

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT)
OFFICER FOR CONSTRUCTION)

IN THE MATTER OF: CONTROVERSY)
GRADUATE SCIENCE RESEARCH)
CENTER)

DECISION

STATE PROJECT H27-9751-AC)
M.B. KAHN CONSTRUCTION CO., INC.)

POSTING DATE: February 3, 2000

vs.)

UNIVERSITY OF SOUTH CAROLIA)
_____)

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from M.B. Kahn Construction Company, Inc. (Kahn) on behalf of its subcontractor, Gleaton Floor Covering, Inc. (Gleaton) under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Graduate Science Research Center Project (Project) for the University of South Carolina (USC). Pursuant to §11-35-4230(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and appointed a mediator. Several specific issues were successfully resolved by the parties. A hearing was held on January 12, 2000 on the remaining issue in contention. At the conclusion of the hearing, the record was held open to permit the CPOC to review the procurement files in more detail. The hearing record was closed on January 31, 2000.

NATURE OF THE CONTROVERSY

Kahn contends that the detailed requirements of the specification for the installation of sheet vinyl flooring are contradictory and defective and that USC, acting through its Architect, Hellmuth, Obata and Kassabaum, Inc. (HOK), and Construction Manager, Southern Management Group, Inc., (SMG) has required Kahn and Gleaton to provide additional work without due compensation. USC disagrees.

FINDINGS OF FACT

1. On October 9, 1995, USC was authorized to execute a contract with SMG for project management services for the Project. The form of contract was AIA document B801/CMa-1992, with state and agency supplementary conditions.

2. On November 6, 1995, USC was authorized to execute a contract with HOK for architectural and engineering services for the Project. The form of contract was AIA document B141/CMa-1992 with state and agency supplementary conditions.
3. On April 21, 1997, USC was authorized to execute a contract with Kahn for the construction of the Project. The form of contract was AIA document A101/CMa-1992 and General Conditions in the form of AIA document A201/CMa-1992, with state and agency supplementary conditions.
4. On April 20, 1999, Gleaton submitted a request for resolution of a contract controversy.
5. On April 23, 1999, the State Engineer appointed a mediator pursuant to the requirements of §11-35-4230(3) of the Code.
6. On November 3, 1999, the CPOC declared the mediation process concluded.
7. On January 12, 2000, a hearing was held before the CPOC with all parties present and represented by counsel.

DISCUSSION

CLAIMANT'S POSITION

Gleaton contends that paragraph 3.3C of Section 09666, "Sheet Vinyl Floor Covering," of the Technical Specifications calls for this material to cut to butt tightly and this requirement guided them in the preparation of their quotation to Kahn. Gleaton argues that the plans, specifications and finish schedules for the project did not require any flooring finishes on the cabinets and casework; that HOK directed Gleaton to install integral cove base on these cabinets, which action constitutes a constructive change to the scope of work; and that the flooring was intended to be installed after the cabinetry. In support of this last contention, Kahn argues that the Pre-Bid Construction Schedule provided in the Bidding Documents defined the required sequence of operations in the basement area and that Kahn's own progress schedules, which reflected this sequence, were routinely approved without objection by SMG.

RESPONDENT'S POSITION

Through HOK, USC testified that the design intent was for integral cove base to be installed on all walls in specified laboratories, for floor penetrations to be watertight and for rubber base molding to be installed around all cabinets as trim. USC argues that although Gleaton was required to do extra work, this was a direct result of Kahn's and Gleaton's failure to follow the specified order of installation described in section 12345 of the Technical Specifications. USC argues that the plans and specifications, read in their entirety, were not defective or ambiguous; and further if there is a conflict, such conflict was patent. USC contends that Kahn, as the contractor, was responsible for his means and methods, including schedule development and compliance. USC maintains that the direction to install integral cove base on the cabinets was USC's offering of a less desirable alternative to assist a contractor who was very much behind schedule.

CPOC FINDINGS

The issues raised by this controversy are ones of contract interpretation and performance, not of law. USC entered into three separate contracts—one with HOK for architectural and engineering services, one with SMG for project management services and one with Kahn for construction services. USC is fully responsible to Kahn for the work of HOK and SMG. Kahn is fully responsible to USC for its work and the work of Kahn's subcontractors.

The question before the CPOC is simple. Does USC owe Kahn any money for the work performed by Gleaton on Kahn's behalf? To determine the answer to that question, the CPOC must first determine whether the integral cove base requirement was ambiguous, second, to determine whether the ambiguity was patent, and only if the ambiguity was not patent, to determine whether Gleaton's interpretation of the Bidding Documents is reasonable. If Gleaton's interpretation were deemed reasonable, then the rule of *contra proferentum* would operate and Gleaton would receive damages.

The issue of ambiguity turns on the clarity of the Bidding Documents, which were jointly prepared by HOK and SMG, on behalf of USC.

The Issue of Ambiguity

As the Architect of Record, HOK is responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Architect under its contract with USC. HOK is an experienced firm, well-versed in designs of research facilities and also in the policy for public construction in South Carolina. In short, the State's policy is to permit any appropriately licensed contractor to bid its projects. Because bidders' level of knowledge and experience is unknown, drawing and specification requirements must be clear and concise, and must clearly indicate the specific features or work to be provided. A designer can not assume that the contractor will include features not specifically called for and can not leave essential items to be defined during the shop drawing or construction process. In preparing its documents, a designer is expected to ensure that sections, details and dimensions are provided in sufficient quantity, clarity and detail to enable the bidder to understand what is expected, to make takeoffs of material types and quantities, and, once contracted, to prepare shop drawings and execute the construction. A designer is responsible to ensure that plans, sections, details and dimensions are coordinated one with the other and between disciplines.

HOK testified that it was their intent, in specific laboratory spaces, to have the sheet vinyl flooring extend continuously from wall to wall, turning up at the walls to form a so-called "bathtub" that would retain any spilled fluids and direct them to a floor drain. Piping and conduit penetrations would be tightly butted and sealed to achieve the desired watertight condition. It was further their intent to provide flexibility for future renovations. Therefore, the laboratory casework units, including any center islands, were to be installed on top of the flooring, with rubber base molding installed as trim.

After carefully reviewing the evidence presented, and having observed the parties' and witnesses' testimony, the CPOC finds that this design approach is be a sufficient departure from the usual construction practice as to impose upon the architect the duty of reasonable care to express his intent unambiguously in his plans and specifications. Based on a thorough review of the bidding documents the CPOC finds that if a watertight "bathtub" was in fact HOK's intent, then the plans and technical specifications fall short of expressing that intent with clarity and are therefore, ambiguous. More specifically, the CPOC notes that:

1. Technical Specifications Section 09666, “Sheet Vinyl Floor Coverings,” paragraph 3.3H describes how to install an “integral flash cove base,” but does not say where this is to occur or how high they should be. Those issues are deferred to the Project Drawings as discussed in item 4 below.
2. Technical Specifications Section 09666, “Sheet Vinyl Floor Coverings,” does not reference Technical Specifications Section 12345, “Laboratory Casework and Fixtures.” Such a cross-reference might have alerted Kahn and Gleaton that the two elements were connected in a significant manner.
3. Technical Specifications Section 12345, “Laboratory Casework and Fixtures,” paragraph 1.5.B.1 includes the sentence: “*Final floor finish shall be completed prior to casework installation.*” This is the only explicit statement that the CPOC could find in the Bidding Documents that suggested any unusual construction sequencing requirements for the flooring and casework.
4. Gleaton testified that to properly install an “integral flash cove base,” the installer must fill the intersection of the wall and floor with a triangular fillet or support strip approximately one inch on a side. This support strip prevents the vinyl flooring from being bent to the point of cracking. The CPOC concludes that the natural consequence of this chamfered condition is that floor-mounted cabinetry with typically square cornered bottoms could not be placed flush against the wall. This condition is not a field coordination issue to be resolved by the Contractor and his subcontractors. It is the responsibility of the designer to recognize a construction condition that is the direct result of his design choices and then to define the desired solution. The Project Drawings for the laboratories in question consist primarily of plans and front elevations. These drawings suggest, without further definition or dimensioning, that some form of floor-to-wall transition is required where there is no floor-mounted cabinetry. There is no reference to rubber cove base or to integral cove base on the drawings. Conversely, Drawing A820, in Detail 5, shows a cross-section of a typical lab bench installation. The bench is shown tightly butted into the wall-floor intersection, which is consistent with the fabrication and installation requirements of Technical Specifications Section 12345. There is no indication in these drawings or the cabinetry specification section

that integral cove base is required behind the base cabinets, nor is there any indication that rubber cove base is required as a trim for any base cabinets.

5. Technical Specifications Section 12345 calls for all base cabinets to be tightly fitted to walls and attached to the floors. While these are normal installation requirements, they would interfere with the integral cove base and create penetrations through the watertight flooring, potentially confounding HOK's design intent.
6. Technical Specifications Section 09000, "Interior Color and Finish Schedule," indicates sheet vinyl as the wall base material on specific laboratories. This section refers the reader to Section 12345 for cabinet finish requirements. As noted in the paragraphs above, Section 12345 does not address cove base in any way.

As Construction Manager, SMG had the responsibility to assemble and issue the Bidding Documents, including a Project Construction Schedule, which is defined in the language of A801/Cma:

2.2.11 The Construction Manager shall prepare a Project construction schedule providing for the components of the Work, including phasing of construction, times of commencement and completion required of each Contractor, ordering and delivery of products requiring long lead time, and the occupancy requirements of the Owner. The Construction Manager shall provide the current Project construction schedule for each set of bidding documents...

During testimony, Kahn argued that the SMG's Pre-Bid Construction Schedule (SMG Schedule) that was issued as part of the Bidding Documents clearly shows that the casework to be installed in the basement before the sheet vinyl flooring, rather than after. Kahn further maintained that the SMG Schedule defined the sequence of Kahn's operations, that Kahn's detailed schedules reflected this sequence and were routinely approved without objection from SMG.

SMG testified that the SMG Schedule was prepared for internal discussions with USC and was intended to confirm the feasibility of the allowed construction duration. SMG testified that the SMG Schedule was prepared without any reference to the requirements of the Technical Specifications, which reference is required by SMG's contract. SMG contends that Kahn was responsible for its means and methods of construction, including its detailed schedule. In support of this argument, SMG noted that Kahn was permitted to vary the start dates of various activities

and their duration, while SMG assessed the impact of Kahn's progress on the overall project. This argument is irrelevant to the issue of Kahn's responsibilities during the bidding process.

Considering all of the above, the CPOC finds that the SMG Schedule was not prepared in conformance with SMG's contract obligations, and it contributed materially to the ambiguity of the final Bidding Documents. Specifically, the SMG Schedule presented to bidders an excessive level of detail and a potential, if not mandatory, sequence of construction which did not reflect the sequence called for in Section 12345 of the Technical Specifications. The combination of failures by HOK and SMG created ambiguity in the Bidding Documents as a whole.

Having determined that the requirements of the Bidding Documents are ambiguous, the CPOC must determine whether that ambiguity is patent. A patent ambiguity exists where there is an obvious error in drafting, a gross discrepancy, or an inadvertent but glaring gap. In determining whether the ambiguity would have been obvious to a contractor prior to bidding, the CPOC acknowledges the existence of a reasonable standard of care for contractors. Contractors are businessmen, and in the business of bidding on State contracts they are usually pressed for time and are consciously seeking to underbid a number of competitors. They are obligated to bring to the State's attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril. However, they are not expected to exercise clairvoyance in spotting hidden or subtle conflicts in the bidding documents.

The one essential to this inquiry is whether Kahn had a duty to seek clarification during the bidding process. What is rise to this duty is not defined, but is resolved on an *ad hoc* basis of looking at what a reasonable man would find patent and glaring. Neither party has been particularly helpful to the CPOC in making this *ad hoc* determination.

USC argues that there are no ambiguities in the Contract Documents, but if there were, then such ambiguities are patent and Kahn and Gleaton bear the responsibility for its failure to resolve these ambiguities. The CPOC disagrees. Based on the greater weight and preponderance of the evidence, the CPOC finds there is ample evidence that the integral cove base requirements were not patently ambiguous. Rather, in context of the size and complexity of this \$29 million project and the level of detail included in the Bidding Documents, the CPOC finds the ambiguity subtle.

For these reasons, the CPOC finds that the ambiguity was latent and that Kahn was under no duty to seek clarification prior to submitting its bid.

Having so found, the CPOC must now address the reasonableness of Gleaton's interpretation of the requirements in the Bidding Documents.

USC's interpretation of the requirements is stated above. USC contends that Kahn and Gleaton should have recognized that these various requirements collectively presented USC's requirements for the "bathtub" flooring in the specified laboratories. What a contractor "knows" or "doesn't know" is the topic of frequent and mostly unproductive conversations at the job site. The contractor is expected to possess construction expertise (as distinguished from design or project management expertise). For the CPOC, the terms "knowledge," "recognize," and "discover," their respective derivatives, and similar terms in the Contract Documents, as used in reference to the Contractor, is interpreted to mean that which the Contractor knows (or should know), recognizes (or should recognize), and discovers (or should discover) in exercising the care, skill, and diligence required by the Contract Documents. Analogously, the expression "reasonably inferable" and similar terms in the Contract Documents is interpreted to mean reasonably inferable by a contractor familiar with the Project and exercising the care, skill, and diligence required of the Contractor by the Contract Documents.

Gleaton testified that its interpretation of the Bidding Documents, which Gleaton admitted did not include any reference to Section 12345, was that integral cove base would be required in specific laboratories and only on wall sections free of installed cabinetry. The issue for the CPOC is not whether one interpretation is more reasonable than another, but whether Gleaton's interpretation is reasonable, from the perspective of a reasonable and prudent contractor engaged in a bidding process. Given the testimony and the CPOC's evaluation of the Bidding Documents, the CPOC finds that Gleaton's interpretation of its responsibilities was reasonable.

The Assessment of Damages

The inevitability of ambiguities, contradictions and conflicts within the Contract Documents is anticipated. Article 3.2 of A201/CMA imposes a duty of performance on the contractor in this area:

3.2.1 *The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Construction Manager and Architect errors, inconsistencies, or omissions discovered...*

3.2.2 *The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.1.2.*

The Construction Manager and the Architect are also charged with the responsibility to resolve questions concerning the Contract Documents. For example, Division 1 – General Requirements, Section V – Special Conditions of the Construction Contract Documents. Subparagraph A.5 under the authorities of the Project Manager states:

5. *The Project Manager is authorized as follows:...*

5. *To resolve questions of Contract interpretation provided, however, that if the Contractor either disagrees the Project Manager's interpretation or considers that such interpretation constitutes a construction [sic] change in Contract requirements, the question shall be referred to the Architect. [emphasis retained]*

Based on the testimony and evidence presented to the CPOC, the question of the actual installation requirements were first raised by Gleaton in RFI 174, dated August 3, 1998. Gleaton posed two questions related to this controversy (with the SMG/HOK response of August 5, 1998 following):

1. *Please let me know the height of the sheet vinyl base (SV1). (4 inches high)*

3. *Will the tables in the Labs get base? (The sheet vinyl should extend up in front of all casework to form a totally watertight condition.)*

The CPOC finds the response to question 3 and the testimony to be singularly unhelpful, especially as to why HOK would issue a directive so at variance with the claimed design intent. According to the testimony, Gleaton would not begin its flooring installation work in the basement until November 30, 1998 or nearly four months after this RFI was processed. HOK testified that they offered Kahn and Gleaton two alternatives—the first to install integral cove base completely around the walls and the second as stated above. The CPOC finds that either of HOK's

alternatives requires Gleaton to perform more work than was reasonably included in Gleaton's bid to Kahn.

The CPOC notes that discussion on this item continued into October and that all parties agreed that Kahn was substantially behind schedule. The CPOC further notes that Kahn and Gleaton presented no evidence to support any claim for additional time, which the CPOC interprets to mean that this activity was not on the Project Critical Path. It was noted in testimony that Gleaton's original crew had to be supplemented with installers more experienced in the installation of integral cove base, solely for achieving the requisite quality and production schedule.

The CPOC concludes the following:

1. That HOK failed to properly define the vinyl flooring installation requirements in the Technical Specifications and on the Drawings; and,
2. That SMG prepared a Pre-Bid Schedule that conflicted with the Technical Specifications and contributed materially to the resultant ambiguity in the Bidding Document; and,
3. That Kahn and Gleaton could not reasonably be expected to infer or deduce HOK's requirements from the Bidding Documents; and,
4. That HOK's subsequent directive to install integral cove base either on the walls or on the cabinetry constitutes a constructive change to the Contract; and,
5. That Kahn, for reasons unknown to the CPOC and unrelated to this controversy, was behind schedule, causing Gleaton to perform its work on an accelerated basis, which cost, if any, is the responsibility of Kahn.

Gleaton submitted a claim for \$69,000 and 45 days in time. The request for time was unsupported by any testimony or evidence and is hereby rejected. Gleaton submitted supporting material indicating the cost of installing integral cove base is \$6.03 per lineal foot (\$1.41 for material and \$4.62 labor) plus \$4,200 for preformed corner pieces. Gleaton requests \$4.50 lineal foot for 6,000 feet of cove base, plus \$4,200 for corner pieces. Gleaton's total request supported by backup

documentation is \$31,200. There is no substantiation for the difference between \$31,200 and the claimed amount of \$69,000.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the University of South Carolina shall pay M.B. Kahn Construction Company, Inc., on behalf of Gleaton Floor Covering, Inc., the sum of \$31,200. A completed Change Order effecting this decision shall be submitted to the CPOC within thirty (30) days of the date of posting, subject to the parties' right of appeal.

Michael M. Thomas

Michael M. Thomas
Chief Procurement Officer
for Construction

February 3, 2000

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 requests a further administrative review by the Procurement Review Panel under 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 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.