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(803) 737-0600  
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## Decision

**Matter of:** Request for Resolution of a Contract Controversy by South Carolina Museum Commission

**Case No.:** 2020-127

**Posting Date:** April 20, 2020

**Contracting Entity:** South Carolina Museum Commission

**Description:** Planetarium/Observatory/Theater Construction Project

### 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.

### BACKGROUND

The South Carolina Museum Commission (Museum) entered into contracts with Gilbane Building Company, (Gilbane) general contractor and Clark Patterson Lee, (CPL) architect, beginning in December 1996 to design and construct a 4D theater. Mr. James “Chuck” Archie attended a presentation at the theater on November 4, 2016, fell and suffered an injury, and

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

brought legal action against the Museum alleging that the lights in the theater had not been turned on or were very low and the stair steps in the theater were not visibly lighted or otherwise marked in October 2018. The Museum maintains that any structural defects in the lighting and markings at the theater that might have contributed to Mr. Archie's injury are the result of the work performed by Gilbane, and CPL and that Gilbane and CPL are contractually obligated to indemnify the Museum against Mr. Archie's complaint. Gilbane and CPL disagree that they are obliged to indemnify the Museum. The Museum requested resolution of a contract controversy between the parties under Section 11-35-4230 on November 1, 2019, requesting a determination of whether CPL and Gilbane are required to indemnify the Museum in this particular circumstance.

## **ANALYSIS**

A certificate of substantial completion was issued for the Planetarium/Observatory/Theater project by CPL on August 12, 2014 and provides in part:

The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion of the Project or portion designated above is the date of issuance established by this Certificate, which is also the date of commencement of applicable warranties required by the Contract Documents, except as stated below:

(Attachment 2)

The South Carolina Office of State Engineer issued a Temporary Certificate of Occupancy on August 12, 2014. (Attachment 2)

Section 11-35-4230(2)<sup>2</sup> sets the time limits under which such a request must be filed:

A request for resolution of contract controversy must be filed within one year of the date the contractor last performs work under the contract; except that in the

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<sup>2</sup> Section 4230(2) was amended by Act 41 of 2019, but the amendment does not apply to this dispute, as the amendment applies only to solicitations issued after May 13, 2019.

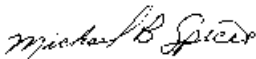
case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

The Chief Procurement Officer's jurisdiction to resolve a contract controversy in this case is statutorily limited to August 11, 2015. *See Appeal by Univ. of South Carolina v. Loveless Comm. Contracting, Inc.*, Panel Case No. 2018-1 ("The Panel also finds that although the language of the one-year time limitation does not use the term 'statute of repose,' it clearly operates as one because it begins to run from the time of a designated event -- the date the contractor last performs work.") The Museum did not file its claim until November 1, 2019, and consequently the Chief Procurement Officer lacks jurisdiction to rule on this matter.

## **DECISION**

For the reasons stated above, the request for resolution of a contract controversy by the South Carolina Museum Commission between it and the Gilbane Building Company and Clark Patterson Lee Professional Corporation is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

## BOYKIN & DAVIS, LLC

Attorneys and Counselors at Law

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COLUMBIA, SOUTH CAROLINA 29211

Kenneth A. Davis  
kdavis@boykinlawsc.com

October 31, 2019

**VIA ELECTRONIC & U.S. MAIL**

Mr. Mike Spicer, Chief Procurement Officer  
State Financial Accountable Authority  
Procurement Services  
1201 Main St., Suite 600  
Columbia, South Carolina 29201

Re: James "Chuck" Archie v. South Carolina Museum Commission  
C.A. No.: 2018-CP-40-5660

Dear Mr. Spicer:

This firm represents the South Carolina Museum Commission ("SCMC") in a third-party personal injury action that arises from an alleged incident in the 4-D theater on November 4, 2016, where it is alleged that because the theater was poorly lit, the individual did not see a step which caused him to fall. As we have reviewed the contracts for the construction and installation of the 4-D theater, we believe it is possible to pursue third-party indemnification claims against the architect and general contractor. This letter is submitted pursuant to S.C. Code Ann. §11-35-4230(2) as our Request for Resolution regarding the requirement of indemnification by these two (2) parties.

As we understand it, Gilbane Building Company ("Gilbane") is a Corporation organized and incorporated in Rhode Island. Gilbane is registered and doing business in the State of South Carolina and served as the general contractor for the construction of the 4-D theater. Clark Patterson Lee, PC ("CPL") is a Corporation organized and incorporated in New York. CPL is registered and doing business in the State of South Carolina and was the architect that designed the 4-D theater. SCMC entered into procurement contracts for the design, construction, and installation of a 4-D theater within the South Carolina State Museum with Gilbane and CPL which included the design and installation of lighting for the 4-D theater, which is the subject of the third-party's claim.

Specifically, the contracts for the general contractor, as well as the architect, contain indemnification clauses and liability insurance provisions naming the museum as an additional insured. The contract for the general contractor contains a liability insurance provision which required the museum be named as an additional insured for completed operations.

Mr. Mike Spicer, Chief Procurement Officer

October 31, 2019

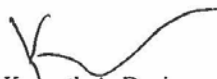
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With this Request for Resolution, we respectfully request a determination of whether CPL and Gilbane are required by these contract provisions to provide SCMC with indemnification in this particular circumstance.

A copy of the summons and complaint filed by the third-party, the amended Answer filed on behalf of SCMC, and the CPL and Gilbane contract documents are enclosed for your review. If you need any additional documents or should you have questions, please feel free to contact us.

Additionally, by copy of this letter, we hereby serve CPL and Gilbane.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth A. Davis', with a stylized flourish extending to the right.

Kenneth A. Davis

/tjb

Enclosures

cc: Mr. David A. Doser (w/o encls.)  
C.T. Corporation System (w/o encls.)  
Mr. William P. Calloway, Executive Director, South Carolina State Museum (w/o encls.)  
Charles J. Boykin, Esq. (w/o encls.)  
S. Lynn Smith, Esq. (w/o encls.)

**SE-590**  
**TEMPORARY**  
**CERTIFICATE OF OCCUPANCY**  
**STATE OF SOUTH CAROLINA**  
**OFFICE OF STATE ENGINEER**

**Temporary dates from August 11, 2014 to September 10, 2014**

**Agency:** H95 State Museum

**Project Number:** H95-9501-AC

**Project Name:** Planetarium/Observatory/Theater Constr. – A/E – Mill Building Renovation

**Project Location:** Columbia South Carolina State Museum

**Purposes & Occupancies:** Assembly Mercantile and business

**SPECIAL CONDITIONS**

**Permission to occupy the facility is hereby granted, subject to the following conditions:**

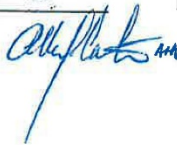
See attached lists that are required to be completed prior to Final Certificate of Occupancy. Fire watch is necessary until such time that the Authority Having Jurisdiction deems the Fire Watch is no longer necessary.

The contractor has a period of 30 days to complete punch list items.

Approved: \_\_\_\_\_

  
(State Engineer)

Date: 08-12-14



# AIA® Document G704™ – 2000

## Certificate of Substantial Completion

**PROJECT:**  
*(Name and address)*  
OPT Project  
South Carolina State Museum  
301 Gervais Street  
Columbia, South Carolina, 29202

**TO OWNER:**  
*(Name and address)*  
South Carolina State Museum  
301 Gervais Street  
Columbia, South Carolina 29202

**PROJECT NUMBER:** 11626.02/  
**CONTRACT FOR:** General Construction  
**CONTRACT DATE:**

**TO CONTRACTOR:**  
*(Name and address)*  
Gilbane Building Company  
705 Park Street  
Columbia, SC 29201

**OWNER:**   
**ARCHITECT:**   
**CONTRACTOR:**   
**FIELD:**   
**OSE:**

**PROJECT OR PORTION OF THE PROJECT DESIGNATED FOR PARTIAL OCCUPANCY OR USE SHALL INCLUDE:**

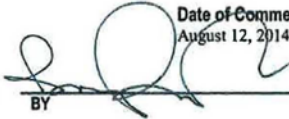
OPT Project

The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion of the Project or portion designated above is the date of issuance established by this Certificate, which is also the date of commencement of applicable warranties required by the Contract Documents, except as stated below:

**Warranty**

Clark Patterson Lee

ARCHITECT

  
BY

**Date of Commencement**  
August 12, 2014

August 12, 2014

DATE OF ISSUANCE

A list of items to be completed or corrected is attached hereto. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Unless otherwise agreed to in writing, the date of commencement of warranties for items on the attached list will be the date of issuance of the final Certificate of Payment or the date of final payment.

**Cost estimate of Work that is incomplete or defective:** \$15,000.00

Watson Tate Savory Punch List dated August 6, 2014  
Inspection Comment Forms (items 62 thru 79):  
ICF dated August 7, 2014 (items 62 thru 66)  
ICF dated August 8, 2014 (items 67 thru 71)  
ICF dated August 10, 2014 (items 72 thru 79)  
Geiler & Associates, LLC Report dated August 7, 2014  
Clark Patterson Lee Electrical Engineering Reports dated August 1, 2014 and August 7, 2014

The Contractor will complete or correct the Work on the list of items attached hereto within thirty (30) days from the above date of Substantial Completion.

Gilbane Building Company

CONTRACTOR

BY

DATE

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Contract Controversy Appeal Notice (Revised June 2019)*

The South Carolina Procurement Code, in Section 11-35-4230, 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 requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(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 why the person disagrees 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 any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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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.**