

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), SCRCPP; Rule 41(a), SCRCPP (Vol. Dismissal/Consult); Rule 43(k), SCRCPP (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCPP; 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 1 day of Mar, 2011 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 William Dixon Robertson, III
George William Lampl, III Christian M. Emanuel
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

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

RICHLAND COUNTY
FILED
2016 FEB 29 PM 2: 19
JEANETTE W. MOBRIDE
C.C.P. & G.S.

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.

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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.

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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

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.

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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

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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*.

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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

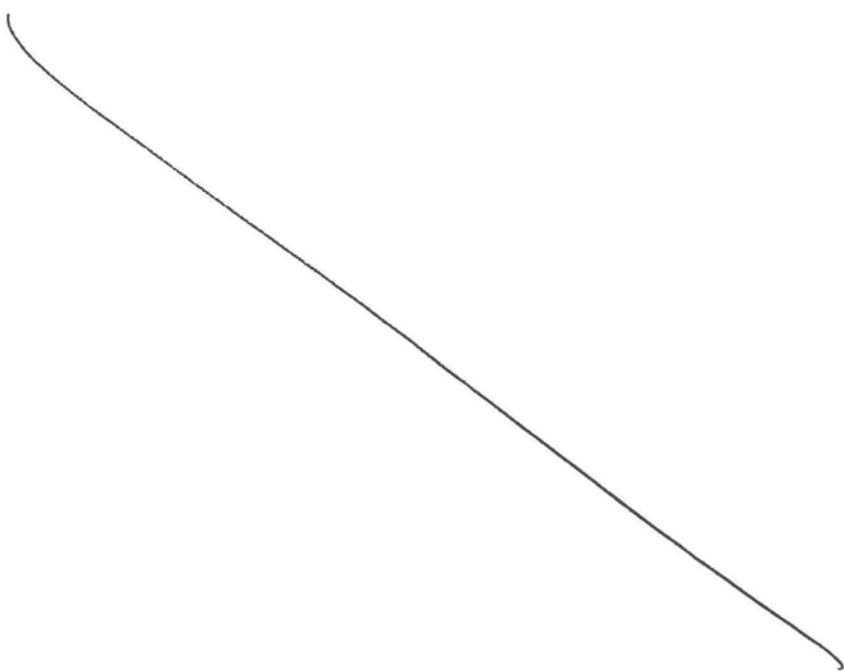
For the reasons stated above, it is therefore **ORDERED** that the decision of the South Carolina Procurement Review Panel is **AFFIRMED AS MODIFIED**.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
February 29, 2016

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