

1997-16C (IV)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 98-CP-40-2466

Hass Construction Company, Inc., )  
Clontz-Garrison Mechanical, Inc., )  
Utilities Construction Company, Inc., )

APPELLANTS and )  
PLAINTIFFS, )

SECOND ORDER OF REMAND

vs. )

South Carolina State University, )

RESPONDENT and )  
DEFENDANT, )

and )

The South Carolina Procurement )  
Review Panel, )

RESPONDENT. )

FILED  
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BANDINA A. SCOTT  
S.C.C.P. & G.S.

This case came before the court for the second time after remand to the South Carolina Procurement Review Panel. The case concerns various disputes and claims between Hass Construction and its subcontractors (hereafter "Hass") and South Carolina State University (hereafter "SCSU") arising from the construction of the 1890 Administration Building in Orangeburg, South Carolina. Although the case has a long and dated procedural history, the issues presented in this appeal arising under the Administrative Procedures Act are primarily limited in scope to issues of law. Findings of fact are not to be disturbed to the extent they are supported by substantial evidence in the record.

In 1997, the claims of both parties were originally presented to the State Engineer or the "Chief Procurement Officer for Construction" (CPOC) under the Consolidated Procurement Code. The CPOC held a hearing and found both parties partially at fault. The

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CPOC awarded Hass the value of the work it had completed, terminated the contract “for the best interest of the state”, attempted to apportion damages between the parties, and prohibited Hass from any further participation in this, or any other, state project.

Both parties appealed to the Procurement Review Panel for a *de-novo* review. The Panel appointed a hearing officer, conducted a hearing and rendered its own findings in 1998. The Panel found SCSU and its architect responsible for the delays and failure of the project as Hass had alleged, but denied Hass’s claims because Hass did not properly submit supporting data to the project architect under the Panel’s interpretation of the contract. The Panel’s first Order did not clearly address Hass’s claims for termination damages. Neither party was awarded any damages, but the Panel sustained the CPOC’s previous finding that the contract should be terminated.

After the Panel’s first decision, all parties appealed to this court. Hass also initiated additional termination damage claims to the CPOC and the Panel which were denied and/or stayed pending the outcome of the appeal. After hearing, Circuit Judge William Keesley remanded the case to the Panel to explain their determination that SCSU breached the contract, and provide detailed specifics as to the Panel’s logic in denying Hass’s delay and termination damages.

After remand, the Panel met in executive session and received a memo or proposed order from its general counsel. Neither party was notified of or requested to appear in this proceeding. The Panel issued a more detailed order. In essence, the Panel identified the evidence and facts upon which it based its conclusion that SCSU was at fault. The Panel also made legal conclusions as to its interpretation of the contract and denied Hass’s delay claims on that basis. The Panel also added a new and additional basis for the denial of

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Hass's delay damage claims (that Hass failed to complete the project within the allotted time) and attempted to adopt the Order of the CPOC.<sup>1</sup> The Panel further held that although Hass may have a valid termination damage claim, Hass did not avail itself of the right to terminate and cannot now recover damages on that basis. The Panel further found Hass could not recover its earned contract retainage, that SCSU could recover liquidated damages from Hass, and confirmed yet again the decision to terminate the contract for the State's best interest.

After the first remand, both parties again appealed. This matter is now before this court for the second time. Both parties raise a number of issues which the court has attempted to summarize and simplify below.

1. SCSU'S APPEAL

Turning first to SCSU's arguments on appeal, SCSU argues that the Panel made incorrect factual determinations when it determined SCSU and its architect were responsible for the failure of the project and the delays asserted by Hass. SCSU relies upon a considerable number of documents in the record, excerpts of the transcript, and certain change orders to the contract to support its contentions. While there are certainly facts in the record which could support such an argument, there is also substantial evidence in the record to the contrary. The trial of this action before the Panel was contentious and ably

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<sup>1</sup> On remand, an administrative agency cannot exceed the scope of the Order of Remand and adopt entirely new findings. The Panel had no authority to "adopt" the Order of the CPOC or make new substantive findings that Hass caused any delay on this project. See Bobo v. Marshane, 302 S.C. 86, 394 S.E.2d 2 (S.C. App. 1990). The Panel afforded neither party any notice or opportunity for hearing, and conducted no evidentiary hearing on these issues. The Panel's decision goes beyond the scope of remand, and the new conclusions that Hass is in breach for failing to complete within the contract time also contradicts the previous decision of the Panel. The Court, in reviewing the legal sufficiency of the Order on Remand, will therefore address the adequacy of the explanations actually proposed to the Panel in the first Order of Remand, and the issues properly addressed in the Second Order on Remand.

tried by both sides for more than twenty (20) days. All parties presented experts and fact witnesses. SCSU essentially blamed Hass for the delays and Hass conversely blamed SCSU. The Panel found that the preponderance or greater weight of the evidence supported Hass's theory of the case and found SCSU and its agent responsible for the delays Hass asserted.

S.C. Code Ann. § 1-23-380(6) states in pertinent part: "The court *shall not* substitute its judgment for that of the agency as to the weight of the evidence on questions of fact (emphasis added)." This rule, which prohibits the Circuit Court from substituting its judgment on issues of fact is also referred to as the "substantial evidence" rule. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. *Hendly v. S.C. Budget and Control Board*, 325 S.C. 413, 481 S.E.2d 159 (S.C. App. 1996); and *O'Banner v. Westinghouse Electric Corp.*, 319 S.E. 24, 459 S.E.2d 324 (S.C. App. 1995). In order to affirm the findings of an administrative agency, the reviewing court need only find, considering the record as a whole, evidence that would allow reasonable minds to reach the same conclusions as the administrative agency; the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent administrative agency's factual findings from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (S.C. 1995). Issues as to the credibility of witnesses and weight of the evidence are reserved to the administrative agency. *O'Banner v. Westinghouse Electric Corp.* The record in this case clearly supports the conclusion that SCSU was responsible for the delays in this project; therefore, this finding cannot be disturbed on appeal because it is supported by substantial evidence. This court cannot disturb the factual conclusions of the

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Procurement Review Panel as the finder of fact. Consequently, the determination that SCSU caused the delays and failure of the project is hereby affirmed.

2. Hass's Appeal

As to Hass's claims, Hass essentially advances three (3) theories of recovery. Hass first asserts it is entitled to its earned and as of yet unpaid retainage or contract balance. Secondly, Hass asserts it cannot be foreclosed from pursuing a claim for delay damages because it availed itself of the contractual right to "stand on" its summary claims as initially submitted to the project architect. Thirdly, Hass contends it may recover termination damages under the contract based upon the decision to terminate the contract as ordered by both the CPOC and the Panel.

A. The Contract Balance

Judge Keesley's initial order directed the Panel to address the issue of the contract balance. The Panel denied this claim on the basis that it was "jurisdictionally barred" as not having been presented to the CPOC. A close review of the record reveals that this conclusion is manifestly incorrect; the order of the CPOC actually awarded Hass this sum. The order states in pertinent part: "Hass is entitled to compensation for work completed to date...(\$2,196,569.00) of which to date Hass has been paid...(\$2,086,732.00)". The difference between these two (2) sums represents the contract retainage (including liquidated damages). While the amount of this award was subsequently off-set in the CPOC's decision against the net award to SCSU, this does not mean that the issue was not presented to the CPOC for resolution. Accordingly, the justification the Panel advances for denying Hass recovery of this sum is incorrect and hereby reversed. Hass is entitled to

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recover the sum of \$109,837<sup>2</sup> plus interest to be determined by the Panel in accordance with the further directives of this order.

B. Delay Damages

The Panel denied Hass's delay damages and time extension claims on the basis of its' legal interpretation of Article 4 of the contract. Although the Order of Remand inquired as to the issue of timeliness, Hass's claim was not determined to be untimely in the Order after remand. The Panel simply held that the contract, when read as a whole, does not allow Hass or its subcontractors to invoke the right to "stand on" their claims. The Panel thus imposes upon Hass the obligation to respond fully and completely to any inquiries from the architect. The Panel seems to suggest that such a requirement is consistent with the obligation of good faith and fair dealing, and in a general sense, this Court cannot argue with this conclusion. However, the written Contract in issue provides an explicit, precise, and detailed claim procedure which the Court cannot disregard. The written Contract supports Hass's interpretation that he could refuse to respond to such inquiries by simply advising the architect of the decision to "stand on" its claims. For this reason, the court finds the Panel's interpretation legally erroneous.

In interpreting contracts, a court must construe a contract as a whole and give meaning to every provision. The intent and purpose of a written contract or agreement must be gathered from the contents of the entire agreement and not from any particular clause or provision thereof. *Sloan v. Colonial Life and Accident Insurance Co.*, 72 S.C.2d 446, 222

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<sup>2</sup> On remand, the Panel is also directed to determine and add the amount of improperly withheld liquidated damages, plus appropriate interest, to this amount in light of the conclusion that SCSU is responsible for the delay and disruption asserted by Hass.

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S.C. 248 (S.C. 1952); *Kittles v. General American Life Insurance Company*, 188 S.E. 784, 182 S.C. 162 (S.C. 1937).

Articles 4.3 and 4.4 of the Contract, in their entirety, establish the requirements for delay claims under the Contract. Both of these articles contain numerous sub-articles.

Article 4.3.2 is the initial step in the claims procedure. This provision states:

Claims, including those alleging an error or omission by the architect, shall be referred initially to the architect for action as provided in paragraph 4.4. A decision by the architect, as provided in subparagraph 4.4.4 shall be required as a condition precedent... the decision by the architect in response to a claim shall not be a condition precedent... in the event... (2) the architect has not received evidence or has failed to render a decision within agreed time limits, (3) the architect has failed to take action as required under subparagraph 4.4.4 within thirty days after the claim is made, (4) Forty-five days have passed after the claim has been referred to the architect...

Article 4.4.1 describes the architect's responsibility for evaluating and reviewing claims:

The architect will review claims and take one or more of the following preliminary actions within ten 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 the reasons for the rejection, (4) recommend approval of the claim by the other party, or (5) suggest a compromise.

After the contractor receives the architect's preliminary action (i.e. a request for information), the claimant has the option to take one or more of the following actions.

Article 4.4.3 provides:

If a claim has not been resolved, the party making the claim, shall, within ten days after the architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the architect, (2) modify the initial claim, or (3) notify the architect that the initial claim stands. (emphasis added)

Clearly, this language gives the contractor-claimant the prerogative to refuse to submit additional data to the architect by availing himself of the option to notify the architect "that

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the initial claim stands." There is no obligation to file any supporting data if the claimant decides he does not wish to supply it. The Contract is susceptible to no other interpretation. If the contractor notifies the architect that the claim stands, the architect must issue a final decision on the claim under Article 4.4.4. This is the very course of events that occurred in this case.

Notwithstanding Article 4.4.3, the Panel imposed an apparently implied extra-contractual duty upon Hass to respond in the manner requested by the architect. The Panel found as a matter of law that the contract did not allow Hass the option to notify the architect that its "claims stand". There is no procedural requirement to submit data to the architect for evaluation after a claim has been submitted when the contractor exercises the election to notify the architect the claim stands. Nonetheless, the Panel denied Hass's delay damages on this basis.

The reason there is no such requirement is manifestly obvious. Claims directed to the architect often, as in this case, challenge the competency of the design professional. If detailed submission to the architect were an absolute requirement, an architect could bottle up a claim in perpetuity by simply always asking for more data and taking the position the contractor never submitted enough data.

The Panel's interpretation that there is such a "procedural requirement" effectively rewrites the contract. A court cannot write into a contract terms that it does not contain, either expressly or by reasonable implication. *Brown v. Lowe*, 188 S.E. 182, 182 S.C. 9 (S.C. 1936). In construing a written contract, the intention of the parties and meaning are gathered primarily from the contents of the contract itself, and, when the contract is clear and unequivocal, its meaning must be determined by its contents alone. *White v. White*, 42

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S.E.2d 537, 210 S.C. 336 (S.C. 1947). The function of the courts is to adjudge and enforce contracts as they are written, and when such contracts are capable of clear interpretation, the court cannot exercise its discretion as to the wisdom of the contract or make a substitution for that which was agreed upon. *Charles v. Canal Insurance Company*, 121 S.E.2d 200, 238 S.C. 600 (S.C. 1961). Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *Blakely v. Rayburn*, 221 S.C.2d 767, 266 S.C. 68 (S.C. 1976).

Significantly, Hass's failure to submit data back to the architect was actually of no moment. The Architect issued a final decision notwithstanding Hass's notification that its claims stood and the parties presented their claims to the CPOC. Even if one assumes Hass was required to submit additional data to the architect so that the architect could make a decision in order to satisfy a condition precedent, the architect issued a decision nonetheless. Hass's "breach" gives rise to no harm, damages, or prejudice to the owner. This "breach" cannot bar all of Hass's claims for delay damages when it made no difference.

Although there is no South Carolina case directly on point, courts from other jurisdictions have held that failure to submit information to an architect does not bar a claim for termination or delay damages. In *International Fidelity v. County of Rockland*, 51 F. Supp. 2d 285 (S.D.N.Y. 1999), the Court addressed the issue in the context of a declaratory judgment action. The owner asserted a delay damages claim against a contractor's surety and the surety sought a declaration that such claims should not be initially referred to the architect under the AIA standard form contract for construction. The court agreed and actually issued an injunction against the architect prohibiting any action by the architect on the claims on the grounds that the contract did not require

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submission of such claims to the project architect as a condition precedent. The Court held:

The claims resolution clause in the parties' contract is a fairly standard device that has arisen in the construction industry to effect a quick resolution of disputes that arise during construction and might cause delay if they are not taken care of immediately. New York courts examining such clauses have rejected the notion that project architects are empowered to resolve delay damages disputes.

One of the many cases relied upon in *International Fidelity* is a 1984 termination decision directly on point, *Liebhafsky v. Construct Assoc. Inc.* 466 N.E. 2d 844 (N.Y. 1984). In *Liebhafsky*, a contractor who was terminated from a project wished to pursue a claim against the owner for various changes to the contract and termination damages. The issue presented was whether or not a decision of the architect was required under the AIA contract in the context of a contractor's claims for termination and delay damages.

The Court held that a decision from the architect was not required as a matter of law:

The architect's role as a mediator, to whom all disputes relating to the extension or progress of the work or interpretation of the contract shall be referred initially, is but one aspect of the architect's general responsibility to supervise the contract in order to expedite its completion. The essence of our [prior holding] is that this role is terminated once the architect is no longer responsible for supervising the contractor's performance. Whether the contractor's services have terminated because of substantial completion of the work or on the ground that he has substantially violated the terms of the contract is not controlling. In either instance, the architect's responsibility to supervise the contractor's performance and, by extension, initially mediate his disputes, is at an end.

The Panel's conclusion that Hass is procedurally barred from pursuing its claims for failure to comply with Article 4.4.3 is legally erroneous, clearly erroneous, and arbitrary and capricious. Hass received a final decision from the architect on its claims. Hass properly availed himself of the option to notify the architect that its "claims stand" pursuant to Article 4.4.3. The Panel cannot re-write the contract between Hass and SCSU. The decision of the

Panel is hereby reversed and remanded to the panel so that Hass and its subcontractors may proceed to recover damages for their claims for delay and disruption damages under the contract. The Panel is directed to determine Hass's delay damages, or upon election by Hass as set forth below, Hass's termination damages. The Panel cannot withhold or assess liquidated damages against Hass in light of the determination that SCSU is responsible for the project delays in the Panel's first Order.

C. Termination Damages.

During the earlier proceedings, both parties raised and argued their respective positions that each had the right to terminate the contract as a consequence of breach by the other party. Nonetheless, the Panel and CPOC found neither party actually terminated the agreement. The Court agrees; the CPOC and the Panel terminated this Contract. Finding No. 1 of the Panel's first decision before remand was: "The contract of the parties is terminated."

Article 14 contains provisions for termination by the contractor:

The contractor may terminate the contract if the work is stopped for a period of thirty days through no act or fault of the contractor or a subcontractor... for any of the following reasons...(1) issuance of an order of a court or other public authority having jurisdiction [i.e. termination by public official], (2) an act of government, [i.e. termination by sovereign act]... (4) if repeated suspensions, delays, or interruptions by the owner described in Article 14.3 constitute in the aggregate more than 100% of the total number of days scheduled for completion, or 120 days in a 365 day period, whichever is less [i.e. termination by owner delay]...(emphasis added).

If the work is stopped for a period of sixty days through no act or fault of the contractor or a subcontractor or other agents or employees or any persons performing portions of the work under contract with the contractor because the owner has persistently failed to fulfill the owner's obligations under the contract documents with respect to matters important to the progress of the work, the contractor may, upon seven additional written days notice to the owner and the architect, terminate the contract....[i.e. termination by owner's failure to fulfill obligations] (emphasis added).

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This provision allows the contractor to recover payment for work performed, proven loss, and damages under article 14.1.2 in the event of termination.

The CPOC terminated the contract for the "best interest of the State." The CPOC articulated the following public purpose for his decision to terminate the contract in his capacity as a government official: "It is clear ...that as long as they remain bound by the contract, the State's substantial investment will remain at risk.... irrespective of the reasons, the CPOC finds that it is in the best interest of the State and of the parties to order termination of the contract, effective this date" (emphasis added).

The Panel's first decision did not address Hass's Article 14 claims. Because the Panel refused to address Hass's termination claims, Hass submitted a subsequent termination claim to CPOC and Panel. These claims were also presented to the architect, CPOC, and Panel within one year of Hass's last performance of work under the contract. Upon the issuance of the first Panel decision, Hass also sent the prescribed notice of termination to the Owner and the architect.

Judge Keesley remanded the case to the Panel and directed it to make specific findings on Hass's right to termination damages. The Panel made the following ruling on remand:

Hass asserts that two other grounds arose only after the CPOC terminated the contract. These grounds are termination by a public official and termination by sovereign act. The Panel finds that provision 14.1.1.2 of the contract dealing with termination by a sovereign act does not apply to the facts of this case. The government act at hand, termination by the CPOC for the best interest of the state, is distinguishable from the declaration of a national emergency making material unavailable. The Panel further finds that provision 14.1.1.1 of the contract may apply to the facts of this case, but again Hass failed to exercise the right of termination pursuant to the plain language of the contract.

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This conclusion is based upon the illogical premise that Hass would have had to terminate the contract before the CPOC terminated the contract in order to complain about the CPOC's termination of the contract. The CPOC's decision states in pertinent part: "[Hass] is hereby suspended indefinitely from participation in or receiving any contract for construction from any agency of the State of South Carolina". Appeal from this decision did not stay this decision, and indeed, Hass gave notice to SCSU of its termination from the project. On September 26, 1997, Hass notified the architect: "Pursuant to the ruling of the State Engineer, we are making arrangements for the demobilization of the project". The decision of the CPOC was a self-executing prohibition of Hass's continued participation in the project. The Panel affirmed the CPOC on the decision to terminate the contract, and Hass notified the Owner and Architect of the termination. To suggest that Hass failed to take some action to avail itself of the consequences of the CPOC's and Panel's decision is manifestly wrong. Hass could take no other action than leave the project, notify the owner and architect in accordance with the contract, and continue to press its claim for termination damages.

Termination as a consequence of the act of a public official, or a sovereign governmental act, is contemplated and addressed in the contract between Hass and SCSU. If such actions occur, the contractor is entitled to termination damages. There is no other possible interpretation of the contract as a matter of law. S.C. Code Ann. § 1-23-350 requires an administrative agency to make findings of facts and conclusions of law, separately stated. Where material facts and law are in dispute, an agency must make specific express conclusions which address every issue presented for review. Implicit findings are insufficient. *Hamm v. Public Services Commission*, 380 S.E.2d 428 (S.C.

(1989). The findings of an administrative agency must be sufficiently stated so as to allow a reviewing court to evaluate whether an error has occurred. The Panel's decision fails to address or identify how Hass could have possibly further availed itself of its termination rights under the contract after the issuance of the CPOC's decision to remove Hass from the project. The court finds that this reason is not a legally sufficient basis to deny Hass the contractually prescribed termination damages, claims for which was put into evidence as noted by the Panel in its Order on Remand, p. 24.

Article 14.1.2 allows the contractor to "recover from the owner payment for work executed, and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable profit, overhead, and damages." Under South Carolina law, this contractual remedy survives termination of the contract. *Bodie v. 42 Magnolia Partnership*, 344 S.C. 474, 544 S.E.2d 279 (Opinion Number 3270 December 18, 2000).

### 3. Judgment and Remand

This court agrees completely with the distinguished Judge Keesley's conclusion that, "[i]n a nutshell, the Panel has determined that SCSU and its agents were responsible for the delays and disruptions under the contract." First Order of remand, p. 2. Now, this court has determined that the Plaintiffs did properly submit their claims and, further, that the Panel exceeded its authority under the prior Order of Remand when it made new substantive findings that Hass had breached its contract and was the cause of such delays in the project so that it should be denied those claims, *Bobo v. Marshane, supra.* (Fn. 1).

Therefore, for the foregoing reasons, this case is remanded once more to the

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Procurement Review Panel. In light of this holding, the court finds it unnecessary to address the other arguments raised by Hass challenging the Panel's decision.

The Panel shall re-convene an evidentiary hearing before which all parties may appear.

The Panel shall limit the hearing to the following tasks:

1. Determine the appropriate interest to be added to the amount awarded by the CPOC on Hass's contract retainage claim, including the amount of liquidated damages to be refunded to Hass and direct the payment of such funds.
2. Determine the amount of Hass's and its subcontractors' termination and delay damages in accordance with the language set forth in the contract. To the extent there is any overlap in the measure of damages, Hass will be required to elect between these two (2) measures of damages by the Panel as Hass may not obtain a double recovery, but the Panel is cautioned to apply the measure of damages as prescribed in the contract.

The Panel may appoint a hearing officer to address the issues raised in this Order but the Panel is cautioned to issue a written determination as to the Panel's findings which encompass these issues only and stay within the scope of this order on remand. Nevertheless, nothing in this Second Order of Remand, just as with the former, should be construed as an attempt by the undersigned judge to retain jurisdiction or take the matter under advisement.

AND IT IS SO ORDERED.



Alexander S. Macaulay, Judge

Walhalla, South Carolina,  
October 2, 2001.

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