

1997-160(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,)

vs.)

ORDER

South Carolina State University)

RESPONDENT and)
DEFENDANT,)

and)

The South Carolina Procurement)
Review Panel)

RESPONDENT.)

SCSU has moved for reconsideration of this Court's ruling pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure. SCSU's basis for reconsideration relies not upon some newly discovered evidence, new or overlooked dispositive legal authority, or some allegations of prejudice or defective procedure below. Rather, SCSU relies upon the identical arguments previously raised and argued in this Court. SCSU contends: 1) Hass and its subcontractors did not meet their burden of proof on damages before the Panel and therefore Hass and its subcontractors cannot raise those claims before the panel, and 2) Hass is actually responsible for the delay to this project and this delay exonerates SCSU from liability for the contract balance and termination damages.

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The decisions under review in this appeal are the decisions of the Procurement Review Panel. SCSU motion relies heavily on the prior decision of the Chief Procurement Officer's (CPO). The Panel's Review of the CPO's decision is *de-novo* and the findings and conclusions of the CPO are not before this court.

I. THE BURDEN OF PROOF ISSUE

The first Panel decision held the owner (SCSU) "responsible for the delays and disruptions in this contract." The Panel denied Hass's damages claims because: "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 cannot now recover damages". This is a legally erroneous interpretation of the contract. The Panel's first order did not conclude that Hass failed to meet its burden of proof before the panel, and even SCSU does not claim such a finding is present in the first order.

Similarly, the Panel's second order found that Hass was procedurally barred from recovering damages based upon the identical legally incorrect reason. The Second Order states:

Hass did not comply with the procedural requirements for Claims under the contract and will not be allowed to substantiate those claims at this point. Therefore, Hass has failed to meet its burden of proof before the Panel and is procedurally barred from recovering delay and disruption damages as well as all other damages sought before the panel. The failure of proof is premised on the quantity over quality of evidence standard. The evidence in the record though voluminous is best characterized as unorganized and unconvincing. Therefore, the Panel finds that there is a failure in the preponderance of the evidence standard on the part of Hass in the recovery of damages. (emphasis added)

During its deliberations over each of its orders, the Panel was suffering under the mistaken belief that the contract affirmatively required Hass to substantiate and prove

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each of its claims on a "claim by claim" basis in the submission of supporting materials to the architect. The Panel rejected Hass's contention that it could "stand on" its claims and refuse to provide support, documentation, and proof to the architect to substantiate those claims. The Panel simply found (erroneously, as it turns out) that Hass's decision to refuse to document its claims and election to "stand on" its claims resulted in both a procedural bar to Hass's claims, and a failure to carry its burden of proof in the submission and proof of those claims to the architect as reviewed by the Panel. The Panel links these two concepts in its own order based upon its incorrect interpretation, and understanding of the contract's claims process: "Hass did not comply with the procedural requirements for claims under the contract and will not be allowed to substantiate those claims at this point" (emphasis added). This finding pertains to the claims process before the architect; it does not pertain to the documentation and evidence provided at the hearing before the panel which was rejected because of a "procedural bar". The case must be remanded to the Panel because the Panel's holding that Hass could not "stand on" its claims and document those claims before the Panel was legally erroneous.

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II. NEW FINDINGS OF DELAY ATTRIBUTABLE TO HASS AND ITS SUBCONTRACTORS

Until the Panel's second order after remand, the Procurement Review Panel had uniformly held that the greater weight or preponderance of the evidence was that SCSU was responsible for the delay and/or failure of the project. The Panel held: "we find that the owner and/or its agents were responsible for the delays and disruptions in this contract." Judge Keesley, in reviewing the matter, noted "the court's reading of the Panel's order is that only SCSU and its agents are responsible for the delays and disruptions on this project. The panel should provide some explanation of the basis by which it made this determination." Faced with this direct question, the panel initially answered the question, and then made sua sponte and wholly inconsistent findings that Hass and its subcontractors were actually responsible for the delay. This finding was made on unlawful procedure contrary to the Administrative Procedures Act, and results in the illogical holding that even though SCSU is at fault and responsible for the delays to the project, and even though Hass had a right to "stand on" its claims, Hass cannot pursue any remedy.

After remand from a reviewing court, an administrative agency may explain its previous decision and its original findings of fact and conclusions of law in direct response to the Order remanding the case. However, the agency cannot create entirely new findings or adopt prior inconsistent findings by effectively re-opening the evidentiary hearing if the order on remand does not so provide. Nor may the agency exceed the scope of the order on remand in an effort to bolster its unsupported conclusions. *Bobo v. Marshane Company*, 302 S.C. 86, 394 S.E. 2d 2 (S.C. App.1990).

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The Panel made new findings that Hass breached the contract by failing to complete the project within the allotted time: "there is evidence in the record that Hass failed to proceed expeditiously with adequate forces to achieve substantial completion within the contract time". The Order then proceeds to cite a string of self-serving correspondence from the architect in support of this new conclusion. The Panel's first Order, however, made no such findings.

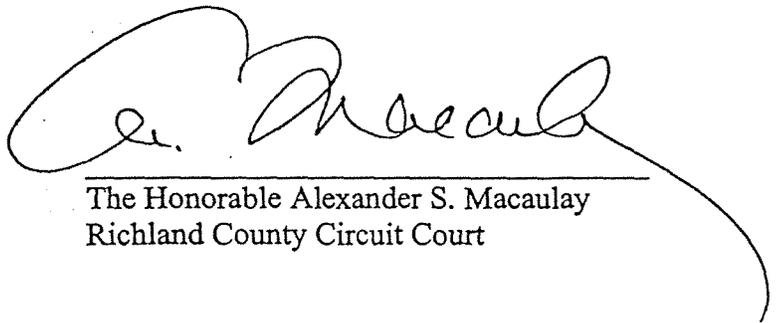
The Order on remand did not give the Panel the license to create new findings. The Panel's first and second Orders found the Owner and Architect responsible for the delay and failure of the project; consequently, this new decision which imposes a new theory of mutual breach exceeds the directives of the Order on remand. This new finding, made without any notice or opportunity for hearing by any party, is an inconsistent and contradictory alternate basis to reject Hass's claims from the conclusions the Panel reached in its first Order. The Panel is bound to its earlier conclusions. The Panel can neither adopt a decision which it previously rejected, nor may it create novel substitute findings which contradict its own prior conclusions and were not requested in the Order on remand.

The Motions are denied.

AND IT IS SO ORDERED.

Columbia, South Carolina

December 11, 2001



The Honorable Alexander S. Macaulay
Richland County Circuit Court

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