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Decision Contract Controversy

Matter of: SNB of Dillon, LLC

File No.: 2022-006B

Posting Date: September 4, 2024

Contracting Entity: South Carolina Department of Parks, Recreation and Tourism

Project No.: P28-9762-PD

Description: Dillon Welcome Center

DIGEST

Claims for relief from set offs, contract balance, and prejudgment interest granted in part.

AUTHORITY

Per S.C. Code Ann. § 11-35-4230, the Chief Procurement Officer for Construction (CPOC) issued a decision in the Case of File Number 2022-006, SNB of Dillon, LLC, (SNB) contract controversy with the South Carolina Department of Parks, Recreation and Tourism (PRT). The parties have largely accepted the CPOC’s decision with limited exceptions. On September 7, 2023, SNB submitted a “Request for Clarification of CPO Decision and Limited Request for Further Administrative Review Pursuant to Section 11-35-4410(1).”¹ [Exhibit A] Per the CPOC’s request, the parties submitted briefs to the CPOC clarifying their positions on the issues raised in SNB’s Request for Clarification. [Exhibit B - SNB’s brief, and Exhibit C – PRT’s brief]

BACKGROUND

The CPOC incorporates herein by reference the statement of facts and findings set forth in his decision in File Number 2022-006 dated August 28, 2023.²

¹ On September 18, 2023, General Counsel for the South Carolina Procurement Review Panel (Panel) notified all parties of its receipt of SNB’s limited request for review and that the Panel was staying their review of the matter “until the CPOC issues its clarification/final written decision.”

² Both parties have correctly observed that the CPOC’s decision in File Number 2022-006 contains a typographical error about the number of days of liquidated damages PRT assessed against SNB. File Number 2022-006 erroneously states PRT

ISSUES

SNB's Limited Request for Further Administrative review raises four issues:

1. Whether SNB should recover amounts withheld by PRT as back charges for additional Architect/Engineer (A/E) fees,
2. Whether SNB should recover amounts withheld by PRT as back charges for reinspection services performed by PRT's third-party inspection firm,
3. Whether SNB should recover amounts for certain other credits and deductions, and
4. Whether SNB receive interest on amounts the CPOC awarded to SNB in File Number 2022-206 and on items 1 and 2 above.

PRT contests SNB's entitlement to recovery on each of these claims.

ANALYSIS

PRT's Assessment of Back Charges, Credits, and Deductions

SNB has asked the CPOC for further administrative review of PRT's assessment of back charges, credits, and deductions, believing the CPOC overlooked these in his decision in File Number 2022-206. A review of SNB's written claim submitted to the CPOC does not find an express reference to the back charges, credits, and deductions at issue. Instead, they appear to be subsumed in the category of "undisputed [contract] balance." For its part, PRT filed no claims against SNB with the CPOC but assumed a purely defensive posture. Nonetheless, the parties briefly referred to these items during the hearing, and PRT submitted exhibits showing the charges. In other words, PRT seems to have been aware that these items were at issue and claimed that they were appropriate charges. However, because of the lack of express mention of these items in the pleadings, the CPOC did not consider them in his decision in File Number 2022-206. As a preliminary matter, the CPOC notes that while SNB made clear claims for interest, both parties' claims regarding the charge backs raised in SNB's request for further review were not clear. The parties referenced some or all of the charge backs at the CPOC's hearing but did not go into detail. As a result, the CPOC frankly overlooked the disputed charge backs in his decision of August 28, 2023.

The issues raised in SNB's request for additional review become apparent when examining the Award Worksheet SNB submitted to the CPOC at the hearing. At the top of this worksheet is a summary of the contract amount, amount paid, and the balance in dispute before considering claims for additional work and compensable delay. Specifically, this Award Worksheet shows the following:

APPROVED CONTRACT AMOUNT AS OF DATE OF HEARING	\$4,765,700.92
LESS PREVIOUS PAYMENTS	(\$4,436,393.18)
CONTRACT BALANCE BEFORE CONSIDERATION OF ANY CLAIMS OR LDs	\$329,307.73

assessed 560 days of liquidated damages when it was 542 days. However, as the parties also noted, this error had no effect on the result of that decision.

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 September 4, 2024

PRT assessed \$271,000 in liquidated damages leaving a contract balance after assessment of liquidated damages of \$58,307.73. It is this balance which is at issue.

PRT provided slightly different though corresponding numbers in its Exhibit 19. The first page of PRT's Exhibit 19 shows the following:

Original Contract Sum	\$4,653,000.00
Approved Change Orders 1 – 6	\$112,700.91
New Contract Sum	\$4,765,700.91
Amount Paid through Pay App 28	(\$4,436,393.15)
Contract Balance before consideration of claims or LDs	\$329,307.76

However, PRT's Exhibit 19 also shows charge backs, liquidated damages, and credits totaling \$330,150.36 as follows:

Liquidated Damages (542 days at \$500.00 per day)	\$271,000
Dennis Corp Additional Fees	\$32,995.00
Jeff Lewis AIA (JL AIA) Additional Fees	\$22,080.68
COR #51 WH LCDE Display Credit	\$890.56
COR #52 Crape Myrtle Credit	\$556.60
COR #56 Wall Heater #7 Credit	\$957.72
COR #53 Seamed Gutters Credit	\$1,669.80
Sum	\$330,150.36

PRT's assessment of charge backs for Dennis Corp. and JL AIA (the project Architect/Engineer) and credits for CORs #51, #52, #56, and #53, totaling \$59,150.36 are at issue in SNB's request for Further Administrative Review.

As a preliminary matter, the CPOC can reject any consideration of amounts due for CORs #51, #52, #56, and #53. A review of the Change Order Requests in PRT's Exhibit 19 clearly show these requests by SNB were credits to PRT against the contract balance, not debits. Therefore, it was appropriate for PRT to take these credits. This leaves the question of charge backs for additional fees charged by Dennis Corp. and JL AIA in the amount of \$55,075.68.

PRT Charge Backs for Re-Inspection

The General Conditions of the Contract for Construction address the responsibility for inspections stating:

§ 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. **The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.**

[emphasis supplied]

Dennis Corp. is a third-party inspection firm retained by PRT to perform inspections required by the applicable Building Codes, which, per those Codes, PRT could not delegate to SNB. Therefore, PRT was responsible for such inspection costs. However, the General Conditions also state:

§ 13.5.3 If such procedures for testing, inspection or approval **under Sections 13.5.1 and 13.5.2** reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, **all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.**

In other words, the contract authorizes PRT (a) to withhold from payments otherwise owing to SNB the cost of reinspections necessitated by SNB's failure to comply "with the requirements established by the Contract Documents"; and (b) to deduct the amount of those charges from the contract balance. Whether a specific charge is warranted is, of course, subject to the dispute-resolution procedures in the contract and in Section 11-35-4230. And as the party claiming entitlement to these charges, PRT has the burden of proving by a preponderance of the evidence both the amount of the chargeback and the reason the contract supports charging SNB for that amount. *Muller Elec. Corp. v. E.I. Dupont De Nemours Co., Inc.*, 450 So. 2d 746, 749 (La. Ct. App. 1984).

PRT's Exhibit 19 does not include documentary support for the charge back amounts assessed in Exhibit 19 for Dennis Corp. and JL AIA. However, a few other documents that appear to be related are PRT's Exhibits 10, 12 and 13. Exhibit 12 is an amendment to Dennis Corp.'s contract for inspection and material testing dated May 20, 2021, for a \$12,540 increase in fees and \$1,000 increase in reimbursables. However, Exhibit 12 lacks documentation tying these increases to SNB's actions or inactions. Exhibit 13 is an amendment to JL AIA's contract dated May 19, 2022, for \$19,432.44 for additional services from 9/1/2021 through 4/29/2022, and an increase in reimbursables of \$357.44 for the same period. However, Exhibit 13 also lacks documentation tying these increases to SNB's actions or inactions. A third Exhibit, PRT Exhibit 10, does bear on PRT's charge back for Dennis Corp. A part of Exhibit 10 is PRT Exhibit 10B, which is an SNB pay application for pay period ending June 26, 2020. JL AIA certified this application with a recommendation that PRT deduct the cost for reinspection fees for Dennis Corp. for \$11,905. Included with this Exhibit is detail from Dennis Corp. about what the charges are for. This documentation supports a charge back of this amount to SNB.

Other than Exhibit 10B there is no documentation supporting a specific charge back. The overall record, including oral testimony, leaves little doubt that SNB's failure "to comply with the requirements established by the Contract Documents" caused substantial additional costs of re-inspection, testing, etc., by Dennis Corp. and JL AIA. On the other hand, the record also reflects that a significant amount of those costs resulted from actions of the Project Architect. While the record may reflect that SNB's actions required significant reinspection, the cost of those re-inspections cannot be left to conjecture or speculation. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014). Lacking further detail, the CPOC finds that PRT proved its entitlement to only \$11,905 (the amount substantiated by Exhibit 10B) of additional inspection charges. This leaves a balance due to SNB of \$43,170.68.

SNB's Claims for Interest

SNB claims that it is entitled to interest on the part of its claim sustained by the CPOC. Section 13.6 of the General Conditions state:

Payments due to the Contractor and unpaid under the Contract Documents shall bear interest only if and to the extent allowed by Title 29, Chapter 6, Article 1 of the South Carolina Code of Laws.

Included in Article 1 is Section 29-6-50, which states:

If a periodic or final payment to a contractor is delayed by more than twenty-one days ... the owner ... shall pay his contractor ... interest, beginning on the due date, **at the rate of one percent a month** or a pro rata fraction thereof **on the unpaid balance as may be due**. However, no interest is due unless the person being charged interest **has been notified** of the provisions of this section at the time request for payment is made.

On January 14, 2022, SNB sent an initial claim to PRT, which requested payment of interest under this statute. However, also included in Article 1 is Section 29-6-40, which states:

Nothing in this chapter **prevents the owner ... from withholding application and certification for payment because of the following: unsatisfactory job progress**, defective construction not remedied, **disputed work, third party claims** filed or reasonable evidence that claim will be filed, failure of contractor or subcontractor to make timely payments for labor, equipment, and materials, damage to owner, contractor, or another subcontractor, reasonable evidence that contract or subcontract cannot be completed for the unpaid balance of the contract or subcontract sum, or a reasonable amount for retainage.

[emphasis supplied]

There does not appear to be any South Carolina case law addressing S.C. Code Ann. §29-6-40, and the only case addressing S.C. Code Ann. §29-6-50 does not supply insight on the application of §29-6-40 other than to find that where the contract provided for interest per Section 29-6-50, the general interest statute at S.C. Code Ann. §34-31-20 does not apply. *EllisDon Const., Inc. v. Clemson University*, 391 S.C. 552, 707 S.E.2d 266 (SC 2011).

SNB is asking for prejudgment interest. At first blush, Section 29-6-40 would appear to preclude such interest where the state withholds amounts due to a good faith dispute over the amounts due. However, a close reading of this Section does not support such a conclusion. This Section is silent on the issue of prejudgment interest.

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Though not applicable to this matter, case law addressing prejudgment interest under the general interest statute sheds some light on the matter. Considering the general interest statute, the Supreme Court has observed “[t]he law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty.” *Butler Contracting, Inc. v. Court Street, LLC.*, 369 S.C. 121 631 S.E.2d 252 (SC 2006). Further, “[i]t is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.” *Id.* A claim for liquidated damages is such a claim. However, unliquidated change order claims are not.

Prejudgment interest is to compensate the successful claimant for the judgment debtor’s continued retention and use of the claimant’s money. *Id.* The CPOC finds that such compensation is appropriate under Section 29-6-50.

In his previous order, the CPOC awarded SNB \$87,000 in liquidated damages. SNB made a claim for these damages with interest on January 14, 2022. According to SNB, PRT paid all damages awarded by the CPOC on September 21, 2023, 628 days after SNB’s demand. Interest at 12% per year on \$87,000 over 628 days is \$17,962.52. SNB is also entitled to 12% per year interest on the contract balance of \$43,170.68 (a daily rate of \$14.19) from January 14, 2022, until paid in full.

DECISION

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

1. A contract balance of \$43,170.68,
2. Interest on the contract balance of \$14.19 per day from January 14, 2022, until paid in full, and
3. Interest for liquidated damages of \$17,962.52.



John St. C. White, PE

Chief Procurement Officer for Construction

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Contract Controversy Appeal Notice (Revised July 2024)

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 2024 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

Exhibit A

WARREN C. POWELL, JR., P.A.*
HENRY P. WALL
E. WADE MULLINS III, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
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JAMES L. BRUNER (1950–2023)

J. COLE HANCOCK
J. KEANE MOSSMAN*
J. WEBSTER HALL

* ALSO ADMITTED IN DISTRICT OF COLUMBIA

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

September 7, 2023

Via Electronic Mail and Hand Delivery

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

**Re: SNB of Dillon, LLC
Welcome Center Project (State Project P28-9762-PD)
Application for Resolution of Contract Controversy
Request for Clarification of CPO Decision and Limited Request for Further
Administrative Review Pursuant to Section 11-35-4410(1)**

Dear Mr. White:

On behalf of Claimant, I hereby submit this request for clarification of the CPO decision dated August 28, 2023, and limited administrative review by the Procurement Review Panel in the event the request for clarification cannot be granted or is not granted in SNB's favor.

As a threshold matter, SNB accepts as final and conclusive and does not appeal any findings or relief granted on the final page (page 18) of your decision or the reasoning therefor with two minor exceptions: 1) the total amount of days in dispute between the parties is 542 days instead of 560 days, as measured by the total contract duration as adjusted by the original contract duration and previously granted time extensions¹, and 2) the meaning of the phrase "all other claims are denied". These two issues require further clarification and administrative review because they have resulted in two differing interpretations over the application of your ruling.

In addition to these two issues, SNB also contends the CPO decision did not fully address the merits of the following "claims" which has led to two differing interpretations of your ruling in the computation of the final payment due SNB:

1. SNB's "claim" for statutory and contractual interest based upon SC Code Section 29-6-50.
2. SCPRT's "claims" for additional engineering fees from Dennis Corporation and Lewis Architects.
3. SCPRT's "claims" for certain credits and other deductions.

¹ SNB does not believe there is a dispute between the parties on this point.

SNB contends that the claim for interest was perfected in the initial claim letter dated January 14, 2022, and interest must accrue on the award under Article 13.6 of the contract. SNB contends the CPO has overlooked this issue and it should be corrected and resolved prior to further administrative review. SNB further contends that the CPO did not award SCPRT's other "claims" because the deductions are not directly addressed and granted in your decision and were therefore necessarily denied.² An electronic excel spreadsheet included at **Exhibit A of the electronic version of this letter** shows SNB's computation that the balance due under the contract as final payment, before statutory and contractual interest is added is \$344,196.47. Interest on this amount would be \$66,877.85.

The Owner has taken a different view as exemplified in **Exhibit B of the electronic version of this letter**. The Owner interprets the decision as sustaining SNB's claims to the extent indicated, but as also sustaining all Owner- asserted claims and back-charges which were not directly addressed in the decision. The following differences explain the Owner's conclusion that \$287,388.72 is the amount due:

Dennis Corp Additional Fees	\$ 31,995.00
JL AIA Additional Fees	\$ 22,080.68
COR #51 WH LCDE Display Credit	\$ 890.56
COR #52 Crape Myrtle Credit	\$ 556.60
COR #56 Wall Heater #7 Credit	\$ 957.72
COR #29 Toilet Partition Bulkhead (Add)	(\$ 1,342.60)
COR #53 Seamed Gutters Credit (Deduct)	\$ 1,669.80

If the Owner is correct on these amounts, the applicable interest would be \$55,903.00.

The parties have discussed their differences on the application of your award to the Project accounting and have been unable to resolve their differences. Therefore, I am requesting the following relief:

1. Reconsideration, supplementation or clarification of the CPO decision to address SNB's claims for interest, and, in the event that SNB's claim for interest is denied, further limited administrative review of the interest issue by the Procurement Review Panel *de novo* pursuant to Section 11-35-4410(1).
2. Reconsideration, supplementation or clarification of the CPO decision to address the Owner other claims for credits as indicated above, and in the event that Owner's claim

² SNB argued at the hearing that the additional claims and clawbacks were not properly asserted, there is no architect decision on those claims (in contrast with the claims of SNB all of which were submitted to and denied by the architect) and SNB did not consent to the Owner's irregular assessments and back charges. See Article 15.5.2.

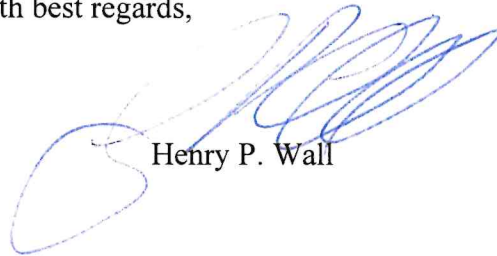
John St. Clair White, PE
September 7, 2023
Page 3 of 3

is granted further limited administrative review of those claims for additional credits by the Procurement Review Panel *de novo* pursuant to Section 11-35-4410(1).

SNB accepts that it is currently due, at a minimum, the undisputed sum of \$287,388.72, and by copy of this letter to the Owner demand is hereby made for payment of that sum immediately pursuant to the contract and South Carolina law.

Claimant would further propose a brief status conference with you and both parties and a potential short briefing schedule to address the issue of final payment if the CPO is inclined to consider further consideration or clarification of this matter. Thank you for your consideration and we look forward to hearing from you soon. I have enclosed the required filing fee payable to the Panel in the amount of \$250.00.

With best regards,



Henry P. Wall

Encl.

cc: Manton Grier, Esq.
Chuck McDonald, Esq.
Mr. Sammy Bracey

BRUNER, POWELL, WALL & MULLINS, LLC

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J. WEBSTER HALL

* ALSO ADMITTED IN DISTRICT OF COLUMBIA

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

September 28, 2023

Via Electronic Mail

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

Re: SNB of Dillon, LLC
Welcome Center Project (State Project P28-9762-PD)
Application for Resolution of Contract Controversy
Request for Clarification of CPO Decision and Limited Request for Further
Administrative Review Pursuant to Section 11-35-4410(1)

Dear Mr. White:

On behalf of Claimant, I am providing you with additional argument and documentation in support of our request for clarification of the CPO decision dated August 28, 2023, and limited administrative review by the Procurement Review Panel in the event the request for clarification cannot be granted or is not granted in SNB's favor.

SNB believes the parties agree, and the CPO decision is clear, with respect to the assessment of liquidated damages in the final amount of 368 days or \$184,000.00 which should be withheld from the contract balance. SNB contends the CPO decision failed to address or did not clearly address three issues which are before you on SNB's pending request:

- 1. SCPRT's claims for additional engineering fees from Dennis Corporation and Lewis Architects.
2. SCPRT's claims for certain credits and other deductions.
3. SNB's claim for statutory and contractual interest based upon SC Code Section 29-6-50.

SCPRT'S AFFIRMATIVE CLAIMS

SCPRT claims the following adjustments should be made to SNB's final payment under the contract even though these amounts were not specifically addressed in the CPO decision:

Table with 2 columns: Description (Dennis Corp Additional Fees) and Amount (\$ 31,995.00)

JL AIA Additional Fees	\$ 22,080.68
COR #51 WH LCDE Display Credit	\$ 890.56
COR #52 Crape Myrtle Credit	\$ 556.60
COR #56 Wall Heater #7 Credit	\$ 957.72
COR #53 Seamed Gutters Credit (Deduct)	\$ 1,669.80

SNB acknowledges that these amounts were listed in the SCPRT damages summary (Respondent's Exhibit 19) submitted to the CPO at the administrative review and the CPO has jurisdiction over these back-charges and claims.

The merits of these claims; however, are governed by clear terms and conditions in the contract for construction, and SCPRT's failure to carry its burden of proof and substantiate compliance with the contract is glaring and obvious, particularly with respect to the inspection fee back charges. As a threshold matter, Article 15 of the general conditions of the contract for construction requires a party asserting any claim to carry the burden of proof to substantiate a claim. The issues listed above clearly fall within the definition of Owner claims (see Article 15.1.1). SCPRT failed to follow the terms and conditions of its own contract and therefore SCPRT's claims should be denied for the following obvious deficiencies:

1. SCPRT Failed to Give SNB Proper Written Notice of the Reinspection Claims.

Article 15.1.2 requires prior written notice to the other party and Architect as a condition precedent to the assertion of any claims by Owner or Contractor. Support for the claims must be provided. An opportunity to respond must be afforded. Ostensibly neutral evaluation by the design professional must ensue. This requirement applies with equal force to both parties to the agreement. The record is utterly devoid of any notice to the Architect and Contractor of the claim for reinspection fees. Assuming arguendo that such charges are permitted under Article 2.2.7, the claims nonetheless must be asserted on a timely basis pursuant to Article 15. The only evidence in the record of any notice is in SCPRT Exhibit 10b which refers to any claw-back withholding of \$11,905.00 for reinspection fees for Dennis Corporation. There is no other notice in the record anywhere. SCPRT failed to timely assert by written notice the claims it has listed on its damages summary and the claims must be denied.¹

2. SCPRT Failed to Comply with the Condition Precedent of Obtaining a Decision of the Architect before Asserting the Claim before the CPO.

Similarly, the Architect did not address the SCPRT claims before submission to the CPO. This requirement is an absolute condition precedent pursuant to Article 15.5.2. Without a written

¹ SCPRT's claims for liquidated damages, in distinction from the claims for reinspection, are not subject to the additional written notice requirements of the contract (see Article 15.1.6.3- the written notice requirements do not preempt the collection and withholding of liquidated damages).

determination of the claims, the condition is not met.² No such determination exists, and it is too late to produce one now.

3. SNB has been Prejudiced by SCPRT's failure to follow the Contract.

Perhaps more significantly, SNB has been severely prejudiced by the lack of notice and lack of determination from the Architect. SNB had no explanation of the allocation of the charges more than \$50,000 other than that they related to "reinspection". The conclusory summary in SCPRT's damages exhibit, particularly in light of the prior written notice in exhibit 10 b which limited the reinspection fees to a fraction of the amount now claimed, is not in keeping with the terms of the contract which require the parties to give prompt written notice of claims, seek resolution in good faith at the project level, and avoid "gotcha" surprises at the end of the Project. SNB may have been aware of the unresolved COR's credits, but timely notice and discussion obviously could have been provided for the reinspection costs and the failure to provide the notice to SNB is highly prejudicial.

4. The "inspection fee claims" are not clearly defined in the record, most probably relate in whole or in part to issues that SNB prevailed on; therefore, SCPRT has not met its burden of Proof.

Given the state of the record, the lack of prior notice, and the vacuum of the claims for reinspection it is difficult if not impossible to sort allocate the charges in hindsight. There were multiple re inspections of the vending room ceiling, and under-designed area which SNB prevailed on in the initial decision. It is bad enough that the architect has charged SCPRT for this mistake, but that is no reason to pass the improper charge on to SNB. The argument applies with equal force to Dennis inspections in that area. Based on the evidence and the record, there is simply no basis to allocate the reinspection fees to SNB. The determination cannot be made because SCPRT did not carry its burden of proof on these points. To make such an award would be purely speculative.

5. The CPO's decision to "deny" all other claims necessarily includes the denial of SCPRT's affirmative claims.

The CPO decision denied all claims not expressly granted. This necessarily included the SCPRT affirmative claims except the liquidated damages claims expressly allowed. Nonetheless, SCPRT takes the illogical position that its claims were somehow granted by asserting that SNB had the presumptive burden of proof on every issue in dispute in this case. This assertion is

² In contrast to SCPRT's claims, the architect of record addressed and denied all SNB's claims before they were submitted to the CPO pursuant to the contract.

obviously incorrect, SCPRT has the burden of proof on all its affirmative claims under the contract and the decision of the CPO denied those claims.³

SNB'S CLAIM FOR CONTRACTUAL AND STATUTORY INTEREST

The Contract, the Statute, and the Caselaw require SCPRT to pay interest on the portion of the Claim which has been sustained by the CPO. SNB's initial claim to the agency included a request for payment of interest under the statute. (See claim letter dated January 14, 2022, incorporated by reference into SNB's Application for Resolution of Contract Controversy: "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"). This demand, made at the time of the request for payment, triggered the statutory notice for the commencement of interest:

SECTION 29-6-50. Interest on late payments; specific waiver of requirements of sections 29-6-30 and 29-6-50.

If a periodic or final payment to a contractor is delayed by more than twenty-one days or if a periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the owner, contractor, or subcontractor shall pay his contractor or subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. However, no interest is due unless the person being charged interest has been notified of the provisions of this section at the time request for payment is made. Nothing in this chapter shall prohibit owners, contractors, and subcontractors, on private construction projects only, from agreeing by contract to rates of interest and payment periods different from those stipulated in this section, and in this event, these contractual provisions shall control, provided the requirements of Section 29-6-30 and this section are specifically waived, by section number, in conspicuous bold-faced or underlined type. In case of a willful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply.

Notably, the statute requires notice at the time the request for payment is made. This case and this claim are for the final payment due SNB. The interest is non-waivable on public construction projects. SNB is plainly due interest on the final payment commencing 21 days after January 14, 2022, the date of the statutory notice.

Article 13.6 of the contract likewise compels the award of interest for the delay in final payment. The contract states late payments "shall" bear interest when the statutory demand is triggered. South Carolina case law is likewise in accord. See Ellis Don v. Clemson (attached) which establishes that state agencies are indeed liable for interest on contract claims when the

³ SCPRT's interpretation of the CPO decision to allow reduction of SNB's final payment for the claimed credits is therefore improper and the amounts remain due and owing to SNB.

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September 28, 2023
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statutory notice requirements are met.⁴ The Act applies to disputed sums found to be due and owing. South Carolina law has a separate statutory scheme for the failure to pay undisputed claims (See S.C. Code Section 27-1-15). Taxpayers pay interest to the State on late payments even when the obligations may be contested in good faith. The converse is also true under South Carolina law. SCPRT made an election to withhold sums and that decision carries the simple consequence of interest. SNB has effectively loaned SCPRT more than three hundred thousand dollars since the completion of the contract. The state owes this adjustment.

In summary, SNB contends the CPO should affirm and confirm the denial of the SCPRT claims beyond the liquidated damages already allowed and add interest to the delayed final payment for the number of days indicated. SNB contends daily interest of 12% on the total contract amount due of \$344,196.47 (\$113.16 per day) should be added to the final payment due from 21 days after the date of the interest notice to September 21, 2023⁵, and interest on the remaining unpaid balance from September 21, 2023, until paid in full. Thank you for your consideration.

With best regards,

S:/ Henry P. Wall

Henry P. Wall

Encl.

cc: Manton Grier, Esq.
Chuck McDonald, Esq.
Mr. Sammy Bracey

⁴ Only one of five justices found any merit in the state's argument of sovereign immunity for interest. see Pleicones dissent.

⁵ SNB was paid \$285,888.72 on September 21, 2023.

Exhibit C

In the Matter of:)	BEFORE THE CPOC FOR CONSTRUCTION
)	
)	OSE CASE 2022-006
)	State Project P28-9762-PD
SNB OF DILLON, LLC,)	
)	
Claimant,)	
)	
v.)	
)	POST-HEARING BRIEF OF SOUTH
SOUTH CAROLINA)	CAROLINA DEPARTMENT OF PARKS
DEPARTMENT OF PARKS)	RECREATION AND TOURISM
RECREATION AND TOURISM,)	
)	
)	
Respondent.)	

Pursuant to the directive from the Chief Procurement Officer for Construction (CPOC), the South Carolina Department of Parks Recreation and Tourism submits this post-hearing brief addressing the issues raised by SNB of Dillon, LLC (SNB) in the letter to the CPOC dated September 7, 2023, from its attorney, Henry P. Wall.

ISSUES

1. Total Amount of “Days in Dispute.”

On page 18 of the CPOC’s decision, there is a recapitulation of the relief awarded to SNB by the CPOC. Under item number 3 addressing an adjustment to the number of days of liquidated damages to be assessed against SNB, the CPOC awarded SNB relief for 174 days. The “Sub-Total” lists 560 Days which certainly appears to be a clerical error. SCPRT assessed liquidated damages against SNB in the amount of \$271,000.00 which represented 542 days. The CPOC has awarded SNB relief from liquidated damages in the amount of \$87,000.00. As to this, the CPOC’s order is clear and there is no issue as to the relief awarded SNB as to liquidated damages. The 560 Days in the

Sub-Total is a clerical error that has no impact on the Order, the relief awarded SNB, or the relief to which SNB is entitled under the Contract.

2. The meaning of the phrase “all other claims are denied.”

SNB contends that even though the CPOC’s detailed Order contained a clear and non-ambiguous recapitulation of the relief awarded which ended with the directive that “[a]ll other claims are denied,” the CPOC’s Order remains unclear as to SNB’s entitlement to additional amounts above and beyond the “Grand Total” awarded to SNB of \$285,888.72. SCPRT disagrees with this contention and submits that the Order is clear and that SNB is due the additional sum of \$285,888.72 from SCPRT and no more.

SNB’s claim in this matter sought relief on six (6) enumerated grounds. [See SNB Claim Letter dated January 14, 2022, Exhibit to CPOC Decision; see *also* CPOC Decision at p. 3.] Relevant here is the first ground: Payment of the undisputed contract balance and interest for late payments. Therefore, the issue of what constituted the contract balance due SNB was raised by SNB as part of its claim. Moreover, this issue was raised during the hearing and evidence was presented by both parties with respect to same. At the hearing, SCPRT presented testimony and documentation regarding the charges it incurred for additional fees from Dennis Corporation and Jeff Lewis Architects. [Testimony from Nicholas Leitner, P.E.; see *also* SCPRT Exs. 12 and 13.] In addition, SCPRT presented evidence of the adjusted contract amount accounting for all liquidated damages, additional costs for Dennis Corporation and Jeff Lewis Architects, and credits due SCPRT from SNB that had not been included in any final change orders.¹

¹ Considering that SNB received an award of \$66,081.32 in its favor for unresolved Change Order Requests [see CPOC Decision at p. 18], SNB’s complaint that SCPRT should not be entitled to deduct a total of \$4,074.68 for credits and other deductions (i.e., unresolved Change Order Requests) rings hollow. SCPRT does not recall these credits and deducts being contested by SNB during the hearing, and, in fact, recalls acknowledgement from SNB that at least some of these credits and deducts were appropriate.

[Testimony from Nicholas Leitner, P.E.; see SCPRT Ex. 19.] In short, SCPRT's position was that all undisputed sums had been paid to SNB prior to the commencement of the hearing before the CPOC. SNB was the party seeking additional amounts under the contract and the party disputing the above deductions for fees from Dennis Corporation, Jeff Lewis Architects and additional credits and deducts by SCPRT.² Accordingly, "All other claims are denied" clearly means that SNB is not entitled to any additional sums under the contract other than those set forth in the CPOC's Decision (i.e., the Grand Total of \$285,888.72).

3. SNB's entitlement to interest on the CPOC award or otherwise.

Because SNB sought interest as a part of its claim, the CPOC's denial of all other claims means that SNB's claim for interest was denied. Nevertheless, SNB argues that it is entitled to interest pursuant to Article 13.6 of the OSE General Conditions and S.C. Code Ann. § 29-6-50.³ Article 13.6 makes Article 1 of Chapter 6 of Title 29 of the South Carolina Code applicable regarding the payment of interest on late payments to Contractors by a state agency such as SCPRT. While SNB cites only § 29-6-50 in support of its claim for interest, § 29-6-30 is the relevant statute here with respect to SNB's entitlement, or lack thereof, to interest. Section 29-6-30 requires that the Owner make

² SNB contends that SCPRT should have submitted the credits and deducts to the Architect for a decision under Article 15.5.2 of the OSE General Conditions as a condition precedent to SCPRT asserting the right to deduct same from the Contract Amount. This argument is the height of form over substance. Even if SNB did contest the legitimacy of these credits and deducts at the hearing (which is not what SCPRT recalls), then SNB's position demonstrates that it would not have executed deductive Change Orders on these issues. And given the rather benign nature of the credits and deducts and the amounts sought, it is not credible to suggest that the Architect here would not have approved them as deductions to the Contract Amount. Especially considering the totality of the circumstances and the Architect's position as to the numerous claims submitted by SNB. Nevertheless, SCPRT submits that these matters were properly before the CPOC for consideration.

³ In its claim, SNB also cited S.C. Code Ann. § 27-1-15 as a basis for an award of interest. It appears that SNB does not now seek interest under this statute. Regardless, SNB is not entitled to relief under this statute as it is outside of the South Carolina Consolidated Procurement Code and is not relief available under state contracts. Moreover, even if it was applicable, SCPRT conducted a reasonable investigation into SNB's claims and further paid all undisputed amounts prior to the hearing rendering the statute's terms inapplicable.

payments on all **undisputed** amounts of any pay requests submitted by the Contractor. In this case, SCRPT paid all undisputed amounts sought by SNB in its applications for payment.⁴ Further, § 29-6-50 awards interest only on late payments. There was no credible evidence presented that SCPRT was late making payments on undisputed amounts due SNB. Accordingly, SNB was not entitled to interest on the amount awarded by the CPOC because all amounts awarded by the CPOC were legitimately disputed by SCPRT and did not become liquidated until the CPOC's decision became final. SCPRT made payment to SNB in the full amount of the CPOC award by electronic funds transfer on September 21, 2023.

Respectfully Submitted,

BELSER LAW FIRM, P.A



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Attorneys for South Carolina
Department of Parks Recreation and
Tourism

September 28, 2023

⁴ SCPRT paid all approved change orders and justifiably relied on the decision of the Architect regarding claims submitted by SNB as to which the Architect denied.