STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	))))	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: CONSTROVERSY	))	**DECISION**
PENN CONTRACTING, LLC	))	**CASE NUMBER: 2012-016**
vs.	))	
THE UNIVERSITY OF SOUTH CAROLINA JONES PSC 210 RENOVATIONS PROJECT H27-I905	)))))	**POSTING DATE: JANUARY 10, 2013**

This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from Penn Contracting (Penn) filed June 15, 2012, under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code, for an administrative review of a contract controversy over fixed audience seating for the Jones PSC 210 Renovation (the "Project") for the University of South Carolina (USC). (A copy of Penn's request is attached as Exhibit "A").

PROCEDURAL HISTORY

Pursuant to S.C. Code Ann. §11-35-4230(3), the CPOC assigned a project manager with the Office of State Engineer (OSE) to attempt to mediate a settlement between the parties. On November 9, 2012, the CPOC was notified that the parties were at an impasse and unable to reach settlement. On December 6, 2012, the CPOC commenced his administrative review pursuant to S.C. Code Ann. § 11-35-4230 by conducting a hearing. At this hearing, Bob Summers, Vice President of Penn, represented Penn, and attorney George Lampl, III, represented USC. Present as witnesses for USC were Linda A. Ciaccia, USC's Project Manager, Thomas Opal, USC's Senior Project Manager, Richard Katz, USC's Director of Facilities Business and Finance, and Justin Abrams, Architect with Quackenbush Architects & Planners. At the start of the hearing, the parties submitted into evidence Exhibits 1 and 2. This decision is based on the testimony and evidence presented at the hearing and on applicable law.

FACTS

On February 13, 2012, USC advertised for bids to renovated Jones PSC Room 210, an auditorium. [Ex. 2, tab 2] The scope of work included installation of fixed seating for 316 people. [Project Plans, Sheet T1] The basis of design for the fixed seating prepared by Quackenbush Architects and Planners (the Architect

for the project) was an Irwin Seating Company product called Marquee 51.6.56.4. [Project Manual, Specifications p. 12100-4] USC subsequently approved seating by American Seating Company (American) as an equivalent product via Addendum Number 2. [Ex. 2, Tab 4, p. 28[1]] By Addendum Number 1, USC added a requirement for a full-sized sample of a seating unit within 14 days of USC issuing notice to proceed with construction. [Ex. 2, Tab 3, p. 21]

By 3 P.M. on March 6, 2012, the time for receiving bids, USC received five bids. [Ex. 2, Tabs 5 & 6] Penn submitted a low bid of $217,400. On or about March 26, 2012, USC and Penn executed a contract (the Contract) for construction of the Project. [Ex. 2, Tabs 8 & 9] On March 29, 2012, USC issued a notice to proceed establishing the Date of Commencement as May 3, 2012 and the date for substantial completion as August 3, 2012. [Ex. 2, Tab 11] The parties considered this schedule for completion to be an aggressive schedule and acted accordingly.

According to Bob Summers, Penn's Vice President, on the day of the bid opening Justin Abrams, an architect with Quackenbush, called him to ask which seating manufacturer Penn used and remind Penn of the requirement for a sample. On March 19, 2012, Mr. Summers asked American's independent sales representative, Blake Woodley, for a sample of a "chair/fabric/color selections ASAP as for [sic] time is of the essence." [Ex. 1, p 1] Apparently, Mr. Woodley responded the following day notifying Mr. Summers that a sample was not readily available but that he was trying to locate one. [Ex. 1, p 1] On March 21, 2012, Mr. Abrams asked Mr. Summers if he had received a response from Mr. Woodley regarding the sample and Mr. Summers relayed the gist of his conversation with Mr. Woodley. [Ex. 1, p 1] In addition, Mr. Summers gave Mr. Abrams the contact information for Mr. Woodley and suggested Mr. Abrams contact Mr. Woodley directly to discuss the matter. [Ex. 1, p. 1] According to Abrams testimony, he tried to contact Mr. Woodley that same day but was not able to talk to him until March 27, 2012. [See also, Ex. 2, Tab 12, p. 102] Apparently, Mr. Abrams did not accomplish much in his March 27th conversation with Mr. Woodley because on March 28, 2012, Mr. Abrams sent an email to Linda Ciaccia, the USC project manager, indicating he would contact Mr. Woodley "again to confirm his production schedule and if there is an installation that can be reviewed." [Ex. 2, Tab 10] The email record indicates that Mr. Abrams was not able to reach Mr. Woodley again until the morning of April 4, 2012, six days after the Notice to Proceed and eight days before a sample was due. Mr. Abram's conversation with Mr. Woodley on April 4, 20112, caused Mr. Abrams to become concerned that American could not

[1] For ease of reference, the CPOC had each page of the Exhibits paginated starting with first page of Exhibit 1 being paginated as OSE000000001. The first page of Exhibit 2 starts where Exhibit 1 left off. As referenced herein, The CPOC has dropped the letters OSE and zeros preceding the first number other than zero in the page number.

provide a sample within 14 days of the Notice to Proceed or deliver the seating in a time to complete the project on schedule. That same day, Mr. Abrams brought his concerns to the attention of USC. [Ex. 2, Tab 12, p. 101]

According to the testimony, in a meeting on April 5, 2012, Mr. Abrams, Mr. Summers, and Ms. Linda A. Ciaccia, the USC project manager, discussed the seating issues further. During this meeting, Mr. Abrams orally recommended to Ms. Ciaccia a change order to substitute the Irwin seating for the American seating that Penn bid. Ms. Ciaccia told Mr. Abrams that she would have to check with her superiors as to who could approve a change order for the seating.[2] It is not clear whether Mr. Summers was a party to the discussion between Ms. Ciaccia and Mr. Abrams concerning who had authority to approve a change order. Mr. Summers says he was not, Mr. Abrams says he was and Ms. Ciaccia was not sure. However, Mr. Summers testified that at no time did Ms. Ciaccia or any other USC employee represent to Penn that they would approve the proposed change order. Nonetheless, Penn proceeded with the change in the seating manufacturer believing that Mr. Abrams had orally directed it to do so, that Mr. Abrams would recommend approval of a change order for the change in manufacturer, and that USC would ultimately approve the change order. That same day, Mr. Summers notified James Pressley with G.C.F., Inc., the Irwin supplier, that Penn was processing a subcontract with G.C.F. [Ex. 1, p. 3]

On May 3, 20122, Mr. Abrams directed Penn to execute a change order for "the Seating change." [Ex. 1, p. 6] On May 7, 2012, Penn submitted to Mr. Abrams a change order in the Amount $38,905. [Ex. 2, Tab 13] On May 8, 2012, Mr. Abrams signed the proposed change order recommending that USC accept the change order. [Ex. 1, p. 11] On May 9, 2012, Ms. Ciaccia initialed the change order beside Mr. Abrams' signature of recommendation and forwarded it to Jeff Lamberson, USC's Director of Facilities, Design and Construction, with a brief explanation as to why she felt the change order was necessary. [Ex. 1, pp. 10 & 11]

According to the testimony, about June 6 or 7, Richard Katz, USC's Director of Facilities Business and Finance, reviewed the proposed change order in accordance with USC procedures prior to submitting it to Mr. Lamberson for approval. Upon review, Mr. Katz questioned the reasoning behind the need for a change order and brought the change order request and his concerns with the request to the attention of Tom Opal, USC's Senior Project Manager. Mr. Opal testified that he could not determine that the change order changed any contract requirements and he asked Ms. Ciaccia if there were any changes to the

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[2] One should expect USC to know that the Contract designated Ms. Ciaccia as the person having authority to approve change orders. However, when asked whom the Contract designated as having the authority to approve change orders on USC's behalf neither Ms. Ciaccia nor any other representative present from USC knew the answer. Moreover, they did not know of any means that USC employed to notify contractors who had such authority.

Contract requirements. Ms. Ciaccia responded to Mr. Opal's inquiry in the negative. As a result, USC determined not to execute the change order and notified the Architect of its decision. The Architect notified Penn of USC's decision on or about June 11, 2012. [Ex. 1, p. 17]

At most, the evidence establishes that Penn believed Mr. Abrams orally directed it to change the chair manufacturer from American to Irwin and that Mr. Abrams orally represented that a change order for the difference in cost would be approved by USC.[3] Penn's request for resolution of a contract controversy agrees with the evidence in that the request does not claim that USC directed a change or that USC represented that it would approve a change order for a change in the seat manufacturer. Instead, Penn's request claims the Architect "indicated" a need for a change in the seating vendor and represented that USC would approve a change order. Penn's claims that the Architect directed a substitution or change are of no help to Penn. No provision of the Contract gives the Architect the authority to direct a change to the Contract that increases the cost to the Owner.

An unambiguous contract must be enforced according to its terms. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994); *Davis v. KB Home of South Carolina, Inc.*, 394 S.C 116, 713 S.E.2d 799 (Ct.App. 2011). Here, the Contract unambiguously sets forth strict requirements for a change or amendment to the Contract and defines who has the authority to approve a change or amendment on behalf of USC. Section 8.3.2 of the Agreement Between Owner and Contractor designates Ms. Ciaccia as USC's representative with the authority and responsibility set forth in Section 2.1.1 of the General Conditions. [Ex. 2, Tab 8, p. 66] Section 2.1.1 of the General Conditions states that USC's designated representative "shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization." [Ex. 2, Tab 8, p. 69] Moreover, this same provision states, "the Architect does not have such authority." Section 1.1.2 of the General Conditions states, "The Contract may be amended or modified only by a Modification." Section 1.1.1 of the General Conditions defines a Modification as:

> "(1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect.

[AIA Doc. A201 - 2007] Section 5.2.1 of the General Conditions of the Contract provides that only USC may object to a subcontractor (including a key supplier) to Penn planned and demand a substitution.[4] [Ex. 2, Tab 8, p. 73] Any such objection must be in writing. Section 7.2.1 of the General Conditions states:

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[3] This is a contention that Mr. Abrams denies.

[4] In the event a subcontractor is rejected, the contractor is entitled to a change order for any associated cost only if the rejected subcontractor "was reasonably capable of performing the Work." [Section 5.2.3 of the General

> "A Change Order is **a written instrument** prepared by the Architect … and **signed by the Owner**, Contractor and Architect stating their agreement upon all of the following:
> .1 The change in the Work;
> .2 The amount of the adjustment, if any, in the Contract Sum; and
> .3 The extent of the adjustment, if any, in the Contract Time."

[Emphasis added] [Ex. 2, Tab 8, pp. 74 & 75] Section 7.3.1 of the General Conditions states:

> "A Construction Change Directive is **a written order** prepared by the Architect and **signed by the Owner** and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both." [Emphasis added] [AIA Doc. A201- 2007]

Section 7.4 of the General Conditions states:

> "The Architect has authority to order minor changes in the Work **not involving adjustment in the Contract Sum** or extension of the Contract Time and not inconsistent with the intent of the Contract Documents." [Emphasis added] [AIA Doc. A201- 2007]

The proposed change order in question is for a sum of $38,353 and is not a minor change that the Architect alone could authorize. Only, Ms. Ciaccia had authority to direct a subcontractor substitution, direct a change, or approve a change order to the Contract that increased the cost of the Project. Penn presented no evidence of a written direction for substitution, or written amendment, change order, or change directive signed by Ms. Ciaccia or anyone with authority to direct Ms. Ciaccia's actions. Moreover, Mr. Summers testified that neither Ms. Ciaccia nor any other USC employee or official orally directed a change or orally approved a change order.

The parties can through their course of conduct, waive contractual requirements. *T.W. Morton Builders, Inc., v. Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct.App. 1994); *Smith-Hunter Construction Company, Inc. v. Hopson*, 365 S.C. 125, 616 S.E.2d 419 (2005). However, Penn presented no evidence that USC waived the contractual limitations on the Architect's authority or in any way vested the Architect with authority to issue change directives and approve change orders on its behalf.[5] Moreover, Penn presented no evidence that USC's designated representative vested with authority to issue change directives and approve change orders engaged in a course of conduct that would constitute waiver of the requirement that a Modification be in writing signed by USC.

Conditions, AIA Doc. A201 - 2007] The evidence, including Mr. Summer's own testimony, suggests that American Seating was not capable of meeting the sample and scheduling requirements of the contract.

[5] Penn did attempt to argue a course of conduct on other projects but USC's course of conduct on unrelated projects is not relevant to this dispute.

From USC's perspective, there was no change to the contract because USC received nothing more than what it contracted for, 316 seats meeting the requirements of the specifications, including sample and delivery requirements.

DECISION

It is the decision of the Chief Procurement Officer for Construction that Penn failed to prove upon a preponderance of the evidence an amendment or modification to the Contract regarding the seating for the Project.

For the foregoing reasons, Penn's claim is denied.

John St. C. White
Chief Procurement Officer for Construction

January 10, 2013
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Contract Controversy Appeal Notice (Revised January 2013)

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other information regarding the protest process are available on the internet at the following web site: http://procurement.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2012 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002); *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.