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Contract Controversy Decision

Matter of: B. L. Harbert International, LLC

File No.: 2014-002

Posting Date: January 6, 2016

Contracting Entity: University Of South Carolina

Project No.: H27-6069-AC-3

Description: Darla Moore School of Business

Appearances:

William A. Lalor for B. L. Harbert International, LLC.
George W. Lampl, III, and Henry P. Wall for University of South Carolina

DIGEST

Building contractor's claim for additional compensation based on ambiguous specification denied where ambiguity was patent and contractor was aware that its submitted product did not meet the design intent; agency's counterclaim denied for failure of proof.

DECISION

This matter came before the Chief Procurement Officer for Construction ("CPOC") on the November 5, 2013 Request for Resolution of Contract Controversy submitted by B. L. Harbert International ("BLHI") on behalf of itself and its subcontractor, Bettinger West Interiors, Inc. ("BWI"). BLHI is the contractor under State Project No. H27-6069-AC-3-Bid Package 3. BLI's Request is submitted pursuant to S. C. Code Ann. § 11-35-4230. BLHI seeks to recover \$392,426 plus interest to comply with an alleged "de facto sole source product insisted upon by the project architect." (BLHI Request for Resolution, p. 1) Against this claim, the Respondent, the University of South Carolina ("USC"), has filed a Counterclaim in the amount of \$128,987.50 asserting that BLHI forced USC to accept a non-compliant access flooring system in order to meet the Project schedule. (Affidavit of David Lindsay) For the reasons stated below, the CPOC dismisses both BLHI's claim and USC's counterclaim.

BACKGROUND

The Project at issue in this contract controversy is the Darla Moore School of Business. The project delivery method is construction manager at risk as authorized by S.C. Code Ann. § 11-35-3005(b) (2011). The Project Architect is Rafael Vinoly Architects of New York (“Architect”). Gilbane/Cumming (“Gilbane”) is the construction manager for the Project. The Project was funded in significant part by a donation from Ms. Darla Moore and represents a level of artistic expression and design excellence greater than that normally expected of State construction projects. The construction contracts were awarded by Gilbane in sequential phases. BLHI was awarded the contract under Bid Package 3, which includes most of the interior work. BLHI seeks a determination that the specification for access flooring panels, as interpreted by the Project architect and the construction manager, imposed a “de facto sole source product” upon BLHI in violation of §§ 11-35-2730 and -2750, and S.C. Code Ann. Reg. 19-445.2140.

THE RECORD

The parties have submitted this contract controversy for resolution on a written record without oral testimony. While the parties to a contract dispute may waive a hearing, there are instances where sworn testimony from witnesses might have assisted the CPOC’s decision. The Record, for instance, does not include BLHI’s actual estimate for the Project, or any sworn testimony as to BLHI’s reliance on its purported understanding that Haworth TecCrete 1250 panels met the performance requirements. As to USC’s case, the record does not include an explanation as to why the TecCrete 1250 panels were mentioned in the specification when they clearly did not meet the requirements for gravity held panels with a factory-installed finish. In the absence of sworn testimony on these issues, the CPOC has relied on reasonable inferences from the evidence of Record.

The Record consists of the following documents:

1. BLHI Request for Resolution dated 11/05/2013 with exhibits 1 – 17.
2. USC’s Response of May 9, 2014 to BLHI’s Request for Resolution including Motion to Dismiss and Counterclaim.
3. BLHI’s Response and Opposition to Motion to Dismiss and Counterclaim dated May 29, 2014.
4. BLHI’s Itemized Statement of Damages (\$392,426) with additional exhibits.
5. USC’s Memorandum dated 02/23/2015.
6. BLHI’s Response of March 17, 2015 to USC’s Memorandum of February 23, 2015.
7. Affidavit of David Lindsay (Gilbane) dated February 23, 2015.
8. Affidavit of Joyce Ignacio (Architect) dated February 25, 2015.

9. Affidavit of James E. Wren IV (BLHI) dated March 13, 2015.

FINDINGS OF FACT

The scope of the work under the Bid Package 3 Contract 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 construction of a new 5-story facility of approximately 256,068 square feet for the Business School at the University of South Carolina.” (BLHI Request for Resolution, p. 1)

The initial RFQ included specifications for an “access flooring system.” Access flooring provides owner access to open floor cavities in order to accommodate electrical, mechanical and systems and for any number of other uses including low voltage wiring, conduit and cables. The system allows easy access and future reconfiguration of floor spaces and allocations without significant waste and demolition. (Ignacio Affidavit at Para. 3)

As initially issued, USC’s specification for access flooring panels stated in relevant part as follows:

SECTION 10 28 13 – ACCESS FLOORING

PART 1 – GENERAL

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. (for emphasis)
2. Cementitious filled formed steel panels.

1.4 PERFORMANCE REQUIREMENTS

A. Performance Requirements, General: Provide access flooring systems that comply with the following requirements:

1. Access flooring systems are proprietary portable systems composed of modular floor panels on elevated supports (understructures) forming accessible under floor cavities (airspace) to accommodate electrical and mechanical services.
2. Access flooring systems comply with performance requirements specified as determined by testing manufacturers’ current standard products representing those indicated for this Project.

[Performance requirements were included for: concentrated-load, ultimate-load, rolling-load, floor panel impact-load, panel drop test, panel cutout, stringer concentrated-load, pedestal axial-load, pedestal overturning-moment, seismic performance, and static-dissipative floor covering resistance.]

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. ASC (FS200)
2. Haworth (TecCrete 1250)
3. Lindner (Nortec ST38 with Stone DE tile (Specified))
4. Or equal.

2.2 FLOOR PANELS

A. General [text omitted]

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.* (for emphasis)

Drawing A8400, "Finish Legend," included the following under "Floor Finish Legend":

ACCESS FLOORING (10 28 13)

RF-1A ACCESS FLOORING
 MANUFACTURER: LINDNER
 STYLE: NORTEC ST38
 FINISH: STONE De TILE, HONED-R10
 COLOR: GREIGE
 SIZE: 24" x 24"

RF-1B ACCESS FLOORING
 MANUFACTURER: LINDNER
 STYLE: NORTEC ST38
 FINISH: STONE De TILE, STRUCTURED-R11
 COLOR: OLIVE
 SIZE: 24" x 24"

Drawings A1320C and D specified the locations and extents of the RF-1A and RF-1B access floors. (Exhibit 3 to BLHI's Request for Resolution)

Addendum #3 to the RFP incorporated pre-bid questions and answers, including: "(f) Is the RF1A and RF1B a factory applied stone finish?" The answer provided by USC was: "Yes." (BLHI Request for Resolution, Exhibit 5) USC's answer merely repeated what was stated in specification sec. 2.2A (quoted above).

BLHI asserts that the question as to the requirement for a "factory applied" stone finish came from Bonitz, the supplier for the Lindner/Stone De Tile product identified in the specification. (Request for Resolution, p. 5, fn 1)

Bonitz's proposal to bidders, including BLHI, stated: "Our proposal is based on the Lindner access floor system which is the basis of design, and is the only manufacturer which can meet the factory applied stone finish as noted on the finish schedule." (BLHI Request for Resolution, Exhibit 7) BLHI argues that "The Lindner distributor, at least, believed the specifications were sole source prior to bid." (BLHI Request for Resolution, p. 6) The Record is silent as to whether, prior to bid, BLHI understood the "factory applied stone finish" requirement to create a sole source specification.

Bonitz's proposal for the Lindner/Stone De Tile "was more than \$650,000 (425% higher) than Haworth TecCrete 1250 as quoted by BWI and more than \$400,000 higher than any other quote for the "RF-1" and "RF-2" panels." (BLHI Request for Resolution, p. 6)

BLHI claims to have included the price of the TecCrete 1250 panels in its bid. USC apparently does not contest this assertion. The CPOC accepts this at face value but notes that BLHI did not submit its actual bid documents or the testimony of anyone with firsthand knowledge of the bid.

On August 9, 2012, BLHI submitted RFI # 105 to Gilbane and the Architect: "Please clarify the finish on Access Flooring RF-1A and RF-1B. * * * [I]s this a factory applied stone tile or can it be applied in the field?" (BLHI Request, Ex. 6) The Architect responded five days later with the following:

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 extract from their website: [quotation omitted].

Each of the two tile types specified would be factory applied to the floor panel and edge banded so that the edge 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.

On January 9, 2013, BLHI submitted TecCrete 1250, to the Architect for approval. (BLHI Request, Ex. 8) The Architect annotated the submittal in several respects and returned it to BLHI on February 11, with instructions to “Revise and Resubmit.”

BHI sent revised Access Flooring information to the Architect on April 10, 2013. The Architect returned the additional information on April, 25, 2013 stamped “Revise and Resubmit.” (BLHI Request, Ex. 9) BLHI’s submittal included a letter of March 27, 2013 from Haworth, Inc. to BWI: “Haworth understructure is not available with an epoxy finish.” The Architect noted in red on the Haworth letter: “This is a requirement of the contract documents.” The Architect’s comment on the TecCrete 1250 information sheet included in BLHI’s Access Flooring submittal was: “Why is this included in the Submittal? Project calls for gravity held system.” (*Id.*)

The disagreement over Access Flooring escalated in May 2013, with a flurry of correspondence among BLHI, BWI, Gilbane, and the Architect. (BLHI Request for Resolution, Exhibits 11, 12, and 13) On June 3, BLHI offered to substitute a different Haworth product, “Technika,” for the TecCrete panels. The change order proposal carried a price increase of nearly \$325,000. (BLHI Request for Resolution, Exhibit 14) On July 9, 2013, USC and its Architect issued a no cost Construction Change Directive (“CCD”) pursuant to Sec. 7.3 of the General Conditions (OSE AIA Doc A201-2007) that directed BLHI to install the “Technika” panel rather than the TecCrete 1250 panel. (BLHI Request for Resolution, Exhibit 16) In its letter bearing the same date, Gilbane noted:

With CCD # 11 we are providing approval for you to proceed with preparing submittal materials and samples for consideration at this point. If the Technika [*sic*] submittal is approved, further dialogue associated with cost and time issues will follow dispute resolution procedures as outlined in the contract documents, if there is continued disagreement on this being a zero cost change order.

On October 2, 2013, Gilbane issued final approval of the Technika product and authorized BLHI to “proceed with production.” (BLHI Request for Resolution, Exhibit 17) BLHI installed the substituted product as directed and filed the Request for Resolution that began this dispute.

Each party blames the other for Project delays resulting from the seven months taken for approval of the access flooring system. The CPOC does not rule on any issues related to fault for the amount of time taken to approve the access flooring system. The Record in this controversy does not include any analysis of the Project schedule by either party. The CPOC does not rule on any delay and disruption issues raised by BLHI separately.

DECISION

Based on the evidence presented, the CPO finds as follows:

- (1) USC’s specification for access floor panels was patently ambiguous as it listed three products under the specification heading “Basis-of-Design Product,” while at least one of the listed products, the TecCrete 1250, did not meet the specification

requirements for gravity held panels and a factory applied finish. Moreover, the TecCrete 1250 was, according to Mr. Lindsay of Gilbane, manifestly inferior aesthetically to the point of being unsuitable for the type of building under construction. To the extent that USC listed a non-compliant product under the heading "Basis-of-Design," the specification was defective and ambiguous.

- (2) BLHI was aware of the patent ambiguity in USC's access flooring specifications prior to bid and knowingly submitted a product for approval which, even though listed under the heading "basis of design," did not have a factory applied finish and did not use gravity attachment as specified. Under South Carolina procurement law, BLHI was required to protest, or request clarification of, this specification prior to bid but did not do so. Rather, BLHI apparently decided to take advantage of USC's error and try either to force USC to accept a clearly unsuitable product, or to obtain additional compensation for supplying the type of product that was compatible with the quality of the Project. Accordingly, the CPO denies BLHI's request for additional compensation.
- (3) USC's CCD directing use of a substitute product (also manufactured by Haworth) indicated that USC did not think the CCD warranted a change in price. After BLHI submitted a Request for Resolution to the CPO, USC submitted a counterclaim. USC's statement that the CCD did not require a change in price is inconsistent with its Counterclaim. USC also argues that its issuance of the CCD is evidence that the specification was never intended to be sole source. This argument is also inconsistent with USC's Counterclaim. Moreover, the only evidence in support of the Counterclaim is an opinion by the Construction Manager that is both speculative and self-serving. For these reasons, the CPO dismisses USC's Counterclaim.

DISCUSSION

USC's specification for access flooring included a mixture of performance specifications, *e.g.*, concentrated-load performance, structural performance, *et cetera*, together with a "brand name or equal" specification that listed both the Haworth TecCrete 1250 and the Lindner Nortec ST38 with Stone DE tile. The Nortec ST38 with Stone DE tile was followed by the word "Specified" in parenthesis. Drawing A8400, "Floor Finish Legend" listed only Lindner, Nortec ST38, Stone De Tile with the colors "Greige" and olive. The specifications did not identify a color for the TecCrete 1250.

The specification required gravity-held panels with a factory applied finish. The Q&A's released prior to bidding confirmed that USC required a factory finish. The only testimony of record (Lindsay Affidavit) is that the differences in finish between the Nortec ST38 and the Tec Crete 1250 are dramatic. The Nortec ST38 has a terrazzo type finish while the TecCrete 1250 resembles a concrete paver. In addition, the TecCrete 1250 had a "fully visible mechanical fastening system" that did not meet the requirement that the panels be gravity held. (Ignacio Affidavit, p. 4)

The inclusion of the TecCrete 1250 panel in the access flooring specification for the Darla Moore School of Business seems to be an anomaly. The TecCrete 1250 was not the basis of design and should not have been listed as such. Addendum 3 reinforced the intent of the specification as requiring a factory-installed finish, which eliminated the TecCrete 1250 as a conforming product. The specification as issued was, thus, patently ambiguous. The specification as clarified by Addendum 3 remained ambiguous as to why the TecCrete 1250 was listed, but it was not ambiguous as to whether a field-finished panel would be acceptable.

BLHI argues that it was entitled to rely on USC's listing of the TecCrete 1250 panel as a representation that the product had been fully researched and fully contract compliant. BLHI's argument is not without merit. In *Protest of M. B. Kahn Construction Co., Inc. for Southern Contracting, Inc.*, Panel Case No. 1995-13, the Panel stated that "[I]t is presumed that . . . the performance specification can be met by the approved manufacturer named." (emphasis in the original) *M. B. Kahn* dealt with the supply of water heaters to a fire academy training facility. The specification at issue in *M. B. Kahn* included a requirement for a 750 gallon storage capacity and listed several approved manufacturers, but did not list model numbers. M.B. Kahn submitted a product that did not meet the storage capacity required but had a quicker recovery time than the basis-of-design product. The Owner's engineer had not determined that any of the listed manufacturers could, in fact, meet the 750 gallon storage requirement. The Panel found that in refusing to consider recovery time as a basis for meeting the requirement for a number of showers in a given time, the State had administered the specification without the level of completion required. In this case, however, reliance on the "presumption" acknowledged by the *M.B. Kahn* decision was unreasonable as the presumption—that the TecCrete 1250 panel could meet the factory-applied finish requirement—was clearly contradicted by the specifications themselves and that contradiction was further confirmed by Addendum 3.

All bidders should have realized, first by reading the bid specifications, and then from reviewing Bid Addendum 3, that the TecCrete 1250 panels would not be acceptable. To be sure, USC should not have listed the TecCrete 1250 under the specification heading "Basis-of-Design-Product." After Addendum 3 and Bonitz' statement that only Nortec ST38 with Stone DE tile met the requirement for a factory installed finish, BLHI's reliance on the specification as a representation that the TecCrete 1250 panels were acceptable must fail.

Four factors indicate that BLHI knew prior to bid that the Haworth TecCrete 1250 panels did not meet USC's specification for access floor panels.

First, Addendum 3 to the RFP re-stated that the finish on the access flooring panels had to be factory installed. The finish on the TecCrete 1250 panels was installed in the field. BWI's proposal of June 27, 2012 specifically stated "panels stained in the field." A hand-written notation in the margin stated: "Factory Finish?" (Wren Affidavit, Exhibit 3) The CPOC finds that BLHI knew the requirement and knew that the TecCrete 1250 did not meet it.

Second, the price differential between Lindner/Stone De Tile and Haworth TecCrete 1250 was extreme (425%).

Third, the supplier of the Lindner/Stone De Tile product represented that it alone met the requirements.

Fourth, the Lindner/Stone De Tile and the Haworth TecCrete 1250 are quite different in appearance. Mr. Lindsay's Affidavit provided the following testimony:

The proposed Haworth panels are essentially a finished concrete panel. These panels bear the resemblance to a concrete paver, and bear little if any resemblance to a factory applied stone finish which resembles polished quartz or terrazzo tile. * * * [T]he proposed Haworth panels which BWI and Harbert wanted USC to accept were very suitable for an industrial, warehouse or light commercial application, but they bore little, if any resemblance to a well-appointed and elegant business setting which was the intended aesthetic effect." (Lindsay Affidavit, p. 3)

BLHI did not contradict Mr. Lindsay's description of the TecCrete 1250 panels. On the contrary, BLHI appears to concede that the TecCrete 1250 panels are not the aesthetic equal to the Lindner/Stone De Tile. (See BLHI Request for Resolution, p. 8, fn 5)

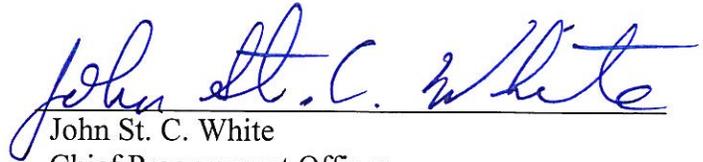
The South Carolina Procurement Code provides for a right of protest at Sec. 11-35-4210. A prospective bidder who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer. Sec. 11-35-4210 (a). A matter that could have been raised prior to award cannot be raised after award. Sec. 11-35-4210 (b). The right to protest is to the exclusion of all other rights and remedies of the bidders, offerors, contractors, or subcontractors against the State. Sec. 11-35-4210 (c). Under the South Carolina Procurement Code, the failure to protest a patent ambiguity in the specifications prior to award bars further relief, including post-award of additional compensation under the contract's remedy granting clauses. *Protest of Ruscon Construction Co., Inc. for Triad Mechanical Contractors*, Panel Case No. 1994-10.

BLHI cited several opinions of the Procurement Review Panel. All of those opinions addressed protests filed prior to award. *Protest of Kodak and Xerox Corporation*, Panel Case No. 1988-15; *Protest of B& D Marine and Industrial Boilers, Inc.*, Panel Case No. 2000-12; *Protest by General Sales Company*, Panel Case No. 1983-5. None of the cases cited by BLHI grant post-award relief as to issues that could have been raised by protest prior to award. The *M.B. Kahn* decision granted a partial post-bid award to the protesting contractor, but, as noted, the facts in *M.B. Kahn* were significantly different. *M.B. Kahn* involved a supply item and the inability of the named manufacturer to meet the performance requirement was not apparent from the bid documents themselves. In short, *M.B. Kahn* involved a latent ambiguity, not the patent ambiguity involved here.

BLHI and BWI were aware prior to bid that the TecCrete 1250 panels could not meet USC's requirements for gravity installation and a factory finish. BLHI's failure to file a timely protest as required by South Carolina Code Sec. 11-35-4210 is thus fatal to its claim and bars the requested relief.

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For the reasons stated above, the BLHI request for resolution of contract controversy is denied.
USC's counterclaim is also denied.



John St. C. White
Chief Procurement Officer
For Construction

6 Jan 16
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Contract Controversy Appeal Notice (Revised January 2016)

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.

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>

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

FILING FEE: Pursuant to Proviso 111.1 of the 2015 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
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

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: _____

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.