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## Written Determination

**Matter of:** BONITZ, Inc., Harris Carpets & Linoleum, Inc., and Michael & Company Interiors, Inc.

**File No.:** 2022-104B

**Date:** August 30, 2021

**Contracting Entity:** Clemson University

**Solicitation No.:** 139775414

**Description:** Campus Wide Flooring

### DIGEST

Request to cancel award of a contract prior to performance granted where inadequate or ambiguous specifications were cited and the award was based on administrative error.

### AUTHORITY

The Chief Procurement Officer (CPO) conducted an administrative review per S.C. Code Ann. § 11-35-1520(7) and Regulation 19-445.2085. This determination is based on the evidence and applicable law and precedents.

### DETERMINATION

On August 2, 2021, BONITZ, Inc. (BONITZ), protested Clemson University's intended award of a contract for flooring claiming that Michael and Company Interiors, Inc.'s (Michael) bid was nonresponsive. BONITZ's protest is attached as Exhibit A and incorporated herein by reference.

On August 11, 2021, Clemson University (Clemson) requested that the Chief Procurement Officer (CPO) cancel award of contracts to Harris Carpets & Linoleum, Inc. (Harris), and Michael prior to performance. [Exhibit B] Clemson's grounds for the request is an administrative error in deciding which bidders should be awarded a contract. A review of the solicitation, bids,

and the Notice of Intent to Award shows that Clemson committed administrative error in the awards of this contract.

The source selection method used in this solicitation is competitive sealed bidding per S.C. Code Ann. §11-35-1520. Under this source selection method, the State must award to the lowest responsive and responsible bidder. *Id.* at §11-35-1520(10)

The solicitation calls for an initial contract term of one year with four optional one-year renewal terms. The solicitation states that Clemson will award contracts to “two based on bids.” However, the solicitation is unclear on how Clemson will decide who the two low bidders are. Any such analysis is complicated by the following instructions:

Appendix A Bidding Schedule - This file must be completed and submitted along with your bid. Offerors must complete the required pricing information listed in the Excel File (Appendix A Bidding Schedule).

Offerors are required to provide pricing information for all unit prices throughout the spreadsheet. **Do not enter \$0 for any given price, enter \$0.01 which will indicate you do not carry this product or service**, therefore, it will not be considered during evaluation. **Failure to provide a price in each and every required cell will result in your bid being deemed non- responsive.**

On the PricingSummary tab (1st tab) the Grand Total will reflect the pricing you enter in the online bidding system that will be used for evaluation. After completing Appendix A Bidding Schedule, reattach a completed copy of the spreadsheet in the online bidding system under the attachments tab.

[emphasis supplied]

Instructions on the bid schedule state:

**Offerors must enter a Unit Price in all required cells in tabs 1-8.** The Pricing Summary below as well as tabs 1-8 will automatically calculate as you enter your pricing. The Grand Total price on the summary sheet below will be for evaluation purposes.

[emphasis supplied]

BONITZ argues that by entering a price \$0.00 in a couple of cells and N/A in another, Michael failed to comply with the requirement to “enter a Unit Price in all required cells rendering its bid nonresponsive.” A review of each bid, however, indicates that the pricing impact of Michael’s non-conformity was negligible, and Clemson could have chosen to deal with each as a minor informality or irregularity per S.C. Code Ann. §11-35-1520(13).

Clemson’s request for cancellation does not focus on BONITZ’s allegations but points to another issue that relates back to the instructions. The instruction specifically tells bidders that pricing of \$0.01 will not be evaluated, yet in determining the low bidder, Clemson included such pricing in its evaluation. For example, one vendor inserted a bid price \$0.01 for all line items on bid tab 8- Hard Tile meaning it was not offering to provide any of these line items as shown below:

<b>Hard Tile/Ceramic/Porcelain/Quarry</b>						
<b>Description</b>	<b>Qty</b>	<b>Unit</b>	<b>Unit Price</b>	<b>Extended Price</b>		
Skilled Laborer/Foreman hourly rate	1000	EA	\$0.01	\$10.00		
Helper hourly rate	1000	EA	\$0.01	\$10.00		
Demo and dispose of hard tile	5000	SF	\$0.01	\$50.00		
Added cost for EPOXY GROUT Material and Labor	200	SF	\$0.01	\$2.00		
<b>Total Price:</b>				<b>\$72.00</b>		

The spreadsheet transferred the total extended price of \$72 to the pricing summary tab and added it into the total bid price as shown below:

<b>Pricing Summary</b>			
<b>Tab#</b>	<b>Description</b>	<b>Total Pricing</b>	
1	Misc Labor-Turn Key Pricing	\$ 328.00	
2	Base-Tran-Tred-String Pricing	\$ 129,092.50	
3	Standard Carpet Pricing	\$ 782,904.00	
4	LVT Rubber Pricing	\$ 218,036.00	
5	VCT Pricing	\$ 15,400.00	
6	Engineered Hardwood	\$ 14,911.00	
7	Marmoleum	\$ 18,905.00	
8	<b>Hard Tile Pricing</b>	<b>\$ 72.00</b>	
	<b>Grand Total:</b>	\$ 1,179,648.50	

Another bidder included a bid price for each line item on tab 8 as shown below:

<b>Hard Tile/Ceramic/Porcelain/Quarry</b>						
<b>Description</b>	<b>Qty</b>	<b>Unit</b>	<b>Unit Price</b>	<b>Extended Price</b>		
Skilled Laborer/Foreman hourly rate	1000	EA	\$45.00	\$45,000.00		
Helper hourly rate	1000	EA	\$25.00	\$25,000.00		
Demo and dispose of hard tile	5000	SF	\$4.50	\$22,500.00		
Added cost for EPOXY GROUT Material and Labor	200	SF	\$4.50	\$900.00		
<b>Total Price:</b>				<b>\$93,400.00</b>		

As is readily clear, a bidder that bid all line items was at a disadvantage vis-à-vis a bidder that did not. The problem is not with the instructions to bid \$0.01 if the bidder intend to bid the item. The problem is that when bidders can choose which items it is bidding and which it is not, you have a situation where each bidder is bidding a different scope. Though solutions for effectively comparing such bids may exist, the structure of the solicitation, including the bid schedule does not supply one.

Regardless of the above, there is a problem with the structure of the solicitation. The contracts resulting from the two awards are indefinite quantity/indefinite delivery contracts where Clemson will place orders to the contractors on an as-needed basis. However, the solicitation does not supply any basis for awarding orders between the two contractors. Indeed, as the solicitation is currently structured, Clemson may arbitrarily choose which of the two contractors it wants to award orders to without regard to price or delivery. Such a process is contrary to the purpose and policies of the Consolidated Procurement Code. S.C. Code Ann. §11-35-20.

The S.C. Code Ann. § 11-35-1520(7) authorizes the cancellation of awards or contracts after award but before performance per regulations promulgated by the Board. Regulation 19-445.2085(C) authorizes cancellation of an award prior to performance reading:

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.

[emphasis supplied]

While the authority to cancel awards and solicitations should be exercised carefully and sparingly, the Code and Regulations authorize the CPO to cancel an award of a contract before performance begins, when a compelling reason exists and one or more of the grounds listed in the Regulation are present. Cancellation is called for where, as here, the determination of bid prices fails to follow the instructions in the solicitation, the solicitation fails to provide a basis for determining the low bidder where each bidder is not bidding the same thing, and the solicitation fails to provide any basis for awarding subsequent orders among the two awardees.

For the foregoing reasons, the CPO hereby cancels the Intent to Award contracts to Harris and Michael and the matter is remanded to Clemson with instructions to proceed in accordance with the Consolidated Procurement Code.

  
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John St. C. White  
Chief Procurement Officer  
For Construction

Columbia, South Carolina

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Written Determinations Appeal Notice (Revised May 2020)*

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b), states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:  
(b) requests for review of other *written determinations*, decisions, *policies*, and *procedures* arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(Emphasis added.) *See generally Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc.*, Case Nos. 1996-4 & 1996-5, *Protest of Charleston County School District*, Case No. 1985-5, *Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

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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  
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

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

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

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

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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.**