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## Protest Decision

**Matter of:** Triad Mechanical Contractors, Inc.

**Case No.:** 2020-008

**Posting Date:** April 28, 2020

**Contracting Entity:** Aiken Technical College

**Solicitation No.:** H59-N039-FW

**Description:** Aiken Tech College 900 Building Boiler Replacement

### DIGEST

Protest of restrictive specifications is dismissed as moot. Triad Mechanical Contractors' (Triad) letter of protest is included by reference. (Attachment 1)

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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<sup>1</sup> The State Engineer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## BACKGROUND/ANALYSIS

FORM SE-310 posted:	01/15/2020
Addendum 1 posted:	01/29/2020
Protest Received	01/30/2020

Aiken Technical College issued this request for bids on January 15, 2020 to attain the services of a contractor to replace the boiler in a building on its campus. The solicitation required any potential bidder to have a GC-BL license or a MC-1P with MC-HT license to perform the work. The solicitation was amended on January 29, 2020. Triad protested the solicitation on January 30, 2020, alleging that the requirement for a GC-BL license or a MC-1P with MC-HT license was unduly restrictive:

*The basis for this Protest is that certain language included on the FORM SE-310, Invitation for Bids, Addendum I, and other portions of the bid documents purport to require a GC-BL license or a MC-1P with MC-HT license as a standard of responsibility; and after Addendum I, the language purports that the prospective bidder must be “licensed per LLF requirements”; and this language/requirement directly contradicts the specific statutory language which permits the work of this project to be performed by a contractor holding solely a MC-HT license.*

(emphasis in original)

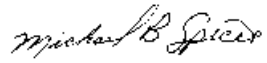
On February 10, 2020, Aiken declared an emergency stating that building 900 had been without heat since the boiler stopped operating on January 2, 2020 and continued use of the building without permanent heat potentially endangers the property and personnel within the building until heat is restored. Aiken awarded a contract to McCarter Mechanical Inc. of Spartanburg, SC, under the emergency procurement provisions in Section 11-35-1570 of the Procurement Code. (Attachment 2) According to the procurement officer, work is nearly completed as of this date. Since there is no longer a need for the services solicited under this contract, the solicitation is effectively cancelled and the protest of Triad Mechanical Contractors, Inc. is moot.

## DECISION

For the reasons stated above, the protest of Triad Mechanical Contractors, Inc. is dismissed.

Protest Decision, page 3  
Case No. 2020-008  
April 28, 2020

For the Office of the State Engineer

A handwritten signature in cursive script that reads "Michael B. Spicer".

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Michael B. Spicer  
Chief Procurement Officer



January 30, 2020

**Via Email and Facsimile:**

Chief Procurement Officer for Construction

Office of State Engineer

[protest-ose@mmo.sc.gov](mailto:protest-ose@mmo.sc.gov)

Facsimile: 803-737-0639

File Name: 2000102 – Triad Mech (Protest of Aiken Bldg 900 Boiler)  
Solicitation No.: H59-N039-FW  
RE: Protest of Triad Mechanical Contractors Inc of the Invitation For  
Design-Bid Build Construction Services (FORM SE-310) dated 01/15/20

**PROTEST OF TRIAD MECHANICAL CONTRACTORS, INC.**

Dear Sir/Madame:

Please accept this letter as Triad mechanical Contractors, Inc.'s ("Triad") protest of the following:

- 1) Portions of the Notice of Invitation for Bids (Form SE-310) for Project H59-N039-FW, Aiken Tech College 900 Building Boiler Replacement, dated January 15, 2020;
- 2) Specific Language of Addendum I, dated January 29, 2020;
- 3) Any and all language in the bid documents, drawings, specifications, and/or other procurement related documents which purport to require a GS-BL license and disallow an MC-HT license in order to be declared "responsible" to perform the boiler related work of this project.

Triad has standing to file this Protest as it is an aggrieved prospective bidder, who holds contractor licenses with the State of South Carolina which specifically permit Triad to perform some or all of the scope of work of this project. Triad holds the following licenses: MC-HT, MC-PB, MC-AC, GC-BD, GC-IR. Triad believes that the Bid Documents have been written with a specific unlawful intention in mind; that intention is to define Triad as being non-responsible

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3674 Old Charleston Hwy, Johns Island, SC 29455, Inside the "Triad Building"  
Phone (843) 556-2958 -- Facsimile (888) 745-8449 -- [eric@laqlaw.com](mailto:eric@laqlaw.com)  
[www.laqlaw.com](http://www.laqlaw.com)

to self-perform the boiler related work of this project because Triad has a MC-HT license and not a GC-BL license.

The protest is timely filed because it is filed within fifteen (15) days of the posting date of the FORM SE-310, within fifteen (15) days of Addendum I, and prior to the receipt of bids for the project.

**Summary of Legal Basis for Protest:**

*The basis for this Protest is that certain language included on the FORM SE-310, Invitation for Bids, Addendum I, and other portions of the bid documents purport to require a GC-BL license or a MC-1P with MC-HT license as a standard of responsibility; and after Addendum I, the language purports that the prospective bidder must be “licensed per LLF requirements”; and this language/requirement directly contradicts the specific statutory language which permits the work of this project to be performed by a contractor holding solely a MC-HT license.*

Subsequent to the drafting of this protest on January 29 and prior to filing on January 30, the protestor received the Addendum No.: I, dated January 29, 2020, which was distributed at 5:41pm. Curiously, this includes a change to the SE-310 form and other areas regarding scope of work being instituted just hours after the engineer questioned the OSE regarding why the OSE mandated a MC-1P license with the MC-HT when there was no “process piping on the project”.

Subsequent to the 01/29/20 inquiry from the engineer of record the description of services was revised to: “REMOVAL OF EXISTING BOILER AND INSTALLING A NEW CONDENSING BOILER, PIPING, CIRCULATOR PUMP, ELECTRICAL, AND CONTROLS FOR A FULLY FUNCTIONING HEATING HOT WATER SYSTEM FOR BUILDING 900 OF THE AIKEN TECHNICAL COLLEGE. PRIME BIDDERS SHALL BE LICENSED PER LLR REQUIREMENTS.” See Addendum I, dated 01/29/20.

*Of particular note here is the language, “PRIME BIDDERS SHALL BE LICENSED PER LLR REQUIREMENTS.” The Protester specifically protests against the inclusion of this language as part of Addendum I, because it is in direct violation of the laws of the State of South Carolina.*

South Carolina Statutes define contractor license classifications and the scope of work permitted under those classifications. “LLR Requirements” whatever that is purported to mean, does not, and cannot reduce or limit the scope of a particular license classification that is established by

State Statute. With specific reference to the project at issue, SC Code 40-11-410(5)(b) authorizes the boiler related work of this project, Aiken Bldg 900 Boiler Replacement, to be performed by a contractor possessing a MC-HT license even in the absence of a GC-BL license.

A policy established by the LLR's Contractor Licensing Board at the April 19, 2018 meeting (or any other meeting for that matter) does not, and cannot, limit the scope of existing licenses which were granted by SC Statute. There is a process for passing regulations under the Administrative Procedures Act; but this process was not used. There is a process for amending laws via the SC Legislature, but this process was not used. The LLR cannot use the OSE to implement an unlawful policy as though it were law.

**Summary of Facts Relevant to Protest:**

On April 19, 2018 the South Carolina Contractor's Licensing Board held a meeting during which the members of the Board adopted a policy in executive session which simply stated is: "a boiler license is required for an individual to engage in boiler work and that individuals with a heating license are not allowed to engage in boiler work". This rule/policy of the LLR was established by virtue of an executive session discussion, a motion by Mr. Richardson that this rule be established, the motion was seconded by Mr. Lehman, and carried unanimously. The Board did not comply with the procedures of the SC Administrative Procedures Act for establishing a regulation; nor did the Board submit its "policy" to the Legislature for consideration as a legislative amendment to existing law; thus, it has absolutely no legal effect.

The persons who voted in favor of this new rule/policy were: James Lady (Board Chair), Scott Appleton, Daniel Lehman, Legrand Richardson, Jr., Lewis Caswell, Kimberly Lineberger, Frank Walker, and Charles White. Persons who were present and potentially influencing this vote were: Georgia Lewis (Advice Counsel), Roger Lowe (Board Administrator), Shaker Thomas (Program Assistant), Daniel Gourley (Office of Disciplinary Counsel), Todd Bond (OIE, Chief Investigator), Ron Spiker (Chief Boiler Inspector) and Shirley Dallas-Gerrald (Court Reporter). Persons who are identified in the meeting minutes as influencing the vote are: Roger Lowe, Georgia Lewis, and Ron Spiker.

***The rule in question, "a boiler license is required for an individual to engage in boiler work and that individuals with a heating license are not allowed to engage in boiler work" is directly opposed to current statutory law.***

***The applicable statutory law allowing the holder of a heating license to engage in boiler work is SC Code 40-11-410(5)(b). SC Code 40-11-410(5)(b) defines "Heating", it states: "Heating which includes installation, replacement, alteration, and repair of heating equipment and***

***systems in buildings which require the use of high or low pressure steam vapor or hot water including all piping, ducts, and mechanical equipment within, adjacent to, or connected with a building and the installation of necessary gas lines if any of this equipment is gas fired.”***

The scope of work of the project at issue, including the ‘boiler replacement’ is included in the language of SC Code 40-11-410(5)(b). Many of the contractor licensing classifications overlap too some degree. The creation of the GC-BL license does not act to reduce the scope of the MC-HT license.

It is curious that neither the CPO of Aiken Technical College nor the Engineer of Record, DWG Consulting Engineers, is the source of the unlawful bid inclusion in this IFB. The Office of State Engineer, acting under direct instructions from the CPOC, John White, issued a written directive to Will Billard, DWG Consulting Engineers specifically instructing him to include this language.

On January 29, 2020, DWG Engineers asked Fred Walker, OSE, for clarification because there was no process piping in the scope of work of the project and was told it was because the “LLR states it that way” and “is based on the information provided by LLR in the SC Contractor’s Licensing Board Meeting Notes of April 29, 2018”. This demonstrates that the OSE’s only basis for forcing this policy upon Aiken Technical College is the April 29, 2018 LLR meeting. It also shows that the OSE is acting as a co-conspirator with the Contractors Licensing Board of the LLR to enforce an otherwise unlawful rule/policy which was not passed in accordance with the requirements of the administrative procedures act; and furthermore, is directly in opposition of the existing state statutes.

Later in his email, Fred Walker states “We had a protest decision recently in which this interpretation of the LLR’s restrictions was determined not to be arbitrary or capricious (in other words, it’s a reasonable position). It is presently being appealed.” This statement is relevant because he is specifically referring to Triad’s protest of the St. Matthews Project, where all bidders were declared ‘non-responsible’ because they possessed MC-HT licenses rather than GC-BL licenses. This is evidence that the OSE is a co-conspirator with the LLR to enact otherwise unlawful policies for the following reasons:

1. In the St. Matthews Project, the CPOC issued a decision on the protest while denying the Protestor a hearing on the matter.
2. The CPOC’s decision was presented as though he was an independent arbiter of the issue, which was later discovered to be completely false. The truth is that the OSE specifically directed the CPO and Engineer of Record on the St. Matthews Project that a GC-BL license was required and that the bidders could not perform the work with a MC-HT license.

3. This decision is currently on appeal.
4. Documents have been discovered during the course of the appeal that indicate that CPOC John White communicated with the LLR personally, and that communications between the LLR and the OSE occurred prior to the protest in the St. Matthews Case.
5. These facts indicate that the CPOC, John White, should have recused himself for this obvious conflict of interest; but instead, he chose to issue a decision which up-held the policies and directives that he specifically instructed his office to compel CPO's and Engineers of Record to enact.

**CPOC's Conflict of Interest:**

The CPOC must recuse himself from presiding over this Protest due to express conflicts of interest. The office of OSE, acting under the direction of the CPOC, John White, are the very source of the inclusion of the licensing mandate which is being protested. The CPOC cannot act as an independent and unbiased arbiter of a dispute where he is the very party whose action is being opposed. Additionally, in the protest of Triad v St. Matthews, which is currently on appeal, the CPOC failed to disclose the facts relating to his conflict of interest, a clear-cut ethics violation for any judicial officer; and the CPOC sits as a quasi-judicial officer.

The opinion expressed by the Contractor's License Board at the meeting on April 19, 2018 is nothing more than a statement of opinion. This opinion/policy of the LLR is not law. It does not alter the law. The CPOC and the Office of OSE are engaging in a campaign to enforce this non-law upon public expenditures by the State, in violation of existing statutes. The CPOC / OSE, cannot issue written instructions to the CPO's and Engineers of Record, requiring them to disqualify bidders with a MC-HT license from doing boiler work integrated into heating systems and then preside over the protests of their own actions.

Proof that the OSE is complicit as a co-conspirator with the LLR Contractor Licensing Board on this project is found in OSE Comment no.5, transmitted from the OSE to the engineer of record, which states "5. Drawings, C001, 1) Please modify[ing]sic the wording of the last sentence of the Scope of Work to state; 'A special standard of responsibility shall be required of all prime bidders that they hold the license GC-BL (or MC-1P with MC-HT) as required by LLR to install this boiler.' 2) in the Electrical Codes and Standards, remove NFPA 101".

The CPOC has an ethical obligation to recuse himself from presiding over this protest due to conflicts of interest. The standard is "appearance of impropriety"; the CPOC's situation is far more severe, for the CPOC has a direct conflict of interest; he is being asked to preside over a protest where he is an active participant in the action complained of.




*To be clear, the conspiracy which the CPOC and the Office of OSE are accused is articulated as follows:*

*"The OSE and the LLR have conspired to prevent contractors possessing a MC-HT license from bidding and/or performing work upon heating systems which include a boiler as part of the system in direct violation of SC Code 40-11-410(5)(b). The LLR established the policy on April 19, 2018 and the OSE has on multiple occasions, including the Aiken Bldg 900 Project being protested, directed the engineer of record to apply this licensing policy to the responsibility determination of the solicitation. The CPOC, as the head of the OSE, was directly involved in directing members of the OSE to follow this policy, and has a direct conflict of interest rendering it unlawful for him to preside over protests of this policy."*

The Protestor incorporates by reference the invitation for bids (FORM SE-330), the drawings and specifications for the project, the solicitation documents, the full content of the OSE's file on this project (Aiken Tech College Bldg 900), the full content of the OSE's file on the St. Matthews Project, all communications by and between the OSE's office and the LLR relating to boilers licensing GC-BL and MC-HT, all communications between the OSE's office and the procuring agencies and their design professionals. The protestor will have to supplement the record as not all of these documents are currently in the protestor's possession.

Should you have any questions, please feel free to contact me at 843-556-2958.

Sincerely,

  
Eric B. Laquiere, Esq.  
Laquiere Law Firm

EBL

Cc: President, Office of Admin. [mahanf@atc.edu](mailto:mahanf@atc.edu); Toni Marshall [marshalt@atc.com](mailto:marshalt@atc.com) Enclosures: FORM SE-310 dated Jan 15, 2020, communications from Walker to Billard dated Jan 29 2020, Addendum No. I dated Jan 29, 2020, communications from Billard to protestor, excerpt from April 19, 2018 meeting minutes

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**MMO/OSE - 103  
JUSTIFICATION FOR EMERGENCY PROCUREMENT**

**AGENCY:** Aiken Technical College  
**PROJECT NAME:** Aiken-900 Building Boiler Replacement  
**PROJECT NUMBER:** H59-N039-FW

Based upon the following determination, the proposed procurement action described below is being procured pursuant to the authority of SC Code § 11-35-1570 and SC Regulation 19-445.2110.

This Agency proposes to procure:

A replacement for the boiler in building 900 that is no longer operational  
(1)

as an Emergency Procurement from:

McCarter Mechanical Inc 685 John Dodd Rd Spartanburg SC 29303  
(2)

The basis for this emergency determination and the reason no other vendor is suitable is:

The building has been without heat since the boiler stopped operating on January 2, 2020. Continued use of the building without permanent heat potentially endangers the property and personnel within thte building until heat is restored.  
(3)

**BY:**  **DATE:** 2/10/2020  
*(Signature of Authorized Agency Representative)*

**PRINT NAME:** Forest E Mahan **TITLE:** President

- NOTES:
1. Enter description of goods or services to be procured.
  2. Enter name of emergency contractor.
  3. Enter the determination and basis for emergency procurement.

**THE DRUG FREE WORK PLACE ACT APPLIES TO ALL EMERGENCY PROCUREMENTS OF \$50,000 OR GREATER.**

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised June 2019)*

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.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILING FEE: Pursuant to Proviso 111.1 of the 2019 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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

- 
1. What is your/your company's monthly income? \_\_\_\_\_
  2. What are your/your company's monthly expenses? \_\_\_\_\_
  3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

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For official use only: \_\_\_\_\_ Fee Waived      \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

**NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.**