

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
)
IN THE MATTER OF: CONTROVERSY)
USC BASKETBALL ARENA)
STATE PROJECT H27-9838-MP-B)
SKANSKA USA BUILDING, INC.)
AND)
MCKINNEY DRILLING COMPANY)
vs.)
UNIVERSITY OF SOUTH CAROLINA)
)

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

DECISION

POSTING DATE: August 27, 2003

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a Request for Resolution of a contract controversy filed on April 5, 2002 by McKinney Drilling Company (McKinney) [Exh. 1] seeking the payment of \$869,710.48 for excavated rock. On May 15, 2003 Skanska USA Building, Inc. (Skanska) submitted a Request for Resolution [Exh. 2] seeking the payment of \$821,633.31 on behalf of McKinney for excavated rock and the payment of \$81,283,41 to Skanska for contractual overhead and profit on the work of a subcontractor. On November 7, 2002 the University of South Carolina (USC) filed a counter-claim [Exh. 4] against Skanska, alleging indemnification from Skanska for any amounts that might otherwise be determined payable to McKinney or Skanska for rock excavation. These requests were filed under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the USC Basketball Arena project (Project). Pursuant to §11-35-4230(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and attempted to resolve the dispute by mutual agreement. The effort proved unsuccessful.

These various claims revolve around a complex and overlapping set of parties, facts, documents and witnesses. As a result of the preliminary dispute resolution process the CPOC determined, with the agreement of the parties, [Exh. 5] that it was appropriate to first decide the following issues:

1. *Beers', and then McKinney's, contractual entitlement to unit prices for rock excavations;*
2. *Beers'/McKinney's quantification of the claim based upon unit prices for rock excavation, including proof of the type of material excavated (i.e. earth versus rock};*
3. *All of USC's defenses to Item 1;*
4. *All of USC's defenses to Item 2, including its own quantification of the claim.*

Based on the final resolution of these four issues, further proceedings before the CPOC may be held on the remainder of the issues in contention.

Accordingly, a hearing was held on May 20-22, 2003 on the issues in contention. At the hearing Skanska and McKinney were represented by Jonathan Crumly, Esq., Brook Clark, Esq., W.C. Garth Snider, Esq., Elizabeth Crum, Esq. and Joshua Kohner, Esq. USC was represented by Henry P. Wall, Esq. and Bryan Robinson, Esq. At the conclusion of the hearing, the record was held open to permit the CPOC to review the procurement files in more detail and the parties to submit a consolidated set of exhibits, in the form of a three-volume set hereafter identified as Exh. 3, with specific documents identified by volume and tab. The hearing record was closed on August 20, 2003.

MOTIONS

At the outset USC moved to dismiss the request for resolution filed by McKinney, citing McKinney's failure to qualify as the real party in interest as required by §11-35-4230(1) of the Code. After oral argument the CPOC determined that the circumstances of this dispute are consistent with prior rulings of the CPOC¹.

The CPOC cannot act without subject matter jurisdiction. A court has subject matter jurisdiction over an action if it has authority and power over such an action.² The concept of subject matter jurisdiction is equally applicable to the administrative process.³ Boards, commissions, agencies, and administrative officers only have subject matter jurisdiction over a matter if they are granted such authority by statute or regulation.⁴

The statute applicable to McKinney's original request for resolution is §11-35-4230. This section grants the appropriate chief procurement officer exclusive subject matter jurisdiction over any dispute within its ambit.⁵ On its face, §11-35-4230 limits the CPOC's authority over disputes to disputes arising under or by virtue of a contract between the State and the party requesting resolution of the controversy. More

¹ *In the Matter of Controversy: Graduate Science Research Building, Order on Motion for Summary Judgement*, Decision of the Chief Procurement Officer for Construction, April 21, 2003.

² *Washington v. Whitaker*, 451 S.E.2d 894, 898 (S.C. 1995) ("[S]ubject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue.").

³ *Livingston Manor, Inc. v. Department of Social Services*, 809 S.E.2d 153, 155 (Mo. Ct. App. 1991) ("If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction."); 73A C.J.S. *Public Administrative Law and Procedure* § 117 (1983) ("A public administrative body has such adjudicatory jurisdiction as is conferred on it by statute; and, generally, an administrative body has jurisdiction of a proceeding where it is dealing with a controversy of the kind which it is authorized to adjudicate, and it has the parties before it."); *and* 2 Am. Jur. 2d *Administrative Law* § 274 ("'Jurisdiction' in regard to administrative agencies generally may be defined as power given by law to hear and decide controversies.").

⁴ *South Carolina Tax Commission v. South Carolina Tax Board of Review*, 299 S.E.2d 489 (S.C. 1983).

⁵ *Unisys Corp. v. South Carolina Budget and Control Board*, 551 S.E.2d 263, 270 (S.C. 2001) (finding § 11-35-4230 an exclusive grant of jurisdiction to the CPO).

importantly, §11-35-4230 also limits a CPO's authority over subcontractor disputes to only those involving a subcontractor that is a real party in interest.

*This section applies to controversies between the State and a contractor **or subcontractor when the subcontractor is the real party in interest**, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor or subcontractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code.*

S.C. Code Ann. §11-35-4230(1) (West Supp. 2002) (emphasis added).

The issue of whether McKinney, as asserted in the April 5, 2002 submission, is the real party in interest also determines whether McKinney's claim is barred by the doctrine of sovereign immunity. While not a bar to the CPOC's subject matter jurisdiction,⁶ the defense of sovereign immunity is a complete defense.⁷ A state can only be sued in a manner and upon such terms as expressly allowed by law.⁸ Section 11-35-4230 is just such a law, and it must be strictly construed.⁹

"The real party in interest is the one who has the right sought to be enforced under the substantive law."¹⁰ Merely because one may benefit by the result of litigation does not make him a "real party in interest"¹¹. In a contract action, the real parties in interest are, as a general rule, the parties to the contract.¹² On the face of the documents [Exh. 3, Tab 6] McKinney is not a party to the contract between USC and Skanska,

⁶ Washington v. Whitaker, 451 S.E.2d 894, 898 (S.C. 1995) (ruling that sovereign immunity is not a jurisdictional bar).

⁷ Jinks v. Richland County, 563 S.E.2d 104, 107 (S.C. 2002) ("As a matter of sovereignty, the State has the authority to determine whether it consents to suit within its own court system."); and Melton v. Crowder, 452 S.E.2d 834, 835 (S.C. 1995) ("A State is immune from suit unless it expressly consents to be sued.").

⁸ Unisys Corp. v. South Carolina Budget and Control Board, 551 S.E.2d 263, 270 (S.C. 2001) (With reference to Section 11-35-4230, ruling that "the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.").

⁹ Unisys Corp. v. South Carolina Budget and Control Board, 551 S.E.2d 263, 270 (S.C. 2001) (finding that Section 11-35-4230, as a statute waiving the State's immunity, must be strictly construed) and Watford v. South Carolina Highway Department, 257 S.E.2d 229, 230 (S.C. 1979) (finding that statutes in derogation of sovereign immunity must be strictly construed).

¹⁰ James F. Flanagan, South Carolina Civil Procedure 141 (2nd ed. 1996) (citing Glenn v. E.I. DuPont de Nemours & Co., 174 S.E.2d 155, 157-58 (1970) ("A civil action may be maintained only in the name of a person in law, an [sic] entity, which the law of the forum may recognize as capable of processing and asserting a cause of action.")). See generally Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §1543 ("In order to apply Rule 17(a) properly, it is necessary to identify the law that created the substantive right being asserted by plaintiff.").

¹¹ See 6A Fed. Prac. & Proc. Civ.2d §1543, citing Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592 (Ill. 1973).

¹² See Dagle Construction Co. v. Cerrati, 262 S.E.2d 12 (S.C. 1980) (for lack of status as a real party in interest, dismissing case brought by corporation when the owner of the construction company, not the company itself, was the party to the contract at issue).

and under South Carolina law, McKinney – which lacks privity of contract with USC – has no substantive right under the common law of contracts to bring an action against USC.¹³ Accordingly, McKinney is not the real party in interest.

The United States Court of Appeals for the Fifth Circuit reached a similar conclusion in Farrell¹⁴. In that case, Jefferson Parish (Owner) hired Farrell Construction Co. (Contractor) as general contractor to build two pump stations. Contractor hired Emile Babst and Company (Sub) as its mechanical subcontractor. When the project suffered from significant delay, Contractor and Sub claimed that Owner had provided defective plans and specifications. Litigation ensued, but only after Contractor and Sub had entered into a "prelitigation agreement." In that agreement, Contractor and Sub agreed that Contractor would pursue both its and Sub's claims against Owner and that Sub's share of any recovery would satisfy all its claims against Contractor. Contractor filed suit, seeking to recover delay damages for itself and extra work charges for Sub. Contractor's complaint stated that Contractor was recovering "for the account of [Sub]." Due to issues regarding federal diversity jurisdiction which are irrelevant here, the court directly addressed whether Sub was a real party in interest in the dispute with Owner. Because, in the absence of privity of contract, the applicable substantive law did not provide Sub with any "enforceable substantive contract rights against the Owner," the court concluded that Sub was not a real party in interest. In other words, because Sub was a subcontractor, it lacked any right to sue Owner on the contract and, thus, was not a real party in interest to the action against Owner on the contract.

As noted above, South Carolina law is in accord with this analysis. Accordingly, the CPOC concludes that McKinney is not a real party in interest¹⁵. Because it is not a real party in interest, McKinney's April 5, 2002 claim does not fall within §11-35-4230's limited waiver of sovereign immunity and the CPOC lacks subject matter jurisdiction. Accordingly, the matter of McKinney's April 5, 2002 Request for Resolution is dismissed.

The only matter before the CPOC is the May 15, 2003 Request for Resolution submitted by Skanska.

¹³ Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (denying subcontractor's contract claim against state because subcontractor lacked privity of contract with the state) and Railroad Co. v. Railroad Co., 9 S.C. 325, 329, 9 Richardson 325, 325, 1878 WL 5400, *3 (1878) ("Wherever redress is sought for an injury, arising out of the breach of a contract, whether the action be conceived in form ex contractu or ex delicto, some privity of contract must limit the range of a plaintiff in seeking those who are liable to him.") (quoting Gray v. Ottolengui, 46 S.C.L. 101, 12 Rich. 101, 1859 WL 4326 (S.C.App.L. Jan Term 1859).

¹⁴ See Farrell Construction Co. v. Jefferson Parish, 896 F.2d 136 (5th Cir. 1990)

¹⁵ The CPOC recognizes that §11-35-4230(1) cannot and should not be construed into a nullity. The statute clearly intends to afford subcontractors a limited avenue for redress. However, to avail themselves of this limited right of action, subcontractors must acquire the status of "real party in interest" as defined in South Carolina law. SCRC 17(a) offers illustrative examples of such status and there may well be others, but the CPOC believes the most appropriate option for a subcontractor is that of an assignee of the General Contractor.

Given the history of this matter and McKinney's central role in the underlying dispute, McKinney's representatives and witnesses fully participated in the hearing on behalf of Skanska.

NATURE OF THE CONTROVERSY

USC¹⁶ solicited bids for the construction of the Project. The Architect of Record is Rosser International (Rosser) and the Engineer of Record is Stevens & Wilkinson (S&W). After receiving unacceptably high bids, USC entered into scope and price negotiations with Beers Construction Company, now a subsidiary of Skanska. Ultimately USC entered into an agreement for the construction of the Project with Skanska. In the expectation of a reduced cost, USC approved a modification to the foundation to include drilled, reinforced concrete shafts (commonly called "caissons") as the building foundation system. McKinney is the drilling subcontractor selected by Skanska. During construction of the Project, Skanska and McKinney encountered subsurface conditions that they contend, according to their interpretation of the Contract Documents, entitle them to increased compensation based on the contractually-established unit prices for extra work. USC denies the claim in large part.

FINDINGS OF FACT—UNIT PRICES (UP)

With respect to the first element of the Request for Resolution, the CPOC finds that there are two distinct sub-issues. The first sub-issue addresses the applicability of unit prices for "Rock" excavation to the prime contract between Skanska and USC. After a review of the evidence and testimony, and by the greater weight or preponderance of the evidence, with respect to the first sub-issue, the CPOC makes the following findings of fact:

UP-1. On March 9, 2001 McKinney submitted to Skanska a "budget pricing" estimate in the amount of \$1.3 million to install 268 drilled shafts of varying lengths and diameters. [Exh. 3, Tab 4] The estimate included the following two relevant statements:

NOTE: Not having seen a soils report, this price is based on normal soils excavation. ...

THIS BUDGET DOES NOT INCLUDE: ...

8. Any rock excavation or hand belling.

UP-1. On April 6, 2001 McKinney submitted to Skanska a firm quotation for drilling 225 caissons of a specified length and diameter. [Exh. 3, Tab 35] The basis for the base bid price was stated to be information provided by Skanska on February 21, 2001, but the nature of this information was not

¹⁶ In the context of this discussion, it should be clearly understood that "USC" means not only the University as the contracting party, but also those engaged to provide it with competent technical advice and contract administration assistance.

otherwise defined in the McKinney proposal or in the evidence submitted to the CPOC¹⁷. There was an extensive list of conditions and exclusions to McKinney's proposal, including an exclusion for any "rock drilling." McKinney provided a list of unit prices for drilling in "Earth" and "Rock". These terms were not otherwise defined in McKinney's proposal.

UP-2. On April 9, 2001 Skanska and USC entered into a contract to build the Project. [Exh. 3, Tab 6] One of the cost reduction changes accepted by USC¹⁸ was a change in the foundation system from concrete-filled driven steel pipe piles to drilled reinforced concrete caissons with an anticipated cost reduction of \$490,300. [Id., Appendix C, line 2.9A] The handwritten notes to that line item state:

Caisson Work(?) Notes

- *No Specification included*
- *Standard straight shafts*
- *No testing, bells or rock anchors*

According to testimony by Skanska, Skanska's understanding of the technical requirements for the caissons were a matter of informal communications between Rosser and Skanska. The change to a caisson foundation system was not formally incorporated into the USC-Skanska contract until the execution of Change Order 1, dated December 11, 2001 [Exh. 3, Tab 22], some 7 1/2 months after McKinney began work on the revised foundation system.

UP-3. On April 12, 2001 USC issued the technical specification for the caissons. [Exh. 3, Tab 8] This specification was prepared by Rosser/S&W. Included in this specification were several sections relevant to this case. First was a basis for payment, as follows:

Part 1 - GENERAL...

1.2 SUMMARY...

- C. Base Bid: Base bids on indicated number of caissons; design length from top elevation to bottom of shaft; and diameter of shaft.*
- D. Basis for Payments: Payment for caissons will be made on actual net volume of caissons in place and approved. Actual length and shaft diameter may vary to coincide with elevation where satisfactory bearing strata are encountered, and with actual bearing value of bearing strata determined by an independent testing and inspecting agency. **Adjustments will be made on net variation of total quantities, based on design dimensions for shafts.** [emphasis added]*

Second, the technical specification also included provisions for mutual agreement on unit price adjustments for several items:

¹⁷ Skanska testified that Rosser provided Skanska with the locations, diameters and depths of the caissons.

¹⁸ There was no testimony as to the identity of the originator of this change in foundation design.

1.3 UNIT PRICES...

- B. *The unit prices shall be mutually agreed to by the Contractor and the Owner.*
1. *Adjustment for over-run and underrun of caisson lengths—costs/ft/caisson size.*
 2. *Installation of rock anchors base unit price on #8 dwydag embed plus shaft height—\$/ft.*
 3. ***Machine rock excavation—\$/CY.***^{19, 20}[emphasis added]
 4. *Hand rock excavation—\$/CY.*

Third, the technical specification defined three classifications of excavation, as follow:

PART 3 - EXECUTION...

3.2 EXCAVATION

- A. *Classified Excavation: Excavation is classified as standard excavation, special excavation, and obstruction removal and includes excavation to bearing elevations, as follows:*
1. *Standard excavation includes excavation accomplished with conventional augers fitted with soil or rock teeth²¹, drilling buckets, and under reaming equipment attached to drilling equipment of size, power, torque, and down thrust necessary for the Work.*
 2. *Special excavation includes excavation that requires special equipment or procedures above or below indicated depth of caissons where drilled-pier excavation equipment used in standard excavation, operating at maximum torque and down thrust, cannot advance the shaft.*
 - a. *Special excavation requires use of special rock augers²², core barrels, air tools, blasting, or other methods of hand excavation...*

¹⁹ The CPOC notes that in reading paragraph 1.3 together with paragraph 1.2, it is clear that: (1) USC agreed to pay for changes from the depth shown on the design drawings; (2) that this paragraph on Unit Prices indicated that the Base Bid does not include any "rock excavation," [all rock excavation is either "machine" or "hand," indicating that all rock excavation is not included in the base bid]; and, (3) that the only attempt to explain what "rock excavation" is appears in paragraph 3.2 on classification of excavation.

²⁰ The CPOC also notes that the parties agreed in testimony that Skanska was obligated, under its Base Bid, to provide a six-inch "rock socket", which length is deducted from the length of rock excavation that might otherwise be compensable.

²¹ After a review of the testimony of the witnesses and of the published standards of the drilled shaft industry [Exh. 3, Tab 26], the CPOC concludes that the term "conventional auger fitted with soil or rock teeth" is a term without any meaning relevant to this case and cannot be construed as a term of art. The CPOC adopts the position that there are only two types of augers—earth (or soil) and rock. Based on testimony, including pictures of the augers used by McKinney, an earth auger appears to be of comparatively lighter construction, with narrower flights (the space between the corkscrew layers), and is fitted with flat, chisel-like teeth arranged in a plane across the diameter of the auger. The earth auger's teeth are typically positioned at a common negative angle from the horizontal and remove material by a slicing action. In contrast, an rock auger is of heavier construction, with wider flights to accommodate chunks of rock, and is fitted with cone-shaped teeth. The rock auger teeth are typically pointed at different angles, presumably to provide greater efficiency in penetrating a particular material.. The rock auger removes material by penetration and fracturing.

²² USC argued that "Special Excavation" required a "special rock auger", but presented no evidence that such an item existed or that the phrase had a meaning within the industry differentiable from "rock auger." Consistent with FN 21, the term "special rock auger" is taken to be equivalent to "rock auger."

Finally, the technical specification defined some twenty-one responsibilities of the owner's testing agency with respect to field quality control, including the four items related to payment as follows:

3.5 *FIELD QUALITY CONTROL...*

B. A caisson report will be prepared by Owner's testing and inspection agency for each caisson as follows:...

- 1. Actual top and bottom elevations (determined by contractor's Registered Land Surveyor).*
- 2. Top of rock elevation.*
- 3. Description of soil materials*
- 4. Description, location, and dimensions of obstructions...*

UP-4. On or about May 1, 2003, McKinney began actual drilling operations.

UP-5. On April 18, 2001 Skanska submitted a copy of McKinney's proposed unit prices for "Earth" and "Rock" drilling to USC. [Exh. 3, Tab 38] The prices offered for "Rock" excavation were as follows:

<i>Rock</i>	<i>Price</i>
<i>30" Diameter</i>	<i>\$291.00/LF</i>
<i>36" Diameter</i>	<i>\$393.00/LF</i>
<i>42" Diameter</i>	<i>\$428.00/LF</i>
<i>48" Diameter</i>	<i>\$589.00/LF</i>
<i>54" Diameter</i>	<i>\$707.00/LF</i>
<i>60" Diameter</i>	<i>\$873.00/LF</i>

These prices are "Add" only, clearly indicating that rock excavation, other than the six-inch rock socket, were not included in the Base Bid amount.

UP-6. On July 5, 2001 USC indicated its approval of the unit prices for "Rock" excavation as proposed by Skanska on April 18, 2003 by signing the minutes of the project meeting where the issue was discussed and resolved. [Exh. 3, Tab 84] In his testimony, Mr. Robinson (the USC Project Manager) confirmed USC's agreement with the unit prices identified in those meeting minutes.

UP-7. On July 19, 2001 Skanska and McKinney executed a subcontract for caisson construction which included the agreed-upon unit prices. [Exh. 3, Tab 18]

UP-8. It is undisputed by the parties that no formal change order to the USC-Skanska contract was ever issued to include the agreed-upon unit prices for "Rock" excavation.

UP-9. It is undisputed by the parties that "Special Excavation" requires additional compensation at "Rock" unit prices.

UP-10. Neither USC's technical specification nor McKinney's proposal define the terms "Earth", "Rock", "Earth [or Soil] Auger Refusal", or "Rock Auger Refusal".

DETERMINATION–UNIT PRICES

Based on the Findings of Fact as stated above, it is the determination of the CPOC that the unit prices agreed to by USC on July 5, 2001 are a part of the contract between USC and Skanska and shall be used to calculate any damages proven by Skanska for the performance of "Special Excavation" as defined in the Contract Documents for the Project.

DISCUSSION–PERFORMANCE OF COMPENSABLE WORK

The second sub-issue to the first element of the Request for Resolution is the actual performance of work by Skanska/McKinney which meets the definition of compensable "Special Excavation" as set forth in the Contract Documents.

CLAIMANT’S POSITION–PERFORMANCE OF COMPENSABLE WORK

Skanska contends that McKinney performed "Special Excavation" as defined in the specification and that such work should be compensated at the "Rock" unit prices agreed to by USC. Skanska argues that it consistently calculated and reported compensable rock excavation to USC based on the daily reports prepared by USC's geotechnical consultants. These reports provided elevations for Earth auger refusal and bottom of the hole. Skanska contends that the contract documents do not require McKinney to physically reach earth auger refusal in order to be compensated at "Special Excavation" prices. In support of these contentions, Skanska offers the following arguments:

1. Skanska believes the meaning of the technical specification is clear and that Skanska should be paid using the "Rock" unit prices from the point of "Earth Auger Refusal" to the bottom of the hole as reported in the reports of USC's geotechnical consultants.
1. While McKinney sometimes started drilling with an earth auger and later switched to a rock auger, at other times it drilled solely with a rock auger. However, Skanska argues that McKinney used a rock auger on every hole and was always doing so after the point of "Earth Auger Refusal" as established by the field reports of USC's geotechnical engineers. McKinney testified that it did not physically reach "Earth Auger Refusal"²³ on every hole; rather, it relied on USC's own

²³ The CPOC notes that there is no testimony or evidence that McKinney ever reached the point of actual "Earth

geotechnical reports to define where "Earth Auger Refusal" was reached. Skanska argues that under the terms of the technical specification, because McKinney used a rock auger below a point designated "Earth Auger Refusal" it was thereby engaged in "Special Excavation," which is compensable at the "Rock" unit prices²⁴.

2. Skanska asserts that nothing in the caisson specification expressly states that McKinney must physically reach "Earth Auger Refusal" to establish entitlement to compensation for "Special Excavation." According to Skanska's reading, the technical specification simply states that everything after "Earth Auger Refusal" is "Special Excavation."
3. Skanska argues that the technical specification establishes that payment for "Special Excavation" will be based solely on the reports of USC's independent geotechnical engineers. Thus, Skanska maintains that regardless of what logs or other documents McKinney kept in its own records, for payment purposes McKinney's drilling logs are irrelevant.

RESPONDENT'S POSITION—PERFORMANCE OF COMPENSABLE WORK

USC contends that Skanska proposed a savings of \$490,300 if the original foundation [driven pipe piles] were changed to drilled shafts [caissons]. USC contends that Skanska's proposal included the need to drill through partially weathered rock to the point of actual auger refusal, and to require some other exceptional methods and means of excavation before the contractor is entitled to additional payment. In support of these contentions USC argues²⁵ that:

1. Both Skanska and McKinney had Volume I of the QORE geotechnical report prior to the submission of the April 6, 2001 proposal;
2. That the Qore report disclosed a layer of PWR above bedrock in all instances where the exploratory drilling reached bedrock;
3. That the parties therefore knew or should have known from the inception of the Project that they would most probably encounter PWR during the caisson excavation²⁶;

Auger Refusal" on any hole.

²⁴ Skanska's argument conveniently ignores the testimony of its own witnesses that a rock auger was used because it allowed the holes to be completed more quickly. The CPOC notes that many caissons were drilled and poured on the same day or within one day.

²⁵ The CPOC notes that much of USC's argument is more pertinent to its counter-claim of indemnification. That matter was not addressed in the hearing and is not addressed in this order. USC's indemnification-related arguments are described solely to lend context to the CPOC's decision on the specific issues before him.

²⁶ The CPOC notes that the "prior knowledge" of PWR imputed to Skanska and McKinney applies even more

4. That Skanska's proposal for caissons did not exclude any type of excavation from the scope of the quoted price;
5. That USC accepted the proposal, and Skanska executed a contract with USC on April 10, 2001 for construction of the Arena;
6. That USC issued a Caisson Specification to Skanska on April 12, 2001, Skanska gave the Caisson Specification to McKinney on April 13, 2001, and neither McKinney nor Skanska modified their caisson proposal after receipt of the Specifications²⁷;
7. That the use of any standard helical auger with rock teeth is to be construed to be within the definition of "Standard Excavation";
8. That the actual level of resistance of the in-situ material and the extent of additional or extra effort required to advance the shaft is of great significance to the claim for performing "Special Excavation"²⁸;
9. That actual drilling in the PWR took no extra or special effort and McKinney did not use any equipment or tools for drilling in the PWR different from those it used above the PWR for ordinary earth excavation;
10. That McKinney failed to show any correlation between the quantity of PWR in any particular shaft, and the time it took to drill the shaft or that the presence of PWR had any negative impact upon McKinney's productivity²⁹.

strongly to USC.

²⁷ The CPOC notes the highly irregular conduct of the parties when they agreed to a contract for caisson construction apparently without any prior agreement on the technical requirements, followed by USC's evident assumption that Skanska's silence can be equated to assent to a document not included in the original agreement. While Skanska should have informed USC of disagreements or conflicts in the Contract Documents, a request for a formal concurrence with the after-the-fact caisson specification is just one of the many "coulda, shoulda, woulda" actions by USC that might have avoided this controversy.

²⁸ Ordinarily owners are properly loathe to become involved in a contractor's means and methods, yet the caisson specification hints at performance requirement (i.e., "...necessary for the Work." "...cannot advance the shaft.") with no objective basis for judging compliance with the requirement. There was no evidence that USC ever approved McKinney's equipment as "necessary for the Work." The CPOC wonders what would have been USC's position if McKinney had chosen to use drill rigs of lesser capability than the Hughes LLDH, which presumably would have reached "earth auger refusal" sooner than the LLDH, thus increasing the amount of "rock" to be removed. This is just another example of the inadequacies of the caisson specification as a contract document and USC's administration thereof.

²⁹ The CPOC finds this argument particularly irrelevant. The caisson specification issued by USC does not say you get paid more for working harder or longer, but for the conditions you encounter. See FN 28. Nevertheless, given that McKinney had no apparent reason to assume that the caisson logs would say what they did (i.e., include a line

11. That McKinney's conventional earth auger was never taken to the point of actual refusal in any holes on this project.

FINDINGS OF FACT—PERFORMANCE OF COMPENSABLE WORK

Based on the evidence and testimony, and by the greater weight or preponderance of the evidence, with respect to the second sub-issue of the first element of the Request for Resolution, the CPOC makes the following findings of fact:

PW-1. "Partially Weathered Rock" (PWR) is a term used to define a transitional region between soil (rock which has been fully decomposed by chemical action) and relatively intact bedrock material. [Exh. 3, Tab 20A]

PW-2. On July 27, 2000 Qore, Inc. (Qore), the geotechnical consultant for the Project, submitted a report to USC entitled "Report of Geotechnical Exploration for University of South Carolina Arena." [Exh. 3, Tab 15] Sections 5.1.5 and 5.1.6 of this report contains the following information:

5.1.5 Piedmont Residual Soils

*Piedmont residual soils ...were encountered below the Coastal Plain soils. **Standard penetration resistances...ranged from 1 to 50 bpf** [blows per foot], but were typically in the order of 10 to less than 20 bpf range...* [emphasis added]

5.1.6 Partially Weathered Rock

*Piedmont residual materials **with standard penetration resistances in excess of 100 bpf** (partially weathered rock) were encountered in Borings SB1 through SB3 and B-1 through B-4 at depths...corresponding to Elevations 168 to 145 feet...**Standard penetration test resistances in the partially weathered rock ranged from 50/5" to 50/1" of penetration of the sampling device.**³⁰ [emphasis added]*

PW-3. It is undisputed by the parties that Qore's July 27, 2000 geotechnical report was provided to Skanska as part of the original bidding process. [Exh. 3, Tab 14]

PW-4. On February 27, 2001 Skanska submitted the apparent low bid for the construction of the Project. Skanska's bid exceeded USC's budget and an intensive, mutual and iterative cost reduction effort

for "earth auger refusal"), the CPOC also wonders why, if earth auger refusal was the objective trigger for a pay item, McKinney failed to raise this issue before or immediately after commencing to drill. This is just another example of the inadequacies of the Skanska and McKinney contract management effort.

³⁰ The term 50/x" refers to the depth of penetration, in inches, achieved by 50 blows of a standard penetration test device. As an example, a penetration resistance of "50/1" means that one foot of penetration would require some 600 blows, or approximately six times the effort required by the definition of PWR (100 bpf) contained in the Qore geotechnical report.

ensued. Included in this effort was the consideration of alternatives for the design of the building foundation. As a self-evident consequence of this effort, USC requested Qore to conduct additional evaluations of subsurface conditions.

PW-5. On March 30, 2001 Qore submitted a report to USC entitled "Report of Additional Geotechnical Recommendations, Volume 3, Caisson and Retaining Wall Issues." [Exh. 3, Tab 5] Section 7.1.0 of this report contains the following relevant statement:

The shaft should be drilled to rock auger refusal with a drill capable of a down force (crowd) of at least 50,000 pounds and a torque of at least 83,000 foot-pounds (Hughes LLDH or equivalent). Rock auger refusal is defined as a penetration rate of no greater than 6 inches in 15 minutes when the machine is equipped with a rock auger with carbon steel Kennametal teeth.

This paragraph later contains the following definition:

... "soil" is defined as material excavated with an earth auger, advanced by the previously recommended drilling device (standard penetration resistances assessed to be less than 100 bpf [blows per foot]). Partially weathered rock is defined as material excavated from earth auger refusal to the previously referenced rock auger refusal criteria (standard penetration resistance assessed to be greater than 100 bpf).

PW-6. It is undisputed by the parties that Qore's March 30, 2001 geotechnical report was not provided to Skanska until September 27, 2001.

DETERMINATION—PERFORMANCE OF COMPENSABLE WORK

Based on the Findings of Fact as stated above, it is the determination of the CPOC that:

1. Underlying the Project there exists an extensive subsurface layer of material referred to as PWR and that Qore indicated to USC that such material existed and would be encountered by the caisson driller;
2. That the objective geotechnical evidence is insufficient to determine, even to a reasonable approximation, the extent and thickness of the PWR;
3. That PWR exhibits a variable degree of decomposition and resistance to excavation. The ease of excavation depends on several factors, including but not limited to, the type of drilling machine, the condition of the machine, the condition of the drill bits, operator skill, the dimension of shaft (which has a very significant impact), and the number of teeth/pressure per tooth);

4. That PWR can be, but is not always, sufficiently consolidated so as to be effectively resistant to excavation by an earth auger attached to a large drill rig, such as the Hughes LLDH used in this case;
5. That Qore rendered a credible professional opinion that this degree of consolidation, i.e., "earth auger refusal", is reached at or about the point where the "blow count" of a standard soil penetration test device exceeds 100 bpf;
6. As a consequence of the inherently unpredictable results of the combination of a natural material and a particular set of drilling equipment, it is industry-standard practice for the point of refusal to be agreed upon by the field engineer and the drilling contractor at the time the hole is being drilled.
7. That Qore, and therefore USC, expected that large drilling rigs comparable in power and capability to the Hughes LLDH³¹ were required to comply with the Contract Document requirement that the caisson work be performed using "*...drilling equipment of size, power, torque, and down thrust necessary for the Work*;
8. That USC was knew, or should have known, drilling rigs comparable in power and capability to the Hughes LLDH, fitted with earth augers, could be expected to advance a shaft until reaching a material with a standard penetration resistance in excess of 100 bpf.
9. That Skanska and McKinney, as experienced contractors and drillers, respectively, were provided sufficient information by USC for a knowledgeable person, skilled in the art, to conclude that a layer such material existed;
10. That, under the terms of the Contract Documents, "Special Excavation" begins at the point where an earth auger³² attached to a large drill rig, such as the Hughes LLDH used in this case, is no longer effective in advancing the shaft³³, a point commonly referred to as "Earth [or Soil] Auger

³¹ McKinney used three Hughes LLDH throughout its performance of the Work, but in the absence of any contractual requirement that USC approve the equipment, the actual choice of drilling rig used by McKinney is not determinative of the validity of its claim.

³² The CPOC has previously rejected as meaningless the phrase "conventional augers fitted with soil or rock teeth."

³³ Without repeating the words of the Contract Documents which are quoted earlier, the CPOC makes the following points: (1) for this contract, all drilling falls into one of two categories—"standard excavation" or "special excavation"; (2) that the work of each category is defined by what is included in the definition AND by what is excluded by definition in the other category; (3) that each definition is best understood by comparing and contrasting the one to the other; (4) if "drilling equipment of the size, power, torque, and down thrust necessary for the Work, operating at maximum torque and down thrust," can advance an earth auger, then the classification is

Refusal."

11. That McKinney did, on some caissons, encounter material that would entitle McKinney to compensation for "Special Excavation"³⁴;

DISCUSSION-QUANTIFICATION OF THE CLAIM

Having determined that the contract between Skanska included rates for "Special Excavation" and that McKinney did perform such "Special Excavation", there remains the final element of this Request for Resolution—quantification of the amount.

CLAIMANT'S POSITION—QUANTIFICATION

Skanska contends that it is entitled to the payment of \$902,916.72 for "Special Excavation" on the Project. This amount includes \$821,633.31 for the costs incurred by McKinney and \$81,283.41 for Skanska's contractual markup. In support of its claim, Skanska argues the following:

1. That Skanska submitted self-styled "caisson logs" beginning on May 9, 2001. These spreadsheets presented several columns, one of which reported the amount of rock, i.e., "Special Excavation," it considered compensable under the contract. [Exh. 3, Tab 72]
2. That Skanska calculated the total rock removed as being from the top of PWR to the bottom of the hole as reported on USC's geotechnical consultants' caisson drilling reports. [Exh. 3, Tabs 28, 29 and 30).
3. That Skanska consistently reported to USC the following information regarding rock excavated. On May 9, 2001, 246 linear feet of rock had been reported. [Exh. 3, Tab 72] On May 29, 2001, 513 linear feet of rock had been reported. [Exh. 3, Tab 74] On June 13, 2001, 757 linear feet of rock had been reported. [Exh. 3, Tab 76] On June 20, 2001, 864 linear feet of rock was reported. [Exh. 3, Tab 78] On July 10, 2001, 1,070 linear feet of rock was reported. [Exh. 3, Tab 88] On July 25, 2001, 1,203 linear feet of rock reported. [Exh. 3, Tab 90] On August 1, 2001, 1,203 linear feet of rock was reported. [Exh. 3, Tab 91] On August 22, 2001, 1,794 linear feet of rock was reported. [Exh. 3, Tab 92]

"standard"; and, (5) all other excavation is "special" and entitles the contractor to compensation for "rock excavation" at the contract unit prices.

³⁴ There is an undisputed quantity of rock for which Skanska and USC agree compensation is owed. This decision does not affect either the amount or price to be paid for that undisputed quantity. The CPOC understands that this undisputed quantity has not yet been paid for, but that resolution of that matter is not before him.

4. That Skanska repeatedly expressed concern to USC over USC's failure to act on the proposed unit prices for "Rock" excavation while McKinney was proceeding³⁵;
5. That these various submissions constitute effective notice to USC of a claim for a contract modification for "Special Excavation";
6. That USC was advised by its geotechnical consultant in early July that the consultant disagreed the calculation of the amount of "Rock", but failed to inform Skanska that it disagreed with Skanska's calculation of compensable rock until late August 2001.
7. That USC took no action with respect to the field geotechnical operations to indicate they disagreed with Skanska's approach to the calculation of compensable "Special Excavation." All of the Law Caisson Inspection Reports after the date USC informed Skanska of Skanska's "misinterpretation" of the reports continued to include the "EARTH AUGER REFUSAL ELEV. (Top of PWR)" line without any modification. These reports remained in the same format throughout Law's performance of geotechnical services on the Project.

RESPONDENT'S POSITION-QUANTIFICATION

In its defense of the claim, USC makes three arguments. The first argument is that McKinney did not perform "Special Excavation" as defined in the Contract Documents. In support of this argument, USC states that:

1. The definition of "Special Excavation" as presented in the caisson specification contemplates excavation which exceeds the typical methods and means of "Standard Excavation." "Standard Excavation" requires the use of "conventional augers fitted with earth or rock teeth." "Special Excavation", on the other hand, requires "special equipment where drilled pier excavation equipment used in standard excavation, operating at maximum power, torque, and down thrust, cannot advance the shaft."
2. That the definition of "Special Excavation" is equivalent to "rock auger refusal" and any calculation of additional compensation should be based on the amount of "rock" documented on both the USC and McKinney drilling records.
3. That McKinney never attempted to drill through PWR with an earth auger and therefore never

³⁵ See, for example, Exh. 3, Tabs 49, 81 and 83.

reached a demonstrable point of earth auger refusal.

4. That McKinney's standard drilling procedure was to begin initial excavation with a standard earth auger, and switch to a rock auger at about 30 feet into the excavation. McKinney never used an earth auger below about 30 feet. In the alternative, McKinney drilled the entire hole using a rock auger.

USC's second argument is that Skanska and McKinney failed to properly document the basis for its claim. In support of this argument, USC states:

5. Based on testimony offered by Skanska's expert witness, it is common for earth augers to penetrate some distance into PWR and that the actual level of earth auger refusal cannot be predicted. There are many factors that determine where the earth auger may reach refusal in PWR, including the skill of the operator, the level of maintenance of the equipment, the type of equipment, the size of the auger, and the hardness of the PWR, among others. Without taking the earth auger to refusal, it is impossible to determine precisely where refusal would have actually occurred;
6. That according to testimony offered by Skanska's expert witness, a knowledgeable person would know earth auger refusal when he saw it, but he would have to observe it;
7. That contrary to McKinney's interpretation of the Qore and Law field reports, the geotechnical field representatives monitored the drilling to determine the top of the PWR for engineering reasons and did not attempt to determine where or whether earth auger refusal occurred;
8. That neither Skanska nor McKinney ever asked either QORE or LAW to establish where earth auger refusal did occur or would have occurred;
9. That McKinney failed to conform to industry custom, as testified to by Skanska's own expert, who stated when a rock auger is necessary to drill through PWR and the elevation of earth auger refusal is important as a pay item, the drill operator and the geotechnical inspector collaborate to agree where earth auger refusal occurs on a daily basis;
10. That contrary to the industry custom, the course of dealing on the Project was quite different. McKinney's field representatives never discussed with the USC geotechnical representatives the point of earth auger refusal or whether the material between the top of PWR to the bottom of the

hole should be a special pay item;

11. That in contrast to the lack of discussion regarding PWR, there were daily discussions and documented agreement between the McKinney superintendent and the geotechnical inspectors on the amount of obstructions or rock encountered at the bottom of the shafts;
12. That these discussions and agreements were reflected on both the Qore/Law and McKinney drilling records.

USC's third argument is that Skanska failed to give proper and timely notice of its claim as required by the Contract Documents. In support of this argument, USC states that:

13. The Contract between USC and Skanska also incorporated Supplementary Conditions; [Exh. 3, Tab 6, Article 9.1.3]
14. That written notice of a claim for additional compensation is required by the Contract between USC and Skanska; [Exh. 3, Tab 2, Article 4.3.3]
15. That written notice of a claim must be made to the Agency within 21 days of the occurrence of the event giving rise to the claim; [Exh. 3, Tab 2, Article 4.3.3]
16. That McKinney started drilling on May 1, 2001 and encountered PWR within the first week.
17. That Skanska and McKinney were given copies of the geotechnical observers daily drilling logs on a weekly basis and therefore Skanska and McKinney both knew of the actual presence of PWR no later than May 8, 2001;
18. That Skanska prepared spreadsheet recapitulations of USC's logs and provided these summaries in numerous Project meeting minutes;
19. That the summaries did not total the amount of "rock" Skanska claimed had been removed until July 10, 2001, while by comparison, they had consistently showed the cumulative variance between actual installed caisson length and the design length, which was a compensation item;
20. That the text of the summaries do not contain any written assertions to the right or entitlement to additional compensation;
21. That Skanska was fully aware of the proposed unit prices for "Rock" excavation and could have

applied those prices to the claimed variances, but did so no earlier than August 1, 2001;

22. That McKinney gave its first written notice of a claim to Skanska on October 18, 2001; [Exh. 3, Tab 60]

23. That Skanska gave its first written notice of a claim to USC on November 8, 2001; [Exh. 7]

24. That as a result of its conduct Skanska failed to provide USC with the requisite timely notice of both Skanska's claim and the magnitude of the claim.

FINDINGS OF FACT-QUANTIFICATION

Based on the evidence and testimony, and by the greater weight or preponderance of the evidence, with respect to the second element of the Request for Resolution, the CPOC makes the following findings of fact:

Q-1. That pursuant to the caisson technical specifications [Exh. 3, Tab 8], which defines both "Standard Excavation" and "Special Excavation" for pay purposes, USC bears the risk of an increase to the contract sum resulting from any "Special Excavation" required by the subsurface conditions actually encountered by Skanska and its subcontractor, McKinney.

Q-2. That "Special Excavation" commences, for this contract, at the point of "Earth Auger Refusal";

Q-3. That "Earth Auger Refusal." is not synonymous with "Top of PWR";

Q-4. That, consistent with the duties of the geotechnical engineer as defined in ¶ 3.5 of the technical specification and the definitions contained in Volume 3 of the Qore geotechnical report, the geotechnical field logs recorded the top of rock; and,

Q-5. That, consistent with industry custom, the McKinney field superintendent discussed and agreed with the determinations of the geotechnical engineer regarding the elevation of rock in any given boring.

DETERMINATION-QUANTIFICATION

The first issue to be addressed is USC's assertion that Skanska's claim is barred by virtue of Skanska's failure to provide proper, timely notice of its claim. Skanska asks the CPOC to find that its spreadsheet "caisson logs", combined with a letter of proposed unit prices, is sufficient to constitute a claim. Skanska

argued that if USC wanted to know the current value of Skanska's claim USC could have totaled the numbers of feet of rock by the appropriate unit price. USC asks the CPOC to find that it was never informed of a claim as required by the Contract Documents until some 5½ months after PWR first appeared.

Ordinarily, the CPOC is highly sympathetic to the position espoused by USC. The contract between USC and Skanska calls for timely notice. The subcontract between Skanska and McKinney obligates McKinney to provide notice of claims so that Skanska may fulfill its obligations to USC for timely notice. The purpose of notice is to permit the State to resolve situations such as differing site conditions short of the disputes resolution process, or to mitigate the cost to a contractor for a state-caused delay³⁶. The intent of notice is the furtherance of the State's independent ability to react to knowledge of the facts. Whether notice is written or constructive is not critical to achieving this intent. Rather, the question is whether a lack of notice caused any real prejudice to the State's ability to defend itself against the contractor's claim, or to limit the State's damages. Form should not be made superior to substance³⁷.

The scope of work as defined in the technical specification was the installation of a specific number of caissons of defined dimensions and locations, excavated through soil. The price requested and quoted was a lump sum. In obvious anticipation of differing subsurface conditions, USC requested unit prices for changing the length of shafts and the excavation of rock and obstructions. When additional (or deleted) work performed during the execution of a lump sum contract is performed on a unit-price basis, the unit-priced work is a modification to the scope of work as originally contemplated by the contract. Therefore, the contractual notice provisions apply to unit-price work under the USC-Skanska contract for caisson drilling.

Skanska's testimony that USC "could have run a calculator anytime it wanted to" is ludicrous to the point of insult. Skanska was engaged as a General Contractor to manage a construction contract, not to throw data over the transom for USC to puzzle out. Skanska also had calculators **and** the contractual obligation to use them. Skanska claims it could not provide USC with a proper calculation of the claim for PWR because USC did not agree to unit prices until July 5, 2001. USC's agreement or lack thereof to the unit prices is irrelevant to Skanska's obligation to timely present the USC with a claim in the amount to which Skanska believed it was entitled³⁸. As the CPOC has commented in other decisions, it is the responsibility

³⁶ Austin-Griffith, Inc. v. Goldberg, et al. 79 S.E.2d 447 (1953). (Where the contract stipulates that there must be written application of demand for extension of time, an oral demand is insufficient...As we have already said, the purpose of this stipulation [timely written notice] was to protect the defendants from stale claims for delay, which might be based on oral understandings, and made when it might be difficult to prove the facts in relations thereto.)

³⁷ Clark-Fitzpatrick, Inc./Franki Foundation Co., J.V. v. Gill, 652 A.2d 440 (R.I. 1994)

of the claimant to assemble, present and defend its claim in accordance with the Contract Documents and the Code. Put more succinctly, it is not the responsibility of the State to make a silk's purse of a claim out of a contractor's sow's ear presentation.

Nevertheless, the CPOC is very reluctant to hold Skanska to a standard of scrupulous adherence with the notice provisions of the Contract Documents when USC's own conduct in this matter runs rough-shod over numerous, equally fundamental principles of sound contract administration. Some of these have been referred to earlier, but in relation to notice, no later than July 9, 2001³⁹ USC was informed by Rosser that the amount of "Rock" drilled to date totaled some \$135,000, or about one-third the originally anticipated savings. [Exh. 3, Tab 86] USC took no action other than to defer any action until all of the work was complete⁴⁰.

To summarize the relevant Findings of Fact stated above, the CPOC holds: that USC was aware that the site was underlain with material that could resist removal by an earth auger [Qore geotechnical report, volume 3]; that USC was aware that the extent and depth of this material was unknown, but significant⁴¹; that USC was aware that its geotechnical engineer, in the final report evaluating the feasibility of caissons, and the caisson specification effectively defined drilling in this material to be "Special Excavation"; [Qore geotechnical report, volume 3] and therefore, that USC retained to itself the economic risk of the additional cost of drilling through material below the point of "Earth Auger Refusal." Finally, within eight weeks of the initial Skanska "caisson log", USC was formally advised by Rosser of a substantial cost impact to the Project. [Exh. 3, Tab 86]

USC argued that Skanska's failure to submit a claim for an amount stated in accordance with the contract constitutes prejudice to USC's interests in that USC could have reconsidered its decision to change the foundation design. No evidence or testimony was offered in support of this bald assertion. In addition, USC accepted the proposed unit prices for "special excavation" as offered and without negotiation after being advised by Rosser of the growing magnitude of Skanska's prospective charges. Lacking any

³⁸ Agencies have a fiduciary duty to the public to maintain independent oversight of actual completed work and to compare the cost of work against the project budget. To fulfill this obligation requires, in accordance with the contract, that contractors submit timely requests for price adjustments, supported by detailed cost information. An agency is being denied its opportunity to manage and direct when the contractor submits multiple notices of change (as Skanska did with its "caisson logs"), yet fails to submit timely pricing and scheduling information.

³⁹ This occurred only 4 days after USC approved the unit prices for "Rock" excavation. The CPOC is hard-pressed to believe that Rosser and USC were not aware of the potential cost consequences of USC's approval of the unit prices as originally proposed.

⁴⁰ The CPOC remains mystified by USC's lack of action. It is one thing to expect that the net change in shaft length would fluctuate as the drilling progressed. It is quite another to expect that a claim for "special excavation" (which was only an addition to the contract) would do anything but increase.

⁴¹ The soil boring logs contained in Volume 3 of the Qore report showed PWR depths of 3 to 11 feet.

evidence that USC was foreclosed by Skanska's conduct from pursuing any credible action that would have eliminated or minimized the damages due for "special excavation, the CPOC finds no merit in USC's assertion of prejudice.

In consideration of the specific facts of this case and the unique circumstances surrounding the caisson drilling effort, the CPOC holds that USC had actual knowledge⁴² that non-trivial claims for performing "Special Excavation" were a near-certainty from the initiation of the drilling effort, and should have exerted greater oversight and control of the drilling effort. It is the determination of the CPOC that USC had effective notice of the claim and that USC was not prejudiced by the lack of formal written notice.

At last we come to the seminal issue before the CPOC. At the outset of the dispute resolution process, the CPOC asked a single three-word question, "What is Rock?" Three days of hearings failed to provide testimony resulting in a coherent answer to that simple question, perhaps because this controversy is not about what is under the ground, but what can somebody get paid for digging out of it.

Skanska interprets the specification to allow payment for any point below the point of "Earth Auger Refusal," and equates that point to the first occurrence of PWR⁴³, providing it was using a rock auger at that point. Under this interpretation, the entitlement to additional payment depends solely upon the presence of PWR and the contractor's election to fit the drill shaft with a rock auger. The level of resistance encountered is of no significance under this interpretation.

USC believes that "Special Excavation" begins at the point of "Rock Auger Refusal," a point documented on the field logs of the geotechnical engineer and reflected in the McKinney field logs. This is a position already rejected by the CPOC.

While the testimony was unhelpful, the CPOC believes the written evidence, specifically Volume 3 of Qore's geotechnical report, provides a reasonable answer to the question of "What is Rock?" The CPOC holds, for the purposes of this contract: that "rock" means material possessing a standard penetration resistance exceeding 100 bpf; further, that the point of encountering this material is equivalent to "Earth Auger Refusal"; and, finally, it is also the point for the initiation of "Special Excavation." Further, the CPOC notes that while Volume 3 of the Qore geotechnical report was NOT a part of the Contract Documents (though it should have been), the terms of the caisson specification are not inconsistent with

⁴² Hoel-Steffen Const. Co. v. U.S., 456 F.2d 760 (1972) (actual knowledge sufficient in absence of notice). See generally Philip L. Bruner and Patrick J. O'Conner, Jr., Bruner & O'Conner on Construction Law § 5:105, at 154 (West 2002) and Richard J. Bednar, et al., Construction Contracting 671 (George Washington University 1991).

⁴³ The CPOC notes that while this position is conveniently the most favorable to Skanska's claim, it was discredited by the testimony of Skanska's own expert witness.

this document.

Having answered his own question, the CPOC is now faced with another—the Clara Peller-like question of "Where's the Rock?" Skanska would have the CPOC believe it is located at the top of the PWR layer, based solely on the field logs of the two geotechnical field engineers. USC would have the CPOC believe that if it is not "Rock Auger Refusal", then the location of rock could be determined only by actual "Earth Auger Refusal" on each hole.

For the CPOC to adopt the position that the State has been ill-served by every participant in the issue of the Arena foundation's design and construction is to give them far too much credit.

Skanska has petitioned the CPOC to interpret the technical specifications to allow them to establish an entitlement for specific damages based on its interpretation of documents prepared by others (the drilling logs of the geotechnical engineers), in the face of a disavowal from the authors that this was the intent of the data collected and without presenting a scintilla of evidence that such an interpretation was understood by and agreeable to USC. This position is in contradiction of the testimony of Dr. Brown, Skanska's own expert witness, who testified that industry custom requires agreement on special pay items on a daily basis. As noted above, McKinney adhered to this practice scrupulously with respect to the geotechnical engineer's documentation of rock and obstructions, an amount that the CPOC understands is approximately \$60,000. In very distinct contrast, for PWR as an element of special pay, and a claim now totaling nearly \$1 million, Skanska/McKinney chose to rely silently on its own interpretation of USC's geotechnical logs, an interpretation conveniently most favorable to maximizing a claim for damages.

USC has petitioned the CPOC to infer a obligation of the contractor (using an earth auger to the point of actual earth auger refusal on each hole) when such language is absent from the plain language of the Contract Documents as prepared and issued by USC.

The positions of the two parties are patently disingenuous. The Contract Documents say what they say, even if they do so quite poorly.

As to Skanska's petition, while the measurements of the top of PWR on each hole may be accurate, the CPOC has previously determined that they do not represent the location of "Rock" for the purposes of entitlement to special pay. As A.C. Mulford, in his classic book on the art and science of surveying says, "It is far more important to have faulty measurements on the place where the line exists, than an accurate measurement where the line does not exist at all."⁴⁴ The determination of the amount of a claim, if any,

⁴⁴ Mulford, A.C. 1912. *Boundaries and Landmarks*, New York: D. Van Nostrand Company, preface.

requires that the contractor documents and the CPOC agrees, on what exists, not what doesn't.

As to USC's position, the responsibility for the quality and clarity of its Contract Documents rests solely with USC. While independent documentation of actual earth auger refusal in each hole would certainly find "where the line is", such performance was not required by the Contract Documents and was not performed in any event. If USC wanted to have such a requirement, it could have and should have put it in the specification. Likewise, if USC wanted to pay for nothing but rock excavation after rock auger refusal, it could have said so.

The CPOC is persuaded, based the evidence and testimony, that Skanska, through McKinney, performed work to the benefit of USC and that Skanska is entitled to additional compensation for "Special Excavation." The CPOC is persuaded that this entitlement flows directly from character of the material actually encountered and the terms of the caisson specification as issued by USC. Skanska is entitled to some compensation, but how much is unknown. To be awarded, damages need not be proved with mathematical exactitude, but with reasonable certainty, provided the amount is not based on conjecture, guess or speculation⁴⁵.

Seeking a point of "reasonable certainty" upon which to base an award after having rejected the positions of both parties as to where "rock" begins, the CPOC reviewed Volume 3 of the Qore geotechnical reports and the seven boring logs contained therein that showed the elevation and depth of PWR. The data is considered to have the greatest credibility, as it is based on detailed and reproducible observations by trained personnel using standard equipment and test protocols. These data showed PWR existed in a layer from 3 to 11 feet thick, commencing at a variety of elevations ranging from 144 to 168 feet above mean sea level. These data were then compared to the drilling logs for the 17 caisson holes nearest to those borings to determine the average "top of PWR" recorded by the geotechnical engineers. The deviation in the average "top of PWR" elevation from the caisson logs and the elevation in the boring log ranged from + 1.25 feet to -25.5 feet. The CPOC's reluctant conclusion is that there is no reasonable correlation between the "top of PWR" as reported by the geotechnical field engineers in their drilling logs and the elevation of material meeting the contractual definition of "Rock". To rely on these drilling records as a basis for the award of damages to Skanska would be an exercise in impermissible speculation.⁴⁶

Absent any other alternative from the parties,

⁴⁵ See *Whisenant v. James Island Corporation*, 277 S.C. 10281 S.E.2d 794, August 31, 1981.

⁴⁶ The CPOC notes that his inability to determine "where's the rock" is consistent with the testimony of the expert witnesses, to the effect that the boring logs did not provide enough information to estimate the depth or extent of the PWR.

CLAIM DENIED

DECISION

It is the decision of the Chief Procurement Officer for Construction that by the greater weight and preponderance of the evidence, Skanska has failed to meet its burden of proof as to the amount of its damages related to the drilling of caissons on the University Arena project for the University of South Carolina.⁴⁷

Michael M. Thomas

Michael M. Thomas, PE, C.B.O.
Chief Procurement Officer for Construction

August 27, 2003
Date

⁴⁷ Based upon my determination, it is unnecessary to address USC's claim for indemnity against Skanska in the event of USC's liability. As for USC's indemnity claim for attorney's fees incurred in the initial defense of the independent action brought by McKinney, USC and Skanska have agreed to brief and argue that issue separately in the pending related matter of Skanska v. USC.

STATEMENT OF THE RIGHT TO APPEAL

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

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:
<http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] 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(4). . . . 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." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."