horizon I First Floor Laboratory Upfit (WFA & SFAFPC)
(Project Number) (Project Name)

TO ALL BIDDERS:

The Agency has determined that the below-named Bidder is responsible in accordance with the requirements of the Bidding Documents and has submitted the lowest responsive Bid. The Agency hereby announces its intent to enter into a contract with this Bidder for the construction of the above-named Project, subject to the provisions of SC law.

NAME OF BIDDER(S): Rodgers Builders, Inc.

DATE BIDS WERE RECEIVED: October 19, 2010

AMOUNT OF BASE BID: \$ 3,149,000.00 (Base Bid #2)

ALTERNATE(S) ACCEPTED: \$ N/A Total: \$ 0.00

TOTAL AMOUNT OF BASE BID WITH ALTERNATE(S): \$ 3,149,000.00 (Base Bid #2)

Remarks (in accordance with Chapter 6 of the OSE Manual, explain any negotiations that resulted in a change to either the Base Bid or the accepted Bid Alternates)

RIGHT TO PROTEST:

Any actual bidder, offeror, contractor or subcontractor who is aggrieved in connection with the intended award or award of this Contract may protest to the State Engineer in accordance with Section 11-35-4210 of the SC Code of Laws at: CPO, Office of State Engineer, 1201 Main Street, Suite 600, Columbia, SC 29201. EMAIL: protest-usc@dmms.sc.gov

[Signature] 12/03/2010
(Signature of Awarding Authority) (Date Posted)

Tom Opal Senior Project Manager
(Print or Type Name of Awarding Authority) (Awarding Authority Title)

INSTRUCTIONS TO THE AGENCY:

1. Post a copy of this form on the Date and at the Location announced at the Bid Opening.
2. Mail a copy of this Form and the final Bid Tabulation to all responsive Bidders and OSE.

SE-370

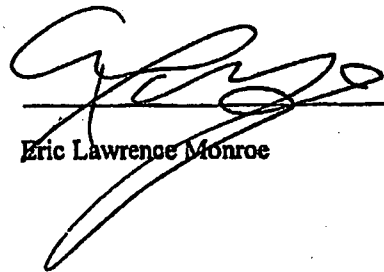
AFFIDAVIT OF ERIC MONROE IN SUPPORT OF

Protest of University of South Carolina's Intent to Award Contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC) to Rogers Builders, Inc.

Personally appeared before me the undersigned, who being duly sworn, states:

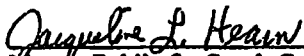
- 1. My name is Eric Lawrence Monroe and I make the following statements of my personal knowledge:**
- 2. I am the managing member and employee of Monroe Construction Company, LLC.**
- 3. I hold the general contractor's license for Monroe Construction Company LLC.**
- 4. I signed and submitted Monroe Construction Company LLC's bid in response to the University of South Carolina's invitations for bids for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC) (the "project").**
- 5. Monroe Construction Company submitted a base bid 2 of \$3,230,000 for the Project.**
- 6. On behalf of Monroe Construction Company, LLC, I reviewed the Project Specifications and determined that Section 15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air and possibly other gasses. Installation of piping to transport these gasses requires a pressure and process piping license.**
- 7. Douglas Fluid Integrated Technologies represented to me that it had a South Carolina pressure and process piping license and I have verified that it does.**
- 8. Because Monroe Construction Company, LLC does not have a process piping license, I included Douglas Fluid Integrated Technologies as a subcontractor to be used by Monroe Construction Company, LLC.**
- 9. I have checked with the South Carolina Department of Labor Licensing and Regulation and have determined that neither Hill Plumbing & Electric Company, Inc. nor Walker White Mechanical has a South Carolina process piping license. Hill has PB5 and HT5 licenses.**
- 10. I was present at the opening of the bids for the Project on October 19, 2010 and I saw the bids that were opened. Rogers Builder, Inc.'s base bid 2 was \$3,149,000, and it listed Hill Plumbing & Electric Service and Walker White Mechanical as the plumbing and mechanical subcontractors respectively.**
- 11. Sumwalt Associates had the next lowest base bid 2 at \$3,178,000, but it also identified Hill Plumbing & Electric as the plumbing subcontractor. It did not list a subcontractor with a pressure and process piping license and Sumwalt is not listed as having such a license either.**
- 12. Attached is a copy of an e-mail that Frank Kerr sent on October 19, 2010 and copied me on informing the University of South Carolina on the day bids were opened that**

Hill Plumbing & Electric Company did not have the proper license. We received no response and became aware of the award on December 3, 2010 when we received the Notice of Intent to Award the contract. See attached fax cover sheet.


Eric Lawrence Monroe

Sworn to and subscribed before me this

13th day of December, 2010



Notary Public for South Carolina

My Commission Expires 9-30-2012

From: "Frank Kerr" <FRANKK2@SC.RR.COM>
To: <barroll@rtt-law.com>
Date: 12/13/2010 2:40 PM
Subject: FW: USC HORIZON I IDEA & SEAEPC LAB UPFIT
Attachments: t40c011.docx; Contractors.pdf

Thank You,

Frank Kerr

Monroe Construction

Office (803) 781-1321

Cell (803) 553-0041

Fax (803) 781-1387

From: Frank Kerr [mailto:FRANKK2@SC.RR.COM]
Sent: Tuesday, October 19, 2010 4:53 PM
To: 'kkelster@fmc.dc.edu'; 'ljackson@fmc.sc.edu'
Cc: 'Eric Monroe'; 'Clark, Lyth'; 'TNOPAL@fmc.sc.edu'
Subject: USC HORIZON I IDEA & SEAEPC LAB UPFIT

Please Be 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. Please see the attached document, pages 19 and 20. The potable water, sanitary sewer and associated vent piping are covered under the plumbing license. It is our understanding that all the gases would be covered under the process piping license. Hill plumbing holds a PB5, unlimited plumbing license, and a HT5, unlimited heating license, but does not hold a 2P, process and pressure piping license. As such, Hill plumbing and any contractor that listed Hill Plumbing should be considered nonresponsive.

We thank you for your review of this issue. We hope that this will be handled as part of your due diligence on this award as opposed to a formal protest being submitted.

Thank You,

Frank Kerr

Monroe Construction

Office (803) 781-1321

Cell (803) 553-0041

Fax (803) 781-1387



Facilities Planning & Construction

743 Greene St.
Columbia, SC 29208
(803) 777-5813
FAX (803) 777-8739

Memorandum of Record

Date: December 3, 2010
To: All Bidders
From: *Kay Kaiser*
Kay Kaiser
Subject: Horizon I First Floor Laboratory Upfit (IDEA & SEAEPC)
State Project: H27-6071-I.C

Please see the attached Notice of Intent to Award and Bid Tabulation sheet for the above referenced project.

UNIVERSITY OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST

DECISION

MONROE CONSTRUCTION
COMPANY

CASE NO. 2011-011

v.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE:
FEBRUARY 14, 2011

HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
STATE PROJECT NO. H27-6071-LC

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request by Monroe Construction Company (Monroe), under the provisions of section 11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of the Horizon 1 First Floor Laboratory Upfit bid (the Project), for the University of South Carolina (USC). On January 27, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review by hearing. At the hearing, attorneys D. Ryan McCabe and Katherine B. Barroll represented Monroe, attorney Boyd B. Nicholson, Jr., represented Rodgers Builders, Inc. (Rodgers), and attorney George W. Lampl, III represented USC. Appearing as witnesses were Eric Monroe, Monroe's President, Frank Kerr, estimator for Monroe, Terry Horomanski, Rodgers' Senior Vice President for Construction Operations, Thomas N. Opal, Senior Project Manager for USC, Kay Keilser, Procurement Specialist/Contract Administrator for USC, Lind Jackson, Contract Administrator for USC, and Regina R. Floyd, architect with Watson Tate Savory Liollo. During the hearing, the CPOC received Exhibits 1 through 11 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Monroe's statement of protest is attached as Exhibit A and incorporated herein by reference.

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On September 13, 2010, USC advertised for bids to construct the Project. [Hearing Ex. 2] Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010. [Hearing Ex. 5]
2. The solicitation documents and bid form provided for two base bids. [Hearing Ex. 3]
3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project. [Hearing Ex. 3]
4. By the time for receipt of bids, USC had received nineteen bids. [Hearing Ex. 6]
5. Rodgers submitted a low bid of \$3,149,000 for base bid two. Monroe submitted the third low bid of \$3,230,000 for base bid two.¹ [Hearing Ex. 6]
6. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two. [Hearing Ex. 7]
7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. (Hill) was not a licensed pressure and process piping contractor.

MOTIONS

At the beginning of the hearing and again at the close of Monroe's case-in-chief, USC and Rodgers moved to dismiss Monroe's protest. First, they argued that Monroe, by the terms of its protest, was only protesting the responsiveness of Rodgers' bid and that an examination of Rodgers' bid shows that it is responsive on its face. Second, they argued that a protest issue regarding Rodgers' responsibility is untimely because Monroe did not raise it in its protest letter and therefore failed to put the parties on notice. Finally, they argue that even if Monroe's protest letter is found to sufficiently raise a protest regarding Rodgers' responsibility, then Monroe's protest should be dismissed because an examination of the facts shows that Rodgers and his listed subcontractors were responsible.²

¹ Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two. Sumwalt was notified of the hearing but declined to attend.

² At issue is the responsibility of Rodgers' plumbing subcontractor which effects Rodgers' responsibility.

After examining Mr. Monroe during the hearing, USC and Rodgers also moved to dismiss Monroe's protest on the ground that Monroe no longer had standing.

Motion Regarding Responsiveness

Monroe's protest alleges that by failing to list a mechanical contractor with a pressure and process piping subclassification along with a mechanical contractor with a plumbing subclassification in the space on the bid form for listing the plumbing subcontractor, Rodgers and all other bidders except Monroe were nonresponsive.³ However, USC and Rodgers argue that Rodgers' bid was responsive on its face and therefore this allegation should be dismissed.

Prior to 1993, the Procurement Review Panel (Panel) issued a number of orders stating that a failure to list subcontractor in the manner required by law rendered a bid non-responsive.⁴ In doing so, the Panel relied on SC Code Ann § 11-35-3020(2)(b)(ii) which stated that "failure to list subcontractors in accordance with this section ... shall render the prime contractor's bid unresponsive."

In 1993, the General Assembly amended § 11-35-3020(2)(b)(ii) to state, "Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." Thus, under the current statute, as long as the bidder lists a subcontractor in each space for listing a subcontractor, his bid is responsive. Protest of Brantley Construction Co., Inc., Case No. 1999-3. Here Rodgers listed Hill in the space on the bid form for listing the plumbing subcontractor(s). Therefore, the CPOC agrees with USC's and Rodgers' motion and finds that Rodgers' bid was responsive. Accordingly, the CPOC dismisses Monroe's protest on the issue of responsiveness.

Motions Regarding Responsibility

First, USC and Rodgers argue that Monroe does not protest USC's determination that Rodgers was a responsible bidder and as a result, the CPOC cannot entertain any argument to the contrary that Monroe presented at the hearing. "A protest ... 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." *SC Code Ann § 11-35-4210(2)(b)*. While the specificity of a protest is not to be judged on highly technical or formal standards, the protest 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.

³ Monroe is the only bidder of nineteen that listed both a licensed plumbing contractor and a licensed process piping contractor in the space on the bid form for listing the plumbing subcontractor. All other bidders listed only a licensed plumbing contractor.

⁴ In Re. Protest of ECB Construction Co., Inc., Case No. 1989-7; In Re. Protest of Tricon Associates, Inc., Case No. 1991-11; In Re. Protest of Pizzagalli Construction Company, Case No. 1991-8; In Re. Protest of Delta Industrial Electric Co., Inc., Case No. 1992-8(I).

Monroe's protest letter included the following statements:

Rogers' [sic] bid is nonresponsive and disqualified because Rogers [sic] listed Hill ... as the plumbing subcontractor and neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' [sic] does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license.

Monroe was the lowest bidder that identified a properly licensed subcontractor ... for the specialty piping work.

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.⁵

While Monroe never used the word "responsibility" in its letter of protest, all of these statements above make it clear that Monroe was protesting that Hill was not properly licensed to perform pressure and process piping work and Rodgers was not licensed to perform that either. Possession of the proper license is a responsibility issue. Therefore, the CPOC finds that 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. Since the parties cannot claim that the protest letter failed to notify them that the issue was over licensure and consequently responsibility, USC's and Rodgers' motions to dismiss this issue as untimely are denied.

Second, USC and Rodgers also contended that a hearing on the issue of responsibility, if raised, was not necessary because an examination of the facts shows that Rodgers and his listed subcontractors were

⁵ While the law clearly says that it is improper for a owner to award a contract to improperly licensed contractor, it is far from clear that the law makes the violation of this requirement a criminal offense. Instead of criminal penalties, the law provides for civil penalties. See SC Code Ann § 40-11-110.

responsible.⁶ However, the CPOC declines to rule on USC's and Rodgers' motion in this regard. Since the issue of Rodgers' responsibility depended on the evidence presented in the hearing, the CPOC has addressed the merits of Monroe's protest in this decision instead.

Motion Regarding Standing

During the course of the hearing, USC examined Mr. Monroe on the question of whether USC asked him to hold his bid open beyond the sixty day time period specified in the solicitation documents. Mr. Monroe confirmed that Monroe had indeed received such a request and failed to provide a response to USC. Since Monroe failed to respond in the affirmative that it would honor its bid beyond the sixty day period, USC and Rodgers argued that Monroe was neither an actual bidder nor aggrieved, and consequently Monroe lacks standing to bring this protest. At the close of the hearing, the CPOC asked all parties to submit written briefs on the issue.

The Code provides only an "actual bidder ... aggrieved in connection with the intended award or award of contract" has the right to protest the award. S.C. Code Ann § 11-35-4210(1)(b). No one argues that Monroe did not actually submit a bid on this project. Therefore, Monroe is an actual bidder since its failure to respond to USC's request does not change its pre-existing status of being an actual bidder. At most, one may argue that Monroe is no longer aggrieved; however, even this position must fail. While Monroe may have ultimately failed to show that it is aggrieved by USC's responsibility determination, this is not because Monroe failed to respond to USC's request. USC's request was sent out as a result of Monroe's protest which was filed on December 13, 2010, five days prior to the date bids were due to expire. On December 16, USC sent out an email requesting that certain bidders (the lowest) extend their bids an additional sixty days. [Brief of USC] Monroe was one of these bidders. By Monroe's own admission, Monroe did not respond to this request.

USC's request to bidders to extend the date they would hold their bids open was based on Section 6.1.11 of the Manual for Planning and Execution of State Permanent Improvements, Part II (the "Manual"). This section of the Manual provides:

If the Agency desires to extend the bid acceptance period beyond the time given in the Bid Form (SE 330), then before the expiration of that period, it should obtain a written extension of bid prices(s) from all bidders. A bidder does not have to agree to hold its bid price beyond the bid acceptance period. However, the Agency should consider for award only the bids of those bidders who provide a written extension of their bids before the expiration of the original bid acceptance period. If the Agency fails to obtain a written extension of at least one bid before the expiration of the acceptance period, it will have to re-bid the project before it can award a contract.

This provision is itself based on SC Code Ann Reg. 19-445.2065(C) which provides:

⁶ At issue is the responsibility of Rodgers' plumbing subcontractor, which effects Rodgers' responsibility.

Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

While these provisions taken together may preclude an award to a bidder who has declined to extend its bid, it is not clear that it requires a protestant, who is clearly seeking award under the terms of its protest, to take an additional step of responding to a general request to hold bids open a longer period than specified when that request is sent out in response to that same protest.

Here Monroe filed its bid protest, arguing that the Project be awarded to Monroe. The very act of filing a protest meant that there was no way an award could be finalized prior to the expiration of the time for holding bids open set forth in the solicitation. Therefore, it is logical to conclude Monroe intended to hold its bid beyond this date. Moreover, it is reasonable to assume Monroe intended to hold its bid open as long as it took for its protest to reach a final conclusion. If Monroe changes its mind, the appropriate and logical course would be to withdraw its protest. Monroe has not done so.

Based on the forgoing, the CPOC finds that it was not necessary for Monroe to respond to USC's request that it hold its bid open an additional sixty days to preserve its standing. Accordingly, the motion to dismiss for lack of standing is denied.

DISCUSSION

In the solicitation documents for the Project, USC required bidders to list the subcontractors they planned to use on the project to perform the work of three different subcontractor specialties - mechanical, plumbing, and electrical. This requirement was imposed in compliance with the provisions of S.C. Code Ann § 11-35-3020(2)(b)(ii) which provides as follows:

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 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. 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.

[emphasis added] 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.

In compliance with the requirements of S.C. Code Ann § 11-35-3020(2)(b)(ii), USC identified on the bid form by specialty the subcontractors whose contracts USC expected to exceed three percent of a prime

bidder's total base bid. At 10 in this protest is the identified subcontractor specialty entitled plumbing. In the space for providing the name of the subcontractor(s) it intended to use for the "plumbing subcontractor specialty" (hereafter referred to as "plumbing"), Rodgers listed only Hill, a licensed plumbing contractor.⁷ Neither Hill nor Rodgers are licensed pressure and process piping contractors. In the space for providing the name of the subcontractor(s) it intended to use for "plumbing," Monroe, in contrast, listed both Walker White, Inc., a licensed plumbing contractor, and Douglas Fluid & Integration Technology, LLC (Douglas), a licensed pressure and process piping contractor.

Monroe's protest is couched in terms of the licensure requirements of the Licensing Act. Monroe challenges USC's decision to award a contract to Rodgers on the grounds that Rodger's only listed subcontractor for "plumbing," Hill, was not licensed to perform pressure and process piping work and, by extension, if Hill is not a responsible subcontractor, Rodgers is not a responsible bidder. In short, Monroe protests USC's determination that Rodgers was the lowest responsible bidder.

The Contractors Licensing Act requires a contractor to possess the proper license at the time of bidding. SC Code Ann §§ 40-11-30 and 200. The Panel has determined that 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). If, at the time of bidding, a subcontractor listed on bidder's bid did not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the bidder are responsible bidders.⁸

The protestant has the burden of proving upon the preponderance of the evidence that USC's determination of responsibility is "clearly erroneous, arbitrary, capricious, or contrary to law." Protest of Brantley Construction Co., Inc., Case No. 1999-3. In other words, USC's determination regarding responsibility is a matter of discretion that cannot be overturned absent a showing by Monroe that it is "clearly erroneous, arbitrary, capricious, or contrary to law." See Protest of CollegeSource, Inc., Case No. 2008-4. Since agency decisions regarding responsibility are a matter of business judgment, Monroe must demonstrate a lack of reasonable or rationale basis for the responsibility determination. See Protest of Value Options, et al., Case No. 2001-7.

⁷ The Contractor's Licensing Act divides licenses into categories and subcategories. Plumbing is a subclassification of a mechanical contractor's license, as is heating, air conditioning, electrical, pressure and process piping, etc. For ease of reference, the CPOC refers to mechanical contractor's license with a plumbing subclassification as a plumbing license and a pressure and process piping subclassification as a pressure and process piping license. Similarly, the CPOC refers to a contractor possessing a plumbing license as a licensed plumbing contractors etc.

⁸ SC Code Ann § 11-40-200(B) precludes an owner or contractor from even considering the bid of an entity or individual that does not possess the proper license subclassifications for the work at the time of bidding.

Monroe did not argue that Hill could not legally perform the work of a licensed plumbing contractor. Monroe simply argued that the scope of "plumbing" on the bid form includes the work of a licensed pressure and process piping contractor and that Hill is not legally qualified to perform this work. Because USC determined what the scope of each subcontractor specialty was based on its own intended meaning for each specialty and then chose which ones to list on the bid form, Monroe is for all intents and purposes arguing over USC's intent. Therefore, this argument only holds water if USC's intended meaning for the term "plumbing" included the work of both a licensed plumbing contractor and a licensed pressure and process piping subcontractor.

Monroe does argue that its interpretation of the meaning for the term "plumbing" is supported by Division 15 of the Project specifications and the plumbing sheets in the drawings. However, the question before the CPOC is not whether Monroe's interpretation has support within the record. Given that the validity of USC's responsibility determination turns on the meaning of the term "plumbing," the questions before the CPOC are 1) is USC's intended meaning of the term "plumbing" "clearly erroneous, arbitrary, capricious, or contrary to law," 2) did bidders have a reasonable understanding of USC's intended meaning and, 3) was USC's responsibility determination consistent with its intended meaning for the term "plumbing?"

USC 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 under the express terms of the Contractor's Licensing Act (Licensing Act), not Monroe's understanding of the term. See S.C. Code Ann § 40-11-410(5)(f). Moreover, USC presented testimony and evidence that the Project architect's pre-bid project estimate projected that pressure and process piping constituted less than 3% of the total estimated construction cost; therefore, USC, in consultation with its architect, decided not to list the pressure and process piping subcontractor specialty on the bid form. [Testimony of Ms. Floyd and Hearing Ex. 11]

Monroe does not dispute USC's position that the term "plumbing" covers the work of installing potable water and sanitary waste systems, which requires only a plumbing contractor's license. All agree this is a reasonable position. Monroe simply argues that in this case, it is unreasonable for USC to exclude pressure and process piping from this definition. USC disagreed with Monroe's position, and, in support of its position that its intended meaning for the term "plumbing" was reasonable, pointed to the Contractor's Licensing Act, which includes the installation of potable water and sanitary waste systems in the plumbing license but excludes pressure and process piping. See S.C. Code Ann § 40-11-410(5)(f) & (g). Moreover, USC noted that eighteen of the nineteen bidders on the Project shared its interpretation of the scope of "plumbing" and filled out their bid accordingly by listing a licensed plumbing subcontractor but not a licensed pressure and process piping subcontractor in the space for listing the plumbing

plumbing subcontractor. Indeed, the record indicates that bidders understood USC's intended meaning for the term "plumbing."

Moreover, despite Monroe's arguments otherwise, there is evidence that Monroe had reason to know of USC's intended meaning for the term "plumbing." USC's closing arguments made reference to its course of practice on multiple projects in the Horizon I building.⁹ This course of practice shows that USC has applied a consistent definition of the term "plumbing" across all projects on the Horizon I building, and that bidders had a consistent and compatible understanding of that definition.

The Horizon I Building is a multi-floor building that USC is up-fitting with laboratory space floor by floor.¹⁰ USC previously let projects to up-fit the second and third floors respectively. These two previous projects were similar to the current Project in the following ways:

- they all involved up-fitting the floor space as laboratories,
- they all required potable water and sanitary waste plumbing,
- they all required pressure and process piping work,
- the bid forms for all three required bidders to provide the name of the subcontractor they intended to use to perform the work of "plumbing,"
- the specifications for both the potable water and sanitary waste plumbing and the pressure and process piping for all three were in Division 15 of the Project specifications
- the drawings for all three included both the potable water and sanitary waste plumbing and pressure and process piping in the plumbing drawing sheets.

Despite all these similarities, bidders, including Monroe, uniformly excluded pressure and process piping from the scope of "plumbing" and did not list a subcontractor with a pressure and process piping license subclassification on their bids in those projects. As to the up-fitting of the second floor of Horizon I, USC determined Monroe to be a responsible bidder and awarded a contract to Monroe despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid. As with the second floor up-fit, USC also determined Monroe to be a responsible bidder and awarded a contract to Monroe for the up-fitting of the third floor despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid.

Therefore, on three projects to up-fit the Horizon I Building with laboratory space, 28 of 29 responsive bids (including two of Monroe's bids) did not include the pressure and process piping subcontractor work in the scope of "plumbing." (By way of explanation, there were four responsive bids on the second floor

⁹ The previous projects on the Horizon I building came under the jurisdiction of the Office of State Engineer (OSE), and OSE has project files for each of the projects. The CPOC takes notice of these records for the purposes of this decision.

¹⁰ While not defined in the dictionary, up-fitting is commonly understood within the construction and real estate industries to mean fitting out an existing architectural shell to accommodate a tenant's specific needs.

floor portion, six responsive bids on the third floor portion, and 19 responsive bids on this project for the first floor.) Bidder understanding of USC's intent regarding the scope of "plumbing" was consistent.¹¹ On three projects to up-fit the Horizon I Building with laboratory space, USC applied a consistent meaning to the term "plumbing," made its responsibility determinations consistent with that interpretation, and made contract awards accordingly. USC's intended meaning for the term "plumbing" and bidders' interpretation of that term were compatible. Clearly, USC's decision to award a contract to Rodgers in this case was not arbitrary or capricious but was consistent with USC's prior practice and bidders' understanding on previous projects. Moreover, Monroe clearly knew of USC's prior intent and practice and this intent and prior practice benefited Monroe on two previous occasions.

Based on the forgoing, the CPOC finds that USC's intended meaning for the term "plumbing" was reasonable, and was not clearly erroneous, arbitrary, capricious, or contrary to law; that bidder's consistently had an understanding of the meaning of this term compatible with USC's intended meaning; and USC applied its intended meaning for this term reasonably and consistently in making its responsibility determination. Moreover, 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.¹²

¹¹ Indeed, Monroe's interpretation in this case is not necessarily inconsistent. Monroe simply chose to provide additional superfluous information regarding their intended licensed pressure and process piping subcontractor believing that despite past familiar practice USC's intended meaning for the term "plumbing" had changed.

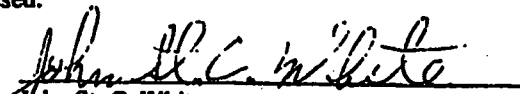
¹² Ultimately Monroe was left arguing that because it had a different understanding of the meaning of the term "plumbing" than USC intended, USC had a duty to make its intended meaning clearer to Monroe and because USC did not make it clearer to Monroe, Monroe's definition should control as against the understanding of eighteen other bidders. In other words, Monroe argues that the term is at a minimum ambiguous; however, a claim of ambiguity is an untimely protest of the solicitation.

Even assuming Monroe could show an ambiguity existed sufficient to protest the award, Monroe's arguments concerning USC's intended meaning also fail because Monroe did not show and cannot show any harm as a result of its alleged misunderstanding. USC did not throw out Monroe's bid as non-responsive for listing a licensed process and pressure piping subcontractor in addition to a licensed plumbing subcontractor for "plumbing." Its misunderstanding simply resulted in Monroe providing superfluous information. Moreover, Monroe was not the low bidder and Monroe does not and reasonably cannot argue that its misunderstanding of the intended meaning of the term "plumbing" caused it to have a higher bid price than it would have had otherwise. Monroe's misunderstanding had no impact on the scope of work for the Project; it only affected which subcontractors Monroe listed and which it did not. In short, Monroe cannot argue that, but for its misunderstanding, it would have been the low bidder. Therefore, Monroe suffered no harm from its alleged misunderstanding of USC's intent and USC's actions made in accordance with that intent.

DECISION

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 to law."

For the foregoing reasons, the Protest is dismissed.


John St. C. White
Chief Procurement Officer for Construction

14 Feb 2011
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

EXH. A

Tel 803-771-7900
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December 13, 2010

VIA FACSIMILE 737-0639 & HAND DELIVERY

Mr. John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of intent of the University of South Carolina to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC),

Dear Mr. White:

On behalf of Monroe Construction Company ("Monroe"), this firm protests and requests an administrative review pursuant to S. C. Code §11-35-4210(4) of the attached University of South Carolina's December 3, 2010 notice of intent to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC), based on Rogers' Base Bid 2 of \$3,149,000. Rogers' bid is nonresponsive and disqualified because Rogers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Rogers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications. Hill has PB5 and HT5 licenses.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license. See attached affidavit of Eric Monroe.

Monroe was the lowest bidder that identified a properly licensed subcontractor (Douglas Fluid Integrated Technologies) for the specialty piping work. Its bid for the Base bid 2 was \$3,230,000.

Section 15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air. Installation of piping to transport these gasses requires a specialty license, i.e. a pressure and process piping license. Pressure and process piping "includes the installation, maintenance, repair, alteration, or extension of a system

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RECORD ON APPEAL 021

Mr. John St. C. White, P.E.

Page 2 of 2

December 13, 2010

of piping, tubing, vessels, containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these." See S.C. Code 40-11-410(g). These do not come under the exception for "boilers, boiler piping, piping used to convey potable water, sanitary sewage, liquefied petroleum, manufactured or natural gas or refrigeration, air conditioning and comfort heating piping" that do not require a pressure and process piping license. *Id.*

On October 19, 2010, Monroe specifically advised USC's procurement officer for this project of the specialty license requirement, the same day bids were opened, of the requirement for a specialty license. See e-mail attached to Mr. Monroe's affidavit. Notwithstanding that advance notice, 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

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:

(B) 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. (emphasis added).

Monroe is the lowest responsive bidder and should be awarded the bid.

Yours very truly,


Katherine B. Barroll

KBB/ash

cc: Monroe Construction Company

FEB 17 2011

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RECORD ON APPEAL 022

Tel 803-771-7900
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Columbia, South Carolina 29210

February 23, 2011

VIA FACSIMILE 737-0639 & HAND DELIVERY

Mr. John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Appeal of February 14, 2011 Decision (CCPO Case no. 2011-11) denying protest of Monroe Construction Company, LLC of University of South Carolina's intent to award to Rodgers Builders, Inc. a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC, the "Project")
RTT File Number: 17024.1

Dear Mr. White:

Pursuant to S. C. Code §11-35-4210, Monroe Construction Company, LLC ("Monroe") hereby requests a further administrative *de novo* review by the Procurement Review Board of your February 14, 2010 decision upholding the University's determination that Rodgers Builders, Inc. ("Rodgers") was a responsible bidder. The decision is attached hereto as Exhibit A.

A check payable to the SC Procurement Review Panel for its \$250 filing fee is enclosed. A hearing before the Procurement Review Panel is requested after additional evidence has been subpoenaed.

Monroe further requests the Procurement Review Panel Board determine whether the University's descriptions for contractor listing requirements on the bid form complied with S.C. Code 11-35-3020 to "list by specialty," an issue you did not directly address in your determination that Rodger's bid was responsive on its face. The responsibility portion of your decision implicitly acknowledges the descriptions were ambiguous. Furthermore, footnote 12 on page 10 of the decision erroneously states that Monroe cannot argue its misunderstanding of the meaning of the term "plumbing" caused it to have a higher bid price. That is incorrect. Having to obtain a specialty subcontractor's bid for pressure and process piping work shown on the Project's plumbing plan did raise Monroe's cost to perform the work over what Monroe would have bid if a licensed plumber could have performed that work. If Monroe had used Hill

Plumbing's bid for that scope of work as Rodgers and Sumwalt apparently did, Monroe's would have been the lowest bid.

It was stipulated at the January 27, 2011 hearing that Hill Construction Company did not have a pressure and process piping license and that performance of the Project work highlighted in blue in the first floor plumbing plan attached hereto as Exhibit B requires a process piping license. Rodgers, Sumwalt (the next low bidder) and most of the bidders other than Monroe selected Hill Plumbing for the plumbing scope of work. (See bid tabulation attached hereto as Exhibit C).

Rodgers conceded at the hearing it did not possess a pressure and process piping license. It is a matter of public record that Sumwalt does not either. Monroe provided evidence at the hearing that Hill Plumbing submitted a bid to Monroe and submitted the same bid to both Rodgers and Sumwalt (a fax to "all") to perform the work highlighted in blue on Exhibit B that was beyond the scope of Hill Plumbing's license. That evidence was further supported by Mr. Kerr's testimony that he obtained confirmation of the scope of Hill Plumbing's bid from Hill Plumbing and by testimony of the University's architect regarding its cost estimates for the portion of the work shown on the plumbing plan which did not require a pressure and process piping license to perform. When those numbers are compared to Hill's bid, it is apparent more than licensed plumbing work was included in Hill Plumbing's bid. The February 14, 2011 decision fails to address any of that relevant evidence.

When at the time of bidding, neither the subcontractor nor the general contractor possesses the proper license for performing work, neither the general nor the subcontractor are responsible bidders. See Protest of Complete Building Corporation, Case No. 2011-013, February 4, 2011 and Protest of Atrium Builders, Inc. & Triad Mechanical Contractors, Inc. Case No. 2008-0011(CPOC). S. C. Code §40-11-200(B) further precludes both an owner (the University) and a contractor (Rodgers) from considering the bid of an entity that does not possess the proper license at the time of bidding. The evidence presented at the hearing indicates Rodgers had no bid from a licensed pressure and process piping subcontractor at the time of bidding to perform the pressure and process piping work, and therefore Rodgers was not a responsible bidder.

The decision erroneously states the "validity of USC's responsibility determination turns on the meaning of the term plumbing." Exhibit A, p. 8. That misses the point. The decision fails to address the University's obligation under S.C. Code §40-11-200(B) to investigate once it was placed on notice that an identified, listed plumbing subcontractor also bid for an identified type of work it had no license to perform. Here that work was identified as laboratory gas work requiring a pressure and process piping license. Nor does the decision address the extent of the investigation required. Public agencies and bidders need guidance about the extent of the duty of a public agency to investigate a pre-award claim that an identified subcontractor does not have the required license to do the work for which it has bid.

The decision indicates you applied a "clearly erroneous, arbitrary, capricious, or contrary to law" standard to the University's determination that Rodgers was a responsible bidder.

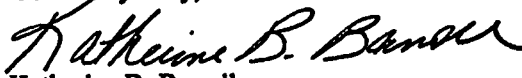
(Decision, Ex. A., p. 7). Under S.C. Code §11-35-2410(A), determinations of nonresponsibility under §11-35-1830(2) are governed by that standard. Determinations of responsibility are under a different subsection, § 11-35-1830(1), which the legislature declined in 11-35-2410(A) to apply that same standard. However, even if that lenient standard also applies to discretionary factors in an agency's determination that a bidder is responsible under the Procurement Code, that lenient standard does not apply to the University's independent, and nondiscretionary obligation to comply with Section §40-11-200(B). Section §40-11-200(B) is part of the state licensing statutes rather than the Procurement Code, and is not among the statutes listed in §11-35-2410(A) to which the lenient standard applies.

Testimony at the January 27, 2011 hearing showed the University failed to investigate Monroe's very prompt complaint that Hill Plumbing did not have a pressure and process piping license before issuing its December 3, 2010 notice of intent to award the contract to Rodgers. Bids were opened on October 19, 2010. It is undisputed that same day, Monroe sent the University an e-mail, attached hereto as Exhibit D (it was promptly resent after an address was corrected, and the University did not dispute its receipt). That e-mail placed the University on inquiry notice that Hill Plumbing had bid beyond the scope of its license. That October 19, 2010 notice was raised for a second time in Monroe's December 13, 2010 bid protest.

Testimony at the January 27, 2011 hearing made it clear that despite receipt of Mr. Kerr's October 19 e-mail, the University made no inquiries until a few weeks after Monroe filed its December 13, 2010 protest about who would perform the laboratory gas work included in the Project plumbing plan that could not be performed with a plumbing license. The testimony at the hearing combined with a review of the documents made under a Freedom of Information Act request revealed those inquiries, when finally made, were very limited, were apparently oral, and directed only to Rodgers, not Hill Plumbing or any other bidders. The University did not even follow up with Monroe prior to issuing its notice of intent to award.

Hill Plumbing chose not to attend the January 27 hearing. Rodgers attended, but came without a single document from its job file for this Project and was not even prepared to advise who it would use to perform the pressure and process piping work shown on Exhibit B. Monroe was hampered by the inability to subpoena documents from either Rodgers or Hill Plumbing. A proper investigation can be done only through this appeal and the use of the Panel's subpoena powers.

Yours very truly,


Katherine B. Barroll

KBB/ash
Enclosures

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Mr. John St. C. White

Page 4 of 4

February 23, 2011

cc: Monroe Construction Company, Inc.
George W. Lampl, III (w/enclosures, via email and U.S. Mail)
Boyd B. Nicholson, Jr. (w/enclosures, via email and U.S. Mail)
Ms. Molly R. Crum (w/enclosures, via email)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST

DECISION

MONROE CONSTRUCTION
COMPANY

CASE NO. 2011-011

v.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE:
FEBRUARY 14, 2011

HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
STATE PROJECT NO. H27-6071-LC

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request by Monroe Construction Company (Monroe), under the provisions of section 11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of the Horizon 1 First Floor Laboratory Upfit bid (the Project), for the University of South Carolina (USC). On January 27, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review by hearing. At the hearing, attorneys D. Ryan McCabe and Katherine B. Barroll represented Monroe, attorney Boyd B. Nicholson, Jr., represented Rodgers Builders, Inc. (Rodgers), and attorney George W. Lampl, III represented USC. Appearing as witnesses were Eric Monroe, Monroe's President, Frank Kerr, estimator for Monroe, Terry Horomanski, Rodgers' Senior Vice President for Construction Operations, Thomas N. Opal, Senior Project Manager for USC, Kay Keilser, Procurement Specialist/Contract Administrator for USC, Lind Jackson, Contract Administrator for USC, and Regina R. Floyd, architect with Watson Tate Savory Liollo. During the hearing, the CPOC received Exhibits 1 through 11 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Monroe's statement of protest is attached as Exhibit A and incorporated herein by reference.



RECORD ON APPEAL 027

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On September 13, 2010, USC advertised for bids to construct the Project. [Hearing Ex. 2] Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010. [Hearing Ex. 5]
2. The solicitation documents and bid form provided for two base bids. [Hearing Ex. 3]
3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(1), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project. [Hearing Ex. 3]
4. By the time for receipt of bids, USC had received nineteen bids. [Hearing Ex. 6]
5. Rodgers submitted a low bid of \$3,149,000 for base bid two. Monroe submitted the third low bid of \$3,230,000 for base bid two.¹ [Hearing Ex. 6]
6. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two. [Hearing Ex. 7]
7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. (Hill) was not a licensed pressure and process piping contractor.

MOTIONS

At the beginning of the hearing and again at the close of Monroe's case-in-chief, USC and Rodgers moved to dismiss Monroe's protest. First, they argued that Monroe, by the terms of its protest, was only protesting the responsiveness of Rodgers' bid and that an examination of Rodgers' bid shows that it is responsive on its face. Second, they argued that a protest issue regarding Rodgers' responsibility is untimely because Monroe did not raise it in its protest letter and therefore failed to put the parties on notice. Finally, they argue that even if Monroe's protest letter is found to sufficiently raise a protest regarding Rodgers' responsibility, then Monroe's protest should be dismissed because an examination of the facts shows that Rodgers and his listed subcontractors were responsible.²

¹ Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two. Sumwalt was notified of the hearing but declined to attend.

² At issue is the responsibility of Rodgers' plumbing subcontractor which effects Rodgers' responsibility.

After examining Mr. Monroe during the hearing, USC and Rodgers also moved to dismiss Monroe's protest on the ground that Monroe no longer had standing.

Motion Regarding Responsiveness

Monroe's protest alleges that by failing to list a mechanical contractor with a pressure and process piping subclassification along with a mechanical contractor with a plumbing subclassification in the space on the bid form for listing the plumbing subcontractor, Rodgers and all other bidders except Monroe were nonresponsive.³ However, USC and Rodgers argue that Rodgers' bid was responsive on its face and therefore this allegation should be dismissed.

Prior to 1993, the Procurement Review Panel (Panel) issued a number of orders stating that a failure to list subcontractor in the manner required by law rendered a bid non-responsive.⁴ In doing so, the Panel relied on SC Code Ann § 11-35-3020(2)(b)(ii) which stated that "failure to list subcontractors in accordance with this section ... shall render the prime contractor's bid unresponsive."

In 1993, the General Assembly amended § 11-35-3020(2)(b)(ii) to state, "Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." Thus, under the current statute, as long as the bidder lists a subcontractor in each space for listing a subcontractor, his bid is responsive. Protest of Brantley Construction Co., Inc., Case No. 1999-3. Here Rodgers listed Hill in the space on the bid form for listing the plumbing subcontractor(s). Therefore, the CPOC agrees with USC's and Rodgers' motion and finds that Rodgers' bid was responsive. Accordingly, the CPOC dismisses Monroe's protest on the issue of responsiveness.

Motions Regarding Responsibility

First, USC and Rodgers argue that Monroe does not protest USC's determination that Rodgers was a responsible bidder and as a result, the CPOC cannot entertain any argument to the contrary that Monroe presented at the hearing. "A protest ... 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." *SC Code Ann § 11-35-4210(2)(b)*. While the specificity of a protest is not to be judged on highly technical or formal standards, the protest 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.

³ Monroe is the only bidder of nineteen that listed both a licensed plumbing contractor and a licensed process piping contractor in the space on the bid form for listing the plumbing subcontractor. All other bidders listed only a licensed plumbing contractor.

⁴ In Re. Protest of ECB Construction Co., Inc., Case No. 1989-7; In Re. Protest of Tricon Associates, Inc., Case No. 1991-11; In Re. Protest of Pizzagalli Construction Company, Case No. 1991-8; In Re. Protest of Delta Industrial Electric Co., Inc., Case No. 1992-8(1).

Monroe's protest letter included the following statements:

Rogers' [sic] bid is nonresponsive and disqualified because Rogers [sic] listed Hill ... as the plumbing subcontractor and neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications.

Sunwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' [sic] does because Sunwalt also listed Hill as the plumbing subcontractor and neither Sunwalt nor Hill have the required pressure and process piping license.

Monroe was the lowest bidder that identified a properly licensed subcontractor ... for the specialty piping work.

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.³

While Monroe never used the word "responsibility" in its letter of protest, all of these statements above make it clear that Monroe was protesting that Hill was not properly licensed to perform pressure and process piping work and Rodgers was not licensed to perform that either. Possession of the proper license is a responsibility issue. Therefore, the CPOC finds that 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. Since the parties cannot claim that the protest letter failed to notify them that the issue was over licensure and consequently responsibility, USC's and Rodgers' motions to dismiss this issue as untimely are denied.

Second, USC and Rodgers also contended that a hearing on the issue of responsibility, if raised, was not necessary because an examination of the facts shows that Rodgers and his listed subcontractors were

³ While the law clearly says that it is improper for a owner to award a contract to improperly licensed contractor, it is far from clear that the law makes the violation of this requirement a criminal offense. Instead of criminal penalties, the law provides for civil penalties. See SC Code Ann § 40-11-110.

responsible.⁶ However, the CPOC declines to rule on USC's and Rodgers' motion in this regard. Since the issue of Rodgers' responsibility depended on the evidence presented in the hearing, the CPOC has addressed the merits of Monroe's protest in this decision instead.

Motion Regarding Standing

During the course of the hearing, USC examined Mr. Monroe on the question of whether USC asked him to hold his bid open beyond the sixty day time period specified in the solicitation documents. Mr. Monroe confirmed that Monroe had indeed received such a request and failed to provide a response to USC. Since Monroe failed to respond in the affirmative that it would honor its bid beyond the sixty day period, USC and Rodgers argued that Monroe was neither an actual bidder nor aggrieved, and consequently Monroe lacks standing to bring this protest. At the close of the hearing, the CPOC asked all parties to submit written briefs on the issue.

The Code provides only an "actual bidder ... aggrieved in connection with the intended award or award of contract" has the right to protest the award. S.C. Code Ann § 11-35-4210(1)(b). No one argues that Monroe did not actually submit a bid on this project. Therefore, Monroe is an actual bidder since its failure to respond to USC's request does not change its pre-existing status of being an actual bidder. At most, one may argue that Monroe is no longer aggrieved; however, even this position must fail. While Monroe may have ultimately failed to show that it is aggrieved by USC's responsibility determination, this is not because Monroe failed to respond to USC's request. USC's request was sent out as a result of Monroe's protest which was filed on December 13, 2010, five days prior to the date bids were due to expire. On December 16, USC sent out an email requesting that certain bidders (the lowest) extend their bids an additional sixty days. [Brief of USC] Monroe was one of these bidders. By Monroe's own admission, Monroe did not respond to this request.

USC's request to bidders to extend the date they would hold their bids open was based on Section 6.1.1.1 of the Manual for Planning and Execution of State Permanent Improvements, Part II (the "Manual"). This section of the Manual provides:

If the Agency desires to extend the bid acceptance period beyond the time given in the Bid Form (SB 330), then before the expiration of that period, it should obtain a written extension of bid prices(s) from all bidders. A bidder does not have to agree to hold its bid price beyond the bid acceptance period. However, the Agency should consider for award only the bids of those bidders who provide a written extension of their bids before the expiration of the original bid acceptance period. If the Agency fails to obtain a written extension of at least one bid before the expiration of the acceptance period, it will have to re-bid the project before it can award a contract.

This provision is itself based on SC Code Ann Reg. 19-445.2065(C) which provides:

⁶ At issue is the responsibility of Rodgers' plumbing subcontractor, which effects Rodgers' responsibility.

Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

While these provisions taken together may preclude an award to a bidder who has declined to extend its bid, it is not clear that it requires a protestant, who is clearly seeking award under the terms of its protest, to take an additional step of responding to a general request to hold bids open a longer period than specified when that request is sent out in response to that same protest.

Here Monroe filed its bid protest, arguing that the Project be awarded to Monroe. The very act of filing a protest meant that there was no way an award could be finalized prior to the expiration of the time for holding bids open set forth in the solicitation. Therefore, it is logical to conclude Monroe intended to hold its bid beyond this date. Moreover, it is reasonable to assume Monroe intended to hold its bid open as long as it took for its protest to reach a final conclusion. If Monroe changes its mind, the appropriate and logical course would be to withdraw its protest. Monroe has not done so.

Based on the forgoing, the CPOC finds that it was not necessary for Monroe to respond to USC's request that it hold its bid open an additional sixty days to preserve its standing. Accordingly, the motion to dismiss for lack of standing is denied.

DISCUSSION

In the solicitation documents for the Project, USC required bidders to list the subcontractors they planned to use on the project to perform the work of three different subcontractor specialties - mechanical, plumbing, and electrical. This requirement was imposed in compliance with the provisions of S.C. Code Ann § 11-35-3020(2)(b)(ii) which provides as follows:

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 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. 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.

[emphasis added] 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.

In compliance with the requirements of S.C. Code Ann § 11-35-3020(2)(b)(ii), USC identified on the bid form by specialty the subcontractors whose contracts USC expected to exceed three percent of a prime

bidder's total base bid. At issue in this protest is the identified subcontractor specialty entitled plumbing. In the space for providing the name of the subcontractor(s) it intended to use for the "plumbing subcontractor specialty" (hereafter referred to as "plumbing"), Rodgers listed only Hill, a licensed plumbing contractor.⁷ Neither Hill nor Rodgers are licensed pressure and process piping contractors. In the space for providing the name of the subcontractor(s) it intended to use for "plumbing," Monroe, in contrast, listed both Walker White, Inc., a licensed plumbing contractor, and Douglas Fluid & Integration Technology, LLC (Douglas), a licensed pressure and process piping contractor.

Monroe's protest is couched in terms of the licensure requirements of the Licensing Act. Monroe challenges USC's decision to award a contract to Rodgers on the grounds that Rodgers' only listed subcontractor for "plumbing," Hill, was not licensed to perform pressure and process piping work and, by extension, if Hill is not a responsible subcontractor, Rodgers is not a responsible bidder. In short, Monroe protests USC's determination that Rodgers was the lowest responsible bidder.

The Contractors Licensing Act requires a contractor to possess the proper license at the time of bidding. SC Code Ann §§ 40-11-30 and 200. The Panel has determined that 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). If, at the time of bidding, a subcontractor listed on bidder's bid did not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the bidder are responsible bidders.⁸

The protestant has the burden of proving upon the preponderance of the evidence that USC's determination of responsibility is "clearly erroneous, arbitrary, capricious, or contrary to law." Protest of Brantley Construction Co., Inc., Case No. 1999-3. In other words, USC's determination regarding responsibility is a matter of discretion that cannot be overturned absent a showing by Monroe that it is "clearly erroneous, arbitrary, capricious, or contrary to law." See Protest of CollegeSource, Inc., Case No. 2008-4. Since agency decisions regarding responsibility are a matter of business judgment, Monroe must demonstrate a lack of reasonable or rationale basis for the responsibility determination. See Protest of Value Options, et al., Case No. 2001-7.

⁷ The Contractor's Licensing Act divides licenses into categories and subcategories. Plumbing is a subclassification of a mechanical contractor's license, as is heating, air conditioning, electrical, pressure and process piping, etc. For ease of reference, the CPOC refers to mechanical contractor's license with a plumbing subclassification as a plumbing license and a pressure and process piping subclassification as a pressure and process piping license. Similarly, the CPOC refers to a contractor possessing a plumbing license as a licensed plumbing contractors etc.

⁸ SC Code Ann § 11-40-200(B) precludes an owner or contractor from even considering the bid of an entity or individual that does not possess the proper license subclassifications for the work at the time of bidding.

Monroe did not argue that Hill could not legally perform the work of a licensed plumbing contractor. Monroe simply argued that the scope of "plumbing" on the bid form includes the work of a licensed pressure and process piping contractor and that Hill is not legally qualified to perform this work. Because USC determined what the scope of each subcontractor specialty was based on its own intended meaning for each specialty and then chose which ones to list on the bid form, Monroe is for all intents and purposes arguing over USC's intent. Therefore, this argument only holds water if USC's intended meaning for the term "plumbing" included the work of both a licensed plumbing contractor and a licensed pressure and process piping subcontractor.

Monroe does argue that its interpretation of the meaning for the term "plumbing" is supported by Division 15 of the Project specifications and the plumbing sheets in the drawings. However, the question before the CPOC is not whether Monroe's interpretation has support within the record. Given that the validity of USC's responsibility determination turns on the meaning of the term "plumbing," the questions before the CPOC are 1) Is USC's intended meaning of the term "plumbing" "clearly erroneous, arbitrary, capricious, or contrary to law," 2) did bidders have a reasonable understanding of USC's intended meaning and, 3) was USC's responsibility determination consistent with its intended meaning for the term "plumbing?"

USC 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 under the express terms of the Contractor's Licensing Act (Licensing Act), not Monroe's understanding of the term. See S.C. Code Ann § 40-11-410(5)(f). Moreover, USC presented testimony and evidence that the Project architect's pre-bid project estimate projected that pressure and process piping constituted less than 3% of the total estimated construction cost; therefore, USC, in consultation with its architect, decided not to list the pressure and process piping subcontractor specialty on the bid form. [Testimony of Ms. Floyd and Hearing Ex. 11]

Monroe does not dispute USC's position that the term "plumbing" covers the work of installing potable water and sanitary waste systems, which requires only a plumbing contractor's license. All agree this is a reasonable position. Monroe simply argues that in this case, it is unreasonable for USC to exclude pressure and process piping from this definition. USC disagreed with Monroe's position, and, in support of its position that its intended meaning for the term "plumbing" was reasonable, pointed to the Contractor's Licensing Act, which includes the installation of potable water and sanitary waste systems in the plumbing license but excludes pressure and process piping. See S.C. Code Ann § 40-11-410(5)(f) & (g). Moreover, USC noted that eighteen of the nineteen bidders on the Project shared its interpretation of the scope of "plumbing" and filled out their bid accordingly by listing a licensed plumbing subcontractor but not a licensed pressure and process piping subcontractor in the space for listing the plumbing

plumbing subcontractor. Indeed, the record indicates that bidders understood USC's intended meaning for the term "plumbing."

Moreover, despite Monroe's arguments otherwise, there is evidence that Monroe had reason to know of USC's intended meaning for the term "plumbing." USC's closing arguments made reference to its course of practice on multiple projects in the Horizon I building.⁹ This course of practice shows that USC has applied a consistent definition of the term "plumbing" across all projects on the Horizon I building, and that bidders had a consistent and compatible understanding of that definition.

The Horizon I Building is a multi-floor building that USC is up-fitting with laboratory space floor by floor.¹⁰ USC previously let projects to up-fit the second and third floors respectively. These two previous projects were similar to the current Project in the following ways:

- they all involved up-fitting the floor space as laboratories,
- they all required potable water and sanitary waste plumbing,
- they all required pressure and process piping work,
- the bid forms for all three required bidders to provide the name of the subcontractor they intended to use to perform the work of "plumbing,"
- the specifications for both the potable water and sanitary waste plumbing and the pressure and process piping for all three were in Division 15 of the Project specifications
- the drawings for all three included both the potable water and sanitary waste plumbing and pressure and process piping in the plumbing drawing sheets.

Despite all these similarities, bidders, including Monroe, uniformly excluded pressure and process piping from the scope of "plumbing" and did not list a subcontractor with a pressure and process piping license subclassification on their bids in those projects. As to the up-fitting of the second floor of Horizon I, USC determined Monroe to be a responsible bidder and awarded a contract to Monroe despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid. As with the second floor up-fit, USC also determined Monroe to be a responsible bidder and awarded a contract to Monroe for the up-fitting of the third floor despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid.

Therefore, on three projects to up-fit the Horizon I Building with laboratory space, 28 of 29 responsive bids (including two of Monroe's bids) did not include the pressure and process piping subcontractor work in the scope of "plumbing." (By way of explanation, there were four responsive bids on the second floor

⁹ The previous projects on the Horizon I building came under the jurisdiction of the Office of State Engineer (OSE), and OSE has project files for each of the projects. The CPOC takes notice of these records for the purposes of this decision.

¹⁰ While not defined in the dictionary, up-fitting is commonly understood within the construction and real estate industries to mean fitting out an existing architectural shell to accommodate a tenant's specific needs.

floor portion, six responsive bids on the third floor portion, and 19 responsive bids on this project for the first floor.) Bidder understanding of USC's intent regarding the scope of "plumbing" was consistent.¹¹ On three projects to up-fit the Horizon I Building with laboratory space, USC applied a consistent meaning to the term "plumbing," made its responsibility determinations consistent with that interpretation, and made contract awards accordingly. USC's intended meaning for the term "plumbing" and bidders' interpretation of that term were compatible. Clearly, USC's decision to award a contract to Rodgers in this case was not arbitrary or capricious but was consistent with USC's prior practice and bidders' understanding on previous projects. Moreover, Monroe clearly knew of USC's prior intent and practice and this intent and prior practice benefited Monroe on two previous occasions.

Based on the forgoing, the CPOC finds that USC's intended meaning for the term "plumbing" was reasonable, and was not clearly erroneous, arbitrary, capricious, or contrary to law; that bidder's consistently had an understanding of the meaning of this term compatible with USC's intended meaning; and USC applied its intended meaning for this term reasonably and consistently in making its responsibility determination. Moreover, 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.¹²

¹¹ Indeed, Monroe's interpretation in this case is not necessarily inconsistent. Monroe simply chose to provide additional superfluous information regarding their intended licensed pressure and process piping subcontractor believing that despite past familiar practice USC's intended meaning for the term "plumbing" had changed.

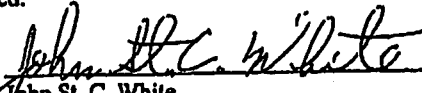
¹² Ultimately Monroe was left arguing that because it had a different understanding of the meaning of the term "plumbing" than USC intended, USC had a duty to make its intended meaning clearer to Monroe and because USC did not make it clearer to Monroe, Monroe's definition should control as against the understanding of eighteen other bidders. In other word, Monroe argues that the term is at a minimum ambiguous; however, a claim of ambiguity is an untimely protest of the solicitation.

Even assuming Monroe could show an ambiguity existed sufficient to protest the award, Monroe's arguments concerning USC's intended meaning also fail because Monroe did not show and cannot show any harm as a result of its alleged misunderstanding. USC did not throw out Monroe's bid as non-responsive for listing a licensed process and pressure piping subcontractor in addition to a licensed plumbing subcontractor for "plumbing." Its misunderstanding simply resulted in Monroe providing superfluous information. Moreover, Monroe was not the low bidder and Monroe does not and reasonably cannot argue that its misunderstanding of the intended meaning of the term "plumbing" caused it to have a higher bid price than it would have had otherwise. Monroe's misunderstanding had no impact on the scope of work for the Project; it only affected which subcontractors Monroe listed and which it did not. In short, Monroe cannot argue that, but for its misunderstanding, it would have been the low bidder. Therefore, Monroe suffered no harm from its alleged misunderstanding of USC's intent and USC's actions made in accordance with that intent.

DECISION

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 to law."

For the foregoing reasons, the Protest is dismissed.



John St. C. White
Chief Procurement Officer for Construction

14 Feb 2011

Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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220 EXECUTIVE CENTER DRIVE
COLUMBIA, SOUTH CAROLINA 29210

EXH. A

December 13, 2010

VIA FACSIMILE 737-0639 & HAND DELIVERY

Mr. John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of intent of the University of South Carolina to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC),

Dear Mr. White:

On behalf of Monroe Construction Company ("Monroe"), this firm protests and requests an administrative review pursuant to S. C. Code §11-35-4210(4) of the attached University of South Carolina's December 3, 2010 notice of intent to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC), based on Rogers' Base Bid 2 of \$3,149,000. Rogers' bid is nonresponsive and disqualified because Rogers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Rogers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications. Hill has PB5 and HT5 licenses.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license. See attached affidavit of Eric Monroe.

Monroe was the lowest bidder that identified a properly licensed subcontractor (Douglas Fluid Integrated Technologies) for the specialty piping work. Its bid for the Base bid 2 was \$3,230,000.

Section 15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air. Installation of piping to transport these gasses requires a specialty license, i.e. a pressure and process piping license. Pressure and process piping "includes the installation, maintenance, repair, alteration, or extension of a system

4389127

RECORD ON APPEAL 039

Mr. John St. C. White, P.E.

Page 2 of 2

December 13, 2010

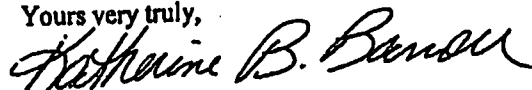
of piping, tubing, vessels, containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these." See S.C. Code 40-11-410(g). These do not come under the exception for "boilers, boiler piping, piping used to convey potable water, sanitary sewage, liquefied petroleum, manufactured or natural gas or refrigeration, air conditioning and comfort heating piping" that do not require a pressure and process piping license. *Id.*

On October 19, 2010, Monroe specifically advised USC's procurement officer for this project of the specialty license requirement, the same day bids were opened, of the requirement for a specialty license. See e-mail attached to Mr. Monroe's affidavit. Notwithstanding that advance notice, 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

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:

(B) 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. (emphasis added).
Monroe is the lowest responsive bidder and should be awarded the bid.

Yours very truly,



Katherine B. Barroll

KBB/ash

cc: Monroe Construction Company

4389127-1

RECORD ON APPEAL 040

ALL-STATE LEGAL[®] EXHIBIT
B

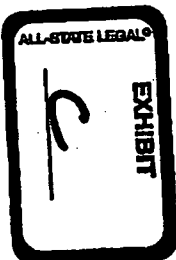
THIS IS CERTIFIED TO BE A TRUE COPY

John H. Hester
John H. Hester
John H. Hester

Horizon 1 First Floor Laboratory Upfit (DEA & SEAEPIC) / Project Number: H27-5074-LC
 Bids Due @ 2:00 PM, Tuesday, October 19, 2010
 743 Greene Street, Columbia, South Carolina 29208 in Conference Room 83

Bidder	Arch. Add. 1-5	Bid Bond	Base Bid 1	Base Bid 2	Base Bid 1 Subcontractor Mechanical	Base Bid 1 Subcontractor Plumbing	Base Bid 1 Subcontractor Electrical	Base Bid 2 Subcontractor Mechanical	Base Bid 2 Subcontractor Plumbing	Base Bid 2 Subcontractor Electrical
Arnold Construction	✓	✓	\$3,800,000.00	\$3,400,000.00	Walker White	Walker White	Swiss Elect	Walker White	Walker White	Swiss Elect
Boyer Commercial Construction, Inc.	✓	✓	\$3,807,000.00	\$3,389,000.00	Gold Mech	Hill Plumbing	Everidge Elect	Gold Mech	Hill Plumbing	Everidge Elect
Burwood Construction	✓	✓	\$3,575,000.00	\$3,105,000.00	Walker White	Hill	Everidge	*		
* China Construction America of S.C. Inc.	✓	✓	\$3,575,000.00	\$3,105,000.00	Walker White	Hill	Everidge	*		
Complete Building Corp.	✓	✓	\$3,746,000.00	\$3,351,771.00	Gold Mech	Hill Plumbing	Swiss Elect	Gold Mech	Hill Plumbing	Swiss Elect
Edcott, Inc.	✓	✓	\$3,717,000.00	\$3,328,000.00	Walker White	Hill Plumbing	Swiss Elect	Walker White	Hill Plumbing	Swiss Elect
Edifice, Inc.	✓	✓	\$3,700,000.00	\$3,308,000.00	Walker White	Hill Plumbing	Swiss Elect	Walker White	Hill Plumbing	Swiss Elect
Everidge Electrical Contr. Inc.	✓	✓	\$3,794,000.00	\$3,304,000.00	Walker White	Hill Plumbing	Everidge Elect	Walker White	Hill Plumbing	Everidge Elect
Parley Associates Inc.	✓	✓	\$3,748,000.00	\$3,348,000.00	WGS	Swiss Elect	Swiss Elect	WGS	Swiss Elect	Swiss Elect
FBI Construction	✓	✓	\$3,712,000.00	\$3,346,000.00	Walker White	Walker White	Swiss	Walker White	Walker White	Swiss
Hammor Construction, LLC	✓	✓	\$3,708,000.00	\$3,400,000.00	Gold Mech	Hill Plumbing	Swiss Elect	Gold Mech	Hill Plumbing	Swiss Elect
HIT Contracting Inc.	✓	✓	\$3,696,000.00	\$3,330,000.00	Walker White	Hill Plumbing	Everidge Elect	Walker White	Hill Plumbing	Everidge Elect
Marshburn Construction Co. Inc.	✓	✓	\$3,910,000.00	\$3,500,000.00	WGS	Hill Plumbing	Baylen Const.	WGS	Hill Plumbing	Baylen Const.
McCarthy Building Companies	✓	✓	\$3,635,000.00	\$3,320,000.00	Walker White	Walker White	Baylen Const.	Walker White	Walker White	Baylen Const.
McGraw Construction Company	✓	✓	\$3,789,000.00	\$3,303,000.00	Gold Mech	Hill Plumbing	Everidge Elect	Gold Mech	Hill Plumbing	Everidge Elect
Myers, Inc.	✓	✓	\$3,730,000.00	\$3,345,000.00	WGS	Hill Plumbing	Baylen Const.	WGS	Hill Plumbing	Baylen Const.
P.C. Construction of Greenwood Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Pearson Contracting LLC	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Randolph & Son Builders, Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Rodgers Builders Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Soil Foundation Const. LLC	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Sumwalt Associates Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Tyler Const. Group, Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge
Webster Const. Co. Inc.	✓	✓	\$3,599,000.00	\$3,149,000.00	Walker White	Hill Plumbing	Everidge	Walker White	Hill Plumbing	Everidge

* NON-RESPONSIVE - BASE BID 2 ONLY



030-03-2010 16:15 Project... PLAN AND SPEC EXHIBIT C

WFO JET1387

P.5/3

From: "Frank Kerr" <FRANKK2@SC.RR.COM>
To: <barroll@rtt-law.com>
Date: 12/13/2010 2:40 PM
Subject: FW: USC HORIZON I IDEA & SEAEPC LAB UPFIT
Attachments: t40c011.docx; Contractors.pdf

Thank You,

Frank Kerr

Monroe Construction

Office (803) 781-1321

Cell (803) 553-0041

Fax (803) 781-1387

From: Frank Kerr [mailto:FRANKK2@SC.RR.COM]
Sent: Tuesday, October 19, 2010 4:53 PM
To: 'kkeister@fmc.dc.edu'; 'ljackson@fmc.sc.edu'
Cc: 'Eric Monroe'; 'Clark, Lyth'; 'TNOPAL@fmc.sc.edu'
Subject: USC HORIZON I IDEA & SEAEPC LAB UPFIT

Please Be 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. Please see the attached document, pages 19 and 20. The potable water, sanitary sewer and associated vent piping are covered under the plumbing license. It is our understanding that all the gases would be covered under the process piping license. Hill plumbing holds a PB5, unlimited plumbing license, and a HT5, unlimited heating license, but does not hold a 2P, process and pressure piping license. As such, Hill plumbing and any contractor that listed Hill Plumbing should be considered nonresponsive.

We thank you for your review of this issue. We hope that this will be handled as part of your due diligence on this award as opposed to a formal protest being submitted.

Thank You,

Frank Kerr



RECORD ON APPEAL 043

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST

DECISION

MONROE CONSTRUCTION
COMPANY

CASE NO. 2011-011

v.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE:
MARCH 3, 2011

HORIZON I FIRST FLOOR
LABORATORY UPFIT
PROJECT H27-6071-LC

Based on the attached request and supporting documentation from Dr. Harris Pastides, President of the University of South Carolina (USC), and consultation with USC, I find that it is in the best interest of the state that the solicitation and award of this procurement shall not be delayed.

With this invitation for bids, USC attempts to procure a contract for fitting out shell space on the first floor of the Horizon I Research Facility with wet laboratory incubation space for small start-up companies along with laboratory space (hereinafter "the Project") for Dr. Jochen Lauterbach, USC Endowed Professor. This project is the third phase of a project to fit out shell space in the Horizon I Research Facility with laboratory space.

The following dates and facts are relevant to this decision:

1. On September 13, 2010, USC advertised for bids to construct the Project. Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010.
2. The solicitation documents and bid form provided for two base bids.
3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project.
4. By the time for receipt of bids, USC had received nineteen bids.

5. Rodgers Builders, Inc., submitted a low bid of \$3,149,000 for base bid two. Monroe Construction Company submitted the third low bid of \$3,230,000 for base bid two.¹

6. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two.

7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. was not a licensed pressure and process piping contractor. In its letter of protest, Monroe asserted that plumbing included pressure and process piping and, therefore, Rodgers had to provide the name of a licensed pressure and process piping contractor in addition to a licensed plumbing contractor in the space on the bid form for listing the plumbing subcontractor.

8. On January 27, 2011, the CPOC conducted a hearing on Monroe's protest.

9. On February 4, 2011, the CPOC concluded his administrative review of Monroe's protest and on February 14, 2011, the CPOC posted his decision denying Monroe's protest.

10. On February 23, 2011, Monroe appealed the decision of the CPOC to the Procurement Review Panel.

11. On February 28, 2011, USC personnel met with the CPOC pursuant to SC Code Ann § 11-35-4210(7) to discuss a lifting of the automatic stay on contract award.

12. On March 2, 2011, USC submitted its formal written request to the CPOC to lift the stay on the following grounds:

a. The Project is partially funded by a \$1,000,000 grant from the Economic Development Administration, United States Department of Commerce (EDA). Under the terms of the grant, USC was required to begin construction on or before June 11, 2009.

b. USC subsequently requested EDA to grant an extension of the deadline for start of construction on two separate occasions for reasons unrelated to this protest. The second amendment extended the deadline to January 11, 2011.

c. As a result of Monroe's protest, USC was compelled to seek an additional extension of the deadline for the start of construction from the EDA. USC discussed with EDA a new deadline of June 11, 2011 to accommodate a possible appeal but an EDA representative orally advised USC that it would be difficult for USC to obtain any extension. Moreover, the EDA strongly suggested

¹ Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two.

that if the EDA agreed to an extension beyond the January 11, 2011 deadline, the extension would be the last granted by the EDA.

d. Subsequent to its conversation with the EDA representative, USC filed a formal request for an extension of the deadline for the start of construction to June 11, 2011. In response, the EDA issued a third amendment extending the deadline for the start of construction to March 11, 2011. This amendment provides in part, "The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988)."

The EDA's position and representations to USC place USC in a dilemma. USC has very strong reasons to believe that if it does not start construction by March 11, 2011, the EDA will not grant an additional extension and USC will lose a significant portion of the funding for the Project. However, USC has no way of knowing this will in fact happen unless USC sits on its hands and does nothing. On the other hand, USC can assure that it will not lose \$1,000,000 of funding for this very important project by starting construction by March 11, 2011. Faced with such a dilemma, USC has chosen the only course that can guarantee they will not lose the EDA grant and the Project by requesting that the CPOC lift the stay on the award of a contract.

This project is an important part of USC's plans for both the present and the future. The Horizon I Research Facility is one of two USC owned research buildings in Innovista. Innovista involves the cooperation and contributions of a number of public and private entities, including the University of South Carolina; local, state, and federal government; and the business and economic development community. USC envisions Innovista as the "key to a new economy built on a foundation of technology and knowledge-based jobs." "Private tenants relocating to Innovista are expected to bring high-paying jobs that will raise the state's per-capita income."

The success of Innovista and this Project is not only important to USC but the State. As a part of its vision for Innovista, USC is raising capital from the private sector pursuant to the South Carolina Research Centers of Economic Excellence Act to "fund endowments for professorships in research areas targeted to create well-paying jobs and enhanced economic opportunities for the people of South Carolina." SC Code Ann § 2-75-5. Moreover, USC is recruiting top researchers to fill these endowments. This project helps fulfill USC's vision for Innovista by providing research space for one of USC's chairs (Dr. Lauterbach) endowed pursuant to the South Carolina Research Centers of Economic Excellence Act

and by providing research space for small start-up companies.

Dr. Lauterbach is the Center of Economic Excellence Chair in Strategic Approaches to the Generation of Electricity at USC. The primary purpose of Dr. Lauterbach's research program at USC is to enhance the economic development of the state by creating cutting-edge technologies in clean energy sources that can be transferred to new knowledge-based companies in the state. Dr. Lauterbach needs adequate and properly-equipped laboratory space to perform the research of his team to create new technologies that can be transferred to for-profit businesses to create well-paying jobs and economic development for the state of South Carolina. The transfer of these technologies will likely be to small and start-up companies which will need wet lab space and would be candidates for locating in the wet lab incubation space to be developed under this Project.

Based on the foregoing, the CPOC finds that the award of the contract without further delay is necessary to protect the best interest of the State.


John St. C. White
Chief Procurement Officer for Construction

3 March 2011
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO ADMINISTRATIVE REVIEW
Written Determination Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Requests must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an action before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



MAR 2 2011

OFFICE OF STATE ENGINEER

HARRIS PASTIDES
PRESIDENT

March 2, 2011

VIA HAND DELIVERY

John St. C. White, P.E.
Chief Procurement Officer for Construction
1201 Main Street, Ste. 600
Columbia, S.C. 29201

Re: Request to Lift Automatic Stay
Appeal of Monroe Construction Company
State Project No. H27-6071-LC

Dear Mr. White:

The University of South Carolina hereby respectfully requests that you exercise your authority as Chief Procurement Officer to lift the automatic stay of the award of the construction contract for the referenced project to Rodgers Builders, Inc. that resulted when Monroe Construction Company appealed your decision to dismiss Monroe's protest.

Enclosed herewith is the Affidavit of R. Steven Etheredge, Assistant Director of Policy and Compliance in the University of South Carolina's Sponsored Awards Management Office. Mr. Etheredge's Affidavit sets forth the factual basis for the University's request.

Thank you for your prompt consideration of this request.

Sincerely,

Harris Pastides

Enclosure (1)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST)

MONROE CONSTRUCTION COMPANY)

v.)

UNIVERSITY OF SOUTH CAROLINA)

STATE PROJECT NO. H27-6071-LC)

CPO CASE NO. 2011-011

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, R. Steven Etheredge, who being duly
sworn, deposes and says:

1. He is the Assistant Director of Policy and Compliance in the University of South Carolina's Sponsored Awards Management Office.
2. He has personal knowledge of the \$1,000,000.00 Financial Assistance Award, EDA Investment No. 04-01-06063 ("the grant") by the Economic Development Administration, U.S. Department of Commerce ("EDA"), to the University of South Carolina ("USC") to construct a technology driven incubator located on the Innovista Research Campus at USC. (A copy of the Financial Assistance Award is attached hereto as Exhibit A.) He signed the Financial Assistance Award on behalf of USC.
3. The total estimated cost of the technology driven incubator project was \$2,087,227 at the time the EDA made the award.
4. The EDA awarded the grant to USC on June 11, 2008. Under the terms of the grant, USC was required to begin construction on or before June 11, 2009.

5. The South Carolina state legislature implemented widespread budget cuts during Fiscal Year 2009, and the state funds that USC expected to receive for the project were among the cuts. Consequently, USC was unable to begin construction by June 11, 2009. USC asked the EDA to extend the construction commencement deadline ("the deadline"), and the EDA issued Amendment No. 1 to the Financial Assistance Award on October 7, 2009 in response to USC's request. (A copy of Amendment No. 1 is attached hereto as Exhibit B.) Amendment No. 1 extended the deadline to June 11, 2010.

6. Amendment No. 1 also amended the scope of work, which it defined as follows: "The new Horizon I Research Facility is a new 125,320 sq. ft. facility, and the current EDA proposal would assist in completing 14,000 to 16,000 sq. ft. of shell space. Twenty wet labs will be constructed on the first floor of this multi-story building. The facility is located on the Innovista campus of USC in Columbia, S.C" ("the project").

7. USC was compelled to request another extension of the construction commencement deadline after it became clear that USC would not be able to begin construction by June 11, 2010. The primary impediment to timely commencement of construction was the rigorous state project review and approval process and the meeting schedules of the various state bodies that were involved. (A copy of Dr. Harris Pastides' letter to Mr. Asa R. Williams of the EDA, dated March 19, 2010, sets forth USC's request for an extension of the construction commencement deadline until November 2010 and is attached as Exhibit C.)

8. On April 8, 2010, the EDA issued Amendment No. 2 to the Financial Assistance Award. Amendment No. 2 extended the deadline to January 11, 2011. (A copy of Amendment No. 2 is attached hereto as Exhibit D.)

9. USC obtained all necessary approvals and proceeded to solicit bids from contractors for the project. On December 3, 2010, USC issued a Notice of Intent to Award that identified Rodgers Builders, Inc. ("Rodgers") as the responsible bidder with the lowest responsive bid. However, on December 13, 2010, Monroe Construction Company ("Monroe") protested USC's Intent to Award the contract for the project to Rodgers.

10. Once again USC was compelled to seek an extension of the deadline from the EDA. Representatives of USC met with Mr. Asa R. Williams of the EDA in Columbia on January 27, 2011 to discuss the status of the project and the grant. The deadline established by Amendment No. 2 had already past. The meeting participants discussed extending the deadline to June 11, 2011, but Mr. Williams indicated that it would be difficult for USC to obtain any extension, and he advised USC to direct its official request to Mr. H. Philip Paradice, Jr., Director of the EDA's Atlanta Regional Office. He also asked USC to identify the date by which USC expected the Chief Procurement Officer for Construction ("CPO") to post a decision on the protest. Mr. Williams strongly suggested that if the EDA consented to another extension beyond the January 11, 2011 deadline, then that extension would be the last extension the EDA would grant for the project.

11. Also on January 27, 2011, the CPO held an administrative hearing to consider Monroe's protest. The CPO posted his decision on February 14, 2011, in which he dismissed Monroe Construction Company's protest.

12. On February 15, 2011, USC formally asked the EDA to extend the deadline to June 11, 2011. USC's request letter stated in part, "We fully realize that construction must begin before June 11, 2011 or the grant will be forfeited." (A copy of Dr. Pamela K. Benicewicz's letter to Mr. H. Philip Paradice, Jr. is attached hereto as Exhibit E.)

13. The EDA issued Amendment No. 3 to the Financial Assistance Award on February 18, 2011. However, the EDA refused to extend the deadline to June 11, 2011. Instead, Amendment No. 3 extended the deadline to March 11, 2011. Amendment No. 3 also provides in part, "The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988)." (A copy of Amendment No. 3 is attached hereto as Exhibit F.)

14. Given the foregoing, USC is convinced that the EDA will terminate the grant if USC does not initiate construction by March 11, 2011, which is next Friday.

15. If USC loses the grant, then USC will be unable to provide wet lab incubation space in the Horizon I Research Facility for small start-up companies in the foreseeable future. This in turn would impair economic development in Columbia and throughout South Carolina.

16. A construction delay beyond March 11, 2011 will also postpone the upfit of laboratory space for Dr. Joachim Lauterbach, USC Endowed Professor, and thereby negatively impact both Dr. Lauterbach's and his team's research programs. Dr. Lauterbach's research program would continue to be hampered by lack of adequate laboratory space. USC hired Dr. Lauterbach as an Endowed Professor under the South Carolina Centers of Economic Excellence Program. He and his team have over \$11,000,000 in external research funding that is designed to enhance the economic development of the State of South Carolina through creation of clean energy sources. Further delay of these research activities will negatively impact economic development in South Carolina.

17. Dr. Pamela K. Benicewicz is USC's director of the project. She has secured additional grant funding from both the U.S. Small Business Administration (\$100,000) and Engenuity/HUD (\$335,000) for the project. These grants are designed to help fund incubation activities of small and/or startup technology companies. The ongoing construction delay is preventing USC from fulfilling its obligations under these grants.

FURTHER AFFIANT SAYETH NOT.


R. Steven Etheredge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 2nd DAY OF MARCH, 2011.


Notary Public/Justice of the Peace
My Commission Expires: My Commission Expires
October 19, 2015

U.S. DEPARTMENT OF COMMERCE

FINANCIAL ASSISTANCE AWARD

☒ GRANT ☐ COOPERATIVE AGREEMENT

AWARD PERIOD
From date of approval to 40 months after approval
6/18/08 - 10/10/2011

RECIPIENT NAME
University of South Carolina

AWARD NUMBER
04-01-06063

STREET ADDRESS
901 Sumter Street, 5th Floor

FEDERAL SHARE OF COST
\$1,000,000

CITY, STATE, ZIP CODE
Columbia, South Carolina 29208

RECIPIENT SHARE OF COST
\$1,087,227

AUTHORITY
Public Works and Economic Development Act of 1965, as amended, (42 U.S.C. §3121, et seq.)

TOTAL ESTIMATED COST
\$2,087,227

CDFA NO. AND PROJECT TITLE
11.300 Public Works Program / Technology Incubator

BUREAU	FUND	FCFY	PROJECT TASK	ORGANIZATION	OBJECT CLASS
20	40	08	0406063-000	04	4110

This Award approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Award provisions checked below and attached. Upon acceptance by the Recipient, two signed Award documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may declare this Award null and void.

- ☐ Department of Commerce Financial Assistance Standard Terms and Conditions
- ☒ Special Award Conditions (see attached Exhibit A)
- ☒ Line Item Budget (see attached Attachment No. 1)
- ☒ 15 CFR Part 14, Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit, and Commercial Organizations
- ☐ 15 CFR Part 24, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
- ☒ OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations
- ☐ OMB Circular A-122, Cost Principles for Nonprofit Organizations
- ☐ OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments
- ☒ OMB Circular A-21, Cost Principles for Educational Institutions
- ☒ 48 CFR Part 31, Contract Cost Principles and Procedures
- ☒ Other(s): EDA Standard Terms and Conditions for Construction Projects, dated October 2007

SIGNATURE OF DEPARTMENT OF COMMERCE GRANT OFFICER

H. Philip Paradise, Jr.

TITLE

Director, Atlanta Region

DATE

6/11/08

TYPED NAME AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL

Daniel L. Christinas

TITLE

R. Steven Etheredge, Director
Pre-Award Services
Sponsored Program Administrator

DATE

6/18/08

EXHIBIT "A"

U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)

Public Works and Development Facilities

Investment No.: 04-01-06063

Recipient: University of South Carolina

SPECIAL AWARD CONDITIONS

1. **PROJECT DEVELOPMENT TIME SCHEDULE:** The Recipient agrees to the following Project development time schedule:

Time allowed after Receipt of Financial Assistance Award for:

Return of Executed Financial Assistance Award..... 30 days
Start of Construction..... 12 Months from Date of Grant Award
Construction Period..... 24 Months

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

2. **GOALS FOR WOMEN AND MINORITIES IN CONSTRUCTION:** Department of Labor regulations set forth in 41 CFR 60-4 establish goals and timetables for participation of minorities and women in the construction industry. These regulations apply to all Federally assisted construction contracts in excess of \$10,000. The Recipient shall comply with these regulations and shall obtain compliance with 41 CFR 60-4 from contractors and subcontractors employed in the completion of the Project by including such notices, clauses and provisions in the Solicitations for Offers or Bids as required by 41 CFR 60-4. The goal for the participation of women in each trade area shall be as follows:

From April 1, 1981, until further notice: 6.9 percent

All changes to this goal, as published in the Federal Register in accordance with the Office of Federal Contract Compliance Programs regulations at 41 CFR 60-4.6, or any successor regulations, shall hereafter be incorporated by reference into these Special Award Conditions.

Goals for minority participation shall be as prescribed by Appendix B-80, Federal Register, Volume 45, No. 194, October 3, 1980, or subsequent publications. The Recipient shall include the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" (or cause them to be included, if appropriate) in all Federally assisted contracts and subcontracts. The goals and timetables for minority and female participation may not be less than those published pursuant to 41 CFR 60-4.6.

3. **AUDIT REQUIREMENTS:** Applicable audit requirements are contained in OMB Circular A-133. Any references to audit requirements contained in 15 CFR Part 29a and 15 CFR 29b in the terms and conditions governing this project are replaced by OMB Circular A-133.
4. **PERFORMANCE MEASURES:** The recipient agrees to report on program performance measures and program outcomes in such form and at such intervals as may be prescribed by EDA in compliance with the Government Performance and Results Act of 1993. Performance measures and reporting requirements that apply to program activities funded by this investment will be provided in a separate GPRA information collection document. EDA will advise recipients in writing within a reasonable period prior to the time of submission of the reports, and in the event that there are any modifications in the performance measures.
5. **REPORT ON UNLIQUIDATED OBLIGATIONS:** All Recipients of an EDA grant award of more than \$100,000 whose Award has not been fully disbursed is required to submit Form SF-269, "Financial Status Report" to EDA semi-annually to report on the status of unreimbursed obligations. This report will provide information on the amount of allowable Project expenses that have been incurred, but not claimed for reimbursement by the Recipient. The first report shall be as of March 30 of each year and shall be submitted to EDA no later than April 30 of each year, and the second report shall be of September 30 of each year and shall be submitted to EDA no later than October 30 of each year. The Recipient must submit a final financial report using Form SF-269 within 90 days of the expiration date of the Award (or from the date the Recipient accepts the Project from the contractor, whichever occurs earlier). Noncompliance with these requirements will result in the suspension of disbursements under this Award. Financial reports are to be submitted to the Project Officer.

6. **PRESERVATION OF OPEN COMPETITION AND GOVERNMENT NEUTRALITY TOWARDS GOVERNMENT CONTRACTORS LABOR RELATIONS ON FEDERAL AND FEDERALLY FUNDED CONSTRUCTION PROJECTS:** Pursuant to E.O. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federal Funded Construction Projects," unless the Project is exempted under section 5(c) of the order, bid specifications, project agreements, or other controlling documents for construction contracts awarded by Recipients of grants or cooperative agreements, or those of any construction manager acting on their behalf, shall not:
a) include any requirement or prohibition on Bidders, Offerors, Contractors, or Subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction Project(s); or b) otherwise discriminate against Bidders, Offerors, Contractors, or Subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction Project(s).
7. **ENGINEERING CERTIFICATE/CERTIFICATE OF TITLE:** The Recipient, prior to Solicitation of bids for construction of this Project, shall furnish to the Government an acceptable Engineering Certificate showing all lands, rights-of-way and easements necessary for construction of this Project along with an acceptable Certificate of Title on said lands, rights-of-way and easements showing good and merchantable title free of mortgages or other foreclosable liens.
8. **CONSTRUCTION START:** If significant construction (as determined by EDA) is not commenced within two years of approval of the project or by the date estimated for start of construction in the grant award (or the expiration of any extension granted in writing by EDA), whichever is later, the EDA grant will be automatically suspended and may be terminated if EDA determines, after consultation with the grant recipient, that construction to completion cannot reasonably be expected to proceed promptly and expeditiously.
9. **USEFUL LIFE:** The useful life of this project for purposes of the Covenant of Use, Purpose, and Ownership required by paragraph M.4. of the Standard Terms and Conditions, is hereby determined to be 20 years.
10. **LEASE OF BUILDING:** A master lease form for the incubator space funded by this grant award shall be subject to the prior written approval of the Economic Development Administration (EDA). Prior to EDA granting said approval, it must be satisfied, inter alia, that said lease arrangement is consistent with the authorized general and special purpose of the grant award; that said lease arrangement will provide adequate employment and economic benefits for the area in which the property is located; that said lease arrangement is consistent with EDA policies concerning, but not limited to, non-discrimination, and that the proposed Lessee is providing adequate compensation to the Lessor for said lease arrangement. Adequate compensation should be based on fair rental value as determined by a local commercial real estate broker.

11. **LEGAL:** Recipient shall provide the Government, for prior approval, any Operation & Management Agreement to be executed between the Recipient and the USC Research Foundation for the incubator space funded through this Financial Assistance Award.

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

PUBLIC WORKS PROJECT COST CLASSIFICATIONS

EDA Investment No. 04-01-06063

State: South Carolina

County: Richland

<u>Cost Classification</u>	<u>Proposed</u>	<u>Approved</u>
Administrative and legal expenses	\$	\$
Land, structures, and rights-of-way appraisals, etc.		
Relocation expenses and payments (Cost incidental to transfer of titles)		
Architectural and engineering fees		
Other architectural and engineering fees		
Project inspection fees and audit		
Site Work		
Demolition and removal		
Construction	1,982,866	1,982,866
Equipment		
Contingencies	104,361	104,361
TOTAL PROJECT COSTS	\$2,087,227	\$2,087,227

Remarks:

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS

Title II
Public Works and Economic Development Facilities
and
Economic Adjustment Assistance Construction Components



OCTOBER 2007

**U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION**

**STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS**

**Title II
Public Works and Economic Development Facilities
and
Economic Adjustment Assistance Construction Components**

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PREFACE

Terms and Conditions of the Award. This financial assistance award on Form CD-450 (this "Award"), executed by the Economic Development Administration ("EDA") and the Recipient, together with the EDA-approved project budget and scope of work, these construction standard terms and conditions, special award conditions, and all applicable federal statutory and regulatory requirements as incorporated by reference (e.g., all applicable statutes, regulations, Executive Orders, and Office of Management and Budget (OMB) Circulars), constitute the complete requirements, hereinafter referred to as the "Terms and Conditions," applicable to the EDA investment.

The Recipient and any subrecipient must, in addition to the assurances made as part of the application for investment assistance, comply with and require each of its contractors and subcontractors employed in the completion of the project to comply with the Terms and Conditions of this Award.

This Award is subject to the laws and regulations of the United States. Any inconsistency or conflict in the Terms and Conditions specified in this Award will be resolved according to the following order of precedence: public laws, regulations (including applicable notices published in the *Federal Register*), Executive Orders, OMB Circulars, EDA's construction standard terms and conditions, and special award conditions. A special award condition may take precedence on a case-by-case basis over a construction standard term or condition when warranted by specific project circumstances.

Some of EDA's construction terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes or regulations published in the *Federal Register* or the *Code of Federal Regulations* ("C.F.R."), Executive Orders, OMB Circulars, or the assurances required of the Recipient (See Forms SF-424B and SF-424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, Executive Order, OMB Circular, or assurance.

**ECONOMIC DEVELOPMENT ADMINISTRATION
STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS**

**Title II - Public Works and Economic Development Facilities
and
Title II - Economic Adjustment Construction Components**

.....

A. General Requirements and Responsibilities.

1. **Purpose.** The Economic Development Administration's ("EDA") grants for (i) public works (42 U.S.C. § 3141) and (ii) economic adjustment (42 U.S.C. § 3149) projects are designed to enhance regional competitiveness and promote long-term economic development in regions experiencing substantial economic distress. EDA provides construction, design, and engineering grants to assist distressed communities and regions revitalize, expand, and upgrade their physical infrastructure to attract new industry, encourage business expansion, diversify local economies, and generate or retain long-term private sector jobs and investment. The requirements set forth in these construction standard terms and conditions (the "Construction Standard Terms and Conditions") are applicable to construction, design, and engineering projects funded in whole or in part by EDA. Any necessary modifications of these requirements will be addressed in special award conditions to accommodate individual projects. In addition, these Construction Standard Terms and Conditions apply to construction projects of revolving loan funds ("RLFs") awarded after February 11, 1999 under section 209 of PWEDA (42 U.S.C. § 3149).
2. **Authority and Policies.** EDA is a bureau within the U.S. Department of Commerce established under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. § 3121 *et seq.*) ("PWEDA"). (See also 13 C.F.R. § 300.1.) As a federal agency, EDA is obligated to promulgate regulations and establish policies and procedures to:
 - a. Ensure compliance with applicable federal requirements;
 - b. Safeguard the public's interest in the grant assets; and
 - c. Promote the effective use of grant funds in accomplishing the purpose(s) for which they were awarded.

The Department or EDA may issue changes from time to time to the regulations and other requirements and policies that apply to this Award. Such changes may upon occasion increase administrative or programmatic flexibility in administering this Award in a manner that is mutually beneficial to EDA and to the Recipient. The implementation of any such regulatory, administrative, or programmatic change in administering this Award must have prior EDA written approval.

EDA's policy is to administer all Awards uniformly; however, there may be special circumstances that warrant a variance. To accommodate these circumstances and to encourage innovative and creative ways to address economic development problems, EDA will consider requests for variances to the procedures set out in these Construction Standard Terms and Conditions if they do not conflict with applicable federal statutory and regulatory requirements, are consistent with the goals of EDA's programs, and make sound economic and financial sense.

3. **Definitions.** Whenever used in these Construction Standard Terms and Conditions, the following words and phrases shall have the following meanings:

- a. "Assistant Secretary" refers to the Assistant Secretary of Commerce for Economic Development;
- b. "Award" – see the definition set out in the first paragraph of the *Preface* above;
- c. "Closeout" or "Project Closeout" refers to the process by which the Grants Officer determines that all applicable administrative actions and all required work under the Award has been completed by the Recipient and EDA;
- d. "Department" or "DOC" refers to the U.S. Department of Commerce;
- e. "Government" or "Federal Government" refers to EDA;
- f. "Grants Officer" refers to the Regional Director in the appropriate Regional Office;
- g. "Project Officer," refers to the EDA official responsible for technical or other programmatic aspects of the Award. During the post-approval stage of the Award, EDA generally assigns this role to an EDA Engineer/Construction Manager.
- h. "Project" refers to the activity for which the EDA grant was awarded;
- i. "Recipient" refers to the undersigned grantee of U.S. government funds under the Award to which this document is made a part;
- j. "Regional Office" refers to an EDA regional office;
- k. "Subrecipient" or "Subgrantee" refers to the legal entity to which a subaward is made and which is accountable to the Recipient for the use of grant funds (this term does not include subcontractors with whom the Recipient enters into a contractual agreement); and
- l. "Terms and Conditions of the Award" – see the definition set out in the first paragraph of the *Preface* above.

Capitalized terms used but not otherwise defined in these Construction Standard Terms and Conditions have the meanings ascribed to them in EDA's regulations at 13 C.F.R. §§ 300.3, 302.20, 307.8, and 314.1.

4. **Grant Recipient as Trustee.** The Recipient holds grant funds and any EDA-assisted project property in trust for the purpose(s) for which the Award was made. The Recipient's obligation to the Federal Government continues for the estimated useful life of the Project, as determined by EDA, during which EDA retains an undivided equitable reversionary interest (the "Federal Interest") in the property improved, in whole or in part, with the EDA investment. See 13 C.F.R. § 314.2.

If EDA determines that the Recipient fails or has failed to meet this obligation, the agency may exercise any rights or remedies with respect to its Federal Interest in the Project. However, EDA's forbearance in exercising any right or remedy in connection with the Federal Interest does not constitute a waiver thereof.

B. **Financial Requirements.**

1. **Financial Reports.**

- a. While EDA generally does not advance funds under an Award, the Recipient must submit Form SF-272, "Report of Federal Cash Transactions," for any Award where funds are to be advanced to the Recipient. Form SF-272 is due 15 working days following the end of each quarter for an Award under \$1 million, 15 working days following the end of each

month for an Award totaling \$1 million or more per year, or as otherwise specified in a special award condition. See 15 C.F.R. §§ 14.52(a)(2) or 24.41(c), as applicable.

- b. Any Recipient whose Award has not been fully disbursed is required to submit Form SF-269A, "Financial Status Report" to EDA annually to report on the status of unreimbursed obligations. This report will provide information on the amount of allowable Project expenses that have been incurred, but not claimed for reimbursement by the Recipient. The report will be as of September 30 of each year and shall be submitted to EDA no later than October 30 of each year. Instructions for completing and submitting Form SF-269A will be furnished to the Recipient at least 60 days before the report is due.
- c. The Recipient must submit a final financial report using Form SF-269 within 90 days of the expiration date of the Award (or from the date the Recipient accepts the Project from the contractor, whichever occurs earlier).
- d. Noncompliance with these requirements will result in the suspension of disbursements under this Award.
- e. Financial reports are to be submitted to the Project Officer.

2. Disbursement Requests.

- a. *Method of Payment.* The Grants Officer determines the appropriate method of payment. Unless otherwise specified in a special award condition, the method of payment under this Award will be reimbursement. Payments will be made through electronic funds transfers directly to the Recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3720B *et seq.*). The Award number shall be included on all payment-related correspondence, information, and forms.
- b. *Disbursement Requests.* The Recipient shall use Form SF-271, "Outlay Report and Request for Reimbursement for Construction Programs," to request reimbursement under the Award. Substantiating invoices and/or vouchers also must be provided. Each request for the disbursement of funds shall be made to the Project Officer. Form SF-271 can be downloaded from OMB's website at www.whitehouse.gov/omb/grants/grants_forms.html.
- c. *Initial Disbursement Request.* For the initial disbursement only, the Recipient must complete and submit Form SF-3881, "ACH Vendor/Miscellaneous Payment Enrollment Form," along with Form SF-271, to the Project Officer.
- d. *Interim Disbursement Requests.* All requests for interim disbursement shall be submitted using Form SF-271 and include substantiating invoices and/or vouchers.
- e. *Quarterly Financial Reporting.* For a Recipient that does not request disbursement at least once quarterly, Form SF-271 must be submitted at least once quarterly to the Project Officer for financial reporting purposes.

3. Federal and Non-Federal Cost Sharing.

- a. Awards that include the federal and non-federal share incorporate an estimated budget consisting of shared allowable costs. If actual allowable costs are less than the total

approved estimated budget, the federal share and non-federal share, or "Matching Share," shall be calculated by applying the approved federal and non-federal cost share ratios to actual allowable costs. *See also* 13 C.F.R. §§ 305.10 and 308.2. If actual allowable costs are greater than the total approved estimated budget, the federal share shall not exceed the total federal dollar amount authorized by this Award.

- b. The Matching Share, whether cash or in-kind, shall be paid out at the same rate as the federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for, or later commitment of, cash or in-kind contributions. In any case, the Recipient must meet its cost share commitment over the Award period.
- c. The Recipient shall show that the Matching Share is committed to the Project, available as needed, and not conditioned or encumbered in any way that precludes its use consistent with the requirements of EDA investment assistance. *See* 13 C.F.R. § 301.5.

4. **Budget Revisions and Transfers of Funds Among Categories.** The EDA-approved budget is the budget plan for the Project. The Recipient must notify EDA of any deviation from the budget or program plans, including any change in scope of work or the objective of the Project (even if there is no associated budget revision requiring prior written approval). *See* 15 C.F.R. §§ 14.25 or 24.30, as applicable.

- a. Requests for budget revisions to the EDA-approved budget in accordance with the provisions provided below must be submitted to the Grants Officer, who shall make the final determination on such requests and notify the Recipient in writing.
- b. Amendments to this Award require preparation of Form CD-451, "*Amendment to Financial Assistance Award*," for execution by both the Grants Officer and the Recipient. Form CD-451 is required for the following:
 - (i) Changes to the Project scope of work;
 - (ii) Budget revisions requiring additional EDA or non-EDA funds;
 - (iii) Budget revisions that result in cumulative transfer among direct cost categories in excess of 10 percent of the project cost and the federal share is greater than \$100,000;
 - (iv) The inclusion of costs for which EDA's prior approval is needed under the following OMB Circulars: Circular A-21, "*Cost Principles for Educational Institutions*" (2 C.F.R. part 220); Circular A-87, "*Cost Principles for State, Local, and Indian Tribal Governments*" (2 C.F.R. part 225); and Circular A-122, "*Cost Principles for Non-Profit Organizations*" (2 C.F.R. part 230), as applicable;
 - (v) Change of site location;
 - (vi) Change or addition of Recipient;
 - (vii) Time extensions; and
 - (viii) Modifications to the Terms and Conditions of the Award other than time extensions.
- c. When an Award supports both construction and non-construction work, the Recipient must obtain prior written approval from the Grants Officer before making any fund or budget transfer from non-construction to construction or vice versa. *See* 15 C.F.R. §§ 14.25(j) or 24.30(c)(3), as applicable.

- d. Transfers shall not be permitted if such transfers would cause any federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the Recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior written approval. In addition, this does not prohibit the Recipient from requesting the Grants Officer's approval for revisions to the budget. See 15 C.F.R. §§ 14.25(c) and (f) or 24.30(c), as applicable.
- e. The Recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.
- f. *Project Underrun Amounts.* Underrun amounts shall be transferred to the contingencies line item. Contingency funds are to be used to address situations resulting from unknown conditions and changes required for the fulfillment of authorized activities under this Award. EDA may approve the use of underrun funds to increase the federal share of the Project or further improve the Project, as long as the improvements are approved by EDA and consistent with the original purpose of the approved EDA investment. See 13 C.F.R. § 308.1.
- g. *Additional EDA Funding in Case of Project Overrun Amounts.* In accepting the Award, the Recipient agrees to fund any overrun amounts. Additional EDA assistance for an approved Project may not be approved.

5. Indirect Costs.

- a. Indirect costs are generally not applicable under this Award.
- b. When indirect costs are applicable, they will not be allowable charges against the Award unless specifically included as a line item in the EDA-approved budget. For Recipients that are educational institutions, the term "indirect cost" has been replaced with the term "facilities and administrative cost" under OMB Circular A-21, "Cost Principles for Educational Institutions" (see 2 C.F.R. part 220).
- c. Excess indirect costs may not be used to offset unallowable direct costs.
- d. If the Recipient has not previously established an indirect cost rate with a federal agency, the negotiation and approval of a rate is subject to the procedures in applicable cost principles and the following subparagraphs:
 - (i) *State, local, and Indian Tribal Governments; Educational Institutions; and Non-Profit Organizations (Non-Commercial Organizations)*

For the above-listed organizations, "cognizant federal agency" is generally defined as the agency that provides the largest dollar amount of direct federal funding. For those organizations for which DOC is cognizant or has oversight, DOC or its designee will either negotiate a fixed rate with carry-forward provisions for the Recipient or, in some instances, will limit its review to evaluating the procedures described in the Recipient's cost allocation methodology plan. Indirect cost rates and cost allocation methodology reviews are subject to future audits to determine actual indirect costs.

- (ii) Within 90 days of the Award start date, the Recipient shall submit to the address listed below documentation (indirect cost proposal, cost allocation plan, etc.) necessary to perform the review. The Recipient shall provide the Grants Officer with a copy of the transmittal letter.

Office of Acquisition Management
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W., Room # 6054
Washington, DC 20230

- (iii) The Recipient can use the fixed rate proposed in the indirect cost plan until such time as DOC provides a response to the submitted plan. Actual indirect costs must be calculated annually and adjustments made through the carry-forward provision used in calculating next year's rate. This calculation of actual indirect costs and the carry-forward provision is subject to audit. Indirect cost rate proposals must be submitted annually. An organization that has previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency within six months after the close of the Recipient's fiscal years.
- e. When DOC is not the oversight or cognizant federal agency, the Recipient shall provide the Grants Officer with a copy of a negotiated rate agreement or a copy of the transmittal letter submitted to the cognizant or oversight federal agency requesting a negotiated rate agreement.
- f. If the Recipient fails to submit the required documentation to DOC within 90 days of the Award start date, the Grants Officer may amend the Award to preclude the recovery of any indirect costs under the Award. If the DOC, oversight, or cognizant federal agency determines there good and sufficient cause to excuse the Recipient's delay in submitting the documentation, an extension of the 90-day due date may be approved by the Grants Officer.
- g. Regardless of any approved indirect cost rate applicable to the Award, the maximum dollar amount of allocable indirect costs for which DOC will reimburse the Recipient shall be the lesser of:
- (i) The line item amount for the federal share of indirect costs contained in the approved budget of the Award; or
 - (ii) The federal share of the total allocable indirect costs of the Award based on the indirect cost rate approved by a cognizant or oversight federal agency and current at the time the cost was incurred, provided the rate is approved on or before the Award end date.
6. **Incurring Costs Prior to Award.** Project activities carried out prior to EDA's approval of this Award shall be carried out at the sole risk of the Recipient. Such activity is subject to the rejection of the application, the disallowance of costs, or other adverse consequences as a result of noncompliance with EDA or federal law, including but not limited to procurement requirements, civil rights requirements, federal labor standards, or environmental and historic preservation requirements. Costs must be included in the EDA-approved budget and must be allowable costs under federal cost principles and under the Award. See 13 C.F.R. § 302.8.

7. Incurring Costs or Obligating Funds Beyond the Project Expiration Date.

- a. The Recipient shall not incur costs or obligate funds for any purpose pertaining to the Project, program, or activities beyond the expiration date stipulated in the Award (or the date of acceptance of the Project by the contractor, whichever occurs earlier), unless a written time extension of this Award is granted by the Grants Officer. The only costs that are authorized for a period of up to 90 days following that date are those strictly associated with Closeout activities. Closeout activities are generally limited to the preparation of final reports. See 15 C.F.R. §§ 14.71 or 24.50, as applicable.
- b. The Recipient shall adhere to the development time schedule and time limits set out in the Terms and Conditions of this Award. Any such Term or Condition supersedes the development time schedule and time limits set out in these Construction Standard Terms and Conditions.

8. Time Extensions.

- a. Unless otherwise authorized in 15 C.F.R. §§ 14.25(e)(2) or 24.30, as applicable, or a special award condition, any extension of the Project period can only be authorized by the Grants Officer in writing. A verbal or written assurance of funding from other than the Grants Officer, including Regional Office staff other than the Grants Officer, does not constitute authority to obligate funds for programmatic activities beyond the expiration date.
- b. The Recipient is responsible for implementing the Project in accordance with the development time schedule contained in this Award. As soon as the Recipient becomes aware that it will not be possible to meet the development time schedule, the Recipient must notify the Grants Officer. The Recipient's notice to EDA must contain the following:
 - (i) An explanation of the Recipient's inability to complete work by the specified date (e.g., a lengthy period of unusual weather delayed the contractor's ability to excavate the site, major re-engineering required in order to obtain State or federal approvals unplanned environmental mitigation required);
 - (ii) A statement that no other changes to the Project are contemplated;
 - (iii) Documentation that demonstrates there is still a bona fide need for the Project; and
 - (iv) A statement that no further delay is anticipated and that the Project can be completed within the revised time schedule.

EDA reserves the right to withhold disbursements while the Recipient is not in compliance with the time schedule. EDA reserves the right to suspend or terminate this Award if the Recipient fails to proceed with reasonable diligence to accomplish the Project as intended.

- c. EDA has no obligation to provide any additional prospective funding. Any amendment of this Award to increase funding or to extend the period of performance is at the sole discretion of EDA.
- 9. Tax Refunds.** Refunds of Federal Insurance Contributions Act and Federal Unemployment Tax Act ("FICA/FUTA") taxes received by the Recipient during or after the Project period must be refunded or credited to DOC where the benefits were financed with federal funds under the Award. The Recipient agrees to contact the Grants Officer immediately upon receipt of these refunds. The Recipient further agrees to refund portions of FICA/FUTA taxes

determined to belong to the Federal Government, including refunds received after the expiration of this Award.

- 10 **Program Income** For Projects that create long-term rental revenue (e.g., buildings or real property constructed or improved for the purpose of renting or leasing space), the Recipient agrees to use such income generated from the rental or lease of any Project facility in the following order of priority:

- a. Administration, operation, maintenance, and repair of Project facilities for their estimated useful life (as determined by EDA) in a manner consistent with good property management practice and in accordance with established building codes. This includes, where applicable, repayment of indebtedness resulting from any EDA-approved encumbrance (e.g., approved mortgage) on the EDA-assisted facility.
- b. Economic development activities that are authorized for support by EDA, provided such activities meet the economic development purposes of PWEDA.

See 15 C.F.R. §§ 14.24 or 24.25, as applicable.

C. Programmatic Requirements.

1. Quarterly Reporting.

- a. Quarterly performance reports must be submitted in accordance with the procedures set out in 15 C.F.R. parts 14 or 24, as applicable, and as indicated below. Failure to submit required reports in a timely manner may result in the withholding of payments under this Award, deferral of processing of new awards, amendments or supplemental funding pending the receipt of the overdue report(s), or the establishment of an account receivable for the difference between the total federal share of outlays last reported and the amount disbursed. See 13 C.F.R. § 302.18(a).
- b. Unless otherwise specified in this Award, the quarterly performance report will contain the following information for each Project program, function, or activity:
 - (i) A comparison of planned and actual accomplishments according to the timetable or list of Project objectives in this Award;
 - (ii) An explanation of any delays or failures to meet the Project timetable or Project goals; and
 - (iii) Any other pertinent information including, when appropriate, analysis, and explanation of cost overruns or high unit costs.
- c. Quarterly performance reports shall be submitted for each calendar quarter to the Project Officer. Each performance report will be due not later than January 15, April 15, July 15, and October 15 for the immediate previous quarter. The final Project performance report shall be submitted to EDA no more than 90 days after the Project Closeout date. This reporting requirement begins with the Recipient's acceptance of this Award and ends when EDA approves Project Closeout. See 15 C.F.R. §§ 14.51 or 24.40, as applicable.

The Recipient shall submit quarterly performance reports to the EDA Project Officer in hardcopy or electronically as specified in the special award conditions.

2. **Interim Reporting.** The Recipient must report any event that will or may have significant impact upon the Project, including delays or adverse conditions that materially may affect the ability of the Recipient to attain Project objectives within established time periods or meet the development time schedule. The Recipient should report such events to the Project Officer in the most time-expedient way possible and then, if the initial report was not in writing, report the event to the Project Officer in writing. Such a report shall include a statement of the event or issue, a statement of the course of action contemplated to resolve the matter, and any federal assistance needed to resolve the situation. If budget changes are required, the Recipient must submit a written budget revision request. See 15 C.F.R. §§ 14.25(h) or 24.30(c)(2), as applicable.
3. **Government Performance and Results Act Reporting.** In addition to quarterly performance reports, EDA may require the Recipient to report on Project performance beyond the Project Closeout date for Government Performance and Results Act (GPRA) purposes. In no case shall the Recipient be required to submit any report more than 10 years after the Project Closeout date. Data used by the Recipient in preparing reports shall be accurate and from independent sources whenever possible. See 13 C.F.R. § 302.16.
4. **Unsatisfactory Performance.** Failure to perform the work in accordance with the Terms and Conditions of the Award and maintain at least satisfactory performance at the discretion of EDA may result in the designation of the Recipient as high-risk and assignment of special award conditions or further action as specified in section C.7. of these Construction Standard Terms and Conditions. See 15 C.F.R. §§ 14.14 or 24.12, as applicable.
5. **Programmatic Changes.**
 - a. The Recipient must report to the Grants Officer, and request prior approval for, any programmatic change to the Award, in accordance with 15 C.F.R. §§ 14.25 or 24.30, as applicable.
 - b. The Recipient must obtain the Grants Officer's written approval for any programmatic changes to the Award. Any changes made to the Project without EDA's approval are made at the Recipient's risk of non-payment of costs, suspension, termination, or other EDA action with respect to the Award. See 13 C.F.R. § 302.7(b).
 - c. **Contract Change Orders.** After construction contracts for the Project have been executed, it may become necessary to alter them. This requires a formal contract change order that must be issued by the Recipient and accepted by the contractor. All contract change orders must be reviewed by EDA, even if EDA is not participating in the cost of the change order or the contract price is to be reduced. Work on the Project may continue pending EDA review and approval of the change order, but all such work will be at the Recipient's risk as to whether the cost of the work is eligible for EDA participation until the Recipient receives EDA approval for the change order. See 13 C.F.R. § 305.13.
6. **Other Federal Awards with Similar Programmatic Activities.** The Recipient shall immediately provide written notification to the Project Officer and the Grants Officer in the event that, subsequent to receipt of this Award, other financial assistance is received to support or fund any portion of the scope of work incorporated into this Award. EDA will not pay for costs that are funded by other sources.

7. **Non-Compliance with Award Provisions.** Failure to comply with any or all of the Terms and Conditions of this Award may have a negative impact on the Recipient's ability to receive future funding from the Department, including EDA, and may be considered grounds for any or all of the following actions: (a) the establishment of an account receivable; (b) withholding payments under any EDA or DOC Award(s) to the Recipient; (c) the imposition of additional special award conditions; (d) the suspension of any active DOC Awards; or (e) termination of any active DOC Awards.

The Recipient hereby agrees that the Government may at its option withhold disbursement of any Award funds if the Government learns or has knowledge that the Recipient has failed to comply in any manner with any Term or Condition of the Award. See 13 C.F.R. § 302.18. The Government may withhold funds until the violation or violations have been corrected to the Government's satisfaction. The Recipient further agrees to reimburse the Government for any ineligible costs paid from Award funds, or if the Recipient fails to reimburse the Government, the Government shall have the right to offset the amount of such ineligible costs from any undisbursed award funds held by the Government. The Recipient agrees to repay the Government for all ineligible costs incurred in connection with the Project and paid from the Award including but not limited to those costs determined to be ineligible if the Government learns of any Award violations after all Award funds have been disbursed. See 15 C.F.R. §§ 14.72-14.73 or 24.51-24.52, as applicable.

8. **Use by Beneficiary.** In the event a beneficiary of the Project fails to comply in any manner with certifications, assurances, or agreements that such beneficiary has entered into in accordance with EDA's requirements, the Recipient will reimburse the Government the Award amount or an amount to be determined by the Government pursuant to 13 C.F.R. §§ 314.4 and 314.5. Where the Government determines that the failure of a beneficiary to comply with EDA requirements affects a portion of the property benefited by the Award, the Recipient will reimburse the Government proportionately.
9. **Prohibition Against Assignment by the Recipient.** Except as provided in a special award condition, the Recipient shall not transfer, pledge, mortgage, or otherwise assign the Award, or any interest therein, or any claim arising thereunder, to any party or parties, banks, trust companies, or other financing or financial institutions.
10. **Disclaimer Provisions; Hold Harmless Requirement.**
- a. The United States expressly disclaims any and all responsibility or liability to the Recipient or third persons for the actions of the Recipient or third persons resulting in death, bodily injury, property damages, or any other losses resulting in any way from the performance of this Award or any subaward or subcontract under this Award.
 - b. The acceptance of this Award by the Recipient does not in any way constitute an agency relationship between the United States and the Recipient.
 - c. To the extent permitted by law, the Recipient agrees to indemnify and hold the Government harmless from and against all liabilities that the Government may incur as a result of providing an Award to assist, directly or indirectly, in the preparation of the Project site or construction, renovation, or repair of any facility on the Project site, to the extent that such liabilities are incurred because of toxic or hazardous contamination or groundwater, surface water, soil, or other conditions caused by operations of the Recipient or any of its

predecessors (other than the Government or its agents) on the property.
See 13 C.F.R. § 302.19.

11. **Prohibition on Use of Third Parties to Secure Award.** Unless otherwise specified in the special award conditions to this Award, the Recipient warrants that no person or selling agency has been employed or retained to solicit or secure this Award upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial or selling agencies maintained by the Recipient for the purpose of securing business. For breach or violation of this warrant, the Government has the right to annul this Award without liability, or at its discretion, to deduct from the Award sum, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.
12. **Payment of Attorneys' or Consultants' Fees.** No Award funds shall be used, directly or indirectly, to reimburse attorneys' or consultants' fees incurred in connection with obtaining investment assistance under PWEDA, such as, for example, preparing the application for EDA investment assistance. However, ordinary and reasonable attorneys' and consultants' fees incurred for meeting Award requirements, such as, for example, conducting a title search or preparing plans and specifications, may be eligible Project costs and may be paid out Award funds, provided such costs are otherwise eligible. See 13 C.F.R. § 302.10.
13. **Commencement of Construction.**
 - a. **Delayed Construction Starts.** If significant construction (as determined by EDA) is not commenced within two years of the Award date or by the date estimated for start of construction in this Award (or the expiration of any extension granted in writing by EDA), whichever is later, this Award will be automatically suspended and may be terminated if EDA determines, after consultation with the Recipient, that construction to completion cannot reasonably be expected to proceed promptly and expeditiously. If significant construction has not been commenced within three years of the Award date, an extension must be approved by the Assistant Secretary.
 - b. **Early Construction Starts.** The Recipient shall make a written request to EDA for early construction start permission (that is, after the date of Award, but before EDA gives formal approval for construction to commence). For Project costs to be eligible for EDA reimbursement, EDA must determine that the award of all contracts necessary for design and construction of the Project facilities is in compliance with the Terms and Conditions of this Award. If construction commences prior to EDA's determination, the Recipient proceeds at its own risk until EDA's review and concurrence. See 13 C.F.R. § 305.11.
 - c. **Project Sign.** The Recipient is responsible for constructing, erecting, and maintaining in good condition throughout the construction period a sign (or signs) in a conspicuous place at the Project site indicating that the Federal Government is participating in the Project. EDA will provide specifications for the sign and may require more than one sign if site conditions so warrant. If the EDA-recommended sign specifications conflict with State or local law, the Recipient may modify such recommended specifications so as to comply with the State or local law. See 13 C.F.R. § 305.12.
14. **Efficient Administration of Project.** The Recipient agrees to properly and efficiently administer, operate, and maintain the Project for its estimated useful life, as required by

section 504 of PWEDA (42 U.S.C. § 3194). If the Government determines, at any time during the estimated useful life of the facility, that the Project is not being properly and efficiently administered, operated, and maintained, the Government may terminate this Award and require the Recipient to repay the federal share. See 13 C.F.R. §§ 302.12, 302.18, and 314.2-314.4.

15. Conflicts-of-Interest Rules.

- a. An "Interested Party" is defined in 13 C.F.R. § 300.3 as "any officer, employee, or member of the board of directors or other governing board of the Recipient, including any other parties that advise, approve, recommend, or otherwise participate in the business decisions of the Recipient, such as agents, advisors, consultants, attorneys, accountants, or shareholders." An Interested Party includes the Interested Party's "Immediate Family" (defined in 13 C.F.R. § 300.3 as a person's spouse, parents, grandparents, siblings, children, and grandchildren, but does not include distant relatives, such as cousins, unless the distant relative lives in the same household as the person) and other persons directly connected to the Interested Party by law or through a business organization. In addition, "Immediate Family" includes an Interested Party's "significant other" or partner.
- b. The Recipient must establish safeguards to prohibit an Interested Party from using its position for a purpose that constitutes or presents the appearance of personal or organizational conflicts-of-interest or of personal gain. See 13 C.F.R. § 302.17(a) and (b), 15 C.F.R. §§ 14.42 or 24.36(b)(3), as applicable, and Forms SF-424B ("*Assurances - Non-Construction Projects*") and SF-424D ("*Assurances - Construction Projects*").
- c. An Interested Party must not receive any direct or indirect financial or personal benefits in connection with this Award or its use for payment or reimbursement of costs by or to the Recipient. A financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with the organization selected or to be selected for a subaward. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice. It also could result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field. See 13 C.F.R. § 302.17(b).

16. Record-Keeping Requirements.

- a. *Records.* The Recipient must maintain records that document compliance with the Terms and Conditions of this Award. At a minimum, the Recipient's records must fully disclose:
 - (i) The amount and disposition of EDA investment assistance;
 - (ii) All Project expenditures and procurement actions;
 - (iii) The total cost of the Project that the Award funds;
 - (iv) The amount and nature of the portion of Project costs provided by non-EDA sources;
 - (v) Contractor compliance with applicable federal requirements; and
 - (vi) Such other records as EDA determines will facilitate an effective audit.

b Records Retention.

In general, all records pertinent to this Award must be kept retained for a period of three years from the date of submission of the final project expenditure report (the final Form SF-27) for disbursement). The only exceptions are the following:

- (i) If any litigation, claim, or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved and final actions taken.
- (ii) Records for real property and equipment acquired with federal funds must be retained for three years after final disposition.
- (iii) When records are transferred or maintained by EDA, the three-year retention requirement is not applicable to the Recipient.

Records relating to indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations on the rate at which a particular group of costs is chargeable are subject to different retention requirements. See 15 C.F.R. §§ 14.53 or 24.42, as applicable.

The Recipient is responsible for monitoring any sub-recipients and contractors to ensure their compliance with the records retention requirements. The Recipient must immediately notify the Project Officer in case records are not retained for the general retention periods noted above. See 13 C.F.R. § 302.14 and 15 C.F.R. §§ 14.50-14.53 or §§ 24.40-24.42, as applicable.

17. Termination Actions.

- a. *Termination for Cause.* If the Recipient materially fails to comply with any of the Terms and Conditions of this Award, EDA has the right to terminate for cause all or any part of its obligation hereunder, including if:

- (i) Any representation made by the Recipient to the Government in connection with the application for Government assistance is incorrect or incomplete in any material respect;
- (ii) The intent and purpose and/or the economic feasibility of the Project is changed substantially so as to affect significantly the accomplishment of the Project as intended (including an unauthorized use of property as provided in 13 C.F.R. § 314.4);
- (iii) The Recipient has violated commitments it made in its application and supporting documents or has violated any of the Terms and Conditions of this Award,
- (iv) The conflicts-of-interest rules in 13 C.F.R. § 302.17 are violated; or
- (v) The Recipient fails to report immediately to the Government any change of authorized representative(s) acting in lieu of or on behalf of the Recipient.

In addition, EDA may take one or more of the actions set out in 15 C.F.R. §§ 14.62(a) or 24.43(a), as applicable

- b. *Termination for Convenience.* The Recipient may request at any time termination for convenience of this Award upon sending to the Grants Officer written notification in a form acceptable to EDA setting forth the reasons for requesting the termination and the effective date of such termination. See 15 C.F.R. §§ 14.61 or 24.44, as applicable.

18. **Project Closeout Procedures.** After construction is completed and the Project is closed out financially, the Recipient has an ongoing responsibility to properly administer, operate, and maintain the Project for its estimated useful life (as determined by EDA) in accordance with its original purpose. See 13 C.F.R. § 302.12. The Recipient must comply with all Award requirements and maintain records to document such compliance, which shall be made available for inspection by EDA or other Government officials as required.

a. **Final Disbursement.** When Project construction and final inspection have been completed, or substantially completed as determined by EDA, and the Recipient has accepted the Project from the contractor, the Recipient can begin the Closeout process by submitting the following documentation to EDA:

- (i) A request for final disbursement on an executed Form SF-271;
- (ii) A written certification that all costs claimed are for eligible activities under this Award, for which there is documentation in the Recipient's records;
- (iii) An executed certificate of final acceptance signed by the Recipient and the Recipient's architect/engineer;
- (iv) The Recipient's certification that its currently valid single or program-specific audit in accordance with OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," if applicable, does not contain any material findings (if the Recipient's currently valid OMB Circular A-133 audit does contain material findings, the Recipient shall submit the applicable audit in hardcopy to the Grants Officer);
- (v) The Recipient's certification that its currently valid audit (in accordance with OMB Circular A-133), if applicable, has been submitted to the Federal Audit Clearinghouse; and
- (vi) Other documentation as may be required by EDA.

EDA shall advise the Recipient of costs determined to be eligible and ineligible. If a balance of this Award is due to the Recipient, the balance will be paid by wire transfer. If the Recipient has received an amount in excess of the amount due the Recipient, the Recipient must refund the excess to EDA, payable to the U.S. Treasury.

As noted above, if the Recipient's currently valid OMB Circular A-133 audit contains material findings, the Recipient shall submit the audit in hardcopy to the Grants Officer before final disbursement.

- b. The Recipient shall submit, within 90 calendar days after the Project Closeout date, all financial, performance, and other reports as required by the Terms and Conditions of this Award. Additional GPRA reporting requirements also may apply.
- c. Unless EDA authorizes an extension, the Recipient shall liquidate all obligations incurred under this Award no later than 90 calendar days after acceptance of the Project from the contractor or before the expiration date of this Award, whichever occurs earlier.
- d. The Closeout of this Award does not affect any of the following:
 - (i) Audit requirements per OMB Circular A-133 and the related "Compliance Supplement;"
 - (ii) The right of EDA to disallow costs and recover funds on the basis of a later audit or other project review;

- (iii) The Recipient's obligation to return any funds due as a result of later corrections or other transactions; and
- (iv) Requirements for property management, records retention, and performance measurement reports.

D. Additional Requirements Relating to Construction Projects.

The Recipient and any subrecipient(s) must, in addition to other statutory and regulatory requirements detailed in these Construction Standard Terms and Conditions and the assurances made to EDA in connection with the Award, comply and require each of its contractors and subcontractors employed in the completion of the Project to comply with all applicable federal, State, territorial, and local laws, and in particular, the following federal public laws (and the regulations issued thereunder), Executive Orders, OMB Circulars, and local law requirements.

1. **The Davis-Bacon Act, as amended (40 U.S.C. §§ 3141-3144, 3146, 3147; 42 U.S.C. § 3212)**
Requiring minimum wages for mechanics and laborers employed on Federal Government public works projects to be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the Project is to be performed, or in the District of Columbia if the Project is to be performed there.
2. **The Contract Work Hours and Safety Standards Act, as amended (40 U.S.C. §§ 3701 - 3708)**
Providing work hour standards for every laborer and mechanic employed by any contractor or subcontractor in the performance of a federal public works project.
3. **The National Historic Preservation Act of 1966, as amended (16 U.S.C. § 470 *et seq.*), and the Advisory Council on Historic Preservation Guidelines**
Requiring projects involving federal funds to follow the requirements of the National Historic Preservation Act, which requires stewardship of historic properties.
4. **The Historical and Archeological Data Preservation Act of 1974, as amended (16 U.S.C. § 469a-1 *et seq.*)**

Requiring appropriate surveys and preservation efforts if a federally-licensed project may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data.
5. **Architectural Barriers Act of 1968, as amended (42 U.S.C. § 4151 *et seq.*), and the regulations issued thereunder, which prescribe standards for the design and construction of any building or facility intended to be accessible to the public or that may house handicapped employees.**

6. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. § 4601 *et seq.*), and implementing regulations issued at 49 C.F.R. part 24.

Establishing uniform policies for the fair and equitable treatment of persons, businesses, or farm operations affected by the acquisition, rehabilitation, or demolition of real property acquired for a project financed wholly or in part with federal financial assistance.

7. The Energy Conservation and Production Act (42 U.S.C. § 6834 *et seq.*)

Establishing energy efficiency performance standards for the construction of new residential and commercial structures undertaken with federal financial assistance.

8. Requirements for New Construction. For new building construction projects, the Recipient will comply with current local building codes, standards, and other requirements applicable to the Project.

E. Non-Discrimination Requirements. No person in the United States shall, on the ground of race, color, national origin, handicap, age, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance. The Recipient agrees to comply with the following non-discrimination requirements.

1. Statutory Provisions.

- a. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) and DOC implementing regulations published at 15 C.F.R. part 8, which prohibit discrimination on the grounds of race, color, or national origin under programs or activities receiving federal financial assistance;
- b. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*), which prohibits discrimination on the basis of sex under federally-assisted education programs or activities;
- c. Pub. L. No. 92-65, 42 U.S.C. § 3123 (which proscribes discrimination on the basis of sex in EDA assistance provided under PWEDA) and Pub. L. No. 94-369, 42 U.S.C. § 6709 (which proscribes discrimination on the basis of sex under the Local Public Works Program), and the Department's implementing regulations at 15 C.F.R. §§ 8.7-8.15
- d. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), and DOC implementing regulations published at 15 C.F.R. part 8b, which prohibit discrimination on the basis of handicap under any program or activity receiving or benefiting from federal assistance;
- e. The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 *et seq.*) and DOC implementing regulations published at 15 C.F.R. part 20, which prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance;
- f. The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), which prohibits discrimination on the basis of disability under programs, activities, and services provided

or made available by State and local governments or instrumentalities or agencies thereto, as well as public or private entities that provide public transportation; and

g. Other applicable federal statutes, regulations, and Executive Orders

2. Other Provisions.

- a. Parts II and III of Executive Order 11246 (30 Fed. Reg. 12319, 1965), as amended by Executive Order 11375 (32 Fed. Reg. 14303, 1967) and 12086 (43 Fed. Reg. 46501, 1978), requiring federally-assisted construction contracts to include the nondiscrimination provisions of §§ 202 and 203 of that Executive Order and Department of Labor regulations implementing Executive Order 11246 (41 C.F.R. § 60-1.4(b), 1991).
- b. Executive Order 13166 (August 11, 2000), "*Improving Access to Services for Persons With Limited English Proficiency*," and DOC policy guidance issued on March 24, 2003 (68 Fed. Reg. 14180) to federal financial assistance Recipients on the Title VI prohibition against national origin discrimination affecting Limited English Proficient ("LEP") persons.

3. Title VII Exemption for Religious Organizations.

Generally, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), provides that it shall be an unlawful employment practice for an employer to discharge any individual or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. However, Title VII, 42 U.S.C. § 2000e-1(a), expressly exempts from the prohibition against discrimination on the basis of religion, a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

F. Audits.

Under the Inspector General Act of 1978, as amended (5 U.S.C. App. 3, § 1 *et seq.*), an audit of the Award may be conducted at any time. The Department's Inspector General ("OIG"), or any of his or her duly authorized representatives, shall have access to any pertinent books, documents, papers, and records of the Recipient, whether written, printed, recorded, produced, or reproduced by any electronic, mechanical, magnetic, or other process or medium, in order to make audits, inspections, excerpts, transcripts, or other examinations as authorized by law. When the OIG requires a program audit on a DOC Award, the OIG will usually make the arrangements to audit the Award, whether the audit is performed by OIG personnel, an independent accountant under contract with DOC, or any other federal, State, or local audit entity.

1. Requirement to Have an OMB Circular A-133 Audit Performed; Organization-Wide, Program-Specific, and Project Audits.
 - a. Organization-wide or program-specific audits shall be performed in accordance with the Single-Audit Act Amendments of 1996, as implemented by OMB Circular A-133, "*Audits of States, Local Governments, and Non-Profit Organizations*," and the related "*Compliance Supplement*." Recipients that expend federal awards of \$500,000 or more in a fiscal year

shall have an audit conducted for that year in accordance with the requirements contained in OMB Circular A-133. A copy of the audit shall be submitted to the Bureau of the Census, which has been designated by OMB as a central clearinghouse. The address is:

Federal Audit Clearinghouse
1201 E. 10th Street
Jeffersonville, IN 47132

- b. In accordance with 15 C.F.R. § 14.26 l and (d), for-profit hospitals, commercial, and other organizations not covered by the audit provisions of OMB Circular A-133 that expend federal awards of \$500,000 or more in a fiscal year, are required to have a program-specific audit performed at the conclusion of the Project, but no less than once every five years. Some DOC programs have specific audit guidelines that will be incorporated into the Award. If DOC does not have a program-specific audit guide available for the program, the auditor should follow *Generally Accepted Government Auditing Standards* and the requirements for a program-specific audit as described in OMB Circular A-133 § ____235. A copy of the program-specific audit shall be submitted to the OIG at the following address with a copy of the transmittal letter to the Grants Officer:

Office of Inspector General
U.S. Department of Commerce
Atlanta Regional Office of Audits
401 West Peachtree Street, N.W., Suite 2742
Atlanta, GA 30308

2. Requirement to Submit Audit to EDA. If the Recipient's currently valid audit required under OMB Circular A-133 contains materials findings, the Recipient must submit the audit in hardcopy to the Grants Officer. See also section C.18.a. of these Construction Standard Terms and Conditions.
3. Audit Resolution Process.
- a. An audit of the Award may result in the disallowance of costs incurred by the Recipient and the establishment of a debt (account receivable) due to EDA. For this reason, the Recipient should take seriously its responsibility to respond to all audit findings and recommendations with adequate explanations and supporting evidence whenever audit results are disputed.
- b. In accordance with the *Federal Register* notice dated January 27, 1989 (54 Fed. Reg. 4053), a Recipient whose Award is audited has the following opportunities to dispute the proposed disallowance of costs and the establishment of a debt:
- (i) Unless the OIG determines otherwise, the Recipient has 30 days from the date of the transmittal of the "Draft Audit Report" to submit written comments and documentary evidence.
- (ii) The Recipient has 30 days from the date of the transmittal of the "Final Audit Report" to submit written comments and documentary evidence. There shall be no extension of this deadline.
- (iii) EDA shall review the documentary evidence submitted by the Recipient and shall notify the Recipient of the results in an "Audit Resolution Determination Letter." The Recipient has 30 days from the date of receipt of the Audit Resolution

Determination Letter to submit a written appeal. There shall be no extension of this deadline. The appeal is the last opportunity for the Recipient to submit written comments and documentary evidence that dispute the validity of the Audit Resolution Determination Letter.

- (iv) An appeal of the Audit Resolution Determination Letter does not prevent the establishment of the audit-related debt nor does it prevent the accrual of interest on such debt. If the Audit Resolution Determination Letter is overruled or modified on appeal, appropriate corrective action will be taken retroactively. An appeal will stay the offset of funds owed by the auditee against funds due to the auditee.

EDA shall review the Recipient's appeal and notify the Recipient of the results in an Appeal Determination Letter. After the opportunity to appeal has expired or after the Appeal Determination Letter has been rendered, EDA will not accept any further documentary evidence from the Recipient. No other administrative appeals are available in the Department.

G Debts.

1. Payment of Debts Owed the Federal Government.

Any debt determined to be owed to the Federal Government must be paid promptly by the Recipient. In accordance with 15 C.F.R. § 21.4, a debt will be considered delinquent if it is not paid within 15 days of the established due date, or if there is no due date, within 30 days of the billing date. Failure to pay a debt by the due date, or if there is no due date, within 30 days of the billing date, shall result in the imposition of late payment charges as noted below. In addition, failure to pay the debt or establish a repayment agreement by the due date, or if there is no due date, within 30 days of the billing date, will also result in the referral of the debt for collection action, including referral to the Treasury Offset Program (31 C.F.R. § 285.5) and may result in EDA taking further action as specified in section C.7. of these Construction Standard Terms and Conditions. The Recipient also may be suspended or debarred from further federal financial and non-financial assistance and benefits, as provided in 2 C.F.R. part 1326, "*Nonprocurement Debarment and Suspension*" until the debt has been paid in full or until a repayment agreement has been approved and payments are made in accordance with the repayment agreement. Payment of a debt may not come from other federally-sponsored programs. Verification that other federal funds have not been used will be made during future program visits and audits.

2. Late Payment Charges.

- a. An interest charge shall be assessed on the delinquent debt as established by the Debt Collection Act of 1982, as amended (31 U.S.C. § 3701 *et seq.*). The minimum annual interest rate to be assessed is the U.S. Department of the Treasury's "Current Value of Funds Rate" ("CVFR"). See www.fms.treas.gov/cvfr/index.html. The U.S. Department of Treasury annually publishes the CVFR in the *Federal Register*. The assessed rate shall remain fixed for the duration of the indebtedness.
- b. A penalty charge will be assessed on any portion of a debt that is delinquent for more than 90 days, although the charge will accrue and be assessed from the date the debt became delinquent.

c. An administrative charge will be assessed to cover processing and handling the amount due.

3 Barring Delinquent Federal Debtors from Obtaining Federal Loans or Loan Insurance Guarantees.

Pursuant to 31 U.S.C. § 3720B, unless waived, the Department is not permitted to extend financial assistance in the form of a loan, loan guaranty, or loan insurance to any person delinquent on a non-tax debt owed to a federal agency. This prohibition does not apply to disaster loans.

4. Effect of Judgment Lien on Eligibility for Federal Grants, Loans, or Programs.

Pursuant to 28 U.S.C. § 3201(e), unless waived by DOC, a debtor who has a judgment lien against the debtor's property for a debt to the United States shall not be eligible to receive any grant or loan that is made, insured, guaranteed or financed directly or indirectly by the U.S. or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied.

H. Name Check Reviews.

1. **Name Check Requirement.** A name check review will be performed by the OIG on key individuals associated with a nonprofit organization applicants, unless: (a) the proposed award amount is \$100,000 or less; (b) the applicant has been a Recipient of financial assistance from the Department for three or more consecutive years without any adverse programmatic or audit finding; or (c) the applicant is a unit of a State or local government. See *"Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements"* (69 Fed. Reg. 78389, December 30, 2004).
2. **Exemptions.** The following individuals who are acting on behalf of their respective entities in applying for assistance are exempt from the name check review process:
 - a. Officials of State and local governments;
 - b. Officials of accredited colleges and universities; and
 - c. Officials of economic development districts designated by EDA, including those entities whose designations are pending.
3. **Results of Name Checks.** EDA reserves the right to take any of the actions described in section H.4. below if any of the following occurs as a result of the name check review:
 - a. A key individual fails to submit the required Form CD-346, *"Applicant for Funding Assistance;"*
 - b. A key individual makes an incorrect statement or omits a material fact on Form CD-346; or
 - c. The name check reveals significant adverse findings that reflect on the business integrity or responsibility of the applicant and/or key individual.

4. **Action(s) Taken as a Result of Name Check Review.** If any situation listed in section H.3. above occurs, the Department, at its discretion, may take one or more of the following actions:
 - a. Consider suspension or termination of the Award;
 - b. Require the removal of any key individual from association with the management or implementation of the Award; or
 - c. Make appropriate provisions or revisions as needed (in the special award conditions to the Award) with respect to the method of payment and/or financial reporting requirements.
- I. **Government-wide Debarment and Suspension (Non-procurement).** The Recipient shall comply with the provisions of subpart C of 2 C.F.R. part 1326, "*Non-Procurement Debarment and Suspension*," which generally prohibit entities that have been debarred, suspended, or voluntarily excluded from participating in federal non-procurement transactions either through primary or lower-tier covered transactions.
- J. **Drug-free Workplace.** The Recipient shall comply with the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. § 702), and the Department's implementing regulations found at 15 C.F.R. part 29, "*Government-wide Requirements for Drug-Free Workplace (Financial Assistance)*," which require that the Recipient take steps to provide a drug-free workplace.
- K. **Lobbying Restrictions.**
 1. **Statutory Provisions.** The Recipient must comply with the provisions of 31 U.S.C. § 1352 and the Department's implementing regulations published at 15 C.F.R. part 28, "*New Restrictions on Lobbying*." These provisions generally prohibit the use of federal funds for lobbying the executive or legislative branches of the United States government in connection with the Award and require the disclosure of the use of non-federal funds for lobbying.
 2. **Disclosure of Lobbying Activities.** A Recipient receiving in excess of \$100,000 in federal funding must submit a completed Form SF-LLL, "*Disclosure of Lobbying Activities*," regarding the use of non-federal funds for lobbying. The Form SF-LLL must be submitted within 30 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Recipient must submit Form SF-LLL from all applicable parties, including those received from subrecipients, contractors, and subcontractors, to the Grants Officer.
 3. **Special Provisions Relating to Indian Tribes.** As set out in 31 U.S.C. § 1352, there are special provisions applicable to Indian Tribes, tribal organizations, or other Indian organizations eligible to receive federal contracts, grants, loans, or cooperative agreements. In accordance with Departmental policy, EDA recognizes Tribal Employment Rights Ordinances ("TEROs"), which may provide for preferences in contracting and employment, in connection with its financial assistance awards. Tribal ordinances requiring preference(s) in contracting, hiring, and firing, and the payment of a TERO fee generally are allowable provisions under federal awards granted to American Indian and Alaska Native tribal governments. The payment of the TERO fee, which supports the tribal employment rights office to administer the preferences, should generally be allowable as an expense that is "necessary and reasonable for

proper and efficient performance and administration" of an Award, as provided under the applicable cost principles set out in 2 C.F.R. part 225.

1. Codes of Conduct and Sub-Award, Contract and Subcontract Provisions.

1. **Code of Conduct for Recipients.** Pursuant to the certification in Form SF-424B, paragraph 3, the Recipient must maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest or personal gain in the administration of this Award.

2. Applicability of Award Provisions to Subrecipients.

- a. The Recipient shall require all subrecipients, including lower tier subrecipients, under the award to comply with the provisions of this Award, including applicable cost principles, administrative, and audit requirements.
- b. A Recipient is responsible for subrecipient monitoring, including the following:
 - (i) *Award Identification* – At the time of the Award, identifying to the subrecipient the federal award information (e.g., *Catalog of Federal Domestic Assistance* ("CFDA") title and number, name of the federal agency, and the Award number) and applicable compliance requirements.
 - (ii) *During-the-Award Monitoring* – Monitoring the subrecipient's use of federal awards through reporting, site visits, regular contact, or other means to provide reasonable assurance that the subrecipient administers federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.
 - (iii) *Subrecipient Audits* – Ensuring that a subrecipient expending federal awards of \$500,000 or more during the subrecipient's fiscal year have met the audit requirements of OMB Circular A-133 and that the required audits are completed within nine months of the end of the subrecipient's audit period. In addition, the Recipient is required to issue a management decision on audit findings within six months after receipt of the subrecipient's audit report and ensure that the subrecipient takes timely and appropriate corrective action on all audit findings. In cases of continued inability or unwillingness of a subrecipient to have the required audits, the pass-through entity shall take appropriate action using sanctions.

3. Competition and Codes of Conduct for Subawards.

- a. All subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. The Recipient must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition. In order to ensure objective subrecipient performance and eliminate unfair competitive advantage, subrecipients that develop or draft work requirements, statements of work, or requests for proposals shall be excluded from competing for such subawards.
- b. The Recipient shall maintain written standards of conduct governing the performance of its employees engaged in the Award and administration of subawards. No employee, officer

or agent shall participate in the selection, award, or administration of a subaward supported by federal funds if a real or apparent conflict-of-interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization in which he/she serves as an officer or which employs or is about to employ any of the parties mentioned in this section, has a financial interest or other interest in the organization selected or to be selected for a subaward. The officers, employees, and agents of the Recipient shall neither solicit nor accept anything of monetary value from subrecipients. However, the Recipient may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Recipient.

- c. A financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with the organization selected or to be selected for a subaward. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice. It could also result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field.

4. **Applicability of Provisions to Subawards, Contracts, and Subcontracts.**

- a. The Recipient shall include the following notice in each request for applications or bids:

Applicants/bidders for a lower tier covered transaction (except procurement contracts for goods and services under \$25,000 not requiring the consent of a DOC official) are subject to 2 C.F.R. part 1326, subpart C, "*Governmentwide Debarment and Suspension (Nonprocurement)*." In addition, applicants/bidders for a lower tier covered transaction for a subaward, contract, or subcontract greater than \$100,000 of federal funds at any tier are subject to 15 C.F.R. part 28, "*New Restrictions on Lobbying*." Applicants/bidders should familiarize themselves with these provisions, including the certification requirement. Therefore, applications for a lower tier covered transaction must include a Form CD-512, "*Certification Regarding Lobbying-Lower Tier Covered Transactions*," completed without modification.

- b. The Recipient shall include a term or condition in all lower tier covered transactions (subawards, contracts, and subcontracts), that the Award is subject to subpart C of 2 C.F.R. part 1326, "*Governmentwide Debarment and Suspension (Nonprocurement)*."
- c. The Recipient shall include a statement in all lower tier covered transactions (subawards, contracts, and subcontracts) exceeding \$100,000 in federal funds, that the subaward, contract, or subcontract is subject to 31 U.S.C § 1352, as implemented at 15 C.F.R. part 28, regarding new restrictions on lobbying. The Recipient shall further require the subrecipient, contractor, or subcontractor to submit a completed Form SF-LLL, "*Disclosure of Lobbying Activities*," regarding the use of non-federal funds for lobbying. The Form SF-LLL shall be submitted within 15 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Form SF-LLL shall be submitted from tier to tier until received by the Recipient. The Recipient must submit all disclosure

forms received, including those that report lobbying activity on its own behalf, to the Grants Officer within 30 days following the end of the calendar quarter.

5. **Minority-Owned Business Enterprise.** DOC encourages Recipients to utilize minority- and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency will assist Recipients in matching qualified minority owned enterprises with contract opportunities. For further information contact:

U.S. Department of Commerce
Minority Business Development Agency
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Website: www.mbdia.gov/

6. **Subaward and/or Contract to a Federal Agency.**

The Recipient, subrecipient, contractor and/or subcontractor shall not subgrant or subcontract any part of the approved Project to any agency or employee of DOC or other federal department, agency or instrumentality without the prior written approval of the Grants Officer.

Requests for approval of such action must be submitted to the Project Officer who shall review and make a recommendation to the Grants Officer. The Grants Officer shall make the final determination and will notify the Recipient in writing of the final determination.

7. **EDA Contracting Provisions for Construction Projects.** The Recipient shall use the "EDA Contracting Provisions for Construction Projects" as guidance in developing all construction contracts. The "EDA Contracting Provisions for Construction Projects" lists applicable EDA and other federal requirements for construction contracts.

M. Property.

1. **Standards.** With respect to any property acquired or improved in whole or in part with EDA investment assistance under this Award, the Recipient shall comply with the property management standards found in EDA's regulations at 13 C.F.R. part 314. Property acquired or improved in whole or in part by the Recipient under this Award may consist of real personal property, including intangible property such as money, notes, and security interests. Any inventory listings stipulated under the applicable uniform administrative requirements must be submitted to the Grants Officer on Form CD-281, "Report of Government Property in Possession of Contractor."
2. **Retention of Title.**
 - a. The Government shall determine who retains title to all nonexpendable personal property in accordance with 15 C.F.R. parts 14 or 24, as applicable. Use, management, and the disposition of such property will be in accordance with the requirements set out at 15 C.F.R. parts 14 or 24, as applicable, and EDA's regulations at 13 C.F.R. part 314.

- b. Title to real property (whether acquired partly or wholly with federal funds) will vest with the Recipient subject to the condition that the Recipient uses the real property for the authorized purpose of the Project.

3. EDA's Interest in Award Property.

- a. *Evidence of Title.* Prior to the advertisement of bids or at such other time as EDA requires, the Recipient must furnish evidence, satisfactory in form or substance to the Government, that title to real property required for the Project (other than property of the United States and as provided in 13 C.F.R. § 314.71) is vested in the Recipient and that such easements, rights-of-way, State or local government permits, long-term leases, or other items required for the Project have been or will be obtained by the Recipient within an acceptable time, as determined by the Government. All liens, mortgages, other encumbrances, reservations, reversionary interests, or other restrictions on title or the Recipient's interest in the property must be disclosed to EDA. With limited exceptions set forth in 13 C.F.R. § 314.6(h) or as otherwise authorized by EDA, Recipient-owned property acquired or improved in whole or in part with EDA investment assistance must not be used to secure a mortgage or deed of trust or in any way otherwise encumbered. See 13 C.F.R. § 314.6.

b. *Recording EDA's Interest in Property.*

- (i) For all Projects involving the acquisition, construction, or improvement of a building, as determined by EDA, the Recipient shall execute and furnish to the Government, prior to initial award disbursement, a lien, covenant, or other statement, satisfactory to EDA in form and substance, of EDA's interest in the property acquired or improved in whole or in part with the funds made available under this Award. EDA may require such statement after initial Award disbursement in the event that grant funds are being used to acquire such property. The statement must specify the estimated useful life of the Project and shall include but not be limited to the disposition, encumbrance, and the Federal Share compensation requirements. See 13 C.F.R. §§ 314.1 and 314.8(a).
- (ii) This lien, covenant, or other statement of the Government's interest must be perfected and placed of record in the real property records of the jurisdiction in which the property is located, all in accordance with applicable law. EDA shall require an opinion of counsel for the Recipient to substantiate that the document has been properly recorded. See 13 C.F.R. § 314.8(b).
- (iii) Facilities in which the EDA investment is only a small part of a larger project, as determined by EDA, may be exempted from the requirements listed in paragraphs M.3.b.(i) and (ii) above. See 13 C.F.R. § 314.81.
- c. The Recipient acknowledges that the Government retains an undivided equitable reversionary interest in the property acquired or improved in whole or in part with grant funds made available through this Award throughout the estimated useful life (as determined by EDA) of the Project, except in applicable instances set forth in 13 C.F.R. § 314.71. See also 13 C.F.R. § 314.2(a).

- d. The Recipient agrees that in the event that any interest in property acquired or improved in whole or in part with EDA investment assistance is disposed of, encumbered or alienated in any manner, or no longer used for the authorized purpose(s) of the Award during the Project's estimated useful life without EDA's written approval, the Government will be entitled to recover the Federal Share, as defined in 13 C.F.R. § 314.5. If, during the Project's estimated useful life, the property is no longer needed for the purpose(s) of the Award, as determined by EDA, EDA may permit its use for other acceptable purposes consistent with those authorized by PWEDA and 13 C.F.R. chapter III. See 13 C.F.R. § 314.3(b).
 - e. For purposes of any lien or security interest, the amount of the Federal Share shall be the that portion of the current fair market value of any property (after deducting any actual and reasonable selling and repair expenses incurred, to put the property into marketable condition) attributable to EDA's participation in the Project. See 13 C.F.R. § 314.5.
 - f. The alienation of Award property includes sale or other conveyance of the Recipient's interest, leasing or mortgaging the property, or granting an option for any of the foregoing.
4. Insurance and Bonding.
- a. *Recipients that are Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations.* The Recipient shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with federal funds as provided to property owned by the Recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award. See 15 C.F.R. § 14.31.
 - b. *Recipients that are State and Local Governments.* If the Award exceeds the simplified acquisition threshold, EDA may accept the Recipient's or subrecipient's bonding policy and requirements if EDA determines that the Federal Interest is adequately protected. If not, the following minimum requirements shall apply:
 - (i) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the proffered bid, execute such contractual documents as may be required within the time specified;
 - (ii) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract; and
 - (iii) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. See 15 C.F.R. § 24.36(h)
5. Leasing Restrictions. Leasing or renting of facilities or property is prohibited unless specifically authorized by EDA. The Recipient agrees that any leasing or renting of any facilities or property involved in this Project will be subject to the following:
- a. That said lease arrangement is consistent with the authorized general and special purpose of the Award;

- b. That said lease arrangement is for adequate consideration; and
 - c. That said lease arrangement is consistent with applicable EDA requirements concerning but not limited to nondiscrimination and environmental compliance.
6. **Use of Eminent Domain Prohibited.** The Recipient will use funds solely for the authorized use of the Project. Pursuant to Executive Order 13406, "*Protecting the Property Rights of the American People*," the Recipient agrees:
- a. Not to use any power of eminent domain available to the Recipient (including the commencement of eminent domain proceedings) for use in connection with the Project for the purpose of advancing the economic interests of private parties; and
 - b. Not to accept title to land, easements, or other interest in land acquired by the use of any power of eminent domain for use in connection with the Project for such purposes.

The Recipient agrees that any use of the power of eminent domain to acquire land, easements, or interests in land, whether by the Recipient or any other entity that has the power of eminent domain, in connection with the Project without prior written consent of EDA is an unauthorized use of the Project. If the Recipient puts the Project to an unauthorized use, the Recipient shall compensate EDA for its fair share in accord with 13 C.F.R. §§ 314.4 and 314.5, as same may be amended from time to time.

7. **Disposal of Real Property.**

- a. If EDA and the Recipient determine that property acquired or improved in whole or in part with EDA investment assistance is no longer needed for the original purpose(s) of this Award, the Recipient must obtain approval from the Government to use the property in other federal grant programs or in programs that have purposes consistent with those authorized by PWEDA and 13 C.F.R. chapter III. See 13 C.F.R. § 314.3(b).
- b. When property is not disposed of as provided above in section M.7.a. above, the Government shall determine final disposition and must be compensated by the Recipient for the Federal Share of the value of the property, plus costs and interest, as provided in 13 C.F.R. § 314.4.

N. **Environmental Requirements.**

Environmental impacts must be considered by federal decision-makers in their decisions whether or not to (i) approve a proposal for federal assistance; (ii) approve the proposal with mitigation; or (iii) approve a different proposal/grant having less adverse environmental impacts. Federal environmental laws require that the funding agency initiate a planning process with early consideration of potential environmental impacts that Project(s) funded with federal assistance may have on the environment. The Recipient and any subrecipients shall comply with all environmental standards, to include those prescribed under the following statutes and Executive Orders, and shall identify to the awarding agency any impact the Award may have on the environment. In some cases, the Grants Officer can withhold Award funds under a special award condition requiring the Recipient to submit additional environmental compliance information sufficient to enable the Department to make an assessment on any impacts that a Project may have on the environment.

1. The National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*)

The National Environmental Policy Act ("NEPA") and the Council on Environmental Quality ("CEQ") implementing regulations (40 C.F.R. parts 1500 - 1508) require that an environmental analysis be completed for all major federal actions significantly affecting the environment. NEPA applies to the actions of federal agencies and may include a federal agency's decision to fund non-federal projects under grants and cooperative agreements. Recipients of federal assistance are required to identify to the awarding agency any impact an award will have on the quality of the human environment and assist the agency to comply with NEPA. Recipients may also be requested to assist EDA in drafting an environmental assessment if EDA determines an assessment is required. If additional information is required during the period of the Award, funds can be withheld by the Grants Officer under a special award condition requiring the Recipient to submit additional environmental compliance information sufficient to enable EDA to make an assessment on any impacts that the Project may have on the environment.

2. Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. § 4371 - 4375)

Federally-supported public works facilities and activities that affect the environment shall be implemented in compliance with policies established under existing law.

3. Executive Order 12088, "*Federal Compliance with Pollution Control Standards*," (43 Fed. Reg. 47707, October 13, 1978), as amended

All necessary actions shall be taken for the prevention, control, and abatement of environmental pollution with respect to federally-supported facilities and activities

4. Executive Order 11514, "*Protection and Enhancement of Environmental Quality*," (35 Fed. Reg. 4247, March 5, 1970), as amended

Federally-supported facilities and activities shall be maintained and directed to meet national environmental goals.

5. Executive Order 11593, "*Protection and Enhancement of the Cultural Environment*," (36 Fed. Reg. 8921, May 13, 1971), as amended

Federally-owned sites, structures, and objects of historical, architectural, or archaeological significance shall be preserved, restored, and maintained.

6. Clean Air Act, Clean Water Act, and Executive Order 11738

Recipients must comply with the provisions of the Clean Air Act (42 U.S.C. § 7401 *et seq.*), Clean Water Act (42 U.S.C. § 1251 *et seq.*), and Executive Order 11738, and shall not use a facility on the Environmental Protection Agency's ("EPA") *List of Violating Facilities* in performing any Award that is nonexempt under 2 C.F.R. § 1532, and shall notify the EDA Project Officer in writing if it intends to use a facility that is on EPA's *List of Violating Facilities* or knows that the facility has been recommended to be placed on the List.

7. The Safe Drinking Water Act of 1974, as amended (42 U.S.C. § 300f *et seq.*)

This Act precludes federal assistance for any project that the EPA determines may contaminate a sole source aquifer so as to threaten public health.

8. Executive Order 11988, "*Floodplain Management*," (42 Fed. Reg. 26951, May 24, 1977) and Executive Order 11990, "*Protection of Wetlands*," (42 Fed. Reg. 26961, May 24, 1977)

Recipients must identify proposed actions in federally-defined floodplains and wetlands to enable the agency to make a determination whether there is an alternative to minimize any potential harm.

9. The Flood Disaster Protection Act of 1973, as amended (42 U.S.C. § 4002 *et seq.*), and regulations and guidelines issued thereunder by the U.S. Federal Emergency Management Administration ("FEMA") or by EDA

Flood insurance, when available, is required for federally-assisted construction or acquisition in flood-prone areas.

10. The Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1451 *et seq.*)

Funded projects must be consistent with a coastal State's approved management plan for the coastal zone.

11. The Coastal Barrier Resources Act, as amended, (16 U.S.C. § 3501 *et seq.*)

Restrictions are placed on federal funding for actions within a Coastal Barrier System.

12. The Wild and Scenic Rivers Act, as amended, (16 U.S.C. § 1271 *et seq.*)

This Act applies to awards that may affect existing or proposed components of the National Wild and Scenic Rivers system.

13. The Fish and Wildlife Coordination Act, as amended, (16 U.S.C. § 661 *et seq.*)

Requiring the evaluation the impacts to fish and wildlife from federally-assisted proposed water resource development projects.

14. The Endangered Species Act of 1973, as amended, (16 U.S.C. § 1531 *et seq.*)

The Recipient must identify any impact or activities that may involve a threatened or endangered species. Federal agencies have the responsibility to ensure that federal awards do not adversely affect protected species or habitats and must conduct the required reviews under the Endangered Species Act

15. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (42 U.S.C. § 9601 *et seq.*), as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. § 9662 *et seq.*)

These requirements address responsibilities of hazardous substance releases, threatened releases, and environmental cleanup. There is also a requirement to impose reporting and community involvement requirements to ensure disclosure of the release or disposal of regulated substances and cleanup of hazards.

16. The Resource Conservation and Recovery Act of 1976, as amended, (42 U.S.C. § 6901 *et seq.*)

This Act regulates the generation, transportation, treatment, and disposal of hazardous wastes, and also provides that Recipients of federal funds give preference in their procurement programs to the purchase of recycled products pursuant to EPA guidelines.

17. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 Fed. Reg. 7629, February 11, 1994)

This Order identifies and addresses adverse human health or environmental effects of programs, policies, and activities on low-income and minority populations.

18. The Lead-Based Paint Poisoning Prevention Act, as amended, (42 U.S.C. § 4821 *et seq.*)

Use of lead-based paint in residential structures constructed or rehabilitated by the Federal Government or with federal assistance is prohibited.

19. The Farmland Protection Policy Act, as amended, (7 U.S.C. § 4201 - 4209)

Projects are subject to review under this Act if they may irreversibly directly or indirectly convert farmland, including forest land, pastureland, cropland, or other land, to nonagricultural use.

20. The Noise Control Act of 1972, as amended, (42 U.S.C. § 4901 *et seq.*)

Federally-supported facilities and activities shall comply with federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

21. The Native American Graves Protection and Repatriation Act, as amended, (25 U.S.C. § 3001 *et seq.*)

This Act provides a process for returning certain Native American cultural items to lineal descendants, culturally affiliated Indian Tribes, and Native Hawaiian organizations

- O Compliance with Environmental Requirements. The Recipient agrees to notify the Grants Officer of any environmental requirement or restriction, regulatory or otherwise, with which it must comply. Before Project Closeout and final disbursement of Award funds, the Recipient further agrees to provide evidence satisfactory to the Grants Officer that any required environmental remediation has been completed: (1) in compliance with all applicable federal, State and local

regulations; and (2) as set forth in the applicable Lease, Finding of Suitability to Lease ("FOSL"), Lease in Furtherance of Conveyance, Quitclaim Deed, or other conveyance instrument and any amendments, supplements, or succeeding documents. Compliance with said laws or restrictions shall be included in any contract documents for Project construction. The Recipient must certify compliance before final disbursement of grant funds.

P. Miscellaneous Requirements.

1. Criminal and Prohibited Activities.

- a. The Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812) provides for the imposition of civil penalties against persons who make false, fictitious, or fraudulent claims to the Federal Government for money (including grants, loans, or other benefits).
- b. The Criminal False Claims Act and the False Statements Act (18 U.S.C. §§ 287 and 1001) provide for criminal prosecution of a person who knowingly makes or presents any false, fictitious, or fraudulent statements or representations or claims against the United States. Such person shall be subject to imprisonment of not more than five years and shall be subject to a fine.
- c. The Civil False Claims Act (31 U.S.C. § 3729) provides that suits under this Act can be brought by the Federal Government, or a person on behalf of the Federal Government, for false claims under federal assistance programs.
- d. The Copeland "Anti-Kickback" Act (18 U.S.C. § 874 and 40 U.S.C. § 276c), prohibits a person or organization engaged in a federally-supported Project from enticing an employee working on the Project from giving up a part of his compensation under an employment contract.

2. Foreign Travel.

- a. The Recipient shall comply with the provisions of the Fly America Act (49 U.S.C. § 40118). The implementing regulations of the Fly America Act are found at 41 C.F.R. §§ 301-10.131 - 301-10.143.
- b. The Fly America Act requires that federal travelers and others performing federal government-financed foreign air travel must use United States flag air carriers, to the extent that service by such carriers is available. Foreign air carriers may be used only in specific instances, such as when a United States flag air carrier is unavailable, or use of United States flag air carrier service will not accomplish the agency's mission.
- c. Use of foreign air carriers may also be used only if bilateral agreements permit such travel pursuant to 49 U.S.C. § 40118(b). The Department is not aware of any bilateral agreements that meet these requirements. Therefore, it is the responsibility of the Recipient to provide the Grants Officer with a copy of the applicable bilateral agreement if use of a foreign carrier under a bilateral agreement is anticipated.
- d. If a foreign air carrier is anticipated to be used, the Recipient must receive prior approval from the Grants Officer. When requesting such approval in accordance with the guidance provided by 41 C.F.R. § 301-10.142, the Recipient must provide a "certification" the

Grants Officer with the following: (i) his or her name; (ii) dates of travel; (iii) the origin and destination of travel; (iv) a detailed itinerary of travel; (v) the name of the air carrier and flight number for each leg of the trip; (vi) and a statement explaining why the Recipient meets one of the exceptions to the applicable regulations. If the use of a foreign air carrier is pursuant to a bilateral agreement, the Recipient must provide the Grants Officer with a copy of the agreement. The Grants Officer shall make the final determination and notify the Recipient in writing. Failure to adhere to the provisions of the Fly America Act will result in the Recipient not being reimbursed for any transportation costs for which the Recipient improperly used a foreign air carrier.

3. **American-Made Equipment and Products.** Recipients are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with funding provided under this Award.
4. **Intellectual Property Rights.**
 - a. **Inventions.** The intellectual property rights to any invention made by a Recipient under a DOC Award are determined by the Bayh-Dole Act, as amended (Pub. L. No. 96-517), and codified in 35 U.S.C. § 200 *et seq.*, except as otherwise required by law. The specific rights and responsibilities are described in more detail in 37 C.F.R. part 401, and in the particular, in the standard patent rights clause in 37 C.F.R. § 401.14, which is hereby incorporated by reference into this Award.
 - (i) **Ownership.**
 - (a) **Recipient.** The Recipient has the right to own any invention it makes (conceived or first reduced to practice) or that is made by its employees. The Recipient may not assign its rights to a third party without the permission of the Department unless it is to a patent management organization (i.e., a university's research foundation.) The Recipient's ownership rights are subject to the Federal Government's nonexclusive paid-up license and other rights.
 - (b) **Department.** If the Recipient elects not to own or does not elect rights or file a patent application within the time limits set forth in the standard patent rights clause, the Department may request an assignment of all rights, which is normally subject to a limited royalty free non-exclusive license for the Recipient. The Department owns any invention made solely by its employees, but may license the Recipient in accordance with the procedures in 37 C.F.R. part 404.
 - (c) **Inventor/Employee.** If neither the Recipient nor the Department is interested in owning an invention by a Recipient employee, the Recipient, with the written concurrence of the Department's Patent Counsel, may allow the inventor/employee to own the invention subject to certain restrictions as described in 37 C.F.R. § 401.9.
 - (d) **Joint Inventions.** Inventions made jointly by a Recipient and a Department employee will be owned jointly by the Recipient and DOC. However, the Department may transfer its rights to the Recipient as authorized by 35 U.S.C. § 202(e) and 37 C.F.R. § 401.10 if the Recipient is willing to patent and license

the invention in exchange for a share of "net" royalties based on the number of inventors (e.g., 50-50 if there is one Recipient and Department employee). The agreement will be prepared by the Department's Patent Counsel and may include other provisions, such as a royalty free license to the Federal Government and certain other entities. The Recipient also is authorized to transfer its rights to the Federal Government, which can agree to share royalties similarly as described above (35 U.S.C. § 202(e)).

(ii) *Responsibilities -iEdison.* The Recipient has responsibilities and duties set forth in the standard patent rights clause, which are not described below. The Recipient is expected to comply with all the requirements of the standard patent rights clause and 37 C.F.R. part 401. Recipients of DOC Awards are required to submit their disclosures and elections electronically using the Interagency Edison extramural invention reporting system (iEdison) at www.iEdison.gov. The Recipient may obtain a waiver of this electronic submission requirement by providing DOC compelling reasons for allowing the submission of paper copies of reports related to inventions.

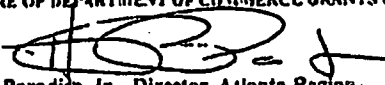
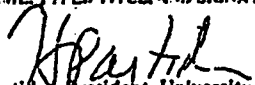
- b. *Patent Notification Procedures.* Pursuant to Executive Order 12889, the Department is required to notify the owner of any valid patent covering technology whenever the Department or its Recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this Award without a license or permission from the owner, the Recipient must notify the Grants Officer:

However, this notice does not necessarily mean that the Government authorizes and consents to any copyright or patent infringement occurring under the financial assistance.

- c. *Data, Databases, and Software.* The rights to any work produced or purchased under a DOC Award are determined by 15 C.F.R. §§ 14.36 or 24.34, as applicable. Such works may include data, databases, or software. The Recipient owns any work produced or purchased under a DOC Award subject to the Department's right to obtain, reproduce, publish, or otherwise use the work or authorize others to receive, reproduce, publish, or otherwise use the data for Federal Government purposes.
- d. *Copyright.* The Recipient may copyright any work produced under a DOC Award subject to the Department's royalty-free, non-exclusive, and irrevocable right to reproduce, publish or otherwise use the work or authorize others to do so for Federal Government purposes. Works jointly authored by the Department and Recipient employees may be copyrighted, but only the part authored by the Recipient is protected under 17 U.S.C. § 105, which provides that works produced by Federal Government employees are not copyrightable in the United States. If the contributions of the authors cannot be separated, the copyright status of the joint work is questionable. On occasion, the Department may ask the Recipient to transfer to the Department its copyright in a particular work when the Department is undertaking the primary dissemination of the work. Ownership of copyright by the Federal Government through assignment is permitted under 17 U.S.C. § 105.

5. Increasing Seat Belt Use in the United States. Pursuant to Executive Order 13043, Recipients should encourage employees and contractors to enforce on-the-job seat belt policies and programs when operating company-owned, rented, or personally-owned vehicles.
6. Research Involving Human Subjects
 - a. All proposed research involving human subjects must be conducted in accordance with 15 C.F.R. part 27, "Protection of Human Subjects." No research involving human subjects is permitted under this Award unless expressly authorized by special award condition, or otherwise authorized in writing by the Grants Officer.
 - b. Federal policy defines a human subject as a living individual about whom an investigator conducting research obtains (i) data through intervention or interaction with the individual, or (ii) identifiable private information. Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.
 - c. The Department's regulations at 15 C.F.R. part 27 require that Recipients maintain appropriate policies and procedures for the protection of human subjects. In the event it becomes evident that human subjects may be involved in carrying out the purpose(s) of this Award, the Recipient shall submit appropriate documentation to the Project Officer for approval. This documentation may include:
 - (i) Documentation establishing approval of the Project by an institutional review board ("IRB") approved for government-wide use under Department of Health and Human Services guidelines (see 15 C.F.R. § 27.103);
 - (ii) Documentation to support an exemption for the Project under 15 C.F.R. § 27.101(b),
 - (iii) Documentation to support deferral for an exemption or IRB review under 15 C.F.R. § 27.118; or
 - (iv) Documentation of IRB approval of any modification to a prior approved protocol or to an informed consent form.
 - d. No work involving human subjects may be undertaken, conducted, or costs incurred or charged for human subjects research until the appropriate documentation is approved in writing by the Grants Officer. Notwithstanding this prohibition, work may be initiated or costs incurred or charged to the Project for protocol or instrument development related to human subjects research.
7. Federal Employee Expenses. Federal agencies are generally barred from accepting funds from a Recipient to pay transportation, travel, or other expenses for any federal employee unless specifically approved in the terms of the Award. Use of Award funds (federal or non-federal) or the Recipient's provision of in-kind goods or services for the purposes of transportation, travel, or any other expenses for any federal employee may raise appropriation augmentation issues. In addition, DOC policy prohibits the acceptance of gifts, including travel payments for federal employees, from Recipients or applicants regardless of the source.

8. **Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally-Funded Construction Projects.** Pursuant to Executive Order 13202, "*Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally-Funded Construction Projects*," unless the Project is exempted under section 51 of the Order, bid specifications, Project-related agreements, or other controlling documents for construction contracts awarded by Recipients or any construction manager acting on their behalf, shall not:
 - a. Include any requirement or prohibition on bidders, offerors, contractors, or subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction Project(s); or
 - b. Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction Project(s).
9. **Minority Serving Institutions ("MSIs") Initiative.** Pursuant to Executive Orders 13256 (President's Board of Advisors on Historically Black Colleges and Universities), 13230 (President's Advisory Commission on Educational Excellence for Hispanic Americans), and 13270 (Tribal Colleges and Universities), the Department is strongly committed to broadening the participation of MSIs in its financial assistance programs. The Department's goals include achieving full participation of MSIs in order to advance the development of human potential, strengthen the nation's capacity to provide high-quality education, and increase opportunities for MSIs to participate in and benefit from federal financial assistance programs. The Department encourages all applicants and Recipients to include meaningful participation of MSIs. Institutions eligible to be considered MSIs are listed on the U.S. Department of Education's website.
10. **Research Misconduct.** Scientific or research misconduct refers to the fabrication, falsification or plagiarism in proposing, performing, or reviewing research, or in reporting research results. It does not include honest errors or differences of opinion. The Recipient organization has the primary responsibility to investigate allegations and provide reports to the Federal Government. Funds expended on an activity that is determined to be invalid or unreliable because of scientific misconduct may result in a disallowance of costs for which the institution may be liable for repayment to the awarding agency. The Office of Science and Technology Policy at the White House published in the "*Federal Register*" on December 6, 2000 a final policy that addressed research misconduct (65 Fed. Reg. 76260). The policy was developed by the National Science and Technology Council. The Department requires that any allegation be submitted to the Grants Officer, who also will notify the OIG of such allegation. Generally, the Recipient organization shall investigate the allegation and submit its findings to the Grants Officer. The Department may accept the Recipient's findings or proceed with its own investigation. The Grants Officer shall inform the Recipient of the Department's final determination.
11. **Publications, Videos and Acknowledgment of Sponsorship.** Publication of the results or findings of a research Project in appropriate professional journals and production of video or other media is encouraged as an important method of recording and reporting scientific information. It is also a constructive means to expand access to federally-funded research. The Recipient is required to submit a copy to the funding agency and when releasing

FORM 100-451 (REV. 10-03) DATE 10-10-10				U.S. DEPARTMENT OF COMMERCE AMENDMENT TO FINANCIAL ASSISTANCE AWARD		☒ GRANT ☐ COOPERATIVE AGREEMENT
				CFDA NO. AND PROJECT TITLE 11.300 Public Works Program / Technology incubator		
				AWARD NUMBER D4-01-06063		
RECIPIENT NAME University of South Carolina				AMENDMENT NUMBER 2		
STREET ADDRESS 901 Sumter Street, 5 th Floor				EFFECTIVE DATE Date of Award Amendment Approval		
CITY, STATE, ZIP CODE Columbia, South Carolina 29208				EXTEND WORK COMPLETION TO 51 Months		
BUREAU 20	FUND 40	PCFY 10	PROJECT-TASK 0406063-001	ORGANIZATION 04	OBJECT CLASS 4110	
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST	
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00	
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00	
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00	
REASON(S) FOR AMENDMENT A no cost change in the Project Development Time Schedule.						
This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.						
☒ Special Award Conditions (See attached Exhibit A) ☐ Line Item Budget ☐ Other(s) _____						
SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER  H. Philip Paradise, Jr., Director, Atlanta Region				DATE 4/9/10		
TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL  Harris Partides, President, University of South Carolina				DATE 4/13/10		

ADMINISTRATION/PSG ELECTRONIC FORM

information related to a funded Project include a statement that the Project or effort undertaken was or is sponsored by DOC. The Recipient also is responsible for ensuring that every publication of material (including Internet sites and videos) based on or developed under an Award, except scientific articles or papers appearing in scientific, technical or professional journals, contains the following disclaimer. "This [report/video] was prepared by [Recipient name] under [Award number] from [name of operating unit], U.S. Department of Commerce. The statements, findings, conclusions and recommendations are those of the author(s) and do not necessarily reflect the views of the [name of operating unit] or the U.S. Department of Commerce." This disclaimer also applies to videos produced under DOC Awards.

12. **Care and Use of Live Vertebrate Animals.** Recipients must comply with the Laboratory Animal Welfare Act of 1966 (Pub. L. No. 89-544), as amended (7 U.S.C. § 2131 *et seq.*) (animal acquisition, transport, care, handling, and use in projects), and the implementing regulations at 9 C.F.R. parts 1, 2, and 3; the Endangered Species Act (16 U.S.C. § 1531 *et seq.*); the Marine Mammal Protection Act (16 U.S.C. § 1361 *et seq.*) (taking possession, transport, purchase, sale, export or import of wildlife and plants); the Non-indigenous Aquatic Nuisance Prevention and Control Act (16 U.S.C. § 4701 *et seq.*) (ensure preventive measures are taken or that probable harm of using species is minimal if there is an escape or release); and all other applicable statutes pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by federal financial assistance. No research involving vertebrate animals is permitted under any DOC Award unless authorized by the Grants Officer.
13. **Homeland Security Directive.** If the performance of this Award requires the Recipient to have physical access to federal premises for more than 180 days or access to a federal information system, personal identity verification procedures must be implemented. Any items or services delivered under this Award shall comply with the Department's personal identity verification procedures that implement Homeland Security Presidential Directive - 12, FIPS PUB 201, and OMB Memorandum M-05-24. The Recipient shall insert this clause in all subawards or contracts when the subaward recipient or contractor is required to have physical access to a federally-controlled facility or access to a federal information system.
14. **Compliance with Department of Commerce Bureau of Industry and Security Export Administration Regulations.**
 - a. This clause applies to the extent that this Award involves access to export-controlled information or technology.
 - b. In performing this Award, the Recipient may gain access to export-controlled information or technology. The Recipient is responsible for compliance with all applicable laws and regulations regarding export-controlled information and technology, including deemed exports. The Recipient shall establish and maintain throughout performance of this Award effective export compliance procedures at non-DOC facilities. At a minimum, these export compliance procedures must include adequate controls of physical, verbal, visual, and electronic access to export-controlled information and technology.

c. *Definitions.*

- (i) *Deemed Export.* The Export Administration Regulations ("EAR") define a deemed export as any release of technology or source code subject to the EAR to a foreign national, both in the United States and abroad. Such release is "deemed" to be an export to the home country of the foreign national. See 15 C.F.R. § 734.2(b)(2)(ii).
- (ii) *Export-controlled information and technology.* Export-controlled information and technology subject to the EAR (15 C.F.R. §§ 730-774), implemented by the Department's Bureau of Industry and Security, or the "International Traffic In Arms Regulations" ("ITAR") (22 C.F.R. §§ 120-130), implemented by the Department of State, respectively. This includes but is not limited to dual-use items, defense articles and any related assistance, services, software, or technical data as defined in the EAR and ITAR.
- d. The Recipient shall control access to all export-controlled information and technology that it possesses or that comes into its possession in performance of this Award, to ensure that access is restricted, or licensed, as required by applicable federal laws, Executive Orders, or regulations.
- e. Nothing in the Terms and Conditions of this Award is intended to change, supersede or waive the requirements of applicable federal laws, Executive Orders, or regulations.
- f. The Recipient shall include this subsection entitled "*Compliance with Department of Commerce Bureau of Industry and Security Export Administration Regulations,*" including this subparagraph (f), in all lower-tier transactions (sub-awards, contracts, and subcontracts) under this Award that may involve access to export-controlled information technology.

APPENDIX

THE FOLLOWING REFERENCE MATERIALS AND FORMS ARE AVAILABLE ONLINE:

1. 2 C.F.R. part 220 (codifying OMB Circular A-21, "Cost Principles for Educational Institutions")
2. 2 C.F.R. part 225 (codifying OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments")
3. 2 C.F.R. part 230 (codifying OMB Circular A-122, "Cost Principles for Nonprofit Organizations")
4. 2 C.F.R. part 1326, "Non-Procurement Debarment and Suspension"
5. 13 C.F.R. chapter III (EDA's regulations)
6. 15 C.F.R. part 14, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations" (codifying OMB Circular A-110).
7. 15 C.F.R. part 24, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"
8. 15 C.F.R. part 4, "Disclosure of Government Information"
9. 15 C.F.R. part 27, "Protection of Human Subjects"
10. 15 C.F.R. part 28, "New Restrictions on Lobbying"
11. 15 C.F.R. part 29, "Government-wide Requirements for Drug-Free Workplace (Financial Assistance)"
12. 48 C.F.R. part 31, "Contract Cost Principles and Procedures"
13. OMB Circular A-133, "Audits of States, Local Governments and Nonprofit Organizations," and the related Compliance Supplement
14. OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments"

To access EDA's regulations, visit EDA's Internet website at www.eda.gov/InvestmentsGrants/Lawreg.xml.

To access the Code of Federal Regulations (C.F.R.), visit the Government Printing Office's Internet website at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=%2Findex.tpl>.

To access the OMB Circulars, visit OMB's Internet website at www.whitehouse.gov/omb/circulars/index.html.

To access the Davis Bacon wage rate determinations, visit the Department of Labor's Internet website at www.wdol.gov/.

EDA FORMS:

1. Form CD-281, "Report of Government Property in Possession of Contractor"
2. Form CD-451, "Amendment to Financial Assistance Award"
3. Form CD-346, "Identification - Applicant for Funding Assistance"
4. Form SF-269, "Financial Status Report"
5. Form SF-270, "Request for Advance or Reimbursement" (with Instructions)
6. Form SF-271, "Outlay Report and Request for Reimbursement for Construction Programs"
7. Form SF-272, "Federal Cash Transaction Report"
8. Form SF-LLL, "Disclosure of Lobbying Activities"

To access Department of Commerce forms ("CD"), visit the Department's Internet website at http://ocio.os.doc.gov/ITPolicyandPrograms/Electronic_Forms/index.htm.

To access the Standard Forms ("SF"), visit the General Services Administration's Internet website at www.gsa.gov/portal/gsa/ep/formslibrary.do?formType=SF.



UNITED STATES DEPARTMENT OF COMMERCE
Economic Development Administration
Atlanta Regional Office
Suite 1820
401 West Peachtree St., N.W.
Atlanta, Georgia 30308-3510

October 14, 2009

In reply refer to:
EDA Investment No. 04-01-06063
University of South Carolina. SC

Mr. R. Steven Etheredge
Director, Pre-Award Services
University of South Carolina
901 Sumter Street, 5th Floor
Columbia, South Carolina 29208

Dear Mr. Etheredge:

The Economic Development Administration (EDA) approves the action requested by the University of South Carolina to modify the Scope of Work and extend the Project Development Time Schedule of the technology incubator. This action was necessary because the Recipient has experienced budget cuts from the Stat of South Carolina.

Enclosed are three signed copies of the AMENDMENT TO FINANCIAL ASSISTANCE AWARD. Your acceptance of the terms and conditions of the award should be indicated by the signature of your principal official on all three signed copies. Two of the executed copies should be returned to the Director, Atlanta Regional Office, Economic Development Administration, 401 West Peachtree Street, N.W., Suite 1820, Atlanta, Georgia 30308-3510 no later than October 30, 2009.

Should you have any questions, please contact Asa R. Williams at -04-730-3821, or email awilliams3@eda.doc.gov.

Sincerely,



H. Philip Paradise, Jr.
Director, Atlanta Region

Enclosures: Amendment to Financial Assistance Award (3)
Amendment "A" - Exhibit No. 1(3)

cc: Mr. Tommy Coggins, Director
Office of Sponsored Awards
208 Osborne Administration Building
University of South Carolina
Columbia, South Carolina 29208



FORM D-41
(SIA 12-21)
DAD 12-21

U.S. DEPARTMENT OF COMMERCE

☒ GRANT ☐ COOPERATIVE AGREEMENT

AMENDMENT TO
FINANCIAL ASSISTANCE AWARD

CFDA NO. AND PROJECT TITLE

11.309 Public Works Program / Technology incubator

AWARD NUMBER

04-01-06063

RECIPIENT NAME

University of South Carolina

AMENDMENT NUMBER

1

STREET ADDRESS

901 Sumter Street, 5th Floor

EFFECTIVE DATE

October 7, 2009

CITY, STATE, ZIP CODE

Columbia, South Carolina 29208

EXTEND WORK COMPLETION TO

51 Months

BUREAU	FUND	FCFY	PROJECT-TASK	ORGANIZATION	OBJECT CLASS
20	40	10	0406063-001	04	4110
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00

REASON(S) FOR AMENDMENT

A no cost change in the Scope of Work and extend the Project Development Time Schedule.

This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.

☒ Special Award Conditions

☐ Line Item Budget

☒ Other(s) Scope of Work

SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER

H. Philip Paradise, Jr., Director, Atlanta Region

DATE

10/14/09

TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL

R. Steven Etheredge, Director, Pre-Award Services

DATE

10/20/09

ADMINISTRATIVE/PSG ELECTRONIC FORM

EXHIBIT "A"

U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)

Public Works and Development Facilities
Amendment No. 1

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

1. **PROJECT DEVELOPMENT TIME SCHEDULE:** The Recipient agrees to the following Project development time schedule:

Time allowed after Receipt of Financial Assistance Award for:

Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....24 Months from Date of Grant Award
Construction Period..... 24 Months

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

AMENDED SCOPE OF WORK

The new Horizon I Research Facility is a new 125,320 sq. ft. facility, and the current EDA proposal would assist in completing 14,000 to 16,000 sq. ft. of shell space. Twenty wet labs will be constructed on the first floor of this multi-story building. The facility is located on the Innovista campus of USC in Columbia, S.C.



March 19, 2010

HARRIS PASTIDES
PRESIDENT

Asa R. Williams, Civil Engineer/Project Manager
U.S. Department of Commerce
Economic Development Administration
Atlanta Regional Office
401 W. Peachtree St. N.W., Suite 1820
Atlanta, GA 30308-3510

Subject: EDA AWARD 04-01-06063
University of South Carolina Wet-Lab Facility (IdeaLabs)

Dear Mr. Williams,

Thank you for visiting with us on Tuesday, March 16, to discuss the status of the above referenced EDA Award to build a wet-lab facility in the new Horizon I building at the University of South Carolina (USC). Attached you will find the schedule for project completion, as well as a schematic of the floor plan. I believe that these two items have also been provided to you in pdf format via e-mail by our architects.

I understand that one project extension has already been requested by the university, indicating a construction start date of June 2010. As you can see from the attached schedule, due to the rigorous approval process and the limited number of times per year these boards meet, the current schedule indicates that construction cannot begin until November of this year. Please understand that Phase I (Planning/Design) of the project has been approved by all required parties - from the USC Buildings and Grounds Committee, the USC Board of Trustees, through the South Carolina Commission of Higher Education, the Joint Bond Review Committee, and the SC Budget and Control Board. Phase II (Construction) of the project has been approved by all university boards. The final approval meeting with the SC Budget and Control Board is scheduled for June 15, 2010.

UNIVERSITY OF SOUTH CAROLINA • COLUMBIA, SOUTH CAROLINA 29208 • 803.777-2001 • FAX 803/777-3264

AN EQUAL OPPORTUNITY INSTITUTION

RECORD ON APPEAL 110

March 19, 2010

Page two

Mr. Williams, you have, and understandably so, expressed concern at the current status of the project, as it indicates another four or five month delay in construction commencement. As I stated during our meeting, we have the funds fully committed and sequestered for this project, and fully expect the SC Budget and Control Board to give its approval during its June meeting. If we didn't have this expectation, we would not have requested to be on their agenda.

If this schedule is unacceptable to you, we are open to any other suggestion you might have that would allow us to begin construction in June, thus preventing our loss of the EDA award. Several ideas were discussed during your visit, and we are more than willing to work with you in pursuing these approaches as you deem necessary.

Please let us know how we might best work with you to insure the success of this project. Thank you again for your personal visit, and consideration of our needs.

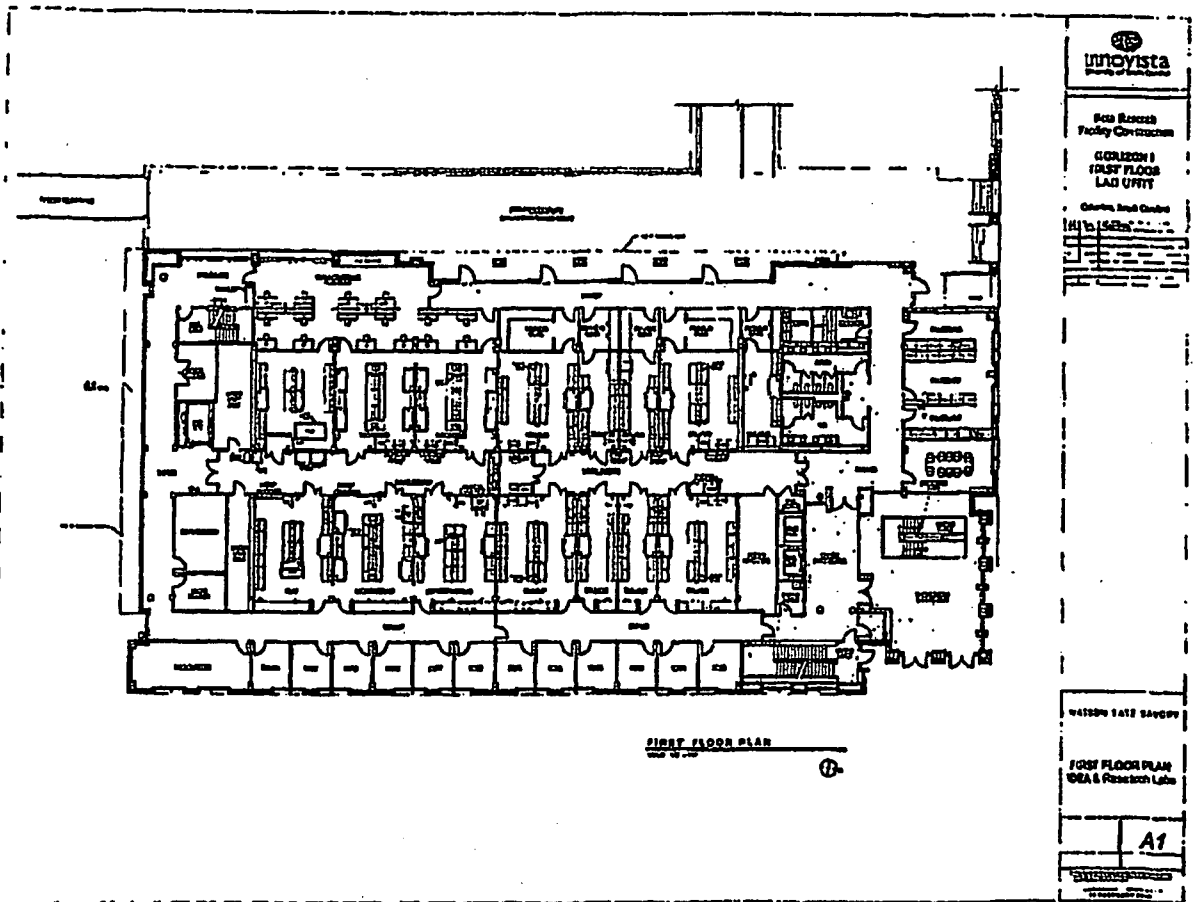
Sincerely,



Harris Pastides

Enclosures

HP/pb





UNITED STATES DEPARTMENT OF COMMERCE
Economic Development Administration
Atlanta Regional Office
Suite 1820
401 West Peachtree St., N.W.
Atlanta, Georgia 30308-3510

April 8, 2010

In reply refer to:
EDA Investment No. 04-01-06063
University of South Carolina, SC

Mr. Harris Pastides
President
University of South Carolina
Osborne Administration Building, suite 202
Columbia, South Carolina 29208

Dear Mr. Pastides:

The Economic Development Administration (EDA) approves the action requested by the University of South Carolina to extend the Project Development Time Schedule of the technology incubator. This action was necessary because the Recipient has experienced various delays in the review process from the State of South Carolina.

Enclosed to Dr. Benicewicz are three signed copies of the AMENDMENT TO FINANCIAL ASSISTANCE AWARD. Your acceptance of the terms and conditions of the award should be indicated by your signature on all three signed copies. Two of the executed copies should be returned to the Director, C/O Asa Williams, Atlanta Regional Office, Economic Development Administration, 401 West Peachtree Street, N.W., Suite 1820, Atlanta, Georgia 30308-3510 no later than May 9, 2010.

Should you have any questions, please contact Asa R. Williams at 404-730-3821, or email awilliams3@eda.doc.gov.

Sincerely,

/s/ H. Philip Paradice, Jr.

H. Philip Paradice, Jr.
Director, Atlanta Region

Enclosures: Amendment to Financial Assistance Award (3)
Amendment "A" - Exhibit No. 1(3)

cc: Pamela K. Benicewicz, Ph.D.
Associate Vice President for Research
Osborne Administration Building, Suite 202
University of South Carolina
Columbia, South Carolina 29208



EXHIBIT "A"

U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)

Public Works and Development Facilities
Amendment No. 2

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

1. PROJECT DEVELOPMENT TIME SCHEDULE: The Recipient agrees to the following Project development time schedule:

Time allowed after Receipt of Financial Assistance Award for:

Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....31 Months from Date of Grant Award
Construction Period..... 24 Months

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).



Date: February 15, 2011

H. Philip Paradise, Jr., Director
U.S. Department of Commerce
Economic Development Administration
Atlanta Regional Office
401 West Peachtree Street, N.W., Suite 1820
Atlanta, Georgia 30308-3510

Office of the Vice President
for Research and Graduate Education

Re: EDA Award Number: 04-01-06063
Columbia, SC

Subject: Request for Start of Construction Extension

Dear Mr. Paradise:

Mr. Asa Williams of your office met with project representatives at the University of South Carolina (USC) on Thursday, January 27th to discuss the status of the above referenced EDA award, the purpose of which is to build a wet-lab facility in the new Horizon I building at USC. As he indicated during this meeting, our grant from the EDA is now at risk because project construction did not begin on or before 1/11/11 per the terms of the contract. However, as we indicated during the meeting, we had met all of the EDA requirements needed to begin construction by this date. We announced a bid award in early December. Unfortunately, as we notified Mr. Williams on Dec. 16th, USC received a bid award protest. A meeting was immediately scheduled with the State Engineer and a hearing held on January 27th. The State Engineer promised a written decision by February 14th. On February 14th, the State Engineer dismissed the protest. We are therefore requesting an extension of the construction start date so that we may continue with the project. We fully realize that construction must begin before June 11, 2011 or the grant will be forfeited.

Mr. Paradise, we are fully committed to completion of this project, as it represents a significant piece of our university's economic development strategy. As you know, an economy that is based on the innovations and inventions that come from our higher educational institutions is often referred to as a "knowledge-based economy". The argument goes, as the federal government spends millions of dollars on basic scientific research in universities, new jobs will be created by the inventions that result from this research, thereby promoting state and regional economic development from the nearby universities. The difficulty is that, traditionally, the translation of scientific discoveries into marketable products has been non-existent (the research remains in the labs) or excessively slow. At USC we are trying to create a faster path from the lab to the market. One approach we are taking is to build wet-lab space in a building (Horizon I) that is devoted to the research efforts of CoEE endowed chairs. CoEEs, or Centers of Economic Excellence, were established by the SC legislature in 2002 (please see <http://www.sccoe.org/>). Thirty million dollars a year has been allocated to the three major research institutions of the state, portions of which when matched by a non-state source (typically an industry or

H. Philip Paradise, Jr., Director

Page 2

February 15, 2011

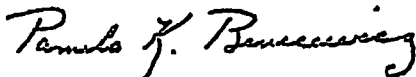
private investor), are used to establish an endowment which supports a CoEE. These endowments are typically between \$4 and \$10 million dollars. A world-renowned scientist or engineer from outside the state is then recruited to run the center. In Horizon I alone there are currently three endowed chairs (one for the Solid Oxide Fuel Cell CoEE, one for the Polymer Nanocomposite CoEE, and one for the Generation of Clean Electricity CoEE). Plans for housing at least three or four more CoEE endowed chairs in this building are moving forward (recruitments are underway). The wet-lab space being funded by the EDA grant will be housed in this building. This will provide nearby, economical space for the researchers to locate startup businesses requiring wet-lab space that they may be associated with, or a place for close collaborations with industrial partners where wet-lab space is required. No such space currently exists in Columbia.

It is clear that to spur innovation and ultimately create jobs universities must make it easy for scientists and engineers to build businesses that can take their breakthroughs in the lab to the market. A bridge must be built between the researchers and entrepreneurs and/or business-savvy people. At the University of South Carolina, we are exploring and implementing new ways to accomplish this. It is evident that if the means by which technology is commercialized can be improved, new science-related jobs will be created, and not just for holders of doctoral degrees. Many of the jobs will in fact go to the employees of science-based startup companies. USC has been awarded two additional grants, one from the EDA for the "Innovista Innovation Center" and one from the SBA for the "Innovista Center for Entrepreneurial Development". These are being utilized to help bridge the gap between the researchers and entrepreneurs, to create a one-stop shop to provide education and services for our researchers to learn about technology commercialization, and a place for entrepreneurs to find technology that they might wish to advance.

Clearly the University of South Carolina fully supports the commercialization of its technology by nurturing science and engineering startups and collaborations with industrial partners and entrepreneurs. Our Research park, Innovista, provides the physical place and the vision of what we are trying to achieve. It is grants such as those provided by the EDA that are crucial to helping us achieve our goals. We hope that you will view our request favorably.

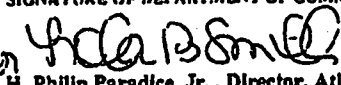
Should you require additional information please contact me at (803) 777-5455.

Sincerely,



Pamela K. Benicewicz, Ph.D.
Associate Vice President, Research & Graduate Education

PB/sp

FORM CD-451 (REV. 10-93) DAO 103-16				U.S. DEPARTMENT OF COMMERCE AMENDMENT TO FINANCIAL ASSISTANCE AWARD		☒ GRANT ☐ COOPERATIVE AGREEMENT
				CFDA NO. AND PROJECT TITLE 11.300 Public Works Program / Technology Incubator		
				AWARD NUMBER 04-01-06063		
RECIPIENT NAME University of South Carolina				AMENDMENT NUMBER 3		
STREET ADDRESS 901 Sumter Street, 5 th Floor				EFFECTIVE DATE Date of Award Amendment Approval		
CITY, STATE, ZIP CODE Columbia, South Carolina 29208				EXTEND WORK COMPLETION TO 58 Months		
BUREAU 20	FUND 40	FCFY 10	PROJECT-TASK 0405063-001	ORGANIZATION 04	OBJECT CLASS 4110	
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST	
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00	
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00	
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00	
REASON(S) FOR AMENDMENT A no cost change in the Project Development Time Schedule. This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.						
☒ Special Award Conditions (See attached Exhibit A) ☐ Line Item Budget ☐ Other(s) _____						
SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER  H. Philip Paradise, Jr., Director, Atlanta Region				DATE 2-18-11		
TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL  Harris Pastides, President, University of South Carolina				DATE 2/21/11		

ADMINISTRATION/PSG ELECTRONIC FORM

EXHIBIT "A"

**U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)**

**Public Works and Development Facilities
Amendment No. 3**

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

- 1. PROJECT DEVELOPMENT TIME SCHEDULE: The Recipient agrees to the following Project development time schedule:**

Time allowed after Receipt of Financial Assistance Award for:

**Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....33 Months from Date of Grant Award
Construction Period..... 24 Months**

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

P/d. 170 27.1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST

DECISION

MONROE CONSTRUCTION
COMPANY

CASE NO. 2011-011

v.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE:
FEBRUARY 14, 2011

HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
STATE PROJECT NO. H27-6071-LC

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request by Monroe Construction Company (Monroe), under the provisions of section 11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of the Horizon 1 First Floor Laboratory Upfit bid (the Project), for the University of South Carolina (USC). On January 27, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review by hearing. At the hearing, attorneys D. Ryan McCabe and Katherine B. Barroll represented Monroe, attorney Boyd B. Nicholson, Jr., represented Rodgers Builders, Inc. (Rodgers), and attorney George W. Lampl, III represented USC. Appearing as witnesses were Eric Monroe, Monroe's President, Frank Kerr, estimator for Monroe, Terry Horomanski, Rodgers' Senior Vice President for Construction Operations, Thomas N. Opal, Senior Project Manager for USC, Kay Keilser, Procurement Specialist/Contract Administrator for USC, Lind Jackson, Contract Administrator for USC, and Regina R. Floyd, architect with Watson Tate Savory Liollo. During the hearing, the CPOC received Exhibits 1 through 11 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Monroe's statement of protest is attached as Exhibit A and incorporated herein by reference.

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On September 13, 2010, USC advertised for bids to construct the Project. [Hearing Ex. 2] Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010. [Hearing Ex. 5]
2. The solicitation documents and bid form provided for two base bids. [Hearing Ex. 3]
3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project. [Hearing Ex. 3]
4. By the time for receipt of bids, USC had received nineteen bids. [Hearing Ex. 6]
5. Rodgers submitted a low bid of \$3,149,000 for base bid two. Monroe submitted the third low bid of \$3,230,000 for base bid two.¹ [Hearing Ex. 6]
6. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two. [Hearing Ex. 7]
7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. (Hill) was not a licensed pressure and process piping contractor.

MOTIONS

At the beginning of the hearing and again at the close of Monroe's case-in-chief, USC and Rodgers moved to dismiss Monroe's protest. First, they argued that Monroe, by the terms of its protest, was only protesting the responsiveness of Rodgers' bid and that an examination of Rodgers' bid shows that it is responsive on its face. Second, they argued that a protest issue regarding Rodgers' responsibility is untimely because Monroe did not raise it in its protest letter and therefore failed to put the parties on notice. Finally, they argue that even if Monroe's protest letter is found to sufficiently raise a protest regarding Rodgers' responsibility, then Monroe's protest should be dismissed because an examination of the facts shows that Rodgers and his listed subcontractors were responsible.²

¹ Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two. Sumwalt was notified of the hearing but declined to attend.

² At issue is the responsibility of Rodgers' plumbing subcontractor which effects Rodgers' responsibility.

After examining Mr. Monroe during the hearing, USC and Rodgers also moved to dismiss Monroe's protest on the ground that Monroe no longer had standing.

Motion Regarding Responsiveness

Monroe's protest alleges that by failing to list a mechanical contractor with a pressure and process piping subclassification along with a mechanical contractor with a plumbing subclassification in the space on the bid form for listing the plumbing subcontractor, Rodgers and all other bidders except Monroe were nonresponsive.³ However, USC and Rodgers argue that Rodgers' bid was responsive on its face and therefore this allegation should be dismissed.

Prior to 1993, the Procurement Review Panel (Panel) issued a number of orders stating that a failure to list subcontractor in the manner required by law rendered a bid non-responsive.⁴ In doing so, the Panel relied on SC Code Ann § 11-35-3020(2)(b)(ii) which stated that "failure to list subcontractors in accordance with this section ... shall render the prime contractor's bid unresponsive."

In 1993, the General Assembly amended § 11-35-3020(2)(b)(ii) to state, "Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." Thus, under the current statute, as long as the bidder lists a subcontractor in each space for listing a subcontractor, his bid is responsive. Protest of Brantley Construction Co., Inc., Case No. 1999-3. Here Rodgers listed Hill in the space on the bid form for listing the plumbing subcontractor(s). Therefore, the CPOC agrees with USC's and Rodgers' motion and finds that Rodgers' bid was responsive. Accordingly, the CPOC dismisses Monroe's protest on the issue of responsiveness.

Motions Regarding Responsibility

First, USC and Rodgers argue that Monroe does not protest USC's determination that Rodgers was a responsible bidder and as a result, the CPOC cannot entertain any argument to the contrary that Monroe presented at the hearing. "A protest ... 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." *SC Code Ann § 11-35-4210(2)(b)*. While the specificity of a protest is not to be judged on highly technical or formal standards, the protest 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.

³ Monroe is the only bidder of nineteen that listed both a licensed plumbing contractor and a licensed process piping contractor in the space on the bid form for listing the plumbing subcontractor. All other bidders listed only a licensed plumbing contractor.

⁴ In Re. Protest of ECB Construction Co., Inc., Case No. 1989-7; In Re. Protest of Tricon Associates, Inc., Case No. 1991-11; In Re. Protest of Pizzagalli Construction Company, Case No. 1991-8; In Re. Protest of Delta Industrial Electric Co., Inc., Case No. 1992-8(I).

Monroe's protest letter included the following statements:

Rogers' [sic] bid is nonresponsive and disqualified because Rogers [sic] listed Hill ... as the plumbing subcontractor and neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' [sic] does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license.

Monroe was the lowest bidder that identified a properly licensed subcontractor ... for the specialty piping work.

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.⁵

While Monroe never used the word "responsibility" in its letter of protest, all of these statements above make it clear that Monroe was protesting that Hill was not properly licensed to perform pressure and process piping work and Rodgers was not licensed to perform that either. Possession of the proper license is a responsibility issue. Therefore, the CPOC finds that 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. Since the parties cannot claim that the protest letter failed to notify them that the issue was over licensure and consequently responsibility, USC's and Rodgers' motions to dismiss this issue as untimely are denied.

Second, USC and Rodgers also contended that a hearing on the issue of responsibility, if raised, was not necessary because an examination of the facts shows that Rodgers and his listed subcontractors were

⁵ While the law clearly says that it is improper for a owner to award a contract to improperly licensed contractor, it is far from clear that the law makes the violation of this requirement a criminal offense. Instead of criminal penalties, the law provides for civil penalties. See SC Code Ann § 40-11-110.

responsible.⁶ However, the CPOC declines to rule on USC's and Rodgers' motion in this regard. Since the issue of Rodgers' responsibility depended on the evidence presented in the hearing, the CPOC has addressed the merits of Monroe's protest in this decision instead.

Motion Regarding Standing

During the course of the hearing, USC examined Mr. Monroe on the question of whether USC asked him to hold his bid open beyond the sixty day time period specified in the solicitation documents. Mr. Monroe confirmed that Monroe had indeed received such a request and failed to provide a response to USC. Since Monroe failed to respond in the affirmative that it would honor its bid beyond the sixty day period, USC and Rodgers argued that Monroe was neither an actual bidder nor aggrieved, and consequently Monroe lacks standing to bring this protest. At the close of the hearing, the CPOC asked all parties to submit written briefs on the issue.

The Code provides only an "actual bidder ... aggrieved in connection with the intended award or award of contract" has the right to protest the award. S.C. Code Ann § 11-35-4210(1)(b). No one argues that Monroe did not actually submit a bid on this project. Therefore, Monroe is an actual bidder since its failure to respond to USC's request does not change its pre-existing status of being an actual bidder. At most, one may argue that Monroe is no longer aggrieved; however, even this position must fail. While Monroe may have ultimately failed to show that it is aggrieved by USC's responsibility determination, this is not because Monroe failed to respond to USC's request. USC's request was sent out as a result of Monroe's protest which was filed on December 13, 2010, five days prior to the date bids were due to expire. On December 16, USC sent out an email requesting that certain bidders (the lowest) extend their bids an additional sixty days. [Brief of USC] Monroe was one of these bidders. By Monroe's own admission, Monroe did not respond to this request.

USC's request to bidders to extend the date they would hold their bids open was based on Section 6.1.11 of the Manual for Planning and Execution of State Permanent Improvements, Part II (the "Manual"). This section of the Manual provides:

If the Agency desires to extend the bid acceptance period beyond the time given in the Bid Form (SE 330), then before the expiration of that period, it should obtain a written extension of bid prices(s) from all bidders. A bidder does not have to agree to hold its bid price beyond the bid acceptance period. However, the Agency should consider for award only the bids of those bidders who provide a written extension of their bids before the expiration of the original bid acceptance period. If the Agency fails to obtain a written extension of at least one bid before the expiration of the acceptance period, it will have to re-bid the project before it can award a contract.

This provision is itself based on SC Code Ann Reg. 19-445.2065(C) which provides:

⁶ At issue is the responsibility of Rodgers' plumbing subcontractor, which effects Rodgers' responsibility.

Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

While these provisions taken together may preclude an award to a bidder who has declined to extend its bid, it is not clear that it requires a protestant, who is clearly seeking award under the terms of its protest, to take an additional step of responding to a general request to hold bids open a longer period than specified when that request is sent out in response to that same protest.

Here Monroe filed its bid protest, arguing that the Project be awarded to Monroe. The very act of filing a protest meant that there was no way an award could be finalized prior to the expiration of the time for holding bids open set forth in the solicitation. Therefore, it is logical to conclude Monroe intended to hold its bid beyond this date. Moreover, it is reasonable to assume Monroe intended to hold its bid open as long as it took for its protest to reach a final conclusion. If Monroe changes its mind, the appropriate and logical course would be to withdraw its protest. Monroe has not done so.

Based on the forgoing, the CPOC finds that it was not necessary for Monroe to respond to USC's request that it hold its bid open an additional sixty days to preserve its standing. Accordingly, the motion to dismiss for lack of standing is denied.

DISCUSSION

In the solicitation documents for the Project, USC required bidders to list the subcontractors they planned to use on the project to perform the work of three different subcontractor specialties - mechanical, plumbing, and electrical. This requirement was imposed in compliance with the provisions of S.C. Code Ann § 11-35-3020(2)(b)(ii) which provides as follows:

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 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. 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.

[emphasis added] 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.

In compliance with the requirements of S.C. Code Ann § 11-35-3020(2)(b)(ii), USC identified on the bid form by specialty the subcontractors whose contracts USC expected to exceed three percent of a prime

bidder's total base bid. At issue in this protest is the identified subcontractor specialty entitled plumbing. In the space for providing the name of the subcontractor(s) it intended to use for the "plumbing subcontractor specialty" (hereafter referred to as "plumbing"), Rodgers listed only Hill, a licensed plumbing contractor.⁷ Neither Hill nor Rodgers are licensed pressure and process piping contractors. In the space for providing the name of the subcontractor(s) it intended to use for "plumbing," Monroe, in contrast, listed both Walker White, Inc., a licensed plumbing contractor, and Douglas Fluid & Integration Technology, LLC (Douglas), a licensed pressure and process piping contractor.

Monroe's protest is couched in terms of the licensure requirements of the Licensing Act. Monroe challenges USC's decision to award a contract to Rodgers on the grounds that Rodgers' only listed subcontractor for "plumbing," Hill, was not licensed to perform pressure and process piping work and, by extension, if Hill is not a responsible subcontractor, Rodgers is not a responsible bidder. In short, Monroe protests USC's determination that Rodgers was the lowest responsible bidder.

The Contractors Licensing Act requires a contractor to possess the proper license at the time of bidding. SC Code Ann §§ 40-11-30 and 200. The Panel has determined that 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). If, at the time of bidding, a subcontractor listed on bidder's bid did not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the bidder are responsible bidders.⁸

The protestant has the burden of proving upon the preponderance of the evidence that USC's determination of responsibility is "clearly erroneous, arbitrary, capricious, or contrary to law." Protest of Brantley Construction Co., Inc., Case No. 1999-3. In other words, USC's determination regarding responsibility is a matter of discretion that cannot be overturned absent a showing by Monroe that it is "clearly erroneous, arbitrary, capricious, or contrary to law." See Protest of CollegeSource, Inc., Case No. 2008-4. Since agency decisions regarding responsibility are a matter of business judgment, Monroe must demonstrate a lack of reasonable or rationale basis for the responsibility determination. See Protest of Value Options, et al., Case No. 2001-7.

⁷ The Contractor's Licensing Act divides licenses into categories and subcategories. Plumbing is a subclassification of a mechanical contractor's license, as is heating, air conditioning, electrical, pressure and process piping, etc. For ease of reference, the CPOC refers to mechanical contractor's license with a plumbing subclassification as a plumbing license and a pressure and process piping subclassification as a pressure and process piping license. Similarly, the CPOC refers to a contractor possessing a plumbing license as a licensed plumbing contractors etc.

⁸ SC Code Ann § 11-40-200(B) precludes an owner or contractor from even considering the bid of an entity or individual that does not possess the proper license subclassifications for the work at the time of bidding.

Monroe did not argue that Hill could not legally perform the work of a licensed plumbing contractor. Monroe simply argued that the scope of "plumbing" on the bid form includes the work of a licensed pressure and process piping contractor and that Hill is not legally qualified to perform this work. Because USC determined what the scope of each subcontractor specialty was based on its own intended meaning for each specialty and then chose which ones to list on the bid form, Monroe is for all intents and purposes arguing over USC's intent. Therefore, this argument only holds water if USC's intended meaning for the term "plumbing" included the work of both a licensed plumbing contractor and a licensed pressure and process piping subcontractor.

Monroe does argue that its interpretation of the meaning for the term "plumbing" is supported by Division 15 of the Project specifications and the plumbing sheets in the drawings. However, the question before the CPOC is not whether Monroe's interpretation has support within the record. Given that the validity of USC's responsibility determination turns on the meaning of the term "plumbing," the questions before the CPOC are 1) is USC's intended meaning of the term "plumbing" "clearly erroneous, arbitrary, capricious, or contrary to law," 2) did bidders have a reasonable understanding of USC's intended meaning and, 3) was USC's responsibility determination consistent with its intended meaning for the term "plumbing?"

USC 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 under the express terms of the Contractor's Licensing Act (Licensing Act), not Monroe's understanding of the term. See S.C. Code Ann § 40-11-410(5)(f). Moreover, USC presented testimony and evidence that the Project architect's pre-bid project estimate projected that pressure and process piping constituted less than 3% of the total estimated construction cost; therefore, USC, in consultation with its architect, decided not to list the pressure and process piping subcontractor specialty on the bid form. [Testimony of Ms. Floyd and Hearing Ex. 11]

Monroe does not dispute USC's position that the term "plumbing" covers the work of installing potable water and sanitary waste systems, which requires only a plumbing contractor's license. All agree this is a reasonable position. Monroe simply argues that in this case, it is unreasonable for USC to exclude pressure and process piping from this definition. USC disagreed with Monroe's position, and, in support of its position that its intended meaning for the term "plumbing" was reasonable, pointed to the Contractor's Licensing Act, which includes the installation of potable water and sanitary waste systems in the plumbing license but excludes pressure and process piping. See S.C. Code Ann § 40-11-410(5)(f) & (g). Moreover, USC noted that eighteen of the nineteen bidders on the Project shared its interpretation of the scope of "plumbing" and filled out their bid accordingly by listing a licensed plumbing subcontractor but not a licensed pressure and process piping subcontractor in the space for listing the plumbing

plumbing subcontractor. In addition, the record indicates that bidders understood USC's intended meaning for the term "plumbing."

Moreover, despite Monroe's arguments otherwise, there is evidence that Monroe had reason to know of USC's intended meaning for the term "plumbing." USC's closing arguments made reference to its course of practice on multiple projects in the Horizon I building.⁹ This course of practice shows that USC has applied a consistent definition of the term "plumbing" across all projects on the Horizon I building, and that bidders had a consistent and compatible understanding of that definition.

The Horizon I Building is a multi-floor building that USC is up-fitting with laboratory space floor by floor.¹⁰ USC previously let projects to up-fit the second and third floors respectively. These two previous projects were similar to the current Project in the following ways:

- they all involved up-fitting the floor space as laboratories,
- they all required potable water and sanitary waste plumbing,
- they all required pressure and process piping work,
- the bid forms for all three required bidders to provide the name of the subcontractor they intended to use to perform the work of "plumbing,"
- the specifications for both the potable water and sanitary waste plumbing and the pressure and process piping for all three were in Division 15 of the Project specifications
- the drawings for all three included both the potable water and sanitary waste plumbing and pressure and process piping in the plumbing drawing sheets.

Despite all these similarities, bidders, including Monroe, uniformly excluded pressure and process piping from the scope of "plumbing" and did not list a subcontractor with a pressure and process piping license subclassification on their bids in those projects. As to the up-fitting of the second floor of Horizon I, USC determined Monroe to be a responsible bidder and awarded a contract to Monroe despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid. As with the second floor up-fit, USC also determined Monroe to be a responsible bidder and awarded a contract to Monroe for the up-fitting of the third floor despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid.

Therefore, on three projects to up-fit the Horizon I Building with laboratory space, 28 of 29 responsive bids (including two of Monroe's bids) did not include the pressure and process piping subcontractor work in the scope of "plumbing." (By way of explanation, there were four responsive bids on the second floor

⁹ The previous projects on the Horizon I building came under the jurisdiction of the Office of State Engineer (OSE), and OSE has project files for each of the projects. The CPOC takes notice of these records for the purposes of this decision.

¹⁰ While not defined in the dictionary, up-fitting is commonly understood within the construction and real estate industries to mean fitting out an existing architectural shell to accommodate a tenant's specific needs.

floor portion, six responsive bids on the third floor portion, and 19 responsive bids on this project for the first floor.) Bidder understanding of USC's intent regarding the scope of "plumbing" was consistent.¹¹ On three projects to up-fit the Horizon I Building with laboratory space, USC applied a consistent meaning to the term "plumbing," made its responsibility determinations consistent with that interpretation, and made contract awards accordingly. USC's intended meaning for the term "plumbing" and bidders' interpretation of that term were compatible. Clearly, USC's decision to award a contract to Rodgers in this case was not arbitrary or capricious but was consistent with USC's prior practice and bidders' understanding on previous projects. Moreover, Monroe clearly knew of USC's prior intent and practice and this intent and prior practice benefited Monroe on two previous occasions.

Based on the forgoing, the CPOC finds that USC's intended meaning for the term "plumbing" was reasonable, and was not clearly erroneous, arbitrary, capricious, or contrary to law; that bidder's consistently had an understanding of the meaning of this term compatible with USC's intended meaning; and USC applied its intended meaning for this term reasonably and consistently in making its responsibility determination. Moreover, 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.¹²

¹¹ Indeed, Monroe's interpretation in this case is not necessarily inconsistent. Monroe simply chose to provide additional superfluous information regarding their intended licensed pressure and process piping subcontractor believing that despite past familiar practice USC's intended meaning for the term "plumbing" had changed.

¹² Ultimately Monroe was left arguing that because it had a different understanding of the meaning of the term "plumbing" than USC intended, USC had a duty to make its intended meaning clearer to Monroe and because USC did not make it clearer to Monroe, Monroe's definition should control as against the understanding of eighteen other bidders. In other word, Monroe argues that the term is at a minimum ambiguous; however, a claim of ambiguity is an untimely protest of the solicitation.

Even assuming Monroe could show an ambiguity existed sufficient to protest the award, Monroe's arguments concerning USC's intended meaning also fail because Monroe did not show and cannot show any harm as a result of its alleged misunderstanding. USC did not throw out Monroe's bid as non-responsive for listing a licensed process and pressure piping subcontractor in addition to a licensed plumbing subcontractor for "plumbing." Its misunderstanding simply resulted in Monroe providing superfluous information. Moreover, Monroe was not the low bidder and Monroe does not and reasonably cannot argue that its misunderstanding of the intended meaning of the term "plumbing" caused it to have a higher bid price than it would have had otherwise. Monroe's misunderstanding had no impact on the scope of work for the Project; it only affected which subcontractors Monroe listed and which it did not. In short, Monroe cannot argue that, but for its misunderstanding, it would have been the low bidder. Therefore, Monroe suffered no harm from its alleged misunderstanding of USC's intent and USC's actions made in accordance with that intent.

Mr. John St. C. White, P.E.

Page 2 of 2

December 13, 2010

of piping, tubing, vessels, containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these." See S.C. Code 40-11-410(g). These do not come under the exception for "boilers, boiler piping, piping used to convey potable water, sanitary sewage, liquefied petroleum, manufactured or natural gas or refrigeration, air conditioning and comfort heating piping" that do not require a pressure and process piping license. *Id.*

On October 19, 2010, Monroe specifically advised USC's procurement officer for this project of the specialty license requirement, the same day bids were opened, of the requirement for a specialty license. See e-mail attached to Mr. Monroe's affidavit. Notwithstanding that advance notice, 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

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:

(B) 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. (emphasis added).

Monroe is the lowest responsive bidder and should be awarded the bid.

Yours very truly,



Katherine B. Barroll

KBB/ash

cc: Monroe Construction Company

FEB 17 2011

17024.1 KBB/ASH

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RECORD ON APPEAL 130

EXH. A

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December 13, 2010

VIA FACSIMILE 737-0639 & HAND DELIVERY

Mr. John St. C. White, P.E.

State Engineer and Chief Procurement Officer for Construction

Office of the State Engineer

1201 Main Street, Suite 600

Columbia, South Carolina 29201

Re: Protest of intent of the University of South Carolina to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia. South Carolina (Project No. H27-6071-LC),

Dear Mr. White:

On behalf of Monroe Construction Company ("Monroe"), this firm protests and requests an administrative review pursuant to S. C. Code §11-35-4210(4) of the attached University of South Carolina's December 3, 2010 notice of intent to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC), based on Rogers' Base Bid 2 of \$3,149,000. Rogers' bid is nonresponsive and disqualified because Rogers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Rogers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications. Hill has PB5 and HT5 licenses.

Sumwalt Associates had the next apparent Base Bid 2 low bid at \$3,178,000 but its bid suffers from the same defect as Rogers' does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license. See attached affidavit of Eric Monroe.

Monroe was the lowest bidder that identified a properly licensed subcontractor (Douglas Fluid Integrated Technologies) for the specialty piping work. Its bid for the Base bid 2 was \$3,230,000.

Section 15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air. Installation of piping to transport these gasses requires a specialty license, i.e. a pressure and process piping license. Pressure and process piping "includes the installation, maintenance, repair, alteration, or extension of a system

4389127

RECORD ON APPEAL 131

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

DECISION

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 to law."

For the foregoing reasons, the Protest is dismissed.



John St. C. White
Chief Procurement Officer for Construction



Date

Columbia, South Carolina

RECEIVED

MAR 23 2011

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL**

IN THE MATTER OF: BID PROTEST

Case No. 2011-3

MONROE CONSTRUCTION COMPANY

v.

UNIVERSITY OF SOUTH CAROLINA

**HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
STATE PROJECT NO. H27-6071-LC**

**MOTION TO QUASH MONROE
CONSTRUCTION COMPANY'S
SUBPOENA TO HILL PLUMBING &
ELECTRIC CO., INC.**

Hill Plumbing & Electric Co., Inc., through its undersigned counsel ("Hill"), moves the Procurement Review Panel to quash Monroe Construction Company's ("Monroe") subpoena to Hill, and to enter a protective order preventing Monroe from obtaining any of Hill's file materials pertaining to the Horizon 1 First Floor Laboratory Upfit Project ("Project"). In support of its motion, Hill submits the following to the Procurement Review Panel:

1. This is an appeal from a dismissal of Monroe's bid protest with respect to the above-referenced Project. On December 10, 2010, Monroe protested the University of South Carolina's Notice of Intent to Award the Project contract to Rodgers Builders, Inc. ("Rodgers"), because Rodgers listed Hill as its plumbing subcontractor for the Project. It is undisputed that Hill is a licensed plumbing contractor.

2. An administrative review by hearing of Monroe's bid protest was conducted by the Chief Procurement Officer for Construction ("CPOC") on January 27, 2011. Documentary evidence and testimony was presented by Monroe, Rodgers and the University of South Carolina. Based thereon, the CPOC dismissed Monroe's bid protest, concluding that Monroe had failed to prove upon the preponderance of the evidence that the University of South

Carolina's determination regarding Rodgers' responsibility was clearly erroneous, arbitrary, capricious, or contrary to law. From that dismissal Monroe has appealed.

3. Following a full hearing on the merits of its bid protest, at which Monroe was entitled to present whatever evidence and testimony it desired, Monroe has now had the Procurement Review Panel issue a subpoena to Hill, through which Monroe seeks to obtain Hill's entire Project file and to compel Hill to appear and testify before the Procurement Review Panel. Hill submits that this attempt by Monroe is irrelevant to the issues, untimely, and for the purpose of obtaining Hill's proprietary information.

4. Hill was not notified about or invited to attend the hearing on January 27, 2011, nor were Hill's Project files requested. Stated differently, everyone understood that Hill's file and Hill's testimony was irrelevant to the issues in dispute at that hearing. Having lost its bid protest, however, Monroe now attempts to untimely change directions and raise new issues and present new evidence.

5. The documents and testimony which Monroe seeks to compel from Hill were irrelevant to the issue before the CPOC, and they remain irrelevant to the same issue that is on appeal to the Procurement Review Panel. That issue was and remains the intent of the University of South Carolina in requiring each Project bid to contain the name of a licensed plumbing contractor but not the name of a licensed process piping contractor. Nothing within Hill's Project file documents or the testimony of its employees is or can be relevant to that issue – the University of South Carolina's intent in requiring that a licensed plumbing contractor be listed, but not a licensed process piping contractor.

6. When it bid the subject Project, Monroe did not identify Hill as its plumbing contractor. It chose instead to list another plumbing contractor, which came as no surprise to

Hill. In the past, Monroe has rejected Hill, even when it was low bidder, and awarded jobs to other contractors instead. Hill therefore suspects that Monroe wants its Project information for reasons other than doing business with Hill. For these reasons, Hill should not be required to divulge to Monroe Hill's confidential and trade-secret information, including but not limited to its job cost and related pricing information. Instead, the Procurement Review Panel should quash the subpoena and issue a protective order that allows Hill to keep its private and trade-secret information protected from Monroe.

WHEREFORE, in the interest of justice and equity and for good cause shown, Hill Plumbing & Electric Co., Inc., respectfully moves the Procurement Review Panel to (1) quash Monroe Construction Company's subpoena for documents and attendance at the hearing, and (2) enter a protective order that allows Hill to keep its private and trade-secret information protected from Monroe.

This 21st day of March, 2011.

Greenville, South Carolina



Hugh M. Claytor (SC Bar No. 11299)
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Attorneys for Hill Plumbing & Electric Co., Inc.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

IN THE MATTER OF: BID PROTEST

Case No. 2011-3

MONROE CONSTRUCTION COMPANY

v.

UNIVERSITY OF SOUTH CAROLINA

CERTIFICATE OF SERVICE

HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
STATE PROJECT NO. H27-6071-LC

This is to certify that the undersigned has, this the 21st day of March, 2011, served this document in the above-entitled action on all of the parties to this cause by:

_____ Hand delivering a copy to the attorney for each said party addressed as follows:

✓ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

_____ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

_____ Telecopying a copy hereof to the attorney for each said party as follows:

_____ Email.

ADDRESSEE:

George W. Lampl, III, Esq.
University of South Carolina
109 Osborne Administration Building
Columbia, SC 29208

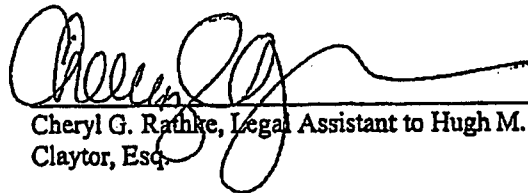
Christian W. Emanuel, Esq.
SC Procurement Review Panel
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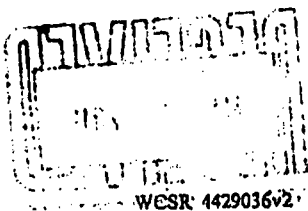
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Cheryl G. Rathke, Legal Assistant to Hugh M.
Claytor, Esq.



3.29

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	Panel Case No. 2011-3
	)	
Appeal of Monroe Construction, LLC	)	
	)	
Re: University of South Carolina	)	CPO's MOTION TO DISMISS
Horizon 1 First Floor Laboratory Upfit	)	ISSUE AS UNTIMELY
<u>Project No. H27-6071-LC</u>	)	

The Chief Procurement Officer for Construction ("CPO"), by and through its undersigned attorney, hereby moves the South Carolina Procurement Review Panel ("Panel") for an Order dismissing an issue of the appeal filed by Monroe Construction, LLC's ("Monroe") because it was not raised in the protest letter and therefore is untimely. This Motion is based upon the initial record before the Panel, the Panel's established procedures, applicable case and statutory law, and such other argument or information as may be received by the Panel.

ARGUMENT

The South Carolina Consolidated Procurement Code ("Code") requires any actual bidder who is aggrieved by the intended award of a contract to protest to the CPO within 10 days of the date of notification of intent to award. S.C. Code Ann. § 11-35-4210(1)(b). The Panel has held that in order for the Panel to have jurisdiction to hear an issue, it had to be raised timely to the CPO. *Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.*, Case No. 1998-6. Further, the Panel has repeatedly stated that issues not raised in the protest letter are untimely because the protest letter establishes the issues of the case. *Id.* (holding that "[t]he protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210"); *See also, Protest of Volume*

Services, Case No. 1994-8 (finding that "...[T]he issues in the case are established in the protest letter. The letter appealing to the Panel cannot add issues....Although the Panel hearing is a *de novo* hearing under Code Section 11-35-4410(1), it is only new as to evidence. The Panel may allow new evidence to be admitted, but only evidence concerning the established issues."); *Protest of Blue Cross & Blue Shield of S.C.*, Case No. 1996-9 (also noting that the protest letter establishes the issues to be determined).

In its protest letter¹ dated December 13, 2010, Monroe alleged that the bid by Rodger Builders, Inc. ("Rodgers") "is nonresponsive and disqualified because Rogers (sic) listed Hill Plumbing and Electric Company, Inc. ("Hill") as the plumbing subcontractor and neither Rogers (sic) nor Hill has the required specialty license to perform the specialty plumbing work..." The "specialty" that Monroe references was for pressure and process piping to transport certain gases. Monroe further claimed that "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" and that "it is a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor." [Record, pp. 38-39] (Emphasis added.)

The gravamen of Monroe's protest was that the term "plumbing," as it appears on the bid form, necessarily included the pressure and process piping work, and therefore, Rodgers was required to have a license to perform the pressure and process piping itself or list a plumbing subcontractor also licensed to perform pressure and process piping work or list both a plumbing subcontractor and a pressure and process piping subcontractor. In other words, Monroe's protest

¹ The protest letter included attachments. The CPO only references these attachments as they relate the protest issues raised; he does not address here whether they are proper from an evidentiary standpoint.

letter alleges that the University of South Carolina ("USC") improperly awarded the contract because Rodgers' bid listed Hill as the plumbing subcontractor and neither Rodgers nor Hill possessed a pressure and process piping license. [Record pp. 38-39.]

Based on these allegations and the arguments made at the hearing, the CPO found that "Monroe challenges USC's decision to award a contract to Rodgers on the grounds that Rodgers' only listed subcontractor for 'plumbing,' Hill, was not licensed to perform pressure and process piping work..." According to the CPO, "Monroe simply argued that the scope of 'plumbing' on the bid form includes the work of a licensed pressure and process piping contractor and that Hill is not legally qualified to perform this work."² Based on USC's application of the scope of plumbing, the CPO ruled that USC's determination that Rodgers, who listed for "plumbing" a subcontractor with a plumbing license, was a responsible bidder was not clearly erroneous, arbitrary, capricious or contrary to law. [Record, pp. 24-34].

With its appeal letter to the Panel, Monroe re-characterizes or "interprets" its protest letter and attempts to raise an issue not raised in its protest letter. Monroe's appeal letter does not challenge the bid form that Rodgers submitted to USC. Rather it attacks the "sub-bid" that subcontractor Hill submitted to Rodgers. Specifically, Monroe now seeks to challenge the "scope of Hill Plumbing's bid" by alleging that Hill submitted a bid to Rodgers to also perform pressure and process piping work, which was improper because it "was beyond the scope of Hill Plumbing's license." In its appeal letter, Monroe repeatedly refers to "Hill's bid" and "Hill

² Even though Monroe did not use the word "responsibility" in its protest letter, the CPO leniently found that "Monroe's letter was 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." [Record, p. 27] (Emphasis added.)

Plumbing's bid." [Record pp. 3-5]

In other words, on appeal Monroe now attempts to turn its protest into a protest of subcontractor Hill's bid to Rodgers, which is not an issue raised in its protest letter or addressed by the Code since it only addresses the listing of first tier subcontractors. Certainly, if Monroe meant to raise the issue that Hill had violated the licensing laws by offering to do the pressure and process piping work in *its* sub-bid and this was improper because it was beyond the scope of its license, it could have done so.³ To the contrary, Monroe does not refer to Hill's bid anywhere in its protest letter and instead argues that Rodgers' bid improperly listed Hill as the plumbing subcontractor because the plumbing work included pressure and processing piping. [Record, p. 38-43] Notably, Monroe's appeal letter does not point to where this issue was raised in its protest letter. Instead Monroe's appeal letter points out evidence regarding the scope of Hill's bid purportedly provided at the CPO hearing. However, whether it attempted to argue or provide evidence of this issue during the protest hearing is irrelevant.

The Panel has specifically addressed the situation where words in a protest are "interpreted" as part of an appeal to the Panel to raise issues not timely raised before the CPO. In the case of *Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.*, Case No. 1998-6, the Panel was faced with the issue of whether the grounds of protest raised on appeal had been raised in the protest letter and found:

However, the issues as stated in the appeal letter are an interpretation of the protest letters. The Panel does not agree that the protest letters raise all of the issues stated in the appeal letter. The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time

³ In fact, Monroe admits in its appeal letter that it too had received a sub-bid from Hill prior to bidding.

constraints of S. C. Code §11-35-4210.

Id. at p. 2-3. *DP Consultants* stands for the proposition that words or phrases in the protest letter cannot be taken out of context to raise issues on appeal to the Panel that were not established in the protest letter.

As detailed above, Monroe's protest letter raised the issue that the plumbing subcontractor who Rodgers listed on its bid to USC was not also licensed to perform pressure and process piping work. It is clear that Monroe's protest letter, when read in context, only protested the content of Rodgers' bid. Not once does Monroe's protest letter allege that Hill's bid was improper and that Rodgers should have been deemed nonresponsive because Hill's bid contained deficiencies. Therefore, this issue was not timely raised and is jurisdictionally barred.

Further, the Code requires the protest letter to "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). The Panel has consistently found that a protestant must sufficiently state an issue in the protest letter or it is untimely. *Protest by J & T Technology, Inc.*, Case No. 1987-3 (holding that Section 11-35-4210 requires that protestants state their grievance with enough specificity to put all parties on notice of the issues to be decided by the CPO and the Panel); *Protest of Blue Cross and Blue Shield of S.C.*, Case No. 1996-9 (dismissing an issue as vague where the protest letter merely stated a broad allegation and was insufficient to put the parties on notice); *Protest of the Megg Corporation of Greenville*, Case No. 1992-9 (stating that the protest letter must put the parties on notice of the general nature of the grievance). According to the Panel, a protest "must also provide specifics in order to give notice of the issues raised and to be

defended." *Protest of DPConsultants, Inc. and Horizon Software Systems, Inc.*, Case No. 1998-

6. However, the record reflects that none of the parties – not the CPO, or Rodgers or USC – were on notice that Monroe was challenging Hill's bid. Therefore, any issue regarding Hill's bid should also be dismissed due to vagueness because it was not sufficiently raised in Monroe's protest letter.

CONCLUSION

As stated above, Monroe's protest letter did not challenge the scope of Hill's bid to Rodgers. Therefore, any issue regarding Hill's bid is untimely at this juncture and should be dismissed.

RESPECTFULLY SUBMITTED,



Molly R. Crum
Assistant General Counsel

Office of General Counsel
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1201 Main Street, Suite 410
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(803) 737-1116
ATTORNEY FOR THE CHIEF
PROCUREMENT OFFICER

March 29, 2011
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Appeal of Monroe Construction, LLC)

Re: University of South Carolina)
Horizon 1 First Floor Laboratory Upfit)
Project No. H27-6071-LC)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

Panel Case No. 2011-3

CERTIFICATE OF SERVICE

I, Renee Larsen, do hereby certify that I have this date served (1) copy of the CPO's Motion to Dismiss upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as follows:

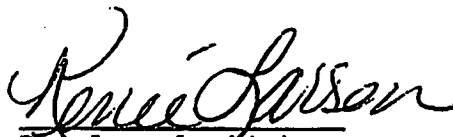
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Renee Larsen, Legal Assistant
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Columbia, SC

March 29, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1998-6

In re:)
Protest of DPConsultants, Inc.)
and Horizon Software Systems, Inc.;) ORDER
Appeal by DPConsultants, Inc. and)
Horizon Software Systems, Inc.)

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on November 23, 1998 on appeal by DPConsultants, Inc. (DPC) and Horizon Software Systems, Inc. (Horizon). Present and participating in the hearing were DPC and Horizon represented by Michael Mullinax, Esq. and lead attorney, Elizabeth Crum, Esq., National Computer Systems, Inc. (NCS) represented by David Summers, Esq., South Carolina Department of Education (DOE) represented by Shelly Carrigg, Esq., and the Office of General Services of the Budget and Control Board represented by Keith McCook, Esq.

FINDINGS OF FACT

On May 13, 1998, a Request For Proposals (RFP) was issued by the Information Technology Management Office (ITMO) of General Services for "Implementation of Windows Based School Administration, Special Education, Curriculum Management, and Facilities Management Modules for the Department of Education". (Record pp. 42 - 183). Amendment No. 1 to the RFP contains questions with answers and was issued June 8, 1998. (Record pp. 29-40). Amendment No. 2 to the RFP changes the closing date and was issued on June 18, 1998. (Record pp. 27-28). Seven proposals were received at the RFP

opening on June 24, 1998. In July, 1998, evaluators completed evaluation of the proposals, the proposals were ranked based on scores and the top ranked offeror, is NCS. NCS demonstrated its proposed system, Schools Administrative Student Information system (SASI™xp). Cost negotiations were completed with NCS on September 16, 1998. The Notice of Intent to Award was issued September 18, 1998. (Record p. 26). DPC raised issues of protest in a letter to the Chief Procurement Officer (CPO), dated September 30, 1998, and Horizon raised issues of protest in a letter to the CPO dated October 1, 1998. (Record pp. 20-23). The CPO conducted a review and issued a decision. (Record pp. 8-18).

Horizon and DPC appealed to the Panel with eleven issues. (Record pp. 4-7). At the Panel hearing, several issues were withdrawn by Horizon and DPC, and NCS, DOE and General Services moved to dismiss most of the remaining issues.

CONCLUSIONS OF LAW

DPC and Horizon withdrew items numbered 2, 4, 5, 6, and 7 in their letter of appeal to the Panel, so those issues are not considered.

MOTIONS TO DISMISS

NCS and DOE made a motion to dismiss the remaining items numbered 1, 3, 8 and 11. General Services joined in the motions to dismiss. For ease of argument at the hearing, the issues were discussed in terms of the numbered issues in the appeal letter of Horizon and DPC. However, the issues as stated in

the appeal letter are an interpretation of the protest letters. The Panel does not agree that the protest letters raise all of the issues stated in the appeal letter. The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S. C. Code §11-35-4210.

Issue 1

Horizon and DPC allege that paragraph 2.30 of the RFP, which states the Award Criteria, violates S. C. Code §11-35-20 (a), (b), (f), & (g), some of the purposes and policies of the Procurement Code, in that the decision of the evaluation team is arbitrary and capricious. Horizon and DPC argue that the issue is not the criteria, but "the method used to evaluate the proposals", as stated in the last sentence of Horizon's protest letter. The methods used to evaluate the proposals cannot be protested until after the notice of award, because they are unknown at the time of the issuance of the RFP. Although the Panel agrees that generally a protest concerning the evaluation team is timely raised after the award notice, this is not the issue stated in the protest letters of Horizon and DPC. The protest letters do not specifically claim that the decision of the evaluation team is arbitrary and capricious, and upon review, do not raise the issue of the team as arbitrary and capricious in its evaluation of the proposals. The Horizon protest letter (Record p. 20) protests "on the basis that the award criteria specified in the RFP did not provide for a fair and equitable selection of proposed systems." Horizon then specifies that the points of protest are the failure of the RFP to provide for a demonstration of the system, and the

failure of the RFP to include cost as a criteria. Similarly, DPC's letter (Record p. 21) argues under the heading of "Award Criteria" that "a paper review of the RFP response and product documentation alone" is not sufficient, and a demonstration of the competing software products is essential to a decision to purchase. From reading the protest letters, the issues raised are attacking the award criteria, specifically the failure to include cost and a demonstration by all offerors. A protest of the award criteria stated in the RFP must be made within fifteen days from the issuance of the RFP, or the relevant amendment to the RFP. The RFP outlines the award criteria, which clearly does not include cost or a demonstration. Prospective offerors had fifteen days from the issuance of the RFP to protest the fact that cost and a demonstration are not included in the RFP's award criteria or specifications. The Panel finds that issue 1 is not timely under S. C. Code §11-35-4210(1). The protest letters do not raise issues of arbitrariness and capriciousness of the evaluators or methods used to evaluate the proposals, and therefore the Panel lacks jurisdiction to hear such issues. The Motions to Dismiss Issue 1, as stated in the appeal letter, was granted at the hearing.

Issue 3

Horizon and DPC allege the Notice of Intent to Award violates the law because the evaluation panel members lack background, training and expertise to properly evaluate the proposals resulting in arbitrary and capricious evaluation scoring. The DPC protest letter states "[t]he RFP did not mention the qualifications of, or how, the Evaluation Team members were selected. We

question that any Evaluation Team could properly evaluate products based on a point system." (Record p. 21). That statement does not specifically protest the qualifications of the evaluation team members. It states a fact, and then explains that the question is the teams ability to "evaluate products based on a point system". The DPC protest letter, in discussing award criteria, questions the qualifications of the "Evaluation Team members" in relation to their ability to "properly evaluate products based on a point system". The context of the allegation involves the need for a demonstration of the software, not a separate issue attacking the individual qualifications of the evaluation team members. When read in context, the statement is part of the protest of the failure to include a demonstration of each offeror's product for evaluation. The fact that a demonstration by each offeror is not a criteria of the RFP is easily determined by review of the RFP, and would be an issue that must be raised within fifteen days from the issuance of the RFP. The issue that the lack of qualifications of the evaluation team makes the evaluation scoring arbitrary and capricious is not raised in the protest letters and therefore is untimely filed under S. C. Code §11-35-4210(1). Failure to file within the time required by the Procurement Code deprives the Panel of jurisdiction to consider the issue.

In support of issue 1 and issue 3, Horizon and DPC argue that the issues raised in the protest letters involves the process, such as failure to "properly evaluate" as stated in DPC's protest letter, and it is not an untimely protest of the award criteria. However, a protest of the process must also provide specifics in order to give notice of the issues raised and to be defended. In reading the

protest letters of Horizon and DPC, the stated specific problems with the process, failure to consider cost and a demonstration of each offeror's system, relate back to the award criteria of the RFP. Because the specific issues raised relate to the RFP award criteria, they are not timely filed within fifteen days of issuance of the RFP as required by S. C. Code §11-35-4210(1).

Horizon and DPC argue that statements in the protest letters, such as, "...protest the way in which entire process has been handled" is sufficient to raise the issue of the process of evaluation. The Panel does not agree. Such a broad statement attacking the process is not sufficient to give notice of the issues to be determined. A protest letter questioning the process must include specific ways in which the process violates the Procurement Code. If Horizon and DPC felt the evaluation process was arbitrary and capricious, they had to timely state in the protest letters specifically how the process was arbitrary and capricious.

Issue 8

Horizon and DPC allege that NCS' proposal does not meet the requirement of RFP paragraph 3.3, General Module Requirements. However, the issue as stated is insufficient to give notice of the issue to be determined. The paragraph referenced is separated into fourteen sections, over three pages, containing several requirements. The stated issue does not allege a specific requirement and how the specific requirement fails to be met. The statement is too vague to state an issue. Further, except as it relates to RFP paragraph 3.3.11, as raised in the protest letter, and appealed as Issue 9, the allegation in

Issue 8 is not timely filed. The Panel lacks jurisdiction to consider the issue and granted the Motions to Dismiss the issue during the hearing.

Issue 11

Horizon and DPC allege that the protest letters raise issues as to the "totality of the errors" made in the solicitation process. Once again, the specifics of the errors alleged must be stated in the protest letter. To allow a "catchall" phrase such as that to be expanded at the CPO review, or Panel hearing, would defeat the purposes of the deadline stated in S. C. Code §11-35-4210(1). The Panel has often stated that an issue must be stated with specificity to give notice of the issue to be determined. A broad statement such as the "totality of the errors", without the specific errors alleged, is not sufficient to state an issue to be determined. The Panel granted the motions to dismiss issue 11 at the hearing.

REMAINING ISSUES

Horizon and DPC allege noncompliance by NCS to the requirements of RFP paragraph 3.3.11 of the General Module Requirements. The scope of the issue is limited to the issue as stated in the DPC letter that NCS' proposal fails to use a School Administration module with the required "industry standard and commercially available database management system that is Open Data Base Compliant [sic] (ODBC)" (RFP paragraph 3.3.11 on Record p. 73). Mr. Bruce Breedlove, procurement officer for this solicitation, testified that the technical term ODBC stands for Open Database Connectivity. NCS' proposal responds to

the requirement of RFP paragraph 3.3.11, in part, by stating "SASI™xp allows other ODBC-capable applications, including report writers, to access its dBase-IV, Oracle and Microsoft SQL Server files with ODBC drivers provided by Microsoft, Oracle, or other third-party vendors." Horizon and DPC allege that dBase-IV is not compliant with the ODBC requirement. Horizon and DPC have the burden to prove by a preponderance of the evidence the issues alleged concerning NCS' nonresponsiveness to the requirements of the RFP. Mr. Brian Lakstins testified about his computer experience, including two projects utilizing ODBC. Mr. Lakstins' testimony included acknowledging that he does not have experience with educational systems, and specifically SASI™xp, the educational software proposed by NCS, nor has he used dBase IV, although he has knowledge of dBase IV. Mr. Lakstins testified, from personal knowledge, that he was not able to access dBase IV with ODBC. Mr. Monte Wagner, employed by NCS as team leader for designing, developing, and deploying software for educational application, testified that ODBC is recognized and widely used in the industry as an application interface that allows external applications to communicate with a database. Mr. Wagner testified that dBase IV is ODBC compliant. NCS' Exhibit One, an article titled "Accessing the World of Information: Open Database Connectivity (ODBC)", states that "Open database connectivity (ODBC) is Microsoft's strategic interface for accessing data in a heterogeneous environment of relational and non-relational database management systems." The article later states that "ODBC allows users to

access data in more than one type of DBMS [database management system] (such as ...dBase) from within a single application." Mr. Wagner further testified that he has personally used ODBC to manipulate dBase IV and his customers have accessed d-Base IV using ODBC. Based on the evidence, the Panel finds that Horizon and DPC did not prove by a preponderance of the evidence that NCS' proposal was nonresponsive to the requirements of RFP paragraph 3.3.11.

For the foregoing reasons, the appeal of Horizon and DPC is dismissed and denied.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

_____, 1998.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1994-8

In re:

Protest of Volume Services;
Appeal by Volume Services

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) ORDER
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This case came before the South Carolina Procurement Review Panel (Panel) for hearing on August 10, 1994, on the appeal of Volume Services (Volume) of a decision by the Chief Procurement Officer (CPO) denying Volume's protest.

Present and participating in the hearing before the Panel were Volume Services, represented by Douglas Drewes; University of South Carolina, represented by Terry Parham, Esquire; and Office of General Services represented by Delbert Singleton, Esquire. A representative of Marriott Services was not present at the hearing.

FINDINGS OF FACT

On March 24, 1994 the University of South Carolina (USC) issued a Request For Proposals (RFP) to provide food and beverage concession operations for Williams-Brice Stadium and various athletic activities. The offerors are required by the RFP to include projected total guaranteed returns to USC. The RFP states the minimum financial return is expected to be:

1. A minimum guarantee of \$400,000 or a minimum of 52% of gross sales, whichever is greater, for 6 home football game schedule and,
2. A minimum guarantee of \$475,000 or a minimum of 52% of gross sales, whichever is greater, for 7 home football game schedule,
(Record p. 34)

Other stadium and athletic events are expected to be a minimum of 52% of gross sales. The RFP also states, "in addition, the proposals should indicate the percentage of gross sales that are to be retained as a management fee. The department will review all financial proposals submitted and alternatives to the management fee will not be deemed non-responsive." (Record p. 34).

Volume Services (Volume) proposed a minimum guarantee of \$354,000.00 or a minimum of 47.0% of gross sales for year one's six home game schedule; a minimum guarantee of \$366,000.00 or a minimum of 42.0% of gross sales for years two through five's six home game schedule; and \$420,000.00 or a minimum of 42.0% of gross sales for years two through five's seven home game schedule. Marriott Management Services (Marriott) proposed a minimum guarantee of \$400,000.00 in six game years and \$475,000.00 in seven game years. Marriott's proposal states "profits earned by Marriott will be split 50/50". Testimony reveals that the evaluation committee called Marriott to ask if the statement in its proposal was a proposed 50% of gross sales. Marriott confirmed that it proposes a minimum guarantee of 50% of gross sales.

The RFP lists the evaluation criteria in order of importance, as follows:

1. Financial guarantee and profit participation for the Athletic Department.
2. Total sports advertising including all purveyors in marketing and signage opportunities and participation in coaches radio and TV shows sports marketing, signage and participation in coaches radio and TV shows Host Communications will provide a menu of opportunities at the April 15 conference.
3. A financial commitment to upgrade the existing concession facilities and equipment at Williams-Brice stadium to coincide with the opening of the 1995 football season.

4. References, financial history, and history of success in large Division I (50,000+ seating) venues.
5. Quality of product, menu, service and willingness to work within departmental guidelines.

(Record p. 30)

The first award criteria was evaluated by one member of USC's evaluation team, Venis Manigo, who compiled and compared the minimum guarantee and profit participation data from the proposals. The first criteria was then objectively assigned points. Marriott was assigned the full 30 points, and Volume received a proportional amount of the 30 points, 27.65 points. The USC evaluation committee members subjectively evaluated the proposals based on the remaining award criteria. The total scores were as follows:

For Evaluation Criteria 2-5:

Volume Services	299
Marriott Management Services	323

With Criteria 1 (Minimum Guarantee):

Volume Services	433.35
Marriott Management Services	473

(Record p. 365)

On April 15, 1994, USC held a site visit and proposer's conference, which was attended by Marriott and Volume. April 15, 1994, was also the deadline for offerors to submit questions regarding the RFP. On April 22, 1994, USC issued Amendment # 001 with attached answers to questions raised during the proposer's conference. Volume asked several questions, but did not ask about the evaluation criteria.

On May 2, 1994, USC opened the two proposals received, which were from Volume and Marriott. On May 13, 1994, USC issued an intent to award to Marriott.

CONCLUSIONS OF LAW

Volume protests on the grounds that the proposals were not properly evaluated under the RFP criteria. Volume believes the USC evaluators did not follow the award criteria and did not properly evaluate the proposals. S. C. Code Section 11-35-2410 provides that "the determinations required" by certain sections, including sections 11-35-1530(9) and (10), "shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law." Volume has the burden to prove, by a preponderance of the evidence, that its allegation concerning the evaluation makes USC's determination clearly erroneous, arbitrary, capricious, or contrary to law. The Panel will not substitute its judgment for the judgment of the evaluators. The Panel will not disturb the evaluators findings "so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased." See In re: Protest of Coastal Rapid Public Transit Authority, Case no. 1992-16.

The first and most important evaluation criteria is the "financial guarantee and profit participation for the Athletic Department". The evaluation process normally separates the cost criteria, which in this RFP is the first award criteria, from the other criteria to be evaluated. The cost criteria is not given to the evaluation committee to be evaluated, but is determined by a mathematical formula, and added to the scores given by the evaluators for the other criteria. Ms. Manigo testified that she evaluated the first criteria herself, and added the scores to the scores for the other evaluation criteria to provide the total scores for the proposals. No evidence was provided to prove this evaluation process was not done correctly under the requirements of the Code.

Ms. Manigo also testified that the evaluation committee, prior to scoring the proposals, met to discuss any need for clarification of the proposals. S. C.

Code Section 11-35-1530(8) allows for discussion with responsive offerors "for the purpose of clarification". The evaluation committee found the need to clarify Marriott's proposal. The committee phoned Marriott to clarify that the "50/50 split" language in Marriott's proposal applied, as it appeared to, the profit participation. Mr. Wertz's testimony corroborates Ms. Manigo's concerning the committee's actions. The Panel does not agree with Volume that USC negotiated with Marriott. No evidence was presented to show that anything other than clarification of the language used by Marriott in its proposal was discussed. The Panel cautions offerors to carefully and accurately respond to the RFP so that clarification may be avoided, as a fine line exists between the need for clarification and being nonresponsive. The Panel also cautions purchasing agencies to carefully handle the need for clarification.

Volume also states its belief that the "importance of the management fee was taken with less merit than it should". (Record p. 13). Volume proposed a management fee of 5%, and Marriott proposed a management fee of 6%. The RFP states "proposals should indicate the percentage of gross sales that are to be retained as a management fee. The department will review all financial proposals submitted and alternatives to the management fee will not be deemed non-responsive." The management fee was asked for as "an additional item" and it is not specifically stated as a criteria. During the time open for asking questions, Volume asked two questions about the "Management Fee Proposal", and therefore had the opportunity to ask about the value of the management fee as a criteria for evaluation if it felt it was not given enough weight in the RFP. (Record p. 21). Under Code Section 11-35-4210(1), an issue of protest concerning the specifications of the RFP, including the criteria for evaluation, is timely filed "within fifteen days of the date of issuance" of the RFP. Volume is not timely in protesting the criteria and specifications of the RFP.

Volume's protest can be summarized as Volume's belief it did not receive adequate consideration of its financial information. Clearly, Marriott offered a greater minimum guarantee and profit participation, and so received more points for the first and most important criteria. Even before adding the first criteria, Marriott was scored higher. The total points for the criteria evaluated subjectively, which does not include the first criteria, was 323 points for Marriott and 299 points for Volume. However, Volume proposed a capital investment of \$240,000.00 in comparison to Marriott's proposed investment of \$200,000.00. Volume received more points from each evaluator for the third award criteria. The "financial commitment to upgrade the existing concession facilities and equipment" was the third most important criteria out of five criteria. Marriott proposed both a better minimum guarantee as well as a better profit participation, which was the first, and most important, criteria of the five. The RFP clearly states the areas of evaluation that are important to USC and will be used to make the award. Volume knew the relative importance placed on each of the stated evaluation criteria, and had the opportunity to tailor its response appropriately, as did Marriott. The USC evaluators found Marriott's proposal superior to Volume's proposal and assigned points accordingly. The Panel will not disturb their findings without a preponderance of the evidence showing the evaluation was clearly erroneous, arbitrary, capricious, or contrary to law.

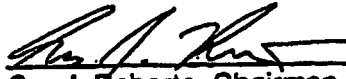
The evidence reflects that each proposal was properly evaluated and assigned a score for each award criteria, and no evidence was presented that the evaluations or scores are arbitrary, capricious, or contrary to law. In fact, the evidence reveals that USC followed standard procedures which comply with the requirements of the Procurement Code. The Panel finds that Volume has not met its burden of proof.

CONCLUSION

For the foregoing reasons, the Panel denies USC's Motion to Dismiss, upholds the decision of the CPO, as far as it is consistent with this opinion, and denies the protest of Volume Services.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL


Gus J. Roberts, Chairman

Columbia, S.C.

August 31, 1994.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1996-9

In re:

Protest of Blue Cross and Blue Shield of South
Carolina; Appeal by Blue Cross and Blue
Shield of South Carolina.

ORDER

This case came before the South Carolina Procurement Review Panel (Panel) on June 25, 1996, on the appeal of Blue Cross and Blue Shield of South Carolina (BCBS). BCBS appeals the decision of the Chief Procurement Officer (CPO) denying BCBS' protest.

Present and participating in the hearing before the Panel were Blue Cross and Blue Shield of South Carolina represented by David Robinson, II, Esq. and Daniel Brailsford, Esq.; Pearce & Pearce represented by Melissa Copeland, Esq. and John Schmidt, III, Esq.; and Office of General Services of the Budget and Control Board represented by Delbert Singleton, Jr., Esq. The University of South Carolina represented by Terry Parham, Esq. and Clemson University represented by Benjamin Anderson, Esq. were present at the hearing but did not participate in legal argument.

FINDINGS OF FACT

On February 8, 1996, the Materials Management Office (MMO) of General Services issued an Invitation For Bid (IFB) on behalf of Clemson University (Clemson) and University of South Carolina (USC) for Student Health Insurance. [Record p. 52-132]. Amendment No. 1 to the IFB was issued on February 22, 1996, and established March 1, 1996 as the final date for submitting questions. [Record p. 26-27]. Amendment No. 2 to the IFB was issued on March 7, 1996, and provided the answers to the questions received. [Record p. 28-51]. Six bids were opened on March 26, 1996, and the bid

tabulation indicates Pearce & Pearce is the lowest bidder with a "composite premium" of \$436.55, Heritage Insurance is the next lowest bidder with a bid of \$643.95, and Blue Cross Blue Shield is the third lowest bidder at \$644.33. The three remaining bids are over \$675.00. [Record p. 25]. Notification of Contract Award to Pearce and Pearce, Inc. (Pearce), was issued on April 4, 1996. [Record p. 24]. BCBS filed a protest of the award to Pearce on April 19, 1996. [Record p. 16-17]. Pearce requested clarification from BCBS concerning the issue stated in number four(4) of its protest letter [Record p. 19] and BCBS responded [Record p. 18]. The Chief Procurement Officer (CPO) conducted a hearing and issued a decision denying BCBS's protest. [Record p. 5-15].

CONCLUSIONS OF LAW

BCBS alleges five areas of nonresponsiveness of Pearce's bid in its protest letter. The fifth issue in the protest letter is an attempt to allow BCBS to raise more issues of nonresponsiveness at a later time, which is not permitted under the strict time limits established in Code section 11-35-4210 for filing a protest. Further, BCBS did not raise the issue in its appeal letter to the Panel. Thus, Issue number five (5) of the protest letter is not addressed by the Panel.

At the Panel's hearing, Pearce and General Services made several motions to dismiss prior to opening statements, and BCBS made counter motions to find for BCBS based on the Record. Pearce and General Services made further motions to dismiss at the conclusion of BCBS's presentation of its case. The initial motions to dismiss were granted as to protest issues two and four. The initial motions to dismiss were denied as to protest issues one and three, however the subsequent motions to dismiss these protest issues was granted. The motions to dismiss the protest issues were granted, and BCBS's counter motions were denied, for the reasons stated herein. The motions were

made in relation to the numbered issues in BCBS's appeal letter to the Panel, which is numbered slightly differently from BCBS's protest letter. To avoid any confusion the Panel provides the following information. Number one and two of the appeal letter relates to the corresponding numbers of the protest letter. Numbers three and four of the appeal letter relate to number three of the protest letter. Number five of the appeal letter relates to number four of the protest letter. The Panel refers to the numbered issues in the protest letter, as that document establishes the issues to be determined.

Issue One: Third Party Administrator

The first issue BCBS alleges is that Pearce "is not licensed, as required by Section A1 of Schedule 2, to carry out the administration of the plans as required in Part IV, Section C, p. 58-61, IFB". BCBS's appeal letter cites Part III A, 2 of the IFB, which states, in pertinent part:

By signing and submitting the Invitation for Bid, each bidder acknowledges compliance with these requirements and specifications, and agrees, affirms, or accepts that:... (d.) They are licensed or otherwise legally authorized to provide health insurance coverage or products in the state of South Carolina.
[Record p. 79]

Also cited is Part V B, 1 of the IFB, which states:

Bidders, who are not also the Underwriter for the offered policy (for example, an insurance broker), must be licensed to provide insurance services in the state of South Carolina, and provide documentation of such in their submission.
[Record p. 114]

BCBS submits an affidavit of the South Carolina Department of Insurance (DOI) that indicates "Pearce & Pearce is not a licensed third party administrator in South Carolina." [Record p. 167]. BCBS argues that the IFB requires activities

which are provided by an administrator, which is defined as "any person who collects charges or premiums from, or who adjusts or settles claims on, residents of the State." S.C. Code Ann. section 38-51-10. DOI is the administrative agency authorized to issue and regulate licensing of insurance, as well as penalize persons in violation of insurance licensing regulations and statutes. BCBS does not present any evidence that Pearce is required by DOI to be licensed as a third party administrator to comply with the terms of the IFB. BCBS has failed to meet its burden of proof on the issue of Pearce's failure to be licensed as a third party administrator. The Panel grants the motion to dismiss this issue for failure to meet the burden of proof.

Issue Two: Signature of Officer of Underwriter

The second issue BCBS alleges is that Pearce's bid is "not signed by an officer of the underwriter, as required in Section E of Schedule 1A", dealing with underwriter qualifications.¹ [Record p. 118-119]. Section E of the schedule relates back to the specifications in Part v, B, 3, that states, in pertinent part:

An officer of the underwriting company must certify that the underwriting company 1) agrees to provide the insurance products in accordance with the IFB specifications, and 2) that the information submitted in Schedule 1.A and 1.B is true and correct, and sign the underwriter affirmation on Schedule 1.A and 1.B.
[Record p. 114]

BCBS argues that Catherine Pulaski signed Schedule 1.A as "President, Managed Care Concepts of Delaware, Inc." [Record p. 142], not as agent for

¹ BCBS's appeal letter raises the issue of Ms. Pulaski being a non-resident agent which is not authorized to sign as an agent for Lamar in South Carolina, but BCBS's protest letter does not raise this issue. Pearce moved to have these arguments stricken from the record as a new issue raised in the appeal letter that is not in the protest letter. The Panel granted the motion to strike such references, as only issues raised in the protest letter can be considered by the Panel. The Panel further notes that if Lamar or Ms. Pulaski is in violation of insurance regulations because Ms. Pulaski is a non-resident agent, the South Carolina Department of Insurance is the administrative agency with jurisdiction to address any violation.

Lamar Life Insurance Company (Lamar), Pearce's underwriter and thus, has not legally bound herself individually or Lamar to the State.

Pearce counters that Ms. Pulaski is an agent of Lamar, as evidenced by her agent license issued by DOI. [Record p. 144]. Pearce further argues that by Ms. Pulaski signing Schedule 1.A, which lists Lamar as the underwriter, Lamar has complied with the signature requirement through the signature of its agent, Ms. Pulaski. Pearce further contends that the letter from the Senior Vice President of Life Insurer's Group, which includes Lamar, indicates that Lamar agrees to provide the insurance and further certifies the accuracy of Schedule 1A, which complies with the specification. [Record p. 143].

The Panel agrees with Pearce's arguments. Clearly Ms. Pulaski is a licensed agent of Lamar and is signing Schedule 1.A concerning the underwriter with the full knowledge and permission of Lamar. Where an agent-principal relationship exists, an agent may legally bind a principal. Lamar specifically references Schedule 1A in its letter and certifies that the information is true and correct and binds itself to provide insurance. [Record p. 143]. Ms. Pulaski's title would raise questions only if the information concerning her status as agent to Lamar, and Lamar's role as principal, were not provided with the bid. While a person may sign documents in different capacities that bind different entities, as argued by BCBS, Lamar's letter to Ms. Pulaski and Schedule 1.A, clearly naming Lamar as the underwriter, indicate that Ms. Pulaski is acting as the agent of Lamar. The fact that Ms. Pulaski lists her title as President of Managed Care Concepts of Delaware, Inc., on the schedule does not change the agent-principal relationship that binds Lamar to perform. The Panel finds that Pearce's bid, on its face, complies with the requirements of Section E of Schedule 1A.

BCBS also argues that the letter from Lamar to Ms. Pulaski is a facsimile and does not contain an original signature. The letter from Lamar is part of the

bid submitted by Pearce, which is using Lamar as its underwriter for the bid. Failure of a bidder to provide an affidavit of affiliates is an example of a minor informality or irregularity. Also, even if a bidder does not sign a bid, it can be waived as a minor informality in circumstances where other signed materials related to the bid indicate the bidders intention to be bound. See, S. C. Code Ann. section 11-35- 1520(13). Similarly, in this case, the letter to Ms. Pulaski from Lamar, stating Lamar's intentions to be bound by the IFB, contains a signature, but it does not have an original signature. However, Ms. Pulaski, a licensed agent of Lamar, has signed Schedule 1.A, indicating Lamar's intention to act as underwriter and be bound by the terms of the IFB. The Panel finds that Lamar's letter to Ms. Pulaski, sent by facsimile, that does not contain an original signature, is a minor informality under S. C. Code Ann. section 11-35-1520(13). The Panel grants General Services' motion to dismiss, and denies BCBS's counter motion to dismiss based on the documents.

Issue Three: Underwriter Certification Limited

The third issue BCBS alleges is that the "underwriter did not certify to the State that it would provide the insurance products required by the terms of the IFB for the duration of the prescribed contract period", which makes Pearce nonresponsive. [Record p. 16]. Pearce argues that the letter from Lamar signed by Howard Robinson, Senior Vice President, Life Insurer's Group, contains the exact language required by the specification. BCBS argues that the letter is addressed to Ms. Pulaski rather than the State, and since Ms. Pulaski signed Schedule 1.A as President of Managed Care Concepts of Delaware, Inc., Lamar has not certified to the State, only to Ms. Pulaski, that it will provide insurance according to the IFB and the information submitted in the schedules of the IFB are accurate. The discussion of issue two is incorporated here. Ms. Pulaski is a licensed agent of Lamar. Lamar's letter to Ms. Pulaski shows that Ms. Pulaski is

working with Lamar in relation to this IFB. Ms. Pulaski has the authority to act as Lamar's agent in relation to this IFB, and Ms. Pulaski signs Schedule 1.A as Lamar's agent. Lamar is bound to the State by this principal-agent relationship. Lamar's letter to Ms. Pulaski clearly indicates that Lamar intends to perform and provides the required certification with the exact language stated in the IFB at Part V, B, 3, as cited above. The Panel finds that Pearce's bid, on its face, provides the required certification to the State, and grants General Services' motion to dismiss this issue, and denies BCBS's counter motion to dismiss.

BCBS further argues that the IFB requires a two year commitment and Lamar has made only a one year commitment, making Pearce's bid nonresponsive. The reference line of Lamar's letter states "1996/97 USC/Clemson School Year". The letter then states that "Lamar Life Insurance Company agrees to provide the insurance products in accordance with the IFB specifications for the above captioned risk". BCBS contends that the reference line of Lamar's letter indicates only one year of performance and Lamar's letter specifically references that one year period in its statement that Lamar will provide insurance products. Pearce contends that the reference line is simply a shorthand reference to the IFB under discussion by Ms. Pulaski and Lamar. The reference line of a business letter usually indicates the subject of the letter, and any references to it in the body of the letter are to reinforce that the referenced subject is being discussed. Although the reference to the 1996/97 school year is troublesome in that it does not accurately reference the term of the contract under the IFB, it does not limit Lamar's commitment to the full term as provided in the IFB. Lamar's statement "in accordance with the IFB specifications for the above captioned risk" indicates it's compliance with the IFB. Also, Ms. Pulaski, Lamar's agent, commits Lamar to provide the products solicited by the IFB, again committing Lamar to compliance with the IFB. The IFB states that "[t]he

initial contract period for both the A&I Plan and the Voluntary Plans will be for two years (August 15, 1996 through August 14, 1998)." [Record p. 64]. The Panel finds that Lamar has bound itself to provide insurance products for the two year term of the IFB, and is not nonresponsive for limiting the period of its performance. The Panel further finds that BCBS failed to carry its burden of proof on this issue of nonresponsiveness, and the Panel grants General Services' motion to dismiss and denies BCBS's counter motion to dismiss.

Issue Four: Compliance With Age Guidelines of Federal Laws

The fourth issue BCBS raises is that the rates quoted by Pearce "in Schedule 3A do not comply with the age rating guidelines of the Equal Employment Opportunity Commission, or with certain regulatory sources cited in the IFB" at Part III A 2 C, which makes the bid nonresponsive. [Record p. 17 & 18]. The IFB in Part III A 2 C requires bidders to affirm that:

[a]ll insurance products and associated plans and policies comply with the requirements of Title IX of the Education Amendments Act of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; the Civil Rights Restoration Act of 1988; the Americans with Disability Act of 1990; and other applicable federal laws, rules, or regulations.

[Record p. 79]

Pearce made a motion that this issue be dismissed as vague. BCBS's protest letter as well as its letter in response to a request to clarify this issue, state a broad allegation that Pearce's bid is not in compliance with age rating guidelines of the Equal Employment Opportunity Commission and other laws cited in part III A 2 C of the IFB. This part of the IFB cites five federal Acts.

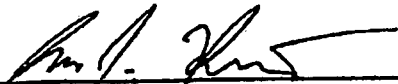
The Panel, in Case No. 1987-3, In re: Protest by J&T Technology, held that protestants must "state their grievance with enough specificity to put all parties on notice of the issues to be decided." Further, in Case No. 1993-16, In

re: Protest of NBS Imaging Systems, Inc., the Panel states that the larger the solicitation, "the more specific a protestant will need to be to state its grievance and give notice of the issues of protest." BCBS does not specify how Pearce's bid is not in compliance, nor does it specify what parts of the law to which Pearce's bid is not in compliance. The Panel grants Pearce's motion to dismiss as vague the issue of Pearce's bid violating age rating guidelines in federal law.

For the foregoing reasons, the Panel denies and dismisses the protest of Blue Cross and Blue Shield of South Carolina.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

July 5, 1996.

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) PROCUREMENT REVIEW PANEL
CASE NO. 1987-3

IN RE:)
PROTEST BY J & T TECHNOLOGY, INC.) O R D E R

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to the South Carolina Code of Laws, §§11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the award of a term contract for personal computers for educational institutions and organizations of the state. The protest was filed by J&T Technology, Inc. (J&T) because its bid was deemed to be nonresponsive as to the PC/XT and PC/AT lots within the request for proposals (RFP). After a determination adverse to J&T was issued by the Chief Procurement Officer (CPO), J&T timely filed a protest with the Panel pursuant to the South Carolina Code Sections cited above.

A hearing was held by the Panel on June 10, 1987. A quorum of the Panel was present. J&T was present and was not represented by counsel. The Division of General Services was present and represented by Ms. Helen Zeigler. The successful vendors for the lots under protest were notified of the hearing but choose not participate in the proceeding.

STATEMENT OF FACTS

The Information and Technology Management Office (ITMO) issued an Intent to Award the contract on March 17, 1987, which was subsequently amended on March 20, 1987, to include items which were omitted. On March 25, 1987, the CPO received a letter of protest from J&T stating that the "reason for this protest is our proposed prices were significantly lower than those you intend to accept." (Record, p.44) The CPO responded by letter, dated April 1, 1987, and informed J&T that its bid was rejected because, in sum, it was not responsive and that price was only one of the factors considered in a RFP. (Record, p.30-36) This letter also requested a response from J&T if it wished to continue the protest. J&T did so in a letter dated April 27, 1987, which stated "[w]e wish to carry on with our protest of the manner in which the your [sic] department handled and awarded the Educational Computer #1/7/205-12-16-86-42P.... It is our contention that the state placed too much weight on minor evaluation factors and not enough on price for category B. This is evidenced in the prices accepted by your office for category B items." (Record, p.27).

The lack of precision in stating the protest presumably caused the CPO to restate the issue for resolution as, "[w]as the evaluation and award conducted in accordance with Section

11-35-1530, (7) of the Consolidated Procurement Code and the evaluation criteria contained in the request for proposal." (Record, p.8) In a letter dated May 21, 1987, J&T requested a review before the Panel and stated that its grievance remained the same as it was stated in its April 27, 1987, letter. In its opening statement, J&T restated its protest as being based upon the fact that the bid was rejected for what it claimed to be nonmaterial deviations from the specifications.

1. In order to be responsive, an offeror must meet all the material aspects of the solicitation. (§11-35-1410(7)).

(a) Section 4.3 and 4.3.1(a) of the RFP provided:

4.3 EDUCATION AND SUPPORT

Education and continuing support for all equipment purchased must be available during and after the term of any contract(s) established. Proposing vendors will provide detailed information (not sales brochures) stating how the vendor will provide the following services. Responses to this section must provide sufficient information for evaluation of value and acceptability." [Emphasis added]

4.3.1 Education and Training

Response to this section should identify the education and training available, detailing the locations at which training is available, the degree of expertise and audience which the training addresses and the cost of that training. Specific areas which should be addressed are:

(a) Technical training

It is likely that one or more purchasers operating under these contract(s) will elect to establish or continue a self-maintenance program. Proposing vendors should be capable of providing training in the following major categories on a continuing basis.

1. Repair and installation of hardware items - instruction sufficient to train an individual to be a competent service technician.
2. Intensive software training - instruction sufficient to train an individual to respond to question (sic) and problems received from end users.
3. Special feature training (e.g., networking, communications).... [Emphasis added]

2. Mr. Phillip Pickard, the employee or agent of J&T who responded to the solicitation on behalf of J&T, testified that he considered the "should" in Section 4.3.1 to be permissive rather than mandatory. Consequently, J&T qualified its response to Section 4.3.1(a): "J&T Technology, Inc., will not participate in any technical training as outlined in this section." (Record, p. 85). The unwillingness of J&T to provide technical training was reiterated by Mr. Pickard, in sworn testimony, during questioning by the Panel.

3. The Panel finds that the language of Section 4.3 makes it clear that it is related to, and must be read in conjunction with, Section 4.3.1. The Panel further finds that it would be illogical or inconsistent to read "should" in Section 4.3 as being permissive, thereby making the training called for in 4.3.1. optional. Rather, "should" is used in an auxiliary function to express an obligation, i.e., if you must provide

education and continuing support, as required in Section 4.3, a responsive bid should identify the education and training available. In sum, the Panel finds that 'should' in Section 4.3.1., when read with Section 4.3, establishes a mandatory requirement for a vendor to supply the training delineated in 4.3.1. The Panel further finds that J&T had a period of time outlined in the RFP during which it could have sought a clarification of Section 4.3.1., if J&T deemed it necessary. (Record, reverse side of p. 91) No evidence was presented that J&T asked for clarification during this time allowed by the RFP.

4. The Panel further finds that Section 4.3.1(a) provides evidence that this section is material. When a vendor trains a user "to be a competent service technician" with regard to hardware and a vendor provides intensive software training in order for "an individual to respond to question (sic) and problems . . .", the state will save money by reducing the need for routine service calls. Further, the uncontroverted testimony of John Watson, Director of System Engineering, University of S. C., further supports this finding of the Panel, as Mr. Watson testified that technical training was sought to reduce the need for service calls thereby saving the state money.

5. Section 11-35-1530(c) of the S. C. Code authorizes, but does not require, discussion with responsible offerors after the R.F.P. has been submitted, but prior to award, in order to

assure full understanding of, and responsiveness to the solicitation requirements of the R.F.P. J&T failed to submit several items that were required by the solicitation in order to evaluate the equipment in its proposal. The Panel finds that these materials (Record, pp.49-50) were necessary to determine whether the equipment bid was responsive to the RFP. The record is replete with evidence of attempts to obtain and attempts to supply the hardware diagnostic and service manuals and the parts list. The Panel finds that these manuals and the parts list were a material component of the solicitation. Ultimately, a deadline was set by ITMO for the receipt of these items, which J&T missed by one day. J&T admitted it failed to meet this deadline. The burden is on the vendor to supply all of the information required by the solicitation when the RFP is submitted. Had ITMO not requested the material which J&T failed to supply in its bid package, ITMO could have properly rejected the bid as nonresponsive under §11-35-1530(c) of the South Carolina Code and Section 8.4 of the RFP. (Record, p.123) The Panel finds that J&T did not meet its burden to supply the material required by the RFP and consequently failed to meet an essential requirement of the solicitation.

6. The Panel finds, and the evidence reveals, that the evaluation criteria contained in Section 7 of the IFB was properly applied in this solicitation. The Panel further finds that any grievance based upon the relative weight given the different factors in the evaluation criteria is untimely under

§11-35-4210, as it was not raised until April 27, 1987, while the RFP was issued in October 1986.

CONCLUSION OF LAW

The Panel concludes that, implicit under §11-35-4210 is the requirement that protestants state their grievance with enough specificity to put all parties on notice of the issues to be decided by the CPO and the Panel. The protestant cannot alter or modify its grievance as the protest develops except as permitted by §11-35-4210. The state is under no obligation to reformulate or perfect a protestant's grievance. The Panel concludes, as a matter of law, that J&T met the bare minimum of what is required under §11-35-4210 in articulating its grievance.

The Panel concludes that, having found that J&T failed to meet the essential requirements of the RFP and thereby it materially deviated from the material aspects of the RFP, J&T's bid is nonresponsive. Based upon Findings of Fact Numbers 3 and 4, the Panel is compelled to conclude J&T's proposal was nonresponsive. The evaluation criteria of the RFP clearly states that the mandatory requirement must be met in order to properly be awarded the contract.

J&T's allegation that it should have been awarded the contract is clearly without merit and the Panel so con-

cludes. A proposal that is nonresponsive cannot, by definition, be the proposal that is most advantageous to the state.

Having reached the aforementioned conclusions, the Panel denies J&T's request for lost profit on the contract during this protest.

The Panel upholds the decision of the CPO and accepts his determinations as its own to the extent that those determinations are not in conflict with those of the Panel.

THEREFORE, the Panel rules that J&T's proposal was properly rejected as nonresponsive and the intent to award stands as issued by ITMO.

IT IS SO ORDERED.



Hugh K. Leatherman
Chairman, South Carolina
Procurement Review Panel

July 13TH, 1987

Columbia, South Carolina

(2941S)

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) PROCUREMENT REVIEW PANEL
CASE NO. 1992-9

IN RE:

PROTEST OF THE MEGG CORPORATION OF)
GREENVILLE;) O R D E R
APPEAL BY THE MEGG CORPORATION OF)
GREENVILLE)

This case comes before the South Carolina Procurement Review Panel (the "Panel") on the appeal by The MEGG Corporation of Greenville ("MEGG") from a decision by the Chief Procurement Officer ("CPO") dismissing MEGG's protest for failure to sufficiently state a grievance.

The Panel decides this case without a hearing and considers only the record made before the CPO as submitted to the Panel.

FINDINGS OF FACT

On October 7, 1991, State Procurement issued a Request for Proposals ("RFP") for annual maintenance on computers owned by the Department of Mental Health. MEGG and six other vendors responded on November 4, 1991.

The award criteria listed in sections 5.1 to 5.4 were:

5.1 Qualifications and experience of offeror and the technicians who will be assigned to this contract in providing services similar to those required by this contract.

5.2 Quality and effectiveness of offeror's plans and procedures for maintaining parts, receiving service requests and responding to requests in a timely manner.

5.3 Input from references.

5.4 Offeror's total annual price.

(RFP Amendment #001, page 26). On March 9, 1992, the State issued a Notice of Intent to Award to The Computer Group.

Shortly thereafter, MEGG discussed its failure to receive the contract with the procurement officer. Those discussions revealed a possible problem with the evaluation committee's check of MEGG's references.

On March 18, 1992, MEGG protested the award to The Computer Group in writing as follows:

The Megg Corporation would like to formally protest the award given the Computer Group for the RFP #B200472, annual maintenance for Micro Computer Hardware for the Department of Mental Health.

The Megg Corporation understands that many factors were used in awarding the RFP. We feel that The Megg has met the award criteria in (5.1-5.4) therefore, we do not understand why we're eliminated from this RFP. We have already established an excellent reputation with the State of South Carolina maintaining the same type of equipment listed on the RFP.

Until we can review how the evaluation was done, we will not understand why it took four months to arrive at a decision, how the decision was reached, and why there was no personal contact with us if there were questions about our ability to service Department of Mental Health.

If I may further clarify my concerns, please let me know. Until then, I look forward to reviewing the evaluation documents and procedures in regards to the award of the RFP to Computer Group.

(Record, p. 14).

On March 23, the State received a Freedom of Information Act request from MEGG for copies of all proposals submitted in response to the RFP and for information how the proposals were evaluated. (Record, Exhibit #5). The State responded to the request on April 1. MEGG received the information on April 4.

At the hearing before the CPO on April 15, MEGG attempted to present a detailed statement of its grounds for protest as follows:

PROTEST OF RFP B200472

Obviously from the reference check list our correct references were not contacted. It seems somebody was using the reference sheet of our technician and called them about the Megg Corporation.

Don Owens gave us a rating of.....1
Regis Parsons gave us a rating of...1
Robert Barkalow gave us a rating of.8
David Poster gave us a rating of...12
Richard Kustrin gave us a rating of.5

Out of a possible point total of 120 we received only 27 because of a mistake by the evaluating committee.

I also believe that Parsons, Owens, Barkalow and Poster would normally be biased in other areas of judgement since they do not know the Megg Corporation and after the response from the incorrect reference what else would they believe.

Mr. Richard Kustrin, who knows us, these past four years, rated us fair in areas (1) and (2). Yet gave us a low reference because of the mistake.

The evaluation of points (1) and (2) of Owens and Parson are totally out of line with Mr. Kustrin. I find this

unsettling as to what formula they used in this area.

My recommendation is to award the contract to the Megg Corporation since it is obvious that we were low bidder; should have received at least 90 or more points on references; and perhaps more in the other areas if an objective review was taken.

Also why did it take so long to make a decision?

(Record, Exhibit #8).

The Department of Mental Health objected to the introduction of the more detailed grounds on the basis of timeliness and moved to dismiss the protest as set forth in MEGG's March 18 letter for failure to sufficiently state a grievance.

The CPO granted Mental Health's motion to dismiss the March 18 protest and rejected the more detailed statement of grounds offered on April 15 as untimely.

MEGG appeals the decision of the CPO to the Panel.

CONCLUSIONS OF LAW

The issue is whether the March 18, 1992, protest letter of MEGG Corporation meets the requirements of Section 11-35-4210(1) of the South Carolina Consolidated Procurement Code. That section provides:

Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate Chief Procurement Officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving

rise thereto, but in no circumstances after thirty days of notification of award of contract.

The Panel in previous cases has elaborated on the requirements of a protest under this section. A protest letter must in some way alert the parties that the author is formally protesting, rather than simply complaining or inquiring¹ and the letter must set forth the general nature of the grounds for protest.² Whether a protest is specific enough to meet the above requirements is not to be judged on highly technical or formal standards.³

The Panel finds that the March 18 letter of MEGG easily meets the requirement that it alerts the parties that MEGG is protesting rather than simply complaining or inquiring. The first sentence of the letter indicates, "The Megg Corporation would like to formally protest the award given to the Computer Group for the RFP #B200472"

The Panel further finds that MEGG's letter meets, though just barely, the second formal requirement of a protest letter - that it put the parties on notice of the general nature of the grievance. Read broadly, rather than technically, MEGG's letter states that, even though MEGG met

¹In re: Protest of Computerland, Case No. 1988-4, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 433.

²In re: Protest of Sterile Services Corporation, Case No. 1983-17, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 99.

³Sterile Services Corporation, cited above, at p. 100.

all the requirements of the award criteria and even though it has established "an excellent reputation with the State of South Carolina maintaining the same type of equipment listed on the RFP", it was eliminated from receiving award of the contract.

The Panel believes that this is a sufficient statement of the general nature of MEGG's grounds - that MEGG has been aggrieved because the State unfairly considered or failed to consider its references.⁴ MEGG also sufficiently raises questions about the length of time taken to evaluate the proposals and why no one from the Department of Mental Health sought clarification of its proposal.

In deciding that MEGG's March 18 protest letter sufficiently states a grievance, the Panel does not decide whether any of MEGG's grounds have legal or factual merit but rather leaves such questions in the first instance to the Chief Procurement Officer.

The Panel notes that the proceeding before the Chief Procurement Officer is informal and designed to resolve matters by compromise if possible. See S. C. Code Ann. §§ 11-35-4210(2) and (3) (1986). So long as a protestant raises the general nature of its grounds, the Panel believes

⁴The Panel does not read MEGG's more detailed statement of grounds as altering the general nature of MEGG's original complaint. The Panel believes that the more detailed statement can be read to merely clarify the original complaint concerning MEGG's references and the length of time taken to evaluation proposals.

that it is proper that the specifics of such grounds be developed before the CPO.

For the reasons stated above, the Panel reverses the April 17 decision of the Chief Procurement Officer and remands this case to the CPO for consideration of the merits in accordance with the above opinion.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 
Gus J. Roberts
Chairman

May 19, 1992
Columbia, S.C.

State of South Carolina
South Carolina Procurement Review Board
No. 2011-3

IN RE:)
)
MONROE CONSTRUCTION COMPANY, LLC)
)
)
)

APPEAL HEARING

DATE: April 13, 2011
TIME: 9:30 a.m. - 3:00 p.m.
LOCATION: Solomon Blatt Building
Columbia, South Carolina

REPORTED BY: KATHRYN J. LINDLER

COPY

1 than that. I will do my best.

2 Again I'm, George Lampl, here on behalf of
3 USC. It's nice to see you all today. The University is
4 moving to dismiss, actually there's a couple issues, but
5 the first appears in the third paragraph of the appeal
6 letter which is on page 3 of the record. The first
7 sentence reads, "Monroe further requests the Procurement
8 Review Panel Board determine whether the University's
9 descriptions for contractor listing requirements on the bid
10 form complied with SC Code 11-35-3020 to list by specialty
11 an issue you did not directly address in your determination
12 that Rodgers' bid was responsive on its face." The
13 paragraph goes on to talk about that issue I think. To be
14 perfectly honest, I'm not exactly sure what the issue is
15 that's being raised, but I am sure, whatever it is, it was
16 not raised in the protest letter. There's not a hint of it
17 in the protest letter. In fact 11-35-3020 is not cited in
18 the protest letter. There's a suggestion in the following
19 sentence and paragraph that there was some sort of
20 ambiguity apparently in the bid form as to what was being
21 asked of bidders I suppose is what is being alleged there.
22 Again there is no suggestion in the protest letter on page
23 19 of the record. There is no suggestion of any sort of
24 bid form ambiguity in the protest letter either. Aside
25 from that even if the issue had been raised in the original

1 protest letter which essentially amounts to the challenge
2 and the solicitation itself and would have been untimely
3 even had it been raised in the protest letter. The Code
4 11-35-4210 requires that protest to the solicitation must
5 be made within 15 days of the issuance of the invitation
6 for bids. So this kind of issue would've had to have been
7 raised well before even the protest letter was submitted.
8 Would have had to raise that issue before the bid was
9 submitted.

10 And finally the determination of which
11 subcontractor should be listed in the invitation for bids,
12 if that's the nature of this issue that's being raised here
13 in the third paragraph of the appeal letter that is not
14 protestable under the code. That is in 11-35-3020-(C)1
15 which explicitly states that the issue as to which
16 subcontractors are listed in the invitation for bid in the
17 bid form is not even a protestable issue. So for all those
18 reasons the University would ask that this issue center on
19 11-35-3020 and the listing by specialty and the ambiguity
20 surrounding that be dismissed as untimely for the reasons
21 set forth.

22 Also there appears to be another issue, I
23 apologize for not bringing this up when we spoke over the
24 telephone. I had thought about it, but decided not to, but
25 I feel like I need to raise it now. Again I'm not certain

1 that this is necessarily a distinct issue, but looking on
2 page 4 of the record which is the second page of the appeal
3 letter, the last full paragraph on the page, the second
4 sentence reads, "The decision fails to address the
5 University's obligation under SC Code 40-11-200(B) to
6 investigate once it was placed on notice that an
7 identified, listed plumbing subcontractor also bid for an
8 identified type of work it had no license to perform." And
9 some of the latter paragraphs of the appeal letter on page
10 5 of the record, particularly the first and second full
11 paragraphs, are devoted largely to this alleged
12 investigation obligation of duty that the University has
13 under 40-11-200(B). And again nothing remotely close to a
14 duty to investigate issue was raised in the protest letter.
15 The statute itself is cited in the protest letter. Again
16 it's on page 19 of the record, but strictly for the
17 proposition that it is, and I'm quoting from the protest
18 letter, "that it is a criminal offense for the University
19 to even consider a bid if the work is not to be performed
20 by a properly licensed contractor," and then there is
21 simply a quotation of the statute and that's it. There's
22 really no allegation at all in here or suggestion that
23 there's some sort of duty on the part of the University to
24 investigate a complaint which is how Monroe characterizes
25 it in its appeal letter with regard to this particular

1 issue. A duty to investigate under 40-11-200(B) was not
2 raised in the original protest and therefore it's also
3 untimely before the Panel. For those reasons the
4 University asks that you dismiss those two issues.

5 MR. MCLANE: Mr. Nicholson.

6 MR. NICHOLSON: I'm not going to add to what
7 Mr. Lampl said. He discussed it fully. I would say that
8 after that those are the only issues remaining as I see it.
9 The chairman has already ruled previously in our prior
10 hearing that any issue with respect to a Hill sub bid were
11 untimely and not before this panel. And so it's my view
12 that the only remaining issue are those that Mr. Lampl has
13 presented to the Panel this morning. And if the Panel
14 rules in Mr. Lampl's USC favor with respect to those
15 motions that ends this appeal right now.

16 MR. MCLANE: Ms. Crum.

17 MS. CRUM: The Panel has already ruled upon CPO's
18 motion to dismiss any issues regarding the scope of Hill's
19 sub bid. Some of these paragraphs seem to somewhat merge
20 that concept in here. To the extent that they address the
21 scope of Hill's sub bid that issue I believe is off the
22 table, not dealing with that. Mr. Lampl's first motion as
23 to moving to dismiss paragraph 3 of the appeal letter, the
24 CPO would agree with that motion. It was not clear at the
25 time of the last motion exactly what that issue was

1 needed.

2 On the issue of compliance with the statute.
3 Both the contractors' and the subcontractors'
4 qualifications and licensing was raised. It states, and
5 you can look on page 27 of the record at the top. That the
6 chief procurement officer did in fact note that. He says
7 as the plumbing subcontractor and neither Rodgers nor Hill
8 has the required specialty license to perform the specialty
9 plumbing work. That is a little loose. It's clear later
10 in the letter that we are talking about the process piping
11 work. But somebody has got to have the license. If the
12 general contractor doesn't have it at the time of -- when
13 he submits his bid, he doesn't have it himself or somebody
14 who is going to do it for him, he's not qualified. He is a
15 non-responsible bidder under the Atrium case. So we did
16 raise it. We then, if you go to the very end of the
17 protest letter, we quote the statute and we highlight the
18 part that say that the University can't consider -- you
19 notice I said it's a vio -- we raise the issue of the
20 University's compliance with this statute.

21 MR. MCLANE: What page?

22 MS. BARROLL: This is record page 37. As to
23 whether or not the duty to investigate -- if this is
24 statute that has a criminal penalty for it, you have an
25 obligation to comply with that statute and a duty to

1 investigate when you have been alerted to a potential
2 violation of it would include a duty to investigate, not
3 stick your head in the sand. There's some obligation --
4 one of the issues is what is the scope of that obligation.
5 How far do they have to go. And did they go far enough.
6 But they have an absolute obligation to comply with this
7 licensing statute. It was at the very end of the protest
8 letter and at the time the initial bid was submitted. It's
9 underlined. So we believe the issue of the duty to
10 investigate is implicit and the duty to comply with the
11 statute and that was clearly referenced. The question is
12 what is the scope of the University's obligation to
13 investigate once it has been placed on notice early on that
14 a plumbing contractor was bidding for work that wasn't
15 theirs. So if he was doing it implicitly, well, who else
16 was going to do it. If it wasn't Hill, then who. Who had
17 the license. Who did he have lined up to do it at the time
18 he submitted the bid. That goes directly to Rodgers',
19 responsibility. And the question is, was the University's
20 determination of the responsibility sufficient. We did
21 raise that under the statutes that we believed the wrong
22 standard was applied, the arbitrary and capricious
23 standard, because technically when you read the statute
24 that references the arbitrary and capricious standard, it
25 doesn't refer to a determination that somebody was

1 responsible, but rather to the fact that they were not a
2 responsible bidder and here we have the flip side of that.

3 The legal argument is raised very clearly in
4 our appeal letter. It starts at the bottom of page 4 and
5 continues to the top of page 5 and that's where I point out
6 that if you look at South Carolina Code Section
7 11-35-2410(A) determinations of non-responsibility under
8 that subsection, under 11-35-1832 are governed by that
9 standard, but determinations of responsibility under
10 subsection 1 of 1830 and the legislature made an
11 affirmative decision not to extend it, the same standards,
12 subparagraph 1 and subparagraph 2. So you have technically
13 under the statute different standards of review for a
14 determination of non-responsibility and one for
15 responsibility. And in some sense that made sense and when
16 you get into a discretionary issue of responsibility, then
17 it makes sense that it should be an arbitrary and
18 capricious standard, but it's not discretionary to comply-
19 with a statute that says you shall not do that. That's
20 mandatory. But it's all in the brief, the argument I just
21 raised.

22 So, yes, the issue is does the -- what duty
23 does the University have to undertake when it's placed on
24 notice of a bidding beyond the scope of work and did it
25 meet that, did it meet that standard in this case. And

1 upon by the CPOC. So I guess -- I'm not trying to be
2 argumentative with the Panel in all respect. I'm just
3 trying to figure out when the Panel says that the duty to
4 investigate was not raised, does that mean the duty to
5 comply with the law in that issue as raised in the original
6 protest letter as heard and argued before the CPOC and as
7 appealed is no longer a valid issue or if it's the Panel's
8 position that that's being dismissed as well. The case
9 law, even this document that the chief procurement officer
10 gives to every party that provides an appeal clearly says
11 that while the specificity of a protest is not to be judged
12 on highly technical or formal standards, the protest must
13 alert the parties to the general nature of the grounds of
14 protest. Clearly this issue of licensing was raised. The
15 issue that we have with these motions is clearly we've
16 raised the issue of responsiveness and responsibility and
17 what the motions are doing is picking out the way that we
18 have now appealed and said now you said duty to investigate
19 as opposed to duty to comply. If you have a duty to comply
20 with the law and you're put on notice that you have a bid
21 from someone who does not have the a license required to
22 bid the work, once you are put on notice, I think the
23 statute that we cited clearly imposes an obligation on the
24 State to investigate. But really what we're talking about,
25 the issue we raised, was compliance with the licensing

1 protesting that Hill was not properly licensed to perform
2 pressure and process piping work and Rodgers was not
3 licensed to perform either. That's the same issue we're
4 talking about today. I guess my point of clarification is.
5 If we limit -- if the decision is that we are not to -- I
6 guess I just don't understand how far. Does that cut off
7 the responsiveness and the responsibility issue or is it
8 limited? I'm just not clear on that point. Thank you.

9 MR. MCLANE: Mr. McCabe, we have already made a
10 ruling on USC, what they were supposed to do. I can't --
11 other than that. We have made a ruling on it and voted on
12 it and given you our ruling.

13 MR. MCCABE: What issues would be left?

14 MR. MCLANE: I don't know. Mr. Lampl, is there
15 anything more? Or Ms. Crum? Mr. Nicholson?

16 MR. NICHOLSON: Mr. Chairman, as I said earlier,
17 I would respectfully submit that given the Panel's ruling
18 both at the hearing the other day and now today that there
19 really is nothing left for us to discuss today. Given the
20 scope of their appeal letter, the Panel has ruled on those
21 issues ruling that the issues they raised were not timely
22 and the other reasons stated here today and so there is
23 nothing left for us to present at this hearing today.

24 MR. MCLANE: Mr. Lampl.

25 MR. LAMPL: I agree with that. If that's a

1 discuss that. That's out. So anything above that or
2 outside of that.

3 MR. MCCABE: The remaining issues are the bid
4 form, any complaints with the bid form and the definition
5 of plumbing. I just want to make sure. That would be the
6 last, the only surviving issue from your motion to dismiss?

7 MR. MCLANE: Yes. On the bid form as far as
8 plumbing, what USC did, we've already heard that. We made
9 a ruling on that.

10 MR. MCCABE: So the only issue is the definition
11 of plumbing?

12 MR. MCLANE: Procurement code, responsiveness of
13 the procurement code, responsibility of the procurement
14 code too.

15 MR. MCCABE: Hasn't been dismissed?

16 MR. MCLANE: We'll listen to that. Everything
17 else we discussed either today or heard and got background
18 on. We discussed it at our meeting last Tuesday on the
19 phone conference.

20 MR. MCCABE: I would call Ms. Floyd, Regina
21 Floyd.
22 Thereupon,

23 REGINA FLOYD,
24 being first duly sworn to tell the truth, the whole truth
25 and nothing but the truth, as hereinafter certified,

1 testified as follows:

2 EXAMINATION

3 BY MR. MCCABE:

4 Q. Good morning, Ms. Floyd. How does the project
5 manual define plumbing?

6 A. How does the project manual define plumbing?

7 Q. Yes, ma'am.

8 A. I guess I'm a little unclear on the question.

9 Q. Is plumbing defined in the project manual?

10 MR. MCLANE: Do you have something she can refer
11 to? You have a copy of the record before you.

12 Q. The project manual begins on page 57 of the
13 record.

14 A. The plumbing work is part of division 15 and it's
15 the work that requires the licensed plumber.

16 Q. Under division 15 beginning on page 60?

17 A. Yes, it's part of division 15.

18 Q. Under division 15 it also includes electrical
19 work as well, correct?

20 A. Electrical work is in division 16.

21 Q. What part of the work does mechanical vibration
22 and seismic controls, what trade handles that type of work?

23 A. I believe that would be mechanical license, but I
24 would have to look at the code to clarify that, if there's
25 any other special license required.

1 Q. If I look under division 15, it doesn't
2 necessarily follow that all the work under division 15
3 would fall under plumbers contract, would it?

4 A. No. Some division 15 falls under mechanical
5 license.

6 Q. The original question was, does the project
7 manual any where define what the plumbing scope of work is?

8 A. You mean somewhere in here do we list like these
9 sections are plumbing or these sections -- I know of no
10 where that we do that.

11 Q. Is it fair to say that the best way to determine
12 what's included in the plumber's scope of work would be to
13 look at the plumbing drawings that you prepared?

14 A. Their work is on those drawings along with other
15 work, yes.

16 Q. I would refer -- let's take a look at Exhibit 1
17 which is page 45 of the record. Are you familiar with that
18 document?

19 A. Yes. Yes, I am.

20 Q. I got a blow up here and I got some small copies.
21 May I approach and give the Panel a copy?

22 MR. MCLANE: We got -- let's see what we got.

23 MR. MCCABE: This is a clear...

24 Q. Who prepared this plan?

25 A. This plan was done by our consultant engineering

1 A. P is plumbing and 7.10 was the sheet number.

2 Q. So the process piping drawings were found in the
3 plumbing section of the plumbing drawings?

4 A. It was shown on a plumbing drawing, that is
5 correct.

6 Q. If I were to bid the plumbing drawings, because
7 you can't look at these division 15 and ascertain what
8 falls into plumbing contract, I would start by looking at
9 the plumbing drawings first and then refer back to the
10 specifications to determine the specific details of what's
11 on the plumbing drawings, correct?

12 A. I'm not a contractor. We're not responsible for
13 the division of the work. It would be up to the person
14 bidding the work that you see to determine what they were
15 placing the bid on.

16 Q. Would you please turn to page 329 in the record.
17 It's Exhibit Number 9 from the hearing.

18 A. Okay.

19 Q. If you go down, it's below the part where it says
20 job location, et cetera. Just above the base bid price.
21 Does it say plumbing as indicated on plumbing drawings and
22 specifications as indicated below?

23 A. Yes, that's what I read.

24 Q. Would P7.10 be included in the plumbing drawings?

25 A. I didn't fill out this form --

1 A. Correct.

2 Q. And it's a part of the bid process?

3 A. It's a part of the design process.

4 Q. Underneath this mechanical and electrical, you

5 got five categories, correct?

6 A. Correct.

7 Q. The first one is plumbing, second is HVAC and

8 then you got fire protection which is another form of

9 plumbing, isn't it?

10 A. Yes.

11 Q. That's a yes?

12 A. Yes.

13 Q. But you broke that out as a separate category

14 here?

15 A. Yes.

16 Q. Fire protection is a type of plumbing you

17 testified. It's broken out separately. Then you have

18 electrical and you have equipment and furnishing. Let's go

19 back up to the top category under mechanical and

20 electrical. It has plumbing. Then go down to the last

21 bullet point. Will you read that for me?

22 A. Laboratory piping, nitrogen, lab air, argon,

23 helium, oxygen, deionized water connection, tempered water,

24 corrosion resistant waste and vent system.

25 Q. Some of this stuff requires a process piping

1 the plumbing for cost purposes or design purposes or
2 anything else?

3 A. Not offhand, no.

4 Q. Did you prepare the bid form?

5 A. Yes.

6 Q. When you prepared the bid form and you don't, you
7 just testified that you don't know of any place in this
8 document or in the project manual where the process piping
9 is listed independently from plumbing. When you put
10 plumbing down on the bid form, what was included?

11 A. Work that had to be done by a contractor holding
12 a plumbing subcontractor license.

13 Q. So you treated it differently on the bid form
14 than you did in all the other documents that your firm
15 prepared?

16 A. Well, the bid form was referring to the license
17 of contractor specialties, not division of work by drawing
18 number or section number.

19 Q. Where would I find documentation to support that?

20 A. Well, on the bid form, I mean we're listing the
21 subs that refers to licensing. It's not discussing
22 division of work. I can't recall off the top of my head
23 how the bid form refers to it.

24 Q. Here is an example. If you go to page 49.

25 A. Okay.

1 Q. On page 49 is a copy of Rodgers Builders. It's
2 one of the pages in the bid form.

3 A. Okay.

4 Q. In fairness if you go to the next, that's Exhibit
5 Number 3. If you turn over two pages, you then come to
6 Monroe Construction Company's bid. They're back to back.

7 A. Okay.

8 Q. Just for ease, let's go to page 49 and look at
9 that page of Rodgers' bid form. It says, let's go down to
10 where you list the subcontractor specialties, okay?

11 A. Okay.

12 Q. It says subcontractor specialty and then in
13 parentheses it says completed by A/E. Who is that?

14 A. Architect engineer.

15 Q. That's the same entity that prepared the plumbing
16 drawings, correct?

17 A. Yes. Well, we're responsible for all the
18 documents.

19 Q. And prepared all the documents that set out the
20 plumbing scope of work and included in the estimate the
21 process piping, the lab gas work, correct?

22 A. Correct.

23 Q. You're saying here, when you say plumbing, you
24 don't mean -- it's not consistent with everywhere else in
25 the record, is that correct?

1 A. Well, the intent here we're listing the proposed
2 licensed subcontractors. And so we were asking for the
3 person who has a mechanical license, plumbing license and
4 eléctrical license.

5 Q. Is there such thing as a mechanical license?

6 A. Yes. Person who is going to do the HVAC would
7 have a mechanical license.

8 Q. If you're talking about licensing, isn't plumbing
9 and electrical and HVAC, they're all mechanical licenses,
10 aren't they?

11 A. That's correct.

12 Q. If we're going to use the LLR definition of
13 licensing, then we got an inconsistency here if you're
14 going to call the HVAC guy mechanical contractor, isn't
15 that correct?

16 A. I'm sorry, could you repeat the question?

17 Q. Well, a mechanical contractor as defined by the
18 licensing statute would include people who hold licenses
19 for plumbing and electrical and HVAC, correct?

20 A. Yes.

21 Q. But when you say mechanical here, you don't
22 really mean the same mechanical as defined by the licensing
23 section, do you?

24 A. I mean the licensed subcontractor who is doing
25 the mechanical portion of the work.

1 an explanation -- is there anywhere I would find a
2 definition of what is meant by mechanical on the bid form?
3 A. No, sir, not to my knowledge.
4 Q. Other than what we have here and on the drawings?
5 A. Yes.
6 Q. Thank you. I appreciate your time.
7 MR. MCLANE: Mr. Nicholson.
8 MR. NICHOLSON: I'm going to defer to Mr. Lampl.
9 MR. MCLANE: Mr. Lampl.

10 EXAMINATION

11 BY MR. LAMPL:

12 Q. Ms. Floyd, I heard a lot of discussion about the
13 cost estimate and what was in the cost estimate and those
14 numbers. Did any perspective bidder have access to any of
15 that information prior to submitting their bids? Would
16 they have any reason to know how the cost estimator decided
17 to lay things out in his report?

18 A. No. No, sir.

19 Q. To your knowledge did Monroe Construction or any
20 other bidder for that matter question you about the bid
21 form and what was intended by the word plumbing?

22 A. No, sir.

23 Q. They never asked a question about it?

24 A. No, we had no questions on that.

25 Q. They just made an assumption apparently about

1 process piping and plumbing?

2 A. Correct.

3 Q. Look again, I believe it's page 45, explain again
4 for the Panel if you would just why you would include
5 plumbing as well as process piping on the same drawing.
6 What was the purpose of doing that?

7 A. This sheet was to show all of the piping that
8 goes into the labs. It's an enlarged plan just for lab
9 spaces and we show on here the lab gas piping, the plumbing
10 pipes that carry water, sewer, as well as the specialty
11 piping that was being done by a separate contractor and the
12 reason we show all this in one location is for coordination
13 so that we can make sure we have room for everything and
14 they all travel together and work together. So they're all
15 shown on the same sheet.

16 Q. Does it in any way attempt to compel a contractor
17 or determine a subcontractor's scope of work?

18 A. No.

19 Q. Page 194 of the record, can you describe for me
20 what that is starting with section 15213?

21 A. Laboratory nitrogen, compressed air, natural gas
22 and argon gas piping.

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

1 A. That's correct.

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

5 A. No, it's not.

6 Q. The bid tabulation on page 326 of the record. Do
7 you know whether -- did any other bidder for this job list
8 both a plumbing sub and a pressure process piping sub on
9 the bid form?

10 A. No. Just Monroe.

11 Q. How many bidders were on this job?

12 A. Twenty.

13 Q. Twenty?

14 A. Yes, sir.

15 Q. Except for Monroe, every one of them listed a
16 plumber with a PB license?

17 A. That's correct.

18 Q. Nobody asked a question about it?

19 A. No, sir.

20 Q. Tell me why again that USC or through Watson
21 Tate, your firm, required bidders to list a plumbing,
22 mechanical and electrical sub? Why did you do that?

23 A. The procurement code we are required to list on
24 the bid form any licensed sub subspecialty that we
25 anticipate the work to be more than 3 percent of the bid.

1 Q. The estimate was that the plumbing work would
2 exceed 3 percent of the prime's base bid?

3 A. That's correct.

4 Q. But what about process piping?

5 A. No, that only, according to our estimate for Base
6 Bid 1, that was 84,000 something and that was like
7 2.3 percent of the total of the job.

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

11 A. That's correct.

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

16 A. To have them list the plumbing subcontractor who
17 had the PB license who was going to do the plumbing work
18 that didn't require a specialty license for process piping,
19 because they're separate licenses.

20 Q. In your experience, do general contractors always
21 have all of their sub bids in hand at the time they make a
22 bid for a project?

23 A. No, they don't. I mean they list these on the
24 bid form and they're held to those unless there is some
25 compelling reason that they have to change subs, but

1 they're not required to tell us who their subs are until 21
2 days after the contract.

3 Q. Other than the listed?

4 A. Other than the ones that are listed on the form.

5 Q. Thank you. That's all I have.

6 EXAMINATION

7 BY MS. CRUM:

8 Q. Ms. Floyd, you assisted USC with determining
9 which of these subcontractor specialties to list on Base
10 Bid 1, correct?

11 A. That's correct.

12 Q. You basically listed the three bids?

13 A. That's correct.

14 Q. You testified that you relied on the definitions
15 under the Licensing Act to determine which or the name of
16 each category to include on the bid form, is that correct?

17 A. That's correct, yes.

18 Q. You don't have the Licensing Act with you today,
19 correct?

20 A. I do not.

21 Q. Would it help if I handed you a copy of the Act
22 we're referring to?

23 A. Yes.

24 MS. CRUM: May I approach?

25 MR. MCLANE: What is that?

1 your estimator did in order to determine which categories
2 to list on that bid form?

3 A. No.

4 Q. You used the licensing categories, correct?

5 A. That's correct.

6 Q. If you will turn to SCBO, I think it's page 46.

7 This project required laboratory cabinetry, right, cabinets
8 in the lab?

9 A. That's correct.

10 Q. Is that listed on the SCBO, cabinets?

11 A. No, it's not. We don't do an exhaustive list of
12 everything on the project. Just a general overview.

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

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

17 Q. Have you worked with Rodgers before?

18 A. I have not, no.

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

21 A. Familiar with their reputation.

22 Q. What was their reputation?

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

25 Q. You mentioned that you checked licenses. Did you

1 check that before you made the award?

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

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

7 A. Correct.

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

10 A. That's correct.

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

14 A. Plumbing.

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

17 A. No.

18 Q. Hill obviously has a plumbing license, right?

19 A. They do.

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

24 A. Yes, we did.

25 Q. If you would turn to page 326 of the bid

1 MS. CRUM: Probably none.
2 MR. MCLANE: Mr. McCabe, call your next witness..
3 MR. MCCABE: Monroe Construction calls Frank
4 Kerr.

5 Thereupon,

6 FRANK KERR,
7 being first duly sworn to tell the truth, the whole truth
8 and nothing but the truth, as hereinafter certified,
9 testified as follows:

10 EXAMINATION

11 BY MR. MCCABE:

12 Q. Please state your name for the record.

13 A. Frank Kerr.

14 Q. Mr. Kerr, where are you employed?

15 A. Monroe Construction.

16 Q. How long have you been employed with Monroe
17 Construction?

18 A. A little over four years.

19 Q. Continuously?

20 A. Yes.

21 Q. You've been employed there all times related to
22 the project we're here about today?

23 A. Yes.

24 Q. Have you been involved with this project since
25 the beginning?

1 Q. Heating is one of them, correct?

2 A. Correct.

3 Q. Plumbing is one of them, correct?

4 A. Correct.

5 Q. Process piping is one of them?

6 A. Correct. There's also several others.

7 Q. That's all I have. Thank you.

8 MR. MCLANE: Mr. Lampl.

9 EXAMINATION

10 BY MR. LAMPL:

11 Q. Mr. Kerr, page 326 of the record is the bid tab.
12 Rodgers listed Hill as the plumbing sub for both base bids?

13 A. That's correct.

14 Q. Looking at that document there, the bid tab, the
15 significant majority of all bidders listed Hill as well,
16 isn't that right?

17 A. That's correct.

18 Q. You acknowledge that Hill has the PB license,
19 that's been stipulated. You acknowledge that Rodgers was
20 the low responsive bidder for both Base Bid 1 and Base Bid
21 2, isn't that right?

22 A. I guess I'm a little unclear on exactly how
23 responsiveness and responsibility are used. I would say
24 no, but I've been told I'm wrong on that, so. That comes
25 out of my understanding and yours might be better than

1 that a bidder would interpret plumbing to be plumbing, not
2 process piping?

3 A. I'm saying it's very common that a plumber quotes
4 process piping scope of work without a license. And to
5 further clarify that, I fell victim of that as well.

6 Q. We've already talked about the fact that we are
7 not here to discuss prior procurements if that's what
8 you're going to talk about. That's just not permissible
9 for you to talk about prior procurements. But the fact of
10 the matter is Monroe was the only bidder to list a process
11 piping sub on its bid form, correct?

12 A. That's correct.

13 Q. You had ample opportunity to ask a question about
14 the bid form or about the scope of plumbing prior to
15 submitting the bid, isn't that right?

16 A. That's correct.

17 Q. You did ask quite a few questions relating to
18 various other aspects of the project prior to the bid,
19 correct?

20 A. That's correct. Things that I thought were
21 unclear and needed clarification. This would have been one
22 of them if I thought it was unclear and needed
23 clarification.

24 Q. But you acknowledge you never asked the question?

25 A. I did not.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) Case No. 2011-3
) ORDER
IN RE:)
) Protest of Monroe Construction Co., LLC;
) Appeal of Monroe Construction Co., LLC)

This case is before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review by Monroe Construction Company, LLC (Monroe). Monroe protested the University of South Carolina's intended award of a construction contract to Rodgers Builders, Inc. (Rodgers). The CPOC conducted a hearing and issued a decision on February 14, 2011, denying Monroe's protest. In the hearing before the Panel, Monroe was represented by Katherine B. Barroll, Esquire, and D. Ryan McCabe, Esquire. Rodgers was represented by Boyd B. Nicholson, Esquire. The University of South Carolina (USC) was represented by George W. Lampl, III, Esquire. The Chief Procurement Officer for Construction (the CPOC) was represented by Molly R. Crum, Esquire.

Findings of Fact

This protest involves a construction contract at USC to upfit laboratory, office, and support spaces on the first floor of the Horizon I project (the Project). The IFB called for two base bids, and the dispute in this case involves Base Bid 2. Base Bid 2 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.

The IFB specified that bidders should designate subcontractors for the following categories: Mechanical, Plumbing, and Electrical. The IFB provided that bids failing to list the

subcontractors as required by law would be rejected. In addition to the relevant provisions of the Procurement Code, the IFB required bidders to comply with the Davis Bacon Act¹ and sections 40-11-340 and -410 of the South Carolina Code of Laws.²

The plumbing work to be performed on the Project was detailed in Division 15 of the Project Manual and included on several drawings. One drawing in particular, entitled "Enlarged First Floor Lab Plumbing Plan, Base Bid 1" and numbered P7.10, showed all piping going into the labs, including specialty gas or process pipes. The highlighted box on the drawing indicated that at least some of the process piping, marked in blue on the drawing, would be provided by separate contract.

USC received nineteen bids on the project. Rodgers submitted the low bid for Base Bid 2. Sumwalt Associates, Inc., and Monroe were the second and third low bidders, respectively. Of those nineteen bidders, only Monroe listed both a plumbing subcontractor and a pressure and process piping subcontractor under the category of "Plumbing" on the bid form. USC posted a notice of intent to award the Base Bid 2 contract to Rodgers Builders on December 3, 2010. Monroe protested the intent to award on December 13, 2010.

USC's Motion to Dismiss Appeal Issues as Untimely

At the beginning of its hearing, the Panel heard argument from the parties on USC's motion to dismiss two issues from the appeal for lack of jurisdiction. First, USC argued that Monroe's appeal letter raised an issue regarding whether or not the Project's bid form satisfied the subcontractor listing requirements of section 11-35-3020³ of the Procurement Code and that

¹ The Davis Bacon Act governs the prevailing wage rates to be paid on construction projects which are federally funded or assisted.

² These two provisions are part of the State's licensing requirements for contractors (the Contractor's Licensing Act). Section 40-11-340 defines the qualifications for acting as a sole prime contractor. S.C. Code Ann. §40-11-340 (2011). Section 40-11-410 lists and describes the license classifications and subclassifications regulated by the State. S.C. Code Ann. § 40-11-410 (2011).

³ Section 11-35-3020(b)(i) provides in pertinent part:

this issue was raised for the first time on appeal. Second, USC argued that Monroe's appeal letter raised an issue regarding whether USC had an obligation to investigate when Monroe alleged a violation of section 40-11-200(B)⁴ of the Contractor's Licensing Act had occurred and that this issue was also raised for the first time on appeal. In response, Monroe asserted that the Panel should hear the issue of whether the bid form satisfied section 11-35-3020 because the Panel was already convened for a hearing and because the bidding public and agencies needed guidance on the subcontractor listing requirements, especially since the determination of which specialties to list on the bid form is not a protestable issue. As to USC's duty to investigate whether a violation of section 40-11-200(B) had occurred, Monroe asserted that this was not a new issue because the allegation that USC had failed to investigate was implicit in its initial protest letter when it cited the statutory provision.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of section 11-35-4210(1)(b) to confer jurisdiction on the CPO and, by extension, the Panel. S.C. Code Ann. § 11-35-4210(1)(b). Section 11-35-4210(1)(b) establishes that a protest must be brought within ten days of the posting of the intent to award. *Id.* The

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. In addition, the governmental body, in consultation with the architect-engineer assigned to the project, may identify by specialty in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. 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.

S.C. Code Ann. § 11-35-3020(b)(1) (2011).

⁴ This provision provides:

(B) 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) (2011).

protest must be in writing and "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) (2011). A party may amend an initial protest of an intended award as long as it does so within fifteen days after the posting of the intended award. *Id.*

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 11-35-4210. *See In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) ("The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2)."); *In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) ("The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210."); and *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 ("The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.")

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 had failed to list any required subcontractors on the bid form. Rather, Monroe asserted that the bid form, Project specifications, and drawings required bidders to list both a plumbing and a pressure and 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.⁵

⁵ During the hearing, the Panel also observed that even if Monroe had raised an issue regarding the sufficiency of the bid form with regard to section 11-35-3020 in its protest letter, it would have been an untimely protest of the

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.⁶

Conclusions of Law

Having granted USC's motion to dismiss the two appeal issues discussed above, the Panel conferred with the parties to determine if any issues remained for the Panel to hear. Monroe asserted that Rodgers' responsibility was still in question. The CPOC agreed in part, suggesting that the scope of work included by the category of "Plumbing" on the bid form needed to be addressed as well as the issue of whether USC had fulfilled its duties under the Procurement Code in determining that Rodgers was a responsible bidder.

The Panel will first address the issue of what work USC intended to include under the "Plumbing" category of the bid form. Monroe has maintained from the start that bidders were required to list both a plumbing subcontractor and pressure and process piping subcontractor on the bid form under the "Plumbing" category. Mr. Frank Kerr, a Monroe employee who was involved in preparing Monroe's bid, testified that he looked at the plumbing drawings, especially

solicitation itself. See S.C. Code Ann. § 11-35-4210(1)(a) (2011) ("a prospective bidder . . . aggrieved in connection with the solicitation of a contract shall protest . . . within fifteen days of the date of the issuance of the Invitation for Bids . . ."). However, a careful reading of the statutory provision governing construction bids makes it clear that the determination of which subcontractors to include in the list is not a protestable issue. S.C. Code Ann. § 11-35-3020(b)(1) (2011). Therefore, the Panel suggests that bidders who are concerned about the inclusion or exclusion of subcontractors on the bid form should be certain to ask questions at the appropriate time during the bid process.

⁶ The Panel also notes that it is not the State entity charged with the authority to enforce this particular provision of the South Carolina Code of Laws. Indeed, on at least one occasion, the Panel held an appealed protest in abeyance while the Contractor's Licensing Board determined whether a bidder was properly licensed at the time it bid on a project. See *In re: Protest of Roofco, Inc.*, Panel Case 2000-14 (March 23, 2000) (granting a continuance until the Contractor's Licensing Board held a hearing to determine whether a bidder was properly licensed to bid on a project).

the drawing marked P7.10, to determine the scope of work for the "Plumbing" category on the bid form. Because that drawing showed general plumbing work as well as specialty pressure and process piping work, he listed both a plumbing subcontractor and a pressure and process subcontractor on Monroe's bid form. However, Ms. Regina Floyd, an Architect involved with the Project who prepared the bid form, testified that the "Plumbing" category was intended to include work that could be performed by a subcontractor holding a general plumbing license as defined by section 40-11-410(f). Ms. Floyd also testified that it was standard practice to show process piping on the plumbing drawings for purposes of coordination of work and that other types of work unrelated to plumbing were also included on the drawing relied upon by Monroe. She also testified that she did not ask for bidders to list a pressure and process piping subcontractor on the bid form because that work was not expected to exceed three percent of the prime contractor's total base bid. Neither Monroe nor any other bidder sought clarification of the plumbing scope of work, nor did any bidder ask what was meant by "Plumbing" on the bid form.⁷ When the bids were submitted, Monroe was the only bidder to interpret "Plumbing" to require the listing of both a plumbing subcontractor and a pressure and process piping subcontractor. Therefore, the Panel finds 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.

The Panel now must decide whether USC properly determined Rodgers to be a responsible bidder. 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

⁷ The Panel has previously expressed concern about bidders who recognize a potential ambiguity in the solicitation requirements, but fail to protest those requirements or ask questions seeking clarification at the appropriate time. *See In re: Protests of Qualis Health, et al.*, Panel Case 2010-4, n. 5 (August 30, 2010). It is too late to address ambiguity in a solicitation's specifications once bids have been received and a notice of intent to award has been posted.

performance which may be substantiated by past performance." S.C. Code Ann. § 11-35-1410(6) (2011). The State must determine responsibility prior to the award of any contract. S.C. Code Ann. § 11-35-1810(1) (2011). Moreover, the Panel has held that if a bidder's responsibility is challenged, "[t]he protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to law." *In re: Protest of Brantley Construction Co., Inc.*, Panel Case 1999-3 (June 25, 1999) (citing S.C. Code Ann. § 11-35-2410).⁸

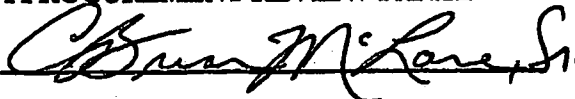
Rodgers listed Hill Plumbing as its plumbing subcontractor on its bid form. Ms. Floyd testified that she checked the licenses of Rodgers and Hill Plumbing prior to award and determined that Hill Plumbing possessed a valid plumbing license, which is all that was required by the bid form. The Panel finds that this inquiry satisfied the requirements of the Procurement Code with regard to responsibility and that Monroe failed to show that USC's determination of responsibility, which was implicit in the intended award, was "clearly erroneous, arbitrary, capricious, or contrary to law."

Therefore, for the reasons stated above, the Panel denies Monroe's protest and upholds the decision of the CPOC.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:



C. BRIAN MCLANE, SR., CHAIRMAN

This 26 day of April, 2011.
Columbia, South Carolina

⁸ Monroe argued that section 11-35-2410's "clearly erroneous" standard of review does not apply to findings of responsibility because that section specifically lists only findings of *nonresponsibility*. However, the *Brantley Construction* case clearly applies the "clearly erroneous" standard to a finding of responsibility implicit in an intended award. In addition, the Panel more recently applied that standard to an implicit finding of responsibility in *In re: Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009).

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	Case No. 2011-3
	)	
	)	ORDER
IN RE:	)	MOTION TO DISMISS AND
	)	MOTION TO QUASH SUBPOENA
Protest of Monroe Construction Co., LLC;	)	
Appeal of Monroe Construction Co., LLC	)	

vs. USC

This case is before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review by Monroe Construction Company, LLC (Monroe). Monroe protested the University of South Carolina's intended award of a construction contract to Rodgers Builders, Inc. (Rodgers). Monroe is represented by Katherine B. Barroll, Esquire, and D. Ryan McCabe, Esquire. Rodgers is represented by Boyd B. Nicholson, Esquire. Hill Plumbing & Electric Company (Hill Plumbing) is represented by Hugh M. Claytor, Esquire. The University of South Carolina (USC) is represented by George W. Lampl, III, Esquire. The State Engineer and Chief Procurement Officer for Construction (the CPOC) is represented by Molly R. Crum, Esquire. On April 4, 2011, with the consent of the parties, the Panel Chairman heard argument by telephone conference call on a motion to dismiss an appeal issue for lack of jurisdiction and a motion to quash a subpoena issued to Mr. Francis L. Hill, Jr., and Hill Plumbing. After hearing the arguments of the parties, the Chairman then ruled on the motions on behalf of the Panel.

Findings of Fact

The underlying protest involves a construction project (the Project) at USC to upfit laboratory, office, and support spaces on the first floor of the Horizon 1 building. The Project solicitation documents and bid form provided for two base bids, Base Bid 1 and Base Bid 2. On

their bid forms, bidders were asked to name subcontractors for the following categories: Mechanical, Plumbing, and Electrical. On the date the bids were due, USC had received nineteen bids. Rodgers was determined to be the low bidder on Base Bid 2, and USC posted an intent to award the Base Bid 2 contract to Rodgers on December 3, 2010. Monroe timely protested the intended award on December 13, 2010.

In its protest letter, Monroe alleged that Rodgers' bid was "nonresponsive and disqualified because Ro[d]gers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Ro[d]gers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications." Monroe asserted it was "the lowest bidder that identified a properly licensed subcontractor . . . for the specialty piping work."¹ Monroe also complained that even though it had "advised USC's procurement officer for this project of the specialty license requirement" on bid opening day, "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." Finally, Monroe cited a provision from the Contractor's Licensing Act, which it argued "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."²

¹ The specialty piping work Monroe refers to is pressure and process piping work, which requires a "pressure and process piping" license. A "pressure and process piping" license is a subclassification of a mechanical contractor's license, as is a "plumbing" license. See S.C. Code Ann. § 40-11-410(5)(f) & (g) (2011) (statutory provisions describing work authorized to be performed under various license classifications and subclassifications). For ease of reference, this order uses the terms "plumbing license" and "pressure and process piping license" to refer to these two subclassifications of the mechanical contractor's license.

² The provision quoted by Monroe provides:

(B) 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.

The CPOC conducted a hearing and ultimately denied Monroe's protest, finding that Rodgers' bid was responsive on its face because it listed Hill Plumbing as its plumbing subcontractor on its bid form and because Hill Plumbing possessed a valid plumbing license. Moreover, the CPOC found that Rodgers was also a responsible bidder because USC had a reasonable basis for excluding pressure and process piping work from its meaning of "plumbing" on the bid form and because Hill Plumbing possessed a valid plumbing license. Although Hill Plumbing did not appear at the CPOC hearing, it was stipulated by the parties that neither Hill Plumbing nor Rodgers possessed a valid pressure and process piping license.

Monroe timely appealed the CPOC's decision. In its appeal letter, Monroe asserts that Hill Plumbing improperly offered to perform the process and pressure piping work as well as plumbing work in its sub-bid to Rodgers and other bidders. Monroe also contends that its notification to USC on bid opening day regarding the requirement of listing a licensed process and pressure piping subcontractor on the bid form "placed the University on inquiry notice that Hill Plumbing had bid beyond the scope of its license."

At Monroe's request, the Panel's attorney prepared a subpoena to Mr. Hill and Hill Plumbing on March 10, 2011. The subpoena compelled Mr. Hill's attendance at the Panel's scheduled hearing on April 13, 2011, in Columbia, South Carolina. The subpoena also requested the production of

Copies of your complete file materials, including but not limited to all correspondence, facsimiles, e-mails, notes, bid submittals, or price quotes, any and all other materials relating to bids submitted to anyone relating to the plumbing work, including the process piping work, for the Horizon I First Floor Laboratory Upfit project on the campus of USC in Columbia, South Carolina.

Through counsel, Mr. Hill and Hill Plumbing filed a motion to quash the subpoena on March 23, 2011. Additionally, on March 29, 2011, the CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill Plumbing's sub-bid.

Conclusions of Law

I. The CPOC's Motion to Dismiss Issue as Untimely

The CPOC asserts that Monroe's initial protest letter challenged Rodgers' bid for its failure to list a pressure and process piping subcontractor under the bid form's plumbing category. In its appeal letter, however, the CPOC contends that Monroe has impermissibly re-characterized or interpreted its protest letter in an effort to raise a new issue: that Hill Plumbing improperly offered to perform work outside the scope of its plumbing license in its sub-bid. In response, Monroe argues that the issue is not a new one because its protest letter asserted that neither Rodgers nor Hill Plumbing had the required pressure and process piping license and that the citation of section 40-11-200(B) of the Contractor's Licensing Act was sufficient to place the parties on notice that if neither Rodgers nor Hill Plumbing possessed the proper license, then Rodgers must have had the bid of a subcontractor who did have that license when it submitted its bid on the Project.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of section 11-35-4210(1)(b) to confer jurisdiction on the CPO and, by extension, the Panel. S.C. Code Ann. § 11-35-4210(1)(b). Section 11-35-4210(1)(b) establishes that a protest must be brought within ten days of the posting of the intent to award. *Id.* The protest must be in writing and "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) (2011). A party may amend an initial protest of an intended award as long as it does so within fifteen days after the posting of the intended award. *Id.*

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 11-35-4210. *See In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) ("The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2)."); *In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) ("The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210."); and *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 ("The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.")

In the instant case, Monroe's 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. Nothing in Monroe's protest letter suggested that Hill Plumbing had acted improperly or bid outside the scope of its license. Furthermore, read in the context of its protest letter, Monroe's citation of the section from the Contractor's Licensing Act only placed the parties on notice that Monroe believed Rodgers and USC had violated that section, not Hill Plumbing. Monroe could have amended its protest letter to allege improper bidding on the part of Hill Plumbing, but it failed to do so within the time constraints of section 11-42-4210(2)(b). Therefore, the allegations raised in Monroe's appeal letter regarding Hill's sub-bid are untimely and are hereby dismissed for lack of jurisdiction.

II. Hill's Motion to Quash

Hill Plumbing has moved to quash the subpoena issued to it and its registered agent, Mr. Francis L. Hill, Jr., on the grounds that the evidence sought is not relevant to the issues to be decided by the Panel and that the evidence sought includes confidential and trade-secret information to which Monroe is not entitled.

The Panel has the authority to issue subpoenas at a party's request under S.C. Code Ann. section 11-35-4410(4)(a)(ii) (2011). The Panel has also entertained motions to quash or modify a subpoena upon a party's application. S.C. Code Ann. § 11-35-4410(4)(b) (2011); *see also In re: Petition for Administrative Review GTECH Corp.*, Case No. 2002-4 (quashing several subpoenas on grounds of relevance and undue burden). This practice is consistent with Rule 45(c) of the South Carolina Rules of Civil Procedure. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, South Carolina Rules of Evidence.

Because 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, and the subpoena is hereby quashed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:



C. BRIAN MCLANE, SR., CHAIRMAN

This 26 day of April, 2011.
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MONROE CONSTRUCTION CO., LLC

Plaintiff(s)

vs.

UNIVERSITY OF SOUTH CAROLINA

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP-40-3174

(Please Print)

Submitted By: D. Ryan McCabe/ Katherine B. Barroll

Address: Rogers, Townsend & Thomas, P.C.

P.O. Box 100200

Columbia, SC 29202-3200

SC Bar #:

Telephone #: 803-771-7900

Fax #: 803-343-7017

Other:

E-mail: rmccabe@rtt-law.com/barroll@rtt-law.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete N/A Appeal

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20-CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☒ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of-State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature:

D. Ryan McCabe

Date: May 16, 2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2011-CP-_____

IN THE MATTER OF: BID PROTEST
MONROE CONSTRUCTION CO., LLC,

Appellant

vs.

UNIVERSITY OF SOUTH CAROLINA,

Respondent

IN RE: HORIZION 1 FIRST FLOOR
LABORATORY UPFIT
SC STATE PROJECT NO. H27-6071-LC

NOTICE OF APPEAL

JEANETTE W. MCGRIDE
C.C.P. & G.S.

2011 MAY 13 PM 4:35

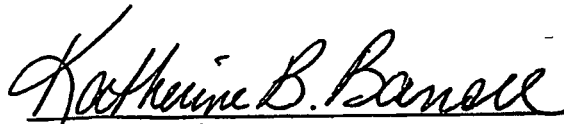
RICHLAND COUNTY
FILED

Pursuant to S.C. Code Ann. §§ 1-23-380 and 11-35-4410, Monroe Construction Co., LLC ("Monroe"), appeals the following orders of the South Carolina Procurement Review Panel ("Panel") in Case No. 2011-3, dated April 26, 2011, signed by Panel Chairman, the Honorable C. Brian McLane., Sr. Monroe's counsel received a copy of these orders on April 29, 2011.

(1) the Order granting the Motion to Dismiss and Motion to Quash Subpoena (attached hereto as Exhibit A), and

(2) the Order denying Monroe's bid protest and upholding the decision of the Chief Procurement Officer (attached hereto as Exhibit B).

[Signature on the following page]



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Katherine B. Barroll
Rogers Townsend & Thomas, PC
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Attorneys for Appellant

Columbia, South Carolina
May 13, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2011-CP-40-03174

IN THE MATTER OF: BID PROTEST
MONROE CONSTRUCTION CO., LLC,
Appellant

vs.

UNIVERSITY OF SOUTH CAROLINA,
Respondent

IN RE: HORIZION 1 FIRST FLOOR
LABORATORY UPFIT
SC STATE PROJECT NO. H27-6071-LC

APPELLANT'S BRIEF

RICHLAND COUNTY
FILED
2012 SEP 11 PM 1:38
JEANETTE W. McBRIDE
C.C.P. & C.D.

Pursuant to S.C. Code Ann. §§ 1-23-380 and 11-35-4410, Monroe Construction Co., LLC ("Monroe"), has appealed the following orders of the South Carolina Procurement Review Panel ("Panel") in Case No. 2011-3, dated April 26, 2011, signed by Panel Chairman, the Honorable C. Brian McLane, Sr. Monroe's counsel received a copy of these orders on April 29, 2011.

(1) the Order granting the Motion to Dismiss and Motion to Quash Subpoena (attached hereto as Exhibit A), and

(2) the Order denying Monroe's bid protest and upholding the decision of the Chief Procurement Officer (attached hereto as Exhibit B).

Facts

1. On October 19, 2010, the University of South Carolina ("USC") solicited bids for a construction project ("Project") to upfit laboratory, office, and support spaces on the first floor of the Horizon 1 building (CPO Record at p. 8).

2. On the same day bids were open, Monroe raised the responsibility issue in an email to USC and the Office of 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." Further, Monroe notified USC that subcontractor Hill Plumbing ("Hill") did not possess a process and pressure piping license. Monroe requested that USC review this responsibility issue (CPO Record at p. 23).
3. On December 3, USC posted an Intent to Award the bid contract to the lowest bidder, Rodgers Builders, Inc. (Rodgers), who listed Hill Plumbing (Hill) as its plumbing subcontractor (CPO Record at p. 40).
4. On December 13, 2010, Monroe timely protested USC's Notice of Intent to Award a contract to Rodgers because neither Rodgers nor Hill were licensed pressure and process piping contractors (CPO Record at p. 38).
5. On February 14, 2011, the Chief Procurement Officer for Construction (CPOC) conducted a hearing and denied Monroe's protest (CPO Record at p. 7).
6. On February 23, 2011, Monroe timely appealed the CPOC decision to the Panel for administrative review (CPO Record at p. 3).
7. On March 10, the Panel issued a subpoena to Hill. On March 23, 2011, Hill filed a motion to quash the subpoena.
8. On March 29, the CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill's sub-bid.
9. On April 26, the Panel issued two orders. First, the Panel granted CPOC's motion to dismiss appeal issues as untimely and granted Hill's motion to quash the subpoena. Second, the Panel

denied Monroe's appeal, holding that USC fulfilled its duties under the Procurement Code in determining that Rodgers was a responsible bidder.

First Grounds for Appeal

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 issue of responsibility concerning both 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. § 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 (CPO Record at p. 38). In its protest letter, Monroe stated §40-11-200(B) of the 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." Further, Monroe stated that "neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work." As such, "Monroe was the lowest bidder that identified a

properly licensed subcontractor...for the specialty piping work." Additionally, Monroe referenced the October 19 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.

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). When at the time of bidding, neither the subcontractor nor the general contractor possesses 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 initial protest letter cited 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, 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. § 200(B). A contractor means a general or mechanical contractor regulated under this chapter. § 40-11-20(4). Thus, these provisions implicate responsibility issues concerning Rodgers and Hill, general and mechanical contractors respectively.

Thus, the protest letter raised the Hill responsibility issue. 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, "At issue is the responsibility of Rodger's plumbing subcontractor, which effects Rodgers' responsibility." (CPO Record at p. 25). 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."

The initial protest letter explicitly stated Monroe's concern that neither Hill nor Rodgers was properly licensed. The initial protest letter even referenced the Contractor Licensing Act implicating the responsibility of Hill. Therefore, the parties cannot claim that the protest letter failed to notify them that the issue was licensure, and consequently responsibility. Therefore, 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 § 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. "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. § 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. § 40-11-30, 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 § 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, was not a responsible bidder. The email was sent the day bids opened on October 19, 2010 and 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 the § 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 specifically advised USC's procurement officer for this project of the specialty license requirement...Notwithstanding that advance notice, 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."

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. § 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 process piping license. Together, the initial protest letter and the email provide sufficient notice and particularity to all parties concerning the issue of USC's compliance with § 40-11-200(B).

Second Grounds for Appeal

A. THE MOTION TO QUASH SHOULD BE DENIED BECAUSE THE EVIDENCE SOUGHT IS 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. 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 be awarded to Monroe.

The Panel erroneously dismissed any issue challenging the scope of Hill's sub-bid by concluding the protest letter did not raise the issue of Hill's responsibility. The 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. § 200(B). A contractor means a general or mechanical contractor regulated under this chapter. § 40-11-20(4). Hill is a mechanical contractor that possesses a plumbing license. §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, "At issue is the responsibility of Rodger's plumbing subcontractor (Hill), which effects Rodgers' responsibility." However, the Panel concluded the subpoena sought irrelevant evidence since the issue had been dismissed.

Since the issue was raised in the protest letter, the Panel's decision to quash the subpoena was erroneous because the evidence is relevant to the Hill responsibility issue.

Monroe requests a subpoena to establish whether Hill's bid included pressure and process piping work for which Hill did not possess the required license. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. SCRE, 401; State v. Alexander, 303 S.C. 377, 401 (1991). The evidence sought by the subpoena is relevant because it makes the determination of responsibility more or less probable than without the evidence. The issues before the court concern the responsibility of Hill and Rodgers. Rodgers concedes it does not have a pressure and process piping license. If Monroe proves that Hill's bid included work for which it did not have the proper license, then Hill and Rodgers violate § 40-11-200(B) and are not responsible bidders. As such, the contract should be awarded to Monroe as the lowest responsible bidder. This court should overturn the motion to quash and order Hill to produce documents and testimony relating to the scope of its bid.

Third Grounds for Appeal

USC has two independent and distinct obligations concerning determinations of responsibility. First, USC had a non-discretionary obligation to comply with § 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 the award of any contract under the Procurement Code. § 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 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. Therefore, the court should review these determinations de novo and remand to the Panel with instructions for determining the responsibility of Hill, Rodgers, and USC under § 11-40-200(B).

A. THE PANEL APPLIED THE WRONG STANDARD OF REVIEW TO USC'S OBLIGATION TO COMPLY WITH THE CONTRACTOR LICENSING ACT.

USC must comply with the Contractors Licensing Act or otherwise face criminal penalties. § 40-11-200(B). The statute states, "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."

However, the Panel applied a "clearly erroneous, arbitrary, capricious, or contrary to law" standard to USC's duty to investigate the responsibility of bidders. The Panel mischaracterizes the issue of responsibility by focusing solely on what work USC intended to include under the "Plumbing" category of the bid form. This reasoning ignores USC's obligation to comply with the plain language of § 11-40-200(B). The "clearly erroneous, arbitrary, capricious, or contrary to law" standard may be appropriate for review where public agencies make discretionary determinations, but compliance with § 11-40-200(B) is not optional.

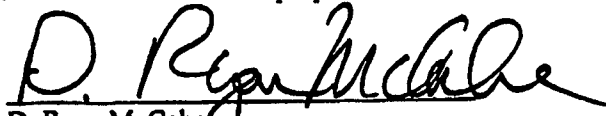
USC has an independent and nondiscretionary obligation to affirm the responsibility of its bidders under the plain language of § 11-40-200(B). The Panel erroneously disposed of the issue concerning USC's duty to investigate the responsibility of its bidders by applying a discretionary standard. Instead, the Panel must address whether USC strictly complied with the Contractor Licensing Act and adequately investigated the responsibility of its bidders, especially

where USC was on advance notice that Hill was not a responsible bidder. The court should review de novo and remand with guidance about the proper standard of review.

B. THE PANEL APPLIED THE WRONG STANDARD OF REVIEW TO USC'S DETERMINATIONS OF RESPONSIBILITY UNDER THE PROCUREMENT CODE.

USC must make determinations of responsibility and non-responsibility prior to the award of any contract under the Procurement Code. § 11-35-1810(1)-(2). The Panel stated that a bidder protesting the responsibility of another bidder must prove the determination of responsibility is "clearly erroneous, arbitrary, contrary to law." However, this standard only applies to determinations of non-responsibility. § 11-35-2410(A).

The legislature declined to apply the same standard to determinations of responsibility. The maxim of *expressio unius exclusio alterius est* provides that an express reference to one thing is an exclusion of others. If the legislature had thought it desirable to extend this standard to determinations of responsibility, the legislature would have incorporated such a provision. Although this lenient standard applies to determinations of non-responsibility, there is no indication that this standard should also apply to determinations of responsibility. Therefore, the court should review de novo and remand with instructions about the proper standard of review.



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Company, LLC*

**BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL**

COUNTY OF RICHLAND

Case No. 2011-3

IN RE:

**ORDER
MOTION TO DISMISS AND
MOTION TO QUASH SUBPOENA**

**Protest of Monroe Construction Co., LLC;
Appeal of Monroe Construction Co., LLC**

This case is before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review by Monroe Construction Company, LLC (Monroe). Monroe protested the University of South Carolina's intended award of a construction contract to Rodgers Builders, Inc. (Rodgers). Monroe is represented by Katherine B. Barroll, Esquire, and D. Ryan McCabe, Esquire. Rodgers is represented by Boyd B. Nicholson, Esquire. Hill Plumbing & Electric Company (Hill Plumbing) is represented by Hugh M. Claytor, Esquire. The University of South Carolina (USC) is represented by George W. Lampl, III, Esquire. The State Engineer and Chief Procurement Officer for Construction (the CPOC) is represented by Molly R. Crum, Esquire. On April 4, 2011, with the consent of the parties, the Panel Chairman heard argument by telephone conference call on a motion to dismiss an appeal issue for lack of jurisdiction and a motion to quash a subpoena issued to Mr. Francis L. Hill, Jr., and Hill Plumbing. After hearing the arguments of the parties, the Chairman then ruled on the motions on behalf of the Panel.

Findings of Fact

The underlying protest involves a construction project (the Project) at USC to upfit laboratory, office, and support spaces on the first floor of the Horizon 1 building. The Project solicitation documents and bid form provided for two base bids, Base Bid 1 and Base Bid 2. On

their bid forms, bidders were asked to name subcontractors for the following categories: Mechanical, Plumbing, and Electrical. On the date the bids were due, USC had received nineteen bids. Rodgers was determined to be the low bidder on Base Bid 2, and USC posted an intent to award the Base Bid 2 contract to Rodgers on December 3, 2010. Monroe timely protested the intended award on December 13, 2010.

In its protest letter, Monroe alleged that Rodgers' bid was "nonresponsive and disqualified because Ro[d]gers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Ro[d]gers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications." Monroe asserted it was "the lowest bidder that identified a properly licensed subcontractor . . . for the specialty piping work."¹ Monroe also complained that even though it had "advised USC's procurement officer for this project of the specialty license requirement" on bid opening day, "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." Finally, Monroe cited a provision from the Contractor's Licensing Act, which it argued "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."²

¹ The specialty piping work Monroe refers to is pressure and process piping work, which requires a "pressure and process piping" license. A "pressure and process piping" license is a subclassification of a mechanical contractor's license, as is a "plumbing" license. See S.C. Code Ann. § 40-11-410(5)(f) & (g) (2011) (statutory provisions describing work authorized to be performed under various license classifications and subclassifications). For ease of reference, this order uses the terms "plumbing license" and "pressure and process piping license" to refer to these two subclassifications of the mechanical contractor's license.

² The provision quoted by Monroe provides:

(B) 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.

The CPOC conducted a hearing and ultimately denied Monroe's protest, finding that Rodgers' bid was responsive on its face because it listed Hill Plumbing as its plumbing subcontractor on its bid form and because Hill Plumbing possessed a valid plumbing license. Moreover, the CPOC found that Rodgers was also a responsible bidder because USC had a reasonable basis for excluding pressure and process piping work from its meaning of "plumbing" on the bid form and because Hill Plumbing possessed a valid plumbing license. Although Hill Plumbing did not appear at the CPOC hearing, it was stipulated by the parties that neither Hill Plumbing nor Rodgers possessed a valid pressure and process piping license.

Monroe timely appealed the CPOC's decision. In its appeal letter, Monroe asserts that Hill Plumbing improperly offered to perform the process and pressure piping work as well as plumbing work in its sub-bid to Rodgers and other bidders. Monroe also contends that its notification to USC on bid opening day regarding the requirement of listing a licensed process and pressure piping subcontractor on the bid form "placed the University on inquiry notice that Hill Plumbing had bid beyond the scope of its license."

At Monroe's request, the Panel's attorney prepared a subpoena to Mr. Hill and Hill Plumbing on March 10, 2011. The subpoena compelled Mr. Hill's attendance at the Panel's scheduled hearing on April 13, 2011, in Columbia, South Carolina. The subpoena also requested the production of

Copies of your complete file materials, including but not limited to all correspondence, facsimiles, e-mails, notes, bid submittals, or price quotes, any and all other materials relating to bids submitted to anyone relating to the plumbing work, including the process piping work, for the Horizon I First Floor Laboratory Upfit project on the campus of USC in Columbia, South Carolina.

Through counsel, Mr. Hill and Hill Plumbing filed a motion to quash the subpoena on March 23, 2011. Additionally, on March 29, 2011, the CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill Plumbing's sub-bid.

Conclusions of Law

I. The CPOC's Motion to Dismiss Issue as Untimely

The CPOC asserts that Monroe's initial protest letter challenged Rodgers' bid for its failure to list a pressure and process piping subcontractor under the bid form's plumbing category. In its appeal letter, however, the CPOC contends that Monroe has impermissibly re-characterized or interpreted its protest letter in an effort to raise a new issue: that Hill Plumbing improperly offered to perform work outside the scope of its plumbing license in its sub-bid. In response, Monroe argues that the issue is not a new one because its protest letter asserted that neither Rodgers nor Hill Plumbing had the required pressure and process piping license and that the citation of section 40-11-200(B) of the Contractor's Licensing Act was sufficient to place the parties on notice that if neither Rodgers nor Hill Plumbing possessed the proper license, then Rodgers must have had the bid of a subcontractor who did have that license when it submitted its bid on the Project.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of section 11-35-4210(1)(b) to confer jurisdiction on the CPO and, by extension, the Panel. S.C. Code Ann. § 11-35-4210(1)(b). Section 11-35-4210(1)(b) establishes that a protest must be brought within ten days of the posting of the intent to award. *Id.* The protest must be in writing and "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) (2011). A party may amend an initial protest of an intended award as long as it does so within fifteen days after the posting of the intended award. *Id*

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 11-35-4210. *See In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) ("The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2)."); *In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) ("The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210."); and *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 ("The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.")

In the instant case, Monroe's 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. Nothing in Monroe's protest letter suggested that Hill Plumbing had acted improperly or bid outside the scope of its license. Furthermore, read in the context of its protest letter, Monroe's citation of the section from the Contractor's Licensing Act only placed the parties on notice that Monroe believed Rodgers and USC had violated that section, not Hill Plumbing. Monroe could have amended its protest letter to allege improper bidding on the part of Hill Plumbing, but it failed to do so within the time constraints of section 11-42-4210(2)(b). Therefore, the allegations raised in Monroe's appeal letter regarding Hill's sub-bid are untimely and are hereby dismissed for lack of jurisdiction.

II. Hill's Motion to Quash

Hill Plumbing has moved to quash the subpoena issued to it and its registered agent, Mr. Francis L. Hill, Jr., on the grounds that the evidence sought is not relevant to the issues to be decided by the Panel and that the evidence sought includes confidential and trade-secret information to which Monroe is not entitled.

The Panel has the authority to issue subpoenas at a party's request under S.C. Code Ann. section 11-35-4410(4)(a)(ii) (2011). The Panel has also entertained motions to quash or modify a subpoena upon a party's application. S.C. Code Ann. § 11-35-4410(4)(b) (2011); *see also In re: Petition for Administrative Review GTECH Corp.*, Case No. 2002-4 (quashing several subpoenas on grounds of relevance and undue burden). This practice is consistent with Rule 45(c) of the South Carolina Rules of Civil Procedure. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, South Carolina Rules of Evidence.

Because 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, and the subpoena is hereby quashed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 26 day of April, 2011.
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST

DECISION

MONROE CONSTRUCTION
COMPANY

CASE NO. 2011-011

v.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE:
MARCH 3, 2011

HORIZON 1 FIRST FLOOR
LABORATORY UPFIT
PROJECT H27-6071-LC

Based on the attached request and supporting documentation from Dr. Harris Pastides, President of the University of South Carolina (USC), and consultation with USC, I find that it is in the best interest of the state that the solicitation and award of this procurement shall not be delayed.

With this invitation for bids, USC attempts to procure a contract for fitting out shell space on the first floor of the Horizon I Research Facility with wet laboratory incubation space for small start-up companies along with laboratory space (hereinafter "the Project") for Dr. Jochen Lauterbach, USC Endowed Professor. This project is the third phase of a project to fit out shell space in the Horizon I Research Facility with laboratory space.

The following dates and facts are relevant to this decision:

1. On September 13, 2010, USC advertised for bids to construct the Project. Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010.
2. The solicitation documents and bid form provided for two base bids.
3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project.
4. By the time for receipt of bids, USC had received nineteen bids.

5. Rodgers Builders, Inc., submitted a low bid of \$3,149,000 for base bid two. Monroe Construction Company submitted the third low bid of \$3,230,000 for base bid two.¹

6. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two.

7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. was not a licensed pressure and process piping contractor. In its letter of protest, Monroe asserted that plumbing included pressure and process piping and, therefore, Rodgers had to provide the name of a licensed pressure and process piping contractor in addition to a licensed plumbing contractor in the space on the bid form for listing the plumbing subcontractor.

8. On January 27, 2011, the CPOC conducted a hearing on Monroe's protest.

9. On February 4, 2011, the CPOC concluded his administrative review of Monroe's protest and on February 14, 2011, the CPOC posted his decision denying Monroe's protest.

10. On February 23, 2011, Monroe appealed the decision of the CPOC to the Procurement Review Panel.

11. On February 28, 2011, USC personnel met with the CPOC pursuant to SC Code Ann § 11-35-4210(7) to discuss a lifting of the automatic stay on contract award.

12. On March 2, 2011, USC submitted its formal written request to the CPOC to lift the stay on the following grounds:

a. The Project is partially funded by a \$1,000,000 grant from the Economic Development Administration, United States Department of Commerce (EDA). Under the terms of the grant, USC was required to begin construction on or before June 11, 2009.

b. USC subsequently requested EDA to grant an extension of the deadline for start of construction on two separate occasions for reasons unrelated to this protest. The second amendment extended the deadline to January 11, 2011.

c. As a result of Monroe's protest, USC was compelled to seek an additional extension of the deadline for the start of construction from the EDA. USC discussed with EDA a new deadline of June 11, 2011 to accommodate a possible appeal but an EDA representative orally advised USC that it would be difficult for USC to obtain any extension. Moreover, the EDA strongly suggested

¹ Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two.

that if the EDA agreed to an extension beyond the January 11, 2011 deadline, the extension would be the last granted by the EDA.

d. Subsequent to its conversation with the EDA representative, USC filed a formal request for an extension of the deadline for the start of construction to June 11, 2011. In response, the EDA issued a third amendment extending the deadline for the start of construction to March 11, 2011. This amendment provides in part, "The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988)."

The EDA's position and representations to USC place USC in a dilemma. USC has very strong reasons to believe that if it does not start construction by March 11, 2011, the EDA will not grant an additional extension and USC will lose a significant portion of the funding for the Project. However, USC has no way of knowing this will in fact happen unless USC sits on its hands and does nothing. On the other hand, USC can assure that it will not lose \$1,000,000 of funding for this very important project by starting construction by March 11, 2011. Faced with such a dilemma, USC has chosen the only course that can guarantee they will not lose the EDA grant and the Project by requesting that the CPOC lift the stay on the award of a contract.

This project is an important part of USC's plans for both the present and the future. The Horizon 1 Research Facility is one of two USC owned research buildings in Innovista. Innovista involves the cooperation and contributions of a number of public and private entities, including the University of South Carolina; local, state, and federal government; and the business and economic development community. USC envisions Innovista as the "key to a new economy built on a foundation of technology and knowledge-based jobs." "Private tenants relocating to Innovista are expected to bring high-paying jobs that will raise the state's per-capita income."

The success of Innovista and this Project is not only important to USC but the State. As a part of its vision for Innovista, USC is raising capital from the private sector pursuant to the South Carolina Research Centers of Economic Excellence Act to "fund endowments for professorships in research areas targeted to create well-paying jobs and enhanced economic opportunities for the people of South Carolina." SC Code Ann § 2-75-5. Moreover, USC is recruiting top researchers to fill these endowments. This project helps fulfill USC's vision for Innovista by providing research space for one of USC's chairs (Dr. Lauterbach) endowed pursuant to the South Carolina Research Centers of Economic Excellence Act

and by providing research space for small start-up companies.

Dr. Lauterbach is the Center of Economic Excellence Chair in Strategic Approaches to the Generation of Electricity at USC. The primary purpose of Dr. Lauterbach's research program at USC is to enhance the economic development of the state by creating cutting-edge technologies in clean energy sources that can be transferred to new knowledge-based companies in the state. Dr. Lauterbach needs adequate and properly-equipped laboratory space to perform the research of his team to create new technologies that can be transferred to for-profit businesses to create well-paying jobs and economic development for the state of South Carolina. The transfer of these technologies will likely be to small and start-up companies which will need wet lab space and would be candidates for locating in the wet lab incubation space to be developed under this Project.

Based on the foregoing, the CPOC finds that the award of the contract without further delay is necessary to protect the best interest of the State.


John St. C. White
Chief Procurement Officer for Construction
3 March 2011
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO ADMINISTRATIVE REVIEW
Written Determination Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Requests must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an action before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



MAR 2 2011

OFFICE OF STATE ENGINEER

HARRIS PASTIDES
PRESIDENT

March 2, 2011

VIA HAND DELIVERY

John St. C. White, P.E.
Chief Procurement Officer for Construction
1201 Main Street, Ste. 600
Columbia, S.C. 29201

Re: Request to Lift Automatic Stay
Appeal of Monroe Construction Company
State Project No. H27-6071-LC

Dear Mr. White:

The University of South Carolina hereby respectfully requests that you exercise your authority as Chief Procurement Officer to lift the automatic stay of the award of the construction contract for the referenced project to Rodgers Builders, Inc. that resulted when Monroe Construction Company appealed your decision to dismiss Monroe's protest.

Enclosed herewith is the Affidavit of R. Steven Etheredge, Assistant Director of Policy and Compliance in the University of South Carolina's Sponsored Awards Management Office. Mr. Etheredge's Affidavit sets forth the factual basis for the University's request.

Thank you for your prompt consideration of this request.

Sincerely,

Harris Pastides

Enclosure (1)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST)
MONROE CONSTRUCTION COMPANY)
v.)
UNIVERSITY OF SOUTH CAROLINA)
STATE PROJECT NO. H27-6071-LC)
_____)

CPO CASE NO. 2011-011

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, R. Steven Etheredge, who being duly sworn, deposes and says:

1. He is the Assistant Director of Policy and Compliance in the University of South Carolina's Sponsored Awards Management Office.
2. He has personal knowledge of the \$1,000,000.00 Financial Assistance Award, EDA Investment No. 04-01-06063 ("the grant") by the Economic Development Administration, U.S. Department of Commerce ("EDA"), to the University of South Carolina ("USC") to construct a technology driven incubator located on the Innovista Research Campus at USC. (A copy of the Financial Assistance Award is attached hereto as Exhibit A.) He signed the Financial Assistance Award on behalf of USC.
3. The total estimated cost of the technology driven incubator project was \$2,087,227 at the time the EDA made the award.
4. The EDA awarded the grant to USC on June 11, 2008. Under the terms of the grant, USC was required to begin construction on or before June 11, 2009.

5. The South Carolina state legislature implemented widespread budget cuts during Fiscal Year 2009, and the state funds that USC expected to receive for the project were among the cuts. Consequently, USC was unable to begin construction by June 11, 2009. USC asked the EDA to extend the construction commencement deadline ("the deadline"), and the EDA issued Amendment No. 1 to the Financial Assistance Award on October 7, 2009 in response to USC's request. (A copy of Amendment No. 1 is attached hereto as Exhibit B.) Amendment No. 1 extended the deadline to June 11, 2010.

6. Amendment No. 1 also amended the scope of work, which it defined as follows: "The new Horizon I Research Facility is a new 125,320 sq. ft. facility, and the current EDA proposal would assist in completing 14,000 to 16,000 sq. ft. of shell space. Twenty wet labs will be constructed on the first floor of this multi-story building. The facility is located on the Innovista campus of USC in Columbia, S.C" ("the project").

7. USC was compelled to request another extension of the construction commencement deadline after it became clear that USC would not be able to begin construction by June 11, 2010. The primary impediment to timely commencement of construction was the rigorous state project review and approval process and the meeting schedules of the various state bodies that were involved. (A copy of Dr. Harris Pastides' letter to Mr. Asa R. Williams of the EDA, dated March 19, 2010, sets forth USC's request for an extension of the construction commencement deadline until November 2010 and is attached as Exhibit C.)

8. On April 8, 2010, the EDA issued Amendment No. 2 to the Financial Assistance Award. Amendment No. 2 extended the deadline to January 11, 2011. (A copy of Amendment No. 2 is attached hereto as Exhibit D.)

9. USC obtained all necessary approvals and proceeded to solicit bids from contractors for the project. On December 3, 2010, USC issued a Notice of Intent to Award that identified Rodgers Builders, Inc. ("Rodgers") as the responsible bidder with the lowest responsive bid. However, on December 13, 2010, Monroe Construction Company ("Monroe") protested USC's Intent to Award the contract for the project to Rodgers.

10. Once again USC was compelled to seek an extension of the deadline from the EDA. Representatives of USC met with Mr. Asa R. Williams of the EDA in Columbia on January 27, 2011 to discuss the status of the project and the grant. The deadline established by Amendment No. 2 had already past. The meeting participants discussed extending the deadline to June 11, 2011, but Mr. Williams indicated that it would be difficult for USC to obtain any extension, and he advised USC to direct its official request to Mr. H. Philip Paradice, Jr., Director of the EDA's Atlanta Regional Office. He also asked USC to identify the date by which USC expected the Chief Procurement Officer for Construction ("CPO") to post a decision on the protest. Mr. Williams strongly suggested that if the EDA consented to another extension beyond the January 11, 2011 deadline, then that extension would be the last extension the EDA would grant for the project.

11. Also on January 27, 2011, the CPO held an administrative hearing to consider Monroe's protest. The CPO posted his decision on February 14, 2011, in which he dismissed Monroe Construction Company's protest.

12. On February 15, 2011, USC formally asked the EDA to extend the deadline to June 11, 2011. USC's request letter stated in part, "We fully realize that construction must begin before June 11, 2011 or the grant will be forfeited." (A copy of Dr. Pamela K. Benicewicz's letter to Mr. H. Philip Paradice, Jr. is attached hereto as Exhibit E.)

13. The EDA issued Amendment No. 3 to the Financial Assistance Award on February 18, 2011. However, the EDA refused to extend the deadline to June 11, 2011. Instead, Amendment No. 3 extended the deadline to March 11, 2011. Amendment No. 3 also provides in part, "The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988)." (A copy of Amendment No. 3 is attached hereto as Exhibit F.)

14. Given the foregoing, USC is convinced that the EDA will terminate the grant if USC does not initiate construction by March 11, 2011, which is next Friday.

15. If USC loses the grant, then USC will be unable to provide wet lab incubation space in the Horizon I Research Facility for small start-up companies in the foreseeable future. This in turn would impair economic development in Columbia and throughout South Carolina.

16. A construction delay beyond March 11, 2011 will also postpone the upfit of laboratory space for Dr. Joachim Lauterbach, USC Endowed Professor, and thereby negatively impact both Dr. Lauterbach's and his team's research programs. Dr. Lauterbach's research program would continue to be hampered by lack of adequate laboratory space. USC hired Dr. Lauterbach as an Endowed Professor under the South Carolina Centers of Economic Excellence Program. He and his team have over \$11,000,000 in external research funding that is designed to enhance the economic development of the State of South Carolina through creation of clean energy sources. Further delay of these research activities will negatively impact economic development in South Carolina.

17. Dr. Pamela K. Benicewicz is USC's director of the project. She has secured additional grant funding from both the U.S. Small Business Administration (\$100,000) and Engenuity/HUD (\$335,000) for the project. These grants are designed to help fund incubation activities of small and/or startup technology companies. The ongoing construction delay is preventing USC from fulfilling its obligations under these grants.

FURTHER AFFIANT SAYETH NOT.


R. Steven Etheredge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 2nd DAY OF MARCH, 2011.


Notary Public/Justice of the Peace
My Commission Expires: My Commission Expires
October 19, 2016

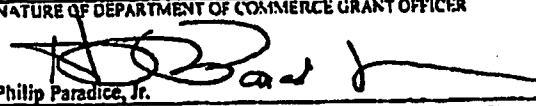
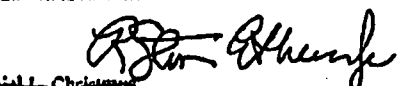
PCRAM (0-10) (REV 10-03) DAG D-12		U.S. DEPARTMENT OF COMMERCE •		☒ GRANT ☐ COOPERATIVE AGREEMENT	
FINANCIAL ASSISTANCE AWARD				AWARD PERIOD From date of approval to 40 months after approval <u>6/18/08 - 10/10/2011</u>	
RECIPIENT NAME University of South Carolina				AWARD NUMBER 04-01-06063	
STREET ADDRESS 901 Sumter Street, 5 th Floor				FEDERAL SHARE OF COST \$1,000,000	
CITY, STATE, ZIP CODE Columbia, South Carolina 29208				RECIPIENT SHARE OF COST \$1,087,227	
AUTHORITY Public Works and Economic Development Act of 1965, as amended, (42 U.S.C. §3121, et seq.)				TOTAL ESTIMATED COST \$2,087,227	
CDFA NO. AND PROJECT TITLE 11.300 Public Works Program / Technology Incubator					
BUREAU	FUND	FCFY	PROJECT TASK	ORGANIZATION	OBJECT CLASS
20	40	08	0406063-000	04	4110
This Award approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Award provisions checked below and attached. Upon acceptance by the Recipient, two signed Award documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may declare this Award null and void.					
☐ Department of Commerce Financial Assistance Standard Terms and Conditions					
☒ Special Award Conditions (see attached Exhibit A)					
☒ Line Item Budget (see attached Attachment No. 1)					
☒ 15 CFR Part 14, Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit, and Commercial Organizations					
☐ 15 CFR Part 24, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments					
☒ OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations					
☐ OMB Circular A-122, Cost Principles for Nonprofit Organizations					
☐ OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments					
☒ OMB Circular A-21, Cost Principles for Educational Institutions					
☒ 48 CFR Part 31, Contract Cost Principles and Procedures					
☒ Other(s): <u>EDA Standard Terms and Conditions for Construction Projects, dated October 2007</u>					
SIGNATURE OF DEPARTMENT OF COMMERCE GRANT OFFICER  H. Philip Paradise, Jr.			TITLE Director, Atlanta Region		DATE 6/11/08
TYPED NAME AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL  Daniel L. Christmas			TITLE R. Sherin Ethredge, Director Pre-Award Services Sponsored Program Administrator		DATE 6/18/08

EXHIBIT "A"

U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)

Public Works and Development Facilities

Investment No.: 04-01-06063

Recipient: University of South Carolina

SPECIAL AWARD CONDITIONS

1. **PROJECT DEVELOPMENT TIME SCHEDULE:** The Recipient agrees to the following Project development time schedule:

Time allowed after Receipt of Financial Assistance Award for:

Return of Executed Financial Assistance Award..... 30 days
Start of Construction..... 12 Months from Date of Grant Award
Construction Period..... 24 Months

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

2. **GOALS FOR WOMEN AND MINORITIES IN CONSTRUCTION:** Department of Labor regulations set forth in 41 CFR 60-4 establish goals and timetables for participation of minorities and women in the construction industry. These regulations apply to all Federally assisted construction contracts in excess of \$10,000. The Recipient shall comply with these regulations and shall obtain compliance with 41 CFR 60-4 from contractors and subcontractors employed in the completion of the Project by including such notices, clauses and provisions in the Solicitations for Offers or Bids as required by 41 CFR 60-4. The goal for the participation of women in each trade area shall be as follows:

From April 1, 1981, until further notice: 6.9 percent

All changes to this goal, as published in the Federal Register in accordance with the Office of Federal Contract Compliance Programs regulations at 41 CFR 60-4.6, or any successor regulations, shall hereafter be incorporated by reference into these Special Award Conditions.

Goals for minority participation shall be as prescribed by Appendix B-80, Federal Register, Volume 45, No. 194, October 3, 1980, or subsequent publications. The Recipient shall include the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" (or cause them to be included, if appropriate) in all Federally assisted contracts and subcontracts. The goals and timetables for minority and female participation may not be less than those published pursuant to 41 CFR 60-4.6.

3. **AUDIT REQUIREMENTS:** Applicable audit requirements are contained in OMB Circular A-133. Any references to audit requirements contained in 15 CFR Part 29a and 15 CFR 29b in the terms and conditions governing this project are replaced by OMB Circular A-133.
4. **PERFORMANCE MEASURES:** The recipient agrees to report on program performance measures and program outcomes in such form and at such intervals as may be prescribed by EDA in compliance with the Government Performance and Results Act of 1993. Performance measures and reporting requirements that apply to program activities funded by this investment will be provided in a separate GPRA information collection document. EDA will advise recipients in writing within a reasonable period prior to the time of submission of the reports, and in the event that there are any modifications in the performance measures.
5. **REPORT ON UNLIQUIDATED OBLIGATIONS:** All Recipients of an EDA grant award of more than \$100,000 whose Award has not been fully disbursed is required to submit Form SF-269, "*Financial Status Report*" to EDA semi-annually to report on the status of unreimbursed obligations. This report will provide information on the amount of allowable Project expenses that have been incurred, but not claimed for reimbursement by the Recipient. The first report shall be as of March 30 of each year and shall be submitted to EDA no later than April 30 of each year, and the second report shall be of September 30 of each year and shall be submitted to EDA no later than October 30 of each year. The Recipient must submit a final financial report using Form SF-269 within 90 days of the expiration date of the Award (or from the date the Recipient accepts the Project from the contractor, whichever occurs earlier). Noncompliance with these requirements will result in the suspension of disbursements under this Award. Financial reports are to be submitted to the Project Officer.

6. **PRESERVATION OF OPEN COMPETITION AND GOVERNMENT NEUTRALITY TOWARDS GOVERNMENT CONTRACTORS LABOR RELATIONS ON FEDERAL AND FEDERALLY FUNDED CONSTRUCTION PROJECTS:** Pursuant to E.O. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federal Funded Construction Projects," unless the Project is exempted under section 5(c) of the order, bid specifications, project agreements, or other controlling documents for construction contracts awarded by Recipients of grants or cooperative agreements, or those of any construction manager acting on their behalf, shall not:
a) include any requirement or prohibition on Bidders, Offerors, Contractors, or Subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction Project(s); or b) otherwise discriminate against Bidders, Offerors, Contractors, or Subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction Project(s).
7. **ENGINEERING CERTIFICATE/CERTIFICATE OF TITLE:** The Recipient, prior to Solicitation of bids for construction of this Project, shall furnish to the Government an acceptable Engineering Certificate showing all lands, rights-of-way and easements necessary for construction of this Project along with an acceptable Certificate of Title on said lands, rights-of-way and easements showing good and merchantable title free of mortgages or other foreclosable liens.
8. **CONSTRUCTION START:** If significant construction (as determined by EDA) is not commenced within two years of approval of the project or by the date estimated for start of construction in the grant award (or the expiration of any extension granted in writing by EDA), whichever is later, the EDA grant will be automatically suspended and may be terminated if EDA determines, after consultation with the grant recipient, that construction to completion cannot reasonably be expected to proceed promptly and expeditiously.
9. **USEFUL LIFE:** The useful life of this project for purposes of the Covenant of Use, Purpose, and Ownership required by paragraph M.4. of the Standard Terms and Conditions, is hereby determined to be 20 years.
10. **LEASE OF BUILDING:** A master lease form for the incubator space funded by this grant award shall be subject to the prior written approval of the Economic Development Administration (EDA). Prior to EDA granting said approval, it must be satisfied, inter alia, that said lease arrangement is consistent with the authorized general and special purpose of the grant award; that said lease arrangement will provide adequate employment and economic benefits for the area in which the property is located; that said lease arrangement is consistent with EDA policies concerning, but not limited to, non-discrimination, and that the proposed Lessee is providing adequate compensation to the Lessor for said lease arrangement. Adequate compensation should be based on fair rental value as determined by a local commercial real estate broker.

11. LEGAL: Recipient shall provide the Government, for prior approval, any Operation & Management Agreement to be executed between the Recipient and the USC Research Foundation for the incubator space funded through this Financial Assistance Award.

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

PUBLIC WORKS PROJECT COST CLASSIFICATIONS

EDA Investment No. 04-01-06063

State: South Carolina

County: Richland

<u>Cost Classification</u>	<u>Proposed</u>	<u>Approved</u>
Administrative and legal expenses	\$	\$
Land, structures, and rights-of-way appraisals, etc.		
Relocation expenses and payments (Cost incidental to transfer of titles)		
Architectural and engineering fees		
Other architectural and engineering fees		
Project inspection fees and audit		
Site Work		
Demolition and removal		
Construction	1,982,866	1,982,866
Equipment		
Contingencies	104,361	104,361
TOTAL PROJECT COSTS	\$2,087,227	\$2,087,227

Remarks:

**U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION**

**STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS**

**Title II
Public Works and Economic Development Facilities
and
Economic Adjustment Assistance Construction Components**



OCTOBER 2007

i

**U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION**

**STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS**

**Title II
Public Works and Economic Development Facilities
and
Economic Adjustment Assistance Construction Components**

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PREFACE

Terms and Conditions of the Award This financial assistance award on Form CD-450 (this "Award"), executed by the Economic Development Administration ("EDA") and the Recipient, together with the EDA-approved project budget and scope of work, these construction standard terms and conditions, special award conditions, and all applicable federal statutory and regulatory requirements as incorporated by reference (e.g., all applicable statutes, regulations, Executive Orders, and Office of Management and Budget (OMB) Circulars), constitute the complete requirements, hereinafter referred to as the "Terms and Conditions," applicable to the EDA investment.

The Recipient and any subrecipient must, in addition to the assurances made as part of the application for investment assistance, comply with and require each of its contractors and subcontractors employed in the completion of the project to comply with the Terms and Conditions of this Award.

This Award is subject to the laws and regulations of the United States. Any inconsistency or conflict in the Terms and Conditions specified in this Award will be resolved according to the following order of precedence: public laws, regulations (including applicable notices published in the *Federal Register*), Executive Orders, OMB Circulars, EDA's construction standard terms and conditions, and special award conditions. A special award condition may take precedence on a case-by-case basis over a construction standard term or condition when warranted by specific project circumstances.

Some of EDA's construction terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes or regulations published in the *Federal Register* or the *Code of Federal Regulations* ("C.F.R."), Executive Orders, OMB Circulars, or the assurances required of the Recipient (See Forms SF-424B and SF-424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, Executive Order, OMB Circular, or assurance.

**ECONOMIC DEVELOPMENT ADMINISTRATION
STANDARD TERMS AND CONDITIONS
FOR CONSTRUCTION PROJECTS**

Title II - Public Works and Economic Development Facilities
and
Title II - Economic Adjustment Construction Components

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A. General Requirements and Responsibilities.

1. **Purpose.** The Economic Development Administration's ("EDA") grants for (i) public works (42 U.S.C. § 3141) and (ii) economic adjustment (42 U.S.C. § 3149) projects are designed to enhance regional competitiveness and promote long-term economic development in regions experiencing substantial economic distress. EDA provides construction, design, and engineering grants to assist distressed communities and regions revitalize, expand, and upgrade their physical infrastructure to attract new industry, encourage business expansion, diversify local economies, and generate or retain long-term private sector jobs and investment. The requirements set forth in these construction standard terms and conditions (the "Construction Standard Terms and Conditions") are applicable to construction, design, and engineering projects funded in whole or in part by EDA. Any necessary modifications of these requirements will be addressed in special award conditions to accommodate individual projects. In addition, these Construction Standard Terms and Conditions apply to construction projects of revolving loan funds ("RLFs") awarded after February 11, 1999 under section 209 of PWEDA (42 U.S.C. § 3149).
2. **Authority and Policies.** EDA is a bureau within the U.S. Department of Commerce established under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. § 3121 *et seq.*) ("PWEDA"). (See also 13 C.F.R. § 300.1.) As a federal agency, EDA is obligated to promulgate regulations and establish policies and procedures to:
 - a. Ensure compliance with applicable federal requirements;
 - b. Safeguard the public's interest in the grant assets; and
 - c. Promote the effective use of grant funds in accomplishing the purpose(s) for which they were awarded.

The Department or EDA may issue changes from time to time to the regulations and other requirements and policies that apply to this Award. Such changes may upon occasion increase administrative or programmatic flexibility in administering this Award in a manner that is mutually beneficial to EDA and to the Recipient. The implementation of any such regulatory, administrative, or programmatic change in administering this Award must have prior EDA written approval.

EDA's policy is to administer all Awards uniformly; however, there may be special circumstances that warrant a variance. To accommodate these circumstances and to encourage innovative and creative ways to address economic development problems, EDA will consider requests for variances to the procedures set out in these Construction Standard Terms and Conditions if they do not conflict with applicable federal statutory and regulatory requirements, are consistent with the goals of EDA's programs, and make sound economic and financial sense.

3. **Definitions.** Whenever used in these Construction Standard Terms and Conditions, the following words and phrases shall have the following meanings:
- a. "Assistant Secretary" refers to the Assistant Secretary of Commerce for Economic Development;
 - b. "Award" – see the definition set out in the first paragraph of the *Preface* above;
 - c. "Closeout" or "Project Closeout" refers to the process by which the Grants Officer determines that all applicable administrative actions and all required work under the Award has been completed by the Recipient and EDA;
 - d. "Department" or "DOC" refers to the U.S. Department of Commerce;
 - e. "Government" or "Federal Government" refers to EDA;
 - f. "Grants Officer" refers to the Regional Director in the appropriate Regional Office;
 - g. "Project Officer," refers to the EDA official responsible for technical or other programmatic aspects of the Award. During the post-approval stage of the Award, EDA generally assigns this role to an EDA Engineer/Construction Manager.
 - h. "Project" refers to the activity for which the EDA grant was awarded;
 - i. "Recipient" refers to the undersigned grantee of U.S. government funds under the Award to which this document is made a part;
 - j. "Regional Office" refers to an EDA regional office;
 - k. "Subrecipient" or "Subgrantee" refers to the legal entity to which a subaward is made and which is accountable to the Recipient for the use of grant funds (this term does not include subcontractors with whom the Recipient enters into a contractual agreement); and
 - l. "Terms and Conditions of the Award" – see the definition set out in the first paragraph of the *Preface* above.

Capitalized terms used but not otherwise defined in these Construction Standard Terms and Conditions have the meanings ascribed to them in EDA's regulations at 13 C.F.R. §§ 300.3, 302.20, 307.8, and 314.1.

4. **Grant Recipient as Trustee.** The Recipient holds grant funds and any EDA-assisted project property in trust for the purpose(s) for which the Award was made. The Recipient's obligation to the Federal Government continues for the estimated useful life of the Project, as determined by EDA, during which EDA retains an undivided equitable reversionary interest (the "Federal Interest") in the property improved, in whole or in part, with the EDA investment. See 13 C.F.R. § 314.2.

If EDA determines that the Recipient fails or has failed to meet this obligation, the agency may exercise any rights or remedies with respect to its Federal Interest in the Project. However, EDA's forbearance in exercising any right or remedy in connection with the Federal Interest does not constitute a waiver thereof.

B. Financial Requirements.

1. Financial Reports.

- a. While EDA generally does not advance funds under an Award, the Recipient must submit Form SF-272, "Report of Federal Cash Transactions," for any Award where funds are to be advanced to the Recipient. Form SF-272 is due 15 working days following the end of each quarter for an Award under \$1 million, 15 working days following the end of each

month for an Award totaling \$1 million or more per year, or as otherwise specified in a special award condition. See 15 C.F.R. §§ 14.52(a)(2) or 24.41(c), as applicable.

- b. Any Recipient whose Award has not been fully disbursed is required to submit Form SF-269A, "Financial Status Report" to EDA annually to report on the status of unreimbursed obligations. This report will provide information on the amount of allowable Project expenses that have been incurred, but not claimed for reimbursement by the Recipient. The report will be as of September 30 of each year and shall be submitted to EDA no later than October 30 of each year. Instructions for completing and submitting Form SF-269A will be furnished to the Recipient at least 60 days before the report is due.
- c. The Recipient must submit a final financial report using Form SF-269 within 90 days of the expiration date of the Award (or from the date the Recipient accepts the Project from the contractor, whichever occurs earlier).
- d. Noncompliance with these requirements will result in the suspension of disbursements under this Award.
- e. Financial reports are to be submitted to the Project Officer.

2. Disbursement Requests.

- a. *Method of Payment.* The Grants Officer determines the appropriate method of payment. Unless otherwise specified in a special award condition, the method of payment under this Award will be reimbursement. Payments will be made through electronic funds transfers directly to the Recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3720B *et seq.*). The Award number shall be included on all payment-related correspondence, information, and forms.
- b. *Disbursement Requests.* The Recipient shall use Form SF-271, "Outlay Report and Request for Reimbursement for Construction Programs," to request reimbursement under the Award. Substantiating invoices and/or vouchers also must be provided. Each request for the disbursement of funds shall be made to the Project Officer. Form SF-271 can be downloaded from OMB's website at www.whitehouse.gov/omb/grants/grants_forms.html.
- c. *Initial Disbursement Request.* For the initial disbursement only, the Recipient must complete and submit Form SF-3881, "ACH Vendor/Miscellaneous Payment Enrollment Form," along with Form SF-271, to the Project Officer.
- d. *Interim Disbursement Requests.* All requests for interim disbursement shall be submitted using Form SF-271 and include substantiating invoices and/or vouchers.
- e. *Quarterly Financial Reporting.* For a Recipient that does not request disbursement at least once quarterly, Form SF-271 must be submitted at least once quarterly to the Project Officer for financial reporting purposes.

3. Federal and Non-Federal Cost Sharing.

- a. Awards that include the federal and non-federal share incorporate an estimated budget consisting of shared allowable costs. If actual allowable costs are less than the total

approved estimated budget, the federal share and non-federal share, or "Matching Share," shall be calculated by applying the approved federal and non-federal cost share ratios to actual allowable costs. *See also* 13 C.F.R. §§ 305.10 and 308.2. If actual allowable costs are greater than the total approved estimated budget, the federal share shall not exceed the total federal dollar amount authorized by this Award.

- b. The Matching Share, whether cash or in-kind, shall be paid out at the same rate as the federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for, or later commitment of, cash or in-kind contributions. In any case, the Recipient must meet its cost share commitment over the Award period.
 - c. The Recipient shall show that the Matching Share is committed to the Project, available as needed, and not conditioned or encumbered in any way that precludes its use consistent with the requirements of EDA investment assistance. *See* 13 C.F.R. § 301.5.
4. **Budget Revisions and Transfers of Funds Among Categories.** The EDA-approved budget is the budget plan for the Project. The Recipient must notify EDA of any deviation from the budget or program plans, including any change in scope of work or the objective of the Project (even if there is no associated budget revision requiring prior written approval). *See* 15 C.F.R. §§ 14.25 or 24.30, as applicable.
- a. Requests for budget revisions to the EDA-approved budget in accordance with the provisions provided below must be submitted to the Grants Officer, who shall make the final determination on such requests and notify the Recipient in writing.
 - b. Amendments to this Award require preparation of Form CD-451, "*Amendment to Financial Assistance Award*," for execution by both the Grants Officer and the Recipient. Form CD-451 is required for the following:
 - (i) Changes to the Project scope of work;
 - (ii) Budget revisions requiring additional EDA or non-EDA funds;
 - (iii) Budget revisions that result in cumulative transfer among direct cost categories in excess of 10 percent of the project cost and the federal share is greater than \$100,000;
 - (iv) The inclusion of costs for which EDA's prior approval is needed under the following OMB Circulars: Circular A-21, "*Cost Principles for Educational Institutions*" (2 C.F.R. part 220); Circular A-87, "*Cost Principles for State, Local, and Indian Tribal Governments*" (2 C.F.R. part 225); and Circular A-122, "*Cost Principles for Non-Profit Organizations*" (2 C.F.R. part 230), as applicable;
 - (v) Change of site location;
 - (vi) Change or addition of Recipient;
 - (vii) Time extensions; and
 - (viii) Modifications to the Terms and Conditions of the Award, other than time extensions.
 - c. When an Award supports both construction and non-construction work, the Recipient must obtain prior written approval from the Grants Officer before making any fund or budget transfer from non-construction to construction or vice versa. *See* 15 C.F.R. §§ 14.25(j) or 24.30(c)(3), as applicable.

- d. Transfers shall not be permitted if such transfers would cause any federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the Recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior written approval. In addition, this does not prohibit the Recipient from requesting the Grants Officer's approval for revisions to the budget. See 15 C.F.R. §§ 14.25(c) and (f) or 24.30(c), as applicable.
 - e. The Recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.
 - f. *Project Underrun Amounts.* Underrun amounts shall be transferred to the contingencies line item. Contingency funds are to be used to address situations resulting from unknown conditions and changes required for the fulfillment of authorized activities under this Award. EDA may approve the use of underrun funds to increase the federal share of the Project or further improve the Project, as long as the improvements are approved by EDA and consistent with the original purpose of the approved EDA investment. See 13 C.F.R. § 308.1.
 - g. *Additional EDA Funding in Case of Project Overrun Amounts.* In accepting the Award, the Recipient agrees to fund any overrun amounts. Additional EDA assistance for an approved Project may not be approved.
5. **Indirect Costs.**
- a. Indirect costs are generally not applicable under this Award.
 - b. When indirect costs are applicable, they will not be allowable charges against the Award unless specifically included as a line item in the EDA-approved budget. For Recipients that are educational institutions, the term "indirect cost" has been replaced with the term "facilities and administrative cost" under OMB Circular A-21, "Cost Principles for Educational Institutions" (see 2 C.F.R. part 220).
 - c. Excess indirect costs may not be used to offset unallowable direct costs.
 - d. If the Recipient has not previously established an indirect cost rate with a federal agency, the negotiation and approval of a rate is subject to the procedures in applicable cost principles and the following subparagraphs:
 - (i) *State, local, and Indian Tribal Governments; Educational Institutions; and Non-Profit Organizations (Non-Commercial Organizations)*

For the above-listed organizations, "cognizant federal agency" is generally defined as the agency that provides the largest dollar amount of direct federal funding. For those organizations for which DOC is cognizant or has oversight, DOC or its designee will either negotiate a fixed rate with carry-forward provisions for the Recipient or, in some instances, will limit its review to evaluating the procedures described in the Recipient's cost allocation methodology plan. Indirect cost rates and cost allocation methodology reviews are subject to future audits to determine actual indirect costs.

- (ii) Within 90 days of the Award start date, the Recipient shall submit to the address listed below documentation (indirect cost proposal, cost allocation plan, etc.) necessary to perform the review. The Recipient shall provide the Grants Officer with a copy of the transmittal letter.

Office of Acquisition Management
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W., Room # 6054
Washington, DC 20230

- (iii) The Recipient can use the fixed rate proposed in the indirect cost plan until such time as DOC provides a response to the submitted plan. Actual indirect costs must be calculated annually and adjustments made through the carry-forward provision used in calculating next year's rate. This calculation of actual indirect costs and the carry-forward provision is subject to audit. Indirect cost rate proposals must be submitted annually. An organization that has previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency within six months after the close of the Recipient's fiscal years.
- e. When DOC is not the oversight or cognizant federal agency, the Recipient shall provide the Grants Officer with a copy of a negotiated rate agreement or a copy of the transmittal letter submitted to the cognizant or oversight federal agency requesting a negotiated rate agreement.
- f. If the Recipient fails to submit the required documentation to DOC within 90 days of the Award start date, the Grants Officer may amend the Award to preclude the recovery of any indirect costs under the Award. If the DOC, oversight, or cognizant federal agency determines there good and sufficient cause to excuse the Recipient's delay in submitting the documentation, an extension of the 90-day due date may be approved by the Grants Officer.
- g. Regardless of any approved indirect cost rate applicable to the Award, the maximum dollar amount of allocable indirect costs for which DOC will reimburse the Recipient shall be the lesser of:
- (i) The line item amount for the federal share of indirect costs contained in the approved budget of the Award; or
 - (ii) The federal share of the total allocable indirect costs of the Award based on the indirect cost rate approved by a cognizant or oversight federal agency and current at the time the cost was incurred, provided the rate is approved on or before the Award end date.
6. **Incurring Costs Prior to Award.** Project activities carried out prior to EDA's approval of this Award shall be carried out at the sole risk of the Recipient. Such activity is subject to the rejection of the application, the disallowance of costs, or other adverse consequences as a result of noncompliance with EDA or federal law, including but not limited to procurement requirements, civil rights requirements, federal labor standards, or environmental and historic preservation requirements. Costs must be included in the EDA-approved budget and must be allowable costs under federal cost principles and under the Award. See 13 C.F.R. § 302.8.

7. Incurring Costs or Obligating Funds Beyond the Project Expiration Date.

- a. The Recipient shall not incur costs or obligate funds for any purpose pertaining to the Project, program, or activities beyond the expiration date stipulated in the Award (or the date of acceptance of the Project by the contractor, whichever occurs earlier), unless a written time extension of this Award is granted by the Grants Officer. The only costs that are authorized for a period of up to 90 days following that date are those strictly associated with Closeout activities. Closeout activities are generally limited to the preparation of final reports. See 15 C.F.R. §§ 14.71 or 24.50, as applicable.
- b. The Recipient shall adhere to the development time schedule and time limits set out in the Terms and Conditions of this Award. Any such Term or Condition supersedes the development time schedule and time limits set out in these Construction Standard Terms and Conditions.

8. Time Extensions.

- a. Unless otherwise authorized in 15 C.F.R. §§ 14.25(e)(2) or 24.30, as applicable, or a special award condition, any extension of the Project period can only be authorized by the Grants Officer in writing. A verbal or written assurance of funding from other than the Grants Officer, including Regional Office staff other than the Grants Officer, does not constitute authority to obligate funds for programmatic activities beyond the expiration date.
- b. The Recipient is responsible for implementing the Project in accordance with the development time schedule contained in this Award. As soon as the Recipient becomes aware that it will not be possible to meet the development time schedule, the Recipient must notify the Grants Officer. The Recipient's notice to EDA must contain the following:
 - (i) An explanation of the Recipient's inability to complete work by the specified date (e.g., a lengthy period of unusual weather delayed the contractor's ability to excavate the site, major re-engineering required in order to obtain State or federal approvals unplanned environmental mitigation required);
 - (ii) A statement that no other changes to the Project are contemplated;
 - (iii) Documentation that demonstrates there is still a bona fide need for the Project; and
 - (iv) A statement that no further delay is anticipated and that the Project can be completed within the revised time schedule.

EDA reserves the right to withhold disbursements while the Recipient is not in compliance with the time schedule. EDA reserves the right to suspend or terminate this Award if the Recipient fails to proceed with reasonable diligence to accomplish the Project as intended.

- c. EDA has no obligation to provide any additional prospective funding. Any amendment of this Award to increase funding or to extend the period of performance is at the sole discretion of EDA.

9. Tax Refunds. Refunds of Federal Insurance Contributions Act and federal Unemployment Tax Act ("FICA/FUTA") taxes received by the Recipient during or after the Project period must be refunded or credited to DOC where the benefits were financed with federal funds under the Award. The Recipient agrees to contact the Grants Officer immediately upon receipt of these refunds. The Recipient further agrees to refund portions of FICA/FUTA taxes

determined to belong to the Federal Government, including refunds received after the expiration of this Award.

10. **Program Income** For Projects that create long-term rental revenue (e.g., buildings or real property constructed or improved for the purpose of renting or leasing space), the Recipient agrees to use such income generated from the rental or lease of any Project facility in the following order of priority:
- a. Administration, operation, maintenance, and repair of Project facilities for their estimated useful life (as determined by EDA) in a manner consistent with good property management practice and in accordance with established building codes. This includes, where applicable, repayment of indebtedness resulting from any EDA-approved encumbrance (e.g., approved mortgage) on the EDA-assisted facility.
 - b. Economic development activities that are authorized for support by EDA, provided such activities meet the economic development purposes of PWEDA.

See 15 C.F.R. §§ 14.24 or 24.25, as applicable.

C. Programmatic Requirements.

1. Quarterly Reporting.

- a. Quarterly performance reports must be submitted in accordance with the procedures set out in 15 C.F.R. parts 14 or 24, as applicable, and as indicated below. Failure to submit required reports in a timely manner may result in the withholding of payments under this Award, deferral of processing of new awards, amendments or supplemental funding pending the receipt of the overdue report(s), or the establishment of an account receivable for the difference between the total federal share of outlays last reported and the amount disbursed. See 15 C.F.R. § 302.18(a).
- b. Unless otherwise specified in this Award, the quarterly performance report will contain the following information for each Project program, function, or activity:
 - (i) A comparison of planned and actual accomplishments according to the timetable or list of Project objectives in this Award;
 - (ii) An explanation of any delays or failures to meet the Project timetable or Project goals; and
 - (iii) Any other pertinent information including, when appropriate, analysis, and explanation of cost overruns or high unit costs.
- c. Quarterly performance reports shall be submitted for each calendar quarter to the Project Officer. Each performance report will be due not later than January 15, April 15, July 15, and October 15 for the immediate previous quarter. The final Project performance report shall be submitted to EDA no more than 90 days after the Project Closeout date. This reporting requirement begins with the Recipient's acceptance of this Award and ends when EDA approves Project Closeout. See 15 C.F.R. §§ 14.51 or 24.40, as applicable.

The Recipient shall submit quarterly performance reports to the EDA Project Officer in hardcopy or electronically as specified in the special award conditions.

2. **Interim Reporting.** The Recipient must report any event that will or may have significant impact upon the Project, including delays or adverse conditions that materially may affect the ability of the Recipient to attain Project objectives within established time periods or meet the development time schedule. The Recipient should report such events to the Project Officer in the most time-expedient way possible and then, if the initial report was not in writing, report the event to the Project Officer in writing. Such a report shall include a statement of the event or issue, a statement of the course of action contemplated to resolve the matter, and any federal assistance needed to resolve the situation. If budget changes are required, the Recipient must submit a written budget revision request. See 15 C.F.R. §§ 14.25(h) or 24.30(c)(2), as applicable.
3. **Government Performance and Results Act Reporting.** In addition to quarterly performance reports, EDA may require the Recipient to report on Project performance beyond the Project Closeout date for Government Performance and Results Act (GPRA) purposes. In no case shall the Recipient be required to submit any report more than 10 years after the Project Closeout date. Data used by the Recipient in preparing reports shall be accurate and from independent sources whenever possible. See 13 C.F.R. § 302.16.
4. **Unsatisfactory Performance.** Failure to perform the work in accordance with the Terms and Conditions of the Award and maintain at least satisfactory performance at the discretion of EDA may result in the designation of the Recipient as high-risk and assignment of special award conditions or further action as specified in section C.7. of these Construction Standard Terms and Conditions. See 15 C.F.R. §§ 14.14 or 24.12, as applicable.
5. **Programmatic Changes.**
 - a. The Recipient must report to the Grants Officer, and request prior approval for, any programmatic change to the Award, in accordance with 15 C.F.R. §§ 14.25 or 24.30, as applicable.
 - b. The Recipient must obtain the Grants Officer's written approval for any programmatic changes to the Award. Any changes made to the Project without EDA's approval are made at the Recipient's risk of non-payment of costs, suspension, termination, or other EDA action with respect to the Award. See 13 C.F.R. § 302.7(b).
 - c. **Contract Change Orders.** After construction contracts for the Project have been executed, it may become necessary to alter them. This requires a formal contract change order that must be issued by the Recipient and accepted by the contractor. All contract change orders must be reviewed by EDA, even if EDA is not participating in the cost of the change order or the contract price is to be reduced. Work on the Project may continue pending EDA review and approval of the change order, but all such work will be at the Recipient's risk as to whether the cost of the work is eligible for EDA participation until the Recipient receives EDA approval for the change order. See 13 C.F.R. § 305.13.
6. **Other Federal Awards with Similar Programmatic Activities.** The Recipient shall immediately provide written notification to the Project Officer and the Grants Officer in the event that, subsequent to receipt of this Award, other financial assistance is received to support or fund any portion of the scope of work incorporated into this Award. EDA will not pay for costs that are funded by other sources.

7. **Non-Compliance with Award Provisions.** Failure to comply with any or all of the Terms and Conditions of this Award may have a negative impact on the Recipient's ability to receive future funding from the Department, including EDA, and may be considered grounds for any or all of the following actions: (a) the establishment of an account receivable; (h) withholding payments under any EDA or DOC Award(s) to the Recipient; (c) the imposition of additional special award conditions; (d) the suspension of any active DOC Awards; or (e) termination of any active DOC Awards.

The Recipient hereby agrees that the Government may at its option withhold disbursement of any Award funds if the Government learns or has knowledge that the Recipient has failed to comply in any manner with any Term or Condition of the Award. See 13 C.F.R. § 302.18. The Government may withhold funds until the violation or violations have been corrected to the Government's satisfaction. The Recipient further agrees to reimburse the Government for any ineligible costs paid from Award funds, or if the Recipient fails to reimburse the Government, the Government shall have the right to offset the amount of such ineligible costs from any undisbursed award funds held by the Government. The Recipient agrees to repay the Government for all ineligible costs incurred in connection with the Project and paid from the Award including but not limited to those costs determined to be ineligible if the Government learns of any Award violations after all Award funds have been disbursed. See 15 C.F.R. §§ 14.72-14.73 or 24.51-24.52, as applicable.

8. **Use by Beneficiary.** In the event a beneficiary of the Project fails to comply in any manner with certifications, assurances, or agreements that such beneficiary has entered into in accordance with EDA's requirements, the Recipient will reimburse the Government the Award amount or an amount to be determined by the Government pursuant to 13 C.F.R. §§ 314.4 and 314.5. Where the Government determines that the failure of a beneficiary to comply with EDA requirements affects a portion of the property benefited by the Award, the Recipient will reimburse the Government proportionately.
9. **Prohibition Against Assignment by the Recipient.** Except as provided in a special award condition, the Recipient shall not transfer, pledge, mortgage, or otherwise assign the Award, or any interest therein, or any claim arising thereunder, to any party or parties, banks, trust companies, or other financing or financial institutions.
10. **Disclaimer Provisions; Hold Harmless Requirement.**
- a. The United States expressly disclaims any and all responsibility or liability to the Recipient or third persons for the actions of the Recipient or third persons resulting in death, bodily injury, property damages, or any other losses resulting in any way from the performance of this Award or any subaward or subcontract under this Award.
 - b. The acceptance of this Award by the Recipient does not in any way constitute an agency relationship between the United States and the Recipient.
 - c. To the extent permitted by law, the Recipient agrees to indemnify and hold the Government harmless from and against all liabilities that the Government may incur as a result of providing an Award to assist, directly or indirectly, in the preparation of the Project site or construction, renovation, or repair of any facility on the Project site, to the extent that such liabilities are incurred because of toxic or hazardous contamination or groundwater, surface water, soil, or other conditions caused by operations of the Recipient or any of its

predecessors (other than the Government or its agents) on the property.
See 13 C.F.R. § 302.19.

11. **Prohibition on Use of Third Parties to Secure Award.** Unless otherwise specified in the special award conditions to this Award, the Recipient warrants that no person or selling agency has been employed or retained to solicit or secure this Award upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial or selling agencies maintained by the Recipient for the purpose of securing business. For breach or violation of this warrant, the Government has the right to annul this Award without liability, or at its discretion, to deduct from the Award sum, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.
12. **Payment of Attorneys' or Consultants' Fees.** No Award funds shall be used, directly or indirectly, to reimburse attorneys' or consultants' fees incurred in connection with obtaining investment assistance under PWEDA, such as, for example, preparing the application for EDA investment assistance. However, ordinary and reasonable attorneys' and consultants' fees incurred for meeting Award requirements, such as, for example, conducting a title search or preparing plans and specifications, may be eligible Project costs and may be paid out Award funds, provided such costs are otherwise eligible. See 13 C.F.R. § 302.10.
13. **Commencement of Construction.**
 - a. **Delayed Construction Starts.** If significant construction (as determined by EDA) is not commenced within two years of the Award date or by the date estimated for start of construction in this Award (or the expiration of any extension granted in writing by EDA), whichever is later, this Award will be automatically suspended and may be terminated if EDA determines, after consultation with the Recipient, that construction to completion cannot reasonably be expected to proceed promptly and expeditiously. If significant construction has not been commenced within three years of the Award date, an extension must be approved by the Assistant Secretary.
 - b. **Early Construction Starts.** The Recipient shall make a written request to EDA for early construction start permission (that is, after the date of Award, but before EDA gives formal approval for construction to commence). For Project costs to be eligible for EDA reimbursement, EDA must determine that the award of all contracts necessary for design and construction of the Project facilities is in compliance with the Terms and Conditions of this Award. If construction commences prior to EDA's determination, the Recipient proceeds at its own risk until EDA's review and concurrence. See 13 C.F.R. § 305.11.
 - c. **Project Sign.** The Recipient is responsible for constructing, erecting, and maintaining in good condition throughout the construction period a sign (or signs) in a conspicuous place at the Project site indicating that the Federal Government is participating in the Project. EDA will provide specifications for the sign and may require more than one sign if site conditions so warrant. If the EDA-recommended sign specifications conflict with State or local law, the Recipient may modify such recommended specifications so as to comply with the State or local law. See 13 C.F.R. § 305.12.
14. **Efficient Administration of Project.** The Recipient agrees to properly and efficiently administer, operate, and maintain the Project for its estimated useful life, as required by

section 504 of PWEDA (42 U.S.C. § 3194). If the Government determines, at any time during the estimated useful life of the facility, that the Project is not being properly and efficiently administered, operated, and maintained, the Government may terminate this Award and require the Recipient to repay the federal share. See 13 C.F.R. §§ 302.12, 302.18, and 314.2-314.4.

15. Conflicts-of-Interest Rules.

- a. An "Interested Party" is defined in 13 C.F.R. § 300.3 as "any officer, employee, or member of the board of directors or other governing board of the Recipient, including any other parties that advise, approve, recommend, or otherwise participate in the business decisions of the Recipient, such as agents, advisors, consultants, attorneys, accountants, or shareholders." An Interested Party includes the Interested Party's "Immediate Family" (defined in 13 C.F.R. § 300.3 as a person's spouse, parents, grandparents, siblings, children, and grandchildren, but does not include distant relatives, such as cousins, unless the distant relative lives in the same household as the person) and other persons directly connected to the Interested Party by law or through a business organization. In addition, "Immediate Family" includes an Interested Party's "significant other" or partner.
- b. The Recipient must establish safeguards to prohibit an Interested Party from using its position for a purpose that constitutes or presents the appearance of personal or organizational conflicts-of-interest or of personal gain. See 13 C.F.R. § 302.17(a) and (b), 15 C.F.R. §§ 14.42 or 24.36(b)(3), as applicable, and Forms SF-424B ("Assurances - Non-Construction Projects") and SF-424D ("Assurances - Construction Projects").
- c. An Interested Party must not receive any direct or indirect financial or personal benefits in connection with this Award or its use for payment or reimbursement of costs by or to the Recipient. A financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with the organization selected or to be selected for a subaward. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice. It also could result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field. See 13 C.F.R. § 302.17(b).

16. Record-Keeping Requirements.

- a. *Records.* The Recipient must maintain records that document compliance with the Terms and Conditions of this Award. At a minimum, the Recipient's records must fully disclose:
 - (i) The amount and disposition of EDA investment assistance;
 - (ii) All Project expenditures and procurement actions;
 - (iii) The total cost of the Project that the Award funds;
 - (iv) The amount and nature of the portion of Project costs provided by non-EDA sources;
 - (v) Contractor compliance with applicable federal requirements; and
 - (vi) Such other records as EDA determines will facilitate an effective audit.

b Records Retention.

In general, all records pertinent to this Award must be kept retained for a period of three years from the date of submission of the final project expenditure report (the final Form SF-271 for disbursement). The only exceptions are the following:

- (i) If any litigation, claim, or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved and final actions taken.
- (ii) Records for real property and equipment acquired with federal funds must be retained for three years after final disposition.
- (iii) When records are transferred or maintained by EDA, the three-year retention requirement is not applicable to the Recipient.

Records relating to indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations on the rate at which a particular group of costs is chargeable are subject to different retention requirements. See 15 C.F.R. §§ 14.53 or 24.42, as applicable.

The Recipient is responsible for monitoring any sub-recipients and contractors to ensure their compliance with the records retention requirements. The Recipient must immediately notify the Project Officer in case records are not retained for the general retention periods noted above. See 13 C.F.R. § 302.14 and 15 C.F.R. §§ 14.50-14.53 or §§ 24.40-24.42, as applicable.

17. Termination Actions.

- a. *Termination for Cause.* If the Recipient materially fails to comply with any of the Terms and Conditions of this Award, EDA has the right to terminate for cause all or any part of its obligation hereunder, including if:
- (i) Any representation made by the Recipient to the Government in connection with the application for Government assistance is incorrect or incomplete in any material respect;
 - (ii) The intent and purpose and/or the economic feasibility of the Project is changed substantially so as to affect significantly the accomplishment of the Project as intended (including an unauthorized use of property as provided in 13 C.F.R. § 314.4);
 - (iii) The Recipient has violated commitments it made in its application and supporting documents or has violated any of the Terms and Conditions of this Award,
 - (iv) The conflicts-of-interest rules in 13 C.F.R. § 302.17 are violated; or
 - (v) The Recipient fails to report immediately to the Government any change of authorized representative(s) acting in lieu of or on behalf of the Recipient.

In addition, EDA may take one or more of the actions set out in 15 C.F.R. §§ 14.62(a) or 24.43(a), as applicable

- b. *Termination for Convenience.* The Recipient may request at any time termination for convenience of this Award upon sending to the Grants Officer written notification in a form acceptable to EDA setting forth the reasons for requesting the termination and the effective date of such termination. See 15 C.F.R. §§ 14.61 or 24.44, as applicable.

18. **Project Closeout Procedures.** After construction is completed and the Project is closed out financially, the Recipient has an ongoing responsibility to properly administer, operate, and maintain the Project for its estimated useful life (as determined by EDA) in accordance with its original purpose. See 13 C.F.R. § 102.12. The Recipient must comply with all Award requirements and maintain records to document such compliance, which shall be made available for inspection by EDA or other Government officials as required.

a. **Final Disbursement.** When Project construction and final inspection have been completed, or substantially completed as determined by EDA, and the Recipient has accepted the Project from the contractor, the Recipient can begin the Closeout process by submitting the following documentation to EDA:

- (i) A request for final disbursement on an executed Form SF-271;
- (ii) A written certification that all costs claimed are for eligible activities under this Award, for which there is documentation in the Recipient's records;
- (iii) An executed certificate of final acceptance signed by the Recipient and the Recipient's architect/engineer;
- (iv) The Recipient's certification that its currently valid single or program-specific audit in accordance with OMB Circular A-133, "*Audits of States, Local Governments, and Non-Profit Organizations*," if applicable, does not contain any material findings (if the Recipient's currently valid OMB Circular A-133 audit does contain material findings, the Recipient shall submit the applicable audit in hardcopy to the Grants Officer);
- (v) The Recipient's certification that its currently valid audit (in accordance with OMB Circular A-133), if applicable, has been submitted to the Federal Audit Clearinghouse; and
- (vi) Other documentation as may be required by EDA.

EDA shall advise the Recipient of costs determined to be eligible and ineligible. If a balance of this Award is due to the Recipient, the balance will be paid by wire transfer. If the Recipient has received an amount in excess of the amount due the Recipient, the Recipient must refund the excess to EDA, payable to the U.S. Treasury.

As noted above, if the Recipient's currently valid OMB Circular A-133 audit contains material findings, the Recipient shall submit the audit in hardcopy to the Grants Officer before final disbursement.

- b. The Recipient shall submit, within 90 calendar days after the Project Closeout date, all financial, performance, and other reports as required by the Terms and Conditions of this Award. Additional GPRA reporting requirements also may apply.
- c. Unless EDA authorizes an extension, the Recipient shall liquidate all obligations incurred under this Award no later than 90 calendar days after acceptance of the Project from the contractor or before the expiration date of this Award, whichever occurs earlier.
- d. The Closeout of this Award does not affect any of the following:
 - (i) Audit requirements per OMB Circular A-133 and the related "*Compliance Supplement*;"
 - (ii) The right of EDA to disallow costs and recover funds on the basis of a later audit or other project review;

- (iii) The Recipient's obligation to return any funds due as a result of later corrections or other transactions; and
- (iv) Requirements for property management, records retention, and performance measurement reports

D. Additional Requirements Relating to Construction Projects.

The Recipient and any subrecipient(s) must, in addition to other statutory and regulatory requirements detailed in these Construction Standard Terms and Conditions and the assurances made to EDA in connection with the Award, comply and require each of its contractors and subcontractors employed in the completion of the Project to comply with all applicable federal, State, territorial, and local laws, and in particular, the following federal public laws (and the regulations issued thereunder), Executive Orders, OMB Circulars, and local law requirements.

1. **The Davis-Bacon Act, as amended (40 U.S.C. §§ 3141-3144, 3146, 3147; 42 U.S.C. § 3212)**
Requiring minimum wages for mechanics and laborers employed on Federal Government public works projects to be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the Project is to be performed, or in the District of Columbia if the Project is to be performed there.
2. **The Contract Work Hours and Safety Standards Act, as amended (40 U.S.C. §§ 3701 - 3708)**
Providing work hour standards for every laborer and mechanic employed by any contractor or subcontractor in the performance of a federal public works project.
3. **The National Historic Preservation Act of 1966, as amended (16 U.S.C. § 470 *et seq.*), and the Advisory Council on Historic Preservation Guidelines**
Requiring projects involving federal funds to follow the requirements of the National Historic Preservation Act, which requires stewardship of historic properties.
4. **The Historical and Archeological Data Preservation Act of 1974, as amended (16 U.S.C. § 469a-1 *et seq.*)**

Requiring appropriate surveys and preservation efforts if a federally-licensed project may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data.
5. **Architectural Barriers Act of 1968, as amended (42 U.S.C. § 4151 *et seq.*), and the regulations issued thereunder, which prescribe standards for the design and construction of any building or facility intended to be accessible to the public or that may house handicapped employees.**

6. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. § 4601 *et seq.*), and implementing regulations issued at 49 C.F.R. part 24.

Establishing uniform policies for the fair and equitable treatment of persons, businesses, or farm operations affected by the acquisition, rehabilitation, or demolition of real property acquired for a project financed wholly or in part with federal financial assistance.

7. The Energy Conservation and Production Act (42 U.S.C. § 6834 *et seq.*)

Establishing energy efficiency performance standards for the construction of new residential and commercial structures undertaken with federal financial assistance.

8. Requirements for New Construction. For new building construction projects, the Recipient will comply with current local building codes, standards, and other requirements applicable to the Project.

E. Non-Discrimination Requirements. No person in the United States shall, on the ground of race, color, national origin, handicap, age, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance. The Recipient agrees to comply with the following non-discrimination requirements.

1. Statutory Provisions.

- a. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) and DOC implementing regulations published at 15 C.F.R. part 8, which prohibit discrimination on the grounds of race, color, or national origin under programs or activities receiving federal financial assistance;
- b. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*), which prohibits discrimination on the basis of sex under federally-assisted education programs or activities;
- c. Pub. L. No. 92-65, 42 U.S.C. § 3123 (which proscribes discrimination on the basis of sex in EDA assistance provided under PWEDA) and Pub. L. No. 94-369, 42 U.S.C. § 6709 (which proscribes discrimination on the basis of sex under the Local Public Works Program), and the Department's implementing regulations at 15 C.F.R. §§ 8.7-8.15
- d. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), and DOC implementing regulations published at 15 C.F.R. part 8b, which prohibit discrimination on the basis of handicap under any program or activity receiving or benefiting from federal assistance;
- e. The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 *et seq.*) and DOC implementing regulations published at 15 C.F.R. part 20, which prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance;
- f. The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), which prohibits discrimination on the basis of disability under programs, activities, and services provided

shall have an audit conducted for that year in accordance with the requirements contained in OMB Circular A-133. A copy of the audit shall be submitted to the Bureau of the Census, which has been designated by OMB as a central clearinghouse. The address is:

Federal Audit Clearinghouse
1201 E. 10th Street
Jeffersonville, IN 47132

- b. In accordance with 15 C.F.R. § 14.26 l and (d), for-profit hospitals, commercial, and other organizations not covered by the audit provisions of OMB Circular A-133 that expend federal awards of \$500,000 or more in a fiscal year, are required to have a program-specific audit performed at the conclusion of the Project, but no less than once every five years. Some DOC programs have specific audit guidelines that will be incorporated into the Award. If DOC does not have a program-specific audit guide available for the program, the auditor should follow *Generally Accepted Government Auditing Standards* and the requirements for a program-specific audit as described in OMB Circular A-133 § ___.235. A copy of the program-specific audit shall be submitted to the OIG at the following address with a copy of the transmittal letter to the Grants Officer:

Office of Inspector General
U.S. Department of Commerce
Atlanta Regional Office of Audits
401 West Peachtree Street, N.W., Suite 2742
Atlanta, GA 30308

2. **Requirement to Submit Audit to EDA.** If the Recipient's currently valid audit required under OMB Circular A-133 contains materials findings, the Recipient must submit the audit in hardcopy to the Grants Officer. *See also* section C.18.a. of these Construction Standard Terms and Conditions.
3. **Audit Resolution Process.**
- a. An audit of the Award may result in the disallowance of costs incurred by the Recipient and the establishment of a debt (account receivable) due to EDA. For this reason, the Recipient should take seriously its responsibility to respond to all audit findings and recommendations with adequate explanations and supporting evidence whenever audit results are disputed.
- b. In accordance with the *Federal Register* notice dated January 27, 1989 (54 Fed. Reg. 4053), a Recipient whose Award is audited has the following opportunities to dispute the proposed disallowance of costs and the establishment of a debt:
- (i) Unless the OIG determines otherwise, the Recipient has 30 days from the date of the transmittal of the "Draft Audit Report" to submit written comments and documentary evidence.
 - (ii) The Recipient has 30 days from the date of the transmittal of the "Final Audit Report" to submit written comments and documentary evidence. There shall be no extension of this deadline.
 - (iii) EDA shall review the documentary evidence submitted by the Recipient and shall notify the Recipient of the results in an "Audit Resolution Determination Letter." The Recipient has 30 days from the date of receipt of the Audit Resolution

Determination Letter to submit a written appeal. There shall be no extension of this deadline. The appeal is the last opportunity for the Recipient to submit written comments and documentary evidence that dispute the validity of the Audit Resolution Determination Letter.

- (iv) An appeal of the Audit Resolution Determination Letter does not prevent the establishment of the audit-related debt nor does it prevent the accrual of interest on such debt. If the Audit Resolution Determination Letter is overruled or modified on appeal, appropriate corrective action will be taken retroactively. An appeal will stay the offset of funds owed by the auditee against funds due to the auditee.

EDA shall review the Recipient's appeal and notify the Recipient of the results in an Appeal Determination Letter. After the opportunity to appeal has expired or after the Appeal Determination Letter has been rendered, EDA will not accept any further documentary evidence from the Recipient. No other administrative appeals are available in the Department.

G Debts.

1. Payment of Debts Owed the Federal Government.

Any debt determined to be owed to the Federal Government must be paid promptly by the Recipient. In accordance with 15 C.F.R. § 21.4, a debt will be considered delinquent if it is not paid within 15 days of the established due date, or if there is no due date, within 30 days of the billing date. Failure to pay a debt by the due date, or if there is no due date, within 30 days of the billing date, shall result in the imposition of late payment charges as noted below. In addition, failure to pay the debt or establish a repayment agreement by the due date, or if there is no due date, within 30 days of the billing date, will also result in the referral of the debt for collection action, including referral to the Treasury Offset Program (31 C.F.R. § 285.5) and may result in EDA taking further action as specified in section C.7. of these Construction Standard Terms and Conditions. The Recipient also may be suspended or debarred from further federal financial and non-financial assistance and benefits, as provided in 2 C.F.R. part 1326, "Nonprocurement Debarment and Suspension" until the debt has been paid in full or until a repayment agreement has been approved and payments are made in accordance with the repayment agreement. Payment of a debt may not come from other federally-sponsored programs. Verification that other federal funds have not been used will be made during future program visits and audits.

2. Late Payment Charges.

- a. An interest charge shall be assessed on the delinquent debt as established by the Debt Collection Act of 1982, as amended (31 U.S.C. § 3701 *et seq.*). The minimum annual interest rate to be assessed is the U.S. Department of the Treasury's "Current Value of Funds Rate" ("CVFR"). See www.fms.treas.gov/cvfr/index.html. The U.S. Department of Treasury annually publishes the CVFR in the *Federal Register*. The assessed rate shall remain fixed for the duration of the indebtedness.
- b. A penalty charge will be assessed on any portion of a debt that is delinquent for more than 90 days, although the charge will accrue and be assessed from the date the debt became delinquent.

c. An administrative charge will be assessed to cover processing and handling the amount due.

3 Barring Delinquent Federal Debtors from Obtaining Federal Loans or Loan Insurance Guarantees.

Pursuant to 31 U.S.C. § 3720B, unless waived, the Department is not permitted to extend financial assistance in the form of a loan, loan guaranty, or loan insurance to any person delinquent on a non-tax debt owed to a Federal agency. This prohibition does not apply to disaster loans.

4 Effect of Judgment Lien on Eligibility for Federal Grants, Loans, or Programs.

Pursuant to 28 U.S.C. § 3201(e), unless waived by DOC, a debtor who has a judgment lien against the debtor's property for a debt to the United States shall not be eligible to receive any grant or loan that is made, insured, guaranteed or financed directly or indirectly by the U.S. or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied.

H. Name Check Reviews.

1. **Name Check Requirement.** A name check review will be performed by the OIG on key individuals associated with a nonprofit organization applicants, unless: (a) the proposed award amount is \$100,000 or less; (b) the applicant has been a Recipient of financial assistance from the Department for three or more consecutive years without any adverse programmatic or audit finding; or (c) the applicant is a unit of a State or local government. See "Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements" (69 Fed. Reg. 78389, December 30, 2004).

2. **Exemptions.** The following individuals who are acting on behalf of their respective entities in applying for assistance are exempt from the name check review process:

- a. Officials of State and local governments;
- b. Officials of accredited colleges and universities; and
- c. Officials of economic development districts designated by EDA, including those entities whose designations are pending.

3 **Results of Name Checks.** EDA reserves the right to take any of the actions described in section H.4. below if any of the following occurs as a result of the name check review:

- a. A key individual fails to submit the required Form CD-346, "Applicant for Funding Assistance;"
- b. A key individual makes an incorrect statement or omits a material fact on Form CD-346; or
- c. The name check reveals significant adverse findings that reflect on the business integrity or responsibility of the applicant and/or key individual.

4. **Action(s) Taken as a Result of Name Check Review.** If any situation listed in section H.3 above occurs, the Department, at its discretion, may take one or more of the following actions:
 - a. Consider suspension or termination of the Award;
 - b. Require the removal of any key individual from association with the management or implementation of the Award; or
 - c. Make appropriate provisions or revisions as needed (in the special award conditions to the Award) with respect to the method of payment and/or financial reporting requirements.
- I. **Government-wide Debarment and Suspension (Non-procurement).** The Recipient shall comply with the provisions of subpart C of 2 C.F.R. part 1326, "*Non-Procurement Debarment and Suspension*," which generally prohibit entities that have been debarred, suspended, or voluntarily excluded from participating in federal non-procurement transactions either through primary or lower-tier covered transactions.
- J. **Drug-free Workplace.** The Recipient shall comply with the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. § 702), and the Department's implementing regulations found at 15 C.F.R. part 29, "*Government-wide Requirements for Drug-Free Workplace (Financial Assistance)*," which require that the Recipient take steps to provide a drug-free workplace.
- K. **Lobbying Restrictions.**
 1. **Statutory Provisions.** The Recipient must comply with the provisions of 31 U.S.C. § 1352 and the Department's implementing regulations published at 15 C.F.R. part 28, "*New Restrictions on Lobbying*." These provisions generally prohibit the use of federal funds for lobbying the executive or legislative branches of the United States government in connection with the Award and require the disclosure of the use of non-federal funds for lobbying.
 2. **Disclosure of Lobbying Activities.** A Recipient receiving in excess of \$100,000 in federal funding must submit a completed Form SF-LLL, "*Disclosure of Lobbying Activities*," regarding the use of non-federal funds for lobbying. The Form SF-LLL must be submitted within 30 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Recipient must submit Form SF-LLL from all applicable parties, including those received from subrecipients, contractors, and subcontractors, to the Grants Officer.
 3. **Special Provisions Relating to Indian Tribes.** As set out in 31 U.S.C. § 1352, there are special provisions applicable to Indian Tribes, tribal organizations, or other Indian organizations eligible to receive federal contracts, grants, loans, or cooperative agreements. In accordance with Departmental policy, EDA recognizes Tribal Employment Rights Ordinances ("TEROs"), which may provide for preferences in contracting and employment, in connection with its financial assistance awards. Tribal ordinances requiring preference(s) in contracting, hiring, and firing, and the payment of a TERO fee generally are allowable provisions under federal awards granted to American Indian and Alaska Native tribal governments. The payment of the TERO fee, which supports the tribal employment rights office to administer the preferences, should generally be allowable as an expense that is "necessary and reasonable for

proper and efficient performance and administration" of an Award, as provided under the applicable cost principles set out in 2 C.F.R. part 225.

I. Codes of Conduct and Sub-Award, Contract and Subcontract Provisions.

1. **Code of Conduct for Recipients.** Pursuant to the certification in Form SF-424B, paragraph 3, the Recipient must maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest or personal gain in the administration of this Award.

2. Applicability of Award Provisions to Subrecipients.

- a. The Recipient shall require all subrecipients, including lower tier subrecipients, under the award to comply with the provisions of this Award, including applicable cost principles, administrative, and audit requirements.
- b. A Recipient is responsible for subrecipient monitoring, including the following:
 - (i) *Award Identification* – At the time of the Award, identifying to the subrecipient the federal award information (e.g., *Catalog of Federal Domestic Assistance* ("CFDA") title and number, name of the federal agency, and the Award number) and applicable compliance requirements.
 - (ii) *During-the-Award Monitoring* – Monitoring the subrecipient's use of federal awards through reporting, site visits, regular contact, or other means to provide reasonable assurance that the subrecipient administers federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.
 - (iii) *Subrecipient Audits* – Ensuring that a subrecipient expending federal awards of \$500,000 or more during the subrecipient's fiscal year have met the audit requirements of OMB Circular A-133 and that the required audits are completed within nine months of the end of the subrecipient's audit period. In addition, the Recipient is required to issue a management decision on audit findings within six months after receipt of the subrecipient's audit report and ensure that the subrecipient takes timely and appropriate corrective action on all audit findings. In cases of continued inability or unwillingness of a subrecipient to have the required audits, the pass-through entity shall take appropriate action using sanctions.

3. Competition and Codes of Conduct for Subawards.

- a. All subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. The Recipient must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition. In order to ensure objective subrecipient performance and eliminate unfair competitive advantage, subrecipients that develop or draft work requirements, statements of work, or requests for proposals shall be excluded from competing for such subawards.
- b. The Recipient shall maintain written standards of conduct governing the performance of its employees engaged in the Award and administration of subawards. No employee, officer

or agent shall participate in the selection, award, or administration of a subaward supported by federal funds if a real or apparent conflict-of-interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization in which he/she serves as an officer or which employs or is about to employ any of the parties mentioned in this section, has a financial interest or other interest in the organization selected or to be selected for a subaward. The officers, employees, and agents of the Recipient shall neither solicit nor accept anything of monetary value from subrecipients. However, the Recipient may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Recipient.

- c. A financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with the organization selected or to be selected for a subaward. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice. It could also result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field.

4 **Applicability of Provisions to Subawards, Contracts, and Subcontracts.**

- a. The Recipient shall include the following notice in each request for applications or bids:

Applicants/bidders for a lower tier covered transaction (except procurement contracts for goods and services under \$25,000 not requiring the consent of a DOC official) are subject to 2 C.F.R. part 1326, subpart C, "*Governmentwide Debarment and Suspension (Nonprocurement)*." In addition, applicants/bidders for a lower tier covered transaction for a subaward, contract, or subcontract greater than \$100,000 of federal funds at any tier are subject to 15 C.F.R. part 28, "*New Restrictions on Lobbying*." Applicants/bidders should familiarize themselves with these provisions, including the certification requirement. Therefore, applications for a lower tier covered transaction must include a Form CF-512, "*Certification Regarding Lobbying-Lower Tier Covered Transactions*," completed without modification.

- b. The Recipient shall include a term or condition in all lower tier covered transactions (subawards, contracts, and subcontracts), that the Award is subject to subpart C of 2 C.F.R. part 1326, "*Governmentwide Debarment and Suspension (Nonprocurement)*."
- c. The Recipient shall include a statement in all lower tier covered transactions (subawards, contracts, and subcontracts) exceeding \$100,000 in federal funds, that the subaward, contract, or subcontract is subject to 31 U.S.C § 1352, as implemented at 15 C.F.R. part 28, regarding new restrictions on lobbying. The Recipient shall further require the subrecipient, contractor, or subcontractor to submit a completed Form SF-LLL, "*Disclosure of Lobbying Activities*," regarding the use of non-federal funds for lobbying. The Form SF-LLL shall be submitted within 15 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Form SF-LLL shall be submitted from tier to tier until received by the Recipient. The Recipient must submit all disclosure

forms received, including those that report lobbying activity on its own behalf, to the Grants Officer within 30 days following the end of the calendar quarter.

5. **Minority-Owned Business Enterprise.** DOC encourages Recipients to utilize minority- and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency will assist Recipients in matching qualified minority owned enterprises with contract opportunities. For further information contact:

U.S. Department of Commerce
Minority Business Development Agency
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Website: www.mhda.gov/

6. **Subaward and/or Contract to a Federal Agency.**

The Recipient, subrecipient, contractor and/or subcontractor shall not subgrant or subcontract any part of the approved Project to any agency or employee of DOC or other federal department, agency or instrumentality without the prior written approval of the Grants Officer.

Requests for approval of such action must be submitted to the Project Officer who shall review and make a recommendation to the Grants Officer. The Grants Officer shall make the final determination and will notify the Recipient in writing of the final determination.

7. **EDA Contracting Provisions for Construction Projects.** The Recipient shall use the "EDA Contracting Provisions for Construction Projects" as guidance in developing all construction contracts. The "EDA Contracting Provisions for Construction Projects" lists applicable EDA and other federal requirements for construction contracts.

M. Property.

1. **Standards.** With respect to any property acquired or improved in whole or in part with EDA investment assistance under this Award, the Recipient shall comply with the property management standards found in EDA's regulations at 13 C.F.R. part 314. Property acquired or improved in whole or in part by the Recipient under this Award may consist of real personal property, including intangible property such as money, notes, and security interests. Any inventory listings stipulated under the applicable uniform administrative requirements must be submitted to the Grants Officer on Form CD-281, "Report of Government Property in Possession of Contractor."
2. **Retention of Title.**
 - a. The Government shall determine who retains title to all nonexpendable personal property in accordance with 13 C.F.R. parts 14 or 24, as applicable. Use, management, and the disposition of such property will be in accordance with the requirements set out at 13 C.F.R. parts 14 or 24, as applicable, and EDA's regulations at 13 C.F.R. part 314.

- b. Title to real property (whether acquired partly or wholly with federal funds) will vest with the Recipient subject to the condition that the Recipient uses the real property for the authorized purpose of the Project.

3. EDA's Interest in Award Property.

- a. *Evidence of Title.* Prior to the advertisement of bids or at such other time as EDA requires, the Recipient must furnish evidence, satisfactory in form or substance to the Government, that title to real property required for the Project (other than property of the United States and as provided in 13 C.F.R. § 314.71) is vested in the Recipient and that such easements, rights-of-way, State or local government permits, long-term leases, or other items required for the Project have been or will be obtained by the Recipient within an acceptable time, as determined by the Government. All liens, mortgages, other encumbrances, reservations, reversionary interests, or other restrictions on title or the Recipient's interest in the property must be disclosed to EDA. With limited exceptions set forth in 13 C.F.R. § 314.6(b) or as otherwise authorized by EDA, Recipient-owned property acquired or improved in whole or in part with EDA investment assistance must not be used to secure a mortgage or deed of trust or in any way otherwise encumbered. See 13 C.F.R. § 314.6.

b. *Recording EDA's Interest in Property.*

- (i) For all Projects involving the acquisition, construction, or improvement of a building, as determined by EDA, the Recipient shall execute and furnish to the Government, prior to initial award disbursement, a lien, covenant, or other statement, satisfactory to EDA in form and substance, of EDA's interest in the property acquired or improved in whole or in part with the funds made available under this Award. EDA may require such statement after initial Award disbursement in the event that grant funds are being used to acquire such property. The statement must specify the estimated useful life of the Project and shall include but not be limited to the disposition, encumbrance, and the Federal Share compensation requirements. See 13 C.F.R. §§ 314.1 and 314.8(n).
 - (ii) This lien, covenant, or other statement of the Government's interest must be perfected and placed of record in the real property records of the jurisdiction in which the property is located, all in accordance with applicable law. EDA shall require an opinion of counsel for the Recipient to substantiate that the document has been properly recorded. See 13 C.F.R. § 314.8(b).
 - (iii) Facilities in which the EDA investment is only a small part of a larger project, as determined by EDA, may be exempted from the requirements listed in paragraphs M.3.b.(i) and (ii) above. See 13 C.F.R. § 314.81.
- c. The Recipient acknowledges that the Government retains an undivided equitable reversionary interest in the property acquired or improved in whole or in part with grant funds made available through this Award throughout the estimated useful life (as determined by EDA) of the Project, except in applicable instances set forth in 13 C.F.R. § 314.71. See also 13 C.F.R. § 314.2(a)



UNITED STATES DEPARTMENT OF COMMERCE
Economic Development Administration
Atlanta Regional Office
Suite 1820
401 West Peachtree St., N.W.
Atlanta, Georgia 30308-3510

October 14, 2009

In reply refer to:
EDA Investment No. 04-01-06063
University of South Carolina. SC

Mr. R. Steven Etheredge
Director, Pre-Award Services
University of South Carolina
901 Sumter Street, 5th Floor
Columbia, South Carolina 29208

Dear Mr. Etheredge:

The Economic Development Administration (EDA) approves the action requested by the University of South Carolina to modify the Scope of Work and extend the Project Development Time Schedule of the technology incubator. This action was necessary because the Recipient has experienced budget cuts from the State of South Carolina.

Enclosed are three signed copies of the AMENDMENT TO FINANCIAL ASSISTANCE AWARD. Your acceptance of the terms and conditions of the award should be indicated by the signature of your principal official on all three signed copies. Two of the executed copies should be returned to the Director, Atlanta Regional Office, Economic Development Administration, 401 West Peachtree Street, N.W., Suite 1820, Atlanta, Georgia 30308-3510 no later than October 30, 2009.

Should you have any questions, please contact Asa R. Williams at 404-730-3821, or email awilliams@eda.doc.gov.

Sincerely,

Lt. Philip Parndice, Jr.
Director, Atlanta Region

Enclosures: Amendment to Financial Assistance Award (3)
Amendment "A" - Exhibit No. 1(3)

cc: Mr. Tommy Coggins, Director
Office of Sponsored Awards
208 Osborne Administration Building
University of South Carolina
Columbia, South Carolina 29208



- d. The Recipient agrees that in the event that any interest in property acquired or improved in whole or in part with EDA investment assistance is disposed of, encumbered or alienated in any manner, or no longer used for the authorized purpose(s) of the Award during the Project's estimated useful life without EDA's written approval, the Government will be entitled to recover the Federal Share, as defined in 13 C.F.R. § 314.5. If, during the Project's estimated useful life, the property is no longer needed for the purpose(s) of the Award, as determined by EDA, EDA may permit its use for other acceptable purposes consistent with those authorized by PWEDA and 13 C.F.R. chapter III. See 13 C.F.R. § 314.3(b).
 - e. For purposes of any lien or security interest, the amount of the Federal Share shall be the that portion of the current fair market value of any property (after deducting any actual and reasonable selling and repair expenses incurred, to put the property into marketable condition) attributable to EDA's participation in the Project. See 13 C.F.R. § 314.5.
 - f. The alienation of Award property includes sale or other conveyance of the Recipient's interest, leasing or mortgaging the property, or granting an option for any of the foregoing.
4. Insurance and Bonding.
- a. *Recipients that are Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations.* The Recipient shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with federal funds as provided to property owned by the Recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award. See 15 C.F.R. § 14.31.
 - b. *Recipients that are State and Local Governments.* If the Award exceeds the simplified acquisition threshold, EDA may accept the Recipient's or subrecipient's bonding policy and requirements if EDA determines that the Federal Interest is adequately protected. If not, the following minimum requirements shall apply:
 - (i) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the proffered bid, execute such contractual documents as may be required within the time specified;
 - (ii) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract; and
 - (iii) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. See 15 C.F.R. § 24.36(h)
5. Leasing Restrictions. Leasing or renting of facilities or property is prohibited unless specifically authorized by EDA. The Recipient agrees that any leasing or renting of any facilities or property involved in this Project will be subject to the following:
- a. That said lease arrangement is consistent with the authorized general and special purpose of the Award;

- b. That said lease arrangement is for adequate consideration; and
 - c. That said lease arrangement is consistent with applicable EDA requirements concerning but not limited to nondiscrimination and environmental compliance.
6. **Use of Eminent Domain Prohibited.** The Recipient will use funds solely for the authorized use of the Project. Pursuant to Executive Order 13406, "*Protecting the Property Rights of the American People*," the Recipient agrees:
- a. Not to use any power of eminent domain available to the Recipient (including the commencement of eminent domain proceedings) for use in connection with the Project for the purpose of advancing the economic interests of private parties; and
 - b. Not to accept title to land, easements, or other interest in land acquired by the use of any power of eminent domain for use in connection with the Project for such purposes.

The Recipient agrees that any use of the power of eminent domain to acquire land, easements, or interests in land, whether by the Recipient or any other entity that has the power of eminent domain, in connection with the Project without prior written consent of EDA is an unauthorized use of the Project. If the Recipient puts the Project to an unauthorized use, the Recipient shall compensate EDA for its fair share in accord with 13 C.F.R. §§ 314.4 and 314.5, as same may be amended from time to time.

7. **Disposal of Rent Property.**

- a. If EDA and the Recipient determine that property acquired or improved in whole or in part with EDA investment assistance is no longer needed for the original purpose(s) of this Award, the Recipient must obtain approval from the Government to use the property in other federal grant programs or in programs that have purposes consistent with those authorized by PWEDA and 13 C.F.R. chapter III. See 13 C.F.R. § 314.3(b).
- b. When property is not disposed of as provided above in section M.7.a. above, the Government shall determine final disposition and must be compensated by the Recipient for the Federal Share of the value of the property, plus costs and interest, as provided in 13 C.F.R. § 314.4.

N. **Environmental Requirements.**

Environmental impacts must be considered by federal decision-makers in their decisions whether or not to (i) approve a proposal for federal assistance; (ii) approve the proposal with mitigation; or (iii) approve a different proposal/grant having less adverse environmental impacts. Federal environmental laws require that the funding agency initiate a planning process with early consideration of potential environmental impacts that Project(s) funded with federal assistance may have on the environment. The Recipient and any subrecipients shall comply with all environmental standards, to include those prescribed under the following statutes and Executive Orders, and shall identify to the awarding agency any impact the Award may have on the environment. In some cases, the Grants Officer can withhold Award funds under a special award condition requiring the Recipient to submit additional environmental compliance information sufficient to enable the Department to make an assessment on any impacts that a Project may have on the environment.

1. The National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*)

The National Environmental Policy Act ("NEPA") and the Council on Environmental Quality ("CEQ") implementing regulations (40 C.F.R. parts 1500-1508) require that an environmental analysis be completed for all major federal actions significantly affecting the environment. NEPA applies to the actions of federal agencies and may include a federal agency's decision to fund non-federal projects under grants and cooperative agreements. Recipients of federal assistance are required to identify to the awarding agency any impact an award will have on the quality of the human environment and assist the agency to comply with NEPA. Recipients may also be requested to assist EDA in drafting an environmental assessment if EDA determines an assessment is required. If additional information is required during the period of the Award, funds can be withheld by the Grants Officer under a special award condition requiring the Recipient to submit additional environmental compliance information sufficient to enable EDA to make an assessment on any impacts that the Project may have on the environment.

2. Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. § 4371 - 4375)

Federally-supported public works facilities and activities that affect the environment shall be implemented in compliance with policies established under existing law.

3. Executive Order 12088, "*Federal Compliance with Pollution Control Standards*," (43 Fed. Reg. 47707, October 13, 1978), as amended

All necessary actions shall be taken for the prevention, control, and abatement of environmental pollution with respect to federally-supported facilities and activities

4. Executive Order 11514, "*Protection and Enhancement of Environmental Quality*," (35 Fed. Reg. 4247, March 5, 1970), as amended

Federally-supported facilities and activities shall be maintained and directed to meet national environmental goals.

5. Executive Order 11593, "*Protection and Enhancement of the Cultural Environment*," (36 Fed. Reg. 8921, May 13, 1971), as amended

Federally-owned sites, structures, and objects of historical, architectural, or archaeological significance shall be preserved, restored, and maintained.

6. Clean Air Act, Clean Water Act, and Executive Order 11738

Recipients must comply with the provisions of the Clean Air Act (42 U.S.C. § 7401 *et seq.*), Clean Water Act (42 U.S.C. § 1251 *et seq.*), and Executive Order 11738, and shall not use a facility on the Environmental Protection Agency's ("EPA") *List of Violating Facilities* in performing any Award that is nonexempt under 2 C.F.R. § 1532, and shall notify the EDA Project Officer in writing if it intends to use a facility that is on EPA's *List of Violating Facilities* or knows that the facility has been recommended to be placed on the List.

7. The Safe Drinking Water Act of 1974, as amended (42 U.S.C. § 300f *et seq.*)

This Act precludes federal assistance for any project that the EPA determines may contaminate a sole source aquifer so as to threaten public health.

8. Executive Order 11988, "Floodplain Management," (42 Fed. Reg. 26951, May 24, 1977) and Executive Order 11990, "Protection of Wetlands," (42 Fed. Reg. 26961, May 24, 1977)

Recipients must identify proposed actions in federally-defined floodplains and wetlands to enable the agency to make a determination whether there is an alternative to minimize any potential harm.

9. The Flood Disaster Protection Act of 1973, as amended (42 U.S.C. § 4002 *et seq.*), and regulations and guidelines issued thereunder by the U.S. Federal Emergency Management Administration ("FEMA") or by EDA

Flood insurance, when available, is required for federally-assisted construction or acquisition in flood-prone areas.

10. The Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1451 *et seq.*)

Funded projects must be consistent with a coastal State's approved management plan for the coastal zone.

11. The Coastal Barrier Resources Act, as amended, (16 U.S.C. § 3501 *et seq.*)

Restrictions are placed on federal funding for actions within a Coastal Barrier System.

12. The Wild and Scenic Rivers Act, as amended, (16 U.S.C. § 1271 *et seq.*)

This Act applies to awards that may affect existing or proposed components of the National Wild and Scenic Rivers system.

13. The Fish and Wildlife Coordination Act, as amended, (16 U.S.C. § 661 *et seq.*)

Requiring the evaluation the impacts to fish and wildlife from federally-assisted proposed water resource development projects.

14. The Endangered Species Act of 1973, as amended, (16 U.S.C. § 1531 *et seq.*)

The Recipient must identify any impact or activities that may involve a threatened or endangered species. Federal agencies have the responsibility to ensure that federal awards do not adversely affect protected species or habitats and must conduct the required reviews under the Endangered Species Act

15. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (42 U.S.C. § 9601 *et seq.*), as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. § 9662 *et seq.*)

These requirements address responsibilities of hazardous substance releases, threatened releases, and environmental cleanup. There is also a requirement to impose reporting and community involvement requirements to ensure disclosure of the release or disposal of regulated substances and cleanup of hazards.

16. The Resource Conservation and Recovery Act of 1976, as amended, (42 U.S.C. § 6901 *et seq.*)

This Act regulates the generation, transportation, treatment, and disposal of hazardous wastes, and also provides that Recipients of federal funds give preference in their procurement programs to the purchase of recycled products pursuant to EPA guidelines.

17. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 Fed. Reg. 7629, February 11, 1994)

This Order identifies and addresses adverse human health or environmental effects of programs, policies, and activities on low-income and minority populations.

18. The Lead-Based Paint Poisoning Prevention Act, as amended, (42 U.S.C. § 4821 *et seq.*)

Use of lead-based paint in residential structures constructed or rehabilitated by the Federal Government or with federal assistance is prohibited.

19. The Farmland Protection Policy Act, as amended, (7 U.S.C. § 4201 - 4209)

Projects are subject to review under this Act if they may irreversibly directly or indirectly convert farmland, including forest land, pastureland, cropland, or other land, to nonagricultural use.

20. The Noise Control Act of 1972, as amended, (42 U.S.C. § 4901 *et seq.*)

Federally-supported facilities and activities shall comply with federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

21. The Native American Graves Protection and Repatriation Act, as amended, (25 U.S.C. § 3001 *et seq.*)

This Act provides a process for returning certain Native American cultural items to lineal descendants, culturally affiliated Indian Tribes, and Native Hawaiian organizations

- O Compliance with Environmental Requirements. The Recipient agrees to notify the Grants Officer of any environmental requirement or restriction, regulatory or otherwise, with which it must comply. Before Project Closeout and final disbursement of Award funds, the Recipient further agrees to provide evidence satisfactory to the Grants Officer that any required environmental remediation has been completed: (1) in compliance with all applicable federal, State and local

regulations; and (2) as set forth in the applicable Lease, Finding of Suitability to Lease ("FOSL"), Lease in Furtherance of Conveyance, Quitclaim Deed, or other conveyance instrument and any amendments, supplements, or succeeding documents. Compliance with said laws or restrictions shall be included in any contract documents for Project construction. The Recipient must certify compliance before final disbursement of grant funds.

P. Miscellaneous Requirements.

1. Criminal and Prohibited Activities.

- a. The Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812) provides for the imposition of civil penalties against persons who make false, fictitious, or fraudulent claims to the Federal Government for money (including grants, loans, or other benefits).
- b. The Criminal False Claims Act and the False Statements Act (18 U.S.C. §§ 287 and 1001) provide for criminal prosecution of a person who knowingly makes or presents any false, fictitious, or fraudulent statements or representations or claims against the United States. Such person shall be subject to imprisonment of not more than five years and shall be subject to a fine.
- c. The Civil False Claims Act (31 U.S.C. § 3729) provides that suits under this Act can be brought by the Federal Government, or a person on behalf of the Federal Government, for false claims under federal assistance programs.
- d. The Copeland "Anti-Kickback" Act (18 U.S.C. § 874 and 40 U.S.C. § 276c), prohibits a person or organization engaged in a federally-supported Project from enticing an employee working on the Project from giving up a part of his compensation under an employment contract.

2. Foreign Travel.

- a. The Recipient shall comply with the provisions of the Fly America Act (49 U.S.C. § 40118). The implementing regulations of the Fly America Act are found at 41 C.F.R. §§ 301-10.131 - 301-10.143.
- b. The Fly America Act requires that federal travelers and others performing federal government-financed foreign air travel must use United States flag air carriers, to the extent that service by such carriers is available. Foreign air carriers may be used only in specific instances, such as when a United States flag air carrier is unavailable, or use of United States flag air carrier service will not accomplish the agency's mission.
- c. Use of foreign air carriers may also be used only if bilateral agreements permit such travel pursuant to 49 U.S.C. § 40118(b). The Department is not aware of any bilateral agreements that meet these requirements. Therefore, it is the responsibility of the Recipient to provide the Grants Officer with a copy of the applicable bilateral agreement if use of a foreign carrier under a bilateral agreement is anticipated.
- d. If a foreign air carrier is anticipated to be used, the Recipient must receive prior approval from the Grants Officer. When requesting such approval in accordance with the guidance provided by 41 C.F.R. § 301-10.142, the Recipient must provide a "certification" the

Grants Officer with the following: (i) his or her name; (ii) dates of travel; (iii) the origin and destination of travel; (iv) a detailed itinerary of travel; (v) the name of the air carrier and flight number for each leg of the trip; (vi) and a statement explaining why the Recipient meets one of the exceptions to the applicable regulations. If the use of a foreign air carrier is pursuant to a bilateral agreement, the Recipient must provide the Grants Officer with a copy of the agreement. The Grants Officer shall make the final determination and notify the Recipient in writing. Failure to adhere to the provisions of the Fly America Act will result in the Recipient not being reimbursed for any transportation costs for which the Recipient improperly used a foreign air carrier.

3. **American-Made Equipment and Products.** Recipients are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with funding provided under this Award.
4. **Intellectual Property Rights.**
 - a. **Inventions.** The intellectual property rights to any invention made by a Recipient under a DOC Award are determined by the Bayh-Dole Act, as amended (Pub. L. No. 96-517), and codified in 35 U.S.C. § 200 *et seq.*, except as otherwise required by law. The specific rights and responsibilities are described in more detail in 37 C.F.R. part 401, and in the particular, in the standard patent rights clause in 37 C.F.R. § 401.14, which is hereby incorporated by reference into this Award.
 - (i) **Ownership.**
 - (a) **Recipient.** The Recipient has the right to own any invention it makes (conceived or first reduced to practice) or that is made by its employees. The Recipient may not assign its rights to a third party without the permission of the Department unless it is to a patent management organization (i.e., a university's research foundation.) The Recipient's ownership rights are subject to the Federal Government's nonexclusive paid-up license and other rights.
 - (b) **Department.** If the Recipient elects not to own or does not elect rights or file a patent application within the time limits set forth in the standard patent rights clause, the Department may request an assignment of all rights, which is normally subject to a limited royalty free non-exclusive license for the Recipient. The Department owns any invention made solely by its employees, but may license the Recipient in accordance with the procedures in 37 C.F.R. part 404.
 - (c) **Inventor/Employee.** If neither the Recipient nor the Department is interested in owning an invention by a Recipient employee, the Recipient, with the written concurrence of the Department's Patent Counsel, may allow the inventor/employee to own the invention subject to certain restrictions as described in 37 C.F.R. § 401.9.
 - (d) **Joint Inventions.** Inventions made jointly by a Recipient and a Department employee will be owned jointly by the Recipient and DOC. However, the Department may transfer its rights to the Recipient as authorized by 35 U.S.C. § 202(e) and 37 C.F.R. § 401.10 if the Recipient is willing to patent and license

the invention in exchange for a share of "net" royalties based on the number of inventors (e.g., 50-50 if there is one Recipient and Department employee). The agreement will be prepared by the Department's Patent Counsel and may include other provisions, such as a royalty free license to the Federal Government and certain other entities. The Recipient also is authorized to transfer its rights to the Federal Government, which can agree to share royalties similarly as described above (35 U.S.C. § 202(e)).

- (ii) *Responsibilities - iEdison.* The Recipient has responsibilities and duties set forth in the standard patent rights clause, which are not described below. The Recipient is expected to comply with all the requirements of the standard patent rights clause and 37 C.F.R. part 401. Recipients of DOC Awards are required to submit their disclosures and elections electronically using the Interagency Edison extramural invention reporting system (iEdison) at www.i Edison.gov. The Recipient may obtain a waiver of this electronic submission requirement by providing DOC compelling reasons for allowing the submission of paper copies of reports related to inventions.

- b. *Patent Notification Procedures.* Pursuant to Executive Order 12889, the Department is required to notify the owner of any valid patent covering technology whenever the Department or its Recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this Award without a license or permission from the owner, the Recipient must notify the Grants Officer.

However, this notice does not necessarily mean that the Government authorizes and consents to any copyright or patent infringement occurring under the financial assistance.

- c. *Data, Databases, and Software.* The rights to any work produced or purchased under a DOC Award are determined by 15 C.F.R. §§ 14.36 or 24.34, as applicable. Such works may include data, databases, or software. The Recipient owns any work produced or purchased under a DOC Award subject to the Department's right to obtain, reproduce, publish, or otherwise use the work or authorize others to receive, reproduce, publish, or otherwise use the data for Federal Government purposes.
- d. *Copyright.* The Recipient may copyright any work produced under a DOC Award subject to the Department's royalty-free, non-exclusive, and irrevocable right to reproduce, publish or otherwise use the work or authorize others to do so for Federal Government purposes. Works jointly authored by the Department and Recipient employees may be copyrighted, but only the part authored by the Recipient is protected under 17 U.S.C. § 105, which provides that works produced by Federal Government employees are not copyrightable in the United States. If the contributions of the authors cannot be separated, the copyright status of the joint work is questionable. On occasion, the Department may ask the Recipient to transfer to the Department its copyright in a particular work when the Department is undertaking the primary dissemination of the work. Ownership of copyright by the Federal Government through assignment is permitted under 17 U.S.C. § 105.

5. **Increasing Seat Belt Use in the United States.** Pursuant to Executive Order 13043, Recipients should encourage employees and contractors to enforce on-the-job seat belt policies and programs when operating company-owned, rented, or personally-owned vehicles.
6. **Research Involving Human Subjects**
 - a. All proposed research involving human subjects must be conducted in accordance with 15 C.F.R. part 27, "Protection of Human Subjects." No research involving human subjects is permitted under this Award unless expressly authorized by special award condition, or otherwise authorized in writing by the Grants Officer.
 - b. Federal policy defines a human subject as a living individual about whom an investigator conducting research obtains (i) data through intervention or interaction with the individual, or (ii) identifiable private information. Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.
 - c. The Department's regulations at 15 C.F.R. part 27 require that Recipients maintain appropriate policies and procedures for the protection of human subjects. In the event it becomes evident that human subjects may be involved in carrying out the purpose(s) of this Award, the Recipient shall submit appropriate documentation to the Project Officer for approval. This documentation may include:
 - (i) Documentation establishing approval of the Project by an institutional review board ("IRB") approved for government-wide use under Department of Health and Human Services guidelines (*see* 15 C.F.R. § 27.103);
 - (ii) Documentation to support an exemption for the Project under 15 C.F.R. § 27.101(b),
 - (iii) Documentation to support deferral for an exemption or IRB review under 15 C.F.R. § 27.118; or
 - (iv) Documentation of IRB approval of any modification to a prior approved protocol or to an informed consent form.
 - d. No work involving human subjects may be undertaken, conducted, or costs incurred or charged for human subjects research until the appropriate documentation is approved in writing by the Grants Officer. Notwithstanding this prohibition, work may be initiated or costs incurred or charged to the Project for protocol or instrument development related to human subjects research.
7. **Federal Employee Expenses.** Federal agencies are generally barred from accepting funds from a Recipient to pay transportation, travel, or other expenses for any federal employee unless specifically approved in the terms of the Award. Use of Award funds (federal or non-federal) or the Recipient's provision of in-kind goods or services for the purposes of transportation, travel, or any other expenses for any federal employee may raise appropriation augmentation issues. In addition, DOC policy prohibits the acceptance of gifts, including travel payments for federal employees, from Recipients or applicants regardless of the source.

8. **Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally-Funded Construction Projects.** Pursuant to Executive Order 13202, "*Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally-Funded Construction Projects*," unless the Project is exempted under section 51 of the Order, bid specifications, Project-related agreements, or other controlling documents for construction contracts awarded by Recipients or any construction manager acting on their behalf, shall not:
 - a. Include any requirement or prohibition on bidders, offerors, contractors, or subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction Project(s); or
 - b. Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction Project(s).
9. **Minority Serving Institutions ("MSIs") Initiative.** Pursuant to Executive Orders 13256 (President's Board of Advisors on Historically Black Colleges and Universities), 13230 (President's Advisory Commission on Educational Excellence for Hispanic Americans), and 13270 (Tribal Colleges and Universities), the Department is strongly committed to broadening the participation of MSIs in its financial assistance programs. The Department's goals include achieving full participation of MSIs in order to advance the development of human potential, strengthen the nation's capacity to provide high-quality education, and increase opportunities for MSIs to participate in and benefit from federal financial assistance programs. The Department encourages all applicants and Recipients to include meaningful participation of MSIs. Institutions eligible to be considered MSIs are listed on the U.S. Department of Education's website.
10. **Research Misconduct.** Scientific or research misconduct refers to the fabrication, falsification or plagiarism in proposing, performing, or reviewing research, or in reporting research results. It does not include honest errors or differences of opinion. The Recipient organization has the primary responsibility to investigate allegations and provide reports to the Federal Government. Funds expended on an activity that is determined to be invalid or unreliable because of scientific misconduct may result in a disallowance of costs for which the institution may be liable for repayment to the awarding agency. The Office of Science and Technology Policy at the White House published in the "*Federal Register*" on December 6, 2000 a final policy that addressed research misconduct (65 Fed. Reg. 76260). The policy was developed by the National Science and Technology Council. The Department requires that any allegation be submitted to the Grants Officer, who also will notify the OIG of such allegation. Generally, the Recipient organization shall investigate the allegation and submit its findings to the Grants Officer. The Department may accept the Recipient's findings or proceed with its own investigation. The Grants Officer shall inform the Recipient of the Department's final determination.
11. **Publications, Videos and Acknowledgment of Sponsorship.** Publication of the results or findings of a research Project in appropriate professional journals and production of video or other media is encouraged as an important method of recording and reporting scientific information. It is also a constructive means to expand access to federally-funded research. The Recipient is required to submit a copy to the funding agency and when releasing

information related to a funded Project include a statement that the Project or effort undertaken was or is sponsored by DOC. The Recipient also is responsible for ensuring that every publication of material (including Internet sites and videos) based on or developed under an Award, except scientific articles or papers appearing in scientific, technical or professional journals, contains the following disclaimer. "This [report video] was prepared by [Recipient name] under [Award number] from [name of operating unit], U.S. Department of Commerce. The statements, findings, conclusions and recommendations are those of the author(s) and do not necessarily reflect the views of the [name of operating unit] or the U.S. Department of Commerce." This disclaimer also applies to videos produced under DOC Awards.

12. **Care and Use of Live Vertebrate Animals.** Recipients must comply with the Laboratory Animal Welfare Act of 1966 (Pub. L. No. 89-544), as amended (7 U.S.C. § 2131 *et seq.*) (animal acquisition, transport, care, handling, and use in projects), and the implementing regulations at 9 C.F.R. parts 1, 2, and 3; the Endangered Species Act (16 U.S.C. § 1531 *et seq.*); the Marine Mammal Protection Act (16 U.S.C. § 1361 *et seq.*) (taking possession, transport, purchase, sale, export or import of wildlife and plants); the Non-indigenous Aquatic Nuisance Prevention and Control Act (16 U.S.C. § 4701 *et seq.*) (ensure preventive measures are taken or that probable harm of using species is minimal if there is an escape or release); and all other applicable statutes pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by federal financial assistance. No research involving vertebrate animals is permitted under any DOC Award unless authorized by the Grants Officer.
13. **Homeland Security Directive.** If the performance of this Award requires the Recipient to have physical access to federal premises for more than 180 days or access to a federal information system, personal identity verification procedures must be implemented. Any items or services delivered under this Award shall comply with the Department's personal identity verification procedures that implement Homeland Security Presidential Directive - 12, FIPS PUB 201, and OMB Memorandum M-05-24. The Recipient shall insert this clause in all subawards or contracts when the subaward recipient or contractor is required to have physical access to a federally-controlled facility or access to a federal information system.
14. **Compliance with Department of Commerce Bureau of Industry and Security Export Administration Regulations.**
 - a. This clause applies to the extent that this Award involves access to export-controlled information or technology.
 - b. In performing this Award, the Recipient may gain access to export-controlled information or technology. The Recipient is responsible for compliance with all applicable laws and regulations regarding export-controlled information and technology, including deemed exports. The Recipient shall establish and maintain throughout performance of this Award effective export compliance procedures at non-DOC facilities. At a minimum, these export compliance procedures must include adequate controls of physical, verbal, visual, and electronic access to export-controlled information and technology.

c. *Definitions.*

- (i) *Deemed Export.* The Export Administration Regulations ("EAR") define a deemed export as any release of technology or source code subject to the EAR to a foreign national, both in the United States and abroad. Such release is "deemed" to be an export to the home country of the foreign national. See 15 C.F.R. § 734.2(b)(2)(ii).
 - (ii) *Export-controlled information and technology.* Export-controlled information and technology subject to the EAR (15 C.F.R. §§ 730-774), implemented by the Department's Bureau of Industry and Security, or the "International Traffic in Arms Regulations" ("ITAR") (22 C.F.R. §§ 120-130), implemented by the Department of State, respectively. This includes but is not limited to dual-use items, defense articles and any related assistance, services, software, or technical data as defined in the EAR and ITAR.
- d. The Recipient shall control access to all export-controlled information and technology that it possesses or that comes into its possession in performance of this Award, to ensure that access is restricted, or licensed, as required by applicable federal laws, Executive Orders, or regulations.
- e. Nothing in the Terms and Conditions of this Award is intended to change, supersede or waive the requirements of applicable federal laws, Executive Orders, or regulations.
- f. The Recipient shall include this subsection entitled "*Compliance with Department of Commerce Bureau of Industry and Security Export Administration Regulations,*" including this subparagraph (f), in all lower-tier transactions (sub-awards, contracts, and subcontracts) under this Award that may involve access to export-controlled information technology.

APPENDIX

THE FOLLOWING REFERENCE MATERIALS AND FORMS ARE AVAILABLE ONLINE:

1. 2 C.F.R. part 220 (codifying OMB Circular A-21, "Cost Principles for Educational Institutions")
2. 2 C.F.R. part 225 (codifying OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments")
3. 2 C.F.R. part 230 (codifying OMB Circular A-122, "Cost Principles for Nonprofit Organizations")
4. 2 C.F.R. part 1326, "Non-Procurement Debarment and Suspension"
5. 13 C.F.R. chapter III (EDA's regulations)
6. 15 C.F.R. part 14, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations" (codifying OMB Circular A-110).
7. 15 C.F.R. part 24, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"
8. 15 C.F.R. part 4, "Disclosure of Government Information"
9. 15 C.F.R. part 27, "Protection of Human Subjects"
10. 15 C.F.R. part 28, "New Restrictions on Lobbying"
11. 15 C.F.R. part 29, "Government-wide Requirements for Drug-Free Workplace (Financial Assistance)"
12. 48 C.F.R. part 31, "Contract Cost Principles and Procedures"
13. OMB Circular A-133, "Audits of States, Local Governments and Nonprofit Organizations," and the related Compliance Supplement
14. OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments"

To access EDA's regulations, visit EDA's Internet website at www.eda.gov/InvestmentsGrants/Lawsreg.xml.

To access the Code of Federal Regulations (C.F.R.), visit the Government Printing Office's Internet website at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/%2Findex.tpl>.

To access the OMB Circulars, visit OMB's Internet website at www.whitehouse.gov/omb/circulars/index.html.

To access the Davis Bacon wage rate determinations, visit the Department of Labor's Internet website at www.dol.gov.

EDA FORMS:

1. Form CD-241, "Report of Government Property in Possession of Contractor"
2. Form CD-451, "Amendment to Financial Assistance Award"
3. Form CD-346, "Identification - Applicant for Funding Assistance"
4. Form SF-269, "Financial Status Report"
5. Form SF-270, "Request for Advance or Reimbursement" (with Instructions)
6. Form SF-271, "Outlay Report and Request for Reimbursement for Construction Programs"
7. Form SF-272, "Federal Cash Transaction Report"
8. Form SF-LLL, "Disclosure of Lobbying Activities"

To access Department of Commerce forms ("CD"), visit the Department's Internet website at http://ocio.os.doc.gov/ITPolicyandPrograms/Electronic_Forms/index.htm.

To access the Standard Forms ("SF"), visit the General Services Administration's Internet website at www.gsa.gov/portal/esa/ep/formslibrary.do?formType=SF.

FORM 101
(2A) (04/03)
OAG 00574

U.S. DEPARTMENT OF COMMERCE

☒ GRANT ☐ COOPERATIVE AGREEMENT

AMENDMENT TO
FINANCIAL ASSISTANCE AWARD

CFDA NO. AND PROJECT TITLE
11.100 Public Works Program / Technology incubator

AWARD NUMBER
04-01-00063

RECIPIENT NAME
University of South Carolina

AMENDMENT NUMBER
1

STREET ADDRESS
901 Sumter Street, 5th Floor

EFFECTIVE DATE
October 7, 2009

CITY, STATE, ZIP CODE
Columbia, South Carolina 29208

EXTEND WORK COMPLETION TO
51 Months

BUREAU	FUND	FCFY	PROJECT-TASK	ORGANIZATION	OBJECT CLASS
20	40	10	0406063-001	04	4110
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00

REASON(S) FOR AMENDMENT

A no cost change in the Scope of Work and extend the Project Development Time Schedule.

This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.

☒ Special Award Conditions

☐ Line Item Budget

☒ Other(s) Scope of Work

SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER

H. Philip Paradise, Jr., Director, Atlanta Region

DATE

10/14/09

TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL

R. Steven Etheredge, Director, Pre-Award Services

DATE

10/20/09

ADMINISTRATIVE/PSG ELECTRONIC FORM

EXHIBIT "A"

**U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)**

**Public Works and Development Facilities
Amendment No. 1**

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

- I. PROJECT DEVELOPMENT TIME SCHEDULE: The Recipient agrees to the following Project development time schedule:**

Time allowed after Receipt of Financial Assistance Award for:

**Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....24 Months from Date of Grant Award
Construction Period..... 24 Months**

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

AMENDED SCOPE OF WORK

The new Horizon I Research Facility is a new 125,320 sq. ft. facility, and the current EDA proposal would assist in completing 14,000 to 16,000 sq. ft. of shell space. Twenty wet labs will be constructed on the first floor of this multi-story building. The facility is located on the Innovista campus of USC in Columbia, S.C.



March 19, 2010

HARRIS PASTIDES
PRESIDENT

Asa R. Williams, Civil Engineer/Project Manager
U.S. Department of Commerce
Economic Development Administration
Atlanta Regional Office
401 W. Peachtree St. N.W., Suite 1820
Atlanta, GA 30308-3510

Subject: EDA AWARD 04-01-06063
University of South Carolina Wet-Lab Facility (IdeaLabs)

Dear Mr. Williams,

Thank you for visiting with us on Tuesday, March 16, to discuss the status of the above referenced EDA Award to build a wet-lab facility in the new Horizon I building at the University of South Carolina (USC). Attached you will find the schedule for project completion, as well as a schematic of the floor plan. I believe that these two items have also been provided to you in pdf format via e-mail by our architects.

I understand that one project extension has already been requested by the university, indicating a construction start date of June 2010. As you can see from the attached schedule, due to the rigorous approval process and the limited number of times per year these boards meet, the current schedule indicates that construction cannot begin until November of this year. Please understand that Phase I (Planning/Design) of the project has been approved by all required parties - from the USC Buildings and Grounds Committee, the USC Board of Trustees, through the South Carolina Commission of Higher Education, the Joint Bond Review Committee, and the SC Budget and Control Board. Phase II (Construction) of the project has been approved by all university boards. The final approval meeting with the SC Budget and Control Board is scheduled for June 15, 2010.

UNIVERSITY OF SOUTH CAROLINA • COLUMBIA, SOUTH CAROLINA 29208 • 803.777-3001 • FAX 803/777-3264

An Equal Opportunity Institution

RECORD ON APPEAL 311

March 19, 2010

Page two

Mr. Williams, you have, and understandably so, expressed concern at the current status of the project, as it indicates another four or five month delay in construction commencement. As I stated during our meeting, we have the funds fully committed and sequestered for this project, and fully expect the SC Budget and Control Board to give its approval during its June meeting. If we didn't have this expectation, we would not have requested to be on their agenda.

If this schedule is unacceptable to you, we are open to any other suggestion you might have that would allow us to begin construction in June, thus preventing our loss of the EDA award. Several ideas were discussed during your visit, and we are more than willing to work with you in pursuing these approaches as you deem necessary.

Please let us know how we might best work with you to insure the success of this project. Thank you again for your personal visit, and consideration of our needs.

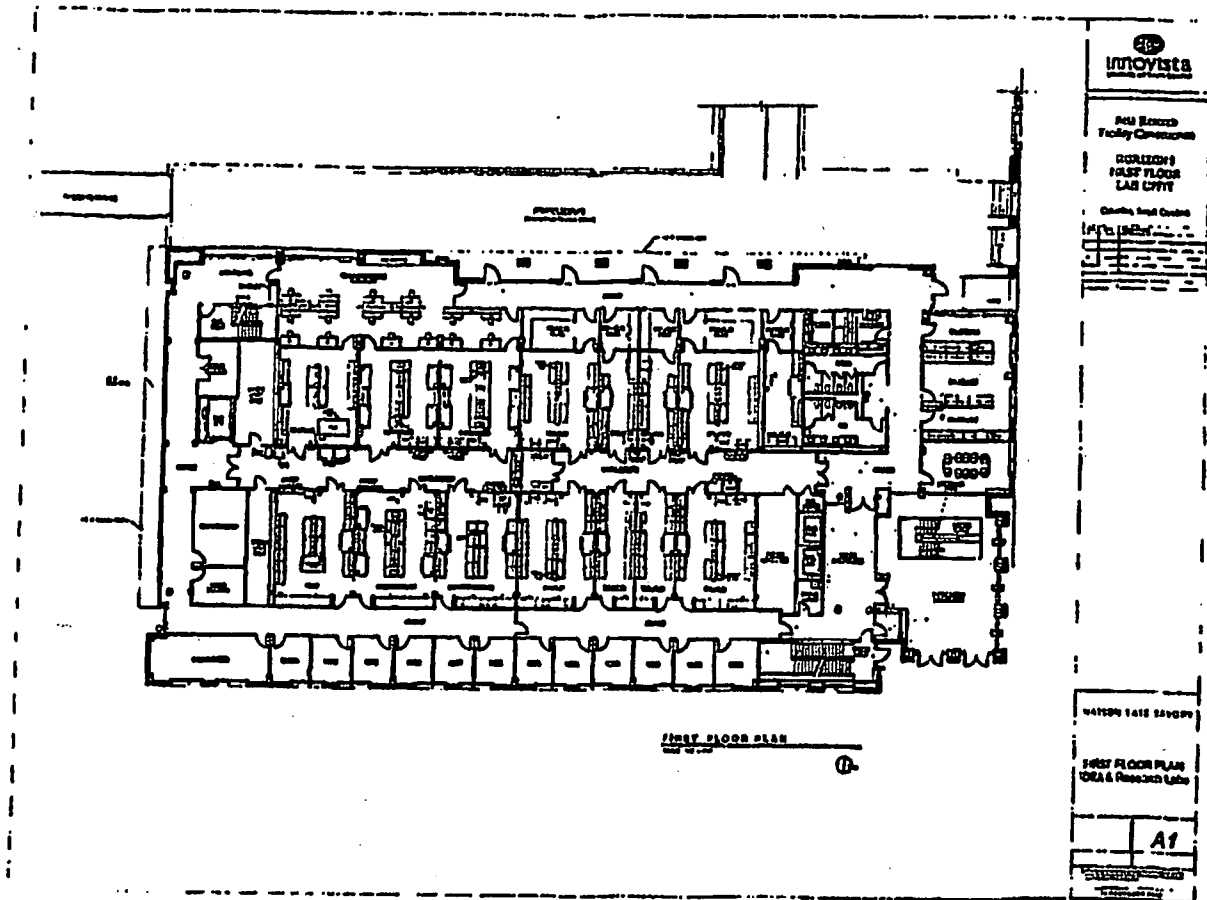
Sincerely,

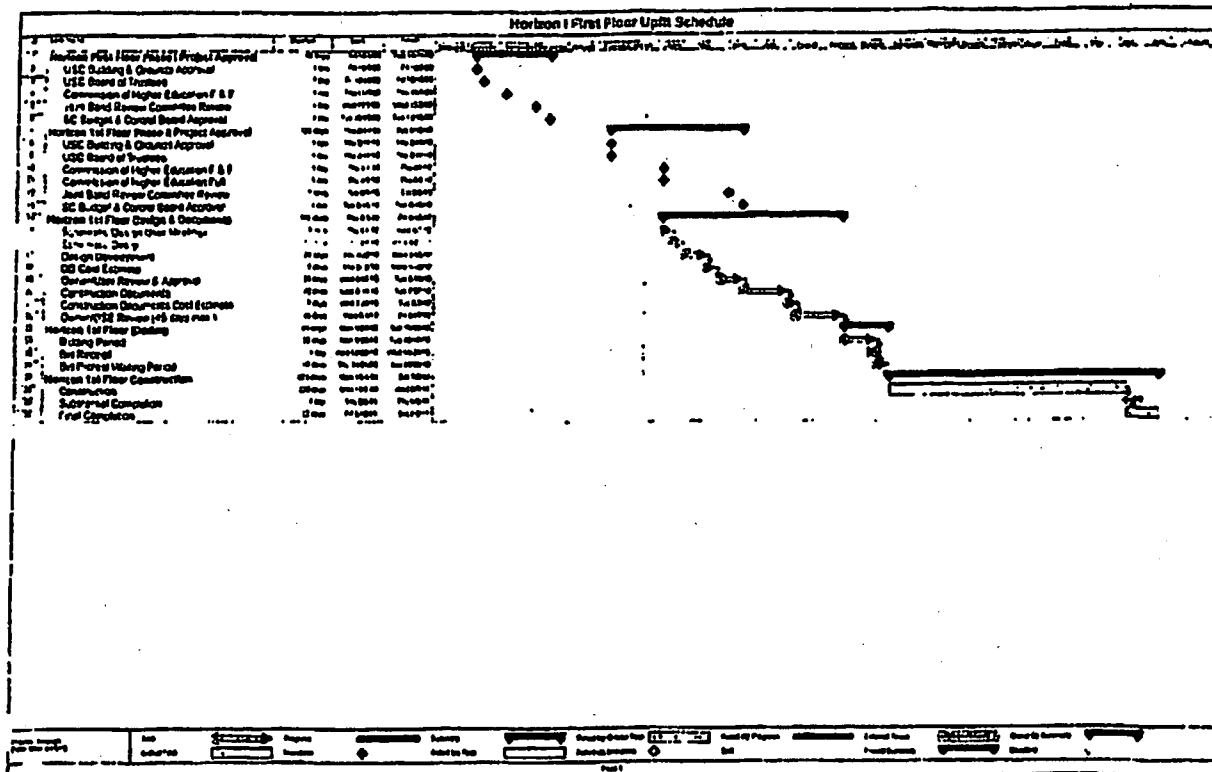


Harris Pastides

Enclosures

HP/pb







UNITED STATES DEPARTMENT OF COMMERCE
Economic Development Administration
Atlanta Regional Office
Suite 1820
401 West Peachtree St., N.W.
Atlanta, Georgia 30308-3510

April 8, 2010

In reply refer to:
EDA Investment No. 04-01-06063
University of South Carolina, SC

Mr. Harris Pastides
President
University of South Carolina
Osborne Administration Building, suite 202
Columbia, South Carolina 29208

Dear Mr. Pastides:

The Economic Development Administration (EDA) approves the action requested by the University of South Carolina to extend the Project Development Time Schedule of the technology incubator. This action was necessary because the Recipient has experienced various delays in the review process from the State of South Carolina.

Enclosed to Dr. Benicewicz are three signed copies of the AMENDMENT TO FINANCIAL ASSISTANCE AWARD. Your acceptance of the terms and conditions of the award should be indicated by your signature on all three signed copies. Two of the executed copies should be returned to the Director, C/O Asa Williams, Atlanta Regional Office, Economic Development Administration, 401 West Peachtree Street, N.W., Suite 1820, Atlanta, Georgia 30308-3510 no later than May 9, 2010.

Should you have any questions, please contact Asa R. Williams at 404-730-3821, or email awilliams3@eda.doc.gov.

Sincerely,

/s/ H. Philip Paradice, Jr.

H. Philip Paradice, Jr.
Director, Atlanta Region

Enclosures: Amendment to Financial Assistance Award (3)
Amendment "A" - Exhibit No. 1(3)

cc: Pamela K. Benicewicz, Ph.D.
Associate Vice President for Research
Osborne Administration Building, Suite 202
University of South Carolina
Columbia, South Carolina 29208



FORM 100-450
(11/81 15-03)
DATE 10-1-86

U.S. DEPARTMENT OF COMMERCE

☒ GRANT ☐ COOPERATIVE AGREEMENT

AMENDMENT TO
FINANCIAL ASSISTANCE AWARD

CFDA NO. AND PROJECT TITLE
11.300 Public Works Program / Technology incubator

AWARD NUMBER
04-01-06063

RECIPIENT NAME
University of South Carolina

AMENDMENT NUMBER
2

STREET ADDRESS
901 Sumter Street, 5th Floor

EFFECTIVE DATE
Date of Award Amendment Approval

CITY, STATE, ZIP CODE
Columbia, South Carolina 29208

EXTEND WORK COMPLETION TO
51 Months

BUREAU	FUND	FCFY	PROJECT-TASK	ORGANIZATION	OBJECT CLASS
20	40	10	0406063-001	04	4110
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00

REMARKS FOR AMENDMENT

A no cost change in the Project Development Time Schedule.

This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.

☒ Special Award Conditions (See attached Exhibit A)

☐ Line Item Budget

☐ Other(s) _____

SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER

H. Philip Paradise, Jr., Director, Atlanta Region

DATE

4/9/10

TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL

Harris Pastides, President, University of South Carolina

DATE

4/13/10

ADMINISTRATION/PSG ELECTRONIC FORM

EXHIBIT "A"

**U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)**

**Public Works and Development Facilities
Amendment No. 2**

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

- 1. PROJECT DEVELOPMENT TIME SCHEDULE: The Recipient agrees to the following Project development time schedule:**

Time allowed after Receipt of Financial Assistance Award for:

**Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....31 Months from Date of Grant Award
Construction Period..... 24 Months**

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).



Date: February 15, 2011

H. Philip Paradise, Jr., Director
U.S. Department of Commerce
Economic Development Administration
Atlanta Regional Office
401 West Peachtree Street, N.W., Suite 1820
Atlanta, Georgia 30308-3510

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION
100 N. W. 10th Avenue, Suite 1820
Atlanta, Georgia 30308-3510

Re: EDA Award Number: 04-01-06063
Columbia, SC

Subject: Request for Start of Construction Extension

Dear Mr. Paradise:

Mr. Asa Williams of your office met with project representatives at the University of South Carolina (USC) on Thursday, January 27th to discuss the status of the above referenced EDA award, the purpose of which is to build a wet-lab facility in the new Horizon I building at USC. As he indicated during this meeting, our grant from the EDA is now at risk because project construction did not begin on or before 1/11/11 per the terms of the contract. However, as we indicated during the meeting, we had met all of the EDA requirements needed to begin construction by this date. We announced a bid award in early December. Unfortunately, as we notified Mr. Williams on Dec. 16th, USC received a bid award protest. A meeting was immediately scheduled with the State Engineer and a hearing held on January 27th. The State Engineer promised a written decision by February 14th. On February 14th, the State Engineer dismissed the protest. We are therefore requesting an extension of the construction start date so that we may continue with the project. We fully realize that construction must begin before June 11, 2011 or the grant will be forfeited.

Mr. Paradise, we are fully committed to completion of this project, as it represents a significant piece of our university's economic development strategy. As you know, an economy that is based on the innovations and inventions that come from our higher educational institutions is often referred to as a "knowledge-based economy". The argument goes, as the federal government spends millions of dollars on basic scientific research in universities, new jobs will be created by the inventions that result from this research, thereby promoting state and regional economic development from the nearby universities. The difficulty is that, traditionally, the translation of scientific discoveries into marketable products has been non-existent (the research remains in the labs) or excessively slow. At USC we are trying to create a faster path from the lab to the market. One approach we are taking is to build wet-lab space in a building (Horizon I) that is devoted to the research efforts of CoEE endowed chairs. CoEEs, or Centers of Economic Excellence, were established by the SC legislature in 2002 (please see <http://www.sceee.org/>). Thirty million dollars a year has been allocated to the three major research institutions of the state, portions of which when matched by a non-state source (typically an industry or

H. Philip Paradice, Jr., Director
Page 2
February 15, 2011

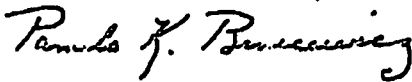
private investor), are used to establish an endowment which supports a CoEE. These endowments are typically between \$4 and \$10 million dollars. A world-renowned scientist or engineer from outside the state is then recruited to run the center. In Horizon I alone there are currently three endowed chairs (one for the Solid Oxide Fuel Cell CoEE, one for the Polymer Nanocomposite CoEE, and one for the Generation of Clean Electricity CoEE). Plans for housing at least three or four more CoEE endowed chairs in this building are moving forward (recruitments are underway). The wet-lab space being funded by the EDA grant will be housed in this building. This will provide nearby, economical space for the researchers to locate startup businesses requiring wet-lab space that they may be associated with, or a place for close collaborations with industrial partners where wet-lab space is required. No such space currently exists in Columbia.

It is clear that to spur innovation and ultimately create jobs universities must make it easy for scientists and engineers to build businesses that can take their breakthroughs in the lab to the market. A bridge must be built between the researchers and entrepreneurs and/or business-savvy people. At the University of South Carolina, we are exploring and implementing new ways to accomplish this. It is evident that if the means by which technology is commercialized can be improved, new science-related jobs will be created, and not just for holders of doctoral degrees. Many of the jobs will in fact go to the employees of science-based startup companies. USC has been awarded two additional grants, one from the EDA for the "Innovista Innovation Center" and one from the SBA for the "Innovista Center for Entrepreneurial Development". These are being utilized to help bridge the gap between the researchers and entrepreneurs, to create a one-stop shop to provide education and services for our researchers to learn about technology commercialization, and a place for entrepreneurs to find technology that they might wish to advance.

Clearly the University of South Carolina fully supports the commercialization of its technology by nurturing science and engineering startups and collaborations with industrial partners and entrepreneurs. Our Research park, Innovista, provides the physical place and the vision of what we are trying to achieve. It is grants such as those provided by the EDA that are crucial to helping us achieve our goals. We hope that you will view our request favorably.

Should you require additional information please contact me at (803) 777-5455.

Sincerely,



Pamela K. Benicewicz, Ph.D.
Associate Vice President, Research & Graduate Education

PB/sp

FORM CD-451
(REV. 10-03)
D-40 103-16

U.S. DEPARTMENT OF COMMERCE

☒ GRANT ☐ COOPERATIVE AGREEMENT

AMENDMENT TO
FINANCIAL ASSISTANCE AWARD

CFDA NO. AND PROJECT TITLE

11.300 Public Works Program / Technology Incubator

AWARD NUMBER

04-01-06063

RECIPIENT NAME

University of South Carolina

AMENDMENT NUMBER

3

STREET ADDRESS

901 Sumter Street, 5th Floor

EFFECTIVE DATE

Date of Award Amendment Approval

CITY, STATE, ZIP CODE

Columbia, South Carolina 29208

EXTEND WORK COMPLETION TO

58 Months

BUREAU

20

FUND

40

FCFY

10

PROJECT-TASK

0406063-001

ORGANIZATION

04

OBJECT CLASS

4110

COSTS ARE REVISED
AS FOLLOWS:

PREVIOUS
ESTIMATED COST

ADD

DEDUCT

TOTAL
ESTIMATED COST

FEDERAL SHARE OF COST

\$0.00

\$0.00

\$0.00

\$0.00

RECIPIENT SHARE OF COST

\$0.00

\$0.00

\$0.00

\$0.00

TOTAL ESTIMATED COST

\$0.00

\$0.00

\$0.00

\$0.00

REASON(S) FOR AMENDMENT

A no cost change in the Project Development Time Schedule.

This Amendment approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. Upon acceptance by the Recipient, two signed Amendment documents shall be returned to the Grants Officer and the third document shall be retained by the Recipient. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally terminate this Amendment.

☒ Special Award Conditions (See attached Exhibit A)

☐ Line Item Budget

☐ Other(s) _____

SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER

DATE

H. Philip Paradise, Jr., Director, Atlanta Region

2-18-11

TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL

DATE

Harris Pastides, President, University of South Carolina

2/21/11

ADMINISTRATIVE/PSG ELECTRONIC FORM

EXHIBIT "A"

U. S. DEPARTMENT OF COMMERCE
Economic Development Administration (EDA)

Public Works and Development Facilities
Amendment No. 3

Investment No.: 04-01-06063

Recipient: University of South Carolina, SC

The following amended award condition(s) is added:

AMENDED SPECIAL AWARD CONDITIONS

1. **PROJECT DEVELOPMENT TIME SCHEDULE:** The Recipient agrees to the following Project development time schedule:

Time allowed after Receipt of Financial Assistance Award for:

Return of Executed Financial Assistance Award..... 30 days
Start of Construction.....33 Months from Date of Grant Award
Construction Period..... 24 Months

Project Closeout - All Project closeout documents including final financial information and any required program reports shall be submitted to the Government not more than 90 days after the date the Recipient accepts the completed project from the contractor(s).

The Recipient shall pursue diligently the development of the Project so as to ensure completion within this time schedule. Moreover, the Recipient shall notify the Government in writing of any event, which could delay substantially the achievement of the Project within the prescribed time limits. The Recipient further acknowledges that failure to meet the development time schedule may result in the Government's taking action to terminate the Award in accordance with the regulations set forth at 15 CFR 24.43 (53 Fed. Reg. 8048-9, 8102, March 11, 1988).

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Monroe Construction Company, LLC,

Appellant,

vs.

University of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-40-03174

ORDER

JEANETTE W. McBRIDE
C.C.P. & G.S.

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RICHLAND COUNTY
FILED

This matter came before the Court on August, 14, 2014, for a hearing on Appellant Monroe Construction Company, LLC's, ("Monroe") appeal from Orders by the South Carolina Procurement Review Panel ("Panel") dated April 26, 2011. Present at the hearing were Donald Ryan McCabe, Jr., Esquire, counsel for Monroe, George William Lampl, III, Esquire, counsel for the University of South Carolina ("USC"), William Dixon Robertson, III, Esquire, counsel for the South Carolina Budget and Control Board ("Budget and Control"), and Christian M. Emanuel, Esquire, counsel for the Panel. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, the decisions of the Panel are **AFFIRMED AS MODIFIED** below.

PROCEDURAL BACKGROUND

This appeal arises out of a protest of the Horizon 1 First Floor Laboratory Upfit Bid ("Project"), for USC. On September 13, 2010, USC advertised for bids to construct the Project. Pursuant to the Invitation for Bids ("IFB"), bidders were to submit their bids on, or before, October 12, 2010. Thereafter, the date for receipt of bids was changed by addenda to October 19, 2010. The IFB provided for two base bids: Base Bid 1 and Base Bid 2. The dispute in this case involves Base Bid 2. Base Bid 2 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.

The IFB required bidders to list the mechanical, plumbing, and electrical subcontractors they intended to use on the Project, pursuant to the subcontractor listing requirements of S.C. Code

Ann. § 11-35-3020 (1976)¹. The IFB provided that bids failing to list the subcontractors as required by law would be rejected.

USC received nineteen bids. Rodgers Builders, Inc. ("Rodgers") submitted the low bid. Sumwalt Associates, Inc., and Monroe were the second and third low bidders, respectively. On December 3, 2010, USC posted a Notice of Intent to Award a contract to Rodgers. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc., ("Hill Plumbing") was not a licensed pressure and process piping contractor.²

In its protest letter, Monroe 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. at 38. Monroe asserted it was "the lowest bidder that identified a properly licensed subcontractor . . . for the specialty piping work."³ R. at 38. Monroe also contended that although it advised "USC's procurement officer for this project of the specialty license requirement" on bid opening day, "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. at 39. Finally, Monroe cited S.C. Code Ann. § 40-11-200(B)⁴ of

¹ S.C. Code Ann. § 11-35-3020(b)(i) (1976) provides, in relevant part, that:

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[.]

² Monroe has, since its protest, argued that based on some drawings of the work that USC was seeking to be performed, contractors were required to possess a pressure and process piping license. Specifically, according to Monroe, since the drawings indicated that successful bidders were to perform pressure and process piping work, those bidders must have possessed the necessary license authorizing them to perform that work.

³ Monroe is the only bidder, of nineteen, that listed both a licensed plumbing contractor and a licensed process piping contractor in the space on the bid form for listing the "plumbing" subcontractor. All other bidders listed only a licensed plumbing contractor.

⁴ S.C. Code Ann. § 40-11-200(B) (1976) provides:

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

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the contractor's licensing act arguing it is "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. at 39.

On January 27, 2011, the Chief Procurement Officer for Construction (CPOC) conducted an administrative review of Monroe's protest pursuant to the South Carolina Procurement Code (S.C. Code Ann. §§ 11-35-10 to 11-35-5300). The CPOC dismissed Monroe's protest alleging Rodgers' bid was unresponsive finding that Rodgers' bid was responsive on its face because it listed Hill Plumbing as its plumbing subcontractor on its bid form and because Hill Plumbing possessed a valid plumbing license. The CPOC also found that Rodgers was a responsible bidder because USC had a reasonable basis for excluding pressure and process piping work for its meaning of "plumbing" on the bid form and because Hill Plumbing possessed a valid plumbing license.

On February 23, 2011, Monroe appealed the CPOC's decision. In its appeal letter, Monroe asserted that Hill Plumbing improperly offered to perform the process and pressure piping work as well as plumbing work in its sub-bid to Rodgers and other bidders. Monroe also contended that its notification to USC on bid opening day regarding the requirement of listing a licensed process and pressure piping subcontractor on the bid form "placed [USC] on inquiry notice that Hill Plumbing had bid beyond the scope of its license." R. at 5.

On March 10, 2011, at Monroe's request, the Panel's attorney prepared a subpoena to Mr. Francis L. Hill of Hill Plumbing. The subpoena compelled Mr. Hill's attendance at the Panel's scheduled hearing on April 13, 2011. The subpoena also requested the production of:

[c]opies of your complete file materials, including but not limited to all correspondence, facsimiles, e-mails, notes, bid submittals, or price quotes, any and all other materials relating to bids submitted to anyone relating to the plumbing work, including the process piping work, for the Horizon 1 First Floor Laboratory Upfit project on the campus of Columbia, South Carolina.

Mr. Hill and Hill Plumbing filed a motion to quash the subpoena. Additionally, the CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill Plumbing's sub-bid. On April 4, 2011, with the consent of the parties, the Panel Chairman heard argument, on behalf of the Panel, on the CPOC's motion to dismiss and Mr. Hill's and Hill Plumbing's motion to quash the subpoena.

awarding authority, contractor, or owner if the contractor was not properly licensed at the time the initial bid or contract was submitted.

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At the hearing, the CPOC asserted that Monroe impermissibly attempted to recharacterize or interpret its protest letter in an effort to raise a new issue before the Panel: that Hill Plumbing improperly offered to perform work outside the scope of its plumbing license in its sub-bid. In response, Monroe argued that it was not a new issue because its protest letter sufficiently placed the parties on notice that if neither Rodgers nor Hill Plumbing possessed the proper license, then Rodgers must have submitted a bid with a subcontractor who did not have the required pressure and process piping license.⁵ The Panel Chairman, on behalf of the Panel, found that the allegations raised in Monroe's appeal letter regarding Hill's sub-bid were untimely and dismissed those allegations for lack of jurisdiction.⁶ The Panel Chairman also found that Monroe's citation of Section 40-11-200(B) in its protest letter only placed the parties on notice that Monroe believed Rodgers and USC had violated that section, not Hill Plumbing. Because Monroe's allegations that Hill Plumbing was performing outside of the scope of its license were dismissed, the Panel Chairman found that the information sought by the subpoena was irrelevant, and thus, quashed the subpoena.

Thereafter, on April 13, 2011, the full Panel held a hearing on Monroe's protest and two motions to dismiss made by USC during the hearing concerning Monroe's appeal of the CPOC's decision.⁷ USC argued that Monroe's appeal letter to the Panel raised two issues, for the first time: (1) whether the Project's bid form satisfied the subcontractor listing requirements of S.C. Code Ann. § 11-35-3020 (1976), and (2) whether USC had an obligation to investigate further when Monroe alleged that Rodgers and Hill Plumbing did not possess the requisite license. See S.C. Code Ann. § 40-11-200(B).

Regarding USC's first motion, the Panel found that Monroe's protest letter did not allege that USC had failed to list any required subcontractors on the bid form. The Panel, thus, dismissed that issue for lack of jurisdiction. Concerning USC's second motion, the Panel found that although Monroe cited Section 40-11-200(B), it never suggested that USC had a duty to

⁵ The Order addressing these issues is Exhibit 2 in the Statement of the Contents of the Record and Certification. This Order will, hereinafter, be referred as Panel Order 2.

⁶ Issues to be decided by the CPOC and the Panel are established by the protest letter. See *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6. Issues, thus, raised for the first time in a letter appealing from a decision of the CPOC are untimely. See *id.*

⁷ The Order addressing these issues is Exhibit 1 in the Statement of the Contents of the Record and Certification. This Order will, hereinafter, be referred as Panel Order 1.

investigate whether a violation occurred. The Panel similarly dismissed that issue for lack of jurisdiction.

After dismissing the two appeal issues discussed above, the Panel inquired into whether there remained any issues for the Panel to hear. The CPOC contended that the scope of work included by the category of "Plumbing" on the IFB needed to be addressed as well as the issue of whether USC had fulfilled its duties under the Procurement Code in finding that Rodgers was responsible bidder. Monroe asserted that Rodgers' responsibility was still in question.

Concerning the scope of work included within "Plumbing," the Panel found that USC intended to include only work that could be performed by a subcontractor holding a general plumbing license. Concerning Rodgers' responsibility, the Panel found that Rodgers sufficiently satisfied the requirements of responsibility under the Procurement Code and that Monroe failed to show that USC's determination of responsibility was "clearly erroneous, arbitrary, capricious, or contrary to law." The Panel, thus, denied Monroe's protest and upheld the decision of the CPOC. On May 13, 2011, Monroe appealed the Panel's decisions.

LEGAL STANDARD

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;

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- (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.

DISCUSSION

On appeal, Monroe contends that: (1) the motion to dismiss regarding the responsibility issue of USC and Hill Plumbing should be reversed and remanded because the protest letter sufficiently raised the issue of responsibility; (2) the motion to quash should be overturned because the evidence sought is relevant to resolve the issue of whether Hill Plumbing and Rodgers were responsible bidders; and (3) the Panel applied the wrong standards of review concerning whether USC appropriately complied with the contractors licensing act (codified at S.C. Code Ann. §§ 40-11-5 to 40-11-430 (1976)) and to USC's determinations of responsibility under the Procurement Code.

I. Protest Letter – Issue of Responsibility

Monroe contends that the Panel erroneously dismissed the responsibility issue concerning Hill Plumbing because the Panel concluded this issue was not raised in the initial protest letter. Monroe also contends that 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.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of S.C. Code Ann. § 11-35-4210(1)(b) to confer jurisdiction on the CPOC and, by extension, the Panel. See S.C. Code Ann. § 11-35-4210(1)(b) (1976). This Section provides that a protest of an awarded contract must be brought within ten days of the posting of the intent to award. *Id.* The protest must be in writing and "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). A party may amend its initial protest of an intended award as long as it does so within fifteen days after date of the award. See *id.*

The protest letter establishes the issues to be decided by the CPOC and Panel. See *In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 13, 1994). Therefore, issues raised for the first time in a letter appealing from the decision of a CPOC are untimely under the time constraints of S.C. Code Ann. § 11-35-4210. "The letter to the Panel cannot add issues. If new

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issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2) [of Section 11-35-4210.]” *Id.* “The protest letter establish[es] the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.” *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 (December 15, 1998).

Monroe argues that the protest letter alleged, with sufficient particularity to provide notice of the issue to be decided: that Hill Plumbing was not a responsible bidder. The Panel, however, found that “[i]n the instant case, Monroe’s 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’s Order Two at 5. (Emphasis added). The Panel further found that “[n]othing in Monroe’s protest letter suggested that Hill Plumbing had acted improperly or bid outside the scope of its license.” *Id.*

Monroe’s protest letter specifically stated that: “*Rodgers’* bid is nonresponsive and disqualified because *Rodgers* listed Hill Plumbing and Electric Company[,] Inc. (“Hill”) as the plumbing subcontractor and neither *Rodgers* nor Hill has the required specialty license to perform the specialty plumbing work[.]” (Emphasis added). Monroe’s protest letter, thus, specifically focused on *Rodgers’* actions in submitting a bid; it did not discuss Hill Plumbing’s alleged performance of actions outside the scope of its licenses. The Panel’s decision concerning this issue, thus, is neither clearly erroneous nor arbitrary or capricious. Accordingly, the Court affirms the Panel’s finding that Monroe’s protest letter failed to provide notice of the issue that Hill Plumbing had bid beyond the scope of its licenses and affirms the Panel’s dismissal of Monroe’s allegation.

Monroe also argues that 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 Monroe’s protest letter. Monroe argues that the protest letter sufficiently provided notice of the issue concerning USC’s duty to investigate whether *Hill Plumbing* possessed the requisite license. According to Monroe, its protest letter specifically referenced Section 40-11-200(B), which precludes an awarding authority from considering a bid of a contractor or subcontractor who does not possess the proper license at the time of bidding. The Panel, however, found that “[a]lthough 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

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had occurred." Panel's Order One at 5. The Panel, thus, dismissed the issue as being untimely under the Procurement Code.

Monroe contends that by citing Section 40-11-200(B) in its protest letter, it directly implicated USC's compliance in awarding its bid. The protest letter, however, did not state that USC possessed a duty to investigate. The Panel's decision, thus, was not in violation of statutory law, clearly erroneous, or arbitrary or capricious. Accordingly, the Court affirms the Panel's dismissal, as untimely, of the issue concerning whether USC possessed the duty to investigate under section 11-35-4210(1)(b).

II. Motion to Quash

On March 10, 2011, at Monroe's request, the Panel's attorney prepared a subpoena to Mr. Hill and Hill Plumbing requesting the production of all of Mr. Hill's and Hill Plumbing's materials related to the submission of bids for the Project. Mr. Hill and Hill Plumbing filed a motion to quash the subpoena arguing that the materials sought were irrelevant to the issue heard by the CPOC: USC's intent "in requiring each Project bid to contain the name of a licensed plumbing contractor but not the name of a licensed process piping contractor." Hill Plumbing's Motion to Quash at 2. The Panel quashed the subpoena because the Panel dismissed the appeal issues relating to Hill Plumbing's sub-bid, and therefore, the evidence sought by the subpoena was irrelevant.

Monroe argues that the evidence sought through the subpoena is relevant to determine whether Hill Plumbing and Rodgers were responsible bidders. Accordingly, Monroe argues that "[s]ince the issue was raised in the protest letter, the Panel's decision to quash the subpoena was erroneous because the evidence is relevant to the Hill [Plumbing] responsibility issue." Appellant's Br. at 8. Monroe's assertion that the subpoena sought relevant evidence is based upon its presumption that its protest letter properly raised the issue of Hill Plumbing's alleged improper sub-bid. The Panel, however, found that the protest letter failed to sufficiently raise such issue. Relevancy determinations generally are left to the trial court's, here, the Panel's, discretion. *See Pike v. South Carolina Dep't of Transp.*, 332 S.C. 605, 613, 506 S.E.2d 516, 520 (Ct. App. 1998). As indicated above, the Panel properly dismissed, as untimely, Monroe's issue concerning Hill Plumbing's sub-bid. The Panel's decision, thus, to quash the subpoena did not violate statutory law and was not clearly erroneous, or arbitrary or capricious. *See S.C. Code Ann. § 1-23-380(5)*. Accordingly, the Court upholds the Panel's decision to quash the subpoena. ad
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III. The Panel's Standard of Review

Monroe argues that the Panel did not apply the appropriate standard of review in determining whether USC sufficiently complied with the contractor's licensing act, specifically S.C. Code Ann. § 40-11-200(B) (making it unlawful for USC to even consider a bid if the work is not performed by a properly licensed contractor) and determining responsibility under the Procurement Code, specifically S.C. Code Ann. § 11-35-1810(1) (requiring the State to determine the responsibility of bidders before awarding contracts).

A. Determination of Compliance with Section 40-11-200(B)

Monroe argues that the Panel applied a "clearly erroneous, arbitrary, capricious, or contrary to law" standard of review in determining whether USC complied with Section 40-11-200(B). According to Monroe, the Panel should have determined whether USC *strictly complied* with the Section. In its brief, Monroe states that:

[T]he Panel applied a 'clearly erroneous, arbitrary, capricious, or contrary to law' standard to USC's duty to investigate the responsibility of bidders. The Panel mischaracterizes the issue of responsibility by focusing solely on what work USC intended to include under the 'Plumbing' category of the bid form. This reasoning ignores USC's obligation to comply with the plain language of [Section 40-11-200(B)]. The 'clearly erroneous, arbitrary, capricious, or contrary to law' standard may be appropriate for review where public agencies make discretionary determinations, but compliance with [Section 40-11-200(B)] is not optional.

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 this issue as untimely.⁸

⁸ Monroe's attorney, Mr. D. Ryan McCabe, asked the Panel the following:

I'm just trying to figure out when the Panel says that the duty to investigate was not raised, does that mean the duty to comply with the law in that issue as raised in the original protest letter as heard and argued before the CPOC and as appealed is no longer a valid issue or if it's the Panel's position that that's being dismissed as well[?]

....

If you have a duty to comply with the law and you're put on notice that you have a bid from someone who does not have the license required to bid the work, once you are put on notice, I think the statute that we cited clearly imposes an obligation on the State to investigate.

See Appeal Hearing Transcript of Record at 19:2-8 & 19:19-24. The Panel responded by stating: "Mr. McCabe, we have already made on a ruling on USC, what they were supposed to do. I can't—other than that. We have made a ruling on

The Court's review of the Panel's decision "must be confined to the record." S.C. Code Ann. § 1-23-380. The Court, thus, cannot review a decision that expressly was *not made* by the Panel.

Although the Panel did not specifically address whether USC complied with Section 40-11-200(B), the Court takes this opportunity to address Monroe's concerns. Monroe contends that the Panel improperly focused on what USC intended to encompass by its "Plumbing" category in its IFB. Monroe contends that pursuant to Section 40-11-410(5)(g)⁹, bidders were required to list both a plumbing subcontractor and a pressure and process piping subcontractor on the bid form under the "Plumbing" category. Since Monroe alleges that USC improperly failed to include a "process piping" subcontractor category in its IFB, it is important to determine what type of contractors USC was seeking to perform the subject work. Accordingly, what USC intended to encompass under the "Plumbing" category in its IFB is a necessary focus in determining whether bidders were required to list both a plumbing subcontractor and a pressure and process piping subcontractor. USC could only violate Section 40-11-200(B) if it awarded the bid to a contractor who did not possess a license to perform the work that USC included in its IFB.

Mr. Frank Kerr ("Kerr"), a Monroe employee who helped prepare Monroe's bid, testified, at the panel hearing, that he looked at the plumbing drawings, specifically the drawing marked P7.10, to determine the scope of work for the "Plumbing" category on the bid form. See Appeal Hearing Transcript of Record at 68:8-15. The drawing marked P7.10 showed general plumbing work as well as specialty pressure and process piping work. See Appeal Hearing Transcript of Record at 32:1-11. Accordingly, Kerr listed both a plumbing subcontractor and a pressure and process subcontractor on Monroe's bid form. See Appeal Hearing Transcript of Record at 70:19-25.

Ms. Regina Floyd ("Floyd"), an architect involved with preparing the IFB on behalf of USC, however, testified at the panel hearing that the "Plumbing" category was intended to

it and voted on it and given you our ruling." See Appeal Hearing Transcript of Record at 24:9-12.

⁹ S.C. Code Ann. § 40-11-410(5)(g) provides the following:

'Pressure and Process Piping' . . . includes the installation, maintenance, repair, alteration, or extension of a system of piping, tubing, vessels containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these[.]

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include only work that could be performed by a subcontractor holding a general plumbing license as defined by S.C. Code Ann. § 40-11-410(5)(f) (1976)¹⁰. See Appeal Hearing Transcript of Record at 39:11-12. Floyd also testified that it was standard practice to show process piping on the plumbing drawings for purposes of coordination of work and that other types of work unrelated to plumbing were also included on the drawing Monroe relied upon. See Appeal Hearing Transcript of Record at 44:7-15. Floyd, moreover, did not ask bidders to list a pressure and process piping subcontractor on the bid form because that work was not expected to exceed three percent of the prime contractor's total base bid.¹¹ See Appeal Hearing Transcript of Record at 45:23-25 to 46:1-11.

Monroe nor any other bidder sought clarification of the plumbing scope of work or asked what USC meant by the "Plumbing" category on the bid form. See Appeal Hearing Transcript of Record at 43:19-25 to 44:1-2. Moreover, when the bids were submitted, Monroe was the only bidder to interpret "Plumbing" to require the listing of both a plumbing subcontractor and a pressure and process piping subcontractor. See Appeal Hearing Transcript of Record at 45:7-19. After considering the above evidence, the Panel's decision that since USC was looking for subcontractors that could perform the work as described within its IFB's plumbing category, and since Hill Plumbing was listed as being able to perform that specific plumbing work, USC did not violate Section 40-11-200(B) was supported by the evidence. Also, Section 11-35-3020(b)(i) provides for the listing of specialty subcontractors if the work to be performed by the subcontractors would exceed three percent of the general contractor's bid—not envisioned here.

¹⁰ S.C. Code Ann. § 40-11-410(5)(f) (1976) provides, in part:

"Plumbing" . . . includes the installation, replacement, alteration, and repair of all plumbing including solar water heating when performed solely within property lines and not on public easements or rights-of-way except to make connections to water meters or sewer taps as allowed by the utility owner, and the installation, alteration, and repair of all piping, fixtures, and appliances related to water supply, including pressure vessels and tanks, and excluding municipal or related water supply systems; venting and sanitary drainage systems for all fluid and semi-fluid and organic wastes; roof leaders; water-conditioning equipment; piping and equipment for swimming pools; and installation of a system of pipes, fittings, fixtures, drains, and all necessary component parts upon the premises or in a building to supply water to buildings and to convey sewage or other waste products from buildings[.]

¹¹ See S.C. Code Ann. § 11-35-3020(b)(i). Fn.1, *supra*.

Further, the decision not to list a specialty subcontractor in the invitation for bids is not protestable. *See id.*

B. Determination of Responsibility under Section 11-35-1810(1)

Monroe argues that the Panel applied the wrong standard of review to USC's determination of responsibility under Section 11-35-1810(1). Monroe contends that under S.C. Code Ann. § 11-35-2410, the "clearly erroneous, arbitrary, contrary to law" standard only applies to determinations of *non-responsibility*. According to Monroe, "[i]f the legislature had thought it desirable to extend this standard to determinations of *responsibility*, the legislature would have incorporated such a provision." Appellant's Br. at 10. (Emphasis added).

A responsible bidder is one who possesses "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 make determinations regarding responsibility before awarding a contract. *See* S.C. Code Ann. § 11-35-1810(1).

In the past, the Panel has found that "[a] procurement officer's decision regarding responsibility is a matter of discretion that will not be overturned absent a showing that is 'clearly erroneous, arbitrary, capricious, or contrary to law.'" *In re: Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009) (quoting S.C. Code Ann. § 11-35-2410). The Court, however, agrees with Monroe that the "clearly erroneous, arbitrary, capricious, or contrary to law" standard only applies to determinations of *non-responsibility*. Section 11-35-2410(A) states, in relevant part, the following: "[t]he determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: . . . Section 11-35-1810(2) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility)." Section 11-35-2410(1) does not mention Section 11-35-1810(1). Thus, based upon the plain reading of Section 11-35-2410, its standard of review does not expressly apply to Section 11-35-1810(1) (Responsibility of Bidders and Offerors, Determination of *Responsibility*). "The canon of construction '*expressio unius est exclusio alterius*' . . . holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (quoting Black's Law Dictionary 602 (7th ed. 1999)). Accordingly, the Panel improperly applied the

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"clearly erroneous, arbitrary, capricious, or contrary to law" standard enumerated in Section 11-35-2410 to USC's determination of *responsibility* in this matter.

Although the Panel used a standard of review not expressly authorized for reviewing determinations of responsibility, the Panel still properly upheld USC's determination of responsibility. The finding that USC properly made its determination of responsibility under Section 11-35-1810 would have been proper under any standard of review. Section 11-35-1810 provides that the "[r]esponsibility of the bidder or offeror shall be ascertained" before awarding a contract. USC did ascertain the responsibility of both Rodgers and Hill Plumbing. Ms. Floyd testified at the panel hearing that she checked the licenses of Rodgers and Hill Plumbing prior to the award and determined that Hill Plumbing possessed a valid plumbing license. See Appeal Hearing Transcript of Record at 50:13-25 to 51:1-19. With the exception of the mechanical and electrical subcontractor specialties listed on the bid form, possessing a plumbing license was all that was required. USC specifically did not list the process piping specialty as a subcontractor category. See Appeal Hearing Transcript of Record at 41:1-4. USC's decision, moreover, not to include the "process piping" specialty is not even protestable. See S.C. Code Ann. § 11-35-3020(b)(i) ("The determination of which subcontractors are included in the list provided in the invitation for bid is not protestable [under any] provision of this code."). USC's inquiry into whether Rodgers and Hill Plumbing possessed the respective licenses for the work that USC desired to be performed satisfied the requirements of Section 11-35-1810(1) of the Procurement Code with regard to responsibility.

Accordingly, with exception to the standard of review utilized by the Panel, the Court upholds the Panel's determination that USC properly made a determination of responsibility under Section 11-35-1810(1) as to Rodgers and Hill Plumbing.

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ORDER

For the reasons stated above, it is therefore **ORDERED** that the decision of the South Carolina Procurement Review Panel is **AFFIRMED AS MODIFIED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
February 29, 2016

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011-CP-40-03174

Monroe Construction Co., LLC

University of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Dismissal); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2118 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Katherine B. Barroll

Donald Ryan McCabe, Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Molly R. Crum

George William Lampl, III

ATTORNEY(S) FOR THE DEFENDANT(S)

William Dixon Robertson, III

Christian M. Emanuel

Court Reporter _____

Clerk of Court

Jeanette W. McBride

South Carolina Procurement Review Panel

HON. CARL G. OEHMIG, III
HON. MARK HARTLEY
HON. WILLIE G. FRANKS
VICE CHAIRMAN

SHERRY COPELAND
BUSINESS MANAGER

SOLOMON BLATT BUILDING
1105 PENDLETON STREET, SUITE 202
COLUMBIA, SOUTH CAROLINA 29201
(803) 734-0880
FAX (803) 734-1427

HON. MARK W. BAKER
HON. BEVERLY GADSON-BIRCH
HON. KENNETH D. MUNSON

CHRISTIE M. EMANUEL
ATTORNEY



HON. C. BRIAN MCCLANE, SR.
CHAIRMAN

RECORD OF CASE #2011-3

**In Re: Protest of Monroe Construction Co., LLC;
Appeal of Monroe Construction Co., LLC**

**State Project No. H27-6071-LC
Horizon 1 First Floor Laboratory Upfit**



SE-330

REVISED

2008 Edition
(Revised 12-12-08)

Bid Form

*Bids shall be submitted only on SE-330*BID SUBMITTED BY: _____ Rodgers Builders, Inc. _____

(Bidder's Name)

BID SUBMITTED TO: _____ University of South Carolina _____

(Agency Name)

FOR PROJECT: H27-6071-LC

(Number)

HORIZON IDEA & SEAEPC LAB UPFIT - Beta Research Facility Co

(Name)

The U.S. Department of Commerce Economic Development Administration is providing partial funding for this project (EDA Investment No. 04-01-08063).

OFFER

1. In response to the Form SE-310, *Invitation for Construction Bids*, and in compliance with the *Instructions to Bidders* for the above-named Project, the undersigned BIDDER proposes and agrees, if this Bid is accepted, to enter into a Contract with the AGENCY in the form included in the Bidding Documents, and to perform all Work as specified or indicated in the Bidding Documents, for the prices and within the time frames indicated in this Bid and in accordance with the other terms and conditions of the Bidding Documents.

2. Pursuant to Section 11-32-3030(1) of the SC Code of Laws, as amended, BIDDER has submitted Bid Security as follows in the amount and form required by the Bidding Documents:

☒ Bid Bond with Power of Attorney ☐ Electronic Bid Bond ☐ Cashier's Check
(BIDDER check one)

3. BIDDER, by submitting this Bid, affirms that it has carefully examined the Bidding Documents and the other related data identified in the Bidding Documents, has visited the actual location of the Work, has satisfied itself as to all conditions and understands that, in signing this Bid Form, it waives all rights to plead any misunderstanding regarding same and agrees to be bound by the provisions of said Bidding Documents and all statements made therein.

4. BIDDER acknowledges the receipt of the following Addenda to the Bidding Documents and has incorporated the effects of said Addenda into its Bid:

ADDENDUM No: #1 dated 9/29/10, #2 dated 10/1/10, #3 dated 10/6/10, #4 dated 10/12/10, #5 dated 10/13/10

5. BIDDER accepts all terms and conditions of the *Invitation for Construction Bids*, including, without limitation, those dealing with the disposition of Bid Security. BIDDER agrees that this Bid, including all Alternate Base Bids, may not be revoked or withdrawn after the opening of bids, and shall remain open for acceptance for a period of 60 Days following the Bid Date, or for such longer period of time that BIDDER may agree to in writing upon request of the AGENCY.

6. BIDDER herewith submits its offer to provide all labor, materials, equipment, tools of trades and labor, accessories, appliances, warranties and guarantees, and to pay all royalties, fees, permits, licenses and applicable taxes necessary to complete the following items of construction work:

6.1 BASE BID WORK (BASE BID NO. 1) (as indicated in the Bidding Documents and generally described as follows):
Provide general construction, mechanical, electrical, and plumbing at existing 5 Story Building as required to outfit 23,396 s.f. First Floor for use as labs, offices, and support spaces.

\$ 3,599,000, which sum is hereafter called the BASE BID No. 1.
(enter BASE BID in figures only)

(If there are additional Base Bids insert the following for each):

SE-330 - Bid Form

2008 Edition
Revised 12-12-08

BASE BID WORK (BASE BID NO. 2) (as indicated in the Bidding Documents and generally described as follows):
Provide general construction, mechanical, electrical, and plumbing at existing 5 Story Building as required to uplift 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.

\$ 3,149.00

(enter BASE BID in figures only)

., which sum is hereafter called the **BASE BID No. 2**

BASE BID WORK (BASE BID NO. _____) (as indicated in the Bidding Documents and generally described as follows):

(enter BASE BID in figures only)

• which sum is hereafter called the **BASE BID No.**

6.2 UNIT PRICE WORK

BIDDER offers for the Agency's consideration and use the following **UNIT PRICES**. The **UNIT PRICES** offered by **BIDDER** indicate the amount to be added to or deducted from the Contract Sum for each item-unit combination. **UNIT PRICES** include all costs to the Agency, including those for materials, labor, equipment, tools of trades and labor, fees, taxes, insurance, bonding, overhead, profit, etc. The Agency reserves the right to include or not to include any of the following **UNIT PRICES** in the Contract and to negotiate the **UNIT PRICES** with **BIDDER**.

[illegible]

000049

SE-330 Bid Form2008 Edition
(Revised 12-12-08)**LISTING OF PROPOSED SUBCONTRACTORS**

1. A Subcontractor is an entity who will perform work or render service in the prime contractor to or about the construction site. Material suppliers, manufacturers and fabricators are not Subcontractors and are not to be listed.
2. Bidder must list in its bid the name of only those Subcontractors that will perform the work so identified in the Invitation.
3. If Bidder determines to use its own employees to perform any portion of the work listed below, and if Bidder is qualified to perform such work under the terms of the Bidding Documents, Bidder must list itself in the appropriate place in its bid and not subcontract any of that work except with the approval of the Agency for good cause shown.
4. Bidder's failure to list a Subcontractor for each listed Specialty Subcontractor will render the BID non-responsive.
5. A Subcontractor listed for an Alternate Base Bid must be used for all work if the Alternate Base Bid is accepted.
6. Bidder hereby states its commitment to use the below-listed Subcontractors in the performance of the Subcontractor Specialty work listed:

SUBCONTRACTOR SPECIALTY (COMPLETED BY A/E)	SUBCONTRACTOR OR PRIME CONTRACTOR'S NAME (MUST BE COMPLETED BY BIDDER)	SUBCONTRACTOR'S SC LICENSE NUMBER (For Information)
	<u>BASE BID 1</u>	
<u>Mechanical</u>	<u>WALKER WHITE</u>	<u>52049</u>
<u>Plumbing</u>	<u>HILL PLUMBING</u>	<u>51434</u>
<u>Electrical</u>	<u>ETHERIDGE</u>	<u>M2074</u>

SUBCONTRACTOR SPECIALTY (COMPLETED BY A/E)	SUBCONTRACTOR OR PRIME CONTRACTOR'S NAME (MUST BE COMPLETED BY BIDDER)	SUBCONTRACTOR'S SC LICENSE NUMBER (For Information)
	<u>BASE BID 2</u>	
<u>Mechanical</u>	<u>WALKER WHITE</u>	<u>52049</u>
<u>Plumbing</u>	<u>HILL PLUMBING</u>	<u>51434</u>
<u>Electrical</u>	<u>ETHERIDGE</u>	<u>M2074</u>

SUBCONTRACTOR SPECIALTY (COMPLETED BY A/E)	SUBCONTRACTOR OR PRIME CONTRACTOR'S NAME (MUST BE COMPLETED BY BIDDER)	SUBCONTRACTOR'S SC LICENSE NUMBER (For Information)
	<u>BASE BID 3</u>	

SE-330 Bid Form

2008 Edition
(Revised 12-12-08)**TIME OF CONTRACT PERFORMANCE**

BIDDER hereby agrees to complete the construction work in accordance with the following schedule:

1. The DATE OF COMMENCEMENT shall be established in Form SE-390, *Notice to Proceed*. The BIDDER shall not incur any expense chargeable to this Project until the Contract has been executed by both the Agency and the Contractor, and a Notice to Proceed has been issued.
2. The DATE OF SUBSTANTIAL COMPLETION, to be documented on Form SE-550A, *Certificate of Substantial Completion*, shall be (220) CALENDAR DAYS from the DATE OF COMMENCEMENT set forth in the SE-390, subject to adjustments as provided in the Contract Documents.
3. The DATE OF FINAL COMPLETION, to be documented on Form SE-560C, *Certificate of Final Completion*, shall be (30) CALENDAR DAYS from the DATE OF SUBSTANTIAL COMPLETION, subject to adjustments as provided in the Contract Documents.

LIQUIDATED DAMAGES AND EARLY COMPLETION AWARD

1. The undersigned further agrees that from the compensation to be paid, the Agency shall retain as Step One Liquidated Damages the amount of \$500.00 for each calendar day the actual construction time required to achieve SUBSTANTIAL COMPLETION exceeds the specified or adjusted Contract time for SUBSTANTIAL COMPLETION, as provided in the Contract Documents.
2. The undersigned further agrees that from the compensation to be paid, the Agency shall retain as Step Two Liquidated Damages the amount of \$250.00 for each calendar day the actual construction time required to achieve FINAL COMPLETION exceeds the specified or adjusted Contract Time for FINAL COMPLETION, as provided in the Contract Documents.
3. The undersigned further agrees that in full and complete satisfaction for the best efforts of the undersigned to achieve SUBSTANTIAL COMPLETION before the date established above, the Agency shall pay the undersigned an Early Completion Award in the amount of NA for each calendar day the actual construction time required to achieve SUBSTANTIAL COMPLETION is less than the originally specified Contract Time for SUBSTANTIAL COMPLETION, as provided in the Contract Documents.

AGREEMENTS

By submitting this Bid, BIDDER hereby agrees to the following terms and conditions:

1. An incomplete Bid, or information not requested that is written on or attached to this Bid Form that could be considered a qualification of the Bid, may be cause for rejection of the Bid.
2. The failure of the BIDDER to indicate a price for an ALTERNATE BASE BID shall render the Bid non-responsive. A typed or printed "No Bid", or words of similar meaning, shall render the Bid non-responsive.
3. The BIDDER shall list only SUBCONTRACTORS (as defined in the Bidding Documents) who are qualified to perform items of work as specified in the Bidding Documents or as required by any material or equipment substitutions approved at the time of bidding. No BIDDER whose Bid is accepted shall substitute another entity as SUBCONTRACTOR in place of the SUBCONTRACTOR listed in the original Bid, except for one or more of the reasons allowed by the SC Code of Laws.
4. The failure of the BIDDER to provide the name(s) of listed SUBCONTRACTORS in accordance with the SC Code of Laws shall render the Bid non-responsive.
5. Unless otherwise provided in the Bidding Documents, BIDDER will provide Performance and Labor and Material Payment Bonds, each in the amount equal to 100% of the Contract Award, as a condition of execution of the Contract. Failure to supply such bonds as required by the Contract Documents shall result in cancellation of the Notice of Intent to Award and forfeiture of the Bid Bond.
6. BIDDER agrees to provide all information requested by the AGENCY to support the AGENCY'S evaluation and determination of the BIDDER'S responsibility, including completion of Form SE-350, *Questionnaire for Contractors*. The Questionnaire shall be completed fully and returned to the AGENCY within SEVEN (7) DAYS from date of receipt by the BIDDER by certified mail. The completed Form SE-350 must be received by the Agency no later than the close of business on the seventh day. Failure by BIDDER to supply requested information with respect to responsibility may be grounds for a determination of non-responsibility.
7. The BIDDER certifies that it will provide a "Drug-Free Workplace" as that term is defined in Section 44-107-30 of the SC Code of Laws, and shall comply with the requirements set forth in Title 44, Chapter 107.

000051

SE-330 Bid Form

2008 Edition
(Revised 12-12-08)

8. At any time prior to the issuance of the Notice to Proceed for this Project, this Contract may be canceled for the convenience of the State.
9. Neither the State of South Carolina nor any of its agencies, employees or agents shall be responsible for any bid preparation costs, or any costs or charges of any type, should all bids be rejected or the Project canceled for any reason prior to the issuance of the Notice to Proceed.

ELECTRONIC BID BOND

By signing below, the Principal is affirming that the identified electronic bid bond has been executed and that the Principal and Surety are firmly bound unto the State of South Carolina under the terms and conditions of the Form SE-333 included in the Bidding Documents.

N/A N/A
(Electronic Bid Bond Number) (Signature and Title)

BIDDER'S TAXPAYER IDENTIFICATION

FEDERAL EMPLOYER'S IDENTIFICATION NUMBER: 58-0798195
OR
SOCIAL SECURITY NUMBER: N/A

CONTRACTOR'S CLASSIFICATIONS AND SUBCLASSIFICATIONS WITH LIMITATIONS

General Contractor BD5 WLS WP5 HY5 Unlimited
(Classification) (Subclassification) (Limitations)

G12941

(SC Contractor's License Number)

SIGNATURERodgers Builders, Inc.

(Legal Name of Person, Firm or Corporation Submitting Bid)

5701 North Sharon Amity Road, Charlotte, NC 28215

(Mailing Address for the above)

J. Bennett Dellinger III
BY: (Signature)

10/19/10

(Date)

Chief Financial Officer

(Title)

704.537.6044

(Phone)



SE-330

REVISED

2008 Edition
(Revised 12-12-08)

Bid Form

Bids shall be submitted only on SE-330

BID SUBMITTED BY: MONROE CONSTRUCTION Company
(Bidder's Name)BID SUBMITTED TO: _____
University of South Carolina
(Agency Name)FOR PROJECT: H27-6071-LCHORIZON IDEA & SEAEPC LAB UPFIT - Beta Research Facility Co

(Number)

(Name)

The U.S. Department of Commerce Economic Development Administration is providing partial funding for this project (EDA Investment No. 04-01-08083).

OFFER

1. In response to the Form SE-310, *Invitation for Construction Bids*, and in compliance with the *Instructions to Bidders* for the above-named Project, the undersigned BIDDER proposes and agrees, if this Bid is accepted, to enter into a Contract with the AGENCY in the form included in the Bidding Documents, and to perform all Work as specified or indicated in the Bidding Documents, for the prices and within the time frames indicated in this Bid and in accordance with the other terms and conditions of the Bidding Documents.

2. Pursuant to Section 11-32-3030(1) of the SC Code of Laws, as amended, BIDDER has submitted Bid Security as follows in the amount and form required by the Bidding Documents:

☒ Bid Bond with Power of Attorney ☐ Electronic Bid Bond ☐ Cashier's Check
(BIDDER check one)

3. BIDDER, by submitting this Bid, affirms that it has carefully examined the Bidding Documents and the other related data identified in the Bidding Documents, has visited the actual location of the Work, has satisfied itself as to all conditions and understands that, in signing this Bid Form, it waives all rights to plead any misunderstanding regarding same and agrees to be bound by the provisions of said Bidding Documents and all statements made therein.

4. BIDDER acknowledges the receipt of the following Addenda to the Bidding Documents and has incorporated the effects of said Addenda into its Bid:

ADDENDUM No: ONE (7/29/10), TWO (8/1/10), THREE (10/6/10), FOUR (10/12/10) & FIVE (10/13/10)

5. BIDDER accepts all terms and conditions of the *Invitation for Construction Bids*, including, without limitation, those dealing with the disposition of Bid Security. BIDDER agrees that this Bid, including all Alternate Base Bids, may not be revoked or withdrawn after the opening of bids, and shall remain open for acceptance for a period of 60 Days following the Bid Date, or for such longer period of time that BIDDER may agree to in writing upon request of the AGENCY.

6. BIDDER herewith submits its offer to provide all labor, materials, equipment, tools of trades and labor, accessories, appliances, warranties and guarantees, and to pay all royalties, fees, permits, licenses and applicable taxes necessary to complete the following items of construction work:

6.1 BASE BID WORK (BASE BID NO. 1) (as indicated in the Bidding Documents and generally described as follows):
Provide general construction, mechanical, electrical, and plumbing at existing 5 Story Building as required to outfit 23,396 s.f. First Floor for use as labs, offices, and support spaces.

\$ 3,625,000, which sum is hereafter called the BASE BID No. 1.
(after BASE BID in figures only)

(If there are additional Base Bids insert the following for each):






























2008 Edition
Revised 12-12-08

3230000 3230000, which sum is hereafter called the BASE BID No. 2
(enter BASE BID in figures only)

14/12

_____, which sum is hereafter called the BASE BID No.
(enter BASE BID in figures only)

BIDDER offers for the Agency's consideration and use the following **UNIT PRICES**. The **UNIT PRICES** offered by **BIDDER** indicate the amount to be added to or deducted from the Contract Sum for each item-unit combination. **UNIT PRICES** include all costs to the Agency, including those for materials, labor, equipment, tools of trades and labor, fees, taxes, insurance, bonding, overhead, profit, etc. The Agency reserves the right to include or not to include any of the following **UNIT PRICES** in the Contract and to negotiate the **UNIT PRICES** with **BIDDER**.

[illegible]

000054

SE-330 Bid Form2008 Edition
(Revised 12-12-08)**LISTING OF PROPOSED SUBCONTRACTORS**

1. A Subcontractor is an entity who will perform work or render service to the prime contractor to or about the construction site. Material suppliers, manufacturers and fabricators are not Subcontractors and are not to be listed.
2. Bidder must list in its bid the name of only those Subcontractors that will perform the work so identified in the Invitation.
3. If Bidder determines to use its own employees to perform any portion of the work listed below, and if Bidder is qualified to perform such work under the terms of the Bidding Documents, Bidder must list itself in the appropriate place in its bid and not subcontract any of that work except with the approval of the Agency for good cause shown.
4. Bidder's failure to list a Subcontractor for each listed Specialty Subcontractor will render the BID non-responsive.
5. A Subcontractor listed for an Alternate Base Bid must be used for all work if the Alternate Base Bid is accepted.
6. Bidder hereby states its commitment to use the below-listed Subcontractors in the performance of the Subcontractor Specialty work listed:

SUBCONTRACTOR
SPECIALTY
(COMPLETED BY A/E)SUBCONTRACTOR OR
PRIME CONTRACTOR'S NAME
(MUST BE COMPLETED BY BIDDER)SUBCONTRACTOR'S
SC LICENSE NUMBER
(For Information)MechanicalPlumbingElectrical**BASE BID 1**

WALKER WHITE Mechanical M 2724
 WALKER WHITE MECH. AND DRAINAGE Fluid Technologies M2724 and M108558
 CUMMINGS Electric M109548

BASE BID 2MechanicalPlumbingElectrical

WALKER WHITE Mechanical M 2724
 WALKER WHITE MECH. and DRAINAGE Fluid Technologies M2724 and M108558
 CUMMINGS Electric M109548

BASE BID 3

N/A

BF-3

SK-330

SE-330 Bid Form

2008 Edition
(Revised 12-12-08)**TIME OF CONTRACT PERFORMANCE**

BIDDER hereby agrees to complete the construction work in accordance with the following schedule:

1. The DATE OF COMMENCEMENT shall be established in Form SE-390, *Notice to Proceed*. The BIDDER shall not incur any expense chargeable to this Project until the Contract has been executed by both the Agency and the Contractor, and a Notice to Proceed has been issued.
2. The DATE OF SUBSTANTIAL COMPLETION, to be documented on Form SE-350A, *Certificate of Substantial Completion*, shall be (220) CALENDAR DAYS from the DATE OF COMMENCEMENT set forth in the SE-390, subject to adjustments as provided in the Contract Documents.
3. The DATE OF FINAL COMPLETION, to be documented on Form SE-560C, *Certificate of Final Completion*, shall be (30) CALENDAR DAYS from the DATE OF SUBSTANTIAL COMPLETION, subject to adjustments as provided in the Contract Documents.

LIQUIDATED DAMAGES AND EARLY COMPLETION AWARD

1. The undersigned further agrees that from the compensation to be paid, the Agency shall retain as Step One Liquidated Damages the amount of \$500.00 for each calendar day the actual construction time required to achieve SUBSTANTIAL COMPLETION exceeds the specified or adjusted Contract time for SUBSTANTIAL COMPLETION, as provided in the Contract Documents.
2. The undersigned further agrees that from the compensation to be paid, the Agency shall retain as Step Two Liquidated Damages the amount of \$250.00 for each calendar day the actual construction time required to achieve FINAL COMPLETION exceeds the specified or adjusted Contract Time for FINAL COMPLETION, as provided in the Contract Documents.
3. The undersigned further agrees that in full and complete satisfaction for the best efforts of the undersigned to achieve SUBSTANTIAL COMPLETION before the date established above, the Agency shall pay the undersigned an Early Completion Award in the amount of NA for each calendar day the actual construction time required to achieve SUBSTANTIAL COMPLETION is less than the originally specified Contract Time for SUBSTANTIAL COMPLETION, as provided in the Contract Documents.

AGREEMENTS

By submitting this Bid, BIDDER hereby agrees to the following terms and conditions:

1. An incomplete Bid, or information not requested that is written on or attached to this Bid Form that could be considered a qualification of the Bid, may be cause for rejection of the Bid.
2. The failure of the BIDDER to indicate a price for an ALTERNATE BASE BID shall render the Bid non-responsive. A typed or printed "No Bid", or words of similar meaning, shall render the Bid non-responsive.
3. The BIDDER shall list only SUBCONTRACTORS (as defined in the Bidding Documents) who are qualified to perform items of work as specified in the Bidding Documents or as required by any material or equipment substitutions approved at the time of bidding. No BIDDER whose Bid is accepted shall substitute another entity as SUBCONTRACTOR in place of the SUBCONTRACTOR listed in the original Bid, except for one or more of the reasons allowed by the SC Code of Laws.
4. The failure of the BIDDER to provide the name(s) of listed SUBCONTRACTORS in accordance with the SC Code of Laws shall render the Bid non-responsive.
5. Unless otherwise provided in the Bidding Documents, BIDDER will provide Performance and Labor and Material Payment Bonds, each in the amount equal to 100% of the Contract Award, as a condition of execution of the Contract. Failure to supply such bonds as required by the Contract Documents shall result in cancellation of the Notice of Intent to Award and forfeiture of the Bid Bond.
6. BIDDER agrees to provide all information requested by the AGENCY to support the AGENCY'S evaluation and determination of the BIDDER'S responsibility, including completion of Form SE-350, *Questionnaire for Contractors*. The Questionnaire shall be completed fully and returned to the AGENCY within SEVEN (7) DAYS from date of receipt by the BIDDER by certified mail. The completed Form SE-350 must be received by the Agency no later than the close of business on the seventh day. Failure by BIDDER to supply requested information with respect to responsibility may be grounds for a determination of non-responsibility.
7. The BIDDER certifies that it will provide a "Drug-Free Workplace" as that term is defined in Section 44-107-30 of the SC Code of Laws, and shall comply with the requirements set forth in Title 44, Chapter 107.

000056

SE-330 Bid Form2008 Edition
(Revised 12-12-08)

8. At any time prior to the issuance of the Notice to Proceed for this Project, this Contract may be canceled for the convenience of the State.
9. Neither the State of South Carolina nor any of its agencies, employees or agents shall be responsible for any bid preparation costs, or any costs or charges of any type, should all bids be rejected or the Project canceled for any reason prior to the issuance of the Notice to Proceed.

ELECTRONIC BID BOND

By signing below, the Principal is affirming that the identified electronic bid bond has been executed and that the Principal and Surety are firmly bound unto the State of South Carolina under the terms and conditions of the Form SE-335 included in the Bidding Documents.

(Electronic Bid Bond Number)_____
(Signature and Title)**BIDDER'S TAXPAYER IDENTIFICATION**

FEDERAL EMPLOYER'S IDENTIFICATION NUMBER: _____

OR

SOCIAL SECURITY NUMBER: _____

CONTRACTOR'S CLASSIFICATIONS AND SUBCLASSIFICATIONS WITH LIMITATIONSBD-5

(Classification)

(Subclassification)Unlimited
(Limitations)G-106354

(SC Contractor's License Number)

SIGNATUREM/andore Construction Company, LLC
(Legal Name of Person, Firm or Corporation Submitting Bid)P.O. Box 2029, Rm 10 S.C. 29063
(Mailing Address for the above)

BY: _____

(Signature)

10/19/10

(Date)

(Title)803.781.1321

(Phone)

DF-5

SE-330

RECORD ON APPEAL 347



SE-370
Notice of Intent to Award

EXH 000327

2008 Edition

AGENCY: University of South Carolina
(Agency Name)

PROJECT: H27-6071-LC Horizon I First Floor Laboratory Upfit (IDEA & SEAEPC)
(Project Number) (Project Name)

TO ALL BIDDERS:

The Agency has determined that the below-named Bidder is responsible in accordance with the requirements of the Bidding Documents and has submitted the lowest responsive Bid. The Agency hereby announces its intent to enter into a contract with this Bidder for the construction of the above-named Project, subject to the provisions of SC law.

NAME OF BIDDER(S): Rodgers Builders, Inc.

DATE BIDS WERE RECEIVED: October 19, 2010

AMOUNT OF BASE BID: \$ 3,149,000.00 (Base Bid #2)

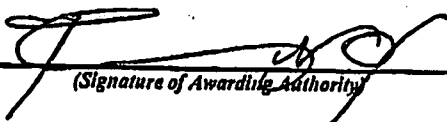
ALTERNATE(S) ACCEPTED: # N/A Total: \$ 0.00

TOTAL AMOUNT OF BASE BID WITH ALTERNATE(S): \$ 3,149,000.00 (Base Bid #2)

Remarks: (In accordance with Chapter 6 of the OSE Manual, explain any negotiations that resulted in a change in either the Base Bid or the accepted Bid Alternates)

RIGHT TO PROTEST:

Any actual bidder, offeror, contractor or subcontractor who is aggrieved in connection with the intended award or award of this Contract may protest to the State Engineer in accordance with Section 11-35-4210 of the SC Code of Laws at: CPO, Office of State Engineer, 1201 Main Street, Suite 600, Columbia, SC 29201, EMAIL: protest-ose@mmo.sc.gov

 12/03/2010
(Signature of Awarding Authority) (Date Posted)

Tom Opal Senior Project Manager
(Print or Type Name of Awarding Authority) (Awarding Authority Title)

INSTRUCTIONS TO THE AGENCY:

1. Post a copy of this form on the Date and at the Location announced at the Bid Opening.
2. Mail a copy of this Form and the final Bid Tabulation to all responsive Bidders and OSE.

SE-370

RECORD ON APPEAL 348

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.

CERTIFICATION OF RECORD

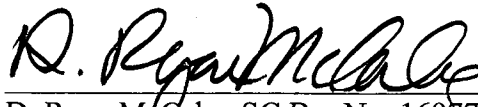
D. Ryan McCabe
McCabe, Trotter & Beverly, PC
Post Office Box 212069
Columbia, South Carolina 29221
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I certify that this Record on Appeal contains all material proposed to be included by all parties and not any other material.



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