

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
) )  
) )  
IN THE MATTER OF: CONTROVERSY )  
) )  
MAC’S MASONRY, INC., AND )  
MB KAHN CONSTRUCTION COMPANY, )  
INC. )  
) )  
vs. )  
) )  
FRANCIS MARION UNIVERSITY )  
) )  
PERFORMING ARTS CENTER )  
STATE PROJECT H18-9558-SG )  
\_\_\_\_\_ )

**BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION**

**DECISION**

**CASE NUMBER: 2010-018**

**POSTING DATE:  
OCTOBER 31, 2011**

This matter is before the Chief Procurement Officer for Construction (“CPOC”) pursuant to a request from Mac Masonry, Inc. (Mac) filed June 18, 2010, under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code, for an administrative review of a contract controversy over the stone masonry work for the construction of the Center for the Performing Arts (the “Project”) for Francis Marion University (FMU). (A copy of Mac’s request is attached as Exhibit “A”). Mac, a subcontractor on the project submitted this request as the alleged “Real Party in Interest”.

**PROCEDURAL HISTORY**

Pursuant to S.C. Code Ann. §11-35-4230(3), the CPOC assigned a project manager with the Office of State Engineer (OSE) to attempt to mediate a settlement between the parties. On January 7, 2011, the mediator notified the CPOC that mediation had failed. Thereafter, the CPOC commenced his administrative review pursuant to S.C. Code Ann. § 11-35-4230.

By motion dated January 24, 2011, FMU moved the CPOC to dismiss Mac’s request for resolution of a contract controversy because FMU was not a party to Mac’s masonry contract. Subsequently, the CPOC asked the parties to submit briefs on the question of Mac’s standing to bring this action. After receipt of the briefs, the CPOC reviewed applicable law and determined it was appropriate to hold his decision on this issue in abeyance until after an opportunity to obtain additional facts during a hearing on the merits.

On April 21, 2011, the CPOC conducted a preliminary conference to schedule exchange of documents, submittal of the names of potential witnesses, and a date for a hearing on the merits. As a result, the CPOC issued a Scheduling Order on April 25, 2011. However, on June 1, 2011, M. B. Kahn Construction

Company, Inc. (Kahn), the general contractor on the project, notified the CPOC that to resolve any “real party in interest” issue raised by Mac’s claim, Kahn was joining Mac in making the claim. Therefore, FMU’s motion to dismiss Mac’s request for resolution was rendered moot.

On July 12 and 13, 2011, the CPOC proceeded to conduct a hearing as a part of his administrative review on the merits of the contract controversy. At this hearing, attorneys Frank Mack and Billy Jenkinson represented Mac; attorney Robert T. Strickland represented Kahn; and attorneys Mark w. Buyck, Jr., Mark Buyck, III, and Henry P. Wall represented Francis Marion University. Present as witnesses were Jeff Newlon, Project Manager for Mac; Dale Willis, President of Willis Dimension Stone, Inc.; Malcolm Holzman, Partner in the architectural firm of Holzman Moss Bottino Architecture (HMB), the Architects on the project; and Delia Lewellis, and architect with HMB. This decision is based on the testimony and evidence presented at the hearing and on applicable law.

### **BACKGROUND**

On March 23, 2007, FMU contracted with HMB to design a performing arts center to be located in downtown Florence, South Carolina. HMB’s lead architect for the Project was Mr. Holzman, an architect with extensive experience in designing buildings using stone as a primary architectural feature. In designing the Project, Mr. Holzman researched regional materials. Mr. Holzman knew of only one stone material potentially available for South Carolina, Winnsboro Blue Granite, but the quarry had long been closed.<sup>1</sup> However, HMB’s research revealed that a Georgia stone supplier, Willis Dimension Stone (WDS), had a supply of Winnsboro Blue Granite.

HMB sent an architect to visit WDS to gather information about Winnsboro Blue Granite.<sup>2</sup> [Testimony of Mr. Holzman] After reviewing the information gathered by the architect sent to WDS, HMB specified large pieces of the Winnsboro Blue Granite for the Project cut on only the two faces forming the setting beds (i.e. the top and bottom of each stone). HMB specified split faces for the remaining four faces providing a rough surface on these faces. Mr. Holzman testified that among other reasons, HMB specified large stones with four split-faces for aesthetics. Mr. Holzman stated that large blocks look like stone as

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<sup>1</sup> Apparently, Winnsboro Blue Granite blocks have not been quarried for years or even decades. However, prior to World War II the stone was used on a number of different Buildings. The stone is reputed to have been used in the construction of the State Capitol Building. The Rockton and Rion Railroad Historic District, Fairfield County, contained or contains a number of buildings constructed with this stone. The stone was also reputedly used in the construction of the 25-story Land Title & Trust building in Philadelphia, PA and the famous Flat-Iron building in Times Square, NYC.

<sup>2</sup> For brevity’s sake, the CPO refers to the Winnsboro Blue Granite as simply “the granite” throughout this document.

opposed to concrete and split-faces highlight the natural color of the stone. The resulting rough appearance in the granite portion of the completed structure was a desired result of the design and a principal architectural feature of the Project.<sup>3</sup>

The Project specifications contain general and specific requirements regarding the stone masonry. [See Ex. 1 pp. 17 – 36,<sup>4</sup> Specification § 04400 – Exterior Stone Cladding.] The general stone masonry requirements at issue in this dispute read as follows:

### 1.7 FABRICATION AND ERECTION TOLERANCES

#### A. Tolerances are as follows

1. Except as noted, all joints shall be 3/8".
2. Stone dimension tolerance shall be +0, -1/16" in both directions with 90 deg. angle for all corners.

#### B. Variation From Plumb: For lines and surfaces of walls and arrises, do not exceed 1/8" in 20 ft. max. For external corners, expansion joints and other conspicuous lines, do not exceed 1/8" in any story or 20 Ft. max.

### 3.3 SETTING STONE

- h. Every stone shall be set in full beds of mortar with all joints slushed full. All joints shall be 3/8" unless otherwise noted.

[emphasis added]

Specific granite stone block requirements at issue in this dispute read as follows:

### 2.1 STONE

- A. Stone Type A Granite Block shall be Winnesboro [sic] Blue Granite as provided by Willis Dimension Stone, Inc. or approved equal only of prior to bid [sic] and meets characteristics of material that is basis of design.
- B. Granite stone blocks to be split face front/back, sawn top and bottom and split sides. Verticals are split +/- 1" variance top to bottom.

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<sup>3</sup> Another stone featured in the project is White Cherokee Marble grave markers from Georgia. These stones were cut for the federal government as grave markers. Each grave marker was cut into multiple stones for use on this Project. The curved pieces of stone cut from the tops of the grave markers form a distinctive feature in the fabric of the building.

<sup>4</sup> Each page of Exhibit 1 is "Bates Stamped" starting with MMI 00001. For convenience sake, the CPOC has omitted the MMI and zeros preceding the actual page number throughout his decision.

The Project specifications and drawings required mock-ups of the exterior wall cladding. [Ex. 1, pp. 5 – 16 and Drawing Sheet A-535] Part 1.4(G)(1) of the Mock-Ups specifications set forth the following requirements:

Before ordering the job requirements of any materials for construction of work of sections or of assemblies requiring mock-ups, the Contractor is advised that he shall obtain approvals of the following:

- a. Material(s).
- b. Mock-up.
- c. Shop Drawings.
- d. Method of Installation, including quality standard that pertain.

[Ex. 1, p. 8] Further, Part 1.3(E) & (F) provided that mock-ups “are intended for review and to set standards of workmanship for all portions of assemblies demonstrated.” [Ex. 1, p. 6]

FMU advertised for bids to construct the project and received bids on October 16, 2008. Kahn submitted the lowest responsive and responsible bid. Sometime after December 10, 2008, FMU executed a contract with Kahn wherein Kahn agreed to construct the Project for a fixed sum in accordance with the Plans and Specifications prepared by HMB. [Ex. 2 Tab 1] Sometime after January 19, 2009, Kahn entered into a subcontract with Mac wherein Mac agreed to perform the masonry work for the Project for a fixed sum and in accordance with the Plans and Specifications. [Ex. 2, p. 152 and Ex. 9<sup>5</sup>]

### DISCUSSION

In its request for resolution filing, Mac’s claims it and Kahn were entitled to compensation for additional work performed on the Project due to deficient plans and specifications. Specifically, Mac claims both that the “specifications are deficient regarding tolerances for head joint” and that FMU, through HMB, issued a directive regarding the head joint<sup>6</sup> that was a constructive change to the contract. Regarding the latter claim, Mac asserts HMB directed that granite stone “joint width should be consistent and should not exceed 1-1/4.” Mac further claims this alleged constructive change was also a commercially unreasonable standard in violation of SC Code Ann § 11-35-30.

At the hearing, Mac failed to set forth in a clear manner why it believed the original plans and specifications were defective with respect to the head joints. In arguing regarding the constructive change, Mac seemed to now argue that the original plans and specifications were adequate and it was HMB’s

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<sup>5</sup> While the date of the subcontract is December 29, 2008, the record reflects that Mac and Kahn were still negotiating terms of the subcontract as late as January 19, 2009.

<sup>6</sup> A head joint is the joint between the vertical ends of two stone blocks.

subsequent directive regarding the head joint that created problems and this directive was defective. In this regard, Mac argued that the 3/8" joint tolerance in the original specifications was a minimum joint width requirement which when combined with +/- 1" top to bottom tolerance on each head end of each stone block meant each joint could vary anywhere from 3/8" in width to 2 3/8" in width. In support of this interpretation, Mac further argued that the original specifications did not provide for any onsite working of the stone to make it fit. Mac argues, therefore, it should have been able to take the stone right off the truck one by one and place each stone into the stone wall in the order that they came off the truck and meet all the head joint requirements without any working of the stone with a hammer or saw. This could only be accomplished if the plans and specifications provided for head joints as wide as 2-3/8". Finally, Mac contended that by directing that the head joints not exceed 1-1/4" joint, HMB tightened the joint specifications and forced Mac and the stone supplier to cut numerous stone blocks that they would not have otherwise had to cut. Contrary to Mac's argument, the CPOC first finds and the record shows that the plans and specifications did not provide for head joints as wide as 2-3/8" and that the directive for a 1-1/4" head joint was a change that relaxed the requirement of the plans and specifications making performance easier, not harder.

By way of explanation, a 3/8" joint tolerance requirement appears in two Parts of the specifications, Part 1.7(A) and Part 3.3. Part 1.7 is a set of general fabrication and erection tolerances for stone. However, when reading Part 1.7 in conjunction with Part 2.1, which provides specific tolerances for the two stone types, a readily apparent discrepancy appears and the only reasonable interpretation is that the general tolerances in Part 1.7(A) were intended to apply to stone that is cut on all six surfaces, not split face stone such as the granite. For example, Part 1.7(A)(3) provides for a stone face flatness tolerance of +0 to -1/16" in all directions. However, the specifications for the granite in Part 2.1(B) provide for split faces with a +/-1" variance top to bottom. The split face granite simply could not meet the tolerance requirements of Part 1.7(A)(3). Likewise, the stone dimension and thickness tolerances of Parts 1.7(A)(2) and 1.7(A)(4) conflict with the split face granite tolerances of Part 2.1(B). Because Part 2.1(B) provides tolerances specific to the granite, these tolerances control over the general tolerances of Part 1.7(A). Therefore, the CPOC finds that Part 1.7(A) does not apply to the granite block; accordingly, Part 3.3 and Part 2.1(B) controlled the granite in the original specifications.

Part 3.3 provides specific requirements for setting the stone blocks. Part 3.3(H) provides that all joints "shall be 3/8" **unless otherwise noted.**" [emphasis added] Therefore, this 3/8" joint requirement applied to the head joints of the granite block unless the plans and specifications provided otherwise elsewhere. The record shows that at the beginning of this project Mac interpreted this 3/8" joint requirement as

applying to the head joints of the granite.<sup>7</sup> On March 18, 2009, months before starting the stone masonry work, Mac submitted a Request for Information (RFI) to Kahn asking the Architect to “[p]lease consider revising the granite to have sawn sides like the tops and bottoms in lieu of split sides as specified.” Mac further stated that 3/8” head joints cannot be maintained with split sides.” [Ex 1, p. 37] Obviously, at that time, Mac did not believe the plans and specifications provided for a different joint size elsewhere and therefore, concluded the head joints had to be 3/8”, not anywhere from 3/8” to 2-3/8”.<sup>8</sup> In response to Mac’s request, HMB notified Mac that the joints for the granite should be 1/2”, a directive that was easier to achieve than the 3/8” joint. [Ex. 1, p 38]

The issue of the joint tolerance next arose on August 25, 2009, when HMB reviewed the mock-ups of stone masonry. Pursuant to the specifications, the purpose of the “mock up” was to establish the proper standard of workmanship and the expectation of the parties as to the quality of work. [Ex. 1, pp. 40 - 42] As a result of this review, the CPOC finds that HMB decided to relax the joint requirements yet again, as allowed by the specifications, and directed that the joint width for the granite blocks “should be consistent and should not exceed 1-1/4”.” [Ex. 1, pp. 40 - 42]. On September 23, 2009<sup>9</sup>, Mac responded to the HMB’s directive with a letter to Kahn putting Kahn on notice that Mac intended to submit a claim for additional costs related to field cutting the granite to meet the head joint requirements. [Ex. 1, p. 43] In its response, Mac noted it first raised this issue in its March 18, 2009, RFI wherein Mac complained about the 3/8” joint requirement. Mac further stated that “at that time we were aware from the granite provided already that a split granite head joint meeting the Architect’s width and tolerance requirements was not realistic.” In short, Mac did not consider the 3/8” head joint set forth in the specifications to be realistic and was now putting HMB and FMU on notice that it did not consider the relaxed 1-1/4” head joint to be realistic either.

At the hearing, Mac also argued that the plans and specifications did not contain an express requirement to field work or dress the stone and therefore, Mac should have been able to construct the granite walls without field working or dressing any of the granite. On the other hand, HMB advised Mac before the start of work that in order to meet the joint requirements, Mac would need to take care to select stone which fit well with adjacent masonry. [Ex. 1, p. 41] HMB further advised Mac that if “two protrusions on facing stones occur, masonry hammer should be used to eliminate some of the protrusions.” [Ex. 1, p. 41]

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<sup>7</sup> Much later in the project, Mac changes its interpretation of the specifications to require a 3/8” joint to an interpretation that the specifications required a 2” joint. [Ex1, p. 87]

<sup>8</sup> Mac’s attempt to now argue that a head joint up to 2-3/8” is a reasonable interpretation, when it did not even interpret it that way initially, is disingenuous.

<sup>9</sup> The record indicates that Mac started or intended to start construction the day after September 7, 2009 (Labor Day).

Moreover, at the hearing, FMU argued and both Mr. Holzman and Ms. Lewellis testified that the plans and specifications as well as the nature of stone masonry using split face stone required Mac to field select, work and dress the stone to meet the joint tolerances of the specifications.

In support of its argument that any fieldwork or dressing of the stone necessary to meet the joint requirements was extra work, Mac pointed to Section 04400, Part 1 - 1.2(A), which reads in part as follows:

The Work of this Section includes all labor, materials, equipment and services necessary to complete the exterior stone cladding as shown on the drawings and/or specified herein, including, but not limited to, the following:

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2.Furnishing, cutting, fabricating, delivery, and setting all stonework.

[emphasis added]

Mac argued that because the word “cutting” comes before the words “fabricating” and “delivery”, the reasonable interpretation of the specification was that any cutting that was necessary would occur at the stone suppliers shop prior to fabrication and delivery. However, Mac’s interpretation of this provision appears to be too narrow and unreasonable. The language states that the list of anticipated work is not exhaustive. Clearly this section required Mac to provide all labor, materials, equipment, and services necessary to set the stonework. Therefore, if labor, materials, equipment, and services were necessary to prepare the granite in the field in order to set it in accordance with the specifications, this labor, materials, equipment, and services was included in the contract.

The CPOC finds that the specifications advised bidders that the vertical splits of the granite would vary from top to bottom by +/-1”. They also advised bidders that joints could not exceed 3/8”. From this, it is obvious that you cannot set a stone that has a 1” protrusion at the top left head end next to another stone that has a 1” protrusion at the top right head end and achieve the joint tolerance. You have to flip the stone over, select another stone, or work the stone by knocking off the protrusion. In other words, it is obvious from the specifications that one could not just slap the stones in place and expect to achieve the joint requirement, but that fieldwork and stone dressing would be necessary to select and/or work stones in order to achieve the specified joint.

At the hearing, Mac and Kahn also raised issues with the granite columns that were not clearly set forth in the request for resolution of a contract controversy. One of these issues appears to be related to head joints in the columns and is within the scope of the request. However, the remaining issues appear to be issues not raised in the complaint at all. Normally, the CPOC would dismiss an issue not raised in the

request for resolution. However, in this case FMU did not object and was prepared to address this additional issue. The CPOC also notes that deadline for Kahn to file an additional request has not yet tolled and if the CPOC dismisses this matter Kahn may file an additional claim resulting in a new and redundant hearing on issues already argued by all parties. Therefore, the CPOC finds it appropriate to consider these additional claims.

On September 29, 2009, Mac sent a letter to Kahn setting forth a list of issues they were allegedly having with the granite. [Ex. 1, p. 45] In addition to the head joint issue previously raised, this letter noted an issue with granite stone veneer around three sides of structural columns along the exterior walls of the building. The drawings show a number of granite columns. For purposes of this decision, the CPOC refers to the veneered side of the column that is parallel to plane of the wall as the face of the column.<sup>10</sup> In the documentation, the parties often refer to the two veneered sides of the column that are perpendicular to the plane of the wall as returns because they return into the plane of the stone wall. [See Ex. 1, p 112, for an example of the side of a column]. The CPOC adopts this convention. Generally, for every other course of stone in the face of the column, the head ends of the return stones are exposed; and on each intervening course, they are not. In the latter case, the face stone extends the full width of the column covering the head end of the return stones. [See Ex. 1, p. 110, for an example of the face of the column] On a 36" wide column the face stone on one course would be nominally 36" wide and on the next course, nominally 26-1/2" wide. This latter stone would be set between the two return stones on either side.

During the course of the project, Mac raised an issue not set forth in the complaint with both the face stones and the return stones and the difficulty of obtaining uniform line along each arris<sup>11</sup> from the top to the bottom of each column unless one sorts, selects, and works stones carefully. [Ex. 1, p. 45] This difficulty results from the +/- 1" variance for the split sides of each stone. A nominal 36" face stone could vary anywhere from 35 to 37 inches in width. On a course of stone where the face stone extends the full width of the column, the end of the face stone could extend beyond the face of a return stone at one point and be set back from the face at another point. On the next course, a return stone with an exposed head end on the face side of the column could be flush with the face of the face stone at one point, protrude beyond the face at another point, and be set back from the face at yet another point. [See Ex. 1, p. 118] Saw cutting the head ends of these stones would provide a more even line but would result in undesirable exposed saw cuts. However, the record does not indicate that FMU or HMB ever directed a change

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<sup>10</sup> Depending on the location, the face widths of the columns vary. Mac's letter specifically refers to columns with a face width of 3'.

<sup>11</sup> An arris is the sharp edge or exterior corner formed by the meeting of two surfaces.

regarding the column veneer stones with exposed head ends nor does the record reflect that Mac incurred or performed extra work related to these stones.

Mac also raised an issue with the column stones that did not have exposed head ends and the joint tolerances for these ends. Consider a face stone set between two return stones. [Ex. 1, p. 113] Unless one sorts, selects, and works stones carefully, the variances on the sides of the face stone between the two return stones could make it difficult to meet the joint requirements. Likewise, consider a return stone. [Ex. 1, p. 107] Unless one sorts, selects, and works stones carefully, the variance in the head end of a return stone set behind a face stone could make it difficult to achieve the joint requirements.

While the record does not reflect that HMB or FMU agreed with Mac that the work necessary to maintain the head joints requirements in the columns was extra work, representatives of Mac, Kahn, HMB, and FMU met with the stone supplier, WDS, at the supplier's facilities to discuss the issue. [Ex. 1, pp. 52 – 53] At this meeting, WDS agreed to saw cut both head ends of the face stones that were to be set between two return stones at no additional cost, provided these stones were not less than two linear feet in width. [Ex. 1, p. 55] Additionally, WDS agreed to cut the return stones on one head end for a fee. However, the record does not indicate that either HMB or FMU requested this change or agreed to pay for any charges by the supplier resulting from this change. It does appear HMB and FMU did not object to this change, which made Mac's task easier. At the same time, Mac presented no expert testimony on this claim and failed to prove upon the preponderance of the evidence that it was impossible to meet the joint specification without these cuts.

The CPOC finds that the plans and specifications combined provide sufficient guidance for the construction of the columns. Moreover, the CPOC finds that examining the stone specifications along with the drawings, the issues the split face granite would create with the columns are apparent and should have been apparent to a skilled stonemason. In other words, it should have been apparent to a skilled stonemason preparing a bid that a significant amount of fieldwork selecting, chipping, and working stones would be required to meet the joint requirements and construct a reasonably plumb column.

At the hearing, Mac and Kahn cursorily raised an additional complaint regarding the return stones in the columns not set forth in the request for resolution of a contract controversy. Each of these stones returns into (intersects) a marble wall. [Drawing Sheet 520, Detail 6] Mac claims that in order to maintain an even joint line along this resulting inside corner, it was required to field notch the face of each granite return stone in the column. [Ex. 1, pp. 61, 67, 71 & 105] However, this need to notch the granite return stones appears to be a result of the sequence of construction that Mac decided to follow, a decision that

was solely Mac's. [See Field Report No. 34, General Site Observations: Area 7, Item b.] For reasons that are not clear, Mac apparently decided to construct the recessed marble walls before installing the split face granite rather than the other way around. As a result, the edge of the marble intersecting the granite would be relatively uniform whereas the granite stones that that intersected and recessed into the marble wall were not. Therefore, to inset this return stone, Mac needed to notch the face to provide a smooth edge. Had Mac place the granite stones first and then constructed the wall, Mac would have needed to cut marble stone along this intersection to fit the contour of the face of the return stone. In either case the need to cut either the marble or the granite in order to meet the joint specifications was apparent from reading the specifications together with examining the drawings.

In short, Mac claims that HMB's directive that the head joints for the granite block should be consistent and no more than 1-1/4" was commercially unreasonable in violation of SC Code Ann § 11-35-30. This statute reads as follows:

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

Mac makes this argument on the assumption that the specification allowed head joints up to 2-3/8" wide and that HMB acted in bad faith by directing a joint of 1-1/4". However, the CPOC has already found that the specifications called for a head joint no greater than 3/8" wide and that by directing a 1-1/4" head joint, HMB loosened the requirements of the specification and made Mac's job easier.

If Mac is arguing that the specifications as written are commercially unreasonable, it first appears to the CPOC that this is an issue that could have and should have been raised prior to bidding via an inquiry or a protest of the solicitation. No one protested the solicitation and Mac did not present any evidence that it or any other mason made an inquiry regarding the stone specifications prior to bidding. Regardless, Kahn and Mac failed to prove that any of the granite specifications or the relaxed changes, which are the specifications at issue before the CPO, were commercially unreasonable and that FMU breached its implied warranty. It is well settled law that a party furnishing specifications and plans for a contractor to follow thereby implied warrants their sufficiency for the intended purpose. *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). Generally, to prove a claim for breach of implied warranty, the party with the burden of proof must establish the standard of care and the deviation thereon by presenting expert testimony. See *Tommy L. Griffin Plumbing and Heating Co.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002).

Kahn and Mac failed to present any evidence of commercial unreasonableness at the hearing. Indeed, Kahn and Mac failed to present any witness that could qualify as an expert on granite stone masonry and/or commercially reasonable standards for specifying split face granite masonry. Kahn and Mac's primary witness, Mr. Newlon, testified that while he had experience with stone masonry, it was not with granite and he had never worked with this particular type of granite. Mr. Newlon did testify that Mac had people on the project who were experienced with granite masonry but Mac did not present any of these individuals as witnesses. The only other witness Kahn and Mac presented on their behalf was Mr. Willis with WDS, the supplier of the granite. However, Mr. Willis was not a stonemason nor was he a credible witness.

While Mac argued in its opening statement that the head joint specifications were impossible to meet, Kahn and Mac presented no evidence of impossibility. Moreover, the Project records reflect that Mac did not claim during the course of the project that the joint requirements were impossible to meet but that they were very difficult to meet. When a contractor, or a subcontractor, contracts to do something that is capable of being done, he is bound to do it no matter how difficult. The South Carolina Supreme Court has explained it as follows:

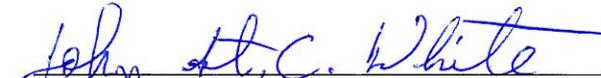
[T]here is always an element of chance [in contracts], an awareness of uncertainty and a conscious ignorance of the future. A bidder estimates its chances and fixes the compensation accordingly. It assumes a risk...The Contractors, having entered into a solemn agreement, must abide by the terms thereof. They took a risk for consideration, and have no right to call upon the courts to protect them against the consequences of erroneous judgment formulated by their own carelessness and failure to make adequate tests and investigation prior to bidding.

*L-J, Inc. and Eastern Contractors, Inc. v. SC State Highway Department*, 270 S.C. 413, 242 S.E.2d 656 (1978). The CPOC agrees with Kahn and Mac that this was a very difficult specification, which demanded a lot of effort on the part of the mason. As previously stated, this difficulty is apparent from an examination of the bid documents and was not ambiguous. Therefore, Kahn and Mac cannot recover from FMU because Mac underestimated the difficulty.

### **DECISION**

Kahn and Mac bear the burden of proving their claims upon a preponderance of the evidence. Kahn and Mac failed to present any witness that could qualify as an expert on granite masonry and did not prove its claims that FMU breached its implied warranty on the sufficiency of the specifications by a preponderance of the evidence. Therefore, the CPOC denies Kahn and Mac's claim that the specifications

were defective and FMU breached its implied warranty. The CPOC further denies Kahn and Mac's claim that they performed additional work as a result of a constructive change. Accordingly, Kahn and Mac did not perform extra work and are not entitled to be additionally compensated.

  
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John St. C. White  
Chief Procurement Officer for Construction

  
\_\_\_\_\_  
Date

Columbia, South Carolina

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Contract Controversy Appeal Notice (Revised July 2011)*

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

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

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

**FILING FEE:** Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**EXH. A**

Reply to Columbia  
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fmack@richardsonplowden.com

June 18, 2010

**Via Hand Delivery:**

Mr. John St. C. White, P.E.  
State Engineer & Chief Procurement Officer for Construction  
1201 Main Street, Ste. 600  
Columbia, SC 29201

RECEIVED  
OFFICE OF STATE ENGINEER  
JUN 18 2010

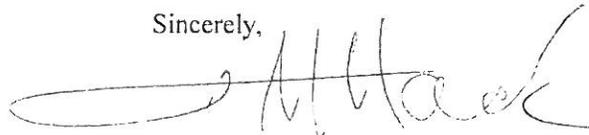
**RE: Request for Resolution by Mac's Masonry, Inc.  
Project: Francis Marion University/Performing Arts Center  
State Project No.: H18-9558-SG  
Our File No.: 7606-001**

Dear Mr. White:

Enclosed please find enclosed a Request for Resolution by Mac's Masonry, Inc., regarding the above project.

With kind regards, I am

Sincerely,



FRANCIS M. MACK

FMM/srm

cc: W.E. Jenkinson, Esquire (w/ enc.)  
Charles B. Jordan, Esquire (w/ enc.)  
Delia Lewellis (w/ enc.)  
Mark. W. Buyck, Esquire (w/ enc.)

DMP JMS

RECEIVED 25 JUN 2010

STATE OF SOUTH CAROLINA        ) BEFORE THE STATE ENGINEER  
  )  
COUNTY OF RICHLAND            )  
  )        **REQUEST FOR RESOLUTION**

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**Project:**                   Francis Marion University  
                                  Performing Arts Center  
                                  Florence, SC

**State Project No.:**   H18-9558-SG

**Prime Contractor:**   M.B. Kahn Construction Company, Inc.

**Sub-contractor:**      Mac's Masonry, Inc., as Real Party in Interest

Mac's Masonry, Inc., (hereinafter "Mac's"), as Real Party in Interest, requests that the State Engineer, as Chief Procurement Officer for Construction, issue a determination that M.B. Kahn and Mac's Masonry are entitled to compensation for additional work performed on the above project as a result of deficient plans and specifications.

The basis for this request is as follows:

1. Francis Marion University entered into a contract with M.B. Kahn on November 20, 2008, for the construction of the new Performing Arts Center (the "Project");
2. The contract amount was \$28,132,988.00;
3. The plans and specifications for the Project were prepared by Holzman Moss Architecture of New York, NY;
4. The contract included installation of Exterior Stone Cladding as set forth in Section 04400 of the specifications;
5. M.B. Kahn entered into a sub-contract with Mac's on December 29, 2008, for the installation of Exterior Stone Cladding, among other items of work;
6. Mac's sub-contract amount for all work, including the exterior stone cladding was \$2,845,406.00;
7. The specifications required that granite to be used for the Project would be supplied by:

Willis Dimension Stone, Inc.  
P.O. Box 6404  
Elberton, GA 30635

- as set forth in Paragraph 2.1.A of Section 04400 of the specifications;
8. The specifications are deficient regarding tolerances for head joints and in materials supplied by the designated manufacturer of the granite blocks;
  9. Paragraph 04400 – 1.7.A.1 specifies that all joints be 3/8”, except as noted;
  10. Paragraph 04400 – 1.7.A.2 specifies that stone dimension tolerance shall be +0, -1/16” in both directions;
  11. Paragraph 04400 – 2.1.B specifies that granite stone blocks will have split sides with allowed variance of +/- 1” top to bottom;
  12. Paragraph 04400 – 3.3.H specifies that all joints shall be 3/8”, unless otherwise noted;
  13. The specified supplier of the granite blocks, Willis Dimension Stone, Inc., provided blocks to meet the requirements of Paragraphs 04400 – 2.1.B, with variation on the sides ranging from +1” to -1” top to bottom. This resulted in head joints with widths ranging from 0 – 2” under the terms of the contract;
  14. During the mock-up stage, the Architect directed that “joint width should be consistent and should not exceed 1¼”;
  15. The Architect’s direction constituted a change to the contract;
  16. In order to comply with the change to the contract directed by the Architect, Mac’s and the stone supplier were required to cut numerous stone blocks in order to achieve a consistent joint width not exceeding 1¼” ;
  17. Mac’s and M.B. Kahn notified the Architect as the Owner’s representative of the increased cost for the cutting of the granite blocks;
  18. Mac’s and MB Kahn complied with the Architects directive;
  19. Mac’s incurred cost of \$226,065.00 in performing the additional work;

20. Mac's presented its claim for an adjustment to the contract as required by its sub-contact with M.B. Kahn and M.B. Kahn's contract with Francis Marion University;
21. The architect and Francis Marion University have failed to act upon the request within the time period provided in the contract;
22. S.C. Code § 11-35-30 requires that reasonable commercial standards be applied in all construction contracts
23. Requiring a consistent joint width not exceeding 1¼" when the specified material has an allowable variation of +/-1" is not in accord with reasonable commercial standards;
24. Mac's and M.B. Kahn are entitled to recover the additional costs incurred in complying with the changed specifications for the width of the head joints on the granite blocks;
25. Mac's, as a Real Party in Interest, requests that the State Engineer, as Chief Procurement Officer for Construction, make a determination that the contract between Francis Marion University and M.B. Kahn be modified to increase the contract price by \$226,065.00, plus 10%, pursuant to Paragraphs 3.77 of Section 00811-OSE, Standard Supplementary Conditions, for a total of \$248,671.50; and
26. This request is being filed within one year of the date the contractor last performed work on the Project.

RICHARDSON PLOWDEN & ROBINSON, P.A.



Francis M. Mack, Esquire (S.C. Bar No.: 3505)  
Emily R. Gifford, Esquire (S.C. Bar No.: 72785)  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400  
Facsimile (803) 779-0016

~and~

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W. Jenkinson, III, Esquire  
Jenkinson Jarrett & Kellahan, P.A.  
P.O. Drawer 669  
Kingstree, SC 29556  
(843) 355-200  
Facsimile (843) 355-2010  
**ATTORNEYS FOR MAC'S MASONRY, INC.**

June \_\_\_\_\_, 2010