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THE DIVISION OF PROCUREMENT SERVICES

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GRANT GILLESPIE
EXECUTIVE DIRECTOR

Protest Decision

Matter of: GFG Supply, Inc.

Case No.: 2017-121

Posting Date: January 20, 2017

Contracting Entity: SC Department of Transportation

Solicitation No.: 5400011983

Description: Steel "H" Piling – 12",53 LBS/FT, 30FT Sections

DIGEST

Protest of an award by apparent low bidder alleging it was erroneously disqualified as non-responsible is denied. GFG Supply's (GFG) letter of protest is included by reference.

[Attachment 1]

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

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

BACKGROUND

<i>Event</i>	<i>Date</i>
Solicitation Issued	09/07/2016
Bid Opening	09/20/2016
Award Issued	11/14/2016
Protest Received	11/17/2016

This Invitation for Bids was issued by the Department of Transportation (DOT) on September 7, 2016, for a contractor to furnish and deliver steel H-piles (12 HP 53, 30 feet long, ASTM A 709 Grade 36) which must meet specifications in accordance with the 2007 Specifications of Highway Construction, Section 711.2.2.1 and 710.2.7.3 for painting of steel. Bids were received on September 20, 2016. GFG was determined to be a non-responsible offeror for failure to provide evidence of appropriate financial resources and because GFG was not qualified to contract with the state. Intent to Award was posted to Taylor & Burns Coating Services, Inc. on November 14, 2016. The contract has a maximum term of five years and a total potential value of \$994,750.

The solicitation requested bidders provide information reflecting the current financial position as follows:

QUALIFICATIONS -- REQUIRED INFORMATION (MAR 2015)

Submit the following information or documentation for you and for any subcontractor (at any tier level) that you identify pursuant to the clause titled Subcontractor - Identification. Err on the side of inclusion. You represent that the information provided is complete. (a) The general history and experience of the business in providing work of similar size and scope. (b) Information reflecting the current financial position. Include the most current financial statement and financial statements for the last two fiscal years. If the financial statements have been audited in accordance with the following requirements, provide the audited version of those statements. [Reference Statement of Financial Accounting Concepts No. 5 (FASB, December, 1984), as amended.] (c) A detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ. (d) A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years. (e) A list of every South Carolina public body for which supplies or services have been provided at any time during the

Protest Decision, page 3
Case No. 2017-121
January 20, 2017

past three years, if any. (f) List of failed projects, suspensions, debarments, and significant litigation. [05-5015-2]

[Solicitation, Page 19] (Emphasis added)

GFG did not provide financial information with its bid. On October 3, 2016, the procurement officer requested the missing financial information from GFG via email. This same email advised GFG that, it needed to “register your company through SCBOS (www.scbos.com) so that we can verify your company is in good standing with the State of SC.” (Attachment 2)

GFG responded on October 3, 2106, that it had updated its profile on SCBOS as requested:

As requested, we have updated our profile on SCBOS.
We will provide the additional information by noon 10/6/16.

(Attachment 2)

GFG responded by email on October 4, 2016, with information about its qualifications to include a history of the company, the supplier that would be used for this project, a list of similar projects with contract names and information, and a statement about failed projects, suspensions, debarments, and litigations as required by the solicitation. In lieu of financial statements, GFG indicated that it had never prepared or published financial statements and requested a waiver as follows:

GFG SUPPLY has never prepared or published a financial statement, so we ask you to waive that requirement.

(Attachment 2)

The procurement officer did not respond to GFG’s request for a waiver until November 14, 2016, when the procurement officer sent GFG a written determination declaring GFG a non-responsible bidder for failure to provide the financial information and failure to be registered with the South Carolina Secretary of State as follows:

Procurement Officers are required by 11-35-1520 (10) to award to the lowest responsive and responsible bidder. Regulation 19-445.2125 spells out the factors

to be considered. In addition much of the information that can be evaluated using those factors is in the State's standard solicitation clause Qualifications - Required Information (Mar 2015). GFG did not submit the information with their response. Per 11-35-1520 (13), this information can be asked for as it is not prejudicial to other bidders and is a minor informality. A request for the information stated in Qualifications - Required Information was sent October 3. GFG responded and stated, in part, "GFG SUPPLY has never prepared or published a financial statement, so we ask you to waive that requirement." While other options were listed by GFG, this contract is critical to the State of South Carolina for the next five years and the ability of GFG Supply to perform financially was not answered. Even if waived, SC Code 33-15-101(a) states "A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State." SC Code 33-1-400(12) defines a foreign corporation as "a corporation for profit incorporated pursuant to a law other than the law of this State." A search at the Secretary of State shows that GFG Supply is not registered (see attached).

(Attachment 2)

ANALYSIS

The South Carolina Consolidated Procurement Code (Code) grants any actual bidder, offeror, contractor, or subcontractor the right to protest the award or intended award of a contract. S.C. Code Ann. §11-35-4210(1)(b). GFG protests the procurement officer's determination that GFG was a non-responsible offeror for failure to provide evidence of appropriate financial resources and because GFG was not qualified to contract with the state.

Section 11-35-1810 requires that the responsibility of the bidder or offeror 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. A responsible bidder is defined in Section 11-35-1410(6) as:

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

Section 11-35-1810 also required the (Budget & Control) board to establish by regulation, standards of responsibility that shall be enforced in all state contracts. Regulation 19-

445.2125(D) requires the procurement officer to determine the prospective contractor's responsibility prior to award as follows:

D. Duty Concerning Responsibility.

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.

Regulation 19-445.2125(B) also provided:

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.

A determination of non-responsibility is required by Section 11-35-1810(2) as follows:

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.

The Regulations applicable to the determination of non-responsibility are found in Regulation 19-445.2125(E) as follows:

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.

In his written determination he gave two independent reasons that he could not find GFG to be a responsible bidder. First, he noted that “the ability of GFG Supply to perform financially was not answered.” Second, GFG was not qualified legally to contract with the State because it had failed to obtain a certificate of authority from the Secretary of State.² The determination also indicated that the second ground was disqualifying even if he were to grant GFG’s request to waive the requirement for financial information.³

The standard for review of this written determination of non-responsibility is found in Section 11-35-2410(A) as follows:

The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law:

The American Heritage Dictionary defines an arbitrary decision as one determined by chance, whim, or impulse, and not by necessity, reason, or principle. Capricious is defined by the American Heritage Dictionary as one that is characterized by, arising from, or subject to caprice; impulsive or unpredictable.

By November 14, 2016, the procurement officer had no information regarding GFG’s finances—only GFG’s statement that it had “never prepared or published a financial statement.” Despite his request that GFG register to do business in the State, the procurement officer confirmed forty days later it had not done so. These facts correlate precisely with the reasons given for his determination. That determination had a reasonable basis in fact and was not “clearly erroneous,

² It is the responsibility of a person wishing to do business in this State to determine the legal prerequisites to contracting. Although GFG advised the procurement officer on October 3 that it had met those requirements, in fact it had not. In its protest letter it acknowledges for the first time that it had hired a company “to file the appropriate application to obtain a certificate of authority.”

³ The second part of Regulation 19-445.2125(B) states:

If such contractor fails to supply the requested information, the procurement officer ... may find the prospective contractor non responsible if such failure is unreasonable.

It does not appear the determination was based on the second part of the quoted regulation, because the procurement officer would have had to conclude that GFG’s response to the request for financial information was unreasonable. GFG asked for a waiver the day after receipt of the demand for financial statements. Regardless if the waiver were granted, GFG’s request cannot be described as unreasonable.

Protest Decision, page 7

Case No. 2017-121

January 20, 2017

arbitrary, capricious, or contrary to law.” *Appeal by Allied Waste Services*, Panel Case No. 2013-12.

DECISION

For the reasons stated above, the protest of GFG Supply, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

ATTN: CHIEF PROCUREMENT OFFICER MATERIALS MANAGEMENT OFFICE

Dear Sir or Madam.

Attached you will find correspondence from Contracts Administrator Emmett I. Kirwan deeming GFG Supply Inc. to be "Non-Responsible" regarding our offer for the above referenced solicitation. I have also received an "Intent to Award" notice naming Taylor and Burns Coating as the intended recipient of award. Their total value quoted is \$994,750.00. GFG Supply quoted \$950,000.00.

This is to formally notify you that we hereby enter a protest for that decision.

You will note as you review the files in the attachment, that I received a letter from Mr. Kirwan on 10/3/16 requesting additional information from page 19 of the solicitation(QUALIFICATIONS) that was not submitted in our bid. Also, we were advised to update our registration to SCBOS. The update was accomplished that day and, on 10/4/16, I submitted a brief explanation of our capabilities, identified our partners for this project and included several customer (including SCDOT) and vendor references. The Qualification page also requests a current financial statement. I explained to Mr. Kirwan that GFG has never prepared or published a financial statement and asked him to waive that requirement. (GFG has never had to borrow money).

The original estimated award date was 10/14/16. But on that date, it was extended indefinitely. On 11/4, it was rescheduled for award on 11/8. The Notice of Intent was finally posted on 11/14/16 and our letter of Determination received the same day. In that letter, Mr. Kirwan points out that one deciding factor was that GFG did not submit a financial statement causing concern of whether or not we could perform financially. He noted that this was a five year project. (Although we would complete it within 6-8 months). It would seem that if our integrity was of concern, and if our references were insufficient, he would have sent me a note that the financial statement requirement could not be waived. Surely then, we would have instructed our accountant to provide it. But I received no further communication from Mr. Kirwan until 11/14/16, forty days later. Also, in his letter, referring again to the financial statement, he writes "Even if waived, SC CODE 33-15-101(a) states "A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State". I replied to Mr. Kirwan in an email dated 11/15, that I was unaware of this requirement (though we have sold SCDOT in the past) and could not find reference to it in the solicitation. I asked if this was a new requirement and if it would apply to future purchases. As of this date, he has not commented.

As you know, it takes a lot of time and effort to develop a bid like this. We work diligently to assemble the best team to produce an offer that can, not only be the best price, but, more importantly, earn the award. Today we retained Northwest Registered Agent, LLC 6650 Rivers Ave. STE 100, Charleston SC 29406 to file the appropriate application to obtain a certificate of authority. They agreed to expedite the process if at all possible. I hope you will thoroughly interview our references and reconsider this decision that GFG Supply is "Non-Responsible". We are apparently the low bidder and we can handle this job. Respectfully submitted.

Jerry Funk

GfG Supply, Inc.
2319 Newburn Lane
The Villages FL 32162-3594

Ph: 757-650-4317
Fx: 352-633-8363

From:

Attachment 2



South Carolina
Department of Transportation
955 Park Street, Room 101
Columbia, South Carolina 29201

Procurement Officer for
Commodities & Service Contracts
Norma J. Hall, FNIGP, CPPO, CPPB, CPM
(803) 737-1483 ♦ Fax (803) 737-2046

November 14, 2016

Gerald Funk
GFG Supply
2319 Newburn Lane
The Villages, FL 32162-3594

Re: Determination of Non-Responsibility in response to Solicitation 5400011983 Steel H Pile for Supply Depot

Mr. Funk,

Please see the information presented below.

Background events:

Solicitation issued 9/7/2016

Solicitation opened 9/30/2016

Request for qualification information from GFG Supply and request for GFG Supply to update information with SCBOS sent 10/3/2016 (e-mail attached)

Initial response received from GFG Supply 10/3/2016 (Attached)

Additional information received from GFG Supply 10/4/2016 (Attached)

Procurement Officers are required by 11-35-1520 (10) to award to the lowest responsive and responsible bidder. Regulation 19-445.2125 spells out the factors to be considered. In addition much of the information that can be evaluated using those factors is in the State's standard solicitation clause Qualifications – Required Information (Mar 2015). GFG did not submit the information with their response. Per 11-35-1520 (13), this information can be asked for as it is not prejudicial to other bidders and is a minor informality. A request for the information stated in Qualifications – Required Information was sent October 3. GFG responded and stated, in part, "GFG SUPPLY has never prepared or published a financial statement, so we ask you to waive that requirement." While other options were listed by GFG, this contract is critical to the State of South Carolina for the next five years and the ability of GFG Supply to perform financially was not answered. Even if waived, SC Code 33-15-101(a) states "A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State." SC Code 33-1-400 (12) defines a foreign corporation as "a corporation for profit incorporated pursuant to a law other than the law of this State." A search at the Secretary of State shows that GFG Supply is not registered (see attached).

For these reasons GFG Supply is deemed Non-Responsible.

This determination is made in accordance with 11-35-1810.

Sincerely,

Emmett I. Kirwan
Contracts Administrator
SCDOT

CC: Norma J. Hall

From: [Jerry GfG](#)
To: [Kirwan, Emmett I.](#)
Subject: RE: SC Solicitation 5400011983 Steel H Pile
Date: Monday, October 03, 2016 5:55:24 PM

Good afternoon.
As requested, we have updated our profile on SCBOS.
We will provide the additional information by noon 10/6/16.

Thanks,

Jerry Funk

GfG Supply, Inc.
2319 Newburn Lane
The Villages FL 32162-3594

Ph: 757-650-4317
Fx: 352-633-8363

From: Kirwan, Emmett I. [mailto:KirwanEI@scdot.org]
Sent: Monday, October 03, 2016 9:40 AM
To: Jerry@GFGSupply.com
Subject: SC Solicitation 5400011983 Steel H Pile

Mr. Funk,

Per 11-35-1520 (8) and (13) I am writing to request additional information that was requested in the bid but that was not submitted. Specifically I need you to submit the information requested in Section V. Qualifications on page 19 of the solicitation. The information requested is not subject to FOIA.

In addition, I would ask that you register your company through SCBOS (www.scbos.com) so that we can verify your company is in good standing with the State of SC.

Please send me the requested information no later than noon Thursday, October 6, 2016.

If you have any questions please let me know.

Thank you,

Emmett I Kirwan
SCDOT Procurement Manager
955 Park St, Columbia, SC 29201 | 803-737-0676 | Fax 803-737-2046

From: [Jerry GFG](#)
To: [Kirwan, Emmett I.](#)
Subject: Bid Invitation 5400011983
Date: Tuesday, October 04, 2016 4:51:44 PM
Attachments: [GFG SUPPLY Capability Statement 2010.pdf](#)
[Dave Steel Company Brochure.pdf](#)

This is submitted in accordance with Solicitation Paragraph V. QUALIFICATIONS.
GFG Supply Inc. is a small woman owned metals supply business founded in 2007. The principals are Genene E Funk, President, and Gerald F Funk (Jerry), Vice President. I am the former owner of Bartone Steel Fabricators Inc. in Chesapeake Virginia from 1980-2010. Genene is the former office manager of Bartone. Combined, we have over 70 years of experience in the steel industry. We invite you to visit our website at www.gfgsupply.com. Also, our Capabilities Statement is attached for your review.

For this project, we would purchase domestic steel H-Piles ASTM-A572 GR 50, rolled by Nucor, Gerdau or Steel Dynamics Inc. Triad Metals International, Petersburg Va. would be our supplier. Triad would ship the steel to Dave Steel Company's Chesnee SC plant to be blasted and painted as per Sections 711.2.1 and 710.2.7.3. Dave Steel is an AISC Certified plant with a Sophisticated Paint Endorsement. Their brochure is attached for your review. Upon completion, the steel would be hauled from Dave Steel by flatbed to your Supply Depot in Columbia SC. Once the first batch is completed, we anticipate processing 2-3 truckloads (60-90 H-Piles) per week. (Note that there may be handling marks on the paint, within AISC Standards, that could require field touch by your forces).

SAMPLES OF SIMILAR PROJECTS:

1. GFG 162 NCDOT PO#4300307365 DATED 3/29/16: CONTACT CHRIS ANDRESEN (919) 707-2627
cstandresen@ncdot.gov
ITEM: STEEL BEAMS BLASTED AND PAINTED TO NCDOT PAINT SYSTEM 1: AMOUNT \$81,120.00
2. GFG 164 NCDOT PO#4300310905 DATED 6/7/16: CONTACT CHRIS ANDRESEN
ITEM: STEEL BEAMS BLASTED AND PAINTED ORGANIC ZINC PRIMER: AMOUNT: \$63,020.00
3. GFG 145 NCDOT PO# 4300250648 DATED 5/28/13: CONTACT CHRIS ANDRESEN
ITEM: STEEL BEAMS BLASTED AND PAINTED TO NCDOT PAINT SYSTEM 1: AMOUNT \$367,240.00
4. GFG 146 NCDOT PO#4300250649 DATED 5/28/13; CONTACT CHRIS ANDRESEN
ITEM: STEEL BEAMS BLASTED AND PAINTED TO NCDOT PAINT SYSTEM 1: AMOUNT \$183,620.00

SOUTH CAROLINA PROJECTS:

1. GFG 142 SCDOT PO# 4600172896 DATED 5/30/12 CONTACT: MARY JANE DAVIS
ITEM: STEEL H-PILES 12X53 AMOUNT: \$70,504.00
2. GFG 144 SCDOT PO# 4400006758 DATED 6/4/13 CONTACT: JANICE DIXON
ITEM: STEEL H-PILES 12X53 AMOUNT: \$100,032.00

CREDIT REFERENCES:

1. TRIAD METALS INTERNATIONAL Greg Valenti greg.valenti@triadmetals.com (267) 913-3434
2. ONEAL STEEL COMPANY Tom Thigpen tthigpen@onealsteel.com (205) 599-8366
3. DAVE STEEL COMPANY David McCurry (828) 252-2771
4. INFRA METALS COMPANY Tom Buckner (800) 899-3432

GFG SUPPLY has never prepared or published a financial statement, so we ask you to waive that requirement. We have incurred no failed projects, suspensions or debarments and zero litigations. We encourage you to research our sample projects and interview our credit references to validate our capabilities and integrity.

Thank you for this consideration.

Respectfully submitted,

Jerry Funk

GfG Supply, Inc.
2319 Newburn Lane
The Villages FL 32162-3594

Ph: 757-650-4317
Fx: 352-633-8363



South Carolina Secretary of State

Mark Hammond



From the Secretary's Desk

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No Results Found.

Corporation Name: GFG Supply

Options: Begins With

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Charities! Raffles!

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised November 2016)

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.

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 2016 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 473, 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.