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Contract Controversy Decision

Matter of: Consensus Construction & Consulting, Inc. v. Horry-Georgetown Technical College
Horry-Georgetown Technical College v. North American Specialty Insurance Company

File No.: 2015-003

Posting Date: March 15, 2016

Contracting Entity: Horry-Georgetown Technical College

Project No.: H59-N738-CA

Description: Exterior Signage

Appearances:

Steven L. Smith, Esq., and Dan Terry, Esq., for Consensus Construction & Consulting, Inc.
Henry P. Wall, Esq., and Caitlin Heyward, Esq., for Horry-Georgetown Technical College.
Steven H. Elizer, Esq., for North American Specialty Insurance Company.

DIGEST

In claims and counterclaims arising from a contract to furnish and install monumental and directional signage, contractor properly terminated the contractor; agency is liable to contractor for amounts withheld without justification and for extra work it directed contractor to perform; contractor may not recover interest and attorneys' fees; agency failed to prove damages resulting from contractor's alleged breach; and agency failed to establish performance bond surety's liability.

BACKGROUND

Horry Georgetown Technical College (HGTC, or the College) issued an invitation for bids for fabrication and installation of exterior monumental signs and directional signs in accordance with plans and specifications prepared by SGA Architecture (SGA). Consensus Construction & Consulting, Inc. (Consensus) was the lowest responsive and responsible bidder. On or about

November 29, 2012, the College and Consensus signed a construction contract (the Contract). Consensus, as principal, and North American Specialty Insurance Company (NASIC), as surety, furnished a performance bond identifying the College as obligee. Consensus subcontracted with Jones Signs (Jones) to fabricate and install the signs. Neither Consensus nor Jones raised any concerns with the specifications for the signs before bidding.

During the course of performance, the parties began to dispute their respective duties and obligations. Subsequently, Consensus filed a request for resolution of a contract controversy. In a verified complaint Consensus alleged that HGTC wrongfully denied change order requests; failed to pay Consensus for work it performed; acted in bad faith by threatening or otherwise coercing Consensus to waive claims or perform work outside the contract scope; and breached the implied warranty of plans and specifications. Alternatively, Consensus claimed substantially the same damages under a *quantum meruit* theory of recovery. Consensus also demanded interest at the legal rate and attorneys' fees. HGTC responded with an "answering statement, counterclaim, and third party claim" (against NASIC). The College alleged that Consensus performed defective work; abandoned the contract before completing the work; and failed to provide a warranty required by the contract. HGTC claimed over \$450,000 in damages, for which it alleged both Consensus and NASIC were liable.

DISCUSSION

The entirety of the dispute between the parties derives from issues regarding the aesthetic effect of both the monumental signs and the directional signs. AIA Document A201 – 2007, General Conditions of the Contract for Construction, is a part of the Contract. Section 4.2.13 of the General Conditions states:

The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

HGTC relies heavily on this provision in support of its defense and its claims.

Monumental Signs

The following specifications for the monumental signs are relevant to this dispute:

SECTION 101400 - MONUMENTAL SIGNAGE

1.7 WARRANTY

A. Special Warranty: Manufacturer's standard form in which manufacturer agrees to repair or replace components of signs that fail in materials or workmanship within specified warranty period.

1. Failures include, but are not limited to, the following:
 - a. Deterioration of metal and polymer finishes beyond normal weathering.
 - b. Deterioration of embedded graphic image colors and sign lamination.

2. Warranty Period: Five years from date of Substantial Completion.
3. Clear Coat Finish Warranty Period (Monument Signage): Ten years from date of Substantial Completion.

2.5 FINISHES, GENERAL

A. Comply with NMMM's "Metal Finishes Manual for Architectural and Metal Products" for recommendations for applying and designating finishes.

B. Protect mechanical finishes on exposed surfaces from damage by applying a strippable, temporary protective covering before shipping.

C. Appearance of Finished Work: Variations in appearance of abutting or adjacent pieces are acceptable if they are within one-half of the range of approved Samples. Noticeable variations in the same piece are not acceptable. Variations in appearance of other components are acceptable if they are within the range of approved Samples and are assembled or installed to minimize contrast.

2.6 ALUMINUM FINISHES

A. Baked-Enamel Finish: AA-C12C42R1x (Chemical Finish: cleaned with inhibited chemicals; Chemical Finish: acid-chromate-fluoride-phosphate conversion coating; Organic Coating: as specified below). Apply baked enamel complying with paint manufacturer's written instructions for cleaning, conversion coating, and painting.

1. Clear Organic Coating: Thermosetting, modified-acrylic enamel primer/topcoat system complying with AAMA 2603 except with a minimum dry film thickness of 1.5 mils, medium gloss. Available from Matthew Paint Company. 1-800-6593

Ignoring the warranty issue, the dispute over the monumental signs is fairly simple: Did the bases of the signs as installed meet the finish and aesthetic requirements of the specifications? For the following reasons, the CPOC finds that they did.

At the start of the project, Jones prepared samples and detailed drawings for SGA to review and approve. SGA rejected paint samples and notations in drawing submittals that provided for a finish other than a brushed aluminum with clear coat. SGA also made notations on the detail submittals requiring a vertical brushed grain on both the letters and the bases of the monumental

signs.¹ Neither Consensus nor Jones objected to SGA's demands and complied with SGA's request in subsequent submittals.²

After receiving submittal approvals, Jones started fabricating the signs in its facilities in Wisconsin. After the monumental signs were substantially fabricated, the project architect employed by SGA, James Rice, visited the Jones' facilities to inspect the signs. During this inspection, Mr. Rice prepared handwritten comments. With respect to the monumental signs, these comments state:

I have carefully examined the signs fabricated or supplied by Jones Sign in person for the above noted project and accept them as they are or with the minor changes noted below.

I represent that I have the authority to make this acceptance. I understand that by making this acceptance I am accepting the fit and finish, materials and methods as acceptable standards of quality, craftsmanship, look and build. Furthermore, these signs will be used to measure the quality, craftsmanship, look and build of all subsequent signs delivered to the Horry-Georgetown Technical College project by Jones Sign Company.

These signs will now be shipped out for installation. Review of these specific signs after installation will be confined to installation materials and methods or possible damage during shipping since these signs have been reviewed extensively at the Jones facility prior to shipment

Sign Type L100 ... All joints to be tight & flush
Only visible fasteners @ back
Finish & buff all

Sign Type L200 ... Grind & finish all smooth
Same comments as other mon. signs
Additional Comments: Monumental signs – all sides finished – including backs

[Exhibit 1.4] On July 16, 2013, Mr. Rice emailed these notes to Consensus and Consensus responded by requesting typed comments to "make sure your comments are relayed correctly." Thereafter, Mr. Rice provided typed comments which expanded on his hand written comments. With respect to the monumental signs, these expanded comments state:

¹ Neither the specifications nor the drawings expressly provide for a vertical grain pattern on both the letters and bases; however, it is clear that Mr. Rice believed this was necessary to meet both the finish specifications of Section 2.5 and the desired aesthetic effect.

² Consensus made much ado about the clear coat specifications by Consensus during oral presentations; however, neither Consensus nor Jones raised objections regarding the clear coat requirement during the submittal phase. Moreover, a resolution of this issue is not necessary to resolution of this controversy.

Sign Type L100 ... 1. Only visible fasteners in the back panels, NO visible fasteners on the face or Sides as these monuments will only be steps away from heavy foot traffic.
2. All fit and finish of panels need to be flush with no exposed edges.
3. Paint and Buff sharp edges for a clean finish look.

Sign Type L200 ... 1. Only visible fasteners in the back panels, NO visible fasteners on the face or Sides as these monuments will only be steps away from heavy foot traffic.
2. All fit and finish of panels need to be flush with no exposed edges.
3. Paint and Buff sharp edges for a clean finish look.

Additional Comments:

- All monument signs need to have a quality finish on all four sides, including backs: owner is very technical and has a cabinet or pattern makers prospective [*sic*] when he quality controls items. Concerned about edges not being flush.

[Exhibit 1.5] Collectively, these comments indicate a general concern with the fit and finish of the edges of the signs and the finish of the backs, not the vertical grain pattern. Mr. Rice testified that the signs may not have been finished at the time of his visit and, if so, the vertical grain pattern would not have been observable. However, the photographs Mr. Rice took of the monumental signs at the time do not support this contention. These photographs clearly show the brushed grain pattern on the sign bases that is the subject of this dispute. [Exhibit 1.38]

Based on Mr. Rice's approval of the monumental signs, Jones addressed the comments and shipped the signs to the Project. Thereafter, Consensus included the cost of the signs in its Application for Payment Number 7 dated July 31, 2013. [Exhibit 1.26] Mr. Rice approved this application on August 13, 2013, without objection. *Id.*³

Consensus and Jones subsequently installed the signs and Mr. Rice inspected the installed signs during an August 14, 2013, walkthrough. At that point in time, Mr. Rice found nothing wrong with the finish of the signs. [August 14, 2013, Rice email message to O'Brien, attached to Exhibit 1.8] On August 16, 2013, Consensus wrote the College and SGA, claiming the project was substantially complete except for punchlist items and additional work requested by HGTC. [Exhibit 1.45] On August 30, Consensus submitted its Application for Payment No. 8. [Exhibit 1.9] The application claimed the monument signs were 100% complete, and requested payment of the balance of the contract sum, less retainage.

Despite his apparent acceptance of the monumental sign finishes, Mr. Rice issued a punch list on August 30, 2013, which noted:

³ Mr. Rice later modified this approval.

The entire base of the monumental signs has a series of “striations” running vertical. ... This issue needs to be looked at by a technical representative familiar with brushed aluminum production techniques and a resolution tendered.

[Exhibit 1.6] During the CPOC’s administrative review, Mr. Rice testified that he did not notice the striations until one week after the signs were installed. Neil McCoy, HGTC’s Facilities Director, and Owner’s Representative on the Project, provided more insight. Mr. McCoy testified that he first noticed the striations when HGTC’s president called them to his attention. Only after objection from the president did Mr. Rice start to take exception to the vertical grain pattern on the sign bases. Notwithstanding his concern over the striations, Mr. Rice certified Application No. 8 for payment on October 16, 2013.⁴

Upon receipt of HGTC’s demand that Consensus fix the striations in the sign bases, Consensus made the same demand of Jones. Jones balked, insisting that it had complied with the specifications and demands of SGA for a vertical grain pattern. In an attempt to satisfy the demands of the HGTC, Consensus terminated its contract with Jones and sought the assistance of other sign manufacturers. Eventually, Consensus contracted with ASL, a sign company in Surfside Beach, to attempt to “fix” the signs. ASL proposed to move each sign to its shop; wet sand them “as per customer;” apply a new clearcoat finish; and reinstall the signs. ASL’s price for the work was \$13,500. [Exhibit 1.12] On October 15, 2013, Consensus submitted Change Order Request 16 to SGA in the amount of \$17,460 for this work. [*Id.*] SGA and HGTC ultimately rejected this request. [*See* Exhibit 1.40]

Sometime between October 15, 2013, and April 18, 2014, ASL refinished the three monumental signs. Messrs. Rice, McCoy, O’Brien, and John Dougherty, Consensus’ project manager, met on April 18 to review the re-worked signs. [Exhibit 1.10] In his field report, Mr. Rice noted for each: “Monumental sign was re-installed and was accepted.” [*Id.*] The report noted some minor landscaping work that Consensus needed to complete, and recited that “Final Payment of \$20,172.87” would be released once the landscape work was completed. Although Consensus performed the work, HGTC never made payment.

Nothing Consensus did regarding the monumental signs satisfied SGA and HGTC. On May 23, 2014, Mr. Rice wrote Consensus about the signs. [Exhibit 1.40] His letter noted that Consensus and its subcontractor (ASL) had worked diligently to address the owner’s complaints. It presented Consensus with three “options.” The second option was to rework the Georgetown Campus sign and one of the signs from the Grand Strand Campus. Later that day ASL provided Consensus a proposal to rework all three signs for \$31,500. [Exhibit 1-46] Later, on June 28, 2014, Consensus presented Change Order Request No. 17 [*Id.*] Including the general contractor’s

⁴ Rice declined to accept proposed Change Order 3, for which Consensus had included a net add of \$6,566.92 in the application. Manuscript revisions to the application show that Rice initially subtracted that sum from the amount Consensus claimed as “current payment due,” leaving \$34,247.85. On October 16, 2013, he certified \$27,000 for payment. The basis for withholding an additional \$7250 is not clear. Much as he had done with Application No. 7, though, Mr. Rice subsequently modified his certification on October 21, 2013, reducing the amount Consensus claimed by \$13,500, and certifying payment in the sum of \$20,747.85. HGTC never paid this amount to Consensus.

markup, the request was for \$35,595. [*Id.*] Mr. O'Brien testified that ASL performed about \$12,000 of the work described in the request. His testimony was not challenged on cross examination nor contradicted by any other witness.

On October 21, 2013, the project architect had approved Consensus application for payment number eight. [Exhibit 1.9] The second page of this application indicated that the "Monumental Signs" were 100% complete. HGTC refused to pay the certified amount in order to cover its anticipated cost to fix the striations in the signs. It rejected Consensus' request for a change order covering the cost of the work performed prior to the April 2014 meeting where the signs were accepted for the second time. And it continued to demand that Consensus perform additional work on the signs, with no indication it would pay Consensus for that work. Not surprisingly, the relationship between the parties deteriorated.

Finally, on July 22, 2014, Consensus notified HGTC that it was in breach of the payment provisions of the contract and demanded HGTC cure its default by paying \$27,402.58. [Exhibit 1.23] On September 5, 2014, Consensus wrote HGTC and terminated the agreement for default, pursuant to article 14 of the contract. [Exhibit 1.25] The basis for default was that work had been stopped on the project for more than 45 days through no fault of the contractor. Consensus also demanded payment in the amount \$117,611.40. On September 11, 2015, HGTC sent its own notice of default to Consensus, demanding Consensus to cure its failure to deliver the monumental signs and warranty required by the contract. [Exhibit 2.32] On September 25, 2014, HGTC notified Consensus that it was terminating the contract for default. The letter also recited that "the College is also giving your surety written notice." [Exhibit 2.33]

HGTC offered testimony from David Cornelius, sales manager for Ritelite Signs, Inc. Ritelite manufactured the Conway Campus signs for HGTC under a 2011 contract. Mr. Cornelius offered two proposals from Ritelite. [Exhibit 2.35] The first was to paint the three existing signs with an opaque finish by Akzo Nobel. The price was \$27,000, and included a two-year warranty on the coating. The second was to replace all three signs with Ritelite signs, for a total \$137,132.⁵ The second proposal included a ten-year manufacturer's limited warranty on the coating. Mr. Cornelius did not know how much of the proposal's cost was for the extended warranty. He also did not know if Akzo Nobel offered a ten-year warranty for its product complying with the technical requirement in the specification.⁶ Mr. McCoy testified about HGTC's warranty concerns. However, he offered no evidence of diminution in value because of the lack of warranty.

⁵ The drawings accompanying Ritelite's proposals indicate the grain on both letters and bases would be vertical. However, Mr. Cornelius testified that he told the architect for the Conway Campus project that Ritelite couldn't manufacture the bases with vertical grain because "it wouldn't look right." Unfortunately that architect didn't share this information with Mr. Rice, even though they both worked with SGA.

⁶ Section 2.6(A)(1) of the monumental signage specification referred to American Architectural Manufacturers Association ("AAMA") 2603. [Exhibit 1.1] AAMA 2603 is apparently an interior specification. [Exhibit 1.16] AAMA 2605 is a high performance exterior coating standard that is rated for a ten-year life in the United States, exclusive of Florida and the Gulf Coast. [*Id.*] Mr. Cornelius did not know if Akzo Nobel offered a ten-year warranty on any of its AAMA 2603 products.

Findings – Monumental Signs

The CPOC finds that in the performance of its duties under Section 3.6.1.1 of the Agreement between the Owner and the Architect, and Section 4.2.13 of the General Conditions of the Contract for Construction, SGA inspected the monumental signs and found that they met the desired aesthetic effect and complied with the finish requirements of the specifications. Only after the President of HGTC objected did SGA attempt to backtrack from its previous approval. CPOC also finds that the vertical grain pattern on the base was mandated by SGA when SGA made notations on the detailed submittal drawings that the sign bases were to have a vertical grain pattern.

Notwithstanding that the monumental signs conformed to the contract requirements, HGTC directed Consensus to perform additional work. This work was done to alter the appearance of the signs to make them look like the unexpressed vision of the College, its architect, or both. When Consensus requested to be paid for this additional work, the College refused. Mr. O'Brien's unchallenged testimony established that the value of this extra work was \$29,460.

The CPOC's findings regarding the monumental sign finish and aesthetics does not resolve all issues on these signs. Consensus was required to provide a manufacturer's warranty which included a ten year warranty on the clear coat finish. The evidence shows that Jones was prepared to provide such a warranty until Consensus terminated its agreement with Jones. As a result, Consensus is unable to provide the required warranty. HGTC bears the burden to prove any damages resulting from the lack of a warranty. HGTC failed to provide evidence of such damages.

Having found that SGA wrongfully rejected the monumental signs, the CPOC finds that HGTC wrongfully withheld payment from Consensus on account of the monumental signs. Section 14.1.1 of the General Conditions states:

The Contractor may terminate the Contract if the Work is stopped for a period of 45 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents and the Contractor has stopped work in accordance with Section 9.7....

Section 9.7 of the General Conditions states:

§ 9.7 FAILURE OF PAYMENT

If the Architect does not issue a Certificate for Payment to the Owner, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date time established in the Contract Documents the amount certified by the Architect or awarded by binding a final dispute resolution order, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased, in accordance with the provisions of Section 7.3.3, by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

On October 21, 2013, SGA certified payment of Application No. 8 for \$20,747.85. HGTC has yet to pay this amount to Consensus. The CPOC finds that the conditions described in Section 14.1.1.3 of the General Conditions were met, and that Consensus properly terminated the contract.

Directional Signs

But for the monumental sign dispute, there probably would not be a directional sign claim. This dispute involves the acceptable products specifications for the post and panel/pylon signage, Section 101426, Part 2. This specification called for "APCO Series 5220.1, curved changeable face Sign Panel, double post mounting." [Exhibit 1.2] Included in the specifications were cut sheets for the APCO product with special emphasis on the panel retention detail—how the sign was to attach to the post(s). During the bidding phase, HGTC issued addendum three which approved additional products. [Exhibit 1.3] The pertinent portion of this addendum states:

SUBSTITUTIONS

4.01 APPROVAL OF ADDITIONAL PRODUCTS/SYSTEMS

- A. Alternate product substitutions must meet all Product and Submittal Requirements as noted in Section 016000 of the Project Manual.
- B. Alternate product substitutions must meet or exceed all Finish and Warrantee requirements as noted on the Drawings and the Specifications.
- C. Alternate product substitutions must meet the Design Intent of the Construction Documents as determined by the Architect.

2. Section 101426- CUSTOM Signage Fabrications based on Sign Comp, "#3000 60 degree" post extrusions have been approved as an alternate.

From the foregoing, it is clear that the approval of the Sign Comp product was contingent upon meeting or exceeding all finish requirements noted on the drawings and specifications and meeting the design intent “as determined by the Architect.”⁷

Jones used the Sign Comp product in preparing its proposal and this product was the basis of Consensus’ bid to HGTC. Jones prepared detailed drawings for the directional signs using the Sign Comp product for submittal the architect. In its submittal reviews, SGA rejected the retention detail for this product. [Exhibit 1.31, p. 215] In the minutes for the March 18, 2013 project meeting, SGA noted:

2. The post detail does not meet the aesthetic requirements of the construction documents. The sign face overlaps the post and provides a completely different look to the signs. The Team discussed a few different ways to get the detail closer to the design intent. Ideas included adding a clip and moving the face mounting detail to the edge of the post and/or using the original specified posts in lieu of the approved alternate. GC to review with their sub and get back to the Team.

[Exhibit 2.4] On March 25, 2013, Consensus sent a letter to Jones stating:

The post detail is not meeting the aesthetic requirements. We need to discuss how to make the alternate post meet the requirement or us[e] the original specified post.

[Exhibit 2.5] The record does not set forth the nature of this discussion between Consensus and Jones but on April 4, 2015, Consensus submitted a change order request in the amount of \$31,939.57 to substitute APCO for Sign Comp. [Exhibit 2.7, p. 58] SGA recommended rejection of this request stating the “burden was on the proposer to meet the Finish requirements as well as the Design Intent for these signs as determined by the architect.” [Exhibit 2.7, p. 43] Nowhere in the record is there a directive from SGA or HGTC to Consensus to provide the APCO product. Instead, SGA and HGTC asked Consensus to present solutions.

After rejection of the change order request, Consensus proceeded with using APCO post signs. Moreover, in an August 23, 2013, email Consensus noted that it had “provided the owner preferred APCO signs valued at approximately \$40,000 at NO COST to the owner.” While in this controversy Consensus makes claim for the cost of this change, Consensus president, Mr. John O’Brien, testified at the hearing that Consensus has not as of the date of his testimony incurred any additional cost for changing to the APCO signs but that it may in the future.

⁷ The CPOC strongly discourages “contingent approval” of substitutions. It is a mechanism by which the design professional avoids its responsibility to determine a product is equivalent before bidding, and thus shifts the risk to the contractor.

Findings – Directional Signs

The CPOC need not determine if SGA improperly rejected the Sign Comp sign posts detail submittal and constructively directed Consensus to use APCO sign posts. Based on the foregoing, the CPOC finds that Consensus has failed to carry its burden of proving upon a preponderance of the evidence that it suffered any damage resulting from delivering the APCO sign posts.

Delay

Consensus submitted Change Order Request #13 for “Owner Delay Impact.” [Exhibit 1.15] It claims \$12,102 for “General Conditions,” Project Management,” Rental Equipment,” and Burden-Payroll, Tax & Insur[ance].” Consensus calculated the amount at “unit price” rates for each category, extended for the thirty-day claimed delay period. It then applied its general overhead (Insurance, Bond, and GC Fee) to reach the total request of \$13,796. There was no testimony how the thirty days was determined, nor any schedule analysis. Likewise, Consensus offered no evidence of how it arrived at the unit prices, or whether it incurred any actual costs owing to the delay. Finally, to the extent the claim is based on delays in approving the directional signage submittals, it is not at all clear those delays were chargeable to the owner. The CPOC finds that Consensus has failed to prove the necessary elements of its claim for delay.

Interest and Attorneys’ Fees

In the “Prayer for Relief” section of its verified complaint, Consensus included a demand for “interest at the legal rate...plus costs and reasonable attorneys’ fees.” The basis for recovering interest and attorneys’ fees is not stated. In a letter accompanying the complaint, Consensus’ counsel claimed “interest of 1.5% per month for the balance due on application for payment number eight,” but did not state any authority for the claim. He also asserted that the College’s breach of the covenant of good faith and fair dealing warranted recovery of attorneys’ fees. [Attachment B to verified Complaint] At the hearing, Consensus relied on S.C. Code Ann. § 27-1-15 (2007) to support the claims.⁸ As discussed below, Consensus failed to comply with the contract provision governing interest; and the statute under which it claims attorneys’ fees is not applicable to the State. Accordingly, the CPOC denies these claims.

Interest

HGTC and Consensus signed a Standard Form of Agreement Between Owner and Contractor, AIA Document A101-2007. [Exhibit 1.50] The A101 defines the contract documents in Article 1, and lists them specifically in Article 9. They include the AIA’s General Conditions, Document A201-2007; and the State Engineer’s Standard Contract Modifications, OSE Form 00501, and Standard Supplementary Conditions, OSE Form 00811. Although the A101 agreement provides

⁸ While HGTC denied any liability to Consensus, it did not challenge Consensus’ right to assert a claim for attorney’s fees. See *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) (no abuse of discretion in allowing amendment of complaint at trial to include claim under § 27-1-15).

for interest in Article 8.2, the Standard Contract Modifications delete that language and substitute the word “Reserved.” [OSE Form 00501, ¶2.11] Similarly, A201 provides for interest “at the legal rate,” but the Standard Supplementary Conditions delete this language and substitute the following:

13.6 INTEREST

Payments due to the Contractor and unpaid under the Contract Documents shall bear interest only if and to the extent allowed by Title 29, Chapter 6, Article 1 of the South Carolina Code of Laws. Amounts due to the Owner shall bear interest at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due.

[OSE Form 00811, ¶3.108] This language provides the sole basis for a contractor’s recovering interest. *Ellis Don Const., Inc. v. Clemson University*, 391 S.C. 552, 707 S.E.2d 399 (2011).

Article 1 of Title 29, Chapter 6, governs payments to contractors, subcontractors, and suppliers. It is expressly applicable to a government agency. S.C. Code Ann. § 29-6-10(4) (2007) (...“Owner” includes any state, local, or municipal government agencies, instrumentalities, or entities.”) Section 29-6-50 specifically provides for interest on late payments. That section reads, in pertinent part:

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

(emphasis supplied) By its terms, the statute requires the contractor to give notice to the owner of the provisions of Section 29-6-50. If the notice is not given, the owner is not liable to pay interest. *Ellis Don Const., ante; Appeal by McCarter Electric Co.*, Panel Case No. 1992-21.

None of the three pay applications in the record (No. 7, Exhibit 1.26; No. 8, Exhibit 1.9; No. 9, Exhibit 1.11) has any reference to Section 29-6-50. Exhibit 1.44 includes five letters from Consensus to HGTC and SGA, notifying them of late payments. None of the letters refers to Section 29-6-50. There is other correspondence from Consensus demanding payment, but none gives notice of an interest claim under Section 29-6-50. [Exhibits 1.18; 1.22; and 1.25] Since it failed to meet the requirements of Section 29-6-50, Consensus cannot recover interest on the late payments.

Attorneys’ Fees

South Carolina generally follows the “American Rule,” that attorneys’ fees are not recoverable unless authorized by contract or statute. *E.g., Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007). Nothing in the contract documents permits recovery of counsel fees.⁹

Like interest claims, claims to recover attorneys’ fees are claims against the state, for which the express consent of the State is required. *E.g., Meade v. State*, 33 Ill.Ct.Cl. 112 (1979) (no recovery of attorneys’ fee absent statutory authorization); *see Melton v. Crowder*, 317 S.C. 253, 452 S.E.2d 834 (1995) (a State is immune from suit unless it expressly consents to be sued); *cf. Ellis Don Const. v. Clemson University*, 391 S.C. 552, 556, 707 S.E.2d 399, 402 (2011) (concurring opinion of Pleicones, J.); *see also Monarch Mills v. South Carolina Tax Comm’n*, 149 S.C. 219, 146 S.E. 870 (1929) (“Interest...is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers.” (citations omitted)), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). South Carolina has, in fact, specifically authorized such claims in S.C. Code Ann. § 15-77-300 (Supp. 2015). That statute applies in circumstances not present here. Most importantly, there must be a “civil action.” Proceedings before the CPO are not civil actions. *Ellis Don Const., ante*, 391 S.C. at 557, 707 S.E.2d at 402 n. 3 (concurring opinion of Pleicones, J.).

Consensus argued at the hearing that it could recover its counsel fees pursuant to Section 27-1-15. That section allows a building contractor to recover attorneys’ fees under certain circumstances:

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Unlike Section 29-6-50, this statute has no language providing for its application against the State. No reported decision has allowed a fee claim against the government under Section 27-1-15. *Cf. Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (describing unappealed trial court ruling to strike demand for attorney’s fees under § 27-1-15).

⁹ The CPOC expresses no opinion whether a procurement officer has authority to include a provision allowing a contractor to recover attorney’s fees against the State.

Since nothing in the statute manifests the State's consent to be liable for attorneys' fees, consensus cannot recover fees pursuant to Section 27-1-15.

HGTC's Affirmative Claims and Damages

In its answering statement dated April 1, 2015, HGTC asserted claims for the following:

Liquidated Damages	\$40,125.00
Deleted Signs	\$7,229.71
Estimated Cost to Rehab existing signs	\$137,132.00
Additional Project Administration costs and design fees	\$41,460.00

HGTC also sought "termination damages, costs and the expense of this action." The April 2015 statement appears to be the first time HGTC notified Consensus of its claims for liquidated damage and additional design fees.

Liquidated Damages

The contract documents provide for liquidated damages thus:

\$250 for each calendar day the actual construction time required to achieve Substantial Completion exceeds the specified or adjusted time for Substantial Completion as provided in the Construction Documents.

Change Order 1 recognized a delay in permitting the project and granted a time extension of sixty days. Change Order 2 was for substituting "breakaway" posts for directional signage located within the right-of-way. It extended the date for substantial completion to July 31, 2013. Consensus claimed substantial completion on August 16, 2013, after SGA accepted the monumental signs. Assuming no delays to the project after Change Order 2 was issued, the most the College could claim in liquidated damages would be \$4000. Just like Consensus, though, the College offered no schedule analysis. It failed to provide any notice to Consensus of the claim, until after Consensus requested resolution of this dispute. Finally, it would be anomalous to recognize the College's claim for liquidated damages in light of its refusal to pay for work Consensus performed for two and one-half years. The CPOC finds this claim should be denied.

Deleted Signs

Consensus acknowledges the amount of \$7,229.71 should be credited to the College for the deleted signs.

Estimated Cost to Rehab Existing Signs

SGA accepted the monumental signs in 2013. As discussed above, the CPOC finds that SGA and HGTC demanded Consensus perform additional work, not required by the contract, for nearly a year thereafter. It has never paid Consensus for this work. The only amount that HGTC might be entitled to recover for this portion of its claims would be the cost of a manufacturer's warranty. However, no witness could testify to the price of such a warranty, nor to the amount of any diminution in value owing to its absence. The CPOC finds this claim should be denied.

Additional Project Administration costs and design fees

SGA presented its invoice for additional services on November 26, 2014. [Exhibit 2.34] The total amount of that invoice was \$35,977.73, and nearly all that amount was for "professional services related to time spent working on the project since substantial completion was achieved for the monumental signs-August 30, 2013." The first time entry on the invoice is September 6, 2013.

By August 30 SGA had inspected the monumental signs and found that they met the desired aesthetic effect and complied with the finish requirements of the specifications. The services HGTC directed it to perform since then have been aimed at obtaining additional work from Consensus. The CPOC finds that HGTC is not entitled to recover for these services.

HGTC's claim against NASIC

Consensus terminated the contract for the owner's default on September 5, 2014. HGTC apparently did not attempt to involve the performance bond surety until a week later, on September 11, 2014. On that day Mr. McCoy replied to Consensus' letter terminating the contract, and wrote:

It is with regret that I must inform you that the College intends to terminate the Contract it has with Consensus for Cause per Article 14.2.1 on September 25, 2014. By copy of this letter, the College is also giving your surety written notice.

[Exhibit 2.32] HGTC sent a copy via certified mail to NASIC. On September 25, Mr. McCoy sent a second letter whose full text was:

There has been no action by Consensus since my September 11, 2014 letter; therefore, the College terminates the Contract It has with Consensus for Cause per Article 14.2.1. By copy of this letter, the College is also giving your surety written notice. Consensus has neglected to carry out the Work in accordance with the Construction Documents. The defective Work of the monumental signs, loss to the Owner of special warranties, and failure of Consensus to ultimately correct such deficiencies are some of the reasons you are terminated.

Please note that the reasonable cost of correcting above noted deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary will likely far exceed the monies currently being

withheld from Consensus. If amounts currently being withheld are not sufficient to cover the costs to correct the Work, Horry Georgetown Technical College will seek relief from either Consensus or their bonding company.

The CPOC has found that Consensus properly terminated the contract. When Mr. McCoy sent copies of his letters to NASIC, Consensus no longer owed HGTC any performance. As a general rule the liability of a surety is measured precisely by liability of its principal. *Greenville Airport Comm'n v. U.S. Fid. & Guar. Co. of Baltimore*, 226 S.C. 553, 86 S.E.2d 249 (1955). When, as here, the principal has discharged its contractual duties to the obligee, the bond surety has no additional liability. *Id.*¹⁰

CONCLUSION

Regarding the claims Consensus asserted, the CPOC finds that:

1. HGTC breached the contract by refusing to pay Consensus for work completed and accepted, and by refusing to pay for extra work it directed Consensus to perform. HGTC owes Consensus the unpaid balance of the contract price, totaling \$20,172.87.¹¹ [Exhibits 1.9, 1.10, & 1.11] HGTC owes Consensus an additional \$29,460 for its efforts to meet HGTC's demands to "fix" the monumental signs. [Exhibit 1.12 and part of Exhibit 1.46]
2. Consensus failed to establish any damages with respect to the directional signs.
3. Consensus failed to prove its claim for delay.
4. Neither the contract nor any applicable statute authorizes Consensus to recover its attorney's fees.
5. Consensus failed to comply with the requirements of S.C. Code Ann. § 29-6-10 for recovering interest.
6. Consensus properly terminated the contract.

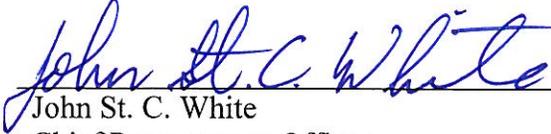
Regarding the claims asserted by HGTC, the CPOC finds that:

1. Consensus failed to provide a manufacturer's warranty as the contract required, but HGTC did not establish any damages resulting from this breach.
2. HGTC failed to prove that consensus was responsible for any delay in achieving substantial completion.

¹⁰ NASIC raised additional defenses pertaining to notice, payment of the contract balance, and contractual limitations on the surety's liability. Because the CPOC finds that Consensus owes no duty to HGTC I need not reach the additional grounds NASIC asserted.

¹¹ This amount is net of the deductive credit for directional signs omitted from the contract.

3. HGTC is not entitled to recover the cost of “rehab” for signs it accepted.
4. HGTC is not entitled to recover the cost of the architect’s additional services.
5. Because Consensus owes HGTC no contractual obligations, HGTC is not entitled to recover anything from NASIC.



John St. C. White
Chief Procurement Officer
For Construction

15 March 16

Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Contract Controversy Appeal Notice (Revised January 2016)

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

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

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

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 111.1 of the 2015 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.