

1997-16(II)

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
IN RE:)	Case No. 1997-16
Protest of:)	
HASS CONSTRUCTION COMPANY, INC. &)	
SOUTH CAROLINA STATE UNIVESITY)	ORDER ON REMAND
)	
Appeal by:)	98-CP-40-2380 & 98-CP-40-2466
HASS CONTSTRUCTION COMPANY, INC.,)	
ET. AL., & SOUTH CAROLINA STATE)	
UNIVESITY)	

This case originally came before the South Carolina Procurement Review Panel (The Panel) for a hearing on February 18, 1998 and concluded after twenty-one and one-half days on April 23, 1998. The Honorable Judge Louis E. Condon heard the case pursuant to S. C. Code § 11-35-4410 (5). Present and participating at the hearing were Hass Construction Company, Inc. (Hass) represented by Henry P. Wall, Esquire, Clontz-Garrison Mechanical Contractors, Inc. (Clontz-Garrison) and Utilities Construction Company, Inc. (Utilities) represented by William H. Bundy, Jr., Esquire, South Carolina State University (SCSU) represented by Neil S. Haldrup, Esquire & Perrin Q. Dargan, III, Esquire, and General Services (GS) represented by Delbert H. Singleton, Jr., Esquire. The initial order in this case was handed down on June 4, 1998. Thereafter, Hass, Clontz-Garrison, Utilities and SCSU appealed the order of The Panel to the Circuit Court. The consolidated appeal, Case Nos. 98-CP-40-2380 and 98-CP-40-2466, was heard on February 2, 2000. Present at the Circuit Court Hearing were Henry P. Wall, Esquire, representing Hass, William H. Bundy, Jr., Esquire, representing Clontz-Garrison and Utilities, Neil S. Haldrup, Esquire, representing SCSU, and SuAnn K. White, Esquire, and Emily Howard, Esquire, representing The Panel. This matter is now on remand to The Panel pursuant to the Order of the Honorable Judge William P. Keesley dated July 28, 2000 for a New Order.

NATURE OF THE CONTRACT CONTROVERSY

On May 14, 1994, SCSU and Hass entered into a contract for the construction of the 1890 Extension Program Campus Office Facility Project (Project) which consists of a two-story concrete and masonry structure located on SCSU's campus. Hass subcontracted the electrical work to Utilities and the mechanical work to Clontz-Garrison. 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 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 (1) compensation for the alleged delays and disruptions, (2) a declaration that SCSU is in default and that the Contract should be terminated to the benefit of Hass or (3) in the alternative, a resolution of the delay and disruption claims.¹

¹ Hass alleged sixty-seven errors and issues in it's request for review before The Panel. S.C. Code of Laws § 11-35-4410(1)(b) provides in part, "...any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under the Code, but was not, shall not be the subject of review under this paragraph..." Therefore, Hass' issues were limited to those established in the Chief Procurement Officer's Statement of the Case.

SCSU declared Hass to be in default of its obligations under the contract and requests (1) that this declaration be affirmed, (2) that Hass be declared in material breach of its obligations, (3) that SCSU be authorized to terminate Hass for cause, (4) that SCSU's right to assess liquidated damages be affirmed,² and (5) that the obligations of Hass' bonding company be confirmed.³

FINDINGS OF FACT

On May 14, 1994, SCSU and Hass entered into a Contract for construction of the 1890 Extension Program Campus Office Facility. [Record p. 79] The contract form used was document A101-1987 along with supplementary conditions (Record p. 115). AIA document A201, General Conditions of the Contract for Construction, were invoked and incorporated within the Contract. [Record p. 90] Articles 4.3 and 4.4 define the requirements for submission and resolution of claims and disputes regarding additional costs and time limits. [Record pp. 98,99] Article 14 defines the basis for termination or suspension of the Contract. [Record p. 127] The Contract included two deductive alternates. Alternate No. 1 removed the stucco exterior wall surface and Alternate No. 2 substituted aluminum storefront for rolled steel storefront.

² SCSU alleged two initial issues in it's request for review and further requested that eleven more items be considered by The Panel. Pursuant to 11-35-4410(1)(b), SCSU's issues were also limited to those established in the Chief Procurement Officer's Statement of the Case.

³SCSU's issue five (5) involving Hass' surety, International, was ruled outside the jurisdiction of the review process because a separate contract/bond governs their liability.

On June 23, 1994, SCSU issued Hall a Notice to Proceed that called for the Date of Commencement to be July 21, 1994 and the Date of Substantial Completion to be July 21, 1995. [Record p. 132] Change Order No. 1 extended the date for Substantial Completion for 31 days (Record p. 140). On July 18, 1994, Hass, SCSU, Huff, and S&W participated in a pre-construction meeting. [Record p. 133] Various aspects of the construction process were discussed including Contract Changes and Modifications and Time Extensions. [Record p. 136] Subsequently, eight Change Orders were approved and the Date of Substantial Completion was extended by 198 days. [Record pp. 140-171] Eleven Change Directives were issued from October 7, 1994 through January 8, 1997. [Record pp. 175-248]

On January 24, 1997, Hass petitioned the State Engineer to resolve a contract controversy with SCSU. Hass sought resolution of the following claims before the Chief Procurement Officer for Construction (CPOC):

1. Additional compensation as well as damages for delay and disruption costs (reserving the right to seek further damages incurred),
2. A declaration that the Owner was in default of its obligation under the Contract and termination of the Contract as a consequence of the Owner's material breach and,
3. In the alternative if the CPOC determined the contract not to be terminable, a declaration and immediate resolution of certain issues which, according to Hass, were causing further delay and disruption on the Project. Hass submitted a lengthy factual and legal basis for these claims. [Record pp. 261-265].

On March 6, 1997, SCSU requested Huff to certify that sufficient cause existed to justify termination of Hass. [Record p. 254] In a letter dated March 11, 1997, 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." [Record p. 255] On March 17, 1997, SCSU notified Hass that Hass had been declared "...in default and neglect..." of the contract.

On March 21, 1997, SCSU made a request to the CPOC for resolution that included the following issues:

1. Whether Hass was in default of its contract obligations,
2. Whether Hass was in material breach of its contract obligations,
3. Whether SCSU could terminate Hass for cause,
4. Whether SCSU could continue to assess liquidated damages, and
5. Whether Hass' performance bonding company was obligated to honor the terms of the performance bond and the terms of the Contract incorporated therein.⁴

On April 4, 1997, SCSU submitted a lengthy list of alleged breaches and defaults by Hass. [Record pp. 22-24] On July 28, 1994, Huff issued the minutes of the pre-construction meeting held on July 18, 1994. [Record p. 135]

On September 24, 1997 the CPOC issued his decision which terminated the Contract, issued item awards to both parties, concluded with a balance due to SCSU, and suspended Hass indefinitely from participation in or receiving any contract for construction from any agency of the State of South Carolina.

⁴ See *supra* note 3 and accompanying text.

On October 3, 1997, pursuant to S.C. Code Of Laws § 11-35-4230 (6), Hass, Clontz-Garrison, Utilities, and SCSU appealed the decision of the CPOC to The Panel. Pursuant to S.C. Code of Laws § 11-35-4410 (5), Judge Louis E. Condon was appointed to serve as the hearing officer for The Panel.

CONCLUSIONS OF LAW

The Panel adopts the report and recommendation of the hearing officer as incorporated herein.

MOTIONS

1. Hass's Motion to Vacate that portion of the State Engineer's decision which indefinitely suspended Hass from State procurement is granted 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. Hass's surety is dismissed from this proceeding at SCSU's request 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 is denied because S.C. Code of Laws § 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 Panel.

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

ISSUE I: DELAYS AND DISRUPTIONS BY OWNER

Contract provision 2.2.2 provides in part, *"The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project..."* [Record p. 92] Pursuant to Contract provision 2.2.4 *"Information under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the Work."* [Record p. 93] Contract provision 4.3.6 provides in part, *"If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions..."*

The testimony and evidence establishes that the design team worked on the plans for two years before the bidding process began. In October of 1992, approximately eighteen months before the bid was let, the Architect notified the owner of problems with underground lines. Specifically, via fax dated October 28, 1992, the Architect stated the following:

“During the initial stages of the project the university decided a survey of the project site would not be required. This was a reasonable decision at the time but since then we have encountered a few unforeseen matters that necessitate preparing a survey of certain key concerns. Most importantly is to locate underground utility lines that extend from Goff Avenue to the 1890 Research Facility. We are aware the lines are in place but the exact location and depth is unknown. The proposed location of the project will traverse (obstruct) the lines and may pose a conflict. If we could locate the lines at this time and accommodate the conflict in the bid package, unnecessary change orders can be avoided.”

“Additionally, there are storm drainage inlets, miscellaneous equipment, and the existing building locations which are not properly pinned down. This request for additional survey work is combined with our previously discussed proposal to survey and design the remote parking area. The total fee for both efforts is \$6,050.00.” [Record p. 1167]

According to Huff's (the architect) testimony during The Panel's hearing, "*the owner did not accept the proposal to conduct the survey work.*" [Transcript p. 2505, ll. 18,19]

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. [Transcript p. 2507, ll. 2-14]

As the record shows, the project was delayed from the very beginning. The original Date of Commencement for the Project was extended from July 21, 1994 to August 21, 1994 which extended the Substantial Completion date by 31 days. This was done because SCSU needed to review the proposed construction lay down area. [Record pp. 935-938] 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. On September 21, 1994 Hass noted the following conditions after extensive digging: (1) A network of water lines where the building is to be located, (2) The new building will be 6'-7' closer to Soldiers Hall than shown on plans, (3) Concerns from the electrical company about the high voltage of direct burial lines where the footing to the fence is going, (4) Old footing and foundation walls where buildings had previously been, (5) Extensive amounts of rubble in the earth, (6) The gas line and the storm drainage will conflict, (7) Possible steam lines, (8) Communication cable and conduit, and (8) Numerous abandoned utilities. [Record p. 1198] Hass made a recommendation of mass excavation and backfill to address these subsurface conditions [Record p. 1212]

The owner and the architect, as his agent, manage the project in the sense that they control the Change Orders, the Construction Change Directives, and payments as well as other responsibilities. SCSU rejected Hass' recommendation and decided to issue several Construction Change Directives (See Record pp. 175-190) instructing Hass to proceed with foundation excavation and utilities relocation on a time and materials basis (See also, Record p. 1220). This decision by SCSU yielded a direct cost increase to the contract of \$95,430 and extended the contract time for 120 days (See Record pp. 141-149).

SCSU made a decision to redesign the concrete arch for the Project. Hass asserts that in developing the cost of the redesigned arch, Huff requested pricing on one design and substituted another, more costly, approach as the final design without advising Hass of the change. SCSU and Huff's failure to advise Hass of this change is questionable to say the least. Change Order No. 3, which reflects the redesign, was executed by Hass on March 16, 1995, but did not become effective until almost two

months later when it was executed by SCSU on May 12, 1995. [Record pp. 143,144] SCSU was not punctual in executing this Change Order and must assume responsibility for delays resulting from the arch redesign.

Change Directives Nos. 4 and 5 address the installation of fan coil units. [Record pp. 194-210] The original contract drawings in regards to the fan coil units turned out to be inadequate by not accommodating piping, insulation, and several of these units could not be located as shown on the original contract drawings because they conflicted with doorways. The responsibility for this is attributed to Huff who did not properly prepare the design work and specifications for these units. As a result, Hass and it's subcontractors were caused delay and required to perform unplanned work.

The greater weight of the evidence reflects that the responsibility for the failure of this project rests with the owner and architect. Therefore, SCSU and the architect are responsible for the delays and disruptions asserted by Hass. The Panel finds that with respect to the Contract SCSU and Huff as their agent are in material breach of their obligations under 2.2.2, 2.2.4, and 4.3.6. The damage claims of SCSU are denied for a failure to meet their burden of proof before The Panel and based on their material breach of the Contract. The failure of proof is premised on a 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 SCSU in the recovery of damages.

ISSUE II: OWNER'S DECLARATION OF CONTRACTOR'S DEFAULT

On March 6, 1997 SCSU requested that Huff certify sufficient cause existed to justify termination of the contractor pursuant to 14.2.2. [Record p. 254] On March 11,

1997 Huff replied to SCSU's request stating, "*To the best of my judgment, given the history and performance of this Project there appears to [sic] a systematic and material breach of contract on the part of the Contractor.*" [Record p. 255] On March 13, 1997 Hass' surety was notified that SCSU declared Hass in default. [Record p. 256] On March 17, 1997 Hass was notified that pursuant to provision 2.4.1 of the Contract SCSU had declared Hass in default and neglect of the Contract, that their bonding company would be notified of the declaration and that SCSU expected Hass and the bonding company to commence and continue correction of the default and neglect with diligence and promptness.[Record p. 257] SCSU further stated that they believed SCSU had sufficient grounds to terminate the Contract, but wished to give Hass and the bonding company an opportunity to cure such default and neglect. Provision 14.2 of the Contract is subtitled: TERMINATION BY THE OWNER FOR CAUSE. Section 14.2.2 of the Contract provides in part, "*...the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days written notice, terminate employment of the Contractor ...*" [Record p. 114]

Based on the evidence in the record, The Panel finds that SCSU did not comply with Article 14 of the Contract. First, the required certification by the Architect is vague at best. Second, SCSU did not provide Hass and the surety with seven days written notice as required by the Contract. Third, SCSU did not exercise their right to terminate employment of the Contractor which is the basis of 14.2.

Section 2.4 of the Contract is subtitled: OWNER'S RIGHT TO CARRY OUT THE WORK. Provision 2.4.1 of the Contract provides in part, "*If the Contractor*

defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a second seven-day period. If the Contractor within such second seven-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies.” [Record p. 93]

Although the March 17, 1997 letter to Hass may be evidence of the initial notice by SCSU of default, there is no evidence in the record of a second seven-day notice period being extended to the Contractor. SCSU did not comply with the provisions in section 2.4 of the Contract.

When a party asserts a particular provision of a contract as grounds for acting, that provision must be complied with by the asserting party. Therefore, The Panel declines to affirm SCSU's declaration of Hass as being in default of its obligations under 14.2.2 and 2.4.1.

ISSUE III: MATERIAL BREACH OF OBLIGATIONS BY CONTRACTOR

According to provision 3.3.1 of the Contract, *“The Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.”* Provision 4.3.1 of the Contract states in part, *“...The responsibility to substantiate Claims shall rest with the party making the Claim.”* Provision

4.3.7 of the Contract provides in part, "If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute work." Provision 4.3.8 of the Contract provides, "If the Contractor wishes to make Claim for all increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary." Provision 4.4.1 of the Contract provides in part, "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 reasons for rejection, (4) recommend approval of the Claim by the other party, or (5) suggest a compromise..." Provision 4.4.3 of the Contract 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." Provision 8.2.3 of the Contract provides, "The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time."

As early as September 8, 1994, Hass began to claim monetary and time impacts based on the rejection of their submittal for the bathroom partitions. In response to Hass' September 8, 1994 assertion, Huff replied on September 12, 1994 and stated in part the following: "I...do not agree that the submittal conforms to the intent of the

contract documents. The layout as submitted has a pilaster added which sticks into the handicapped stall and does not meet ADA requirements. Thus it was rejected...Please note that a re-submittal of shop drawings does not constitute reason for additional time. This is part of the shop drawing process in which not all are approved first time." From that time forward Hass submitted over 90 letters asserting claims for additional time or money or both. Huff in a letter dated June 4, 1996 wrote Hass stating in part the following: "We are in receipt of your letter of May 31, 1996. It appears to be a cover letter for copies of payroll records and invoices in an effort to substantiate additional costs. What are these specifically for? ...We will not usurp your responsibility to link documentation to various Claims...Jeff, a stack of invoices does not constitute sufficient data to allow proper evaluation...I direct your attention to Section 4.3.1 of your contract ... you must support each Claim with appropriate documentation linked to the specific Claim. Further, you must explain what adjustment, payment, extension, or other relief you request with each Claim...You have been bound from your signing of the Contract by the provisions which require cost estimates and effects of delays within 21 days...no one forced you to change your method, manner, sequencing, and scheduling...The manner in which Hass Construction responded to delays was controlled by neither the Owner nor the Architect. For instance, you mentioned in your letter that the delay "required smaller crews than anticipated and to do piecemeal sections of the Project..."(See Record p. 1660) Your decision to respond as you did with smaller crews was the result of your own scheduling...If it is true that have lost control as you have repeatedly stated in your letters,(See Record p. 1660) you are in violation of your Contract..."[Record p. 1683-1685] Hass responded by letter dated June 17, 1996 which

stated in part, "...As per Section 4.4.3 our initial claim for partial billing stands...The documentation requested is the documentation for the project including correspondence, submittals, drawings, etc. The origin and date of this particular claim dates back to September 8, 1994 and is still ongoing today..." On June 18, 1996, by way of a letter, Huff once again makes a distinction in the types of claims made by Hass and requests additional information. That communication from Huff states in part, "In addition to the claims noted above, we have requested additional information but not received any response on the following claims: 1) Claim dated April 11, 1996 re Delay due to steel framing at head of G Windows, 2) Claim dated April 11, 1996 re Delay due to Framing Access to FCU's, 3) Claim dated April 11, 1996 re Delay due to Return Air at Lab Areas, 4) Claim dated April 11, 1996 re Delay due to Removal of Wall at Office 132, 5) Claim dated May 13, 1996 re Delay due to Payment of Impact Fees, 6) Claim dated March 20 for Adverse weather in February and March, 1996, 7) Claim dated February 7, 1996 re Adverse weather in January and February, 1996. The responses we have received provide a brief explanation and reference a letter dated May 31, and a submittal of partial billings, dated May 17, 1996. Please note that reference to these documents does not provide us with sufficient data to analyze each claim. In reviewing these documents, we find that neither the letter dated May 31 nor the partial billings provide sufficient data to allow for evaluation of the individual Claims. Please note it is incumbent on you to provide substantiation of Claims based on the Contract Documents and previous correspondence. This must be done on a Claim by Claim basis and must include: 1) A statement describing the nature of the Claim and the reason for making the Claim. (We have received this in most cases, except for Claims noted above,

where no response to additional information was received). 2) The effect of the Claim on the Contract time and Contract Sum, with full detailed documentation, with a statement describing the effect of the Work by separate or other Contractors. (We have not received information concerning cost on a Claim by Claim basis, nor have we received information concerning adjustments to Contract time on a claim by claim basis). 3) A schedule for each Claim which demonstrates how the Claim impacts the critical path of the Work. (We have not received this for any of the Claims)." In a second letter dated June 18, 1996 Huff communicated to Hass the following: "...You continue to misunderstand our position on the matter of your Claims. There are three issues associated with your Claims: 1) requests for increase in the Contract Sum as associated with direct and indirect project costs, 2) increase in the Contract Time as a result of the Claims, and 3) what is generally referred to as extended overhead as it relates to Claims against the Contract...Your persistence in treating what amounts to a host of Claims as one is in conflict with the Contract Documents and will not be entertained in this matter by us. We are willing to work with you as is our responsibility...These requirements for documenting a Claim have been outlined previously. We have gone so far as to accommodate you in this regard as to extend the date for receipt of this information...I hope this once and for all clarifies the issue so that we may bring these matter to closure..." [Record p. 1741]

Hass takes the position that Section 4.4.3 (3) of the Contract protects them in the submission of their Claims by notifying the Architect that the initial Claim stands. The Panel disagrees. When read as whole the contract provides separate provisions for the submission of Claims for Additional Cost (See Provision 4.3.7 above) and

Claims for Additional Time (See Provision 4.3.8 above). The contract also provides that the responsibility to substantiate Claims shall rest with the party making the Claim (See Provision 4.3.1 above). Further, the Contract gives the Architect an option to request additional supporting data from the claimant. There is evidence on the record that the Architect made repeated attempts and requests to obtain information from Hass to substantiate Claims. The Panel rejects Hass' contentions under Section 4.4.3 and finds that Hass failed to substantiate Claims as required by the contract. The Panel agrees with the Architect that Hass' Claims are not of the nature of a continuing delay making one Claim necessary, but Hass' Claims cover different aspects under Section 4.3 of the Contract's General Conditions and should have been substantiated as requested on a Claim by Claim basis. [Record pp. 98,99]

There is evidence in the record that Hass failed to proceed expeditiously with adequate forces to achieve Substantial Completion within the Contract Time. On September 6 of 1995 the progress of the work was discussed at a Construction Progress Meeting. The Architect expressed concern about the project being behind schedule at that point and emphasized that the Contractor needed to implement steps to increase the rate of progress. Hass indicated plans to increase crews and schedule simultaneous work of different trades. [Record p. 7005] On October 11, 1995 the Architect noted, "...*Schedule of concrete work continues to be pushed back with each months construction schedule, concrete frame of building between col lines 1 and 8 is behind schedule.*" [Record p. 1041] In June of 1996 \$1,787,797.30 had been paid on the Contract yet on June 25 of 1996 the Architect noted the following: "...*Problems occur throughout building and are due to masonry and concrete openings which are out of plumb...aluminum frames have been notched in attempt to fit in opening which is*

out of plumb. Notched frames will not be accepted...At the area of type G windows...brick walls were not constructed in alignment with concrete beam...correct as required...Pending resolution of above noted items, problem areas of aluminum window framing constitute non-conforming work." Further at the hearing before The Panel, when referring to the installation of the G windows, the Architect testified, "The quality of that work is really somewhat questionable," and "...it's not the kind of quality that I feel the building warranted." [Transcript pp. 2742-2745] The Certificates for Payment to the Contractor also reflect on the work done by Hass. In September of 1994 \$28,500.00 was certified for payment. In October of 1994 \$30,898.75 was certified for payment. In November of 1994 \$46,604.15 was certified for payment. In December of 1994 \$59,831.00 was certified for payment. In January of 1995 \$56,734.00 was certified for payment. In February of 1995 \$139,352.65 was certified for payment. In September of 1996 \$18,387.00 was certified for payment. In October of 1996 \$18,322.00 was certified for payment. In November of 1996 \$16,235.00 was certified for payment. In December of 1996 \$5,186.00 was certified for payment. In January of 1997 5,194.00 was certified for payment representing an underpayment from December of 1996. [See Record pp. 7055-7100] In regards to the January 1997 Certificate for Payment the following was communicated by letter to the Owner from the Architect: "...Please note markups by our office in red. Most of the amounts we withheld are due to the application by Contractor for amounts over the amount of work completed...In addition to the amounts withheld due to discrepancy with work complete, withholdings have been made for non-conforming work..." [Record p. 824] In March of 1997 \$10,548.00 was certified for payment representing an underpayment from January of 1997. At the beginning of the Project amounts certified for payment

to the Contractor gradually increased evidencing steady progress in the work even in the midst of the subsurface problems. However, toward the end of the project the amounts certified for payment to the Contractor drastically decreased which directly reflects on the level of inactivity and non-conforming work on the part of the Contractor. On January 15, 1997 the Architect by way of letter to Hass stated, "*It is our understanding from your letter that you are refusing to execute Change Order No.7 Revised and refusing to proceed with the work of Construction Change Directive No. 10. Both of these deal with the metal railings which you have identified as the major area of work on which the schedule is dependent. The procedural nuance you cite as the reason for not executing the Change Order is not valid...Your refusal to act on either of these documents has delayed the project the amount of time since their issuance. We are concerned that you are in default on the Contract and urge you to proceed with execution of the work and the Change Order.*" On March 7, 1997 the Architect noted, "*...No drywall work has occurred in approximately the two to three months...Ceiling in Auditorium is approximately 75% installed and has seen no progress in the last several recent months...No additional progress has been done on roof since last Field Report...Stack of rigid insulation stored on roof remains uncovered and exposed to weather...Wood paneling installation has not been started.*" All the instances set out above tend to reflect on work the Contractor had not done expeditiously or had to correct because of non-conforming work.

The Panel finds Hass in material breach of Contract provisions 3.3.1, 4.3.1, 4.3.7, 4.3.8, 4.4.3, and 8.2.3. Provision 4.3.2 of the Contract states in part, "*...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 to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due..."

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.⁵ The failure of proof is premised on a 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.

ISSUE IV: OWNERS RIGHT TO ASSESS LIQUIDATED DAMAGES

SCSU seeks affirmation of their right to assess liquidated damages under the Contract. According to the Standard Form of Agreement Article 3, Section 3.2, "*The Contractor and the Contractor's Surety shall be liable and shall pay the Owner the sums hereinafter stipulated as liquidated damages for each calendar day of delay until the Work is substantially complete: Two Hundred dollars (\$200.00) for each calendar day.*" Provision 9.5.1 of the General Conditions provides in part, "*...The Architect may also decide not to certify payment...as may be necessary in the Architect's opinion to protect the Owner for loss because of...reasonable evidence that the Work will not be*

⁵ There is evidence in the record that Hass was terminated on another unrelated project in February of 1997. Consequentially the facts of that case are extremely similar to the facts of this case. [See Record pp. 3618-3628]

completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay..."

There is evidence on the record that Hass breached Section 8.2.3 of the Contract's General Conditions and did not perform 100% efficient work under the Contract. The liquidated damages withheld in the amount of \$25,440 was done so in connection with Certification for Payment Application 29 dated December 21, 1996. As noted above this was a period when the work by the Contractor was either non-conforming or being carried out in a less than expeditious manner. At the point liquidated damages were assessed, reasonable evidence existed that the work would not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay based on unsatisfactory job progress. The amount withheld was not increased in the subsequent three Certificates for Payment. Therefore, The Panel affirms SCSU's right to assess liquidated damages.

ISSUE V: OWNER'S & CONTRACTOR'S RIGHT TO TERMINATE THE CONTRACT

Article 14 of the General Conditions for the Contract sets forth the provisions for termination of the Contract by the Contractor and the Owner. Subparagraph 14.1 is entitled TERMINATION BY THE CONTRACTOR. Provision 14.1.1 states in part the following: *"The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor ...or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons:*

.1 issuance of an order of a court or other public authority having jurisdiction;

.2 an act of government, such as a declaration of national emergency, making material unavailable ...;

.4 if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number days scheduled for completion, or 120 days in any 365-day period, whichever is less ...;

Provision 14.1.2 provides, *"If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and 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 overhead, profit and damages.*

Provision 14.1.3 provides, *"If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other 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 days written notice to the Owner and the Architect, terminate the Contract and recover from the Owner..."*

Subparagraph 14.2 is entitled TERMINATION BY THE OWNER FOR CAUSE. Provision 14.2.1 of the Contract provides in part, *"The Owner may terminate the Contract if the Contractor:*

.1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials...;

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

Provision 14.2.2 of the Contract provides, "*When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days written notice, terminate employment of the Contractor...*"

The language of the Contract regarding termination is clear and unambiguous. It is manifest from that language that the right to terminate the Contract was conferred upon Hass and SCSU. No where in the Contract, the South Carolina Consolidated Procurement Code, Common Law, Custom or established Case Law, as presented to The Panel, is there stated a requirement that the Contractor or the Owner must seek approval or affirmation of a decision to exercise their rights under the Contract. To the contrary, the rights under a contract represent the agreement between parties to that contract to act in accordance therewith.

The act of terminating a contract should be used as a last resort, however, when one of the contracting parties has engaged in activities constituting a material breach of contractual duties the non-breaching must act accordingly to protect their investment.

In the present case there is no evidence in the record that the Contractor even made an attempt to exercise their Contractual right to terminate prior to litigation. Two of the grounds for which the Contractor could have asserted this right arose

before a hearing was requested before the CPOC. 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 of the contract by the CPOC for the best interest of the State, is distinguishable from the declaration of 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 Hass again failed to exercise their right of termination pursuant to the plain language set forth in the Contract. It should be noted that Hass' was allowed to put into evidence his claims for damages including those for wrongful termination (See Transcript p. 677 ll. 1-25).⁶

There is evidence on the record that SCSU intended to exercise their right to terminate the Contract under provision 14.2 of the Contract. In SCSU's March 6, 1997 letter to the Architect they ask for certification that sufficient cause existed to justify terminating the Contractor. [Record p. 254] Thereafter, on March 17, 1997 SCSU by certified mail contacts Hass stating in part, "...*We believe we have sufficient grounds to terminate your contract, but wish to give your company and the bonding company an opportunity to cure such default and neglect...*" [Record p. 257] The Panel finds that SCSU failed to exercise their right of termination pursuant to the plain language set forth in the contract.

⁶ The wrongful termination claim which was denied by the Hearing Officer refers to provisions 14.1.1.1 and 14.1.1.2 which were issues not presented to the CPOC (See Transcript pp. 631-680) because according to Hass they had not yet arisen. The Panel addressed Hass' termination claims above after reviewing the Hearing Officer's recommendation, the Record, the Transcript and the Party's Appeal Briefs.

South Carolina Consolidated Procurement Code Section 11-35-30 is entitled OBLIGATION OF GOOD FAITH and provides the following: *“Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. “Good faith” means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.* It is inherent in Contract Law that there must be a meeting of the minds in regards to the obligations of the parties.

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 as is the case at hand. That is not to say that there were no 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. This particular case is plagued with communications asserting unreasonableness and unfair dealings. On January 17 of the 1997 Hass communicated a letter to Huff which stated in part the following: *“We are not citing procedural nuances in order to impede the progress of the project; rather we are standing under the terms and conditions of our contract because of a course of dealing from your organization and South Carolina State University which has engendered a lack of trust and confidence in the owner’s intent to honor its obligations and promises under contract (See Record p. 6237 for Huff’s January 15,1997 letter)...As you are aware, during the course of this contract, the owner has unilaterally cut our pay applications without justification, and attempted to browbeat us into*

submission during the change order process by withholding our pay applications..."

[Record p. 6231] On March 20, 1997 the Architect by way of letter to Hass stated the following, "At no time has anyone suggested that Hass is the "designer" of the project. The continuation of this issue is attributable to Hass' actions and not those of any other party...Our offer was presented in good faith to facilitate your concerns regarding your ability to install the railings. It is not and never has been our intent to redesign the railings. While you have haggled unreasonably this entire time, it befuddles me why you haven't installed the railing systems as contracted to do ... Your failure to carry out the Work in accordance with your contract is by your volition only. [Record p. 5085]

Personality clashes and conflicting attitudes eliminate the possibility of agreeable resolution of legitimate claims and controversies. The Panel finds a meeting of the minds has not existed for a long time between the parties to the Contract in question. South Carolina Consolidated Procurement Code Section 11-35-4320 dealing with the remedies in a contract controversy case provides in part, "...the Procurement Review Panel...may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law. In Re Protest of Zupan and Smith Sand & Concrete Company, Case No. 1988-3, The Panel found "an agency generally has such powers as are expressly conferred and such powers which are necessary by reasonable implication or are incidental to powers expressly conferred." In Re Protest of Bytes & Types, Case No. 1988-20, The Panel found "inherent in its mandate to review contract controversies is the power to resolve them by awarding costs, fees or such other relief as justice dictates. This power is irrespective of whether there are contract provisions which provide for such relief." The Panel finds that this contract is terminated based on

the mutual breach of the parties as justice dictates. A continued contractual relationship between these parties would be futile.⁷

ISSUE VI: SUBCONTRACTOR'S CLAIMS

South Carolina Consolidated Procurement Code Section 11-35-4210 (6) provides in part, "A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel..." It is clear in the Code that the subcontractors, Clontz-Garrison and Utilities were entitled to appeal to the Panel as they were clearly adversely affected by the decision of the CPOC.

However, The Panel finds that Clontz-Garrison was aware of the cost impact of the project delays as they occurred. There is evidence in the form of letters where Clontz-Garrison expressed their intentions not to remobilize on the Project until the Owner satisfied by way of written assurance that all remaining payments would be paid. [Record pp. 5928, 5929] One of these letters was addressed to Hass and one was addressed to Representative Harry M. Hallman, Jr., however, there is no evidence before The Panel that Clontz-Garrison sought to have their Claims resolved by the Architect pursuant to the Contract. As an injured party under the Contract

subcontractors must enforce their rights and Claims through the Contractor.

Therefore, The Panel finds that the Claims for direct damages asserted by the Clontz-Garrison are denied for a failure to meet their burden of proof before The Panel as well as procedurally barred for the same reasons as those of the Contractor.

⁷ The Panel finds that the conclusions in Issues I, III and V are dispositive of Issue VII: RESOLUTION OF DELAY AND DISRUPTION CLAIMS - REQUEST FOR RESOLUTION. The ultimate termination of the contract makes resolving issues under the contract unnecessary. Therefore this issue need not be addressed.

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The communications, located in the record, to the Contractor from Utilities concern authorization to proceed with work (See Record p. 5430), change of plans (See Record p. 5692), clarification and direction pertaining to drawings (See Record p. 5693), non-conforming work (See Record p. 6821) and so on. There is no evidence that Utilities sought to have their claims resolved by the Architect pursuant to the Contract. As an injured party under the Contract subcontractors must enforce their rights and claims through the Contractor Therefore, The Panel finds that the Claims for direct damages asserted by the Utilities are denied for a failure to meet their burden of proof before The Panel as well as procedurally barred for the same reasons as those of the Contractor.

RESPONSE TO ISSUES RAISED TO THE CIRCUIT COURT NOT
OTHERWISE ADDRESSED IN THE BODY OF THIS ORDER

ISSUE: The Panel erred as a matter of law in admitting into evidence inadmissible evidence...(See SCSU's Petition for Judicial Review p. 8)

RESPONSE: The Panel lends deference to the judgment of the Hearing Officer, a former Circuit Court Judge, as to his discretion in admitting evidence during the hearing in question.

ISSUE: The Panel erred as a matter of law in failing to admit admissible evidence...(See SCSU's Petition for Judicial Review p. 8)

RESPONSE: The Panel lends deference to the judgment of the Hearing Officer, a former Circuit Court Judge, as to his discretion in admitting evidence during the hearing in question.

ISSUE: The Panel erred as a matter of law in allowing more than one attorney acting on behalf of one party, Hass, to examine and cross-examine the same witnesses.

RESPONSE: The Panel extends wide discretion to all parties in the presentation of evidence during hearings, including the participation of co-counsel in the process as long as acknowledge prior to the start of the hearing.

ISSUE: The Panel erred as a matter of law in failing to find that Hass, Utilities, and Clontz-Garrison failed to mitigate their damages.

RESPONSE: The Panel finds that this issue is jurisdictionally barred as it was not raised before the CPOC below.

ISSUE: Hass is entitled to a declaration that it is entitled to payment of it's earned unpaid retainage...(See Hass Consolidated Brief p. 22)

RESPONSE: The Panel finds that this issue is jurisdictionally barred as it was not raised before the CPOC below.

CONCLUSIONS

THEREFORE IT IS ORDERED, for the foregoing reasons, that Hass and SCSU are found to be in material breach the 1994 Contract for the construction of the 1890 Extension Program Campus Office Facility Project and the Contract is hereby terminated. SCSU is denied further damages based on their failure to meet their burden of proof before The Panel and their material breach. Hass' and the subcontractors' damage claims are denied based on their failure to meet their burden of proof before The Panel as well as being procedurally barred. The parties are responsible for their own respective attorney's fees and costs in connection with this proceeding. Those portions of the CPOC's decision consistent with this order are upheld, and those portions of the CPOC's inconsistent with this order are reversed.

