STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1997-10

In re:	)	
	)	
Protest of Architectural Engineering Associates;	)	**ORDER**
Appeal by Architectural Engineering Associates and	)	
The South Carolina Department of Corrections	)	

This matter came before the South Carolina Procurement Review Panel (Panel) on July 28, 1997, on appeal from Architectural Engineering Associates (AEA) and the South Carolina Department of Corrections (SCDC). AEA and SCDC appeal the Chief Procurement Officer's (CPO) decision in two construction contract disputes involving the Lee Correctional Institution and the Kershaw Correctional Institution. Present and participating at the hearing before the Panel were AEA represented by Terry Haskins, Esq. and Will Rogers Helton, Jr., Esq., SCDC represented by Robert Petersen, Esq., and the Office of General Services of the Budget and Control Board represented by Delbert Singleton, Jr., Esq.

LEE CORRECTIONAL INSTITUTION

FINDINGS OF FACT

On August 15, 1989, SCDC contracted with AEA to provide architectural and engineering services on the Lee Correctional Institution (LCI) Project. The

contract was to run for thirty six months but was extended by a contract modification to forty seven months making September 12, 1993, the ending date of the contract. After this date, AEA's obligations were limited to the performance of a one-year warranty inspection.

Sometime before the expiration of the contract, it was discovered that paint would not adhere to the concrete surfaces at LCI. The concrete panels and the painting of the panels were the responsibility of the General Contractor but AEA assisted SCDC with the problem and continued to do so after the ending date of their contract on September 12, 1993. AEA continued to work on the site until December 1996 and submitted an invoice for 1,791 hours of work in the amount of $149,034.56 on December 12, 1996. SCDC refused to pay the invoice, claiming that the bill was submitted too late to be paid. On April 4, 1997, AEA filed a protest with the CPO seeking compensation for the claim.

ISSUE

Whether AEA should be compensated for work it performed on the LCI Project that was beyond the scope of Basic Services and past the term of its contract.

CONCLUSIONS OF LAW

The contract between AEA and SCDC provides for the performance and payment of Additional Services beyond the Basic Services required by the contract if necessary to complete the project. The contract states that an example of Additional Services is the following:

> Providing services made necessary by the default of the Contractor, by major defects or deficiencies in the work of the Contractor, or by failure of performance of either the Owner or Contractor under the Contract for Construction. [Record p. 678].

AEA contends that it provided Additional Services after the completion date of the contract in support of SCDC's efforts to resolve the surfacing issue. AEA further contends that these services were authorized by SCDC and that AEA never received payment for its services. SCDC argues that no payment is due because AEA did not comply with the Additional Services provision of the contract and secondly that these services fell within the warranty clause that AEA was obligated to perform.

The Additional Services provision of the contract required that AEA give notice to SCDC before performing any additional work and reads as follows:

> If services described under contingent Additional Services...are required due to circumstances beyond the Architect's control, the Architect shall notify the Owner prior to commencing such services. If the Owner deems that such services... are not required, the Owner shall give prompt written notice to the Architect. [Record p. 678].

SCDC claims that AEA only requested SCDC's permission to perform Additional Services on December 29, 1995, when AEA requested permission to contact the construction contractor regarding additional areas of defective coating. On January 4, 1996, SCDC accepted AEA's request and authorized them to proceed. AEA argues that they continually corresponded with SCDC from September 12, 1993 to December 1996, and that SCDC never told them to cease the performance of the Additional Services as is required by the Owner in the Additional Services provision cited above. At the hearing, testimony and

evidence were presented that established that the services provided by AEA were performed on a continuous basis from September 12, 1993 to December 1996, and that SCDC was aware of this and working with AEA during this time to resolve the coating problems. AEA provided documentation for these services and proved that the work performed exceeded the scope of Basic Services.

Secondly, SCDC asserts that AEA was obligated to perform the work under the warranty inspection clause of the contract which reads as follows:

> One month prior to the expiration of the one-year warranty period as called for in the Construction Documents, the Architect and/or Engineer shall inspect the project for any deficiencies that may have developed under the one-year warranty. Upon completion of inspection a written report shall be furnished to the Owner, the State Engineer and the Contractor, and the Architect and/or Engineer shall assist the Owner in taking necessary action to see that the deficiencies are corrected. Article 12.2.6 [Record p. 687].

AEA contends that the problem was not a warranty issue and that they worked with SCDC to prove that it was a construction defect. AEA argues that even if it is termed a warranty issue, that their efforts to help SCDC investigate and correct the problem were over and above what is required under the warranty provision. Testimony at the hearing established that the extent and nature of the work performed by AEA exceeded the performance of Basic Services and what was required under the warranty provision.

As to SCDC's claim that AEA's invoice was submitted too late to be paid, the South Carolina Consolidated Procurement Code (Procurement Code) provides that "[a] request for resolution of contract controversy must be filed within one year of the date the contractor last performs work on the contract."

S.C. Code Ann. § 11-35-4230(2). The Panel finds that AEA's claim is timely because the testimony and evidence at the hearing established that AEA worked on the project from September 12, 1993 to December of 1996. AEA is therefore entitled to be compensated for their claim of $149,034.56 for Additional Services performed on the LCI Project because it has proven the services were provided and that they were beyond the scope of the warranty clause.

KERSHAW CORRECTIONAL INSTITUTION

FINDINGS OF FACT

On January 3, 1994, SCDC contracted with AEA to provide construction management services for the Kershaw Correctional Institution Project (KCI). The contract was for a stipulated lump sum of $1,900,000.00 payable in monthly installments of $55,800.00. The intent of the contract was to site-adapt the LCI Project to the Kershaw site. AEA was chosen to serve as the construction manager because AEA had served as architect and engineer on the LCI Project and was therefore most familiar with the Project. The contract between SCDC and AEA was a standard form contract between Owner and Construction Manager that was modified to include both standard modifications established by the Office of the State Engineer and specific terms and conditions negotiated by the parties. Exhibit I of the contract contains an extensive list of changes, additions and deletions which were anticipated as part of the conversion of the LCI design to the KCI Project. Exhibit I of the contract states in part,

> The scope of work listed below is intended to represent the project design requirements as of the contract date of January 3, 1994. It is understood that certain adjustments to the design requirements will be necessary as

> the project goes through design development. Both parties to the contract agree that minor adjustments to the below-listed scope of work are hereby included in the lump sum fee.

The contract also provided for a design phase and a construction phase and established a period of performance for these phases in Article 16.4, which states,

> It is expressly understood that the time of design development and finalizing of drawings can be extended by a two month period and that the final Substantial Completion date can be extended by a two month period for a total four month period without any additional compensation to the Architect and the Project Manager.

The purpose of Article 16.4 was to shift the burden of expenses associated with any time slippage of up to two months on each phase to AEA.

However, Article 7.1.3 provides that AEA shall receive compensation for any Basic Services that are provided if the project is extended beyond the time limits set forth above. On January 16, 1997, the Substantial Completion date of the Project was extended from October 31, 1996 to July 31, 1997, through a contract amendment. This amendment established compensation for Additional Services at the original contract's monthly payment amount of $55,800.00. As agreed in the contract, AEA continued to work on the Project and now claims payment for those services. SCDC denies payment in full because they contend that AEA is obligated under Article 16.4 to work for two months on the design phase and two months on the construction phase without compensation, for a total of four months without compensation. AEA also demands that the stipulated sum of the contract be adjusted upward because it claims SCDC changed the scope of work of the contract so materially that AEA is entitled to compensation for the

additional work it had to perform on the Project. In addition, AEA also claims payment for two months additional work on the design phase because it had to perform architectural and engineering work in additional to its construction management services because of major changes to the LCI plans. SCDC claims there should be no adjustment to the stipulated sum contract or payment for additional work during the design phase because the scope of work was mutually agreed upon by the parties in the contract.

ISSUES

1. Whether SCDC changed the scope of work so materially that it would justify an adjustment to the stipulated lump sum contract with AEA.
2. Whether AEA should be compensated for two months additional work it performed during the design phase of the Project due to changes in the LCI plans.
3. Whether AEA is entitled to compensation for additional services performed due to the extension of the Substantial Completion date from October 31, 1996 to July 31, 1997.
4. Whether AEA is entitled to reimbursable expenses incurred as a result of the contract extension.

CONCLUSIONS OF LAW

AEA maintains that the intent of the contract was to site-adapt the LCI design to the Kershaw design and that the scope of work was materially changed after the project was commenced due to major changes in the LCI plans. AEA claims that it agreed that "minor adjustments" to the design would

be included in the lump sum fee as quoted in Exhibit I above, but that some of the LCI designs were changed substantially. It cites Article 15.6.1 in support of a percentage adjustment to the lump sum contract which reads as follows:

> If the scope of the Project or the Construction Manager's Services is changed materially, the amounts of compensation shall be equitably adjusted. [Record p. 219]

SCDC agrees that there were changes made to the LCI designs, but asserts that the changes were consistent with those set forth in Exhibit I [Record p. 241] and did not materially change the scope of work. SCDC maintains that AEA knew that a site-adapt project would involve plan adjustments and that these changes were enumerated in the contract. At the hearing both parties presented extensive testimony and evidence in support of each position. The Panel finds that the contract was entered into as a stipulated lump sum contract and its terms were mutually agreed upon by the parties. AEA claims that because actual the construction cost exceeded the estimated cost, that its lump sum contract should be adjusted upward by a percentage of the actual construction cost. Under the Procurement Code, lump sum fees can not be re-negotiated merely because the actual construction cost is higher than the estimate. The Panel therefore finds that it can not rewrite the agreement between AEA and SCDC and holds that the stipulated sum contract stands as written.

The second issue involves AEA's claim for payment for two months additional work that it performed during the design phase. AEA claims that certain changes made to the LCI plans were beyond the adjustments

contemplated in Exhibit I and that they had to perform additional work as a result. At the hearing, testimony and evidence established that AEA had, in fact, performed additional work during the design phase of the Project. Testimony also established that AEA and SCDC had negotiated this matter and determined that a two-month add-on would be equitable compensation for the additional work. The Panel finds that AEA is entitled to an additional two months payment at $55,800 per month for the work performed.

The third issue is whether AEA is entitled to compensation for services performed due to the extension of the Substantial Completion date from October 31, 1996 to July 31, 1997. Article 16.4 of the contract states that the design stage can be extended for two months and the construction stage may be extended for two months for a total of four months with no additional compensation to AEA. Article 7.1.3, provides, however, that if the contract is extended for longer than two months, that AEA is entitled to compensation. The amount of this compensation was set forth in the Amendment that extended the Substantial Completion date at $55,800. 00 per month.

SCDC argues that Article 16.4 requires AEA to work up to four additional months beyond the Substantial Completion date for free. SCDC maintains that it is using November and December as its two free months for the construction phase. AEA argues that Article 7.1.3 governs because the contract Substantial Completion date was extended longer than two months through no fault of AEA's and that the two months therefore should apply to any time beyond July 31, 1997. The Panel finds that SCDC knew on October 31, 1996, that the Project

was not complete and that the completion date would need be extended. The Panel finds that Article 16.4 cannot be manipulated so as to secure two free months of work from AEA during the course of the construction phase. The Panel finds that SCDC is entitled to the two months only if the Project is not completed on the completion date of July 31, 1997. The Panel therefore finds that AEA is entitled to be compensated for the months of November and December 1996 and for the months of January to July 1997 in the agreed upon amount of $55,800.00 per month.

The fourth issue is whether AEA is entitled to $7,634.77 in reimbursable expenses for the period of the contract extension. The Panel finds that because the contract is a stipulated lump sum contract that did not allow compensation for reimbursables that AEA is not entitled to reimbursable expenses in addition to its monthly payments and therefore denies AEA's claim for reimbursable expenses.

The CPO awarded AEA $62,880.00 for negotiating a global settlement with Morganti , the General Contractor on the Project. AEA did not appeal this issue and the Panel, finding that this award was substantiated by evidence at the hearing, upholds the CPO's decision on this issue and denies SCDC's appeal of the award.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Gus J. Roberts, Chairman

Columbia, South Carolina

August 26, 1997