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Decision Contract Controversy

Matter of: SNB of Dillon, LLC
File No.: 2022-006
Posting Date: August 28, 2023
Contracting Entity: South Carolina Department of Parks, Recreation and Tourism
Project No.: P28-9762-PD
Description: Dillon Welcome Center

DIGEST

Claims for unresolved change orders, compensable delay, and excusable delay granted in part and denied in part.

AUTHORITY

Per S.C. Code Ann. § 11-35-4230, the Chief Procurement Officer for Construction (CPOC) conducted an administrative review of a request for resolution of a contract controversy filed by SNB of Dillon, LLC, (SNB) making claims against the South Carolina Department of Parks, Recreation and Tourism (PRT). SNB's request is attached as Exhibit A.¹ The CPOC's administrative review included a two-day hearing where the parties presented testimony and documentary evidence. This decision is based on the testimony, documentary evidence, and applicable law and precedents.

Present at the Hearing were:

Legal Counsel:

Henry P. Wall representing SNB

Chuck McDonald and Emily Johnson representing PRT

¹ Due to the sheer volume of documents, the CPOC has excluded the exhibits which SNB attached to its request for resolution of contract controversy from Exhibit A.

Witnesses:

For SNB:

Sammy Bracey, President of SNB, and

Grady W. Query, Project Scheduler

For PRT:

Devon Harris, PRT Visitor Services Manager

Trey Riggan, Project Manager with Jeff Lewis AIA – Architect

Vince Williams, Project Structural Engineer (consultant for the Architect)

Nicholas Leitner, PRT Engineer and Project Representative

Jeff Lewis, the Project Architect was present during the testimony of Messrs. Riggan and Williams but did not testify himself.

BACKGROUND

On or about May 31, 2017, PRT contracted with Jeff Lewis AIA – Architect (the A/E) for the design of a welcome center on the south bound side of Interstate 95 near the North Carolina border (the Project). In turn, the A/E contracted with Vince Williams to supply structural engineering services for the project. The contract with the A/E required the A/E to periodically observe the progress of construction and SNB's compliance with the construction documents.

On October 11, 2018, PRT awarded a contract to SNB to construct the Project in accordance with construction plans and specification prepared by the A/E and its consultants. On November 1, 2018, the parties executed the Agreement Between Owner and Contractor (the Contract). The Contract called for a substantial completion within 300 days of the date of commencement established by PRT in its Notice to Proceed with construction. The Contract also provide for \$500 per day of liquidated damages for every calendar day SNB took after the substantial completion date (subject to adjustments as provided in the Contract documents) to complete the Project.

On January 28, 2019, PRT issued SNB a Notice to Proceed with construction. This Notice established a date of commencement of January 28, 2019. This document also states the contract time is 314 days rather than 300.² The Notice to Proceed established the initial date for substantial completion as December 8, 2019. During the Project, many events intervened to delay the project. The nature of those events and who was responsible for them are issues in this dispute. By the time of substantial completion, the parties had agreed to two change orders changing the contractual substantial completion date to January 22, 2020. However, SNB had previously sent PRT multiple change order requests for time and money. The A/E did not issue a certificate of substantial completion of the Project until August 4, 2021.

² This additional 14 days was added by Change Order 1 which predates the Notice to Proceed.

PRT assessed liquidated damages for the 560 days of delay from the contractual substantial completion date and the date of the certificate of substantial completion. However, SNB challenged all assessments of liquidated damages claiming it was entitled to change orders compensating it for extra work and extending the date of substantial completion to August 4, 2021.

On April 27, 2022, SNB filed its request for resolution of a contract controversy making claims against PRT for the following relief:

1. Payment of the undisputed contract balance and interest for late payments,
2. Approval and Payment of Unresolved Change Order Requests (CORs),
3. Time Related Claims:
 - a. Remission of Liquidated damages and time extension through the date of substantial and final completion,
 - b. Compensation for Owner-Caused Delays, Disruption, Suspension of work, and changes,
4. Alternative Equitable Relief for impacts of Covid-19,
5. Alternative Damages for breach of the covenant of good faith and fair dealing, and,
6. Statutory Attorney's fees.

After the CPOC's receipt of this contract controversy, PRT agreed to additional change orders increasing compensation and extending the substantial completion date to February 6, 2020. SNB signed these change orders with a reservation of rights to claim more compensation and time. On or about July 31, 2022, the parties engaged in non-binding mediation on the remaining issues of dispute. On August 3, 2022, the parties notified the CPOC that they had completed mediation and made progress in narrowing some issues but "were unable to come to an accord on all matters." Per the prior agreement of the parties, the CPOC commenced his administrative review on October 17, 2022, with a two-day hearing with the parties. At the hearing, the parties presented testimony and documentary evidence.³

At the hearing, SNB asked the CPOC to grant it the following relief:

1. Relief for unresolved changes:

Chane Order Request#	Description	Amount Claimed
COR 19	Roof Sheathing	\$ 23,720.04
COR 29	Framing Modifications	\$ 6,342.60
COR 36	Plywood/Insulation Inversion	\$ 83,822.60
COR 40	Soffit Vents	\$ 22,780.35
COR 41	Ridge Vents	\$ 6,122.60

³ By agreement of the parties, each side presented its case in turn without interruption or cross examination.

COR 43	Replace Toilet	\$ 278.30
COR 47R	Valley Beams	\$ 3,906.59
COR 54	Sliding Door Hardware	<u>\$ 1,324.71</u>
Sub-Total		\$148,297.79

2. Relief for compensable days at the rate of \$991.10 per day plus withheld liquidated damages of \$500 per day:

Issue	Days claimed	Amount Claimed
Inwall Bracing	177 days	\$263,924.70
Vending Room Ceiling	169 days	\$251,995.90
Sliding Door Change	18 days	\$ 26,839.80
Delay of Substantial Completion	23 days	<u>\$ 34,295.30</u>
Sub-Total	387 days	\$577,055.70

3. Relief from assessed liquidated damages in the amount \$500 per day due to delay being excusable or concurrent with owner caused delays:

Issue	Time Requested	Amount Requested
Compensable delays set forth above	387 Days	\$193,500.00
Slab on Grade	89 Days	\$ 44,500.00
Vented Roof Redesign concurrent with Slab on Grade	13 Days	\$ 6,500.00
Standing Seam Roofing Metal delivery delay due to COVID	71 Days	\$ 35,500.00
Sub-Total	560 Days	\$280,000.00

SNB's monetary claims total \$1,005,353.49. PRT contested all SNB's claims asserting that it had already paid SNB all amounts due under the contract.

ANALYSIS

The terms and conditions of the Agreement between PRT and SNB govern this dispute. The Agreement dated November 1, 2018, is written on South Carolina Division of Procurement Services, Office of State Engineer (SCOSE) Version of AIA Document A101-2007. This document states:

The Contractor shall fully execute the Work **described in the Contract Documents**, except as specifically indicated in the Contract Documents to be the responsibility of others.

[AIA A101 SCOSE edition, Article 2] [emphasis supplied]

The Agreement further states:

§ 1.1 The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. **An enumeration of the Contract Documents**, other than a Modification, **appears in Article 9**.

§ 1.2 Any reference in this document to the Agreement between the Owner and Contractor, AIA Document A101, or some abbreviated reference thereof, shall mean AIA Document A101-2007 Standard Form of Agreement Between Owner and Contractor, SCOSE edition. Any reference in this document to the General Conditions of the Contract for Construction, AIA Document A201, or some abbreviated reference thereof, shall mean AIA Document A201-2007 General Conditions of the Contract for Construction, SCOSE edition.

[AIA A101 SCOSE edition, Article 1] [emphasis supplied]

Among other Contract Documents listed in Article 9 are AIA Document A201-2007, General Conditions of the Contract for Construction, SCOSE edition, technical specification in the Project Manual dated August 30, 2018, Project Drawings dated July 13, 2018, and four addenda issued during bidding.

The General Conditions of the Contract for Construction state:

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results. In the event of patent ambiguities within or between parts of the Contract Documents, the Contractor shall 1) provide the better quality or greater quantity of Work, or 2) comply with the more stringent requirement, either or both in accordance with the Architect's interpretation.

[AIA A201 SCOSE edition, Article 1]

I. CLAIMS FOR UNRESOLVED CHANGES

A. Claim for Roof Sheathing

The roof area involved in this claim is what the parties call the high roof area. The drawings show a membrane and roof structure consisting of the following elements from top to bottom:

- architectural shingles over synthetic underlayment [Drawing A105]
- 5/8" sheathing rated for a 24" span [Drawing S701 Sect. D]
- 2x4 nailers at 24" on center
- metal decking
- steel roof joists

SNB installed the nailers so that they were running horizontal to the ridge of the high roof. This layout prevented venting of the high roof. After SNB installed the nailers and a substantial percentage of the sheathing, PRT's A/E observed the problem. To correct the problem, SNB had to remove the installed sheathing, cut out sections of the nailers to allow air to vent vertically, and reinstall the sheathing. SNB claimed that it installed the nailers per the drawings and further argued that the drawings did not call for ridge venting of the high roof area and, therefore, all this work was extra work for which it was entitled to receive compensation.

An examination of the drawings and specifications do not support SNB's contention that it installed the nailers per the drawings. The drawings clearly show the nailers running perpendicular to the ridge. [Drawings A105, A106-4 High Ridge Detail, S701 Sect. D, etc.] It is true that the drawings do not show ridge venting for the high roof area.⁴ However, SNB's contract requires it to construct per all the Contract Documents which include the technical specifications. Section 073113 of the Technical Specifications govern asphalt shingles and states:

Ridge Vents: Install continuous ridge vents over asphalt shingles according to manufacturer's written instructions. Fasten with roofing nails of sufficient length to penetrate sheathing.⁵

[Section 073113-3.4H]

SNB attempts to bolster its argument by citing Structural Note 7 on Drawing S002 which states:

All roof sheathing shall be 5/8" APA rated structural sheathing. Attach the sheathing to the joists or trusses with 10d nails at 6" O.C. panel edges and 12" O.C. field. **Block all edges unless noted otherwise on the plans.**
[emphasis supplied]

⁴ The only ridge venting shown on the drawings is over an area of the low roof which is a metal roof membrane.

⁵ Not only is ridge venting required by the Technical Specifications, but the approved shop drawings for the shingle roof system submitted by SNB includes an exhaust-vent product.

SNB argues that even if it had installed the nailers perpendicular to the ridge, the blocking required by this note would prevent venting and therefore, venting was not required.⁶

To the extent the drawings and the specifications conflict about ridge venting, they present a patent ambiguity. The drawings are clear that the contractor was to install the nailers perpendicular to the high roof ridge. The specifications are clear that the asphalt shingle roof had to have ridge venting. To the extent the blocking requirements of Note 7 on Drawing S002 conflicted with these requirements, SNB should have inquired before going ahead with installing the nailers horizontal to the high roof ridge. *See Appeal by B&R Contractors, Inc.*, Panel Case No. 2018-6 (finding offerors have a duty to inquire about patent ambiguities); 1A BRUNER & O'CONNOR CONSTRUCTION LAW § 3:54.

For the foregoing reasons, the CPOC denies SNB's claim for compensation for roof sheathing.

B. Claim for Framing Modifications

This is a minor item of claim. By Change Order Request 29, SNB asked for \$6,342.60 for a framing modification required for the restroom partitions manufactured by PSiSC, one of three approved manufacturers. The parties could not agree on the extent of the required modifications and the responsibility for the cost. Eventually, the parties executed Change Order 6 for \$5,000. However, SNB signed with a reservation of rights. PRT was not satisfied that it had received sufficient backup information to support a claim for more. Neither party presented sufficient information for the CPOC to fully resolve this issue, and the CPOC leaves the parties where they currently stand on Change Order 6.

C. Claim for Plywood/Insulation Inversion

The exterior walls for the areas of the restrooms, vending, and utilities are sheathed with 15/32" plywood sheathing and 3/4" foamboard insulation. The Architectural Drawings issued for bidding did not indicate which is attached to the framing first but pointed to the same image for both. [Drawing A107] However, with reference to the structural sheathing, the Architectural Drawings also refer the reader to the structural drawings. The structural drawings show the plywood sheathing attached directly on the studs.⁷ [Drawings S701 Sections A & B and S704 Sections A&B]

On or about September 27, 2018, PRT published Addendum No. 3 to the bidding documents. Addendum No. 3 included a revised drawing A107 which clarified "[s]heathing and rigid insulation details." The provided details show the 3/4" foamboard insulation placed directly against the framing and the sheathing installed on the outside of the insulation. The CPOC finds that this addendum superseded all earlier directions in the plans and specifications regarding the structural sheathing. SNB installed the foamboard insulation and plywood sheathing following revised drawing A107.

SNB claims that Mr. Williams directed it to remove the plywood sheathing and foamboard insulation and reinstall it with the sheathing place directly against the framing and the insulation place on the outside of the sheathing. PRT and the A/E claims that SNB allowed some of the plywood sheathing to become saturated and that the sheathing had started to delaminate. SNB's position is that the reason it

⁶ At the hearing, Vince Williams stated that Note 7 on Drawing S002 should not have been interpreted to apply to the sheathing installed over nailers on the metal deck, but to only the sheathing attached directly to joists or trusses.

⁷ This would be the typical application for structural sheathing.

had to remove and reinstall the plywood sheathing was because of moisture damage, not the fact that the plywood and insulation were inverted. PRT also asserted that SNB started removing the sheathing and insulation before receiving any formal direction to do so and before the architect had decided on the best course of action to fix the problem. On the other hand, the testimony of Mr. Williams focused on the need to have the structural sheathing attached directly to the studs, and he argued that the requirements of the plans and specifications were to do just that. The position of the structural engineer is reasonable since the purpose of the sheathing is to resist shear forces. Sheathing that is separated from the structural framing by $\frac{3}{4}$ inches of insulation will not be able to resist shear forces. The CPOC finds the testimony of Sammy Bracey for SNB to be more reliable on this point than that of PRT and its architect.⁸ The fact is that any solution to the architect's mistake was going to be costly, and the solution implemented was a reasonable one.

SNB submitted SNB Exhibit 5 in support of its claim of \$83,822.60 for the inverted plywood/insulation. SNB Exhibit 5 is SNB's Change Order Request (COR) 36 which SNB submitted to PRT on September 8, 2020. According to COR 36, the work of replacing the insulation and plywood took place from Thursday April 9, 2020, through Friday April 17, 2020. PRT claims COR 36 was both insufficient to support the cost claimed and untimely.

The CPOC finds COR 36 to be defective but not completely inadequate for the allocation of costs. COR 36 states that an itemized breakdown of materials and labor is attached but there is none. There is an itemization of general conditions cost but this assigns one month for main office, 16 days for the superintendent, 2 weeks for the project manager, 8 weeks for "skilled labor (Hunter)," 5 weeks for "skilled labor (Thomas), and 8 weeks for site cleaning. However, the daily logs attached to COR 36 show only 7 days of work. Even these seem to be incomplete since the photographs attached to the last daily log show that the reinstallation of the foamboard insulation is not complete.

The material invoices and equipment rental invoices attached to COR 36 seem to be the best indicator of the duration of this work. Sunbelt Rentals' invoice for a boom lift is for April 9, 2020, to May 10, 2020. The April 9, 2020, date for start of this work is consistent with first daily log SNB included with COR 36.

The material and equipment rental invoices all appear to be consistent with the work involved and total \$18,791.62, including tax.⁹ Evaluating SNB's labor claims is much more difficult. It appears that SNB did not keep good records. SNB includes time sheets for labor supplied by temporary labor agencies, but the daily logs supplied do not indicate that any of the work involved in COR 36 was performed by any of these workers. The daily logs supplied by SNB indicate the work of COR 36 was performed by ABC Drywall and Framing (ABC), but SNB did not include any invoices from ABC. Moreover, some of the dates on the temporary agency labor invoices do not correlate with the dates of the work of COR 36. For instance, one invoice is dated April 2, 2020, days before the work started. Finally, SNB claims as labor for General Requirements items that are not labor items and then adds a markup for payroll

⁸ In addition to the testimony of Mr. Bracey on this point, SNB suggests that the architect, in placing the blame on SNB, was attempting to shift the blame for its design error to SNB.

⁹ This number, which is derived by summing all material, rental, and waste management invoices SNB attached to COR 36 differs from the total SNB included in its summation for COR 36.

taxes and insurance to these items.¹⁰ SNB also claims under General Requirements, labor for a period exceeding that shown by other documents.

After examining the documentation, concluding that the duration of the work related to COR 36 was no longer than five weeks, and adjusting claims accordingly, the CPOC finds that SNB is due \$62,807.36 for COR 36.

D. Claim for Vented Soffit, COR 40

The issue about COR 40 appears to be primarily over solid versus vented soffits. The record on this item is confused by the overlapping of the question of the venting of the high roof area discussed above with venting for the low roof area. However, the material invoices that SNB submitted with COR 40 are all associated with soffit for the low roof area and SNB's claim for material cost is based on the cost of vented soffit material versus solid. The A/E does not seem to argue the question of whether SNB incurred added cost for soffit in the low roof area for which PRT is responsible, but he balks at the delay in bringing the claim. The CPOC finds, however, that PRT was not prejudiced by any delays and, therefore, gives SNB the benefit of the doubt on this claim, but notes that SNB claims the full cost of the vented soffit rather than the difference in cost between vented soffit and solid soffit. The difference between the cost of the vented soffit and solid soffit is \$161.84 per unit while the total added cost of the vented soffit over solid soffit is \$2,168.18. The CPOC finds that SNB is due this amount.

SNB's claim includes an added labor claim of 18,000. The subcontractor invoice for this amount is not legible and it is not clear as to why it cost \$18,000 more to install a combination of vented and solid soffit than install all solid soffit. Therefore, the CPOC denies this claim for labor cost.

C. Claim for Ridge Vents, COR 41

Like SNB's claim for vented soffits, the testimony and record on this item seems to confuse ridge venting for the high roof area with ridge venting for the low roof area. SNB attached a change order request from a subcontractor to COR 41. The subcontractor's claim is for "vented Z closures installed at ridge and low roof areas" for \$5,500. Z closures are a type of metal closure used in the ridge area of metal roofs. SNB's entire claim in COR 41 is based on this subcontractor claim for perforated Z Closures. Despite the association of Z closures with metal roofs, SNB claimed in its emails that COR 41 was related to venting both the asphalt shingle high roof and the metal low roof.

PRT's response to COR 41 was that SNB was to only install venting in a limited area of the metal roof and any venting installed on the metal roof by SNB beyond this limited area was at SNB's cost. [Drawing A103] SNB responded that the claim was for ridge venting both the asphalt shingle high roof area and the metal roof area. SNB also responded that if COR 41 included any venting in the metal roof areas, it would deduct that cost. Therefore, since this claim was for perforated Z closures, which could only relate to the metal roof, this claim must fail. Even if this claim were related to the asphalt shingle roof area, the claim fails for the reason discussed above in the discussion of SNB's claim for roof sheathing.

¹⁰ One of these items is a charge for SNB's main office. Not only is this not a item of labor, it should not be included as a separate line item since it is included in SNB's markup for overhead.

D. Claim for Replacement of a Toilet, COR 44

The testimony and the other evidence leave the CPOC unclear as to the basis of this claim for \$278.30. Therefore, the CPOC denies this claim.

E. Claim for Wrapping of Valley Beams, COR 47-R

On or about January 22, 2021, SNB submitted COR 47 making a claim for decorative wrapping of valley beams by its subcontractor Thompson Cabinets & Millwork, Inc. On May 27, 2021, SNB revised COR 47 to add rental equipment and material for temporary floor protection not included in its first claim. On May 3, 2022, PRT signed Change Order 4 agreeing to compensate SNB for this item for the amount originally claimed, \$2,800.81. SNB signed this same change order with a reservation of rights. The CPOC finds that SNB's documentation supports a claim of \$3,906.59 for this item of work and that SNB is entitled to the difference between this amount and the amount of \$2,800.81 which is \$1,105.78.

F. Claim for Sliding Door Hardware, COR 47-R

The record shows that the parties resolved all monetary claims other than compensable delay claims in Change Order 5. The CPOC discusses the related compensable delay claim below.

II. CLAIMS FOR COMPENSABLE DELAY

In its testimony about compensable delay and supporting documentation, SNB showed that the parties had used \$991.10 as a basis for calculating compensable delay in Change Order 2 and argues that this is a reasonable value for the per day cost for compensable delay. The CPOC concurs, leaving the only issue to decide is whether any of SNB's claims for delay are compensable.

A. Inwall Bracing Claim

This claim is the result of delay caused initially by SNB's failure to install bridging or inwall bracing in the structural steel stud walls per the plans and specifications. The plans and specifications clearly specify inwall bracing which SNB did not install. (See Drawing Sheet S002, Structural Steel Notes 21 & 22. See also, Drawing Sheet S002, Structural Steel Note 25 requiring approved Shop Drawings and the approved Shop Drawings Sheet LSF-5.0. Finally, see Specification 054000 and ASTM C 1007 which is incorporated therein by reference.) On July 1, 2020, Mr. Williams visited the site to observe the structural framing. During this inspection, Mr. Williams observed that SNB had failed to install bridging in bearing and shear walls as required by the plans and specifications. The claim of delay relates to how long it took to resolve the inwall bracing issue once the A/E discovered the missing bracing.

As SNB worked to resolve its mistake, it ran into issues installing the bracing as specified due to interference with previously installed plumbing or electrical conduit, or studs installed in a manner that the holes in the studs did not align. Rather than propose a solution where this occurred, SNB asked the A/E for a solution. For example, on July 9, 2020, SNB submitted Request for Information (RFI) 52 asking the A/E what it should do when the stud holes did not align.¹¹ On July 14, 2020, Mr. Williams

¹¹ Section 4.2.14 of the General Conditions states:

responded by supplying three options for inwall bracing. On July 23, 2020, SNB submitted RFI 56 asking for added guidance on how to install bracing due to issues arising from its failure to follow the plans. Mr. Williams responded:

THIS ISSUE HAS GONE ON LONG ENOUGH WITH S.N.B. CONSTANTLY FINDING WAYS TO NOT BUILD ACCORDING TO THE ORIGINAL CONSTRUCTION PLANS AND LATER SK SHEET DIRECTIVES THAT WERE PROVIDED TO ASSIST S.N.B. WITH RESOLVING THEIR CONSTRUCTION MISTAKES. IF THE ORIGINAL CONSTRUCTION PLANS HAD BEEN FOLLOWED THIS WOULD NOT BE AN ISSUE. SEE THE SNIP FROM THE ORIGINAL CONSTRUCTION DRAWINGS ON THE NEXT SHEET. DUE TO THE LACK OF GOOD FAITH EFFORTS IN THIS MATTER, I WILL NO LONGER BE ISSUING AND DESIGN REVISIONS OR APPROVING ANY DESIGN REVISIONS BECAUSE I HAVE PREVIOUSLY PROVIDED THREE METHODS OF SOLVING THESE ERRORS. IF S.N.B. IS UNABLE TO RESOLVE THIS ISSUE WITH ANY THE THREE METHODS PROVIDED, IT IS CLEAR S.N.B. DOES NOT WISH TO MAKE A GOOD FAITH EFFORT TO CORRECT THEIR MISTAKES. THEREFORE, MY ANSWER TO THIS RFI IS AS FOLLOWS;

S.N.B. MUST INSTALL ALL LATERAL WALL BRACING IN ACCORDANCE WITH THE ORIGINAL CONSTRUCTION PLANS, IF THERE ARE LOCATIONS WHERE THE PUNCHES IN THE WALL STUDS DO NOT ALIGN, THEN THOSE STUDS MUST BE REPLACED, SUCH THAT THE WALLS ARE BUILT IN ACCORDANCE WITH STANDARDS OF LIGHT GAUGE CONSTRUCTION AND GOOD CONSTRUCTION PRACTICES (i.e CUTTING STUDS FROM THE SAME END SUCH THAT ALL PUNCHES ALIGN IN THE WALLS). ALL SHEATHING ATTACHMENT TO ANY REPLACED WALL STUDS MUST BE RE-INSTALLED IN ACCORDANCE WITH THE ORIGINAL CONSTRUCTION DRAWINGS. THIS MAY REQUIRE REMOVING EXISTING FINISHES AND SIDING, AT CONTRACTOR'S EXPENSE. NO ADDITIONAL COSTS FOR REPAIRING THESE CONSTRUCTION ERRORS WILL BE THE RESPONSIBILITY OF THE OWNER OR ANY MEMBER OF THE DESIGN TEAM.

NO ADDITIONAL RFIs REGARDING THIS MATTER WILL BE ACCEPTED.

[emphasis in original]

The Architect will review and respond to requests for information **about the Contract Documents** so as to avoid delay to the construction of the Project. The Architect's response to such requests will be made in writing with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information. Any response to a request for information must be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. Unless issued pursuant to a Modification, supplemental Drawings or Specifications will not involve an adjustment to the Contract Sum or Contract Time.

SNB's request was not so much about the contract documents, but about what to do when it failed to follow the contract documents.

While one may take exception to the tone of this response, up until this time, SNB had not proposed any solutions for its errors but looked to the A/E for solutions. The General Conditions state:

§ 4.2.2 The Architect will visit the site as necessary to fulfill its obligation to the Owner for inspection services, if any, and, at a minimum, to assure conformance with the Architect's design as shown in the Contract Documents and to observe the progress and quality of the various components of the Contractor's Work, and to determine if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 12.2 Correction of Work

§ 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

It is not the A/E's responsibility to supply a solution for the contractor when the contractor does not follow the plans and specifications. Rather, if the contractor wishes to pursue a solution short of strict compliance, it is the contractor's responsibility to propose a solution reasonably acceptable to the A/E.

After Mr. Williams's response, SNB reached out to ClarkDietrich Engineering Services, LLC (ClarkDietrich), for help.¹² ClarkDietrich inspected the metal stud framing and made recommendations on how to address the inwall bracing. On August 7, 2020, SNB submitted ClarkDietrich's conclusions and solutions to the A/E. At this point, SNB properly placed the matter in PRT's court to consider SNB's proposed solution and, if reasonable, to accept it. However, Mr. Williams's response was to reject any solution proposed by another engineer. The CPOC finds Mr. Williams's refusal to consider any solutions offered up by ClarkDietrich to be unreasonable, and that any responsibility for delay on behalf of PRT started at this point.

Another aspect of this claim has merit. On August 19, 2020, Mr. Williams reviewed the framing and made observations. Immediately thereafter, Mr. Williams became incapacitated and was not able to notify the architect of his observations until October 1, 2020. [18D] This delayed SNB from going ahead with sheathing the walls by 43 days.

It is not clear at what point in time the delay stopped. Was it October 1, 2020, or a later date? The October 20, 2020, Updated Project Schedule, shows the installation of sheathing starting on October 19, 2020. This suggests that it took more than two weeks for SNB to complete taking the actions described in Mr. Williams's observations supplied on October 1, 2020. While Mr. Williams's notes do address the need for inwall bracing in 6 of the 27 wall areas noted, the notes appear to primarily address the need for blocking to support sheathing panel edges and issues other than lateral bracing that needed correction before SNB could install the sheathing. Moreover, the notes name many areas where SNB could start installing sheathing at once. In other words, SNB was free to start installing sheathing in some areas as early as October 1, 2020. However, SNB stated at the hearing that once it received Mr. Williams's notes, its subcontractors were occupied on other jobs and were not available to start framing work and installation of sheathing at once. SNB's testimony that its subcontractors did not wait 43 days for PRT to supply Mr. Williams's observation notes and that the subcontractors were not available when SNB did receive the notes is credible. Therefore, the CPOC uses the date on the October Updated Project Schedule for when sheathing started, October 19, 2020, as the date for the end of delay.

SNB's scheduler testified at the hearing that the inwall bracing issue delayed SNB by 177 days. The CPOC finds significant issues with the scheduler's testimony. The CPOC finds that SNB was responsible for the majority of the delay and is only entitled to delay from August 7 to October 19, 2020, 73 compensable days of delay. At \$991.10 per day, this equates to \$72,350.30. In addition, SNB is entitled to the \$36,500 in liquidated damages PRT withheld for these 73 days.

¹² ClarkDietrich is a full-service engineering consulting firm specializing in cold-formed steel. ClarkDietrich supplied the shop drawings and calculations for the light gauge steel stud walls. ClarkDietrich's parent company produces light gauge steel framing systems.

B. Vending Room Ceiling

SNB claims that PRT delayed its performance for the installation of the vending room ceiling framing 169 days. The facts do not fully support SNB's claim. The October 20, 2020, update to the Project Schedule shows SNB planned to have the ceiling framing completed for overhead inspections by November 24, 2020. However, the record shows that SNB was not ready for inspection by this date and that failure to meet this date was not due to any action or inaction of PRT and its A/E but to problems within SNB's own construction team.

The documents submitted by the parties show that SNB's framing subcontractor, ABC Framing and Drywall (ABC), asked SNB for guidance on bracing for the framing of the ceiling in the vending room on October 19, 2020. ABC said that it could not find anything in the plans and specifications with guidance on what to do and they needed direction in writing. That same day, SNB prepared and gave the A/E RFI 65. The A/E responded eight days later with direction from the structural engineer to follow the standards of ASTM C 754 and C 645.¹³

While the plans do not supply any guidance on this issue, the Project Specifications do. Section 092216 of the Project Specifications addresses non-structural metal framing. This section of the specifications incorporates ASTM C 645 and C 754. ASTM C 754 provides guidance on supporting suspended and furred ceilings using wire hangers. The record indicates that after being pointed to ASTM C 754, ABC knew how to proceed.

Sometime between October 19 and November 24, 2020, ABC left the project and SNB took over completion of the ceiling framing using its own forces.¹⁴ At this point SNB did not know how to proceed and submitted RFI 74 asking for additional direction beyond just a citation to ASTM standards. In response, the A/E said several things. One, the A/E said that SNB was responsible "for ensuring there is [sic] qualified personnel or subcontractors on site to perform the work in accordance with the plans and specifications, codes, and any noted standards." Two, the A/E said "[t]he plans and specifications are also very clear on what standards have to be followed, previously identified as ASTM C754 and ASTM C645." Three, the A/E said "[t]his all goes back to means and methods ..., which the design team does not assume liability for. We are not on site as construction managers or subcontractors/installers to help determine exact solutions with regard to other work in place, any potential conflicts with selected install methods, etc." In other words, SNB, it is your responsibility to figure this out in accordance with ASTM C 754 and proceed accordingly.

The record is clear that from this point SNB did not follow ASTM C 754 but decided to use light gauge steel framing members to support the ceiling from the structure above rather than wire hangers. By February 10, 2021, SNB braced the ceiling in some form and had enclosed the vending room ceiling before receiving a required above ceiling inspection by the third-party inspector. The third-party

¹³ Section 4.2.14 of the General Conditions requires the A/E to respond to an RFI "with reasonable promptness." Section 4.2.1 states:

Any reference in the Contract Documents to the Architect taking action or rendering a decision with a "reasonable time" is understood to mean no more than **fourteen days**, unless otherwise specified in the Contract Documents or otherwise agreed to by the parties.
[emphasis supplied]

¹⁴ The record does not indicate why ABC left the project.

inspector complained that it could not adequately inspect the framing work and work of other trades with the ceiling enclosed. Moreover, the inspector complained that he had no guidance on what to inspect for regarding the bracing of the framing.

By deviating from ASTM C 754, SNB created a situation where engineering guidance became necessary.¹⁵ At some point, SNB hired ADTEK engineering to supply plans for bracing the vending room ceiling using light gauge steel framing members. The documents show that ADTEK supplied guidance as early as March 5, 2021. What is not clear is the date by which SNB had completed support of the ceiling framing following ADTEK's plans. By April 10, 2021, the A/E and its structural engineer were questioning ADTEK's solution. At this point, they insisted that they now needed to approve details, shop drawings, and calculations. From this point until June 10, 2021, the matter went back and forth between ADTEK and the A/E. In the discourse, the A/E displayed an amazing degree of density in comprehending ADTEK's solution. On June 10, 2021, Mr. Williams approved ADTEK's drawings.

According to SNB's scheduler, SNB finally received approval to enclose the vending room ceiling on June 17, 2021. The inability of the parties to resolve the matter of bracing for a non-structural ceiling for a period of months is disturbing. This should not have been that difficult.

The CPOC finds that SNB is entitled to compensation for delay by PRT through its representatives. However, the record makes it difficult to calculate at which point in time SNB's responsibility for the delay ends and PRT's begins. Providentially, the record is not totally devoid of information to inform the CPOC. On April 10, 2021, ADTEX supplied a plan for SNB to follow in bracing the ceiling. Based on scheduling information provided by SNB, SNB should have had the bracing completed and ready for an above ceiling inspection within seven days of Mr. Williams' approval of ADTEK's drawings on June 10, 2021. The CPOC finds that PRT delayed SNB from April 17, 2021, until seven days after the last record of a shop drawing submittal to the A/E, which is June 17. This calculates to 61 days of compensable delay at a daily compensation rate of \$991.10 per day for a total of \$60,457.10. SNB is also entitled to withheld liquidated damage in the \$500 per day for these 61 days for a total of \$30,500.

C. Sliding Door Change

By Change Order 5, the parties settled all monetary claims related to the sliding door. In addition, the parties agreed to 7 days for this claim. SNB has not presented the CPOC with sufficient evidence to support an added claim for 18 days of delay in substantial completion due solely to this item. Therefore, CPOC denies this claim.

D. Delay of Substantial Completion

SNB did not provide the CPOC with sufficient evidence to support a claim for 23 days delay in the A/E granting substantial completion after SNB achieved substantial completion. Therefore, CPOC denies this claim.

¹⁵ ASTM C 754 is a prescriptive standard. If you follow it, nothing more is needed. Once you deviate from the standard however, one creates a situation where the ability of the assembly to perform must be approved by someone qualified to make that determination.

III. CLAIMS FOR NON-COMPENSABLE DELAY

A. Slab-On-Grade

After SNB poured the slab-on-grade foundation, the concrete did not meet the strength requirements of the plans and specifications. The record further shows that this was the result of the concrete subcontractor adding inordinate amounts of water to the concrete to make it easier to work. As a result, the A/E directed SNB to tear out the slab and pour a new slab. The record also shows that the plan for the slab in the bid documents had an error in the slab dimensions and SNB installed the first slab following these erroneous dimensions. For the new slab, the A/E provided SNB with corrected dimensions. Specifically, the dimension on Sheet A101 for the width of the main entry area of the building is shown as 35'-8" when it should have been 35'-10". Thus, the overall width of the front of the building was shown as 87'-4" and the overall width of the back as 87'-6".¹⁶ The A/E's revised slab layout fixed this error. SNB argues that this error is the real reason that the A/E rejected the slab. The CPOC finds this claim by SNB has no merit.

The record is clear that the slab poured by SNB significantly did not meet the strength requirements of the plans and specifications. The 2" dimensional issue could have been resolved short of tearing out the entire slab; however, the strength issue could not. The CPOC finds that the actions of SNB's concrete subcontractor necessitated demolition of the slab and pouring a new slab, and that SNB is not entitled to a time extension for this matter.

B. Vented Roof Redesign

This is a companion with SNB's claim for COR's 19, roof sheathing and the venting of the high roof area. Inasmuch as the CPOC finds that SNB is not entitled to any monetary compensation for the roof sheathing and venting of the high roof area, the CPOC finds that SNB is not entitled to any additional days for these issues for the same reasons.

C. Standing Seam Covid Supply

The record shows that SNB did not order standing seam metal for the roof until February 27, 2020, 81 days after the original scheduled substantial completion of December 8, 2019. The documentation provided by SNB shows that SNB expected delivery within 3 weeks, which would be March 19, 2020. However, delivery of the first shipment arrived on April 22, 2020. The balance of SNB's order arrived the next week. SNB claims this delay in shipment was due to the supply chain impact of COVID-19.

SNB also claims that COVID-19 affected its standing seam installer causing illness and resulting in quarantine of the crew preventing it from starting on the metal roof upon arrival of the metal. The pre-COVID Project Schedule updated January 30, 2020, shows SNB installing the standing seam roofing during the period of February 19 to 27, 2020, a period of eight calendar days.¹⁷ The Project Schedule

¹⁶ The CPOC would have expected this dimensional error to be discovered by SNB's surveyor when it was laying out the slab, but it was not.

¹⁷ This Schedule appears to be outdated the day SNB's scheduler published it since to meet this schedule, by its own testimony, SNB would have needed to order the standing seam roofing by January 29, 2020. Instead, SNB ordered the standing seam metal on the last day scheduled for its installation.

updated April 24, 2020, shows the actual installation of the sheet metal roof running from April 22 to May 6, 2020, six calendar days longer than planned in the Project Schedule updated on January 30, 2020.

PRT does not contest the claim that COVID-19 impacted the delivery of the sheet metal nor does it contest the impact on the sheet metal roofing crew. Instead, PRT argues that if SNB had not delayed the project through its own actions the roofing material would have been ordered, delivered, and installed before the impacts of COVID-19. There is appeal to this argument, but the CPOC finds that this is not consistent with the law. Clearly if SNB were making a claim for compensatory delay due to an event that would not have impacted the project but for SNB's own delay, PRT would be correct. However, SNB is entitled to time extensions to the extent an event of force majeure delay affects the critical path even if its own delay pushed the project into the force majeure event. *See, e.g. Appeal of C.R. Bagwell*, 57-1 BCA ¶ 1332 (1957) (finding that even though contractor failed to prove excusable delays that pushed the project beyond the contract completion date, subsequent delays after the completion date caused by worker picketing were excusable, and "the contracting officer was in error in denying the 12-day extension because the contract completion date antedated the picketing.")

SNB claims a 71-day delay impact to the schedule for the delay of the standing seam metal delivery and COVID-19's impact on its roofing crew. The CPOC find that SNB is entitled to a time extension for the impacts of COVID-19 on the delivery and installation of the standing seam metal roofing. However, the record does not support a claim of 71 days. Based on SNB own information, it expected the standing seam metal to be delivered in two to three weeks. Using the three-week number, delivery should have been by March 19, 2020, but for COVID-19. Adding eight calendar days for installation as originally planned yields an expected completion date of March 27, 2020. Completion occurred on May 6, 2020. There are 40 days between May 6, 2023, and March 27, 2023. SNB does not explain how this 40-day delay results in a total of 71 days of delay to the project.

Based on the forgoing, the CPOC finds that SNB is entitled to an extension of 40 days for the impact of COVID-19 on the delivery and installation of the standing seam metal. PRT has withheld \$500 per day in liquidated damages for this delay. Therefore, SNB is entitled the release of \$20,000 in liquidated damages for this item.

DECISION

Based on the foregoing, the CPOC finds that SNB is entitled to the following relief:

1. Compensation for unresolved changes:

Chane Order Request#	Description	Amount
COR 36	Plywood/Insulation Inversion	\$62,807.36
COR 40	Soffit Vents	\$ 2,168.18
COR 47R	Valley Beams	<u>\$ 1,105.78</u>
	Sub-Total	\$66,081.32

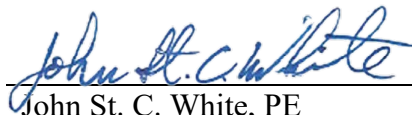
2. Delay damages for compensable days at the rate of \$991.10 per day:

Issue	Days	Amount
Inwall Bracing	73 days	\$72,350.30
Vending Room Ceiling	61 days	<u>\$60,457.10</u>
Sub-Total	134 days	\$132,807.40

3. Refund of assessed liquidated damages at the rate of \$500.00 per day:

Issue	Days	Amount
Compensable delays set forth above	134 Days	\$67,000.00
COVID delay - Standing Seam Metal	40 Days	<u>\$20,000.00</u>
Sub-Total	560 Days	\$87,000.00
	Grand Total	\$285,888.72

All other claims are denied.



John St. C. White, PE
Chief Procurement Officer for Construction

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Contract Controversy Appeal Notice (Revised July 2023)

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 additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILING FEE: Pursuant to Proviso 111.1 of the 2023 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) and *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.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW

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* ALSO ADMITTED IN DISTRICT OF COLUMBIA

AUTHOR'S E-MAIL: HWALL@BRUNERPOWELL.COM

April 27, 2022

Via Electronic and Regular Mail

John St. Clair White, PE
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201

**Re: SNB of Dillon, LLC
Welcome Center Project (State Project P28-9762-PD)
Application for Resolution of Contract Controversy**

Dear Mr. White:

On January 14, 2022, I submitted the attached and enclosed claim for damages, time extension and equitable adjustment to the Owner and Architect on behalf of my client SNB of Dillon, LLC. When we submitted the claim we were hopeful that the matter would progress expeditiously and some of the issues in the claim would be resolved quickly and without further undue delay. Most pressing for my client was the release of what we believe are undisputed payments so that the many subcontractors may receive payment without any further undue burdens, hardships or delays.

The architect has denied the claims and they are subject to mediation which we are anxious to commence. However, because the Architect and Owner seem to be persistently ignoring our final pay application request and are creating significant financial duress and hardship on my client and its subcontractors, we are initiating this request pursuant to SC Code Section 11-35-4230. The enclosed claim accurately describes the issues in controversy and the relief requested and should be considered to be incorporated herein by reference.

Because this process constitutes the sole and exclusive remedy available to us, and because you are fully vested with authority to grant relief in law and equity, we are asking for an immediate declaratory and injunctive relief from you directing: 1) the Owner to release undisputed funds currently due, and 2) the Owner to engage in mediation without further undue delay. The other claims for time, additional compensation, and other relief may be addressed by you subsequent to the mediation process and we would consent to a stay of those claims until mediation is completed.

We would request an opportunity to confer with you immediately. We regret having to bring this matter to your attention in this way, but the lack of cooperation from the agency and

April 27, 2022
Page 2 of 2

architect has left us with no other meaningful means of recourse. Please let us know when we can discuss this matter with you.

With best regards,

S:/ Henry P. Wall

Cc: Sammy Bracey, SNB
Jeff Lewis, AIA
Perry Derrick, PE
Nicholas Leitner, SCPRT
Chuck McDonald, Esq.
Manton Grier, Esq.

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AUTHOR'S E-MAIL: HWALL@BRUNERPOWELL.COM

January 14, 2022

Via Electronic and Regular Mail

Nicholas Leitner, PE

Chief of Engineering

South Carolina Department of Parks, Recreation and Tourism

1205 Pendleton Street

Columbia, SC 29201

Jeff Lewis, AIA

561 Jacobs Mill Pond Road

Elgin, SC 29045

Perry Derrick, PE

Office of the State Engineer

1201 Main Street, Suite 600

Columbia, SC 29201

Re: SNB of Dillon, LLC

Welcome Center Project (State Project P28-9762-PD

**Claim for Payment, Additional Time, Additional Compensation, Request for
Equitable Adjustment, Architect Decision, and Demand for Neutral
Mediation**

Gentlemen:

I am legal counsel for SNB of Dillon, LLC ("SNB" or "Contractor") and this letter constitutes SNB's claim to South Carolina Department of Parks, Recreation and Tourism ("SCPRT" or "Owner") for the following contractual, legal, and equitable relief:

1. Payment of the undisputed contract balance and interest for late payments,
2. Approval and Payment of Unresolved Change Order Requests (CORs),
3. Time Related Claims:
 - a. Remission of Liquidated damages and time extension through the date of substantial and final completion,
 - b. Compensation for Owner-Caused Delays, Disruption, Suspension of work, and changes,
4. Alternative Equitable Relief for impacts of Covid-19,
5. Alternative Damages for breach of the covenant of good faith and fair dealing, and,
6. Statutory Attorney's fees.

A brief explanation of each claim for relief, the legal basis for each claim and the supporting documentation for each claim is as follows:

I. Immediate Payment of Undisputed Contract Balance and Demand for Interest Pursuant to South Carolina Law for any Amounts Remaining Unpaid

Through change order two, the adjusted contract amount is \$4,695,661.75. Pending change order three includes \$58,552.54 in additional work items and pending change order number 4 includes \$5,161.91 in additional work items. Therefore, the contract amount, before considering the impacts of delay for either party (liquidated damage for the Owner or delay claims for the contractor) is \$4,759,376.20. Thus far, SNB has been paid the sum of \$4,207,702.98, leaving an undisputed balance of \$551,673.22.¹ SNB has included a final invoice and pay application in this amount (see **Exhibit A**), and hereby demands payment of the undisputed contract balance in accordance with the contract and South Carolina law. SNB reserves all rights to the other claims.

Under South Carolina law and the contract in issue, performance of a contract for construction by a contractor entitles the contractor to payment from the Owner (See S.C. Code §29-6-20). Payment of the undisputed amount is hereby demanded and due within 21 days of your receipt of this letter and the enclosures. Pursuant to the contract and S.C. Code §29-6-50, any unpaid overdue payments will bear statutory interest at the rate of one percent per month until paid in full. Alternatively, and additionally, pursuant to S.C. Code §27-1-15, you are hereby directed to make a reasonable and fair investigation into the merits of the numerous claims asserted in this letter and pay the undisputed amount within forty-five days of this demand. Failure to investigate or pay any undisputed amounts may result in the imposition of interest at the post judgment rate and liability for attorney's fees made necessary in the collection of those amounts.

II. Approval and Payment of Unresolved Change Order Requests (CORs)

Assuming the immediate approval of the amounts in change orders three & four, the Owner and Architect have also refused to approve, process, pay, and unjustifiably rejected the following CORs:

COR#	Amount Due	Description
COR 19	\$23,720.04	Roof Sheathing
COR 29	\$ 6,342.60	Framing Modifications
COR 36	\$83,822.60	Plywood/Insulation Inversion
COR 40	\$22,780.35	Vented Soffit
COR 41	\$ 6,122.60	Ridged Vents

¹ The owner previously executed and tendered change order three to SNB in an apparent effort to lever approval of change orders against "acceptance" of liquidated damages and SNB has consistently notified the Owner and Architect that liquidated damages are contested and disputed. SNB denies all Owner claims of liquidated damages for the reasons set forth in section III of this letter.

January 14, 2022

Page 3 of 8

COR 43	\$278.30	Replace Toilet
COR 47R	\$3,906.59	Valley Beams
COR 54	\$1,324.71	Sliding Door Hardware

TOTAL DUE \$148,297.79

(Please note that Note COR 43 for 82 days of compensable days is in section III of this claim). Support for these claims is attached at **Exhibit B**.

These changes in scope, actual and constructive, address conflicting directives and/or errors and omissions in the Project plans and specifications. Under South Carolina law, when an Owner issues a set of plans and specifications for a hard bid, the Owner impliedly warrants the plans are complete, adequate, accurate and sufficient for construction. The Owner further warrants that completing the work in accordance with the plans will result in an acceptable finished work or product (This legal concept is also known as the *Spearin doctrine* which has been adopted and applied in South Carolina in numerous cases). To the extent that the Contractor incurs additional costs and expenses in resolving errors and omissions in the plans, the Owner must pay for the reasonable and fair value of the modifications. The changes clause in the contract is also applicable and of similar effect.

Just as in the case of payment for the contract balance, under South Carolina law and the contract in issue, performance of a contract for construction by a contractor entitles the contractor to payment from the Owner (See S.C. Code §29-6-20). Payment for the additional work included in these CORs is hereby demanded and due within 21 days of your receipt of this letter and the enclosures. Pursuant to the contract and S.C. Code §29-6-50, any unpaid overdue payments will bear statutory interest at the rate of one percent per month until paid in full. Alternatively, and additionally, pursuant to S.C. Code §27-1-15, you are hereby directed to make a reasonable and fair investigation into the merits of the numerous claims asserted in this letter and pay the undisputed amount within forty-five days of this demand. Failure to investigate or pay any undisputed amounts may result in the imposition of interest at the post judgment rate and liability for attorney's fees made necessary in the collection of those amounts.

III. Time Related Claims

The Owner has, without agreement or consent of SNB, began to withhold liquidated damages at a rate of \$500.00 per day for a portion of the claims it intends to assert against SNB. Conversely, SNB has continuously and repeatedly notified the Owner of requests for additional time, both compensable and excusable, based upon SNB's scheduling impact analysis and the dramatic effects of COVID-19 on this Project. as of this date, the only mutual agreement between the parties as to contract time is recorded in Change Orders 1 & 2. These changes confirm three adjustments in contract time: 1) a 14 day extension in Change Order 1, 2) the allowance of 41 days of compensable delay as a consequence of delay in power to the site caused by a transformer delay which occurred in May and a portion of June, 2019, and was the Owner's responsibility pursuant to the contract which is included in Change Order 2, and, 2) the

allowance of 4 additional excusable weather delays which occurred prior to December 23, 2019, also included in Change Order 2. Importantly, there are no agreements as to contract time between the parties other than these extensions, and all these extensions pre-date the impact and manifestation of COVID-19 in this state. As of this date, all time issues, and time-related claims for both parties remain open, unsettled, and unresolved, including all impacts of COVID-19.

SNB has provided the Owner with regular schedule updates and reports documenting the scheduling impacts of numerous delays, work disruptions, and suspensions to the critical path of the Project. The final report is attached hereto as **Exhibit C** and is briefly summarized as follows:

<u>DELAY/SUSPENSION EVENT</u>	<u>TIME IMPACT</u>
Power Relocation	42 days* (* covered in CO2)
Slab on Grade Redesign	89 days
Vented Roof Redesign	13 days (Concurrent with Slab) (Cost of work in CORs)
Standing Seam Covid Supply	71 days
Inwall Bracing Modifications and Changes	177 days
Vending Room Ceiling Modifications and Changes	169 days
Sliding Door Modifications and Changes	18 days
Delay in Acknowledgement of Substantial Completion	23 days
Total time impacts to SNB excusable/compensable days	589 days
Less credit for CO 2	(42) days
Total Days Claimed	547 days

For the reasons stated in the expert report and based upon the legal principles and contract provisions discussed in greater detail below, SNB contends it is entitled to a contract time extension of 547 days and daily compensation for extended jobsite costs and overhead in the amount of \$1,362.00 per day. SNB seeks unabsorbed home office overhead pursuant to the Eichleay formula (see calculation included at **Exhibit D**) in the amount of \$605.00 per day. SNB therefore seeks full remission of liquidated damages which would result in payment of the full

January 14, 2022

Page 5 of 8

contract balance set forth in section I, plus additional delay damages for direct jobsite costs of \$745,014.00 (\$1,362.00 per day X 547 days) and unabsorbed home office overhead in the amount of \$330,935.00 (\$605.00 per day X 547 days) in addition to payment for the direct costs of the CORs stated in Section II. Thus, SNB requests a final payment of:

The Unpaid Contract Balance through Change Order 2:	\$551,673.22
Payment for Unresolved COR's	\$148,297.49
Payment for Compensable Jobsite Delays	\$745,014.00
Payment for Unabsorbed Overhead	\$330,935.00
 Total Amount Claim (exclusive of interest and attorney fees)	 \$1,775,920.01

The legal justification for these claims includes the changes provision of the contract and the implied warranty of plans and specifications. Additionally, these specific contract provisions justify payment to SNB:

- Pursuant to article 4.2.12, the Architect is charged with a duty of fairness, impartiality, and good faith. SNB contends the Architect utterly failed to comply with this duty and the Architect's lack of fairness, impartiality and lack of good faith and fair dealing resulted directly in the delays listed in this section.
- Pursuant to Article 4.2.14, the Architect and Owner have a duty to meaningfully respond to requests for information to avoid delay in construction as an agent and representative of the Owner. The failure to discharge this duty resulted directly in the delays listed in this section.
- Pursuant to article 6.2.3 the Owner is liable to the Contractor because of delay caused by a separate contractor. The delay resulting from the utility contractor is within the scope of this provision.
- Pursuant to article 8.3.1, if the work is delayed by an act or neglect of the Owner or Architect or "unusual delay in deliveries, unavoidable casualties or other causes beyond the control of the Contractor and any subcontractor at any tier....then to the extent such delay will prevent the Contractor from achieving substantial completion within the contract time and provided the delay is not.... [the fault or responsibility of the Contractor] the Contract Time shall be extended. SNB contends that every claim asserted in this section derives from this provision of the contract, including the impacts of COVID 19.
- Section 8.3.3 provides that claims based upon 8.3. may include recovery of "damages for delay" and thus expressly authorizes the claims presented in this section.
- Pursuant to article 14.3.1, if the work is suspended (actual or constructive) by an act of the Owner or the Architect, article 14.3.1 provides justification for an increase in the contract time and cost. SNB contends that every claim asserted in this section derives from this provision of the contract, including the impacts of COVID 19.

IV. Alternative Equitable Relief for impacts of Covid-19

Beyond the express contractual justification for payment of these claims to SNB, the facts of this case also present additional equitable grounds for entitlement and recovery. COVID 19 emerged and shut down the South Carolina economy in calendar year 2020, drastically impacting the labor force and the supply and distribution chains for construction materials. Some of the materials specified for the Project became unavailable in the marketplace. SNB had no control, responsibility, or risk for the dramatic impacts of the national pandemic on this construction project.

To make matters more difficult and onerous on SNB, the terms and conditions of the contract shifted the obligation to provide public restrooms to the traveling public and a temporary welcome center during the entire course of the project. This was and is an ordinary and regular responsibility of the sovereign state of South Carolina, fully funded in the SCPRT's annual appropriated state budget. It was not and could not have been foreseen by anyone when the Project was bid that a national pandemic would occur and dramatically slow the completion of the work. The effect of requiring the Contractor to provide a temporary welcome center and public restrooms for the convenience of the traveling public during a national pandemic is not a fair, reasonable or just allocation of risk. SNB performed this governmental function at its sole expense without fair compensation for nearly two years, and the State of South Carolina has received an enormous windfall from this unfair, unintended, and unconscionable risk allocation which has nearly destroyed a South Carolina small business.

Principles of equity (mutual mistake, impossibility and impracticability of performance, unconscionability, and unjust enrichment) standing alone, justify reimbursement to SNB for providing these government services to the State of South Carolina and its citizens. It is astonishing that the government of this state would not have shown some grace and good faith to one of its own citizens under the circumstances presented here; yet SCPRT has continued to press for more and more "liquidated damages" and withheld payment contrary to the contract terms causing further unnecessary harm, not only to a South Carolina business, but also the employees and families of that business.

V. Alternative Damages for Breach of the Covenant of Good Faith and Fair Dealing

Though the *Metcalf Doctrine* has yet to be adopted in this state, federal public contract law is an accurate bellwether of the law in South Carolina and the doctrine was established in public contract law in 2014 in the case of *Metcalf v. United States*, 742 F. 3d. 984 (Fed. Cir. 2014). *Metcalf* holds that when a public agency fails to administer and manage a construction project with good faith and fair dealing, a contractor may assert a claim for recovery of traditional breach of contract damages beyond the limitations of the remedies afforded in the specific contract. It is firmly established in South Carolina that the Architect is an agent for the Owner and, in evaluating the conduct of the Owner in the administration of this construction contract,

the conduct of the Architect must not only be carefully considered, but it is attributable to the Owner. The Owner is liable for the improper acts of the architect in this state under general agency principles.

The following examples suffice to establish that SNB has a viable *Metcalf* claim against SCPRT:

1. Throughout the course of the Project, the Architect consistently adopted the most expensive and punitive contract interpretations and solutions to interpretive questions in the plans and specifications. Good examples of this conduct include the Architect's refusal to cooperate and resolve the numerous problems and difficulties encountered in the incomplete design of the inwall framing. When the contractor raised questions and concerns over the as-bid design, the Architect adopted inflexible and punitive solutions to intentionally impose additional cost and time on the contractor. When the Contractor attempted to mitigate these concerns with professional opinions of other qualified design professionals, the Architect's subconsultant effectively abandoned the duty to address the Contractor's continuing concerns and issued an edict that no further questions would be answered, effectively abandoning its professional duties for the administration of the Project.
2. When the Architect discovered that the as-bid drawings had improperly inverted the sheathing and insulation and that the Contractor had built the Project per the design, the Architect denied the error, rejected the Contractor's work through over-inspection and to this day has not issued an adjustment for the corrective work even though there is a clear design change.
3. The plans did not have details for the vending entrance ceiling and the Architect left the Contractor to undertake a series of trials and errors, consistently adopting and imposing the most expensive and time-consuming alternatives. The Architect was only willing to tell the Contractor what was not acceptable, never what was acceptable.
4. The Architect and Owner consistently attempted to lever payment and cash flow such as approval of change orders and pay applications for acceptance and cram down of unjustified liquidated damages.
5. The Architect and Owner threatened termination for default without adequate cause or justification.
6. The Owner refused to cooperate in the removal of the temporary restrooms and welcome center, intentionally costing the Contractor additional and unnecessary weeks of rental while at the same time refusing to occupy the new facility.

These examples provide evidence of the lack of good faith and fair dealing in the administration of this construction contract but should not be taken as an exhaustive or complete list of each instance of lack of cooperation and fairness.

Notably, to the extent that such a claim can be established, the limitations in the contract on damages which are expressly subject to the obligation of good faith and fair dealing (see Article 15.1.6) do not apply. Therefore, in addition to the contract balance, payment for CORs, and direct delay damages listed in the previous sections of this letter, SNB would also be entitled to recover lost profits, lost business opportunity and loss of reputation from the Owner. Those additional damages exceed one million dollars.

The completion of this Project has been an enormously costly ordeal for SNB and but for the strength and resolve of the Company leadership, SNB would be out of business from the way this Project was managed. The resolution of these claims need not pose a similar ordeal. SNB would remind SCPRT that of the obligations in paragraph 15.5.1. While a final decision of the Architect on the claims is a formal contract requirement and SNB hereby demands such a decision, SNB concedes that it is a foregone conclusion that all claims for payment of any kind will be denied by the Architect because the Architect has lost all pretense of fairness, objectivity, and impartiality. SNB requests the Architect's perfunctory and summary denial of these claims by the Architect as soon as possible so that the claim can proceed through an objective process.

Pursuant to Article 15.6.1, SNB requests an opportunity to meet with counsel and senior representatives of SCPRT and OSE within 21 days of this request to discuss a potential resolution of these claims and close out the Project. If that fails it is our intention to proceed directly to the CPO and the Article 15.6.3 further requires mediation. Given the amount in controversy, the mediation must proceed under the rules of the American Arbitration Association or by mutual selection of a qualified neutral. SNB desires to meet with SCPRT directly and then proceed to mediation as quickly as possible considering the gravity of its financial losses and the continuing impacts of COVID 19 on its business. If you do not have legal counsel for construction matters, I would suggest that the agency retain counsel now.

Please let us hear from you as soon as possible.

With regards,


S:/ Henry P. Wall

Cc: Sammy Bracey, SNB