

HENRY MCMASTER, CHAIR  
GOVERNOR  
CURTIS M. LOFTIS, JR.  
STATE TREASURER  
RICHARD ECKSTROM, CPA  
COMPTROLLER GENERAL



THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.  
DIVISION DIRECTOR  
(803) 734-8018

JOHN ST. C. WHITE  
MATERIALS MANAGEMENT OFFICER  
(803) 737-0600  
FAX: (803) 737-0639

HARVEY S. PEELER, JR.  
CHAIRMAN, SENATE FINANCE COMMITTEE

G. MURRELL SMITH, JR.  
CHAIRMAN, HOUSE WAYS AND MEANS COMMITTEE

GRANT GILLESPIE  
EXECUTIVE DIRECTOR

## Protest Decision

**Matter of:** SGA | Narmour Wright Design

**Case No.:** 2022-002

**Posting Date:** March 28, 2021

**Contracting Entity:** Central Carolina Technical College

**Project:** H59-6174-PD

**Description:** Architectural Services for a New Academic Building.

### DIGEST

Protest alleging improper determination of nonresponsibility is denied. The protest letter of SGA | Narmour Wright Design (SGA) is included by reference. (Attachments 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

Invitation for Professional Services Issued:	11/01/2021
Notification of Selection for Contract Negotiation (O)	12/16/2021
Notification of Selection for Contract Negotiation (R)	02/09/2022
Intent to Protest	02/11/2022
Protest Received	02/24/2022

Central Carolina Technical College (CCTC) issued this Invitation for Professional Services (IPS) on November 01, 2021, to acquire architectural and engineering services for the construction of a new academic building. On December 2, 2021, CCTC issued a “Notification of Selection for Interview” identifying SGA and three other firms for interview. On December 16, 2021, CCTC issued a “Notification of Selection for Contract Negotiation” announcing its intention to negotiate a contract for this project with SGA. The time for protesting this decision passed and the parties opened negotiations on or about December 30, 2021.

On January 27, 2022, while still in negotiations, SGA notified CCTC that it had sold substantially all its physical assets, its business contracts, and transferred all but two of its employees to Greenberg Farrow Architecture Incorporated (“GF”) on January 7, 2022. On February 9, 2022, CCTC halted negotiations and notified SAG that:

Per our conversation yesterday, Central Carolina Technical College will not be able to move forward with a contract with SGA|Narmour Wright for the A/E services for the H59-6174-PD Academic / Student Services building. This is due SGA|Narmour Wright firms as it is today, is not the same firm in which the selection committee evaluated and interviewed. Due to this, it deems SGA|Narmour Wright non responsible.

On February 9, 2022, CCTC issued a revised Notification of Selection for Contract Negotiation announcing its intention to negotiate a contract for this project with Quackenbush Architects + Planners.

SAG filed an Intent to Protest on February 11, 2022, and a formal protest on February 24, 2022, alleging that the determination of nonresponsibility and contract cancellation were not made in accordance with the Code.

## ANALYSIS

SGA protests that the determination of non-responsibility lacks sufficient detail to justify a finding that SGA was not responsible. The determination simply states that SGA was not the same firm that was evaluated and interviewed and consequently was not responsible. SGA argues that the Code and Regulations require a more substantive analysis of whether SGA was still a responsible offeror, and CCTC's one sentence analysis is not adequate.

SGA submitted its original proposal on or about November 19, 2021. SGA included certain owned physical assets and certain SGA employees in its proposal to influence CCTC to view SGA favorably in the evaluation and interview process. SGA was successful and was determined to be the most advantageous, responsible offeror. The parties began negotiations on or about December 20, 2022. However, before the negotiations were concluded, SGA informed CCTC that it had sold its physical assets and transferred its employees to GF through an Asset Purchase Agreement (APA).

Apparently, this information was conveyed by voice, as there is no evidence of a written notification nor a copy of the APA in the record or procurement file. At the same time, and directly attributable to the APA, SGA sought to modify its original proposal by substituting Steve Goggans as the designated representative in place of Don Baus, adding that Mr. Baus would remain involved with the project as a member of the Little Diversified Architectural Consulting firm ("Little"), which was a designated consultant for the Project. This modification of its proposal by SGA is not in accordance with the Code.

Initially, the CPO finds that regardless of SGA's responsibility, its protest fails because it is no longer the same company that was ranked and evaluated under Section 11-35-3220. That statute states as follows:

(a) The agency selection committee shall evaluate each of the persons or firms interviewed in light of their:

(i) past performance;

- (ii) the ability of professional personnel;
- (iii) demonstrated ability to meet time and budget requirements;
- (iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;
- (v) recent, current, and projected workloads of the firms;
- (vi) creativity and insight related to the project;
- (vii) related experience on similar projects;
- (viii) volume of work awarded by the using agency to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the State among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous state work; and
- (ix) any other special qualification required pursuant to the solicitation of the using agency.

S.C. Code § 11-35-3220(5)(a) (emphasis added).

Here, SGA submitted a bid and was interviewed and ranked in December of 2021. Shortly after negotiations were underway, SGA transferred substantially all of its assets and employees to GF. Although SGA would continue to exist to wind up affairs and complete projects during the transition, notably it would be performing these duties “for the convenience of and with the agreement of [GF].”<sup>2</sup> In any event, SGA no longer existed in the same corporate structure as had existed when it was interviewed, evaluated, and ranked. GF, the now controlling company, was never interviewed, evaluated, and ranked. For example, GF’s recent and current and projected workloads were never evaluated; its related experience on similar projects is similarly unknown.

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<sup>2</sup> Letter from Melanie J. Wright to Steven W. Goggans dated February 1, 2022.

This easily could have affected the final rankings and prejudiced the other bidders on the project. The CPO finds SGA is disqualified on this basis alone.<sup>3</sup>

And regarding SGA's responsibility, it is undisputed that SGA transferred control of the proposed assets and personnel to GF and attempted to modify its proposal after evaluation and interview. These facts altered the perception if not the reality of SGA's ability to perform the contract and the risks involved,<sup>4</sup> and on its face, caused the procurement officer to question SGA's responsibility.

SGA argues that, even in the face of such a significant change to SGA's business, the Code requires the procurement officer to examine what remains of SGA's business and its relationships to determine whether SGA it is still a responsible offeror. SGA asserts that it retained access to the proposed assets and personnel through the APA and had the necessary financing, equipment, facilities, expertise, and personnel to be considered a responsible offeror. SGA maintains that this would have been evident had the procurement officer conducted a proper investigation to determine the existence of these factors

To support its argument SGA included a Cooperation Agreement and Commitment<sup>5</sup> (CAC) with its protest in lieu of the APA. In the CAC, GF agrees to provide SGA access to the same assets

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<sup>3</sup> Federal cases, of course, are not binding precedent on the CPO or the Panel. Further, the federal cases found by the CPO were not decided under a statute such as § 11-35-3220. Nevertheless, in a different context, the Comptroller General "has stated before that the substitution of a new prime contractor, in place of the original offeror, may well have a material effect on the technical approach employed during contract performance." *Matter of Lockheed Martin Integrated Systems, Inc.*, B-410189.5 (2016) (denying protest where agency had excluded a proposal after corporate restructuring had occurred after final proposal revisions and had introduced uncertainty over costs and risks involved); *see also Matter of Wyle Laboratories, Inc.*, B-408112.2 (2013) (granting protest where, among other things, the agency's evaluation "was based on the technical approach, resources, and costs associated with 'old' SAIC[.]"); *cf. Matter of ICI Services Corp.*, B-418255.5 (2021) (finding corporation was proper successor-in-interest and denying protest but noting "the Navy was aware of the transaction and fully considered it as part of the agency's evaluation.").

<sup>4</sup> "In light of the divestiture by LM of its IS & GS business segment, we see nothing unreasonable in the agency's conclusion that the transaction created some element of risk regarding the protester's actual performance." *Matter of Lockheed Martin Integrated Systems, Inc.*, B-410189.5 (2016)

<sup>5</sup> The Cooperation Agreement and Commitment, notably presented after-the-fact, includes the following statement which appears to bring into question the ultimate provider of the services:

and personnel that were transferred to GF for the duration of the project or until the project is assigned to GF. The CAC was effective February 18, 2022, after the procurement officer's determination of non-responsibility and the filing of the Intent to Protest.

The Code requires that the responsibility of the bidder or offeror shall be ascertained for each contract let by the State. S.C. Code §11-35-1810(1) While the Code imposes a statutory requirement on an offeror to provide information in response to a procurement officer's inquiries concerning its responsibility, there is no statutory requirement that a procurement officer conduct an investigation into an offeror's responsibility beyond that which is provided by the offeror. The Code and Regulations only require that the procurement officer be satisfied that a prospective contractor is responsible. This is clarified in Regulation 19-445.2125(D)(1) which provides:

Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

If the procurement officer is not satisfied that a bidder or offeror is responsible, he must provide the basis for that determination in a written determination of nonresponsibility. S.C. Code §11-35-1810(2)

The purpose of the written determination is to give notice and set forth the basis for the finding. While the procurement officer's written determination in this case could have been more expansive than two sentences in an email, it conveyed the essential facts. Since SGA was the source of the information, the details giving rise to the determination were well known to SGA. The divestiture of SGA's personnel and assets during negotiations provided a reasonable and

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**WHEREAS**, the Purchase Agreement contemplates SGA completing any unassigned projects and performing future projects if and until they can be properly assigned;

rational basis for concern about SGA's responsibility and is not arbitrary. The procurement officer's determination meets the absolute minimum requirements of the Code.

SGA next protests that the cancellation of the contract was not made in accordance with the Code. SGA argues that the contract was not cancelled in accordance with Regulation 19-445.2085(C), which requires a written determination by the CPO. However, there never was a contract between SGA and CCTC.

The Notification of Selection for Contract Negotiation is simply a notification that the State intends to attempt to negotiate a contract with the named company for the listed project:

Notice is hereby given that the Agency Selection Committee has, in accordance with the requirements of SC Code §11-35-3220, the *Manual for Planning and Execution of State Permanent Improvement Projects*, and the solicitation documents, reviewed the qualifications of interested firms and determined the below listed firm to be the most qualified firm for this project. The Agency hereby announces its intent to negotiate a contract with the following firm:

(emphasis added)

There is nothing in the record to indicate that the negotiations were finalized. SGA attached a contract to its letter of protest, but it is the only signature. Section 11-35-3220(9) requires the approval of the State Engineer's Office before the parties can enter into a contract:

In the event of approval, the State Engineer's Office shall notify immediately in writing the governmental body and the person or firm selected of the award and authorize the governmental body to execute a contract with the selected person or firm.

There is no approval from the State Engineer's Office.

The February 9, 2022, announcement that CCTC would not be able to move forward with a contract can only be interpreted as a termination of negotiations as there was no contract between the parties for this project. Since there was no contract, Regulation 19-445.2085(C) does not apply. This issue of protest is denied.

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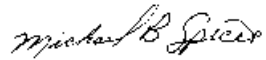
Case No. 2022-002

March 28, 2021

## **DECISION**

For the reasons stated above, the protest of SGA | Narmour Wright Design is denied.

For the Materials Management Office

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

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Michael B. Spicer  
Chief Procurement Officer



**WILLOUGHBY & HOEFER, P.A.**  
ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY  
JOHN M.S. HOEFER  
RANDOLPH R. LOWELL\*\*  
TRACEY C. GREEN  
CHAD N. JOHNSTON  
JOHN W. ROBERTS  
ELIZABETH ZECK\*  
ELIZABETHANN L. CARROLL  
ANDREW J. D'ANTONI  
R. WALKER HUMPHREY, II\*\*\*  
ANDREW R. HAND\*\*\*\*  
J. JOSEPH OWENS  
MARGARET M. O'SHIELDS

ELIZABETH S. MABRY  
J. PATRICK HUDSON  
OF COUNSEL

JOSEPH H. FARRELL, III  
SPECIAL COUNSEL

\_\_\_\_\_  
\*ALSO ADMITTED IN TEXAS  
\*\*ALSO ADMITTED IN WASHINGTON, D.C.  
\*\*\*ALSO ADMITTED IN CALIFORNIA  
\*\*\*\*ALSO ADMITTED IN NORTH CAROLINA

February 24, 2022

OFFICES:

**COLUMBIA**

930 RICHLAND STREET  
P.O. BOX 8416  
COLUMBIA, SC 29202-8416

AREA CODE 803  
TELEPHONE 252-3300  
FAX 256-8062

**CHARLESTON**

133 RIVER LANDING DRIVE  
SUITE 200  
CHARLESTON, SC 29492

AREA CODE 843  
TELEPHONE 619-4426  
FAX 619-4430

**VIA HAND DELIVERY AND ELECTRONIC MAIL**

John White, PE  
Chief Procurement Officer for Construction  
Office of State Engineer  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201  
protest-ose@mmo.sc.gov  
jwhite@mmo.sc.gov

RE: **Protest**  
Project: H59-6174-PD  
CCTC Main Campus-Academic/Student Services Building Construction

Dear Mr. White:

As you are aware, this law firm represents SGA | Narmour Wright Design ("SGA"). On February 11, 2022, we submitted to you a Notice of Intent to Protest on behalf of SGA regarding the February 9, 2022 "revised" "Notification of Selection for Contract Negotiation" ("February 9, 2022 Decision") (Exhibit A) and the intended award of the contract for the above-referenced project to Quackenbush Architects + Planners. This letter constitutes the Protest of the February 9, 2022 Decision and the related cancellation and revocation of the original award of the contract to SGA.

In summary, there was no basis for the arbitrary decision to disqualify SGA as "nonresponsible" because Central Carolina Technical College ("CCTC") failed to fully investigate SGA's responsibility and, had it done so, it would have learned that there had been no substantive change in the ability of SGA to perform the requested

professional services for Project H59-6174-PD (“Project”) since the original “Notification of Selection for Contract Negotiation” identifying SGA as “the most qualified firm for this project” was issued on December 16, 2021. As more fully explained below, SGA remains committed to and capable of meeting all pertinent contractual obligations and performing the contract for the Project as originally contemplated. Pursuant to S.C. Code Ann. § 11-35-4210, SGA now respectfully protests the February 9, 2022 Decision.

### **Background**

- On November 1, 2021, CCTC posts “Invitation for Professional Services” for architectural and engineering services for construction of new academic building (Project # H59-6174-PD).
- On November 19, 2021, SGA submits its proposal (with all required information) for the Project.
- On December 2, 2021, CCTC issues the “Notification of Selection for Interview” identifying SGA as one of four firms selected for interview.
- On December 15, 2021, SGA interviews for Project.
- On December 16, 2021, CCTC issues “Notification of Selection for Contract Negotiation” identifying SGA as “the most qualified firm” for the Project and announcing CCTC’s intent to negotiate the contract for the Project with SGA.
- On December 30, 2021, period for protest challenging award to SGA expires without any protests filed.
- CCTC and SGA thereafter begin contract negotiation process.
- On January 7, 2022, SGA closes asset purchase with Greenberg Farrow Architecture Incorporated (“GF”). *See* Exhibit B, Goggans Affidavit, ¶¶7-10.
  - Pursuant to the Asset Purchase Agreement between SGA and GF (“APA”), SGA transfers substantially all of its physical assets (although, as SGA is a professional services firm, those assets were minimal) and its business contracts, subject to obtaining any required consents, to GF.
  - Except for two individuals, all SGA employees become GF employees.

- The APA also contemplates (1) SGA performing future projects and (2) SGA and GF working together to ensure proper performance of all SGA contracts.
- On January 27, 2022, SGA informs CCTC of asset purchase.
- On and around February 1, 2022, SGA provides information regarding asset purchase, which includes letter from counsel confirming that SGA is a valid, existing, and active corporation and is licensed to practice architecture in South Carolina
- On February 9, 2022, CCTC informed SGA it has been deemed “nonresponsible” because “SGA|Narmour Wright firm as it is today, is not the same firm in which the selection committee evaluated and interviewed.”
- Also on February 9, 2022, CCTC issues “revised” “Notification of Selection for Contract Negotiation” announcing CCTC’s intent to negotiate the contract for the Project with another firm, Quackenbush.
- On February 11, 2022, SGA files “Notice of Intent to Protest” with Chief Procurement Officer and submits AIA Document B133-2014 completed and signed by SGA to CCTC.

**Pertinent Statutory and Regulatory Provisions**

S.C. Code Ann. § 11-35-1810

1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

(2) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board. The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

S.C. Code of Regulations R. 19-445.2085

C. Cancellation of Award Prior to Performance.

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;
- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
- (7) Administrative error of the purchasing agency discovered prior to performance, or
- (8) For other reasons, cancellation is clearly in the best interest of the State.

S.C. Code of Regulations R.19-445.2125.

A. State Standards of Responsibility.

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;

(4) qualified legally to contract with the State; and

(5) supplied all necessary information in connection with the inquiry concerning responsibility.

B. Obtaining Information; Duty of Contractor to Supply Information.

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable. In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the using or purchasing agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

C. Demonstration of Responsibility.

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(1) evidence that such contractor possesses such necessary items;

(2) acceptable plans to subcontract for such necessary items; or

(3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

D. Duty Concerning Responsibility.

(1) Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

(2) Consistent with Section 11-35-1529(3), the procurement officer must determine responsibility of bidders in competitive on-line bidding before bidding begins.

E. Written Determination of Nonresponsibility.

If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the procurement officer. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

**Factual Summary**

On November 19, 2021, SGA submitted a proposal to CCTC's "Invitation for Professional Services" posted on November 1, 2021. SGA was selected as one of four firms for interview for the Project and, on December 16, 2021, CCTC announced that SGA was "the most qualified firm" for the Project and that it would negotiate the contract for the Project with SGA. After the protest period expired on December 30, 2021, SGA and CCTC began the contract negotiation process. Before the contract was finally negotiated, SGA closed on the APA with GF on January 7, 2022. Pursuant to the APA, GF acquired SGA's assets and its business contracts, subject to obtaining any required consents. The APA specifically contemplates that SGA will continue to perform regarding business contracts until their proper assignment and that SGA and GF will work together to ensure proper performance of all SGA contracts. However, after learning of the asset purchase, CCTC deemed SGA "nonresponsible" because "SGA | Narmour Wright as it is today, is not the same firm in which the selection committee evaluated and interviewed."

**Analysis**

- 1. The determination that SGA is "nonresponsible" was not made in accordance with the pertinent statutory and regulatory provisions and is arbitrary and contrary to law.**

Regulation 19-445.2125.B provides the procurement officer may request information regarding responsibility. In turn, a prospective contractor can demonstrate "the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request" the following:

- Evidence that the contractor possesses such necessary items;
- Acceptable plans to subcontract for such necessary items; or
- A documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

Reg. 19-445.2125.C(1)-(3); *see* S.C. Code Ann. § 11-35-1810(1) ("The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts."). Importantly, the regulations do not require that the contractor directly

possess the “necessary financing, equipment, facilities, expertise, and personnel”; only that the contractor has access to those items. For two reasons, CCTC’s declaration that SGA is “nonresponsible” was arbitrary and contrary to law.

First, CCTC did not comply with the provisions governing a determination of a contractor’s responsibility. Contrary to these requirements, it certainly made no determination in writing that would support the existence of any investigation beyond simply determining that the award should be cancelled because of the asset sale. Section 11-35-1810(2) requires that a “written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board.” In turn, Regulation 19-445.4445.2125.E states that if “a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the procurement officer.” The only explanation given was set forth in an email stating that SGA had been deemed nonresponsible because it “is not the same firm in which the selection committee evaluated and interviewed.” But this is not an adequate or substantive analysis of whether SGA remained a responsible contractor and, for the reasons explained below, is not supported by the pertinent regulatory provisions. *Cf. Hamm v. S.C. Pub. Serv. Comm’n*, 309 S.C. 295, 300, 422 S.E.2d 118, 121 (1992) (“An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings.”).

Second, to make a substantive analysis regarding whether SGA was a responsible contractor, CCTC was required to ascertain if SGA had the “necessary financing, equipment, facilities, expertise, and personnel.” *See* Reg. R 19-445.2125.C. This CCTC did not do. CCTC never conducted an adequate or proper investigation to determine the existence of these factors. If CCTC had in fact conducted a proper investigation, it would have learned that SGA does have the “necessary financing, equipment, facilities, expertise, and personnel,” either directly or in connection with GF.

SGA certainly had at all times the “necessary ... expertise[ ] and personnel.” The same personnel as contemplated in the original proposal will perform the services for the Project. Exhibit B, Goggans Aff. ¶¶9, 22; Exhibit C, Abney Aff. ¶¶10, 12. The only change will be that Steve Goggans will be the designated representative in place of Don Baus, although Mr. Baus will remain involved with the project as a member of the Little Diversified Architectural Consulting firm (“Little”), which is a designated consultant for the Project. Exhibit B, Goggans Aff. ¶14. Exhibit D, Baus Aff. ¶¶7-9. The APA further contemplates that GF will make available necessary personnel and material resources to SGA in the performance of any contracts for which it remains responsible. Goggans Aff. ¶¶7-10. Further supporting this evident assertion, GF and SGA have executed a Cooperation Agreement and Commitment (Exhibit E) regarding

the Project to further illustrate GF's commitment to provide the "necessary financing, equipment, facilities, expertise, and personnel" to SGA for meeting its obligations under the contract to complete the Project. And, finally, CCTC was in fact informed that the same "necessary ... expertise[ ] and personnel" would be available to and working on the Project but it disregarded this information and instead terminated SGA as the contractor without the required analysis or, indeed, any analysis at all. *See* Email (Feb. 9, 2022) (Exhibit F).

SGA also has or has access to the "necessary financing, equipment, [and] facilities." There is no question that SGA remains an operating entity doing business in South Carolina, that it remains licensed, that it will have the required insurance coverage, and that it will apply the same resources to the Project as before the asset sale. Exhibit E, Cooperation Agreement and Commitment; Exhibit B, Goggans Aff. ¶¶21-23; Exhibit C, Abney Aff. ¶¶10-13. SGA will do this either directly or in conjunction with GF, which certainly has the resources to provide the "necessary financing, equipment, [and] facilities" for the Project. Exhibit C, Abney Aff. ¶¶7-8. By virtue of the APA, GF owns and makes available to SGA the same assets that SGA had when the original notification of intent was issued and that CCTC thought sufficient. And as previously mentioned, the Cooperation Agreement and Commitment further illustrates GF's commitment to provide the "necessary financing, equipment, facilities, expertise, and personnel" to SGA for meeting its obligations under the contract to complete the Project.

Thus, SGA has the "necessary financing, equipment, facilities, expertise, and personnel" either directly or indirectly through its cooperation and work with GF and Little. Consequently, SGA is a responsible contractor and CCTC's contrary determination, made without regard to or consideration of the pertinent factors set forth in the pertinent regulations, was arbitrary and capricious and with no factual or legal basis. CCTC therefore acted improperly in declaring SGA "nonresponsible" and the award to SGA should be reinstated.

**2. The cancellation of the contract was not made in accordance with the pertinent statutory and regulatory provisions.**

CCTC also did not comply with the pertinent standards for cancelling the award to SGA. Regulation 19-445.2085.C allows cancellation of an award or contract before any performance has begun only if certain determinations are made in writing regarding the reasons for the cancellation. These reasons include problems with the original invitation, changes in the agency's needs, additional costs not considered by the state, changes in the agency's circumstances, administrative errors, or other reasons for which "cancellation is clearly in the best interest of the state."

CCTC did not comply with Regulation 19-445.2085.C. There is no writing in which the Chief Procurement Officer makes any determinations regarding a reason



for cancellation of the contract. The only explanation given is that SGA “is not the same firm” that was interviewed by the selection committee. But the only factor under 19-445.2085.C that this explanation could possibly meet would be that “cancellation is clearly in the best interest of the state.” But CCTC certainly never made that determination in writing. And it could not have determined that cancellation of the contract based on the asset sale alone was in the “best interest of the state” because Regulation 19-445.2125.C contemplates that a contractor might not itself have the “necessary financing, equipment, facilities, expertise, and personnel” but that it nonetheless is a responsible contractor so long as those resources are available to it in performing the Project. Because, as explained above, the “necessary financing, equipment, facilities, expertise, and personnel” are in fact available to SGA for use on the Project and SGA had already been determined to be the “the most qualified firm for this project,” cancellation of the contract could not have been, and was not, in the “best interest of the state” and was therefore improper. The decision to award the contract to a different entity (which was, by CCTC’s own determination, **not** “the most qualified firm for this project”) is invalid and should be reversed, and the award to SGA should be reinstated.

#### Relief Requested

For the reasons stated above, SGA respectfully requests that the arbitrary and improper decision to disqualify it as “nonresponsible” be reversed and the contract award to SGA be reinstated.

Respectfully submitted,

WILLOUGHBY & HOEFER, P.A.



Mitchell Willoughby

Enclosures

cc: Manton Grier, Jr., Esquire  
Beth Young (*via email only*)  
Steve Goggans, AIA (*via email only*)

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised May 2020)*

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 2020 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.**