

Esq., Clontz-Garrison and Utilities, both represented by William H. Bundy, Jr., Esq., SCSU represented by Neil S. Haldrup, Esq. and Perrin Q. Dargan, III, Esq., and the Office of General Services of the Budget and Control Board represented by Delbert H. Singleton, Jr., Esq.

The Panel adopts the findings and recommendations of the hearing officer and issues this order in accordance with those findings. Prior to the hearing, the hearing officer ruled on the following five motions which are hereby incorporated into the order of the Panel.

1. Hass's Motion to Vacate that portion of the CPOC's decision which indefinitely suspended Hass from State procurement was granted because no party ever raised the issue of suspension or debarment as a remedy nor was Hass afforded a hearing on that issue as the Procurement Code provides.
2. At SCSU's request, Hass' surety, International, was dismissed from the proceeding since the question of International's liability, if any, depends on its contract (bond) and is outside the issues in this matter.
3. SCSU's Motion to Dismiss the subcontractors' claims was denied because §11-35-4230 gives subcontractors independent standing to assert claims against the State when they are the real parties in interest, and the Procurement Code gives any party aggrieved by the CPOC's decision the right to request review by the Procurement Review Panel.
4. Hass' Motion to Limit the Involvement of counsel for the Office of General Services, Delbert Singleton, was denied on the grounds of the long standing

procedure of the Procurement Review Panel which allows counsel for General Services to fully participate in proceedings before the Panel.

5. Hass' Motion to Recuse the Honorable Gus Roberts, Chairman of the Panel, was moot because Mr. Roberts recused himself when he learned of SCSU's involvement.

FINDINGS

1. Hass and SCSU entered into an agreement for the construction of the 1890 Extension Program Campus Office Facility on the University's grounds in Orangeburg, South Carolina. The contract form was the AIA document A101-1987 with the then current OSE Supplemental Conditions.
2. The contract invoked and incorporated the General Conditions of the Contract for Construction, AIA document A201. Articles 4.3.3 and 4.4.1 (as amended) define the requirements for submission and resolution of claims for additional costs and time.
 - 4.3.3 Time Limits on Claims. Claims by either party must be made within 21 days after occurrence of the event giving rise to such claim or within 21 days after the claimant recognizes the condition giving rise to the claim, whichever is later. Claims must be made by written notice. An additional claim made after the initial claim has been implemented by change order will not be considered unless submitted in a timely manner.
 - 4.4.1 The Architect will review claims and take one or more of the following preliminary actions within 10 days of receipt of a claim: (1) request additional supporting data from the claimant; (2) submit a schedule to the parties indicating when the architect expects to take action; (3) reject the claim in whole or in part, stating reasons for rejection; (4) recommend approval of the claim by the other party; (5) suggest a compromise.
3. The contract included two deductive alternates. Alternate 1 removed stucco exterior wall surface. Alternate 2 substituted aluminum storefront for rolled steel storefront.

4. On June 23, 1994, SCSU issued Hass a Notice to Proceed for the project. The date of commencement was July 21, 1994. The date of substantial completion was July 21, 1995. This was later extended by 31 days (Change Oder no. 1) due to a delay in SCSU's ability to release the site to Hass.
5. Eight Change Orders to the contract were approved. The date of substantial completion was extended by a total of 198 days.
6. Eleven Change directives (CCD) were issued.
7. On January 24, 1997, Hass petitioned the State Engineer/Chief Procurement Officer for Construction (CPOC) to resolve a contract controversy with SCSU. The issues submitted for resolution were: compensation for delays and disruptions; a request for declaration of default by the owner; or in the alternative, resolution of certain issues.
8. On March 6, 1997, SCSU requested the architect to certify that sufficient cause existed to justify termination of the contractor, which Huff did by a letter dated March 11, 1997.
9. On March 12, 1997, SCSU notified Hass that SCSU had declared Hass in default and neglect of the contract. Thereafter, on March 21, 1997, SCSU requested the CPOC to resolve certain issues including: whether Hass was in default; whether SCSU could terminate Hass for cause.
10. In his decision dated September 24, 1997, the CPOC terminated the contract.

DECISION

Based on our review, we find that the owner and/or its agents were responsible for the delays and disruptions in this contract. However, in order to be compensated in damages, the contractor must have complied with the terms of the contract dealing with

claims arising out of the contract. Since this matter arises out contract, this is an issue of law and not of equity. Accordingly, we look to the terms of the parties' agreement to decide this matter. Hass did not comply with the procedural requirements of the contract in that he failed to timely file the necessary details in support of his claims as required by the contract and as requested by the architect.

IT IS HEREBY ORDERED AND DECREED:

1. The contract of the parties is terminated.
2. SCSU and/or its agents are responsible for the delay and disruption in the project and are therefore barred from recovering damages.
3. Hass failed to comply with the procedural requirements of the contract so that its claims could be adjudged and ruled on by the architect and therefore Hass can not now recover damages.
4. For the same reasons, the claims of the subcontractors are denied.
5. Each party shall be responsible for its own attorney's fees and costs.

AND IT IS SO ORDERED,

South Carolina Procurement Review Panel



C. Brian McLane, Sr., Vice Chairman,
South Carolina Procurement Review Panel

Columbia, SC
27th day of June, 1998

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

In the Matter of:

1890 Extension Program Campus)
Office Facility)
State Project No. H24-9512-MP)

Hass Construction Company;)
International Fidelity Company;)
Clontz-Garrison Mechanical Contractors,)
Inc.; and Utilities Construction)
Company, Inc.)

REPORT OF THE HEARING
OFFICER TO THE
PROCUREMENT REVIEW PANEL

VS)

South Carolina State University)

In accordance with the South Carolina Procurement Code Section 11-35-4210 (1995), this matter was presented to the Chief Procurement Officer for administrative review. His decision was issued on September 24, 1997. Thereafter, Requests for review "de novo" by the South Carolina Procurement Panel were filed on behalf of Hass Construction Company; South Carolina State University; Utilities Construction Company, Inc.; Clontz-Garrison Mechanical Contractors, Inc.; and International Fidelity Insurance Company, surety for Hass.

Pursuant to Section 11-35-4410(5) of the Procurement Code, I was appointed as Hearing Officer for the Panel. Prior to the hearing I ruled on several motions, to wit:

1. I granted Hass's Motion to Vacate that portion of the State Engineer's decision which indefinitely suspended Hass from State procurement because no party ever raised suspension or debarment as a remedy nor was Hass afforded a hearing on that issue as the Code provides.
2. I dismissed Hass's surety from this proceeding at South Carolina State University's (SCSU) request since the question of International's liability, if any, depends on its contract (bond) and is outside the issues in this matter.
3. I denied SCSU's Motion to Dismiss the subcontractors' claims because S.C. Code Section 11-35-4230 gives subcontractors independent standing to assert claims against the State when they are the real parties in interest, and the Procurement Code gives any party aggrieved by the CPOC's decision the right to request review by the Procurement Panel.

4. I denied Hass's Motion to Limit the Involvement of counsel for General Services, Delbert Singleton, on the grounds of the long standing procedure of the S.C. Procurement Review Panel which allows counsel for the hearing officer to fully participate in proceedings before the Review Panel.
5. Hass's Motion to Recuse the Honorable Gus Roberts, Chairman of the Procurement Review Panel was moot because Mr. Roberts agreed to recuse himself when he learned of SCSU's involvement.

The hearing consumed 20 days of oral testimony. If issued, the transcript would approximate 6,000 pages; there are approximately 10,000 pages of documents and exhibits in the record. The Procurement Review Panel's procedures allows the introduction of new evidence but restricts the parties to matters (issues) brought before the CPOC. In his appeal notice Hass lists sixty-seven (67) alleged errors and issues for review. In his opening remarks, Hass' attorney stated that it was a case of mismanagement involving four areas: funding, design, administration, and accountability. In SCSU'S request they specifically asked for review of two issues: the date of substantial completion, and the cost to complete. They also asked the Panel to review eleven (11) other items not included in the decision portion of the CPOC's order. While they may have disagreed with the CPOC's conclusions, no-one questioned his statement of the case or findings of fact which really frame the issues for review by the Panel. Nor do I have any difference with them except for the portion relating to the surety which I ruled was outside the jurisdiction of the review process and therefore not relevant to this proceeding. Accordingly, they are set forth hereafter for the Review Panel.

NATURE OF THE CONTRACT CONTROVERSY

Hass and SCSU entered into an agreement (the contract) for the construction of the project which consists of a two-story concrete and masonry structure located on SCSU's campus. Hass subcontracted the electrical work to Utilities Construction (Utilities) and the mechanical work to Clontz-Garrison Mechanical (C-GM).

The architect of record is Ray Huff Architects, P.A. (Huff). Huff subcontracted with Stevens & Wilkinson, Inc. (S&W) for civil, structural, mechanical and electrical engineering services for the project. The contract initially allowed 365 days for completion of the work. As of this date, the project remains unfinished. Hass contends that the delay in the completion is due to a combination of subsurface conditions which differ materially from those shown in the contract documents, errors and omissions in the design documents and actions by SCSU which interfered with Hass' ability to complete the project. Hass seeks compensation for the alleged delays and disruptions and a declaration from the CPOC that SCSU is in default and that the contract should be terminated to the benefit of Hass, or in the alternative, a resolution of the delay and disruption claims.

SCSU has declared Hass to be in default of its obligations under the contract and requests the CPOC affirm this declaration, to declare Hass in material breach of its obligations, to



authorize SCSU to terminate Hass for cause, to affirm SCSU's right to assess liquidated damages and to confirm the obligations of Hass' bonding company.

FINDINGS OF FACT

1. On May 14, 1994, SCSU and Hass entered into the contract for construction of the 1890 Extension Program Campus Office Facility. The contract form was the AIA document A101-1987, with then current OSE Supplemental Conditions.
2. The contract invoked and incorporated the General Conditions of the Contract for Construction, AIA document A201. Articles 4.3 and 4.4 (as amended) defines the requirements for submission and resolution of claims for additional cost and time. Article 14 (as amended) defines the basis for termination or suspension of the contract.
3. The contract included two deductive alternates. Alternate 1 removed the stucco exterior wall surface. Alternate 2 substituted aluminum storefront for rolled steel storefront.
4. On June 23, 1994 SCSU issued Hass a Notice to Proceed for the project. The date of commencement was July 21, 1994. The date of substantial completion was July 21, 1995. This was later extended by 31 days (Change Order No. 1) due to a delay in SCSU' ability to release the site to Hass.
5. On July 18, 1994, Hass, SCSU, Huff and S&W participated in a pre-construction meeting. The requirements for Change Orders (CO) and Time Extensions were discussed.
6. Eight Change Orders to the contract have been approved to date. The date of substantial completion has been extended by a total of 198 days.
7. Eleven Change Directives (CCD) have been issued to date.
8. On January 24, 1997, Hass petitioned the State Engineer to resolve a contract controversy with SCSU. The issues submitted for resolution were:
 - a) Compensation for delays and disruptions; and
 - b) A request for a declaration of default by the owner and termination of the contract for a material breach by the owner; or, in the alternative,
 - c) Resolution of certain issues:
 - i) Subsurface and latent soil conditions.
 - ii) Deficiencies in the design of the entry-way arch.
 - iii) Deficiencies in the design causing a change in the sequence of construction of the building's structural frame.
 - iv) Issuance of numerous changes without compliance with the contract provisions for resolution of change orders.

- v) Failure to pay for undisputed work, arbitrary reductions in pay applications and imposition of liquidated damages.
- vi) Failure to make the site available.
- vii) Relocation of the building due to survey inaccuracies.
- viii) Lobby area design changes.
- ix) Window frame and hollow metal changes.
- x) Structural steel column support changes.
- xi) Suspensions of work.
- xii) HVAC design changes.
- xiii) Delays in the processing of shop drawing submittals.
- xiv) Delays in access to utilities.
- xv) Changes in the steel reinforcement requirements for wall framing.
- xvi) Delays in getting electrical power for elevator operation.
- xvii) Relocation of a retaining wall.
- xviii) Redesign of the auditorium ceiling system.
- xix) Changes in the ceiling electrical outlets.
- xx) Delayed shop drawing review and redesign of the metal hand rails.
- xxi) Delayed resolution of a slate flooring issue.
- xxii) Delayed resolution of the project finish schedule
- xxiii) SCSU's persistent refusal to authorize changes.

9. On March 6, 1997, SCSU requested Huff to certify that sufficient cause existed to justify termination of Hass.

10. In a March 11, 1997 letter, Huff stated "...given the history and performance of the project there appears to (sic) a systematic and material breach of contract on the part of the contractor."

11. On March 13, 1997, SCSU notified International Fidelity Insurance Company (International), the performance bond surety, that Hass was in default of its obligations under the contract.

12. On March 17, 1997, SCSU notified Hass that SCSU had declared Hass "...in default and neglect.." of the contract. SCSU further offered Hass and the bonding company the opportunity to "... cure such default and neglect.."

13. On March 21, 1997 SCSU requested the CPOC resolve the following issues:

- a) Whether Hass is in default of its contract obligations.
- b) Whether Hass is in material breach of its contract obligations.
- c) Whether SCSU can terminate Hass for cause.
- d) Whether SCSU can continue to assess liquidated damages.
- e) Whether Hass' performance bonding company is obligated to honor the terms of the



performance bond and the terms of the contract incorporated into the performance bond.

14. On April 4, 1997 SCSU submitted a list of alleged breaches and defaults by Hass. This list included:

- a) Failure to prosecute the work and staff the project adequately in the areas of:
 - i) Concrete work
 - ii) Installation of sealants in control joints
 - iii) Roofing
 - iv) Windows
 - v) Building expansion joints
 - vi) Metal railings
 - vii) Metal lobby bridge
 - viii) Performance of work in Change Directives and Change Orders
 - ix) Site work
 - x) Construction of the Goff Street retaining wall
 - xi) Installation, testing and startup of mechanical systems
 - xii) Drywall installation
 - xiii) Plumbing and toilet installation
 - xiv) Interior finishes installation
 - xv) Kitchen casework installation
 - xvi) Slate paver installation

- b) Installation of non-conforming work in the areas of:
 - i) Roof flashing
 - ii) Concrete bond beams
 - iii) Wall framing
 - iv) Instrumentation and controls installation
 - v) Concrete placement and finish

- c) Failure to comply with contract provisions in the areas of:
 - i) Submission and documentation of claims
 - ii) Submission of progress reports
 - iii) Unauthorized substitution of subcontractors
 - iv) Submission of excessive claims

- d) Submission of inflated delay claims by stacking concurrent delays

- e) Failure to protect exposed equipment

- 15. ~~DELETED~~ (Reference to performance bond mentioned above)



16. On July 28, 1994, Huff issued the minutes of a pre-construction meeting held on July 18, 1994. These minutes stated in part:

3. Key dates:

Following are the key dates (sic) for the project:

- a. Commencement: 21 July 1994
- b. Substantial completion: 21 July 1995
- c. Final completion: 17 August 1995...

5. Contract changes and modifications:

- a. Change Order

Processing Change Orders in a timely manner have been difficult due to the multi-tiered approval process. The University will make every effort to facilitate the approval process. The contractor must notify the architect when delays related to modifications affect the progress of the work.

- i. Must provide detailed cost breakdown including labor, burden and materials: All modifications in the contract sum must be supported by itemized breakdowns if cost based on current Means Cost Data.
- ii. Change Directives may be issued: Change Directives will be issued as described in Section 01028 when there is no agreement on the costs for a contract modification.
- iii. Work conducted without a Change Order is at the Contractor risk. There will be occasions during construction when the contractor will be asked to proceed with changes prior to the complete execution of Change Order. If the contractor proceeds, he does so at his own risk.

6. Time Extensions

- a. Submit notice of delay within 10 days of the delay. Failure to do so will waive the rights the contractor may have for a legitimate request for extension.
- b. Claims for additional expenses cannot be collected until delay exceeds 30 days : No claims for additional cost attributable to a delay (that is not the fault of the contractor) can be claimed until 30 days after the delay commences and only then will direct costs be compensated.
- c. Five weather days per calendar month assumed: Claims for inclement weather must assume five inclement weather days per calendar month. Days that exceed the minimum can be claimed only if the overall schedule is affected and supporting documentation is submitted. ...

11. Progress Schedules:



- a. Submit with each application for payment, updated. Schedule shall show planned and actual schedules. Schedule shall be reasonably detailed to allow adequate monitoring of the project...

21. Review alternates: The contractor did not have any questions regarding the alternates.

DISCUSSION

It is axiomatic that inherent in a contract, such as is before the Panel, the parties have mutual obligations for acting in good faith and fair dealing. Both the Procurement Code and the South Carolina statutes are in accordance with this principle. It is also basic contract law that the agreement may be terminated in appropriate circumstances. A review of the evidence and testimony clearly shows a breakdown in the relationship of the parties, although they may have had their good moments. It appears to have been as much a communication problem as anything else. Once deterioration starts it is difficult to overcome. That is not to say that there were not legitimate complaints on both sides but rather deterioration is like a snowball rolling down hill. Items which should not be a problem become so. Real problems get worst. Ultimately, even though the parties go through the motions little if anything productive is accomplished.

As his order indicates, there was an exhaustive hearing before the CPOC lasting eight days. In this review the parties took six and one-half days in their examination of the first witness. The minutia was overwhelming. It was reflective of their relationship throughout the project. It is somewhat surprising that neither tried to terminate the contract early on.

Clearly, Hass' claim for wrongful termination was not presented to the CPOC and, therefore, can not be raised on appeal to the panel. Further, apart from the procedural fault and probably more significant, the claim is based on an illogical premise. One of Hass' requests to the CPOC was that he determine that Hass had the right to terminate the contract. As the CPOC pointed out, the right to terminate is inherent in any contract. Based on the facts, the CPOC decided it would be impossible for the parties to reasonably conclude the project, and therefore, since both had asked for it, he said the contract was terminated. Hass' complaint is that it did not get everything it wanted. To now maintain that this somehow makes the state liable for damages is totally lacking in merit.

As previously noted, while the parties to a contract have the right to terminate for "just cause" doing so is not without risk. It is an act or decision taken at the terminator's peril. In asking the CPOC to decide he could terminate the contract Hass was seeking to shift the burden of making this decision. It can't be done.

Two people who were involved in and familiar with many of the events that took place during this project were in attendance for much if not most of the hearing. One left the employ of the architect to work for SCSU, where he is currently employed. The other was

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the architect's associate who handled most of the project and still works for the architect. Their names appear on numerous documents as well as in the minutes of various meetings. Neither were called to testify. One can only speculate as to what light their testimony might have shed on the issues.

The testimony and evidence establishes that the design team worked on the plans for two years before the bidding process began. In October 1992, approximately eighteen (18) months before the bid was let, the architect notified the owner of problems with underground lines and recommended that a survey be made to determine the magnitude of the problem at a cost of \$6,000.00. It was during this period that the engineers noted prospective problems with the fan coil units. The owner rejected the architect's advice and elected not to do the survey. The building was located on the site using a 1984 survey. The subsurface conditions, building location and the fan coil units all came back to haunt this project.

As the record shows, the project was delayed from the very beginning. One month into the project Hass called the architect's attention to the fact that there would have to be an adjustment for the delay in startup. Shortly thereafter the foundation and subsurface problems arose. The record overflows with request from Hass for information, guidance and relief, as well as claims of delay and disruption. These requests may have been an irritation but that does not mean they were improper or done for devious purposes.

Likewise, there are repeated examples of the architect setting forth his need for substantiation of a claim for time and money. When this was done, from time to time at least, adjustments were made in that eight CO's were issued. CCD's were used in other instances. Hass indicated his cooperation by signing the CO's but not his agreement to the time and money, rather he attempted to reserve his right to submit documentation for his claim at some later date. While there is some correspondence about the attempt to reserve his rights the parties never resolved this issue between them. Hass never indicated at what point in time he would submit his documentation. Why Hass resisted tying labor and other costs in to specific claims was never made clear.

While a shortage of funds may have been the owner's reason for delaying a decision, Hass comments and concern about SCSU'S funding are of no consequences to this matter. It is not the right or responsibility of the contractor to decide if the owner is handling his finances correctly. If the contractor performs as required by his contract he is entitled to be paid. The source of the funds is not for the contractor to determine. If the contractor is not paid when the claim is due and proper he has legal recourse through the contract and statutes. Obviously, just as it can affect the contractor's ability to perform on the job, failure to pay proper claims can be grounds for termination.

While the general contractor has the duty to plan and schedule his work, the owner and architect, as his agent, manage the project in the sense that they control CO's, CCD's, payments, etc., as well as having other responsibilities. Each has specific duties and obligations in carrying out his part of the project. Without attempting to cite each of the many exhibits, it is my conclusion that the greater weight of the evidence reflects that the responsibility for the failure of this project rests with the owner and architect. Having arrived



at that conclusion the question arises as to what damages, if any, the contractor and subs are entitled to receive.

In the hearing, Hass claimed its damages arose from one continuing event. Although Hass asserted its alleged claims on a claim by claim basis, Hass consistently refused or failed to provide documentation in support of those claims, despite the architect's pleading with him to do so. See the architect's letter (R 1739-1740). Rather, Hass adopted the option of letting "all of our previous submitted claim notification letters and demands without exception stand." Without the documentation to make a decision, the architect took the only action he could which was to deny the claims.

Before pursuing claims under the Procurement Code the contractor must exhaust its remedies under the contract. In other words, Hass must first present claims to the architect in accordance with the contract. Any rejected claims can then, and only then, be pursued under the procurement Code. Such claims must be made within a year of the rejection. The claims submitted under the Procurement Code must be substantially similar if not identical to those submitted to the architect. To allow otherwise would totally circumvent the dispute resolution process which is the prime purpose of the Code. It goes without saying that there must be sufficient documentation for the CPOC to make an intelligent decision.

The time limits established by the Procurement Code are jurisdictional and can not be waived. While the architect may have stretched the time limits on occasion in attempting to get documentation from Hass, his actions were more in the nature of cooperation and did not constitute waiver.

Apart from Hass' damage claim being procedurally barred the claim for disruption damages is based on the "total cost method," which courts have generally prohibited except in rear instances. This method simply calculates damages by subtracting the original estimated costs from the total costs of performing the work without segregation of those costs. The difference between the actual and estimated costs are assumed to be the full responsibility of the owner. It is precisely because of this misplaced assumption that the "total cost method" is not favored by the courts and boards of contract appeal. (WRB Corp. v. United States 183 Ct.Cl. 409, 1968). According to that court, the total cost method "has never been favored by the court and has been tolerated only when no other mode was available and when the reliability of the supporting evidence was fully substantiated." Id. at 426. Other modes of calculation were available to Hass. More importantly, the supporting evidence was never substantiated by Hass. In effect, Hass asks the Panel to assume that its work was 100% efficient and that every hour it spent on the project above the planned amount is SCSU's responsibility.

CONCLUSION

While the owner/architect may have been responsible for the delays and disruptions, Hass failed to meet the procedural requirements of the contract and therefore its claim for damages should be denied. The subcontractors' claims for damages are barred for the same reasons in that neither ever submitted a claim through Hass or otherwise during the pendency of the work.

RECOMMENDATION

Accordingly, for the foregoing reasons, I recommend that the damage claims of all the parties should be denied with each being responsible for its own costs and attorneys' fees of this proceeding.

Respectfully Submitted



Louis E. Condon
Hearing Officer

June 4, 1998
Columbia, S.C.