

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

In re: Contract Controversy – Agricultural
Biotechnology/Molecular Biology Complex

EllisDon Construction, Inc.

v.

Clemson University

Case No. 2005-2

ORDER

EllisDon Construction, Inc. (“EllisDon”) comes before the South Carolina Procurement Review Panel (the “Panel”) seeking to limit the issues on appeal to be considered by the Panel. Clemson University (“Clemson”) and the Chief Procurement Officer (“CPO”) oppose the motion. For the reasons set forth herein, the Panel agrees that the issues on appeal can be limited and framed by the parties. However, the Panel also offers the parties an opportunity to reframe the issues and areas of dispute so that neither party is prejudiced by this decision.

This case involves numerous disputes concerning the contract between EllisDon and Clemson regarding the construction of the Agriculture Biotechnology/Molecular Biology Complex (the “Project”) at Clemson. Following a Request for Resolution in which both parties alleged multiple breaches of contract and extensive damages, the CPO rendered a decision on January 11, 2005 (the “CPO Decision”).¹ On January 21, 2005, EllisDon timely requested a review of the CPO decision pursuant to S.C. Code § 11-35-4230(6) (the “Request for Review Letter”). Clemson did not request a review or formally appeal the CPO Decision and nor did it respond to the Request for Review Letter. EllisDon maintains that the issues before the Panel are restricted to those raised in the

¹ The hearing before the CPO lasted more than six days, including the testimony of many witnesses and the introduction of voluminous exhibits.

Request for Review Letter. Clemson and CPO argue that the whole matter is to be heard *de novo* by the Panel.

The exclusive means to resolving a controversy between the State and a contractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code is set forth in S.C. Code § 11-35-4230. In this case, the CPO conducted an administrative review and issued a written decision as provided in S.C. Code § 11-35-4230(4) (the “CPO Decision”). The CPO Decision is “final and conclusive” unless a party adversely affected by it, like EllisDon, requests a further administrative review by the Panel. S.C. Code § 11-35-4230(6).

The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Id. (emphasis added).² The Panel is empowered to review and determine such decisions *de novo* pursuant to S.C. Code § 11-35-4410(1)(a).³

As may be typical in disputes concerning major construction projects, the CPO found some issues in favor of Clemson and some issues in favor of EllisDon. The CPO Decision sets forth the issues raised before the CPO and his rationale for deciding the various issues before him. The detailed and well-organized Request for Review Letter frames the issues on which EllisDon contends the CPO was mistaken. EllisDon’s Motion

² There is no dispute that EllisDon properly served and noticed the Request to Review Letter.

³ In this instance, the Panel has appointed the undersigned hearing officer to conduct the administrative review and report to the Panel pursuant to S.C. Code § 11-35-4410(5).

raises the sole question of whether the scope of the Panel's review of the CPO Decision is limited to the issues set forth in its Request for Review Letter.

Because this issue has not been directly addressed or uniformly decided, the parties have understandably advocated conflicting positions as to the responsibilities and procedures and scope of the Panel's review of a CPO decision concerning a contract controversy in which the CPO makes findings for and against both parties to the dispute. There does not appear to be any written statutory or regulatory procedures⁴ on this issue other than the mandate that the adverse party shall make a request "in writing setting forth the reasons why the person disagrees with the decision," S.C. Code § 11-35-4230(6), and that the Panel is supposed to make its review and determination *de novo*, *id.* § 11-35-4410(1). There is no statutory admonition that the issues are limited to the Request for Review Letter nor a requirement that Clemson file its own protest letter or respond to the Request for Review Letter.

The confusion comes about because of seemingly contrary precedent. In Protest of Kodak and Xerox Corp., Case No. 1988-15, relied upon by EllisDon, Kodak appealed a decision in which the CPO agreed that the Department of Mental Health was not justified in sole sourcing a copier contract to Xerox but did not award Kodak any relief. Kodak appealed the decision of the CPO to the Panel solely on the grounds that the CPO did not award it any relief. Xerox had initially appealed the CPO decision but withdrew its appeal. The Department of Mental Health initially informed the Panel that "it did not wish to appeal the decision of the CPO to the Panel." However, when Xerox withdrew

⁴ The Panel has the authority to establish its own rules and procedures pursuant to S.C. Code § 11-35-4410(4)(a). No such rules and procedures as may be applicable to this case have been published in S.C. Reg. 19-445. Instead, it appears that the Panel has relied on case precedent and its procedural memos to establish various rules, expectations, and procedures.

its appeal, the Department of Mental Health “moved the Panel to be allowed to present evidence that the decision to sole source was justified.” The Panel expressly determined that any such evidence could be heard by the Panel, but such a decision was solely within its discretion. When the agency pressed the issue after the Panel limited testimony only to the issue of damages, the Panel, in its discretion, did not permit the agency to present this evidence, explaining its rationale in a footnote:

DMH argues that, because the hearing before the Panel is essentially de novo, DMH is entitled to present all the evidence it chooses on the decision to sole source. If DMH had timely appealed the decision of the CPO as was its right as an adversely affected person, its argument would have merit. However, if the time limitations on appeal are to have any meaning, DMH must be bound by its decision to accept the CPO’s findings. Kodak did not, by applying for relief, open the door for DMH to relitigate its case.

This decision appears to support EllisDon’s contention that issues not appealed by Clemson are abandoned and that the issues to be decided by the Panel are limited to those contained in the Request for Review Letter.⁵

More recently, the Panel decided Protest of Skanska USA Building, Inc. and McKinney Drilling Co., Case No. 2003-8. In Skanska, the CPO found that Skanska was eligible to receive additional compensation for rock excavation during the construction of the University of South Carolina basketball arena. However, the CPO was “unable to make a determination as to how much compensation was due.” When Skanska appealed, it also moved to limit the scope of the appeal to whether Skanska proved its damage entitlement. The Panel held:

⁵ Similarly, EllisDon cited Protest of Blue Bird Corp., Case No. 1994-15, for the proposition that issues not raised in a protest letter are not properly before the Panel. At least two times in this decision, however, the Panel considered (and presumably took evidence) and addressed issues not contained in the protest letter. This decision confirms the point made in Kodak that the Panel has the authority and discretion to address issues that are not expressly contained in the appeal letter following the CPO decision.

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. 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.

(emphasis added).⁶ Clemson and the CPO cite Skanska for the proposition that all of the issues before the CPO are to be relitigated.⁷

The parties have impressively attempted to parse, distinguish, harmonize, or otherwise reconcile this precedent. The Panel greatly appreciates these efforts. However, the common thread among these prior cases is that the Panel has the authority and retains the discretion to structure its procedures and hear evidence on all of the issues raised before the CPO, even if those issues were not identified in the letters appealing the CPO decision. And, these cases, expressly or by inference, emphasize and reaffirm that when the facts and circumstances so dictate, the Panel has the discretion to limit the testimony to the issues raised in the request for review.

⁶ Arguably, this portion of Skanska is dicta because the Panel later determined that it did not have to reach this particular issue because the areas of dispute raised by Skanska in its appeal letter were not nearly so narrowly framed as Skanska had inferred in its motion for summary judgment. Of note, the Skanska Panel did not cite the Kodak decision and none of the parties brought the Kodak decision to the attention of the Panel, thereby leaving to question whether the Panel was aware of a potentially conflicting precedent.

⁷ The Skanska Panel cited Protest of McCrory Construction Co., Inc., Case Nos. 1994-13 & 1995-7, and Clemson and the CPO also rely on McCrory for support. McCrory involved a unique set of procedural questions and primarily addressed a dispute about the order of the presentation of evidence and the burden of proof of the parties bringing the claims. While forcefully confirming the *de novo* nature of the Panel review, the McCrory decision buttresses the Panel's discretion to set its own procedures and hear issues raised before the CPO, whether or not such issues were expressly set forth in the appeal letters. Indeed, a review of the case and appeal of that case to the Circuit Court confirm that it had little, if anything, to do with the preservation or abandonment of issues raised or not raised in the letters appealing the CPO's decision.

Consequently, even though the individual cases can be factually or procedurally distinguished from the instant appeal, each of the parties failed to appreciate that these cases, read together, affirm the discretion of the Panel to frame the issues and decide the scope of review after considering all of the facts and circumstances of the particular appeal at issue. By appealing a portion of the CPO Decision in the Request for Review Letter, EllisDon took a risk that the Panel might consider all of the issues before the CPO -- the whole case anew -- just as the Panel did in Skanska. Even in the precedent favorable to EllisDon's position, Blue Bird and Kodak, the Panel expressly retained the discretion to address, hear evidence, and take testimony on issues not specifically contained in the protest letters.

Similarly, Clemson took the precarious position that EllisDon's appeal automatically preserved all of its issues for review and consideration. Clemson, unlike the agency in Skanska, was clearly an aggrieved party and had standing to appeal. It could, just like it did in McCroory, request a review of the CPO Decision and articulate grounds for relief.⁸ Even in Skanska, the Panel did not **mandate** the rehearing of all issues in the event of an appeal of a portion of a CPO decision. It merely held that the Panel **may** hear any issue that was originally before the CPO.⁹ McCroory simply confirms

⁸ Indeed, Clemson's request for a review helped frame the issues before the McCroory Panel. The Panel construed Clemson's appeal not to raise new issues but as "defenses" to the issues raised by McCroory. It used those letters to frame the issues and procedures by which it would hear evidence, noting that it was not bound by the issues expressly raised in the appeal letters.

⁹ Reading otherwise into the Skanska opinion could have absurd and inefficient results. If, hypothetically, a party merely appealed one of thirty issues brought before the CPO in a contract dispute and the agency did not request a review of the CPO decision, the Panel should not be obligated to hear all of the issues brought before the CPO just because one of the parties appealed a minor portion of the decision. Nor should a party be forced to guess which issues a non-appealing party intends to litigate or contend in a subsequent hearing before the Panel.

that the Panel has the discretion to form procedures and decide the scope of reviewable evidence, so long as it complies with due process rights.¹⁰

The Panel is thus justified hearing the whole case anew and may consider those issues not specifically raised in the Request for Review Letter. It is reluctant to do so in this case, however, as judicial economies and efficiencies may be served by limiting the issues before the Panel to those in actual dispute.¹¹ However, the Panel recognizes that both parties have claimed that any action taken on this Motion could be prejudicial. For example, Clemson argues that limiting the issues to those contained in the Request for Review Letter prevents it from litigating other issues adversely determined against it in the CPO Decision that are not contained in the Request for Review Letter. And, not knowing which issues Clemson intends to litigate before the Panel prevents EllisDon from preparing for the hearing and/or forming the strategic decision to determine which issues, if any, it should abandon. Prior precedent put both parties on notice that the Panel may entertain evidence on some, or all, of the issues before the CPO, and therefore the Panel determines that the procedural due process rights of neither party would be threatened if the Panel heard the whole case anew or limited the issues to those contained in the Request for Review Letter. Yet, in the interest of fairness to both parties, the Panel will issue a scheduling order simultaneous with this decision that requires the parties to

¹⁰ Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful matter. See *Unisys Corp., v. South Carolina Budget & Control Bd.*, 346 S.C. 158, 174-75, 551 S.E.2d 263, 272 (2001); *Cameron & Barkley Co. v. South Carolina Procurement Review Panel*, 317 S.C. 437, 440-41, 454 S.E.2d 892, 894 (1995).

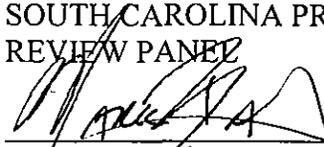
¹¹ Even though EllisDon contends that it has “narrowly” framed the issues in dispute, there may actually be very few issues before the CPO that are not in dispute, thus practically forcing the Panel to hear the whole case anew.

identify the issues in conflict and exchange documents to be introduced before the Panel, thus giving both parties ample notice and opportunity to be heard.¹²

The Panel concludes that the issues on this appeal should be limited. **IT IS HEREBY ORDERED** that the parties proceed pursuant to the Scheduling Order dated June 25, 2005.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Mark W. Bakker
Hearing Officer

¹² As a hearing officer and a member of the Panel, I take this opportunity to suggest that the following procedures be adopted by the Panel at the conclusion of the case to provide guidance and procedures for further litigants and participants in the procurement review process. Any party adversely affected by a CPO decision pursuant to S.C. Code § 11-35-4230(4) shall request a review by the Panel pursuant to the procedures of S.C. Code § 11-35-4230(6), specifically listing the issues such party wants the Panel to review. Once such an appeal has been filed, any other party adversely affected by any portion of the CPO decision may institute a cross-appeal by serving a similar request for review pursuant to the procedures set forth in S.C. Code § 11-35-4230(6) within five (5) business days of receipt of the original review letter. Although the Panel is not absolutely limited to the issues raised in the review letter or cross-appeal letter, parties are hereby on notice that the Panel may be inclined to limit its scope of review to the issues raised in these letters. The Panel would then hear evidence and testimony on any matters specifically raised in the letters for review or the cross-appeal as well as any “defenses” to these issues. This approach would appear to balance the needs of fairness with the needs of judicial economy and efficiency.