STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: CONTROVERSY	)	**DECISION** **CASE NO. 2010-006**
STEVENS & WILKINSON, INC. **vs.** **MEDICAL UNIVERSITY OF SOUTH CAROLINA**	)	**POSTING DATE:** **NOVEMBER 15, 2010**
DRUG DISCOVERY BUILDING **STATE PROJECT NO. H51-9773-PG-A**	)	

This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from Stevens & Wilkinson, Inc. ("S&W"), under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code, for an administrative review of a contract controversy over the architect-engineer services for the Drug Discovery Building for the Medical University of South Carolina ("MUSC"). (A copy of S&W's request is attached as Exhibit "A"). Pursuant to S.C. Code Ann. §11-35-4230(3), the CPOC assigned a project manager with the Office of State Engineer's ("OSE") to attempt to mediate a settlement between the parties.

On June 16, 2010, S&W notified MUSC and the OSE mediator that the parties had resolved all issues but one. S&W requested that the sole remaining issue be submitted to the CPOC for administrative review. Pursuant to this request, the CPOC commenced an administrative review pursuant to S.C. Code Ann. §11-35-4230(4). As a part of his administrative review, the CPOC conducted a hearing on August 5, 2010. At the hearing, E. Lee Morris, III, S&W's Executive Vice President and General Counsel, represented S&W and John Malmrose, MUSC's Chief Facilities Officer, represented MUSC. Robby Aull, Senior Architect and Principal of S&W, and Robert T. Lyles, Chairman for S&W, were present as witnesses for S&W, and Philip S. Mauney, MUSC's Director of Engineering, was present as a witness for MUSC. During the hearing, the parties submitted into evidence Exhibits 1 through 11. However, the amendments to the Agreement for design services which were included as a part of Exhibit 5 were incomplete. After the hearing, the CPOC discovered this defect and asked the parties to provide complete copies and to consent to these being included into the record. The parties consented and the amendments were marked as Exhibits 12. During the hearing, the parties consented to the post hearing submission of the specifications and plans for the first bid of the project. These drawings and specifications where subsequently submitted and marked as Exhibits 13 and 14 respectively. At the conclusion of the hearing, the CPOC held the

administrative review open to permit him to review the Drug Discovery Building project documents and record in more detail. On November 5, 2010, the CPOC closed the administrative review.

NATURE OF THE CONTROVERSY

At the start of the hearing, S&W withdrew all but one claim set forth in its request for resolution of a contract controversy.[1] The parties further advised the CPOC that the sole issue remaining to be resolved is whether S&W is entitled to additional compensation as a result of the cancellation of the first bid solicitation for the Drug Discovery Building, which necessitated a second bid solicitation. S&W claims that its contract only provided for one bid phase for the Drug Discovery Building and they conducted two bid phases, one of which constituted "additional services" under the contract.[2] S&W claims it is entitled to additional compensation of $135,662.50 for these alleged additional services. At the hearing, S&W withdrew all other claims made in its request for resolution.

MUSC counters that it received no additional value from S&W for these alleged additional services and that the MUSC cancelled the first bid for the Drug Discovery Building because the bid documents prepared by S&W were inadequate for bidding. MUSC further argues that the subsequent rebid did not constitute additional services because the rebid was necessitated by S&W's actions or inactions in preparing deficient documents and that there was no, or at the most, minimal additional effort on the rebid because on re-bid the Drug Discovery Building was combined with the adjacent Bioengineering Building project into a single solicitation of bids for both.[3] On the last point MUSC essentially argues that the effort on the second bid was no more than would have been necessary to bid the Bioengineering Building by itself, something S&W was already obligated to do by contract.

FINDINGS OF UNDISPUTED FACTS

1. On or about October 10, 2005, S&W and MUSC executed an agreement ("the Agreement") wherein S&W agreed to provide design, bidding, and construction contract administration services (collectively, "basic services") for the Drug Discovery Building Project. In consideration for these services, MUSC agreed to pay S&W a specified amount for the basic services listed in the Agreement, which equaled 6.75% of the awarded construction contract amount. Pursuant to the Agreement, S&W also agreed to

[1] The parties advised the CPOC that all issues withdrawn by S&W had been resolved either by change order or by S&W dropping its claim.
[2] S&W statement of controversy claims "Additional Services for the first Bid of DDB."
[3] By way of background, S&W was the architect on both projects.

provide certain specified "additional services"[4] and in consideration for these additional services MUSC agreed to pay S&W a fee of $430,000. [Ex. 5, pp. OSE 5, 28, 30, and 39][5]

2. The Agreement between S&W and MUSC set MUSC's budget for the cost of construction of the Drug Discovery Building, including a construction contingency, at $30 million.[6] [Ex. 5, p. OSE 30]

3. On or about April 16, 2008, S&W and MUSC modified their Agreement to increase MUSC's budget for the cost of construction of the Drug Discovery Building, including a construction contingency, to $45 million.[7] [Ex. 14, p. 1016 - 1017][8]

4. On or about March 31, 2008, S&W and MUSC executed an agreement wherein S&W agreed to also provide design, bidding, and construction contract administration services for the Bioengineering Building project. [Ex. 11]

5. On September 18, 2008, MUSC advertised in the South Carolina Business Opportunities for bids to construct the Drug Discovery Building. The Invitation for Bids required bidders to submit their bids no later than 2 PM on October 16, 2008. [Ex. 6, p. 439]

6. Subsequent to advertising for bids, the parties issued six Addenda. [Ex. 6] In addition to other changes to the bid documents, three addenda extended the date for receipt of bids. On October 28, 2008, the parties issued the last published Addendum, which among other things changed the date for receipt of bids to November 13, 2008. [Ex. 6, pp. 61 – 67]

7. On November 3, 2008, while a seventh addendum was being prepared, Mr. Malmrose directed Lonnie Long, MUSC's project manager, to cancel the bidding of the Drug Discovery Building. [Ex. 9, pp. 811 - 816] Mr. Long subsequently called S&W and advised S&W that MUSC was cancelling the solicitation.[9]

---

[4] Under the Agreement, any services that are not a part of basic services are additional services.

[5] After the hearing, the CPOC had staff add "Bates stamp" numbers to each page of all exhibits in numeric order. The first page, which is Ex. 1, is number OSE000000001, the second page, which is the first page of Ex. 2, is numbered OSE000000002, etc. As used herein, the CPOC only cites the last digits - less the OSE and preceding zeros.

[6] The Agreement sets the initial basis of compensation (basis for calculating progress payments) to S&W at $2,025,000 or 6.75% of $30 million.

[7] Amendment Number 10 increased the initial basis of compensation to $3,037,500 (6.75% of $45 million) to reflect this change in the construction budget.

[8] The amendments included with the Agreement submitted into evidence were incomplete, including only the cover sheet with no explanation of the amendment. When the CPOC discovered this defect after the hearing, he asked the parties to provide complete copies to be included into the record.

[9] Mr. Long passed away in 2009; therefore any testimony concerning statements by Mr. Long is hearsay. However, on some matters, the parties did not dispute what Mr. Long said or did. The fact that Mr. Long called S&W to notify

On November 5, 2008, S&W sent a letter to all bidders of record notifying them that "[d]ue to recent, significant revisions to the Scope of Work" the solicitation was being cancelled. [Ex. 6, p. 60]

8. On or about March 26, 2009, the parties amended the Agreement to compensate S&W for additional design work related to changing the precast panel system called for in the plans and specifications - a change that was requested by MUSC after soliciting bids. [Ex. 14, p. 1028 - 1029]

9. At some point subsequent to cancellation of the first bid on the Drug Discovery Building, MUSC decided to combine the Drug Discovery Building with the Bioengineering Building into one project for purposes of bidding.

10 On April 2, 2009, MUSC solicited bids on the combined Drug Discovery Building/Bioengineering Building project with bid. MUSC subsequently received extremely favorable bids.

11. On or about August, 17, 2009, the parties amended the Agreement to compensate S&W for combining the Drug Discovery Building with the Bioengineering Building into one project for purposes of bidding. [Ex. 12, p. 1049 – 1054]

DISCUSSION

As the claimant, S&W has the burden of proving its claim by a preponderance of the evidence. Therefore, S&W must establish by a preponderance of the evidence 1) that under its contract with MUSC, the services it provided for one of the two bid and negotiation phases of the Drug Discovery Building were additional services and 2) its damages resulting from providing the additional services (that is its cost of providing the alleged additional services[10]).

S&W's contract with MUSC consist of the following: AIA Document B151-1997, "Abbreviated Standard Form of Agreement Between Owner and Architect" (B151); "Article 12 – Other Conditions or Services AIA B151-1997" (Article 12), which is a compilation of state standard modifications to the B151; and twenty amendments to the contract (hereinafter collectively referred to as "the Contract"). The Contract sets forth basic services that are to be provided for the contract price and additional services that are not included in the contract price. As a part of basic services, S&W was required to prepare and/or provide, in

---

S&W that MUSC was cancelling bids is not disputed; however, what Mr. Long actually said in the conversation or subsequent conversations is another matter.

[10] The proper measure of damages for breach of contract is the loss that was actually suffered as the result of the breach. *S.C. Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

sequence, schematic design documents, design development documents, construction documents, bidding phase services, and construction contract administration services.

At issue here are the quality of the bidding documents prepared by S&W and the bidding phase services. Section 2.5 of the Contract sets forth the requirements for bidding phase services provided by the architect. The provisions of this section applicable to this dispute provide as follows:

> 2.5 BIDDING OR NEGOTIATION PHASE
> The Architect, **following the Owner's approval of the Construction Documents** and estimate of Construction Cost, **shall assist the owner in obtaining bids** or negotiated proposals and assist in awarding and preparing contracts for construction.
>
> 2.5.1 Prior to advertisement for bids, the A/E shall submit to the Agency and the OSE a record copy of the Bidding Documents, which are to be issued to prospective bidders. The submittal to the Agency and the OSE shall include the SE-271, "Design/Construction Documents Transmittal Form" and the Final Estimate of Construction Cost signed by the Agency.
>
> 2.5.2 The A/E **shall evaluate substitutions proposed** by Bidders and **make subsequent revisions to Bidding Documents by Addenda**.
>
> 2.5.3 The A/E shall attend the Pre-Bid Conference and the Bid Opening and shall assist the Agency in obtaining bids and awarding and preparing construction contract.
>
> 2.5.4 If the lowest bona fide bid exceeds the Agency's Construction Budget by less than 5%, and the Agency elects to award the Contract, the A/E shall, without additional charge to the Agency, assist in negotiations to reduce the bid amount to the level requested by the Agency, but not more than 10% below the Agency's established Project Construction Budget.
>
> 2.5.5 If the lowest bona fide bid exceeds the Final Estimate of Construction Cost by more than 5% and the Agency elects to continue the Project, the A/E shall, without additional charge to the Agency, modify the Contract Documents as necessary to bring the Project within the Project Construction Budget. The A/E shall be responsible for all its costs associated with the redesign and rebidding of the Project, including the reproduction of revised documents and fees for any new or revised permits based on the revised plans. However, the A/E shall not be required to perform such additional services at no cost to the Agency if the unfavorable bids are the result of conditions beyond the A/E's reasonable control.
>
> 2.5.6 If the Agency elects to terminate the Project, then this Contract is terminated in accordance with Article 8.

[emphasis added]. This section of the Contract contemplates only one bid phase unless the low bid exceeds the estimated construction cost by more than five percent. Because MUSC cancelled the bidding process, this threshold event for contractually requiring the architect to rebid the project at no additional cost to the owner did not occur. Because the second bid phase of the Drug Discovery Building was not

provided for in the contract, the second bid phase services were additional services[11] unless S&W breached a duty owed to MUSC justifying cancellation of the first bid phase.

MUSC does not dispute the fact that S&W was asked to cancel the first bid of the Drug Discovery Building and prepare for a subsequent rebid for reasons other than bids exceeding the final estimate of construction cost. However, MUSC argues that the bidding documents referred to in Section 2.5 of the Contract were inadequate for bidding, thus justifying cancellation of the first bid. In other words, MUSC argues that S&W breached the duty of care for architects in the preparation of the bid documents.

The bidding documents are "all the documents required to bid ... the construction contract." *Construction Specifications Institute, Manual of Practice (1992), cited in "The Architect's Handbook of Professional Practice," Twelfth Edition, AIA, Volume 2, §3.8, p. 706.* The bidding documents consist of the construction documents prepared by the architect in the construction document phase of design services plus the bid and contract forms, not yet executed. *Id.* The construction documents "are all of the written and graphic documents prepared or assembled by the architect/engineer for communicating the design and administering the project." *Id.* The Contract provides that the construction documents consist of "Drawings and Specifications setting forth in detail the requirements for construction of the Project."[12] [See Ex. 5, p. 6, § 2.4.1.]

Quality construction documents prepared by the architect during the construction documents phase are critical to obtaining accurate and competitive bids. These documents need to be comprehensive and detailed to avoid having to negotiate post award contract change orders that result from unclear or incomplete items.[13] *"The Architect's Handbook of Professional Practice," Twelfth Edition, Volume 2, AIA, §3.8, p. 706.* Nonetheless, it is normal that once bidders, sub-bidders, and suppliers have an opportunity to review the bid documents during the preparation of their bids, they will find items that "must be clarified, corrected, or explained." *"The Architect's Handbook of Professional Practice,"*

---

[11] Section 3.1.1 of the Contract defines services that are not a part of the contract as additional services as follows:

> Additional services shall be defined as services required for the Project that are not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted architectural and engineering practice.

[12] The construction documents elaborate the design, which is the culmination of the Schematic Design Phase and the Design Documents Phase, to describe what is to be built. *"The Architect's Handbook of Professional Practice," Twelfth Edition, AIA, Volume 2, §3.8.*

[13] When a designer prepares plans and specifications and furnishes them to a contractor to follow in the construction of a job, the designer "impliedly warrants their sufficiency for the purpose in view." *Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951).*

Twelfth Edition, AIA, Volume 2, §3.91, p. 751. The architect makes these clarification and corrections by issuing addenda which become a part of the contract documents.[14]

While it is generally accepted that it will be necessary to issue addenda on a project the size of the Drug Discovery Building, as implied by *"The Architect's Handbook of Professional Practice," Twelfth Edition, Volume 2, AIA,* excessive addenda issued as a result of request for information from bidders calls into question the completeness of the construction documents, may create additional ambiguities and conflicts in the documents, and increases the likelihood that bidders will become confused regarding what they are supposed to bid. When this happens, an owner cannot be sure that all bidders are bidding the same thing. Moreover, it is highly likely that the owner will be faced with numerous change orders and increased cost related to changes after contract award. Therefore, when excessive addenda establish that the bid documents contain excessive defects, the best recourse is to cancel the solicitation for bids to allow the architect to revise the bid documents by incorporating the changes that were made by the addenda into the construction documents and creating one comprehensive set of documents rather than multiple sets that modify one another. If the issuance of excessive addenda and resulting cancellation of bid results from a poorly prepared set of construction documents that does not meet the architect's professional standard of care, the resulting damage is the responsibility of the architect.

The standard of care for an architect practicing in the State of South Carolina is conformance with "the generally recognized and accepted practices in his profession." *Jane DOE v. American Red Cross Blood Services, S.C. Region, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989) (setting professional standard of care).* Moreover, unless "the subject matter is of common knowledge or experience," the professional standard of care must be established by expert testimony. *Tommy L. Griffin Plumbing & Heating Co., v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 472, 570 S.E.2d 197, 203 (2002).* Therefore, the question presented to the CPOC is whether evidence establishes that the construction documents prepared by S&W for the Drug Discovery Building conformed with the generally recognized standard and practices for the preparation of such documents by architects. In this regard, S&W's witnesses testified that at the time of bid cancellation the bid documents, including all issued addenda, provided all the information necessary for accurate bidding. Moreover, S&W's witnesses testified that the number and nature of requests for clarifications received from potential bidders were not unusual for a project the size and complexity of the Drug Discovery Building.

---

[14] The Contract provides for this process of making clarifications and corrections by incorporating by reference the Manual for Planning and Execution of State Permanent Improvements, Part II – 2001 Edition (Manual). [Ex. 5, p. 19, §2.1 and p. 34, §12.9.3] Section 6.6 of the Manual sets forth requirements for when and how addenda to the bid documents should be issued.

MUSC contends that S&W did breach the architect's standard of care. In support of its contention that S&W breached the standard of care, MUSC's witnesses testified that its staff architect, Mr. Long, was not satisfied with the quality of the construction documents. To further support its claim that the bid documents prepared by S&W were defective and did not meet the professional standard of care, MUSC relies on the fact that during the first bid for the Drug Discovery Building, the date for receipt of bids changed three times with a fourth change likely and that six extensive addenda were issued with at least one additional addenda still required at the time the solicitation was canceled. [Ex. 10, p 846] The CPOC will examine each of these claims in sequence.

The date for receipt of bids established in the original solicitation documents was October 16, 2008. Addendum Number 2 changed the date for receipt of bids to October 23, 2008. However, the record shows that this change was not due to any alleged defects in the bid documents but a concern by MUSC that solicitation documents for sixteen other projects in the state had also set October 16, 2008, as the date for receipt of bids. [Ex. 9, p 836] The next addendum to change the date for receipt of bids was Addendum Number 4 which changed the date to October 30, 2008. While the written record is not clear as to the reason for this extension, Mr. Malmrose testified at the hearing that this was to give S&W more time to prepare addenda. The last addendum to change the date for receipt of bids was Addendum Number 6 which changed the date to November 13, 2008. As with Addendum Number 4, the written record is not clear as to the reason for this extension, but Mr. Malmrose testified at the hearing that this was also to give S&W more time to prepare addenda. On the other hand, S&W's witnesses testified that these extensions were to give bidders more time to prepare their bids. Regardless of the reasons for the last two time extensions issued before the time of bid opening, multiple bid extensions are not unusual and are not by themselves evidence of architect default.

To further support its contention that the bid documents prepared by S&W were inadequate for bidding and necessitated cancellation of bidding, MUSC relied on five specific issues. Those five issues were as follows: 1) a disagreement over a window detail; 2) a defect in glass curtain wall design related to Building Code requirements for wind resistance in high wind zones; 3) a need to revise the bid documents for the precast panels; 4) an issue with the HVAC control system specifications; and 5) confusion over the proper bid form to be used.

From the record and testimony, it appears there was ongoing dispute between S&W and Mr. Long, MUSC's on staff architect, over a window detail, a dispute which had not been resolved at the time of bid cancellation. Mr. Aull, an architect with S&W, testified at the hearing that that there was no problem with the detail S&W included in the plans. Mr. Aull further testified that they did not agree with Mr. Long's

position but finally acquiesced because they wanted to please their client. MUSC presented no expert testimony regarding this detail, relying on the documentation submitted into evidence. However, this documentation by itself is not sufficient to support an argument that S&W's detail did not meet the standard of care for architects.

There was no dispute that after soliciting bids, Mr. Long discovered that the glass curtain wall design provided to S&W by a glass curtain wall manufacturer did not meet Building Code requirements for wind resistance for the location where the Drug Discovery Building was to be constructed. S&W testified that at the time of cancellation of bidding by MUSC, this issue had been resolved with the manufacturer and S&W was prepared to issue an addendum correcting the defect in design within a day or two. This particular issue points out the practice of designers relying heavily on manufacturers to provide design information related to the manufacturers products. While this practice is common, the manufacturer is not the designer of record and the designer of record is charged with verifying the appropriateness of the design. In this case, S&W failed to do so. Nonetheless, the solution was apparently simple and issuance of an addendum rather cancelling bids would be the normal recourse if a defect of this type were the only significant issue with the bid documents.

With respect to the precast panel design, both the documentation and testimony of both parties' witnesses established that shortly after MUSC solicited bids, MUSC decided it wanted to change the precast panel system requiring a review of the design and changes to the bid documents. [Ex. 9, pp. 828 & 829, 830, 831 & 832, 834, and 837] Therefore, MUSC's reliance on the need for a change in the precast panel system design as a basis to support its argument that the bid documents prepared by S&W were defective is misplaced. Indeed, this issue hurts MUSC's defense rather than helping it. This MUSC-requested change had not been resolved at the time MUSC cancelled bidding and at least one more addendum modifying the bid documents and changing the date for receipt of bids was required to address the change. It was only after being notified that the bid date would need to be extended once more to address this change that Mr. Malmrose made the decision to cancel the solicitation for bids.[15] [Ex. 9, p. 811]

The issue with the HVAC control system seems to be either a failure by S&W to follow instructions from MUSC or failure on the part of both parties to communicate rather than a design error. The documentation submitted by MUSC provides very little information on this issue. The first mention of this issue in the record is an email dated September 29, 2008, ten days after soliciting bids. [Ex. 9, p. 838] There is no indication this was an issue prior to soliciting bids; thus the CPOC can only conclude from the record that

[15] One could argue that MUSC should have cancelled the solicitation of bids back in September when it decided to make a change as significant as changing the precast panels, thus avoiding the cost incurred over the ensuing month.

this issue involves another request for change made by MUSC after soliciting bids. [16] The controls specifications in the bid documents approved two vendors subject to their ability to meet the specifications - Johnson Controls, Inc. and Trane Controls, Inc. [Project Manual, Vol. 2 Section 159000, Part 1.3] The record before the CPOC indicates that subsequent to advertising for bids, MUSC instructed S&W to modify the bid form to list Johnson Controls with Phoenix valves as a bid alternate. [Email by Mr. Aull, Ex. 9 p. 838] At the hearing, Mr. Aull testified that MUSC indicated they had a preference for Johnson Controls with Phoenix valves and wanted to include in the bid documents a bid alternate to allow them the opportunity after bidding to select this alternative if they determined it was in their best interest.[17] On October 8, 2008, S&W issued Addendum Six on behalf of MUSC modifying the bid form to add an additional base bid, Base Bid Number Two. The scope of Base Bid Number Two consisted of all of the work of Base Bid Number One "with Johnson Controls as Central Control and Monitoring System Subcontractor." [Ex. 6, pp. 61 - 63] Apparently this change did not satisfy MUSC since there is some evidence that MUSC instructed S&W to make further changes in the next addendum to convert the controls specifications for Base Bid Number One to a pure performance specification without preapproved manufacturers. [Testimony of Phil Mauney and Ex. 9, p. 813] None of the forgoing, however, supports a defense that S&W failed to meet an architect's standard of care for preparation of bid documents.

The issue with the bid form that MUSC raised at the hearing was one and the same with the HVAC controls since the bid form at issue was the form revised by Addendum Six to address MUSC's desire for a bid alternative for controls. While it is clear that the bid form that was a part of Addendum Six was in error because it did not properly provide for a listing of major subcontractors for Base Bid Number Two, this was an error that could be easily resolved by issuing a new bid form and did not rise to the level of a material breach of a professional duty by S&W.

Of the five specific defects with the bid documents raised by MUSC at the hearing, only one appears to have any merit.[18] By itself, this one issue would normally result in the issuance of an addendum rather than cancellation of bid. However, MUSC did not rely solely on these five issues but also argued its cancellation was proper based on the totality of the circumstances, noting the large volume of requests for information received from potential bidders and the large number responses to requests for information, clarifications, corrections, or changes included in Addendums Three, Four, and Five.

---

[16] None of the other hearing exhibits mention this issue prior to this email in Exhibit 9, and MUSC did not present any testimony establishing how this issue arose.

[17] MUSC did not present any evidence or testimony that this issue existed prior to soliciting bids.

[18] This does not mean that the issues with HVAC controls and the window detail were not indications of S&W's failure to meet its professional duty but rather that MUSC failed to prove they were.

Specifically, MUSC submitted into evidence 346 pages of documentation (mostly emails) of requests for information and requests for substitutions submitted by bidders.[19] Neither party presented testimony regarding which requests were substantive and which were not. Moreover, neither party kept a log of the requests for information indicating the number received, the question asked in each, and the response, if any.

MUSC also submitted into evidence 371 pages of addenda. These appear to be a mixture of minor modifications unrelated to the construction documents, wholesale replacement of large sections of the specifications which individually may or may not have constituted a major change, numerous minor changes, responses to substantive requests for information, responses to requests for substitution, and owner-initiated changes that may or may not have been necessitated by omissions in the bid documents. MUSC did not provide any testimony to guide the CPOC through these documents to determine the nature of each change.

MUSC did not present any expert testimony to show that the volume of requests for information or the number of changes to the bid documents were an indication that the bid documents did not meet S&W's professional standard of care.[20] Instead, MUSC left it up to the CPOC to draw his own conclusions by reviewing the project documentation. A significant task requiring a review of 786 pages of documentation related to requests for information, requests for substitutions, and addenda, as well as 306 sheets of drawings, over 2,000 pages of documents and specifications in the project manual, and extensive documentation of communications between MUSC and S&W. Not only is this an unreasonable expectation when the burden is on MUSC, not the CPOC, to prove MUSC's defense, the communication documentation MUSC provided to the CPOC only covers the bid period. Any documentation of communications prior to the bid period necessary for an understanding of events is missing from the record.[21] Despite the forgoing, the CPOC is sympathetic to MUSC's position. The shear volume of

---

[19] Not all of these request were requests for information regarding the bidding documents. Some were requests to substitute a product or manufacturer for a listed product or manufacturer accompanied by extensive supporting documentation.

[20] Interestingly, MUSC presented testimony that other architects at times have problems similar to the ones S&W had on this project, noting the Drug Discovery Building was not the only one in which they experienced large numbers of requests for information and addenda. Mr. Malmrose testified that the Hollings Cancer Center addition, which was designed by a different architectural firm, experienced similar problems during the bid phase. Mr. Malmrose also testified that his experience with the Hollings Center influenced his decision to cancel the Drug Discovery Building Bid. Of course the performance of two different architects on two projects does not establish a standard of care.

[21] For example, in a letter dated March 16, 2010, regarding this contract controversy, Mr. Malmrose states "It is well documented at the time [time of deciding to go to bid for the first time] that MUSC had serious concerns about the readiness of the bid documents." [Ex. 10, p. 848] However, MUSC did not submit into evidence any such documentation.

request for information and the number of addenda (changes within Addendums Four through Five) appear to be excessive. However, absent expert testimony on the architect standard of care, this is not sufficient to establish that S&W has breached its professional duty to MUSC.

Pursuant to the agreement between S&W and MUSC, the architect was not to start its bidding phase services until after MUSC approved the construction documents. [Ex. 5, p. 21, §2.5] The testimony presented at the hearing established that MUSC approved the construction documents for bidding. Moreover, the testimony showed that MUSC approved the construction documents for bidding despite its belief that they were defective and inadequate for bidding.

According to the testimony of Mr. Malmrose, MUSC had a meeting with S&W and a MUSC Board of Trustee member wherein MUSC staff and the Board member agreed that the construction documents were not ready for bidding. However, MUSC decided to move forward with the bidding phase with the understanding that S&W would correct the known deficiencies before bid opening.[22] The parties moved forward and MUSC subsequently cancelled the bidding because the construction documents were not ready for bidding. At the hearing, Mr. Malmrose stated that the documents were even worse than they believed when they decided to solicit bids. Nonetheless, MUSC made a mistake in moving forward to bidding when it believed the documents were inadequate for bidding. Where there are substantial concerns with the quality of the construction documents, the better course is to require the architect to correct the documents before bidding, not after. Because MUSC decided to proceed with bidding when it believed the documents were not ready for bidding, one may argue that MUSC assumed or at least shares responsibility for the results.

Based on the forgoing, the CPOC finds that MUSC failed to establish that S&W breached its professional duty of care in the preparation of construction and bid documents. Therefore, MUSC failed to prove that S&W bore responsibility for all damages resulting from the cancellation of the first bid of the Drug Discovery Building and subsequent rebid.

MUSC's failure to establish its defense that its cancellation of the bid was justified does not end the matter. S&W still bears the burden of proving its damages. In this regard, S&W takes as its starting point the first bid phase. S&W argues that the first bid constituted additional services. The CPOC disagrees.

[22] According to Mr. Malmrose, S&W's design effort up to the time of bidding had taken 2 ½ years. Clearly MUSC was dissatisfied with the performance of S&W up to the date of bidding. Mr. Malmrose's testimony combined with at least one document in the record reflects this dissatisfaction as well as a desire on the part of MUSC to put the project out to bid sooner than later. [Ex. 9, p. 845]

The first bid phase was contemplated by the Contract between S&W and MUSC; it was the second bid phase for the Drug Discovery Building that was not contemplated and constituted an additional service.

S&W does not argue that it was not finally and fully compensated for one bid phase.[23] Therefore, the question presented to the CPOC is what compensation, if any, is S&W entitled to for the second bid phase? S&W contends that it is entitled to the same compensation it was contractually entitled to for the first bid phase. However, this position is not in agreement with the terms of the agreement between S&W and MUSC. The Contract provides that compensation for additional services not listed in the Agreement "shall be agreed upon in advance between the owner and A/E." [Ex. 5, p. 39] The parties also incorporated into the Contract an hourly rate schedule for S&W's employees for the purpose of pricing additional services. [Ex. 5, p. 40] Moreover, this rate schedule was in fact used to price such additional services. [See e.g. Ex. 16, p] Therefore, under the Agreement, the compensation due S&W for the second bid phase services should be established by taking the number of employee hours provided in performing this additional service and applying the rate schedule to those employee hours. The parties could have agreed on this amount in advance of S&W actually providing the services based on an estimate of labor hours. However, in this case S&W and MUSC never agreed that S&W provided any additional bid phase services and, therefore, they never agreed upon compensation for these services. S&W did submit into evidence the number of hours its staff spent on the project during the time period of the first bid.[24] [Ex. 2] However, this evidence focuses on work that was a part of basic services, not part of additional services. S&W failed to provide any evidence as to its effort to provide bidding phase services on the second bid phase of the Drug Discovery Building.

The distinction between the level of effort S&W expended for the first bid phase versus the second bid phase of the Drug Discovery Building is important. Indeed, the parties further disputed whether there was any additional effort on the part of S&W for providing bidding phase services for the second bid of the Drug Discovery Building. MUSC argued that because the second bid solicitation for the Drug Discovery Building was combined with the bid solicitation for the Bioengineering Building, S&W exerted no

[23] In previous documentation and the claim submitted to the CPOC, S&W represents that it only completed 75% of the bid phase provided for in basic services and that it was only entitled 75% of the agreed upon compensation for this bid phase. Since, S&W was eventually compensated in full for basic services, 25% of the compensation S&W received for the bid phase provided for in basic services should be deducted from the value of additional services provided by S&W for the second bid phase.

[24] There are several problems with this exhibit. For example, S&W's witnesses could not confirm that all the work effort listed in the exhibit was specifically for bid phase services. Moreover, during this same period, S&W was working on making corrections to the bid documents that would more appropriately be considered construction phase services. Additionally, the testimony showed that S&W was also working on owner requested changes that were addressed in amendments to S&W's contract which increased the compensation to be paid S&W. Furthermore, S&W did not provide sufficient information to correlate the individuals listed in this exhibit to the positions listed on the rate schedule in the contract.

additional effort than was necessary to bid the Bioengineering Building by itself. MUSC further argued that most of the issues, including responding to contractor questions, for the Drug Discovery Building were addressed during the first bid and there was little, if any, additional effort necessary for the second bid of the Drug Discovery Building. However, S&W argues that there was additional effort and that by contract (as opposed to in actual fact) that effort was the same as for the first bid. Conceptually, the CPOC believes both parties miss the mark. At a minimum, S&W did incur additional printing costs to produce a new set of plans and specifications for each potential bidder, sub-bidder, and supplier requesting a set. On the other hand, since S&W had had a significant opportunity to make corrections to the plans and specifications prior to the second bid,[25] it is reasonable to expect fewer questions related to the documents for the second bid. Moreover, by combining the Drug Discovery Building project with the Bioengineering Building project for bidding, there was a reduced effort related to the pre-bid meeting, bid opening, bid evaluation, bid award, and contract formation. Because of this combining of the projects, there was only one pre-bid meeting, one bid opening, one bid evaluation, one bid award, and one contract formation rather than two separate pre-bid meetings, two separate bid openings, two separate bid evaluations, two separate bid awards, and two separate contract formations. Therefore, the effort S&W expended in providing the first bid phase services is not a reasonable measure of the effort S&W expended in providing the second bid phase services. For the same reason, the agreed upon fee for the basic service bid phase, i.e. the first bid phase, is not representative of the reasonable cost to S&W to provide the second bid phase services.

In addition to labor costs and other costs included in the hourly rates in the Contract, S&W also made a claim for added reproduction cost of the bidding documents provided to potential bidders during the first bid of the Drug Discovery Building, which were not reimbursed. Regarding such cost, Article 12 of the Agreement provides as follows:

> 10.2 PROJECT EXPENSES[26]
>
> 10.2.1 REIMBURSABLE EXPENSES are actual expenses incurred by the A/E in the interest of the Project. Reimbursable expenses shall not exceed the amount indicated in Paragraph 11.3.1.1 without prior approval by the Agency in the form of an amendment to the Agreement.
>
> 10.2.3 Reimbursable expenses and/or Lump Sum Expenses may include the following:
>
> 10.2.3.4 Defined in-house printing depending on the complexity of the project as negotiated by the Agency and the A/E.

[25] Many of these corrections would have resulted from requests for information submitted by bidders during the first bid.
[26] See Ex. 5, pages 27 and 28.

11.3 PROJECT EXPENSES[27]

11.3.1 For REINBURSABLE EXPENSES, as described in Article 10 and listed in Article 12, use a multiple of 1.1 times the expenses incurred by the A/E in the interest of the Project.

11.3.1.1 Total reimbursable expenses shall not exceed: $250,000

11.3.1.2 Description of Reimbursable Expenses not included in Paragraph 10.2.3: Reimbursable expenses shall include all items listed in Item 10.2.3.

EXHIBIT A TO ARTICLE 12[28]

***

Expenses of ... reproductions, will be reimbursed per Section 4.9D of the OSE Manual. Those expenses that are not reimbursable are considered part of the Professional Services Provider's overhead expense included in the Basic Services.

MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS, PART II (i.e. the OSE Manual)[29]

4.9D. Authorized reimbursable or Lump Sum Expense may include:

2. Reproduction expense of ... Bidding Documents for bidding or construction.

Thus, S&W was entitled to reimbursement for all reimbursable expenses (as defined in the Contract) incurred in the normal course of providing basic services, subject to a cap of $250,000. Moreover, the cost of printing the bidding documents that were provided to prospective bidders, sub-bidders, suppliers, and others to facilitate bidding provided were reimbursable expenses. There is no dispute that MUSC, believing S&W had breached its duty of care, declined to compensate S&W for all such cost incurred during the first bid phase of the Drug Discovery Building.[30] [Ex. 4, Ex. 10, pp. 866]

The evidence shows that shortly after the first bid of the Drug Discovery Building was cancelled, S&W claimed $111,511.62 in reimbursable expenses for bid phase services. [Ex. 4] However, S&W did not submit any evidence regarding these expenses. Instead, S&W's evidence of its reproduction cost was evidence of its reproduction cost for the second bid, not the first bid. Moreover, it was evidence of the reproduction cost for documentation related to two projects, the Drug Discovery Building and the Bioengineering Building, with no delineation between the two. [Ex. 8, pp. 788-798] S&W simply divides the reproduction cost for the combined project for the Drug Discovery Building and the Bioengineering

[27] See Ex. 5, page 31.
[28] See Ex. 5, page 36.
[29] See 2001 Edition of the Manual for Planning and Execution of Permanent Improvement Projects, Part I.
[30] Presumably, MUSC reimbursed S&W for its reproduction cost related to additional services for the second combined bid of the Drug Discovery Building since this was not an issue in the dispute.

Building in half and asserts this is a reasonable representation of the amount it is due for reproduction cost related to the first bid phase.

Using only invoices for reproduction costs related to the second combined bid as evidence, S&W claims $45,547.94 for reproduction costs related the first bid of the Drug Discovery Building, an amount substantially less than it claimed in March of 2009. S&W did not explain why it did not use its printer's invoices for reproduction costs related to the first bid of the Drug Discovery Building. However, the evidence presented at the hearing suggests that S&W's reimbursable expenses for the Drug Discovery Building may have exceeded the $250,000 cap in its agreement.[31] By letter dated March 4, 2009, S&W requested an increase in the cap on reimbursable expenses of $85,000. [Ex. 10, p. 869] This letter indicated that through S&W's March invoice "approved" reimbursable expenses totaled $176,258.34, an amount $73,741.66 less than the cap. Moreover, S&W estimated it would incur approximately $30,000 in reimbursable type expenses providing construction phase services, leaving a balance of $43,741.66 to cover bid phase services. Unfortunately, other than this letter submitted into evidence by MUSC, there is no evidence in the record concerning the amounts paid to S&W for reimbursable expenses related to the Drug Discovery Building. Due to lack of evidence regarding actual reimbursable expenses for the first bid of the Drug Discovery Building and the lack of evidence regarding the total reimbursable expenses paid by MUSC on the Drug Discovery Building for basic services, there is no way for the CPOC to determine what amount, if any, is due to S&W for its reproduction cost related to the first bid.

DECISION

It is the decision of the Chief Procurement Officer for Construction that:

1. S&W established upon a preponderance of the evidence that it provided bid phase services for two separate bids of Drug Discovery Building;

2. The Medical University of South Carolina failed to prove its defense that S&W breached its professional duty of care in the preparation of construction and bid documents, which would justify a cancellation of the first bid of the Drug Discovery Building with S&W bearing the resulting increase in cost for a second bid; and

[31] A review of all Amendments to S&W's indicates the cap on reimbursable expenses was never increased by agreement. However, if MUSC was not justified in cancelling the first bid and the second bid was an additional service, S&W would be entitled to an increase in the cap on reimbursable expenses to cover the second bid.

3. S&W failed to prove its reimbursable costs for the first bid of the Drug Discovery Building and its costs for additional services related to the second bid of the Drug Discovery Building. [32]

For the foregoing reasons, Stevens & Wilkinson's claim for damages is denied.

John St. C. White
Chief Procurement Officer for Construction

15 Nov 10
Date

Columbia, South Carolina

[32] Considering the amount in dispute in this case, it is surprising that neither party put in the time and effort necessary to prove their positions.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Contract Controversy Appeal Notice (Revised October 2010)

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: www.procurementlaw.sc.gov

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

FILING FEE: Pursuant to Proviso 83.1 of the 2010 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain 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).