STATE OF SOUTH CAROLINA	)	**BEFORE THE SOUTH CAROLINA PROCURMENT REVIEW PANEL**
	)	
COUNTY OF RICHLAND	)	
		CASE NO. 2003-8
In re: Contract Controversy - University of South Carolina Basketball Arena	)	
	)	**ORDER DENYING SUMMARY JUDGMENT**
Protest of Skanska USA Building, Inc. and McKinney Drilling Co.	)	
	)	
Appeal of Skanska USA Building, Inc. and McKinney Drilling Co.	)	

This matter came before the South Carolina Procurement Review Panel (Panel) on a Motion for Summary Judgment, or in the Alternative a Motion in Limine, filed by Skanska/McKinney on October 29, 2003. After allowing the other parties opportunity to file briefs in response, the Panel decided the matter without oral argument on December 16, 2003.

BACKGROUND

This case involves a construction contract between Skanska and the University of South Carolina (USC) for the building of the new basketball arena. McKinney was the drilling subcontractor for the construction project. During and after construction a dispute arose among the parties as to the amount owed, if any, by USC to McKinney and Skanska for rock excavation. In the order of the Chief Procurement Officer, he found that Skanska was entitled to additional compensation for "Special Excavation", but found that he was unable to make a determination as to how much compensation was due. Skanska/McKinney appealed the order of the Chief Procurement Officer for Construction (CPO) on September 8, 2003. Skanska/McKinney agree that they are entitled to additional compensation, but believe that they did prove how much with reasonable certainty.

Skanska/McKinney then filed a Motion for Summary Judgment. Skanska argued that there are no genuine issues of material fact regarding USC's liability under the original claim and for that reason summary judgment is appropriate to limit the scope of the appeal to just those issues of whether it proved its damage entitlement. In the event that the Panel did not find the summary judgment motion was appropriately made, Skanska/McKinney made an alternative Motion in Limine to exclude any evidence from the hearing except for that on the issue of whether it proved its damage entitlement.[1]

DISCUSSION

We disagree with the arguments made in the motion by Skanska/McKinney that this matter should be limited just to the issue of whether it proved its damage entitlement. We take this opportunity to reiterate what we have held in the past. This Panel is not limited to exactly what is brought before it by way of the request for review. The Panel may hear any issue that was originally brought before the Chief Procurement Officer. However, new issues may not be included when the case comes before the Panel. Appeal of Volume Services, Case No. 1994-8; Appeal of McCrory Construction Co., Inc. Case No. 1994-13. While we understand the arguments that appellate review is limited to the issues stated in the appeal, by statute the Panel does not sit in the usual capacity of appellate review. While it is true that the Panel was created to review the findings and conclusions of the CPO, the statute mandates that the Panel hear the cases anew.

[1] The Panel has decided motions for summary judgment on cases in the past. The most recent case being Appeal by Accent Contracting, Inc., Case No. 2002-2. A Motion for Summary Judgment is an appropriate procedure before the Panel. It is appropriate in this case because Skanska/McKinney claims there is no genuine issue as to material fact regarding USC's liability under the original claim. Therefore, we will decide the Motion for Summary Judgment and disregard the Motion in Limine since it was made as an alternative motion.

Nevertheless, in the case before us, we do not believe that we have to reach the issue of what the statute and our cases say about our scope of review. The request for review in this case does not limit itself to the issues Skanska/McKinney contends it does. The request is not limited to the issues of whether it proved its damages entitlement. First, it seems nearly impossible from what we have seen in the filings in this case that the case could be heard and decided without some findings and conclusions as to other issues. Secondly, the filed document requesting a hearing before the Panel is broad in terms of these issues. In the first paragraph of the Grounds for Appeal, Skanska/McKinney states, "Skanska/McKinney is appealing certain specific findings of fact and determinations (conclusions of law), as well as appealing general grounds either not addressed or inadequately addressed in the Decision." Then, in listing the grounds for appeal, there are issues that appear to expand beyond the point Skanska/McKinney contends. For example, in Paragraph 3 there is question regarding management of the contract, in Paragraph 4 there is an issue raised as to whether McKinney encountered material entitling them to compensation for "Special Excavation" on some of the caissons or all of the caissons, and in Paragraph 6 Skanska/McKinney raises the issue that it met its burden of proof regarding "Special Excavation" being at the point of Earth Auger Refusal at PWR, as determined by USC's geotechnical engineers."

ORDER

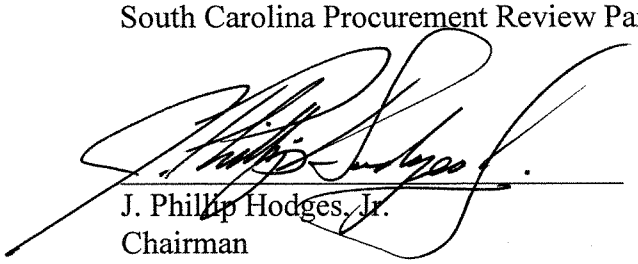
This Panel concludes that summary judgment should not be granted in this case.

IT IS HEREBY ORDERED that the Motion for Summary Judgment dated October 29, 2003, is **DENIED**.

IT IS FURTHER ORDERED that a hearing officer be appointed to hear this matter and make a recommendation to the Panel for final order.

IT IS SO ORDERED.

South Carolina Procurement Review Panel



J. Phillip Hodges, Jr.
Chairman

This 12th day of January, 2004