STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: CONTROVERSY	)	**DECISION**
TRIANGLE CONSTRUCTION CO., INC. **vs.** **SOUTH CAROLINA SCHOOL FOR THE DEAF AND THE BLIND**	)	**POSTING DATE: SEPTEMBER 27, 2007**
WALKER HALL RENOVATION **STATE PROJECT H75-9524-CC-A**	)	

This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from Triangle Construction Co., Inc. (Triangle), under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code, for an administrative review of a contract controversy on the Walker Hall Renovation ("the Project") for South Carolina School for the Deaf and the Blind ("School"). (A copy of Triangle's request is attached as Exhibit "A" and a copy of the School's response is attached as Exhibit "B"). Pursuant to S.C. Code Ann. §11-35-4230(3), the Office of State Engineer's (OSE) project manager assigned to the project attempted to mediate a settlement between the parties. On or about October 11, 2006, the School notified the OSE project manager that the School wanted to terminate mediation efforts. Subsequent to termination of mediation, the CPOC conducted an administrative review pursuant to S.C. Code Ann. §11-35-4230(4). As a part of his administrative review, the CPOC conducted a hearing on June 26, 2007. At the hearing, attorney Robert A. DeHoll represented Triangle and attorney Shane W. Rogers represented the School.

At the start of the hearing, Triangle submitted a three-inch three ring binder with 42 tabbed exhibits to be admitted into evidence. The school objected to the exhibits behind tabs 39, 40, and 42 because these were affidavits and statements of individuals who were not present to testify. The School submitted three additional exhibits which the CPOC added to the binder submitted by Triangle as tabs 43, 44, and 45 and marked the binder as Exhibit 1.

At the conclusion of the hearing, the CPOC held the administrative review open to permit the review of the construction documents and record in greater detail. Subsequently, the CPOC asked the parties to provide briefs on the doctrine of last clear chance raised by Triangle at the

hearing. These briefs were received on August 17, 2007. On September 14, 2007, the CPOC closed the administrative review.

NATURE OF THE CONTROVERSY

On April 15, 2002, the School and Triangle entered into an agreement for the construction of the Project, a renovation of Walker Hall. This agreement required Triangle to test and maintain the existing fire suppression system in Walker Hall in operation during the performance of Triangle's work. [Section 15960-7 of the Project Specifications] In order to meet this obligation, Triangle installed a temporary water supply line for the fire suppression system. This temporary supply line consisted of 10' lengths of 4" diameter steel pipe and two steel 90-degree elbows. Each section of pipe and elbow had a circumferential groove at either end allowing the sections to be coupled using grooved end couplings. This controversy centers around the failure of one of the grooved end couplings (the "coupling") and the ensuing water damage to work already performed by Triangle and paid for by the School.[1] Each party maintains that the other is responsible for the cost to repair and replace the damaged work.

DISCUSSION

UNDISPUTED FACTS

Sometime between the end of work on Friday January 24, 2003 and the start of work on the morning of Monday January 27, 2003, the coupling failed thus flooding insulated ductwork under Walker Hall and rooms A101, A102, and A103.[2] Rooms A101 and A102 are mechanical/electrical rooms that contained newly installed HVAC equipment, ductwork, electrical panels, and communications cables (hereinafter collectively "equipment"). The flooding damaged much of the equipment beyond repair. The School had paid Triangle for this equipment sometime prior to the flooding. The School directed Triangle to repair and/or replace the damaged equipment. Triangle proceeded to repair and/or replace the damaged equipment at its cost.

[1] This coupling is missing and was not a part of the evidence. Testimony and exhibits indicate that Triangle turned it over to the School which then turned it over to the Insurance Adjuster who eventually returned it to the school. The School claims and Triangle denies that the School returned the coupling to Triangle.

[2] Room A101 is also shown in the drawings as Mechanical Room 1 and Room A102 as Mechanical Room 2. Room A103 is a stairwell adjacent to Room A102.

The School notified the South Carolina Insurance Reserve Fund (its insurer) of the flood caused by the failed coupling and filed a property damage claim form on the Builder's Risk policy that the School maintained on Walker Hall. [Exhibit 1 - Tabs 43 through 45] This policy only covered property for which the School had already paid. [See Exhibit 1 - Tab 2 Article 11.3 Supplementary Conditions] The Insurance Reserve Fund assigned Mr. Mike Richardson, an independent insurance adjuster, to investigate and adjust the claim. [Exhibit 1 - Tab 11] Mr. Richardson concluded that the coupling must have failed due to freezing and denied the claim because he believed the sprinkler subcontractor or Triangle was negligent by not insulating or heat taping the fire main resulting in no coverage for the loss. [Exhibit 1 - Tab 15] Triangle contended that Mr. Richardson's interpretation and application of the exclusions in the policy were in error and engaged in an exchange of letters with the Insurance Reserve Fund in support of its own position that the policy did not exclude payment for the damage in question. [Exhibit 1 - Tabs 16 through 21]

On May 25, 2005, Triangle submitted change order request No. 223 to Mr. Donald L. Love, Jr., of McMillan, Smith and Partners, Architects, the School's architect, claiming the repair and/or replacement of equipment in the basement of Walker Hall was a change to the contract. [Exhibit 1 - Tab 22] On July 19, 2005, the School notified Triangle that it was the School's position that the work that Triangle was claiming as a change did not require a change order and was therefore not the School's responsibility. [Exhibit 1 - Tab 25]

TRIANGLE'S POSITION

Triangle relies on several theories of recovery as follows:

1. It installed the temporary fire main, including the coupling, in accordance with the design and specifications provided by the School, and the School's architect approved the installation; therefore, in accordance with the "Spearin Doctrine," the School was responsible for any failure in the system.

2. Paragraph 11.3.4 of the Supplementary Conditions to the Contract, required the School to issue an add change order for the work to repair and replace damaged equipment regardless of whether the loss was insured or not.

3. The damage to equipment ensuing from the failure of the coupling was not excluded by the School's property insurance policy and the Insurance Reserve Fund wrongly denied coverage; therefore, Paragraph 11.3.4 of the Supplementary Conditions requires the School to issue an add change order for the work to repair and replace damaged equipment.

4. The project architect determined that the work to repair and replace the damaged equipment was outside the scope of work for the project entitling Triangle to an add change order under Article 7 of the general conditions.

5. The School was responsible for the damage because the fire alarm system, that, according to Triangle, the School was supposed to maintain during the course of the project, was not working and had it been working, the amount of damage would have been minimized.

6. Even if it is responsible for the damage caused by the flooding on the night of 26 – 27 January, Triangle is not responsible for the damage caused by flooding that it contends occurred on the night of 24 – 25 January. Triangle contends that this alleged flooding occurred due to a failed post indicator valve under the control of the School.

SCHOOL'S POSITION

The School contends that the contract required Triangle to deliver a completed project, including the equipment, and until such delivery, Triangle bore the risk of loss due to accident. The School argues that because the provision and installation of the equipment was a part of the scope of work, Triangle's repairing and replacing the damaged equipment was within the scope of work. The School contends that Article 11.3 of the Supplementary Conditions required it to issue a change order for repair and replacement of the damaged equipment only if there was coverage under the insurance policy. Since the Insurance Reserve Fund determined that Triangle or its subcontractor was negligent and there was no coverage, the School had no duty to issue a change order and Triangle had a duty to repair and replace the equipment at its own cost.

GENERAL

The common law rule is that "One who agrees to construct a building for another under a contract for a stipulated price and calling for the completed structure must bear the loss occasioned by accidental destruction during construction and prior to completion." Baker v. Aetna Insurance Co., 274 S.C. 231, 233, 262 S.E.2d 417, 418 (1980). Triangle did not contend that on the dates in question the project for renovation was complete. Both parties agree that Triangle or its subcontractors installed the equipment that the flooding damaged as a part of that project. Both parties also agreed that the School had already paid for this equipment as a part of previously made progress payments. However, progress payments do not relieve Triangle of its responsibility under the common law rule. Ulmer v. Phoenix Fire Insurance Co., 61 S.C. 459, 39 S.E. 712 (1901). Therefore, unless the parties changed the common law rule by contract, Triangle bore the risk of loss by accident.

CONTRACTUAL RESPONSIBILITY FOR THE COUPLING AND FIRE SPRINKLER SYSTEM

Both the School and Triangle agree on many of the facts surrounding this event. The primary disagreement appears to be the cause of the failure of the coupling. The School relies on the insurance adjuster's belief that the coupling failed due to freezing. Triangle contends that the coupling failed for reasons unknown. Weather records, submitted by Triangle, show that nighttime temperatures during this period were 9 or more degrees below freezing. [Exhibit 1 - Tabs 8 and 9] These same records also indicate that there were other periods of similar temperatures before this weekend. Triangle's project supervisor, Mr. Gery Munz, testified at the hearing that the coupling fractured perpendicular to its circumference, a fracture that could occur due to expansive pressure of ice from the inside of the coupling. However, neither party entered the coupling into evidence nor did they have the coupling forensically analyzed to determine the nature of the fracture. In fact, each party claims the other was the last to have possession of the coupling, and the CPOC can only conclude that it has been lost. Therefore, while it is possible the coupling failed due to the expansive pressure of freezing water, one cannot conclusively determine the cause of failure.

It is interesting to note that the record indicates Triangle apparently did have a concern that the sprinkler system could fail due to freezing but took no substantive action to prevent such failure. At the hearing, Triangle's employee, Mr. Solsebee, testified that his superior directed him to

inspect the building sprinkler system on Sunday January 26, 2003, for leaks and that he did in fact inspect for leaks in the sprinkler system. It appears from the record that Triangle took no other measures to protect itself from the dangers of freezing.

Whether the coupling failed due to freezing or not, Triangle, relying on the "Spearin Doctrine" argues the School bore the risk for any failure because Triangle installed the temporary fire main in accordance with the plans and specifications and that the installation was approved by the architect. Triangle further contends that the plans and specifications did not require it to protect the fire main from freezing. Triangle's position however, is not supported by the contract documents. There is no disagreement that Triangle did install the temporary fire main and the coupling as a part of the work. This is borne out by the Project specifications in Section 01500 Parts 3.5A and 3.6 and Section 15960. Section 15960 required Triangle's sprinkler subcontractor to "**design** and provide the sprinkler system, standpipe system." [emphasis added, at 15960-3] Section 15960 also required Triangle to test the functional parts of the system and, when confirmed as operational, to maintain the existing sprinkler system in operation until construction was complete.[3] [Id. at 15960-1 and 15960-7] After completion of the new system, Triangle was to remove the old. The drawings do not contain any design for the sprinkler system. These provisions make it clear that Triangle had responsibility for the design and installation of the fire sprinkler system, including the temporary main, and retained responsibility for both the existing and new system throughout construction. Moreover, the project specifications required Triangle to:

> "Supervise operations to assure that no part of the Work completed or in progress, is subject to harmful, dangerous, damaging, or deleterious exposure during the construction period. Where applicable, such exposures include, but are not limited to, the following: 1. Excessively high or low temperatures... 4. Water or ice... 13. Unusual wear or other misuse... 20. Vandalism." [Specification Section 01040 Part 3.2C]

Under these provisions, Triangle had a responsibility to protect the sprinkler system and coupling from any of the usual potential causes of failure. Under the contract, Triangle had a duty to maintain and protect the fire sprinkler system throughout the construction period.

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[3] The parties were in agreement on this matter at the hearing; however, in the subsequent brief on "last clear chance" Triangle argued that the School had contractual responsibility to maintain the sprinkler system as set forth in more detail in the discussion of the post indicator valve below. The contract and the hearing testimony do not support this position.

Property Insurance Provisions

Triangle contends that a property insurance provision of the contract, Paragraph 11.3.4 of the Supplementary Conditions, required the School to issue a change order. The referenced paragraph states "Replacement of **insured** damaged work shall be covered by an appropriate Change Order." [Emphasis added] Triangle argues that the equipment was insured under the School's Builders Risk policy and, therefore, this language required the School to issue Triangle a change order for the value of repairing and replacing the equipment regardless of whether the loss was paid by the insurance carrier.

The Supplementary Conditions, part of the parties' contract, contains language requiring the School to acquire Builder's Risk coverage with specific coverage types.[4] [Exhibit 1 – Tab 2] The School's Builder's Risk policy did contain the required coverages. [Exhibit 1 – Tab 3] Under the contract, the School was required to issue an "appropriate Change Order" only when the loss was insured under its property insurance. Since the School's insurance did not cover the loss to this equipment, the School was not required to issue "an appropriate Change Order" under paragraph 11.3.4 of the Supplementary Conditions.

To require the School to issue a change order when the loss was not covered under its Builder's Risk coverage would apply a higher standard of responsibility than is applied under the waiver of subrogation clause in AIA Document A201, which was purposely deleted from this contract. [See AIA A201 Paragraph 11.3.7; See, also, Summit Contractors, Inc. v. General Heating & Air Conditioning, Inc., 358 S.C. 410, 595 S.E.2d 472 (2004), (Court held that the waiver of subrogation in AIA Document A201 did not apply when the loss was excluded by the policy)] The logical reading of paragraph 11.3.4 of the Supplementary Conditions is that the School would only issue a change order when the loss is covered by the School's policy. In this sense, the limits of Paragraph 11.3.4 are comparable to the limits of the waiver of subrogation in the AIA A201; if the loss is not covered, the contractor bears the risk of loss.

[4] Paragraph 11.3.6 of the property insurance provision required Triangle to provide adequate insurance to protect its interest in the work. Triangle did not present any evidence as to whether it procured such insurance or, if it did, whether it filed a claim with its insurer. Presumably, Triangle had an insurable interest in the equipment. Baker v. Aetna Insurance Co., 274 S.C. 231, 233, 262 S.E.2d 417, 418 (1980); Ulmer v. Phoenix Fire Insurance Co., 61 S.C. 459, 39 S.E. 712 (1901).

Finally, Triangle argues that the Insurance Reserve Fund wrongly denied coverage and, therefore, under Paragraph 11.3.4 of the Supplementary Conditions, the School must issue Triangle a change order for the work to repair and replace the damaged work.[5] While Triangle may desire that the CPOC overturn the Insurance Reserve Fund's determination regarding what losses are covered by an Insurance Reserve Fund policy, neither party directly challenged the Insurance Reserve Fund's determination and Triangle does not argue that the School had a contractual obligation to do so. Moreover, the CPOC has no authority to alter the determination of the Insurance Reserve Fund that the loss was not covered by the School's Builder's Risk insurance coverage.[6]

THE OPINION OF THE ARCHITECT

Triangle argues that the architect agreed that the repair and replacement of damaged equipment was extra work. In support of this contention, Triangle relies on a letter of the architect forwarding a change order prepared and submitted by Triangle. [Exhibit 1 -Tab 31] There is no need to detail the evidence in support of or in opposition to Triangle's position. [See Exhibit 1 - Tabs 22 through 38] Even assuming the architect considered the repair and replacement of the damaged equipment to be extra work, the architect's opinion is not dispositive. Paragraph 7.1.2 of the Supplementary Conditions requires that the School, Triangle, the architect, and, when the change order is outside the School's change order certification, the State Engineer agree to any change order. The evidence clearly shows that the School refused to execute the change order; indeed, that is why there is a dispute. Paragraph 4.4.4 of the Supplementary Conditions provides for the architect to render an initial decision on any dispute but that decision is subject to subsequent resolution by the State Engineer. In other words, if either party disagrees with the determination of the architect they may resort to the dispute resolution process as has been done here. Finally, it must be noted that the architect specifically stated in a letter dated November 4, 2005, that "he did not offer an opinion or make

[5] Even if the Insurance Reserve Fund had not denied coverage, it is not entirely clear whether Triangle would have ultimately received the benefit of any payment by the Fund. The property insurance provisions of the contract do not include an express waiver of subrogation, and the Fund's Builder's Risk Policy explicitly prohibits the insured from waiving subrogation. Had the Fund provided coverage to the School, perhaps it would have had a subrogation claim against Triangle for the amount of its payment to the School.

[6] It appears that S.C. Code Ann. § 10-7-180 provides a specific procedure for the insured to follow in the event of a disagreement over the extent of coverage. Apparently, the School did not pursue this procedure to challenge the decision of the Insurance Reserve Fund. Likewise, Triangle apparently did not file a declaratory judgment action in Circuit Court to challenge the decision of the Insurance Reserve Fund.

a determination as to the validity of the change order request or the School's responsibility in the matter." [Exhibit 1 - Tab 34]

DOCTRINE OF LAST CLEAR CHANCE

Triangle presented testimony that the fire main contained a flow detector to set off an alarm when water in the fire main started to flow. [Testimony of Munz] According to Munz, there were a number of times during the project when Triangle flowed water through the fire main and each time, the flow detector set off an alarm and the local fire department responded within five minutes. According to Munz, the flow alarm did not activate as it should have done after the coupling broke.

Triangle contends that had the alarm been working, the fire department would have responded within a few minutes and the majority of damage would have been avoided. Triangle also contends that the School retained responsibility for maintaining the fire alarm system in an operable condition, that the School had a contractual, statutory, and common law duty to Triangle to do so, and that the School had the last clear chance to avoid a loss of the type that ensued by maintaining an operable fire alarm system.[7] Triangle argues that the School, by failing to maintain an operable fire alarm system, bears the risk of loss. In essence, Triangle introduces the tort doctrine of last clear chance, that is, that the School had the last clear chance to avoid the injury and negligently failed to avail itself of that opportunity thus excusing Triangle's negligence and making the School liable for the property damage.

A flow detector alarm is a part of an operating fire suppression system. When a fire activates a sprinkler head, water starts to flow through the sprinkler system. The flow detector detects the flow of water and activates an alarm that notifies the fire department and the School that there is a fire. Without an alarm, the water may flow through the activated sprinkler heads indefinitely without the fire department having notice of a fire unless another type of alarm, such as a smoke detector, activates. Thus, the flow indicator serves the dual purpose of limiting damage by both fire and water. A consequence of this dual purpose is the flow detector also provides notice of water flowing through the system because of a break in the piping system.

[7] In its brief submitted subsequent to the hearing, Triangle relies on SC Code Ann. § 5-25-40 to argue that the School had a legal duty to maintain the fire alarm system in an operable condition, but a cursory reading of this statute is sufficient to show this argument is without merit.

Absent the requirement to maintain an operable fire sprinkler system and hence an operable flow indicator alarm, a responsibility of Triangle, the plans and specifications are silent regarding responsibility for maintaining any part of an operable fire alarm system during construction. Section 16721 of the Specifications addresses the new fire alarm system including a new fire alarm control panel. This section only provides for installation of the new system and unlike Section 15960 regarding fire sprinkler systems, contains no provision regarding maintenance of the existing system during construction. Note 1 on sheet E-1 of the plans does provide that the contractor is to demolish the existing fire alarm system but does not say anything about maintaining all or part of the existing system until the new system is fully operational. However, the specifications do require Triangle to institute every "precaution and preventive measure ... throughout the construction period to prevent fire" including installing and maintaining "temporary fire-protection facilities of the types needed to protect against reasonably predictable and controllable fire losses." [See Section 01500 Part 3.6 A and B] Based on the foregoing, the CPOC finds that the School did not have a contractual responsibility to maintain the fire alarm system for the benefit of Triangle.

Even if the School had a duty outside of the contract, this does not mean that the School has any liability to Triangle. Triangle argues that the School negligently failed to maintain the alarm system in an operable condition and that this failure occurred before the failure of the fire main coupling. In other words, this failure did not damage the work or anything else. A system such as a fire alarm system cannot produce water damage. The damage to the equipment in question required some other event to occur such as the subsequent failure of the coupling. The Restatement (First) of Torts, section 479, regarding a defendant's last clear chance states:

> "A plaintiff who has negligently subjected himself to a risk of harm from the defendant's **subsequent negligence** may recover for harm caused thereby if immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant
>
> (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or
>
> (ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or

(iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and

(c) **thereafter is negligent** in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff." (Emphasis added)

Even if it were applicable, to rely on the doctrine of last clear chance, Triangle must show, among other things, that the School knew of Triangle's peril (the failed coupling), and that the School was negligent subsequent to the failure of the coupling, and that the School's subsequent negligence caused Triangle injury. Triangle did not argue nor did it present any evidence that the School knew of the failed coupling any sooner than Triangle nor did it allege or present any evidence that any negligent act or failure to act on behalf of the School occurred after the failure of the coupling. As a result, even if the tort doctrine of last clear chance were applicable to this contractual dispute, it would not apply to benefit Triangle.

RESPONSIBILITY FOR THE POST INDICATOR VALVE

Triangle's carpenter, Mr. Solsebee, testified that he worked on the project through the weekend of 25 - 26 January 2003. Mr. Solsebee testified that he arrived on the project on the morning of Saturday, January 25, 2003, to find room A101 flooded to a depth of between two and three feet and School employee's working on a failed post indicator valve just outside the building. According to Mr. Solsebee, when this post indicator valve failed, water flowed through penetrations in the outside wall into room A101.

The witness for the School, Mr. O'Brien, testified that he had no knowledge of the failed post indicator valve and could not find any record of such a failure. Mr. O'Brien did state that the records for the security office for this period are missing. Mr. O'Brien stated that he did talk to some of the Schools employees to learn if they knew anything about this alleged event but the employees he talked to did not have any knowledge of such an event. Mr. O'Brien acknowledged that he did not talk to Mr. Sprouse, a School employee Mr. Solsebee testified he saw working on the post indicator valve, nor did he talk to all of the School's former employees who may have had knowledge of the alleged event.

Triangle's position with respect to the post indicator valve is that even if it is responsible for the damage to equipment ensuing from the failed coupling, it is not responsible for the earlier damage to some of the same equipment caused by flooding from the post indicator valve. Triangle's contention is that the post indicator valve was the responsibility of the School as solely evidenced by the fact that School employees responded to the failure and repaired the valve.[8] In its brief submitted subsequent to the hearing, Triangle takes this another step and argues that because the post indicator valve was a part of the existing fire sprinkler system, the School was not only responsible for the failure of the post indicator valve but also responsible for the failure of the coupling, indeed, that the School was, during the course of construction, responsible to maintain the existing fire sprinkler system and any new additions and to protect them from hazards such as freezing. In so arguing, Triangle tries to reach too far turning the contract on its head and making the School responsible for Triangle's contractual obligations.

As Triangle noted in its brief, the post indicator valve was a part of the existing fire sprinkler system. Sheet CV-1 of the Plans has a note that the contractor is to maintain the fire main service line of which this post indicator valve is a part until the new service is installed and operational. Another note on the same sheet indicates that the contractor is to remove the post indicator valve as a part of the work. As noted earlier, the contract documents required Triangle to maintain the existing fire sprinkler system in an operable condition and to protect the work from hazards. Therefore, Triangle was responsible for the post indicator valve. The actions of the School in repairing the post indicator valve on a Saturday morning before any Triangle employee arrived on site and when it was likely that it might take some time for Triangle to respond, do not indicate that the School assumed any responsibility for the damage already caused to the post indicator valve except its emergency repair.[9] Under the circumstances, these same actions are equally consistent with an attempt to mitigate potential damages.

Even if the School was responsible for the post indicator valve and the damage ensuing from its alleged failure, Triangle failed to prove the resulting damages. When asked for a break down of damages resulting from the two different events, Triangle stated that they did not have a breakdown but that the majority of the electrical equipment was in room A101, that most of this

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[8] Triangle presented no other evidence to support its contention that the School was responsible for the post indicator valve.

[9] The likelihood that it would have taken some time for Triangle to respond is supported by Mr. Solsebee's daily log for Saturday January 25, 2003, which states that there was only one Triangle employee on the site that day, a carpenter (presumably Mr. Solsebee). Exhibit 1 - Tab 6.

equipment was most likely damaged in the flooding caused by the post indicator valve and, therefore, a majority of the cost for this equipment should be assigned to the School. Triangle has the burden of proving its damages. With respect to the alleged flooding from the post indicator valve, Triangle has utterly failed to do so.

DECISION

It is the decision of the Chief Procurement Officer for Construction that under the contract, Triangle was responsible for the existing fire sprinkler system, that as a part of that responsibility, Triangle installed and maintained a temporary fire main in accordance with a design prepared by it or one of its subcontractors, that under the contract and the common law, Triangle bore the risk of loss due to accident and that the damage to the equipment resulted from accident outside the control or responsibility of the School.

For the foregoing reasons, Triangle's claim for damages is denied.

John St. C. White
Chief Procurement Officer
For Construction

27 sept 07
Date

Columbia, South Carolina

March 27, 2007
Date

STATEMENT OF THE RIGHT TO APPEAL

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site: 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 66.1 of the 2005 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(4). . . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm

EXH. A

TRIANGLE CONSTRUCTION COMPANY, INC.
POST OFFICE BOX 6266
GREENVILLE, SOUTH CAROLINA 29606-6266
TELEPHONE (864) 288-5500 FAX (864) 458-8800

March 9, 2006

Mr. Michael M. Thomas, PE, CBO
State Engineer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: South Carolina School for the Deaf and the Blind
Walker Hall Building Renovations
Spartanburg, South Carolina
State Project No.: H75-9524-CC-A
Application for resolution of contract controversy
Triangle Construction Company

Dear Mr. Thomas:

Pursuant to South Carolina Code § 11-35-4230, Triangle Construction Company, Inc. ("Triangle") hereby petitions the State Engineer to resolve a contract controversy between Triangle and the South Carolina School for the Deaf and Blind (the "School") in connection with the above-referenced project. This letter is submitted as an attachment to form SE-470 "Notice of Claim". Although the School should have submitted this request for the reasons discussed in this letter, Mr. Gary Wolford, who is the project manager with your office for this project, requested that Triangle submit this request to you. Mr. Wolford has been involved in this controversy between the School and Triangle from the beginning. Although we are submitting this petition pursuant to South Carolina Code § 11-35-4230, we understand that the Office of the State Engineer has a mediation process in which it tries to resolve claims short of a hearing and we would be interested in participating in that process. The following is a brief statement of the facts and history of this project and the legal basis supporting Triangle's position.

I. History of Dispute

On April 15, 2002 the School and Triangle entered into an agreement (the "Construction Contract") for the construction of the renovations of the Walker Hall Building (the "Building") located on the School campus in Spartanburg, South Carolina ("the Project"). The architect of record for the Project is Mr. Donald L. Love with McMillan Smith & Partners Architects, PLLC whose offices are also located in Spartanburg. The original contract amount was $7,894,786.00.

The dispute between the School and Triangle centers around an accident that should have been covered by the Builder's Risk insurance policy that the School was required to maintain for the Project. Part of the project involved the installation of a temporary supply line for the fire sprinkler system for the Building and this line was installed outside of the Building. The temporary fire main consisted of various lengths of 4" steel pipe which were joined together with grooved metal couplings that were designed to provide for expansion and contraction of the steel piping. . On January 26, 2003, one of the grooved couplings separated from a section of pipe for unknown reasons which in turn flooded the interior of the basement of the Building which caused damages to newly installed HVAC equipment and ductwork, electrical panels and communications cables. In addition to the failure of the coupling, apparently the components designed to sound an alarm upon detection of water flow in the fire protection system also failed. If the alarm had sounded, then School personnel would have been alerted to the situation and could have prevented the flooding of the basement by shutting off the water supply. All the damaged equipment and components that were located in the basement of the Building were installed by Triangle's subcontractors as a part of the work that was being performed by Triangle under the Construction Contract. Triangle reported the incident to both the School and the Project architect. The School and the Project architect directed Triangle to make the repairs and replacements to the equipment located in the basement that was damaged by the water. Triangle complied with the directives and completed the repairs and replacements at a cost of $116,040.20.

Subsections 11.3.1 through 11.3.3 of the Supplementary Conditions of the Construction Contract required that the School maintain an "All Risk" Builders Risk property insurance for the Project in the initial amount of the Construction Contract and adjusted to take into account any changes in the contract amount. In addition, Subsection 11.3.4 of the Supplementary Conditions provides that the replacement of the damaged work would be covered by a change order. After Triangle reported the incident, the School notified the South Carolina Insurance Reserve Fund of the loss and the Insurance Reserve Fund assigned the loss as a specific claim number against the Builder's Risk insurance. Triangle provided the School and the project architect with cost estimates regarding the costs of replacements and repairs caused by the water damage in the basement prior to receiving the directive to perform the repairs and replacements. This cost information was also provided so that the School could use that information in adjusting its claim against the Builder's Risk policy. Triangle also tried to assist the School in processing the loss with the Insurance Reserve Fund and informally advised the School that it would wait until the School received the proceeds from the Builders Risk insurance prior to processing the change order for the repairs and replacements.

After the School notified the Insurance Reserve Fund of the loss, the Fund assigned Mr. Mike Richardson, an independent insurance adjuster, to investigate and adjust the claim. On March 21, 2003, Mr. Richardson wrote a letter to the School advising that the School should proceed against Triangle's fire sprinkler subcontractor and its insurance carrier for the losses that the School sustained that resulted from the water damage. However, the adjuster made no determination of whether or not there was any coverage under the Builders Risk insurance policy. The School did not provide Triangle with a copy of the adjuster's letter or otherwise advise Triangle of the adjuster's conclusions and Triangle assumed that the loss was being

processed by the Insurance Reserve Fund. In May, 2004, Triangle's attorneys wrote Mr. Durham Harrison, a Senior Claims Representative for the Insurance Reserve Fund, to determine the status of the claim against the Builders Risk policy. In response, Mr. Durham advised that the adjuster had determined that the sprinkler subcontractor or Triangle was negligent in not insulating the fire main and therefore that the loss was excluded under the Builders Risk policy. Triangle objected to this decision, requested a copy of the Builders Risk insurance policy in order to review the actual exclusions under the policy and requested that Mr. Durham reconsider his initial decision. Triangle disagrees with Mr. Richardson's factual conclusions regarding the cause of the water damage. Mr. Richardson concluded that the piping for the temporary fire main cracked or ruptured due to the lack of insulation. There was no evidence that the piping for the temporary fire main ever cracked or ruptured contrary to the statements made by Mr. Richardson. It appears that there were at least two (2) failures that lead to the flooding of the basement of Walker Hall and those failures could not have been anticipated. First, a grooved metal coupling for a section of pipe separated from that section for unknown reasons. Second, the alarm system for the fire sprinkler system also failed to sound for unknown reasons. Except for the occurrence of these two events, there would not have been any flooding of the basement and the equipment would have not been damaged. In any case, the flooding of the basement of Walker Hall had nothing to due with whether the pipe was insulated or not. Triangle also disagrees with Mr. Richardson's his legal conclusions regarding the exclusion under the Builders Risk policy for reasons discussed in Section II of this letter.

Triangle continued to try to assist the School in processing the loss under Builders Risk policy by continuing to contact the Insurance Reserve Fund to discuss why there should be coverage under the policy. In July, 2004, the Insurance Reserve Fund advised Triangle for the first time that they could not process the claim because the School had never submitted a proof of claim against the policy. Mr. Harrison advised Triangle's representative that the School needed to submit its proof of loss against the Builders Risk policy which had to include a signed change order for the repair and replacement work. Triangle then urged the School to submit its proof of loss and to issue a change order. The School then took the position that it did not need to submit a proof of loss since the adjuster had concluded that the losses were excluded under the Builders Risk policy.

In an effort to get this matter resolved, Triangle again requested a copy of the actual Builders Risk insurance policy. In addition, Triangle submitted legal analyses to Mr. Durham Harrison in an effort to persuade him that the School, in fact, had coverage for the losses under the Builders Risk insurance policy. Although copies of various standard property insurance policies and endorsements were eventually provided to Triangle, neither the School nor the Insurance Reserve Fund provided a copy of the declarations page showing which of the policies were actually in force until November, 2004 despite repeated requests. Upon examination of the declarations page for the School's property insurance policies in late November, 2004, it was discovered for the first time that the Insurance Reserve Fund had never issued a Builders Risk policy for this project. In fact, when questioned, Mr. Harrison did not think that there was ever any requirement for the Insurance Reserve Fund to issue a Builders Risk policy. He was totally unaware that the Construction Contract required that the School maintain a Builders Risk policy. In fact, Mr. Harrison was totally unaware of the fact that the State Engineer's form of

construction contract had any requirements for a Builders Risk policy. Copies of the applicable sections of the Construction Contract were submitted to Mr. Harrison on November 23, 2004 with a letter advising that it was clear that the Insurance Reserve Fund had never issued the Builders Risk policy. Despite repeated requests to Mr. Harrison to make a decision regarding coverage, the Insurance Reserve Fund did not respond until June 21, 2005 when Mr. Harrison sent a one page letter to Triangle's attorney that stated:

"The SC State Insurance Fund and the Office of the State Engineer after an extensive review agree that the request for reimbursement submitted by Triangle Construction Co. for the water damage Walker Hall is not a covered loss. Therefore, in keeping with the administrative requirements of the Insurance Reserve Fund, I am unable to allow reimbursement due to the fact that there is no coverage."

Mr. Harrison never provided any explanation of why there was no coverage under the policy and it may have been that there was no coverage simply because no Builders Risk policy was ever issued. Regardless of the lack of explanation from Mr. Harrison, the fact is that the School never maintained the Builders Risk policy that was required by the Construction Contract. This situation probably existed because the Insurance Reserve Fund did not know that the Fund was supposed to issue the policy under the express terms of the Construction Contract and consequently never issued the policy.

Once Triangle determined that the Insurance Reserve Fund was not going to pay the School any proceeds from the Builders Risk policy, Triangle advised the School and the project architect that it would submit its change order request while trying to resolve the School's claim with the Insurance Reserve Fund. Triangle submitted its request for change order #223 for the costs of the repairs and the replacements to the project architect on May 24, 2005 in the initial amount of $125,641.15. No response to that change order request was received from the architect but the School sent a letter to Triangle on July 19, 2005 essentially denying the request for the change order on the grounds that there had not been a change to the original construction contract and that the School had determined that the flood damage was caused by a temporary sprinkler water line that had not been protected against freezing. At that point in time, the School did not have the authority to deny the change order request since the architect had not rendered a decision. Therefore, Triangle requested that the project architect complete his review of the change order request and respond.

As a result of this request, the project architect questioned some of the invoices that were submitted by Triangle in support of its change order request. As a result of this process and further investigation of the questioned invoices, additional backup information was requested from Triangle's mechanical subcontractor and it was ultimately determined that one of the invoices should not have been submitted as part of the costs for making the repairs and replacements caused by the water damage. Accordingly, the change order request was modified on October 3, 2005 and reduced from $125,641.15 to $116,040.20. On October 24, 2005, the project architect completed his review of the request for a change order and wrote a letter to the School advising the School that the work that Triangle performed in making the repairs and the replacements was not a part of the original scope of work and that the costs that Triangle

submitted for the work were reasonable. As a result of the letter of the project architect approving the change order request, Triangle submitted its change order #12 in the amount of $116,040.20 to the project architect for processing. On November 9, 2005, the School sent a letter to the project architect disagreeing with the determination of the project architect.

Triangle has made a number of requests to the project architect that he process the change order that he approved and submit it to the School but the project architect has not taken any action on the change order that Triangle submitted. Triangle has been advised that the School directed the project architect not to process this change order despite the provisions of the Construction Contract to the contrary. Mr. Gary Wolford of your office requested that Triangle submit this request for the resolution of this dispute although the request should have been submitted by the School since the School is the party that has disagreed with the decision of the project architect.

Legal Basis for Claim and Damages

Subsections 11.3.1 through 11.3.3 of the Supplementary Conditions of the Construction Contract required that the School maintain "All Risk" Builders Risk property insurance for the Project. In addition, Subsection 11.3.4 of the Supplementary Conditions provides that the replacement of the damaged work will be covered by a change order. The School and the project architect directed Triangle to make the repairs and replacements caused by the water damage.

Section 7.1.1 of the General Conditions to the Construction Contract provide that changes in the scope of work may be accomplished by change order or construction change directive. Prior to the time that Triangle was directed to perform the repairs and the replacements, the School and the project architect were provided with cost estimates for performing that work and the School provided the directive to perform the work. At the time that Triangle attempted to help the School by agreeing not to submit a formal change order request until after the School received the proceeds from the Builders Risk policy, Triangle had been lead to believe that the School had maintained a Builders Risk insurance policy and that the School would pursue a claim against the policy. In contrast, the School did not maintain a Builders Risk policy, the School never submitted a proof of loss and Triangle spent a lot of time and money trying to convince the Insurance Reserve Fund to pay the School's claim.

Triangle has never been provided with any explanation of why the Insurance Reserve Fund and the Office of the State Engineer concluded that there was no coverage under the Builders Risk insurance policy but if that conclusion is based upon Mr. Richardson's conclusion that it was excluded under Subsection B (3)(c) of the Special Form endorsement to the Builders Risk policy because of faulty, inadequate or defective design, planning and maintenance as the specific exclusions from coverage under the Builders Risk policy, then Triangle disagrees with this position for at least two reasons. The first reason is that Mr. Richardson's statements of the facts surrounding the incident are simply wrong. The second reason has more to due with the interpretation of the courts as to the effect of the particular exclusion under the Builders Risk policy cited by Mr. Richardson.

Mr. Richardson's factual determination is incorrect. Mr. Richardson stated the temperature fell below freezing on January 23rd and that the pipe burst because it was not insulated. Contrary to Mr. Richardson's statement, the piping for the temporary fire main did not rupture or otherwise burst. It appears that there were at least two (2) failures that lead to the flooding of the basement of Walker Hall and those failures could not have been anticipated. First, a grooved metal coupling for a section of pipe separated from that section for unknown reasons. Second, the alarm system for the fire sprinkler system also failed to sound for unknown reasons. Except for the occurrence of these two events, there would not have been any flooding of the basement and the equipment would have not been damaged. In any case, the flooding of the basement of Walker Hall had nothing to due with whether the pipe was insulated or not. There was no evidence of faulty, inadequate or defective design, planning or maintenance by Triangle or its subcontractor. There were simply unexplained failures of a pipe coupling and the alarm system. Since there is no exclusion under the Builders Risk policy for such occurrences, there should have been coverage under the terms of the policy.

Even assuming that there was some evidence of "defective design, planning or maintenance by Triangle or its subcontractor, then there would still be coverage under the terms of the policy under existing court decisions. Triangle thinks that Mr. Richardson's conclusions are completely wrong and are counter to existing case law and the terms of the insurance policy.

The Builders Risk policy provides that the Insurance Reserve Fund will pay for direct physical loss of or damage to "Covered Property" caused by or resulting from any "Covered Cause of Loss". Under the definitions in the Builders Risk policy, "Covered Property" means the value of improvements, alterations, repairs to buildings or structures under renovation including fixtures, machinery and equipment and therefore the equipment and materials that were in the basement of Walker Hall were "Covered Property". The term "Covered Causes of Loss" is defined to mean all risks of direct physical loss unless the loss is excluded under Section B of the Causes of Loss – Special Form. There is no question that the equipment and materials were damaged by the flooding of the basement. In essence, this means that any losses to Covered Property from any causes are covered under Builders Risk policy unless they are specifically excluded.

Mr. Richardson claimed that there was an exclusion under Subsection B (3)(c) of the Special Form endorsement to the Builders Risk policy. Mr. Richardson cited faulty, inadequate or defective design, planning and maintenance as the specific exclusion from coverage under the Builders Risk policy. Mr. Richardson concluded that the failure to insulate or install heat wrap had caused the temporary pipe to burst as a result of freezing. Once the water line burst it then proceeded to flood the basement of the Walker Building and caused damages to newly installed HVAC equipment and duct work, some electrical panels, and some cabling. Assuming that Mr. Richardson's assertions concerning the ruptured pipe were accurate, nonetheless, the flooding of the basement of Walker Hall would not have occurred had the alarm system functioned. Mr. Richardson's position with regard to the exclusion may appear to be correct on its face but that exclusion only applies to the damages to the temporary fire protection pipe assuming that he is correct on his conclusion of what caused the incident but his position is clearly not correct as to the coverage for the consequential damages caused to the mechanical or electrical equipment that resulted from water damage. This conclusion is supported by a portion of Subsection B(3) which Mr. Richardson did not cite which is

further substantiated in another provision in the exclusion section (Section B) that deals with damages caused by freezing. In addition, there are plenty of court decisions to support the position that although the damage to the temporary fire protection pipe is not covered by the Builders Risk policy, the resulting damages caused by the flooding of the basement are covered.
In examining the first paragraph of Subsection B(3) of the Special Form section, the second sentence states:

> "But if an excluded Cause of Loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the Loss of the damage caused by the Covered Cause of Loss."

This particular provision is sometimes referred to as an "ensuing loss" clause in a Builders Risk policy in that even if the initial cause of the loss was excluded under the policy, nonetheless the ensuing or consequential damages from the excluded cause of loss or other causes are covered under the Builders Risk policy. In this instance, even if the causes cited by Mr. Richardson existed, they resulted in water damage to the equipment and materials that had been located in the basement of the building. Water damage is a "Covered Cause of Loss" since all losses are covered unless they are specifically excluded. In examining the form of insurance policy that was provided, water damage of the type that occurred at Walker Hall is not excluded and therefore, is covered. There is a provision in Subsection B(2)(g) that does exclude damages resulting from water from plumbing and HVAC equipment caused by freezing but it specifically excepts out fire protection systems and therefore, the water damage would be covered under the Builders Risk policy. In summary, the damages to the temporary fire protection line might not be covered by the Builders Risk policy, but the water damage to the equipment and materials in the basement would be covered.

Our conclusion is also supported by existing case law dealing with the same or substantially similar issues under both Builders Risk and other forms of property insurance. In the case of *Blaine Construction, Inc., vs. Insurance Company of North America* (171 F.3d 343) (6th Cir.,1999), the Court held that there was coverage for consequential damages even though there was an admission of faulty workmanship. In the *Blaine Construction, Inc.* case, Blaine was constructing a metal warehouse building and subcontracted out the installation of the roof insulation to a subcontractor. The subcontractor was supposed to tape the edge tabs of the vapor barriers for the insulation bats so that there was a two inch overlap in order to have a continuous vapor barrier. The subcontractor failed to tape some of the edge tabs so there was not a continuous vapor barrier. As a result, there was water damage to the roof insulation which cost $315,000.00 to remove and replace. The insurance carrier took the position that the damage to the insulation was excluded as a result of faulty workmanship. This Court held that although the cost of re-tapping the edge tabs of the vapor barrier would not be covered by the Builders Risk policy because it was the result of defective workmanship, nonetheless the water damage, which was not an excluded Cause of Loss, was covered by the Builders Risk policy.

In the case of *Phillips Homebuilders, Inc. vs. Travelers Insurance Company*, 700 A.2d 127, the contractor experienced settling and cracking of the concrete slab that was to be part of the construction of a small shopping center. The contractor took the position that the slab was settling because of underground water which was not excluded under the policy and the insurer took the

position that it was due to defective workmanship and/or settling and cracking which was specifically excluded under the policy. The Court held that underground water was not excluded and could have been the cause of the floor settling, that there was coverage. There aresimilar results in *Harrison Western Corporation vs. National Fire Insurance Company*, 516 NW 2d 79 (Wisconsin Ct. App. 1994), *Mission National Insurance Company vs. Coachella Valley Water District*, 258 Ca. Rptr. 639) (Cal. Ct. App. 1989), *Alton Ochsner Medical Foundation and Broadmoor Construction Company vs. Allendale Mutual Insurance Company*, 215 F.3rd 501 (5th Cir. 2000), and *Tento International, Inc. vs. State Farm Fire & Casualty Co.*, 222 F.2nd 660 (9th Cir. 2000).

The *Tento International* involved a claim against a property insurance policy issued by State Farm. In that case, the roofing contractor was making repairs to the roofing covering Tento's electronic equipment business but when it removed a portion of the roof it failed to install temporary coverings. As a result of a rain storm, some electronic equipment was damaged. State Farm tried to deny coverage based on the fact that the policy excluded the loss resulting from defective or faulty planning, design, workmanship, etc. In fact, the provision upon which Mr. Richardson relies is almost identical to the language that the Court considered in the *Tento International* case. The insurance policy also contained a "ensuing loss" provision similar to the one contained in the copy of the Builders Risk policy that was provided by the Insurance Reserve Fund. In the *Tento* case, the Court found that although the contractor's negligence existed so that the repairs to the roof would not be covered but that the costs to replace or repair the rain damaged equipment resulting from the contractor's negligence was covered under the policy.

In the *Alton Ochsner Medical Foundation* case, the Court made the clear distinction between Builders Risk coverage to pay for items of defective construction and those damages that would be a consequence of faulty workmanship stating that the costs to repair the defective construction was not covered by Builders Risk but that the consequential damages or ensuing losses were. In fact, when the Court provided an illustration to differentiate between excluded and non-excluded losses, the Court provided that "if shoddy plumbing work caused pipes to break and a building to flood and damage the carpet, then the policy would cover the costs of replacing the carpet but not the costs of repairing or replacing the shoddy plumbing job". Another case with almost identical facts is *Album Realty Corp v. American Home Assurance Cr.*, 607 N.E.2d 804 (N.Y. 1992). In the *Album Realty* case, a sprinkler head froze and then ruptured causing water to flood and damage the building. Although the insurance carrier denied coverage based upon an exclusion for damage caused by freezing, the Court found that the damage to the building was caused by water damage, rather than by freezing, and was not excluded.

The examples provided by the Courts in both the *Alton Ochsner Medical Foundation* and the *Album Realty* cases are precisely the situation that Mr. Richardson cited as the basis for the exclusion of the loss under the Builders Risk policy. Mr. Richardson claims that a pipe ruptured due to freezing due to the lack of insulation by Triangle or its subcontractor and that rupture resulted in the flooding of the basement that caused water damage to the mechanical and electrical equipment that had been installed as part of the renovations of Walker Hall. Even if Mr. Richardson's statement concerning the cause of the occurrence were correct, then only the costs of repairing the fire protection pipe would not be covered by the Builders Risk policy if the insurer could prove that it was caused by defective construction or workmanship. However, the consequential or ensuing losses for the water damaged equipment and materials in the basement from that occurrence would

be covered by the Builders Risk policy In summary, it appears clear from reading the entire policy and the applicable case law that the policy does provide for coverage for the losses of repairing and replacing the water damaged equipment and materials in the basement of Walker Hall. The fact that the School did not maintain a Builders Risk policy as provided under the terms of the Construction Contract is really not material to the dispute that exists between the School and Triangle since the failure to maintain the policy simply means that the School was self-insured and assumed the risk of any losses that would have been covered by that insurance policy. Subsection 11.3.4 of the Supplementary Conditions provides that the replacement of the damaged work will be covered by a change order. The School directed Triangle to perform the repairs and replacements caused by the water damage after Triangle provided the School with cost estimates for the work. The work that was performed by Triangle was not within in original scope of work. The project architect confirmed that this work was not part of Triangle's scope of work under the Construction Contract and approved the amount that Triangle submitted in its change order request. Triangle is entitled under the terms and conditions of the Construction Contract to a change order for the work that it performed. The refusal of the School to execute the change order and its directive to the project architect not to sign the change order constitute breaches of contract by the School.

III. Summary

In summary, Triangle is requesting that the State Engineer direct both the project architect and the School to execute the change order and direct the School to pay Triangle the change order in the amount of $116,040.20. Triangle is willing to try to mediate this dispute prior to proceeding with a hearing. If you or anyone in your office has a question with regard to this application, please do not hesitate to give me call. We appreciate your time and attention to this matter.

Sincerely,

TRIANGLE CONSTRUCTION COMPANY, INC.

N. Tracy Pellett
Chairman of the Board

NTP/dl

cc: Mr. Donald L. Love, Jr., AIA
Mr. Gary Wolford, OSE Project Manager
Mr. Robert A. deHoll

EXH. B

FM: JOHN O'BRIEN

TO: FAY/ WOLFORD, OSE

Facts Surrounding This Walker Hall Contract Controversy

1. The school maintains a Builder's Risk insurance policy, which covers all campus buildings. Ref. Purchase Order numbers 37 dated 7-02-01, 308 dated 7-01-02 and 392 dated 7-01-03 and 589 dated 7-23-04. The school also had a building and personal property insurance policy on Walker Hall during the period the construction contract was signed. Ref. Policy number F120030002 dated 7/23/2001 to 7/23/2002.
2. The school filed an Insurance Reserve Fund Water Claim following the date of the loss, January 26, 2003 and on March 5, 2003 Durham Harrison, Jr., Senior Claims Representative with the Insurance Reserve Board issued the IRF claim number F06250 and assigned M & R Claims Service to handle the claim. Ref. copy of claim filed by SCSDB and copy of IRF letter dated March 5, 2003.
3. Mike Richardson, M & R Claims Service, investigated the incident and determined that liability for the incident lies with the sprinkler company since the installer of the temporary sprinkler line, which froze and burst, was not wrapped with insulation or heat taped. Ref. copy of the letter dated 3/21/03.
4. Mike Richardson summarized in his letter of 12/2/03 that the loss is not covered under the policy due to the facts stated in this letter and the policy provisions. Ref. letter dated 12/2/03 and a copy of the Policy Holder's Manual.
5. Durham Harrison, Jr. stated in his June 20, 2005 letter that the SC State Insurance Fund and the Office of State Engineer, after an extensive review agree that the claim submitted by Triangle Construction Co. for the water damage to Walker Hall is not a covered claim. Ref. copy of the letter.
6. John O'Brien, Construction Manager for SCSDB, stated in his letter to Tracy Pellett, CEO Triangle Construction Company, Inc. dated July 19, 2005 that the school was not responsible for the contractor's means and methods of construction and is therefore not responsible for the water damage repairs to Walker Hall. Ref. copy of the letter.
7. On November 18, 2005, John O'Brien sent a reply letter to project architect, Donnie Love's November 11, 2005 letter with attached change order #12, which Triangle Construction Company had previously forwarded to him on the wrong form signed by Tracy Pellett, but not signed by Donnie Love. John O'Brien reminded Donnie in his reply that, as per the construction contract, the project change order form SE-480 should have been used and the form should not be forwarded to the owner until both the contractor and project architect have signed the document. As of May 4, 2006, Donnie Love has not forwarded a signed change order #12 to the school. Ref. copies of the letters and enclosures.
8. In a March 9, 2006 letter to the State Engineer Michael Thomas, which was forwarded in Voight Shealy's letter of March 15, 2006 to John O'Brien, Tracy Pellett states on page five, in the second paragraph that "Triangle has been advised that the School directed the project architect not to process this change order despite the provisions of the Construction Contract to the contrary." This is a false statement as evidenced in the documentation referenced in paragraph 7.

9. John O'Brien's letter of March 27, 2006 responding to Voight Shealy's letter of March 25, 2006 stated that the Agency agrees to participate in a mediation and identified Jon Castro, CFO as having full negotiating authority. Ref. letter
10. Gary Wolford's letter containing the minutes of the May 4, 2006 mediation meeting, in which it was agreed the agency would contact the IRF in an effort to have the claim re-visited in order to pursue a positive resolution of the water damage claim to the IRF.
11. A fax from IRF to the agency containing a copy of the official letter denying the claim plus a copy of the IRF claim adjuster's log, which supported IRF position in denying the claim.

STATE OF SOUTH CAROLINA

OFFICE OF INSURANCE SERVICES

INSURANCE RESERVE FUND

18 JUL 2001

POLICY NUMBER	POLICY PERIOD FROM	TO	TYPE OF INSURANCE	COVERAGE
F120030002	07/23/2001	07/23/2002	BUILDING AND PERSONAL PROPERTY	30,332,324

NAMED INSURED AND ADDRESS

SC SCHOOL FOR THE DEAF
AND BLIND
CEDAR SPRINGS STATION
SPARTANBURG SC 29302

*** RENEWAL POLICY ***

ATTN:
JANICE CROXDALE (864)577-7542

ACTIVITY 01

COVERAGE PROVIDED UNDER THIS POLICY IS SUBJECT TO THE FOLLOWING FORMS
PD-1 PD-2 PD-3 PD-4 PD-5 PD-8 PD-9 PD-10 PD-11 PD-12 PD-15 PD-27 PD-33

SCHEDULE

12:01 AM STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

COVERED CAUSES OF LOSS:
SPECIAL FORM EARTHQUAKE FORM FLOOD INSURANCE

BOILER AND MACHINERY COVERAGE FORM:
IN RETURN FOR THE PAYMENT OF PREMIUM AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY WHILE THE OBJECT IS IN USE OR CONNECTED READY FOR USE AT ANY LOCATION.
LIMIT OF INSURANCE.....$5,000,000 PER ACCIDENT
PREMIUM.....INCLUDED
FORMS APPLICABLE TO BOILER AND MACHINERY COVERAGE, PD-01; PD-09; PD-12

ORDINANCE AND LAW
LIMIT OF INSURANCE.....$100,000

OPTIONAL COVERAGES APPLICABLE ONLY WHEN ENTRIES ARE MADE IN THE BRACKETS BELOW:
REPLACEMENT COST BUILDINGS.....(X)
REPLACEMENT COST PERSONAL PROPERTY...(X)

DEDUCTIBLE.....$250

COINSURANCE.....80%

SEGMENT NUMBER	PROPERTY DESCRIPTION/LOCATION		LIMIT OF INSURANCE	RATES	PREMIUMS
10	WALKER HALL 33 (101)	BUILDING	7,540,814	0.108	8,144.08
		CONTENT	1,500,000	0.079	1,185.00
20	HUGHSTON HALL 12 (100)	BUILDING	1,266,681	0.108	1,368.23
		CONTENT	225,000	0.079	177.75
30	THACKSTON HALL 28 (120)	BUILDING	2,437,881	0.108	2,632.91
		CONTENT	500,000	0.079	395.00
40	STUDENT AFFAIRS 6 (121)	BUILDING	895,000	0.055	492.25
		CONTENT	0	0.043	.00
50	HENDERSON HALL 10 (122)	BUILDING	749,841	0.108	809.83
		CONTENT	100,000	0.079	79.00