

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	
Appeal by B.L. Harbert International, LLC,	)	Case No. 2016-1
	)	
[B.L. Harbert International, LLC, Appellant,	)	
v. University of South Carolina, Respondent	)	
(Contract Controversy)]	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on May 23 – 24, 2016, pursuant to a request for review by B.L. Harbert International, LLC (Harbert) under sections 11-35-4230(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). Harbert has appealed the January 6, 2016, decision by the Chief Procurement Officer for Construction (the CPOC) denying its claim for damages relating to the installation of access flooring at the Darla Moore School of Business, a construction project<sup>1</sup> at the University of South Carolina (USC). At the Panel’s hearing, Harbert was represented by James F. Archibald, III, Esquire, and Luke D. Martin, Esquire.<sup>2</sup> Henry P. Wall, Esquire, represented USC, and William Dixon Robertson, III, Esquire, represented the CPOC.

Taking into account and considering all of the testimony, the demeanor and the credibility of the witnesses; all of the evidence, pleadings, and documents submitted by the parties; and all of the memoranda and argument submitted by the parties’ counsel, the Panel hereby submits this ORDER.

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<sup>1</sup> State Project No. H27-6069-AC-3.

<sup>2</sup> Mr. Archibald and Mr. Martin are admitted to practice law in the state of Alabama. At the Panel’s request, they moved for and were granted admission *pro hac vice* by the South Carolina Supreme Court on May 16, 2016.

## I. Findings of Fact

### A. Background and Contract Documents

In September of 2011, USC broke ground on a new building for the Darla Moore School of Business (the Project).<sup>3</sup> Rafael Vinoly Architects (RVA) designed the building for the Project, and Gilbane-Cumming (G-C)<sup>4</sup> served as the construction manager. Record at PRP75. The dispute before the Panel involves Harbert's contract with USC to complete Bid Package 3 of the Project on USC's Columbia campus. USC and Harbert executed the contract on August 21, 2012. Record at PRP39. Bid Package 3 "consists of building enclosure elements for the façade, roof and exterior systems, interior construction of partitions and ceiling systems, all interior finishes, rough-in and trim-out of all mechanical, electrical and fire-protection systems, and select site work for the building and grounds associated with [the Project]." *Id.* The specifications for Bid Package 3 included the installation of access flooring,<sup>5</sup> which is the subject of the instant dispute between Harbert and USC. Record at PRP156 – PRP165.

Section 10 28 13 of the parties' contract sets forth the access flooring specifications. Record at PRP156 – PRP165. The following portions of Section 10 28 13 are relevant to the issues before the Panel:

#### PART 1 - GENERAL

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<sup>3</sup> See "Groundbreaking: The Moore School's Green Building Project – Parents Weekend 2011, [http://moore.sc.edu/events.aspx?start\\_date=10%2F13%2F2010&end\\_date=4%2F5%2F2016&appointment\\_id=725](http://moore.sc.edu/events.aspx?start_date=10%2F13%2F2010&end_date=4%2F5%2F2016&appointment_id=725) (last accessed June 8, 2016).

<sup>4</sup> Gilbane-Cumming (G-C) is a joint venture of Gilbane Building Company and Cumming Corporation, a construction management firm which began in Columbia, SC. See "Cumming, Gilbane Joint Venture Leads to Successful University of South Carolina Darla Moore School of Business Opening, [http://www.ccorpusa.com/wp-content/uploads/2012/02/Cumming\\_USC\\_DarlaMoore\\_FINAL-9-12-14.pdf](http://www.ccorpusa.com/wp-content/uploads/2012/02/Cumming_USC_DarlaMoore_FINAL-9-12-14.pdf) (last accessed June 8, 2016).

<sup>5</sup> The contract provides: "Access flooring systems are proprietary portable systems composed of modular floor panels on elevated supports (understructures) forming accessible under floor cavities (air spaces) to accommodate electrical and mechanical services." Record at PRP156. In an affidavit submitted to the CPOC, Joyce Ignacio, an architect employed by RVA who served as Project Manager for the Project, stated that "[Access flooring] systems allow easy access and future reconfiguration of floor spaces and allocations without significant waste and demolition." Record at PRP569.

## 1.1 SUMMARY

A. Work Included: The Work of this Section shall include but not be limited to the following:

1. Gravity-held panels on bolted stringer understructure.
2. Cementitious filled formed steel panels.
3. Integral ramp, railings, steps and other accessories as indicated.
4. Accessories
5. Wire and power management systems.

Record at PRP156.

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## PART 2 - PRODUCTS

### 2.1 MANUFACTURERS

A. Basis-of-Design Product: Subject to compliance with requirements, provide the named product or a comparable product by one of the following:

1. ASM (FS200)
2. Haworth [sic] (TecCrete 1250)
3. Lindner (Nortec ST38 with Stone DE tile (Specified))
4. Or equal.

B. Product: As scheduled – As manufactured by Lindner or equal.

1. Color and finish to match Architects [sic] sample.
2. Concrete fill sealed with a mechanical polish.
3. For areas with high frequency of spillage (i.e. café dining area)

C. Carpet

1. As selected to match samples reference Division 9 Carpet Tile

### 2.2 FLOOR PANELS

A. General: Provide modular field panels complying with the following requirements that one person, using a portable lifting device, can interchange with other field panels without disturbing adjacent panels or understructure and that are free of exposed-metal edges with floor covering in place.

\* \* \* \*

B. Cementitious-filled panels fabricated with die-cut flat top sheet and die-formed and stiffened bottom pan formed from cold-rolled steel sheet filled internally by a lightweight cementitious material and joined together by resistance welding to form an enclosed assembly, with metal surfaces factory-applied electrically conductive epoxy paint finish. Mechanical or adhesive methods for attachment of the steel top and bottom sheets are unacceptable

C. Stone topping: As per manufacturer

Record at PRP161.

In addition to the written specifications, several Project drawings address the access flooring. Drawing A1320 designates the areas on the second level of the building where access flooring was to be installed. Record at PRP167 – PRP168; *see also* USC’s Supplemental Hearing Exhibits, Exhibit 1 at USC\_001 (a color copy of Drawing A1320 that indicates the area receiving “Access Flooring Exposed RF-1” in red and the area receiving “Access Flooring Carpet RF-2” in blue).<sup>6</sup> Drawing A8400 is the “Finish Legend” for the Project and included a general note that provided, “MANUFACTURERS INDICATED IN SCHEDULE ARE BASIS OF DESIGN. REFER TO SPECIFICATIONS FOR LIST OF ACCEPTABLE MANUFACTURERS OR PROVIDE EQUAL PRODUCT.” Record at PRP166, General Note 2.<sup>7</sup> The drawing also notes the following floor finish: “MANUFACTURERS NOTED ARE BASIS OF DESIGN. REFER TO PROJECT SPECIFICATIONS FOR APPROVED EQUAL MANUFACTURERS.” Record at PRP166, Floor Finish Note 1. With regard to the area designated RF-1, Drawing A8400 provides the following information:

ACCESS FLOORING (10 28 13)

RF-1A          ACCESS FLOORING  
                  MANUFACTURER: LINDNER  
                  STYLE: NORTEC ST38

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<sup>6</sup> The dispute before the Panel involves only the area receiving a hard finish (RF-1), not the area receiving carpet (RF-2).

<sup>7</sup> The copy of Drawing A8400 on page PRP166 of the Record is practically illegible. A more legible copy of this drawing was used by witnesses at the Panel’s hearing and is attached to this order as Panel Exhibit A.

FINISH: STONE De TILE, HONED-R10  
COLOR: GREIGE  
SIZE: 24" x 24"

RF-1B      ACCESS FLOORING  
MANUFACTURER: LINDNER  
STYLE: NORTECST38  
FINISH: STONE De TILE, STRUCTURED-R11  
COLOR: OLIVE  
SIZE: 24" x 24"

Record at PRP166.

Along with the specifications in Section 10 28 13 and the two drawings discussed above, Addendum Number Three answered pre-bid questions about the access flooring and became a part of the parties' contract. Record at PRP169. The following question and answer are relevant to the issues before the Panel:

Question 84

\* \* \* \*

f) Is the RF-1A and RF-1B a factory applied stone finish?

\* \* \* \*

Response:

\* \* \* \*

f. Yes

*Id.*

#### **B. Harbert's Bid on Access Flooring**

James Wren, a Senior Estimator for Harbert who was responsible for Harbert's bid on the Project, testified before the Panel. As the estimator, Mr. Wren testified that he worked with a team to estimate all the scopes of work for all of the different trades that would be involved on the Project. With regard to the access flooring scope of work, an estimator would consider the

specification and look at the list of manufacturers identified as “basis of design.” He testified that Harbert contacted these manufacturers (i.e., ASM, Haworth, and Lindner) to find out their authorized installers so that he could compile a subcontractors list. Mr. Wren explained that he understood that the products listed as “basis of design” were acceptable to use because they had been pre-approved by the architect. He also testified that the “or equal” option included with the list of named manufacturers meant that other manufacturers could be considered if their product satisfied the specification. On bid day, Harbert received five bids for the access flooring scope of work. *See* Record at PRP337; PRP608 – PRP626. Three of the subcontractors bid Haworth TecCrete 1250, one bid Lindner, and one bid a product not named in the specification. The bid offering the Lindner product was the highest bid received at a price of \$1,129,465.00. Record at PRP625 – PRP626. The three bids for Haworth TecCrete 1250 ranged in price from \$222,578.00 to \$370,752.00.<sup>8</sup> Record at PRP627. Bettinger West Interiors SE, LLC (BWI) was the low bidder on the Haworth TecCrete 1250, and Mr. Wren testified that he incorporated BWI’s base bid for the access flooring into Harbert’s total bid for the Project. *See* B.L Harbert’s Hearing Exhibits, BEX002 at BLH000018. Mr. Wren explained that he was mainly concerned with price in comparing the bids and only looked at the two lowest bids. He also confirmed that Harbert has a longstanding relationship with BWI. On cross examination, Mr. Wren acknowledged that he included a contingency amount in the access flooring portion of the bid, which added \$71,890 to the bid amount. However, Mr. Wren explained that this contingency amount had nothing to do with concerns about what finish was required. After Harbert was awarded the contract for the

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<sup>8</sup> Mr. Wren testified that the pricing for the five bids Harbert received were compiled into a spreadsheet so that the estimator could compare “apples to apples.” This spreadsheet is the document included in the record at page PRP627. The pricing includes each subcontractor’s base bid and alternate 1.

Project, it awarded BWI a subcontract for the access flooring in the amount of \$222,578.00, which includes the base bid, alternate 1, and bonds. Record at PRP339.

### **C. Access Flooring Submittals and Correspondence**

On August 9, 2012, Harbert submitted a request for information detail (RFI) seeking clarification about the access flooring specification with regard to the areas designated RF-1A and RF-1B on Drawing A8400. Record at PRP170- PRP172. Harbert asked:

Please clarify the finish on Access Flooring RF-1A and RF-1B. Drawing A8400 calls out Stone De Tile, Structured R-11 and Honed R-10. What is this, and is this a factory applied stone tile or can it be applied in the field? All the specifications say is “stone topping: As per manufacturer”. Please clarify.

Record at PRP171. G-C passed the request to RVA for an answer, and RVA responded:

Lindner is the basis of design for ACCESS floor system. Stone DE is the Tile Manufacturer – basis of design for stone finish selected for this project (polished concrete look). This is the stone tile that would be incorporated into the access floor system.

R10 and R11 are types of finishes. See excerpt from their website:

[Link to website page omitted.]

Each of the two tile types specified would be factory applied to the floor panel and edge banded so that edges of the stone does not chip. This cannot be done in the field. Edge banding is very important for the fit and finish as well as joint tightness i.e. air leakage for under floor air distribution.

\* \* \* \*

What was specified as the basis of design is the standard that must be met and provided for in the project.

*Id.*

On January 9, 2013, Harbert delivered its initial access flooring submittal to RVA for review and approval. Record at PRP175 – PRP204. In this submittal, Harbert and BWI proposed the installation of Haworth’s TecCrete 1250 access flooring system. *Id.* On February 11, 2013, RVA returned the submittal to Harbert marked “revise and resubmit.” Record at PRP175. The

cover page of the returned submittal bears the following note from RVA: “Provide specific product data, etc. for non-cornerlock system.” *Id.* Although the submittal bears other comments from RVA, those comments do not address the type of finish on the proposed panels. *See, e.g.*, PRP176 (noting missing or insufficient information); PRP180 (seeking an explanation of testing results); PRP182 (noting testing data does not match the specifications); and PRP183, PRP194 (noting that a non-cornerlock system is required).

Mark Wills, who served as Harbert’s assistant project manager on the Project, testified before the Panel. Mr. Wills explained that he was responsible for the access flooring submittal. In preparing any submittal, Mr. Wills testified that he looks at the specifications to determine the requirements, sends them to the subcontractor, and double-checks what he receives back from the subcontractor. For this particular submittal, Mr. Wills testified that he received RVA’s answer to the RFI and sent it to BWI. Mr. Wills also explained that he considered the finish legend in Drawing A8400, but recognized that it specified the Lindner product, not Haworth’s TecCrete 1250. Because Harbert and BWI were proposing the TecCrete 1250 product, Mr. Wills concluded the finish legend was only helpful with regard to the color specified for the areas designated RF-1A and RF-1B. For example, for the area designated RF-1A, Mr. Wills understood that BWI would need to match the color “greige.” Mr. Wills also brought a bare TecCrete 1250 access floor panel to show to the Panel. He testified that bare panels could be finished with the specified color in the factory or on site, but that BWI was planning a factory finish. Mr. Wills testified that he understood that Haworth could paint and polish the floor panel in the factory to provide a stone finish. Upon cross-examination, Mr. Wills admitted that the TecCrete product brochure indicates that TecCrete has architectural finishes available, but that Harbert had not offered an architectural finish. *See* USC’s Supplemental Hearing Exhibits, Exhibit 4 at USC\_017. Mr. Wills also

acknowledged that the brochure includes a reference to Tecnika, but testified that Harbert had not offered that product because it was not listed in the access flooring specifications.

When RVA returned the access flooring submittal on February 11, 2103, Mr. Wills understood that RVA's objections were primarily directed at the failure to offer a non-cornerlock system. Mr. Wills explained that a non-cornerlock flooring panel would be held in place by gravity and not have visible screws at the corners. Thus, in revising the access flooring submittal, Mr. Wills confirmed with BWI that they would be using a gravity held, non-cornerlock system. Harbert delivered its revised access flooring submittal on April 10, 2013. Record at PRP205 – PRP243. The revised submittal included a TecCrete technical sheet with the following note: “These panels are being special ordered to not have the screw holes. A new sample has been ordered and is in fabrication.” Record at PRP234.

RVA returned the revised submittal on April 25, 2013, again indicating that Harbert should revise and resubmit. Record at PRP205. In addition to requesting further testing information, RVA's comments on the revised submittal raised the issue of the finish, noting on the TecCrete technical sheet that “finish to be factory applied stone finish” with an arrow pointing to the statement that “Other surfaces available by special order.”<sup>9</sup> Record at PRP234. A shop drawing included with the revised submittal includes the following note regarding the finish in the non-carpeted areas: “BARE HAWWORTH [sic] TECCRETE TO RECEIVE STAIN. PANELS WILL NOT HAVE CORNERLOCK HOLES. COLOR TO BE DETERMINED.” Record at PRP241. Above this notation on the drawing, RVA commented: “[N]o concrete stain. [F]inish to be factory applied stone.” *Id.*

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<sup>9</sup> A separate note on this page indicated RVA was satisfied with the offer of TecCrete 1250 “standard grade” in the areas where the floor panels would be covered by carpet, i.e., RF-2A and RF-2B on Drawing A8400.

Mr. Wills testified that Harbert began communicating with RVA at this point because it became clear that RVA would not accept the TecCrete 1250 product in the non-carpeted areas.<sup>10</sup> Therefore, the parties began discussing and negotiating a product that would be acceptable. Mr. Wills admitted that Harbert did not present a submittal offering the special order TecCrete 1250. Nonetheless, Mr. Wills also testified that he felt that Harbert could have submitted a sample that would have met the specifications and answered RVA's concerns.

The record before the Panel includes correspondence documenting the parties' communications after the revised submittal was returned to Harbert. On May 2, 2013, G-C's Project Director, David Lindsay, wrote to Harbert expressing his concern that the access flooring issues were "dragging out" and had significant scheduling implications. Record at PRP244. Mr. Lindsay states that Harbert should consider his letter "as a Field Directive to proceed with steps as necessary to resolve the product and submittal issues with your supplier to rectify this issue and move forward." *Id.*

Joyce Ignacio, an architect with RVA who served as Project Manager on the project, also wrote to Harbert on May 2, 2013. Record at PRP245 – PRP246. In her letter, Ms. Ignacio primarily addresses the issue of the finish<sup>11</sup> on the floor panels in the areas designated RF-1A and RF-1B, noting that the finish legend "specifically called for RF-1A finish to be Stone De Tile, Honed-R10 and Stone De Tile, Structured R-11 for RF-1B." Record at PRP245. Noting that the shop drawing included in the revised submittal indicated a "field-applied stained concrete finish," Ms. Ignacio states that "Stained concrete finish is not an acceptable alternative and was not brought up as a possible substitution during the bidding phase . . . ." Record at PRP246. Ms. Ignacio also

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<sup>10</sup> The Panel notes that RVA and USC did ultimately accept the cornerlock TecCrete 1250 system in the carpeted areas and that this acceptance represents a compromise by the owner.

<sup>11</sup> The other issues raised by Ms. Ignacio in her letter are not part of the dispute before the Panel, which is limited to the question of the finish on the floor panels not receiving a carpet covering.

suggests that “the stone finish is a product available to any access flooring supplier and manufacturer . . . .”<sup>12</sup> Record at PRP246.

Harbert asked BWI to address the concerns raised by Ms. Ignacio’s letter, and BWI responded by a letter dated May 17, 2013. Record at RPP249 – PRP251. In this letter, BWI’s General Manager, Steven Przyborski, writes that BWI has proposed Haworth TecCrete 1250, which was a named “Basis of Design” product in the specifications. Record at PRP249. Mr. Przyborski concedes that Haworth does not provide a factory applied Stone De Tile finish and notes that only Lindner appears to offer that specific finish. Record at PRP249 – PRP250. Nonetheless, Mr. Przyborski notes that paragraph 2.1.B.2 of the specification calls for “Concrete fill sealed with a mechanical finish” and that “The Haworth TecCrete 1250 panels are filled with concrete, with an aggregate (stone) topping that is mechanically polished in the factory.” Record at PRP250.

On May 24, 2013, Harbert’s Project Manager, John Stacy, wrote to Ms. Ignacio and David Lindsay, G-C’s Project Director for the Project, and forwarded BWI’s letter to them. Record at PRP252 – PRP256. In his letter, Mr. Stacy states that the Stone De tile is only factory applied by Lindner and that it is not stone, but an engineered stone made up of stone components.<sup>13</sup> Record at PRP252. Mr. Stacy also notes that “Haworth TecCrete 1250 provides a factory applied stone finish. The finish consists of exposed stone aggregate in a cementitious matrix which is

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<sup>12</sup> Presumably Ms. Ignacio is referring to the De Stone finish on the Lindner NORTEC ST38 panel, which was noted on the finish legend. The Panel received testimony to the effect that applying the De Stone product or other tile topping to the TecCrete 1250 panels would require the addition of an underlayment between the TecCrete panel and the topping. Such an underlayment would defeat the purpose of access flooring because it would render the cavities under the panels inaccessible.

<sup>13</sup> William Lalor, whose testimony is more fully discussed below, testified that the Lindner floor panel is made up of components similar to drywall and therefore requires a topping to allow traffic. *See* B.L. Harbert’s Hearing Exhibits, BEX017 at 005. Mr. Lalor suggested that the Lindner panel is not cementitious as required by paragraph 2.2.B of the specification. In contrast, Mr. Lalor explained that the TecCrete floor panel is similar to concrete in that it is made up of sand, cement, and an aggregate. Regarding paragraph 2.2.C’s requirement of “Stone topping: As per manufacturer,” Mr. Lalor understood that to mean whatever the manufacturer does to satisfy a stone topping.

mechanically polished, as required by paragraphs 2.1.B.2 and 2.2.C of Specification 10 28 13.” *Id.* Mr. Stacy also notes that “Haworth TecCrete 1250 is also not stone, although it incorporates stone components, and may also incorporate pigments (stains).” *Id.* While re-iterating that Harbert and BWI have offered a product, Haworth TecCrete 1250, that complies with the specification, Mr. Stacy advises that Harbert has requested bid pricing for another manufacturer’s product that was added by Addendum Number Three. Record at PRP253. Moreover, Mr. Stacy offers the option of changing to a recently available Haworth product, the Tecnika Terrazzo panel.<sup>14</sup> *Id.* Mr. Stacy notes that these options are offered “[i]n effort to proceed with resolving the access flooring submittal issues” as directed by Mr. Lindsay. *Id.* Mr. Stacy also notes that changing to either to a different manufacturer or to the new Haworth panel would result in additional costs. *Id.*

#### **D. Construction Change Directive**

On June 3, 2013, Harbert submitted its proposal for changing from the Haworth TecCrete 1250 floor panels to the Haworth Tecnika panels. Record at PRP264 – PRP270. BWI’s quote for the change notes that the Tecnika panels will cost \$90.10 more per panel than the TecCrete 1250 panels and that they will cost more to ship. Record at PRP266. BWI’s quote indicates a total price addition of \$298,750.00 to its initial base bid of \$221,250.00. *Id.* Harbert’s change order proposal adds an additional \$25,000.00 to build a temporary platform after the installation of the understructure for the access flooring so that work could proceed while the Tecnika panels are produced and shipped from Italy. Record at PRP264. Thus, Harbert priced the cost of the change

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<sup>14</sup> A Haworth brochure offers this description:

Tecnika is a monolithic panel, made with marble cement and reinforced internally with electro-welded steel netting developed in Italy. The exposed concrete Terrazzo panel offers a unique aesthetic that feels rock solid underfoot. It is easy to maintain, can be resurfaced, and is available in 21 finishes with three gloss levels.

Record at PRP258. Tecnika is produced in Italy by Monotile Trading. See <http://monotile.com/en/> (last accessed June 8, 2016).

at \$323,750.00. *Id.* A July 1, 2013 letter from Harbert to Ms. Ignacio and Mr. Lindsay indicates that Harbert “would expect an adjustment to our contract value if this option is accepted.” Record at PRP271 – PRP272.

On July 9, 2013, USC issued Construction Change Directive No. 11 (CCD #11), which directed Harbert “to move forward with access flooring as Technica [sic] series by Haworth. This system should be utilized at non-carpet areas designated ‘RF-1A and RF-1B.’” Record at PRP274. CCD #11 did not provide for any adjustment in the price, but referenced an attached letter dated July 9, 2013. *Id.* This letter was from Mr. Lindsay and stated, “The Project Team does not feel that this Directive should result in a change in the contract sum or time at this time although we understand that B.L. Harbert does not agree with this position.” Record at PRP275. In other words, although USC issued a change directive to Harbert, it did not accept Harbert’s proposed pricing change.

Correspondence included in the record before the Panel indicates that RVA communicated directly with Haworth between July and September of 2013 to select a Haworth product that would most closely match the desired aesthetic for the Project. Record at PRP276 – PRP300. RVA finally approved, and USC accepted, floor panels from Monotile’s Le Pietre series. Record at PRP278. In her letter advising G-C of RVA’s approval, Ms. Ignacio notes:

As previously communicated, we were unable to find a color and finish that match the basis of design from the initial selection line (Technica panels) presented by Haworth. We were able to find a close match with the Le Piere [sic] series from the same manufacturer (Monotile).

Record at PRP278. It is undisputed that the Le Pietre floor panels were ultimately installed in the areas designated RF-1A and RF-1B.

Mr. Wills testified that once CCD #11 was issued, BWI was not willing to proceed with the access flooring installation because it could not afford to order the Technica panels and do the

work without a change in price. Therefore, Harbert and BWI agreed to a compromise with each absorbing a portion of the additional cost so that BWI would go forward with the work. This agreement is set forth in Subcontract Change Order 1. Record at PRP389. Under the terms of their agreement, Harbert agreed to pay BWI \$190,000 to cover a portion of the additional cost of the Tecnika panels, and BWI agreed “to immediately proceed with placement of the order for the Tecnika product and diligently monitor its production and timely delivery.” Record at PRP389. Harbert agreed that it would pursue a claim against the owner (USC) to recover the additional cost of the Tecnika panels. *Id.* Their agreement further provided that if Harbert recovered in excess of \$190,000 (less legal fees and expenses, and the cost of any temporary platform), then it would add that amount to BWI’s subcontract in the form of a change order. *Id.*

William Lalor, a Vice President at Harbert, testified before the Panel. Mr. Lalor explained that he represented Harbert in its claim before the CPOC, but that he is not a lawyer and has no legal training. In the hearing before the Panel, Mr. Lalor reviewed a claim summary sheet that details the cost increase of the change from the TecCrete 1250 panels to the Tecnika panels. Record at PRP335. This summary sheet is dated January 26, 2015 and states the total cost increase is \$392,426.<sup>15</sup> *Id.* This amount represents the additional cost of the Tecnika panels (\$298,750), the subcontractor and contractor mark ups allowed by the contract (\$80,662.50), the additional bond (\$2,655.89), and legal fees (\$10,357.50). *Id.* However, in the hearing before the Panel, Mr. Lalor testified that Harbert was not seeking to recover its legal fees, thereby reducing the amount of the claim by \$10,357.50, bringing Harbert’s claim to an amount of \$382,068.39.<sup>16</sup> Regarding the subcontract change order, Mr. Lalor testified that Harbert did not feel it had cause to terminate

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<sup>15</sup> This figure appears to be the one referenced in the CPOC’s decision as the amount of Harbert’s claim. Record at PRP5. The Panel notes that this figure has been rounded up; adding the figures in the spreadsheet actually results in a total of \$392,425.89.

<sup>16</sup>  $\$392,425.89 - \$10,357.50 = \$382,068.39$ .

BWI and proceed against its surety. In addition, Mr. Lalor confirmed the compromise reflected in the change order and stated that Harbert intends to honor its terms. Regarding the contingency amount for access flooring included in Harbert's bid on the Project, Mr. Lalor explained that it was not needed to "buy out" the access flooring subcontract so that amount went back into the overall budget. Mr. Lalor admitted that he did not know exactly where the contingency amount of approximately \$71,000 was actually spent.

#### **E. USC's Witnesses**

USC presented two witnesses at the Panel's hearing. The first witness, David Dewar, is an employee of Gilbane Building Company who became involved in the Project in September 2013. Mr. Dewar acknowledged that he was not directly involved with the resolution of the access flooring dispute. Nonetheless, Mr. Dewar testified that the specification in conjunction with the finish schedule indicate that RVA and USC intended something to top a bare panel in the non-carpeted areas. Furthermore, Mr. Dewar explained that in the industry the use of the word "stone" indicates a finished product above and beyond an aggregate. Mr. Dewar stated that USC ultimately accepted products that were not fully compliant with the specifications and that while these products were okay in the carpeted areas, they were not compliant with regard to the stone finish areas. However, Mr. Dewar also conceded that Harbert did not propose the system currently in place and that it was the result of directive issued at the urging of RVA and G-C.

David Lindsay, a Vice President at Cumming Corporation, also testified before the Panel. Mr. Lindsay served as the Project Director for G-C and was involved with Bid Package 3 from the time contract negotiations began. Mr. Lindsay testified that the access flooring in the non-carpeted areas were in public spaces and dining areas and were intended to have a "nice, upscale looking finish." Mr. Lindsay admitted that this was his first experience with using access flooring in a

high visibility area and that he was more accustomed to seeing it in a “back of house” application. Mr. Lindsay explained that stone could mean natural or engineered stone, and that nothing in the flooring specification discussed a field applied concrete stain. Mr. Lindsay testified that RVA and USC consistently took the position that the stone finish had to be factory applied, but that Harbert kept offering TecCrete 1250 with no finish. Mr. Lindsay explained that he wrote his May 2, 2013, letter in an effort to break the impasse over the stone finish because he knew that products ordered from overseas had a longer lead time that could impact the construction schedule. However, Mr. Lindsay said that his letter ultimately did not help because the construction change directive had to be issued in July of 2013. Mr. Lindsay also testified that USC compromised on the access flooring by allowing a cornerlock system in the carpeted areas and accepting a lower load capacity in the Tecnika panels. On cross examination, Mr. Lindsay admitted that the specification could have been clearer with regard to the access flooring in the carpeted versus finished areas. Mr. Lindsay also testified that USC never received a polished sample of the TecCrete 1250.

## **II. Conclusions of Law**

On November 5, 2013, Harbert initiated this claim before the CPOC against USC relating to the access flooring dispute.<sup>17</sup> On January 6, 2016, the CPOC issued a written determination in which he denied Harbert’s claim, finding that Harbert knew or should have known that TecCrete

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<sup>17</sup> The Panel recognizes that Harbert filed a separate claim on May 22, 2015, related to construction delays and impacts to the Project. This claim is currently pending before the CPOC and has yet to be heard. In its pre-hearing brief to the Panel, USC included a footnote noting that it had never consented to the bifurcation or splitting of issues arising out of the Project and that “USC fully reserves all rights to argue the preclusive effect of this matter with regard to . . . any future or pending controversies or decisions.” See Pre Hearing Brief of The University of South Carolina, n. 3 at 4. At the beginning of the Panel’s hearing, counsel for Harbert asked the Panel to clarify that the access flooring issue was the only issue before it for resolution. The Panel decided that it could only consider and decide the access flooring issue that was brought before it and that was the subject of the CPOC’s January 6, 2016, written determination. The Panel takes no position as to any effect its decision in the instant case may have on the other claim still pending before the CPOC.

1250 did not meet the Project's requirements for a gravity held installation<sup>18</sup> and a factory applied finish. Moreover, the CPOC ruled that USC's inclusion of TecCrete 1250 in the list of "basis of design" manufacturers was a patent ambiguity in the bid specifications that Harbert should have protested prior to bidding. In his decision, the CPOC also denied USC's counterclaim based on an assertion of diminished value on the grounds that Harbert forced USC to accept a non-compliant access flooring system in order to meet the Project schedule. Harbert timely appealed the CPOC's decision on January 14, 2016. Record at PRP17 – PRP27. Although USC elected not to appeal the decision, it did send a letter on January 19, 2016, reserving "all rights to all defenses, including the right of set-off against any claims Harbert may assert arising from or relating to the diminution in value of the alternative tile provided which was raised on the counterclaims." Record at PRP28.

This appeal is before the Panel pursuant to section 11-35-4410(1)(a) of the Procurement Code, which charges the Panel with the responsibility to conduct a *de novo* review of a CPO's written determination. S.C. Code Ann. § 11-35-4410(1)(a) (2011). In previous contract controversy cases, the Panel has observed that the CPO's order has no precedential value and that "the Panel is not bound by any aspect of it" in conducting a *de novo* hearing. *In re: Protest of McCrory Constr. Co.*, Panel Case Nos. 1994-13 & 1995-7 at 2 – 3 (May 29, 1995); *see also In re: Protest of M.B. Kahn Constr. Co.*, Panel Case No. 1995-13 at 7 (January 18, 1996) ("[T]he Panel's *de novo* hearing allows the Panel to evaluate the evidence presented and render a decision. The Panel rejects any suggestion that the Panel is bound by the decision of the Architect [interpreting the contract specifications] or the CPO.") Therefore, in accordance with Panel practice, the Panel

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<sup>18</sup> The record before the Panel reflects that TecCrete 1250 is available in a gravity-held option. Record at PRP194. However, USC agreed to accept the cornerlock TecCrete 1250 in the carpeted areas. In the appeal before the Panel, both parties focused on the issue related to the stone finish and did not address this particular finding by the CPOC.

heard anew the issue related to the finish on the non-carpeted access floor panels and allowed the parties to present additional evidence on it.

Harbert maintains that it acted reasonably in bidding TecCrete 1250 for the non-carpeted areas because the product was specifically listed in the access flooring specification. USC contends that the specifications, drawings, and Addendum Number Three all indicate that a factory applied stone finish or topping was required in the non-carpeted areas and that Harbert acted unreasonably in offering stained TecCrete 1250 instead of stone. Both parties expressed dissatisfaction with the CPOC's conclusion that the specifications were patently ambiguous. For the reasons discussed below, the Panel finds that the access flooring specifications involve a latent ambiguity made apparent by RVA's interpretation of the specifications, and decides this case based on Panel precedent.<sup>19</sup>

The Panel previously considered a specification that named "accepted" manufacturers in the context of a contract controversy in the case of *In re: Protest of M.B. Kahn Construction Co., Inc.*, Panel Case 1995-13 (January 18, 1996). The *Kahn* case involved the installation of water heaters on a State project where M.B. Kahn served as the general contractor and Southern Contracting, Inc. (Southern) was the mechanical and electrical subcontractor. The specifications for the installation listed pre-approved water heater manufacturers, including A.O. Smith (Smith) and Pressure Vessels, Inc. (PVI). Kahn, through its subcontractor Southern, based its bid on a Smith water heater, and twice offered submittals to the project's architect and engineer containing information for the Smith water heater. Both times the submittals were rejected, based on the Smith water heaters' smaller storage capacity and perceived slower recovery rate in comparison

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<sup>19</sup> Harbert urged the Panel to adopt the federal contract case of *R.A. Glancy & Sons, Inc., v. Department of Veterans Affairs*, 16-1 BCA ¶ 36,217 (Civilian Board of Contract Appeals, Jan. 15, 2016). The Panel declines to do so in this case, finding that its own precedent adequately resolves the issues before it.

to the named PVI model. The State required Kahn and Southern to install the PVI water heaters, and Kahn brought a contract controversy claim to recover the increased cost of the water heaters.

The project engineer in *Kahn* acknowledged that he drafted the specifications considering only the PVI water heaters and did not confirm that the other listed manufacturers could meet the specifications. The Panel noted that testimony before it made it clear that the State would only accept the PVI water heater as meeting all of the specifications. Thus, the Panel observed that “The specifications appear to be competitive and nonrestrictive with a list of approved manufacturers, while actually being restricted to one manufacturer.” *Id.* at 4. The Panel found that the project engineer and architect should have interpreted the specifications in a non-restrictive manner and should have considered whether the offered water heater could meet the performance requirements of the specifications. Because they did not do that, the Panel considered testimony presented by Kahn that the Smith water heaters did meet the performance requirements and ruled that the State was responsible for the price difference. However, reduced Kahn’s recovery by 25% because Southern delayed the second submittal for more than a year and failed to seek substitution of the Smith water heater on the basis that it could meet the performance requirements.

Several parties filed motions for reconsideration in the *Kahn* case, but the Panel denied the motions and declined to alter its original order. *In re: Protest of M.B. Kahn Constr. Co., Inc.*, Panel Case No. 1995-13(II) (March 13, 1996). However, the Panel did offer this further guidance:

The Panel affirms its ruling that an Architect must look to performance specifications and not just reject items based on descriptive specifications where the specifications appear to be competitive by including an approved manufacturer’s list, but in fact, are proprietary in that only one manufacturer’s product can meet the descriptive specifications. The Panel’s ruling is based on the fact that the specifications were drafted using one manufacturer’s specifications without confirming that other manufacturers could meet the specifications. The root of the problem is the poorly drafted specifications. The lesson to be learned is the need for more care in drafting nonrestrictive specifications to promote

competition. Thus, the State is charged with 75% of the additional cost of the PVI water heaters over the cost of the A.O. Smith water heaters.

*Id.* at 2. The Panel also noted, “To present specifications as competitive, with several preapproved manufacturers, and then interpret the specifications to be limited to one manufacturer, restricts competition and is unfair to bidders.”<sup>20</sup> *Id.*

Like the specifications in *Kahn*, the Panel finds that the access flooring specifications in the instant case appear to be competitive by listing several acceptable manufacturers and products, but were interpreted in an overly restrictive manner. In this case, Haworth’s TecCrete 1250 is a named “basis of design” product. As such, Harbert acted reasonably in bidding TecCrete 1250 and in expecting that it would be able to install it in all areas of the Project receiving access flooring. The finish legend and Addendum Number Three did not remove TecCrete 1250 from the “basis of design” products. Indeed, the finish schedule refers bidders back to the list of accepted manufacturers, which specifically names Haworth TecCrete 1250 without further description regarding finish. Furthermore, the Addendum’s answer to a bidder’s question regarding the requirement of a factory applied stone finish did not exclude TecCrete 1250, which, according to testimony and documents before the Panel, has an aggregate stone cementitious fill that can be mechanically polished in the factory and could be stained to match the desired color. Harbert could not have known that RVA and USC were primarily concerned with aesthetics over performance until its revised access flooring submittal was returned with notes questioning its proposed staining of the TecCrete 1250 panels.<sup>21</sup> Therefore, since it was required to install a more

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<sup>20</sup> Although the *Kahn* case did not discuss the shortcomings of the specifications in terms of ambiguity, those shortcomings did not become evident until the project engineer and architect interpreted them to allow only one manufacturer’s product. Because *Kahn* could not have known based on reading the specifications that the State would only accept one manufacturer’s product, the Panel concludes that its *Kahn* decisions address a latent ambiguity and provide a framework for analyzing the instant dispute.

<sup>21</sup> The testimony before the Panel made it clear that RVA and USC clearly desired the installation of Lindner Nortec ST38 with the Stone De tile topping for its “upscale look.” Even though RVA and USC ultimately accepted a non-

expensive product to meet the desired aesthetics, Harbert is entitled to recover the difference in price. However, the Panel finds that Harbert should have submitted a polished and stained sample with its initial submittal. Including such a sample would have brought the issue to RVA's attention at an earlier date. For this reason, the Panel finds that USC is responsible for 75% of the cost difference and Harbert is responsible for 25%.<sup>22</sup> In addition, the Panel finds that USC is not entitled to a set-off based on the contingency amount included in Harbert's bid for access flooring because that amount went back into Harbert's general budget for the Project and because USC cannot rely on that amount to cover increased costs resulting from its construction change directive.

In light of its finding that Harbert is entitled to recover 75% of the additional cost of installing the alternative access flooring, the Panel must now address the amount to be awarded. Considering the documents and testimony before it, the Panel finds that Harbert is actually out of pocket \$190,000, which is the amount it paid to BWI to continue work on the access flooring. To this amount, the Panel adds the 17% subcontractor mark up of \$32,300 and the 10% general contractor mark up of \$19,000, both of which are allowed by the terms of the parties' contract.<sup>23</sup> These additions bring the total to \$241,300, of which the Panel hereby awards Harbert 75%, or \$180,975.<sup>24</sup>

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Nortec product, this compromise does not change the fact that RVA interpreted the specifications in a restrictive manner, resulting in unfairness to Harbert which reasonably relied on listing of "basis of design" manufacturers.

<sup>22</sup> Five Panel members participated in the hearing held May 23 and 24, 2016. All agreed that Harbert was reasonable in offering TecCrete 1250, but there was a split opinion regarding apportionment of fault. Three Panel members apportioned fault at 75% USC and 25% Harbert. Two Panel members disagreed with this apportionment and would have held USC 60% at fault and Harbert 40% at fault.

<sup>23</sup> The Panel disallows recovery of any additional bond because performance of the contract has been completed.

<sup>24</sup> As previously noted, two Panel members dissented from the apportionment of fault and would likewise reduce the amount of Harbert's recovery to 60% of \$241,300, or \$144,780.

**Conclusion**

Therefore, for the reasons stated herein, the Panel hereby reverses the decision of the CPOC, resolves the contract controversy in favor of Harbert, and awards Harbert damages in the amount of \$180,975.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

  
BY: C. Brian McLane, Sr., Chairman

Date: June 23<sup>rd</sup>, 2016.  
Columbia, SC