

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
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Hass Construction Company, Inc., )  
Clontz-Garrison Mechanical, Inc., )  
Utilities Construction Company, Inc., )  
 )  
Claimants )  
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 )  
vs. )  
 )  
 )  
South Carolina State University )  
 )  
Respondent )  
 )  
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 )

**BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL**

Case No. 1997-16

**ORDER ON SECOND REMAND**

**AND**

**AWARD**

98-CP-40-2380 & 98-CP-40-2466

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This matter came before the Panel for a third occasion on June 19, 2002, pursuant to the Second Order of Remand of the Honorable Alexander Macaulay dated October 2, 2001. Henry P. Wall represented the Claimant-Contractor, Hass Construction ("Hass"). W.H. Bundy, Jr. represented the Claimant-Subcontractors, Clontz-Garrison Mechanical ("Clontz") and Utilities, Inc ("Utilities"). Neil Haldrup represented the Respondent-Owner South Carolina State University ("SCSU").

Judge Macaulay's order affirmed our initial decision finding SCSU and its architect at fault for the failure of the project, but rejected our legal interpretation of the contract's claims provision. The second order of remand directed this panel to convene a hearing for the sole purpose of taking testimony and evidence to calculate and award damages to Hass, Clontz and Utilities based upon the formula in the contract. The second order of remand allowed the Claimants to elect between delay or termination damages. The Claimants elected to proceed under the contract's termination provision.

## CONCLUSIONS OF LAW

### MOTIONS

#### JURISDICTION

SCSU first contends that this Panel lacks jurisdiction because SCSU has filed a Notice of Appeal with the South Carolina Court of Appeals contending that the Circuit Court's Order is appealable. SCSU argues that the Court of Appeals has exclusive jurisdiction over this matter pursuant to SCACR 205, which states that "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal." SCACR 205. We find SCSU's argument without merit because this Panel has jurisdiction over this matter by statute and the Circuit Court has remanded this matter to this Panel to make a decision pursuant to the Circuit Court's Order. Therefore, SCSU's motion is denied.

#### DUE PROCESS

SCSU argues that they have been denied due process in two ways. First, SCSU contends that the procedures put in place by this Panel violate due process because the time constraints we placed on the parties does not give SCSU the opportunity to respond and present evidence and argument on all issues involved. See S.C. Code Ann. § 1-23-320(e) (Law. Co-op. 1976 & Supp. 2001). SCSU contends that allowing one (1) day for the hearing of this matter and limiting each party to four (4) hours to make all arguments and cross-examine witnesses is grossly inadequate given the complex issues involved in this case. Second, SCSU contends that it is denied due process based on the Panel's failure to adhere to the procedures it established by interrupting counsel and not allowing him to finish opening argument; by counting time taken to make objections to improper procedure by Hass and the Subcontractors against SCSU; and by including time taken by the Panel to deliberate on these issues.

We deny SCSU's motion because the time requirements apply equally to both sides and allow for opportunity for SCSU to address all issues involved. We deny the remainder of SCSU's arguments because they are inconsistent with the Circuit Court's directive to award Hass and the Subcontractors damages.

#### TAKING NEW EVIDENCE ON REMAND

SCSU next argues that this Panel may not conduct an evidentiary hearing because only the South Carolina Court of Appeals or South Carolina Supreme Court may direct an agency to take new evidence on remand under the Administrative Procedures Act (APA). Piedmont Natural Gas Co. v. Hamm, 389 S.E.2d 655, 657 (S.C. 1990); Parker v. South Carolina Public Service Commission, 342 S.E.2d 403, 405 (S.C. 1986) (Parker II). See also S.C. Code Ann § 1-23-390 (Law. Co-op. 1976) (providing for appeal under the APA to the South Carolina Supreme Court prior to 1999 amendment); S.C. Code Ann. § 1-23-390 (Supp. 2001) (providing for appeal of actions under the APA to the South Carolina Court of Appeals as in other cases). Further, SCSU argues that both parties had the opportunity to introduce all evidence and testimony in the first hearing before the Panel, including testimony on their respective damages. Thus, SCSU contends that this hearing gives Hass and the subcontractors "two bites at the apple"-two chances to attempt to prove their damages. Despite the fact that the Panel in the first proceeding may have already considered all of the evidence and testimony in this case, the Circuit Court's Order directs us to conduct another evidentiary hearing. Therefore, SCSU's motion is denied.

### SUBCONTRACTORS' CLAIMS

SCSU moves to exclude all testimony and evidence by Clontz-Garrison Mechanical, Inc. and Utilities Construction Company, Inc. (the "Subcontractors") because the Subcontractors have failed to follow the exclusive, statutory means for pursuing a claim against the State by a contractor or a subcontractor. S.C. Code Ann. § 11-35-4230(1)-(2). SCSU states that in order to proceed against SCSU, the Subcontractors must have submitted a Request for Resolution with the CPOC. S.C. Code § 11-35-4230(2); see In re Protest of McCrory Construction Co., PRP Case No. 1994-13 and Case No. 1995-7 (stating that issues for resolution are set by the initial Request for Resolution and not Request for Review). Further, SCSU argues, Hass may not seek damages on behalf of the Subcontractors because Hass did not include subcontractor claims in its Requests for Resolution to the CPOC. S.C. Code § 11-35-4230(1)-(2). Additionally, SCSU cites to the fact that Contract Article 4.4.4 and 4.4.5 require the parties to follow the Procurement Code. Moreover, SCSU argues that the Subcontractors failed to attend the contractually and statutorily mandated mediation. S.C. Code § 11-35-4230(3). Finally, SCSU argues that recovery of damages under the Contract does not apply to the subcontractors who presumably have subcontracts with Hass that govern the recovery of damages. The Circuit Court held that the Subcontractors are entitled to damages in accordance with the Contract. Therefore, this motion is denied.

### TESTIMONY OF JEFFREY T. HASS

SCSU moves to exclude the testimony of Jeffrey T. Hass with respect to tax returns, financial statements, and any other documents that were prepared in anticipation of litigation and that Mr. Hass did not personally prepare. SCSU's argument is that Mr. Hass is not qualified as an expert witness. SCRE 702. In addition, SCSU argues that the lay opinion testimony of Mr. Hass is not admissible. SCRE 701. SCSU introduced documents showing

that Jeffrey T. Hass has no ownership interest in Hass Construction Company, Inc. Therefore, SCSU contends that Mr. Hass may not testify as an owner as to lost profits, loss of business value, lost bonding capacity, and other damages of which he does not have firsthand knowledge. See SCRE 701. Because only an expert may testify as to matters not within firsthand knowledge and because Mr. Hass is not an expert, SCSU argues that he may not testify. SCRE 703; Hundley v. Rite Aid of South Carolina, Inc., 529 S.E.2d 45, 50-51 (S.C. Ct. App. 2000). We find SCSU's argument without merit because all of the documents relied upon by Mr. Hass to support his testimony are business records of Hass Construction and he established his ability to interpret the business records prepared by others, including those documents prepared in anticipation of litigation.

#### SUMMARY SCHEDULES

SCSU moves to exclude Hass and the Subcontractors' summary damages "schedules" on the bases that the information contained therein is unsupported by any underlying documentation; the underlying documentation has not been produced; and/or the underlying documentation is inadmissible. SCRE 1006 (providing that the originals or duplicates shall be made available for examination or copying or both by other parties at a reasonable time and place and that underlying documents must be admissible). SCSU contends that Hass and the Subcontractors failed to submit the majority of its documents to the project architect, the CPOC, or the Panel in the first hearing. Therefore, SCSU argues that Hass and the Subcontractors may not now submit additional evidence, particularly in summarized form, where the underlying documentation that purportedly supports its summaries has not been produced and/or has not been submitted to the architect, the CPOC, or the Panel in the first hearing. Moreover, SCSU contends that some of Hass and the

Subcontractors' summary line items are still not supported by any documents and are simply self-serving and conclusory numbers unsupported by any underlying documents except their self-serving affidavits or documents created by other individuals in anticipation of this rehearing that have not been previously produced and for which no live witnesses will be called who may be cross-examined. Zemp Constr. Co. v. Harmon Bros. Constr. Co., 82 S.E.2d 531 (S.C. 1954) (stating that summaries inadmissible where the only support for their admission is the impracticality of going through every document where some of the line items had no support in any underlying documentation). SCSU further argues that it has no way to determine if some or all of the supporting documents have been produced because the contractors failed to make any effort, in many instances, to segregate or identify which documents that were produced supported a particular line item or items of the summary.

Although we did not attempt to determine if the contractors submitted documents to support the summaries in compliance with SCRE 1006, we were directed by the Circuit Court to award the contractors damages and we therefore find the summaries admissible. Therefore, SCSU's motion is denied.

**AFFIDAVITS OF JANE M. KEEFE AND JANET D. BEDERIAN**

SCSU moves to exclude the affidavits of Jane M. Keefe and Janet D. Bederian on the bases that Ms. Keefe and Ms. Bederian have not been identified as witnesses pursuant to our letter and request that the parties list all witnesses dated January 10, 2002; and because the witnesses are not present and cannot be cross-examined on the contents of their affidavits in accordance with our procedures as set forth in the Notice To Parties Of Pre-Hearing Schedule dated May 6, 2002 and SCRCP 43(a). We grant SCSU's motion on these grounds.

As a threshold matter, the parties differ significantly over the proper method for the measurement of termination damages. SCSU contends Hass's, Clontz's and Utilities' actual cost of construction should not be tabulated or considered and argues any such calculation is a per se improper "total cost claim". SCSU further contends any amount awarded to the claimants should be reduced by the costs SCSU may incur in completing the project, and the estimated cost of repairing any marginal work the Claimants allegedly performed. On the other hand, the Claimants contend the panel should calculate the reasonable project expenditures, deduct the project receipts from this amount, make any adjustments for profit, overhead or interest from this amount, and add any special damages to the extent we find that such special damages naturally and proximately arose from the termination. A review of the contract itself easily resolves this debate.

Article 14.1.2 of the contract contains the formula for the calculation of termination damages when the contractor is not at fault. The contract states: "the contractor may...recover payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages". The term "Work" is defined in article 1.1.3 as "... construction and services required by the contract documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project." The contract clearly allows recovery for "Work" executed (i.e. labor, materials, equipment, etc.) and for proven loss with respect to certain categories. Thus, the claimants may recover payment for the work they performed, and their project losses for certain elements of the work.

This measure of damages is not only consistent with the contract's termination provision, but also in complete accordance with South Carolina Law: "If the breach consists in preventing the performance of the contract, without default of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first what he has already expended towards performance, secondly the profits that he would realize...under such principles, plaintiff is entitled to recover from the defendant its expenditures reasonably made in the performance of its contract with defendant, or in its necessary preparation therefore, as well as such profits as it has lost or been prevented from making, as the natural consequence of defendant's wrongful breach of contract." General Sprinkler Corporation v. Loris Industrial Developers, Inc. 271 F. Supp. 551 (D.S.C. 1967). *See also* South Carolina Federal Savings Bank v. Thornton Crosby Development Co. Inc., 399 S. E. 2d 8, 303 S.C. 74 (S.C. App. 1990) [ "In the normal case, the damage will consist of two distinct elements: 1) out of pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized..."]

Because we previously determined SCSU was at fault in this case, and the Circuit Court's affirmed that determination, SCSU's alleged claims and off sets are not properly before the panel. Those claims have previously been considered and denied. Because we have not been asked to compute damages in this case as if Hass and the subcontractors had breached their agreements, SCSU's allegations as to the cost of completion or defective work have no relevance to this proceeding.

Accordingly, we turn our attention to an evaluation of the costs the Claimants incurred in performing the work and the damages the Claimants allegedly suffered as a consequence of the termination. Each party pre-filed sworn testimony with supporting

exhibits and documentation in anticipation of the hearing. Hass, Clontz and Utilities each filed separate schedules which summarized the costs which they claim to have incurred on this project, their losses, and any special or consequential damages arising from the termination. These records included, among other things, invoices, receipts, cancelled checks, delivery tickets, and payroll records. SCSU filed reply testimony and exhibits which included the testimony and opinions of a certified public accountant challenging whether or not the costs claimed were fair, reasonable and allocable to the specific project. Claimants filed reply testimony and exhibits and made several unilateral reductions in the amounts claimed. At the actual hearing, each side was permitted to conduct direct or cross examination of all witnesses and provide the Panel with opening and closing statements; provided however, that the cumulative time given to the owner and the claimants could not exceed four hours respectively. The Panel had an opportunity to hear from all witnesses, ask questions, consider the pre-filed testimony and subsequent explanations, review all exhibits and the arguments of counsel, and has reached the following findings concerning the preponderance of the evidence and the award of termination damages in this case:

#### FINDINGS

1. Hass incurred reasonable and allocable costs of \$647,129.72 for material costs.
2. Hass incurred reasonable and allocable costs of \$928,716.78 for subcontractors (excluding the direct claims of Clontz and Utilities).
3. Hass incurred reasonable and allocable direct labor expenses of \$562,045.89.
4. Hass incurred a reasonable labor burden of 31% of its direct labor expense for an additional allocable labor burden expense of \$174,234.00.
5. Hass remains indebted to its material suppliers in the sum of \$46,521.35, to its subcontractors (excluding Clontz and Utilities) the sum of \$16,790.30, and will owe those subcontractors additional retainage in the sum of \$13,823.95

6. Hass's subcontractor's Clontz and Utilities suffered losses and damages in the amounts of \$87,164.49 and \$288,231.00, respectively, for which SCSU is liable but which is included in Hass's project cost for purposes of determining the overhead and profit components of Hass's claim.
7. Hass has either incurred or will incur total reasonable and allocable project costs of \$2,764,657.48.
8. A reasonable rate of return for profit and overhead for this project is 8.7%; therefore, the appropriate gross margin is the sum of \$240,525.20 which is 8.7 % of the amount in paragraph 7.
9. Therefore, the total reasonable project costs plus a reasonable rate of return for this project is \$3,005,182.68.
10. Hass has been paid the sum of \$2,061,293.20, leaving a difference of \$938,024.58 for termination damages exclusive of interest.
11. The contract allows payment of interest in the amount of 12% on amounts due under the contract and we have computed Hass's allocable entitlement to interest by subtracting the amounts due Clontz and Utilities (\$375,395.49) from the termination damage subtotal (\$943,889.48) to arrive at a figure of \$568,493.99 upon which to compute interest from the date of termination through the date of the hearing (1,725 days) which yields a total of \$322,402.50 in interest.
12. Hass also asserted claims for equipment ownership costs of \$229,736.00 based upon commercial lease rates. The Panel notes that Hass's equipment was owned and this alleged "cost" was never in fact incurred. To award this amount would simply result in additional profit to Hass and we have already determined that 8.7% is a reasonable rate

of return. Therefore, consistent with the measure of damages contained in the contract, this claim is rejected in its entirety.

13. Hass, Clontz, one of Clontz's subs (Seibe), and Utilities originally sought damages for "unabsorbed home office overhead" in an amount in excess of \$350,000.00. This claim is rejected because we find that the 8.7% mark-up adequately compensates Hass and all subs for any overhead expenses arising from the termination. Therefore a separate award for this item would be inappropriate.
14. Hass also claims \$190,000.00 in special damages for loss of its bonding line of credit. First of all, the award of interest adequately compensates Hass for any loss of use of money it experienced from the termination. Secondly, we find this claim to be speculative in light of the proof offered in this case because the preponderance of the evidence neither establishes that this project caused the loss of Hass's bonding credit, nor that Hass would have made the sums it claims had it not lost its bonding capacity.
15. Hass claims a loss of equity or loss of business value in the amount of \$344,774.00. This claim is rejected for lack of evidence in that Hass presented no credible evidence to establish that the loss of the company's net worth could be attributed solely and proximately to this failed project or that such damages could be reasonably foreseeable and within the contemplation of the parties.
16. Hass seeks \$235,138.38 in expenses it allegedly incurred to its surety. The Panel rejects this claim on the grounds that the preponderance of the evidence did not establish that these alleged expenses related to the SCSU project, and expenses do not appear fair or reasonable in light of the very limited participation of Hass's surety in this case. The Panel is unable to make any causal connection between these expenses and the project.

17. Finally, Hass seeks damages for the cost of its consultants in connection with this case in the amount of \$137,274.00. We note that under the American Rule, each party is responsible for their own expenses, costs and attorney's fees in the absence of a statute or contractual provision to the contrary. Hass has not provided the panel with any authority by which we could make such an award, and the claim is therefore rejected.
18. In sum, the Panel hereby awards the following amounts, allocated in the manner indicated: a) to Hass the sum of \$568,493.99 in termination damages and \$322,402.50 in interest for a total award to Hass in the sum of \$890,896.49, b) to Clontz the sum of \$87,164.49 in termination damages, and c) to Utilities the sum of \$288,231.00 in termination damages.

CONCLUSION

Therefore, it is hereby ordered that SCSU shall pay the total sum of \$1,266,291.98 (one million two hundred sixty six thousand two hundred ninety one dollars and ninety eight cents) to the claimants as allocated in this decision.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: *Patricia T. Smith*  
Patricia T. Smith, Chairman

Columbia, South Carolina

July 19, 2002.