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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

STANTEC CONSULTING SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPELLANT FLATIRON-ZACHRY, A JOINT VENTURE'S APPEAL

INTRODUCTION

Flatiron-Zachry, a Joint Venture ("**FZJV**") concedes that it filed the Notice of Appeal more than 30-days after the Court of Common Pleas denied its February 3, 2022 Motion to Vacate ("**First Motion to Vacate**"). FZJV now argues that its First Motion to Vacate was null and void and that timeliness should be measured from the denial of its June 22, 2022 Motion to Vacate ("**Second Motion to Vacate**"). This argument has several fatal flaws.

A key component of FZJV's argument is that the November 5, 2021 arbitration award (the "**Award**") was not a final award. Yet, in the proceedings below, FZJV represented that the Award

was final. FZJV explicitly represented to the Court that "Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, ***which would be final as to these claims, if not lifted***." (FZJV's First Motion to Vacate attached hereto as Exhibit "**A**," p. 19 ¶ 8) (emphasis added). Before it filed its Return to Stantec's Motion to Dismiss Appeal (the "**Return**"), FZJV consistently and correctly asserted that the Award was final. Partial awards that completely resolve an issue are final.

FZJV now claims that the Award was not final until the arbitration panel "amended" its Award. No substantive amendment ever occurred, nor could it have. Arbitrators are not empowered to redetermine the merits of matters already decided. The "amendment" that FZJV refers to is the deletion of a single word (really a single character) inadvertently included in the Award. Otherwise, the Award was unchanged. Moreover, as described herein, FZJV's argument that the alleged "amended award" was final directly contradicts its argument that the original Award was not final.

Finally, while FZJV's counsel crafts confusing arguments explaining why FZJV *was not required to* appeal the denial of the First Motion to Vacate, FZJV never disclosed the actual reason that it did not appeal the denial of its First Motion to Vacate.[1] FZJV obviously made a conscious decision not to appeal and later regretted the decision. The Court should dismiss FZJV's appeal.[2]

[1] The Court should recall that the Second Motion to Reconsider was denied on March 24, 2022 when there was still 3 weeks left to appeal the denial of the First Motion to Vacate.

[2] While the merits of the underlying arbitration are not at issue in this motion, FZJV conflates the timeliness issue with the merits. Like the Panel, Stantec disagrees with FZJV's merits arguments. The case was baseless. More than two years into the litigation (7 years after the alleged negligent acts), FZJV answered contention interrogatories stating that it was unable to articulate a claim against Stantec. (*See* FZJV's Response to Defendant Stantec Consulting Services, Inc.'s Interrogatories attached hereto as Exhibit "**D**," pp. 58-59).

ARGUMENT

I. FZJV Admitted that the November 5, 2021 Award Was Final.

This appeal relates to an arbitration between FZJV and Stantec Consulting Engineers Inc. ("Stantec"). Stantec filed individual motions requesting dismissal of each of FZJV's six discrete claims. (*See* Stantec Consulting Services, Inc.'s Motions for Summary Judgment attached hereto as Exhibit "**B**," pp. 33-50). The Panel granted 5 of the motions thereby dismissing 5 of the claims. (*See* Order on Stantec's Motions for Summary Judgment attached hereto as Exhibit "**C**," pp. 52-55). The Award was final and considered final by the parties and the Court.[3]

A Motion to Vacate applies only to a final award. *Folse v. Richard Wolf Medical Instruments Corp*., 56 F.3d 603, 605 (5th Cir. 1995). Therefore, by filing the First Motion to Vacate, FZJV represented that the Award was final. Furthermore, FZJV explicitly stated that "Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, ***which would be final as to these claims, if not lifted***." (Ex. A, p. 19, ¶ 8 (emphasis added)).[4] In fact, prior to filing its Return, FZJV never argued that the Award was not final.[5] FZJV now must reverse course and argue that the Award was not final because, otherwise, its appeal is untimely.

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[3] FZJV argues that "Stantec incorrectly posits that the arbitration award at issue in this appeal was issued on November 5, 2021." Return, p. 1. FZJV's argument is puzzling because the November 5, 2021 award is the only award that the Panel ever issued.

[4] FZJV now argues that it merely "chose to go ahead and pursue a motion to vacate," implying that it always considered the summary judgment award to be non-final. (Return, p. 6). Logically, then, FZJV asserts that it *chose to* deliberately flout the rules by filing premature Motions to Vacate. This self-impalement may be necessary to defeat the Motion to Dismiss, but it does not reflect truth. As shown, FZJV represented that the Motions to Vacate were necessary because the Panel's Award was final. (*See* Ex. A, p. 19 ¶ 8).

[5] The Court of Appeals will not consider arguments advanced by a party that were not raised in the proceedings below. *Herron v. Century BMW*, 395 S.C. 461, 465-466 (2011).

FZJV correctly represented that the Award was final. Case law establishes that partial awards that resolve an entire issue are final. *Crawford Group, Inc. v. Holekamp*, 2007 WL 844819 (E.D. Mo. 2007) at * 4 (collecting cases discussing this rule). Stantec and the Court accepted FZJV's assertion that the Award was final. It is undisputed that both liability and damages were determined for each discrete issue. Accordingly, the Award was final.

II. FZJV Is Judicially Estopped from Contending that the Award Was Not Final.

Acting on FZJV's representation that the Award was final, the Court lifted the stay, accepted the First Motion to Vacate, heard argument, and ruled. (*See* Court's Order Denying FZJV's First Motion to Vacate attached hereto as Exhibit "**E**," pp. 63-64). FZJV is judicially estopped from contending that the Award was not final. *Quinn v. Sharon Corp.*, 540 S.E.2d. 474, 475 (S.C. Ct.App. 2000)("the doctrine of [judicial estoppel] precludes a party from adopting a position in conflict with one taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts.")[6]

III. The Panel Did Not Substantively Amend the Award.

a. The Arbitrators Lacked Authority to Redetermine the Merits of the Summary Judgment Award.

Rule 51 of the AAA Construction Industry Arbitration Rules limits the authority of the arbitrators to modify an award. (*See* American Arbitration Construction Industry Arbitration Rules and Mediation Procedures attached hereto as Exhibit "**F**," p. 68). Arbitrators cannot redetermine

[6] If the Court had granted the Motion to Vacate, FZJV surely would have accepted the benefit of its order and would have asserted that the Court had authority to issue it. That was the reason that FZJV filed the motion. Taking a contrary position to reverse a bad outcome is the type of gamesmanship that judicial estoppel is intended to prevent.

the merits of any claim that has been decided.[7] Instead, the arbitrators are limited to correcting clerical, typographical, technical, or computational errors. *Id*.

b. The Arbitrators Did Not Redetermine the Merits

FZJV filed two Motions for Clarification, or in the Alternative, for Reconsideration Regarding the Order on Stantec Consulting Services, Inc.'s Motion for Summary Judgment. It filed one on November 24, 2021 ("**First Motion to Reconsider**") (*See* FZJV's First Motion to Reconsider attached hereto as Exhibit "**I**," pp. 93-105) and the other on March 24, 2022 ("**Second Motion to Reconsider**").[8] (*See* FZJV's Second Motion to Reconsider attached hereto as Exhibit "**J**," p. 107-121). In both, FZJV sought clarification on two issues relating to Stantec's Motion Number 4 on the MSE Wall 32 claim, as follows:

1. that the Award contained statements that FZJV deemed contradictory, to wit that:

    a. "'[o]n items 1, 2, and 4, it is undisputed that Stantec did not provide pre-award services for these items;" and

    b. "'[r]egarding item 4, the MSE walls, while Stantec performed some pre-award services relating to the MSE Walls, it is undisputed that Stantec was not retained by CECS to provide input on strap lengths needed for MSE walls.'" (This argument is hereinafter referred to as "**FZJV's Issue 1**").

[7] Stantec alerted the Panel and the Court that due to the finality of the Award, the Panel was powerless to redetermine the merits. (*See* Stantec's Opposition to FZJV's Second Motion to Reconsider attached hereto as Exhibit "**G**," pp. 75-76; *see also* Stantec's Opposition to FZJV's Second Motion to Vacate attached hereto as Exhibit "**H**," p. 87). Therefore, it is unclear what FZJV hopes to gain when, in its Return, it says "Stantec did not challenge the amendments made by the order on FZJV's second motion to clarify, thereby waiving any argument that the original award was "final" as it now contends in its motion." (Return, p. 7). Stantec did not challenge the amendments because nothing of substance changed but Stantec did repeatedly assert that the Award was final.

[8] The First Motion to Reconsider was filed within 20-days of the Award and was timely. The Second Motion to Reconsider was filed 4 months after the award and was untimely pursuant to Rule 51 of the AAA Construction Industry Rules. (*See* Ex. F, p. 68).

2. that "the Order does not ***specifically*** address the second part of Stantec's MSJ No. 4 regarding FZJV's MSE Wall claim for Wall 32 shoring." (Emphasis added) (This argument is hereinafter referred to as "**FZJV Issue 2**").

The Panel considered FZJV Issues 1 and 2 and denied FZJV's First Motion to Reconsider. The Panel reiterated "…Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED." (Arbitration Panel's Order Denying FZJV's First Motion to Reconsider attached hereto as Exhibit "**K**," p. 123).

In its untimely Second Motion to Reconsider (see footnote 7), FZJV reiterated its request for clarification regarding FZJV Issues 1 and 2 and sought reconsideration of the Award. Responding to FZJV's pestering, the Panel corrected a typographical error, and reiterated that Stantec's motions had been granted in their entirety. The Panel denied the Motion to Reconsider.

i. The Panel's Treatment of FZJV Issue 1.

FZJV Issue 1 addressed a conflict between two sentences in the Award. In one sentence, the Panel stated that "[o]n items ***1, 2, and 4***, it is undisputed that Stantec did not provide pre-award services for these items." (Ex. J, p. 108 (emphasis added)). In a separate sentence, the Panel stated that Stantec had some responsibilities for MSE walls (but none that were material to FZJV's Wall 32 claim). *Id*. FZJV raised this issue in its First Motion to Reconsider. (*See* Ex. I, p. 99). The Panel simply denied the motion. (*See* Ex. K, p. 123). After the Court denied FZJV's First Motion to Vacate, FZJV again asked the Panel for clarification on FZJV Issue 1. In response to FZJV's prodding, the Panel changed "1, 2 and 4" shown in bold above to "1 and 2." In the Award, the Panel found that Stantec had some responsibilities for MSE walls but none that were material to FZJV's claim. That finding was unaffected by correcting the typographical error. (*See* Ex. C, p. 54).

ii. The Panel's Treatment of FZJV Issue 2.

FZJV Issue 2 arises from FZJV's stated confusion about whether the Award resolved the entirety of Stantec's Motion for Summary Judgment 4. The award clearly stated that the motion was "granted," not granted in part and denied in part. If there was any confusion, it had already been clarified when the Panel denied FZJV's First Motion to Reconsider.

FZJV extensively briefed FZJV Issue 2 in its First Motion to Reconsider. FZJV explained that Stantec moved to dismiss the entirety of FZJV's MSE Wall 32 claim. (Ex. I, p. 95 ("Stantec sought the dismissal of the 'entire' MSE Wall Claim…")). Despite the Award clearly stating that "…Stantec's Motions for Summary Judgment are GRANTED for items 1-4 and 6," (Ex. C, p. 52), FZJV hoped that the Panel intended to grant only part of Stantec's Motion on item 4. Therefore, FZJV detailed its claim and the scope of Stantec's motion and asked the Panel to clarify whether it intended to grant only part of the motion. (Ex. I, p. 100). The Panel had granted the motion, not part of it, and believed that no clarification was required. It simply denied FZJV's First Motion to Reconsider. (*See* Ex. K, p. 123).

The Panel must have felt that FZJV's Second Motion to Reconsider meant that FZJV would never relent until the Panel confirmed that its original order granted Stantec's motion in its entirety. Reacting to FZJV's prodding, the Panel confirmed that Stantec's Motion for Summary Judgment had *always* been granted in full. Again, nothing changed. (*See* Arbitration Panel's Order Denying FZJV's Second Motion to Reconsider attached hereto as Exhibit "**L**," p. 125).

The arbitrators' good faith in responding to FZJV's feigned ignorance did not (and, by AAA Rule 51, could not) result in any substantive change to its original award. The motions that were granted in November 2021 remained granted and the reasoning remained the same. The Second Motion to Reconsider was denied.

Accordingly, FZJV cannot contend that its appeal was timely because it was filed within 3 months of the denial of its Second Motion to Reconsider even if that motion had been timely, which it was not. The denial of the Second Motion to Reconsider merely confirmed the Award.

IV. FZJV's Argument Regarding Finality of Award is Self-Contradictory.

FZJV's claim that finality only occurred when the Award was allegedly amended by the Panel contradicts its argument that the Award, itself, was not final. Citing cases discussing the "completed arbitration rule," FZJV argues that the Award could not have been final because one claim (the "**Geomembrane Claim**") was not resolved in the Award.[9] (Return, P. 1-2). However, the Geomembrane Claim was not resolved when the alleged "amended award" was issued either. Therefore, if the existence of the Geomembrane Claim prevented the Award from being final, it also prevented the alleged "amended award" from being final. FZJV does not explain how the same rule applied to the same facts could even possibly yield a different outcome with respect to the Award and the alleged "amended award."[10]

The Court need not dwell long on this contradiction. If either of FZJV's conflicting interpretations is applied uniformly to its two Motions to Vacate, the appeal should be dismissed. If the pendency of the Geomembrane Claim did not prevent the Award from being final, then FZJV missed the April 15, 2022 deadline to appeal the denial of its First Motion to Vacate. Conversely,

[9] The cases cited by FZJV relating to the "completed arbitration rule" all involve issues for which liability was decided but damages were not. Therefore, the cases do not involve an issue or issues that were completely resolved. Here, for each of the 5 issues, both liability and damages were resolved and there was nothing left to resolve. This also distinguishes FZJV's cases from the rule discussed in *Crawford Group, Inc. v. Holekamp*, 2007 WL 844819 (E.D. Mo. 2007), *see infra*, that a partial award entirely resolving an issue is final and subject to vacatur.

[10] FZJV even expressed doubt that the Second Motion to Reconsider supports the appeal. FZJV acknowledged the inconsistency in its argument when it wrote: "…the earliest time that the arbitration panel's order could be considered 'final' was upon the arbitration panel's order amending the original summary judgment order. However, even then, there had not been a 'final arbitration' triggering the deadlines because one of FZJV's claims against Stantec remained pending…" (Return, p. 2).

if the pendency of the Geomembrane Claim prevented the Award from being final, then the Geomembrane Claim would have also prevented the so-called "amended award" from being final. The Second Motion to Vacate would then be a legal nullity, void *ab initio*, and not the proper subject of appeal. In either case, the appeal should be dismissed.

V. If the Resolution of the Geomembrane Claim Was Required for Finality, FZJV Failed to Move to Vacate Timely and There Can Be No Appeal.

On September 12, 2022, FZJV advised the Panel that it would withdraw the Geomembrane Claim. (*See* September 12, 2022 email from Zack Rippeon attached hereto as Exhibit "**M**," p. 128). If FZJV's finality argument is correct, the prior Motions to Vacate were null and void because the Award was not final. If the withdrawal of the Geomembrane Claim achieved finality, then, to preserve its argument, FZJV was required to file a Motion to Vacate between September 12, 2022 and December 12, 2022, which it did not do.

VI. FZJV's Equitable Tolling Argument is Inapposite and Unavailing.

Resorting to the doctrine of equitable tolling, FZJV contends that the three-month period for filing a Motion to Vacate is like a limitations period that can be tolled. (Return, p. 8 citing *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 874 (11th Cir. 2023)).[11] However, FZJV does not require tolling of the period to file a Motion to Vacate. ***It timely filed the First Motion to Vacate***. It just chose not to appeal from the denial.

There was nothing inequitable about the Court's treatment of the First Motion to Vacate. FZJV advanced its arguments that the Panel exceeded its authority and manifestly disregarded the law. The Court read the motion and opposition, and reviewed the evidence presented to it. The Court heard argument. Then, the Court denied the motion. FZJV had its day in Court.

[11] The equitable tolling cases cited by FZJV also involve egregious conduct not at issue here.

Upon receiving the denial of its First Motion to Vacate, FZJV had the right to file a Notice of Appeal within 30-days. FZJV chose not to do so. There is no South Carolina case holding that the time to appeal can be equitably tolled. Rather, South Carolina courts hold that the failure to timely appeal deprives the appellate court of jurisdiction. Tolling does not apply. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004)("… [T]he appellate court … has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.")

Finally, equity aids the diligent and vigilant, not those who sleep on their rights. *Ex Parte Johnson*, 371 S.C. 614, 618 (Ct. App. 2006). FZJV offers no excuse for why it failed to appeal the denial of the First Motion to Vacate. This is the elephant in the room. Clever lawyers can spin webs but the simple question unanswered by FZJV is: why didn't you just appeal the denial of the First Motion to Vacate? Either it chose not to do so and regrets the decision, or it failed to do so. Either way, equity is not available to FZJV.

VII. FZJV's Second Motion to Vacate Was Not Timely Filed.

FZJV argues that its appeal is timely because it was filed within 30-days of the denial of its Second Motion to Vacate which followed from its Second Motion to Reconsider. (Return, p. 1-2 (FZJV argues the Award was final, at the earliest, when the Second Motion to Reconsider was denied)). The Second Motion to Vacate was filed on June 22, 2022, more than 7 months after the date of the Award. (*See* FZJV's Second Motion to Vacate attached hereto as Exhibit "**N**," p. 130). Pursuant to 9 U.S.C. § 12, this was over 4 months too late. Alluding to the alleged "amended award" (i.e., the denial of the Second Motion to Reconsider), FZJV incorrectly implies that its Second Motion to Vacate is timely because it was within 3-months of the denial of the Second Motion to Reconsider.

In its Motion to Dismiss this appeal, Stantec explained that the time for filing a motion to vacate runs from the date of award, not the date that the Panel rules on a motion to reconsider. Stantec extensively briefed this at pp. 5-6 of its Motion to Dismiss citing *Gonzalez v. Mayhill Behavioral Health LLC*, 2022 WL 1185889 (E.D. Tex. 2022) and cases cited therein; *see also, First Kuwaiti General Trading & Contracting W.L.L. v. Kellogg Brown & Root International, Inc*, 2023 WL 3437813 (May 12, 2023) at *5. FZJV completely ignored this case law in its Return. These cases hold that the plain language of 9 U.S.C. § 12 requires measuring timeliness from the date of award. The cases further hold that measuring from the date of award rather than awaiting the result of a reconsideration motion is justified because arbitrators are prohibited from substantively altering the award.

VIII. The Holding in *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) Is Applicable.

FZJV attempts to distinguish the *Elam* case cited by Stantec in the Motion to Dismiss. The relevant point in *Elam* was that a party cannot extend an appeal period through successive filings. Here, in contravention of AAA Rule 51, FZJV filed a Second Motion to Reconsider with the Panel more than 20-days after the date of Award. This motion was nearly identical to its First Motion to Reconsider. Based on the denial of this improper motion, FZJV filed a Second Motion to Vacate more than 3-months after the date of the Award in contravention of 9 U.S.C. § 12. This Motion to Vacate was nearly identical to its First Motion to Vacate. If FZJV's appeal is deemed timely under these circumstances, the jurisdictional time limit for filing a Notice of Appeal can be easily manipulated by litigants who file redundant and procedurally improper pleadings. In turn, this would render SCAR 203(b) meaningless. The parties and the Court could have been spared FZJV's contortion of the facts and law if FZJV had simply timely appealed the denial of the First

Motion to Vacate. Fairness and the law, as described in the *Elam* case, dictate that this appeal be dismissed.

CONCLUSION

For the reasons stated herein and Stantec's Motion to Dismiss, Stantec respectfully requests that FZJV's Appeal be DISMISSED.

WEINBERG WHEELER HUDGINS
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August 24, 2023
Atlanta, Georgia

Exhibit A

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**C.A. No. 2018-CP-23-04740**
Flatiron-Zachry, a Joint Venture,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO LIFT THE STAY FOR APPLICATION TO VACATE**
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Flatiron-Zachry, a Joint Venture (FZJV), under the Federal Arbitration Act,[1] and non-statutory grounds, hereby files this, its Notice of Motion and Motion to lift the Stay for Application to Vacate, showing that vacatur is warranted where the parties' private arbitration panel issued an award in which the panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. This Motion will be heard at such time as this Court may direct. In support thereof, FZJV relies on the following grounds as set forth in the attached Memorandum of Law:

INTRODUCTION

In the absence of meaningful discovery, permission to submit a dispositive motion, and permission to rule on such motion, the arbitration panel (the Panel) issued an Order disposing of all but one of FZJV's claims against Defendant-Respondent Stantec Consulting Services, Inc.

[1] Plaintiff does not believe the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann. §§ 15-48-130(a)(3)–(4), is applicable, but should the Court find it is, this motion would also be brought pursuant to the corresponding section.

(Stantec). In issuing its award, the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. For these reasons, discussed more fully below, FZJV respectfully requests that this Honorable Court enter an Order vacating the Panel's November 5, 2021 Order on Stantec's Motions for Summary Judgment.

FACTUAL BACKGROUND

The dispute that forms the basis for the parties' underlying arbitration arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina. FZJV seeks to recover nearly $60 million dollars in damages that were caused directly by the Designers', including Stantec's, negligent and deficient performance of its work.

PROCEDURAL HISTORY

1. On or about September 14, 2018, FZJV filed its original complaint in this Court, as required under S.C. Ann. § 15-36-100.

2. On or about November 18, 2019, the parties filed a Joint Motion to Stay Proceedings and Compel Arbitration, which included in the filing a copy of the parties' arbitration agreement (the "Arbitration Agreement").

3. On November 19, 2019, the Court issued an Order granting the parties' Joint Motion to Stay Proceedings and Compel Arbitration, compelling the parties to arbitrate the matter as set forth in the Arbitration Agreement.

4. On January 11, 2021, without making prior written application to submit a dispositive motion as required under AAA Rule R-34 (Rule 34), Stantec filed its first motion for summary judgment. The Panel denied Stantec's first motion for summary judgment as "premature" based on the "current status of on-going discovery." At that time, discovery had just begun—months of discovery remained, multiple defendants, including Stantec, had not completed their document productions, no depositions had occurred, there had been no opportunity for the parties

to present final evidentiary support for their positions, and there had been no opportunity for the parties to present expert testimony. For those reasons, the Panel indicated that Stantec could pursue summary judgment only "at the close of discovery."

5. Undeterred, and prior to the close of discovery, Stantec filed a second motion for summary judgment on September 13, 2021. The circumstances surrounding this second motion were essentially the same as the first: Stantec filed its motion without making prior written application as required under Rule 34, the Panel again violated Rule 34 by entertaining Stantec's motion, and discovery remained incomplete, having advanced no further than the "premature" status of discovery at the time of Stantec's first motion.

6. The Panel granted Stantec's second motion on November 5, 2021, notwithstanding the following facts: Stantec had no authority to file its motion, the Panel had no authority to rule on the motion, discovery was ongoing and depositions of corporate representatives had just begun, the discovery period had not closed, the Panel manifestly disregarded the rules governing submission of dispositive motions, the Panel had no authority to undermine the discovery process, and the Panel had no more information available to it than it did at the time it denied Stantec's first motion as premature.

7. An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). In this case, the parties to this action agreed to arbitrate their claims pursuant to the Arbitration Agreement. Under those terms, the Panel received certain authority, including the authority to arbitrate the parties'

claims in accordance with the Federal Arbitration Act (FAA) and the American Arbitration Association's Construction Industry Rules (AAA). One such rule applicable to the parties' arbitration is AAA Rule R-48(b), which allowed the Panel to make interim, interlocutory, or partial rulings, orders, and awards, as it did here. It is the Panel's interim, interlocutory, or partial rulings, orders, and award that is the subject of the instant application to vacate.

8. Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, which would be final as to these claims, if not lifted.

9. Under 9 U.S.C. § 10(a)(3), vacatur is appropriate where an arbitrator or panel refused "to hear evidence pertinent and material to the controversy[.]"

10. Under 9 U.S.C. § 10(a)(4), vacatur is appropriate where an arbitrator or panel "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

11. The Panel exceeded its powers and refused to hear evidence pertinent and material to the controversy when it granted Stantec's motion for summary judgment.

12. Under 9 U.S.C. § 10(b), "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

13. The arbitration as to certain remaining claims is still underway, and thus this Motion and Application are timely.

ARGUMENT

The Federal Arbitration Act (FAA), which applies to this matter pursuant to the Arbitration Agreement, provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. § 10. There are four such statutory grounds under the FAA, two of which are relevant to this application:

> (3) where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In addition to the four statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground of "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This non-statutory "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

Among the various grounds for arbitral vacatur, three are present here—the Panel refused to hear evidence material to the controversy under 9 U.S.C. § 10(a)(3),[2] the Panel exceeded its power under 9 U.S.C. § 10(a)(4),[3] and the Panel manifestly disregarded the law.

I. The Panel refused to hear evidence material to the controversy by issuing an award before the parties conducted meaningful discovery.

Vacatur under the FAA is appropriate when an arbitrator or panel refuses to hear evidence pertinent and material to the controversy. *See* 9 U.S.C. § 10(a)(3). Such a refusal to hear evidence material to the controversy is what happened here.

The FAA required the Panel to hear all evidence pertinent and material to the controversy. The Panel was similarly required by the rules governing the underlying arbitration to ensure a fair hearing, specifically when managing discovery. *See* AAA Rule R-24(a) ("The arbitrator shall

[2] Or S.C. Code Ann. § 15-48-130(a)(4), should the Court determine that the SCUAA is applicable.
[3] Or S.C. Code Ann. § 15-48-130(a)(3), should the Court determine that the SCUAA is applicable.

manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and *safeguarding each party's opportunity to fairly present its claims and defenses*." (emphasis added)); *see also* AAA Rule R-33(a) ("The arbitrator has the discretion to vary [the proceedings], *provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.*"). If, however, an arbitrator does not provide for a full and fair hearing as the AAA rules require, then "courts owe no deference to an arbitrator who has failed to provide the parties with a full and fair hearing." *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (citation omitted) (concluding arbitrator committed misconduct by failing to provide parties with full and fair hearing); *see also Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir. 1985) (holding that arbitrator's refusal to consider a trial transcript submitted by one of the parties denied them "adequate opportunity to present its evidence and arguments"); *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1417 (N.D. Okla. 1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy").

In *International Union*, for example, the arbitrator told the parties to meet, gather information, negotiate further, and, if not resolved, present evidence and argument at an arbitration hearing. *See Int'l Union*, 232 F.3d at 390. The arbitrator then "issued his award without ever holding that hearing or affording the Union the opportunity to present the evidence it had been prepared to offer[.]" *Id.* The United States Court of Appeals for the Fourth Circuit, in holding that the arbitrator had engaged in misconduct, noted that the arbitrator had made no findings that the Union's evidence was "cumulative," "irrelevant," or "immaterial," nor did the record show "that [the] evidence was, in fact, cumulative or anything less than highly material and relevant." *Id.*

The facts here are analogous. The Panel denied Stantec's first motion for summary judgment as premature based on the status of the evidence, saying that summary judgment could not be pursued again until "the close of discovery"—like the *International Union* arbitrator instructing the parties to meet, gather information, and negotiate further before there could be a hearing. Then, before the parties could move past the "premature" status of discovery that warranted denying Stantec's first motion, and before "the close of discovery," the Panel issued its award based on Stantec's second motion for summary judgment—like the *International Union* arbitrator issuing his award before the parties could meet, gather information, and negotiate further. In granting Stantec's motion, the Panel made no findings that the discovery it had cut short would be "cumulative," "irrelevant," or "immaterial"—like the *International Union* arbitrator who failed to do the same. And like *International Union*, where "the Union claimed that [the additional] evidence would demonstrate [certain] facts," the additional discovery that FZJV was deprived of the opportunity to conduct and present would have demonstrated—at the absolute very least—a genuine issue of material fact.[4]

Had it been given the opportunity, FZJV would have conducted the following material discovery: (i) the conclusion of Defendant Civil Engineering Consulting Services, Inc. corporate representative deposition; (ii) the conclusion of FZJV's corporate representative deposition; (iii) the deposition of expert witness Dr. O'Connell; (iv) the deposition of Stantec's expert witness, Dr. Amoroso; (v) the deposition of Stantec's corporate representative; (vi) the deposition of Stantec's engineer, Betsy Watson; and (vii) the deposition of ECS's corporate representative.

[4] In fact, the existence of a genuine issue of material fact is something that the Panel has since acknowledged in its January 13, 2022 Order. In that Order, the Panel denied additional motions for summary judgment, finding there was a genuine issue of material fact on *the very same issue* it had determined was undisputed in the award that is the subject of this application.

Based on that discovery, and if it had been given the opportunity to fairly present its case, FZJV would have presented pertinent and material evidence showing: (i) Stantec's involvement in, and responsibility for, the temporary shoring and design of the MSE Walls; (ii) that Stantec breached the standard of care by deviating from the Pre-Award design and is liable for such negligence; (iii) that FZJV did not know and should not have known an issue with the geomembrane would give rise to a cause of action against Stantec; and (iv) that Stantec's failure to timely provide the Post-Award temporary drainage design caused the inefficiencies and related damages suffered by FZJV.[5] But FZJV did not have the opportunity to present any of this pertinent and material evidence. Instead, the Panel based its decision on the same record it had previously found premature and insufficient to allow for an award.

Because FZJV was denied the opportunity to fairly present its case, because the Panel refused to hear material evidence that it had not found to be "cumulative," "irrelevant," or "immaterial," and because the Panel denied FZJV the right to be heard, this Court should, under 9 U.S.C. § 10(a)(3), vacate the Panel's award.

II. The Panel exceeded its power.

A. The Panel exceeded its power by disregarding the parties' agreement to conduct discovery.

The parties agreed "that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel." *See* Joint Motion to Stay Proceedings and Compel Arbitration at 5, ¶ 9. By disregarding the parties' agreement to

[5] *Cf. e.spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 910 (4th Cir. 2002) ("At the outset, we note that CNS has not identified, either to the arbitral panel or this court, any evidence that it would have presented at the hearing but for the panel's limitation on its right to present evidence. Consequently, it is impossible to determine whether any evidence that was excluded was 'pertinent and material' to the controversy.").

conduct discovery, the Panel exceeded its power, providing additional statutory grounds for vacatur.

As an initial matter, the agreement states that discovery "will" be conducted. The parties did not agree that discovery *may* be conducted, nor did they agree that discovery will be conducted only in part. Instead, the parties' agreement reflects an intent to conduct meaningful discovery—something that did not take place. And although the parties carved out two caveats within their agreement, neither is applicable here. First, the parties agreed that discovery would be subject to further agreement between the parties. There was no further agreement between the parties, and there certainly was no further agreement to cut off discovery just as it was beginning. Second, the parties' agreement provides that the scope and process of discovery may be subject to the direction of the Panel. Here, the Panel did not direct the discovery scope or process (for example, by setting a deadline within which to complete discovery or by expanding the scope of document discovery to include text messages). Instead, the Panel constructively terminated it by issuing an award just as meaningful discovery was beginning. If, however, there was any direction by the panel regarding discovery, it was an implied direction to conduct *more* discovery. Indeed, at the time the Panel granted Stantec's second motion for summary judgment, (1) discovery had not meaningfully progressed further than when the Panel denied Stantec's first motion as premature, and (2) discovery had not closed, despite the Panel expressly stating that summary judgment could not be sought again until the close of discovery.

Because the parties agreed to conduct discovery, and because neither carveout in that agreement applies here (except for the implied direction to conduct more discovery), the Panel exceeded its authority when it disregarded the parties' discovery agreement, effectively terminating the same discovery process that the Panel, itself, had stated was insufficient to support

a grant of summary judgment. The Court should find that the Panel exceeded its authority and vacate the award accordingly.

B. The Panel exceeded its power by disregarding AAA Rule R-34.

AAA Rule R-34, which applies to the underlying arbitration, states in full: "*Upon prior written application*, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case." (emphasis added).

This is a rule with which Arbitrator Gray, who signed the Order granting summary judgment, is familiar. *See, e.g.*, Herbert H. Gray, III, E. Tyron Brown, R. Daniel Douglass, *Motion Practice in Arbitration* (2019). In that article, Arbitrator Gray recognized four things: First, Arbitrator Gray recognized that Rule 34 was a change from the former rule, which had previously allowed arbitrators to entertain dispositive motions *without* written application. *See id.* at 10. Second, Arbitrator Gray recognized that there "are several reasons for this cautious approach," including the fact that, "[i]n arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. [And for that reason], an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing." *Id.* at 11. Third, Arbitrator Gray recognized that depriving a party of the opportunity to fully develop the facts of the case can leave an award vulnerable to challenge, including vacatur where the arbitrator or panel refused to hear evidence pertinent and material to the controversy. *See id.* Finally, Arbitrator Gray recognized that, because "limited discovery and an expedited hearing are hallmarks of the arbitration process[,] [s]ummary disposition is less necessary and to some extent inconsistent with the nature of arbitration." *Id.* Arbitrator Gray is thus intimately familiar with Rule 34 as well as the history and reasoning behind it. Yet in this case, the Panel completely disregarded and failed to enforce Rule 34.

An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). The parties agreed that the AAA rules would apply to and govern the arbitration proceeding. *See* Joint Motion to Stay Proceedings and Compel Arbitration at 4, ¶ 2. By failing to adhere to the AAA rules (i.e., AAA Rule R-34), the Panel stepped outside the scope of its authority and entertained a motion that it had no authority to entertain and issued an award that it had no authority to issue. The effect of this misconduct was the Panel's impermissible resolution of an issue beyond the scope of the parties' agreement. *See, e.g.*, *Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 73, 467 S.E.2d 745, 747 (Ct. App. 1996) (citing *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 106, 333 S.E.2d 781, 786 (1985)) ("Arbitrators exceed their powers within the meaning of § 10(a)(4) of the FAA where their award resolves an issue that is not arbitrable because it is outside the scope of the arbitration agreement.").

AAA Rule R-34 is black or white—a party either makes prior written application or it does not. Here, Stantec did not, thus the Panel had no authority to entertain its motion for summary judgment. In doing so, and in issuing an award pursuant thereto, the Panel plainly and categorically exceeded its authority. And where an arbitrator or panel exceeds their authority by acting beyond the scope of the parties' arbitration agreement, vacatur is appropriate under the FAA. *See* 9 U.S.C. § 10(a)(4); *see also Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 467 S.E.2d 745 (Ct.App.1996), *cert. denied* (S.C.1996) (applying 9 U.S.C. § 10(a)(4) to find that

arbitrators exceeded their authority by disregarding law that they were bound to follow under the terms of the parties' agreement).

For these reasons, the Court should find that the Panel exceeded its authority by disregarding AAA Rule R-34, causing foreseeable and substantial prejudice to FZJV (the same prejudice that Arbitrator Gray recognized in his article, *Motion Practice in Arbitration*), and vacate the Panel's November 5, 2021 award accordingly.

III. The Panel manifestly disregarded the law.

In addition to the five statutory grounds for vacatur, South Carolina recognizes an additional, non-statutory ground of manifest disregard or perverse misconstruction of the law.

"[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003)); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). The focus is thus on whether the arbitrator refused to apply a legal principle of which he or she was aware. *See Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

In this case, the Panel knew of two well-defined, explicit, and clearly applicable legal principles, yet refused to apply them.

A. The Panel manifestly disregarded the summary judgment standard.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-*

Se. Grp., LLC, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). The Panel, like any lawyer, knew of this well-defined, explicit, and clearly applicable legal principle, yet refused to apply it.

Six times throughout the Panel's award it referenced this standard of "genuine issue of material fact." The Panel was thus aware of the legal principle governing summary judgment. Nonetheless, the Panel manifestly disregarded and refused to apply it, as evidenced by a separate Order issued on January 13, 2022. In that Order, the Panel denied yet another round of unauthorized motions for summary judgment, finding that a genuine issue of material fact precluded summary judgment on *the very same issue* that the Panel found undisputed in the award that is the subject of this application. In other words, the Panel (1) knew the summary judgment standard; (2) recognized a genuine issue of material fact, as demonstrated by its January 13, 2022 Order; and (3) granted summary judgment notwithstanding that genuine issue of material fact.

For these reasons, FZJV respectfully requests that this Court find that the Panel manifestly disregarded the law when it granted summary judgment despite the Panel's acknowledging a genuine issue of material fact.

B. The Panel manifestly disregarded AAA Rule R-34.

The second well-defined, explicit, and clearly applicable legal principle that the Panel refused to apply is Rule 34, which requires a party seeking to file a dispositive motion to first make written application. *See* AAA Rule R-34 ("Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case."). The Panel knew of this rule, as evidenced by an article authored by Arbitrator Gray. *See* Herbert H. Gray, III, E. Tyron Brown, R. Daniel Douglass, *Motion Practice in Arbitration* (2019) (devoting two pages to Rule 34, its history, and its purpose). Despite its familiarity with Rule 34, and despite the clarity,

explicitness, and applicability of the principle, the Panel nonetheless refused to apply it, instead allowing for unauthorized motion practice outside the scope of the parties' Arbitration Agreement.

The effect of the Panel's manifest disregard of Rule 34 was to substantially prejudice FZJV, just as Arbitrator Gray warned in his article. In that article, Arbitrator Gray described the importance of Rule 34:

> There are several reasons for this cautious approach and why arbitrators tend to proceed cautiously on dispositive motions. First, a summary judgment ruling by a trial judge in a court case can be appealed as a matter of right and is subject to *de novo* review by the appellate court. In arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. Thus, an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing.

Id. at 11 (internal citation omitted). This is the prejudice that FZJV now faces.

The Panel entertained a dispositive motion that it did not have the authority to entertain. It then issued an award that it did not have the authority to issue. And the Panel based that award on an undeveloped record and discovery process, as evidenced by the blatant flaws contained within an award that is now extraordinarily difficult to vacate.[6] *See id.* ("[A]n award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed.").

Because the Panel knew that Rule 34 was designed to prevent the kind of prejudice that FZJV is now experiencing, and because the Panel disregarded and refused to apply Rule 34, the Court should find that the non-statutory ground of manifest disregard has been satisfied and vacate the Panel's award accordingly.

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[6] For example, one such blatant flaw that may now be solidified in the Panel's unauthorized award is the Panel finding in one paragraph that Stantec had some design responsibility for certain walls and then, in the very next paragraph, finding that Stantec had *no* design responsibility for the same walls. FZJV sought clarification on this glaring contradiction, which the Panel refused to provide.

CONCLUSION

For the foregoing reasons, this Honorable Court should enter an Order vacating the Panel's November 5, 2021, award, where the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law.

Respectfully submitted,

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Charlotte, North Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 3, 2022, a true and correct copy of the foregoing Application to Vacate was served in accordance with South Carolina Electronic Filing Policies and Guidelines Section 4(e)(2) and (3) on the following counsel:

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Exhibit B

IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Permanent Drainage (MSJ # 1).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to permanent drainage. In the O'Connell & Lawrence Report, this claim is enumerated as 3.3.1.1.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute and based on the undisputed material facts, FZJV cannot establish that Stantec breached its duty because FZJV has failed to come forward with evidence that Stantec owed a duty to perform pre-award drainage design or essential expert opinion evidence that Stantec negligently performed pre-award drainage design.
2. The expert opinion that has been presented by FZJV relates to alleged deficiencies in the pre-award drainage design. However, it is undisputed that Stantec, a subconsultant to lead designer, Civil Engineering Consulting Services, Inc. ("CECS"), did not have drainage design in its pre-award scope of services.

Therefore, Stantec cannot be responsible for the allegedly negligent pre-award drainage design.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully requests that the Panel dismiss the permanent drainage claim (designated as 3.3.1.1 by OCL) as to Stantec.

This 13th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Permanent Drainage (MSJ #1), dated September 13, 2021, upon all parties of record via e-mail as follows:

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IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Temporary Drainage - Pre-Award (MSJ # 2).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to temporary drainage – pre-award. In the O'Connell & Lawrence Report, this claim is enumerated as 3.3.1.3.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute. The claim arises out the failure to perform pre-award design of temporary drainage. Temporary drainage design was not in Stantec's pre-award scope of services.
2. Because Stantec's pre-award scope of services did not include designing temporary drainage, it is not responsible for the cost of labor and materials for temporary drainage in the post-award phase.
3. Furthermore, FZJV admits that it knew that pre-award temporary drainage design had not been performed and was able to quantify the potential cost in its pre-award risk register.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully requests that the Panel dismiss the temporary drainage pre-award claim (designated as 3.3.1.3 by OCL) as to Stantec.

This 13th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Temporary Drainage-Pre-Award (MSJ #2), dated September 13, 2021, upon all parties of record via e-mail as follows:

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IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the Roadway Design Claims (MSJ # 3).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to the roadway design claims, specifically relating to impact attenuators and guardrail. In the O'Connell & Lawrence Report, these claims are enumerated as 3.3.2.2. and 3.3.2.5.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute and based on the undisputed material facts, FZJV cannot establish that Stantec had a duty with respect to pre-award roadway design or breached its duty because it has failed to come forward with essential expert opinion evidence.
2. The expert opinion that has been presented is that the pre-award roadway design under-represented the number of impact attenuators and the amount of guardrail that would be necessary in the final design. However, it is undisputed that Stantec, a subconsultant to lead designer, Civil Engineering Consulting Services, Inc.

("CECS"), did not have roadway engineering or design in its pre-award scope of services. Therefore, Stantec cannot be responsible for the allegedly negligently supplied information relating to impact attenuator and guardrail.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully requests that the Panel dismiss the roadway design claims (designated as 3.3.2.2 and 3.3.2.5) as to Stantec.

This 13th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the Roadway Design Claims (MSJ #3), dated September 13, 2021, upon all parties of record via e-mail as follows:

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/s/ Ross D. Ginsberg
Ross D. Ginsberg

IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the MSE Wall Design Claims (MSJ # 4).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to MSE Wall design claims. In the O'Connell & Lawrence Report, this claim is enumerated as 3.3.4.1.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute and based on the undisputed material facts, FZJV cannot establish that Stantec had a duty to perform geotechnical engineering and cannot establish that Stantec breached any duty because it has failed to come forward with essential expert opinion evidence.
2. The expert opinion that has been presented asserts that advice provided by the geotechnical engineer relating to the required length of longitudinal reinforcement (i.e., strap lengths) in pre-award phase was deficient. However, it is undisputed that Stantec, a subconsultant to lead designer, Civil Engineering Consulting Services, Inc. ("CECS"), did not have geotechnical engineering or design in its pre-award scope of

services. Therefore, Stantec cannot be responsible for the allegedly negligently supplied information relating to strap lengths.

3. To the extent that there is a claim relating to the alleged failure to specify temporary shoring for Wall 32 (there are no damages sought for the cost of temporary shoring), it is undisputed that Stantec's employer, CECS, did not assign Stantec any responsibility for evaluating slope stability and excavation support requirements for Wall 32.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully requests that the Panel dismiss the MSE Wall claims (designated as 3.3.4.1) as to Stantec.

This 13th day of September, 2021.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

/s/ Ross D. Ginsberg
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Attorney for Defendant Stantec Consulting Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the MSE Wall Design Claims (MSJ #4), dated September 13, 2021, upon all parties of record via e-mail as follows:

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/s/ Ross D. Ginsberg
Ross D. Ginsberg

IN THE PRIVATE ARBITRATION
BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the Structures Claims (MSJ # 5).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to the "Structures" claims, specifically relating to bridge barrier conduit and geomembrane at bridge abutments. In the O'Connell & Lawrence Report, these claims are enumerated as 3.3.3.4 and 3.3.3.6.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute.
2. The expert opinion that has been presented is that the pre-award plans did not show bridge barrier conduit or geomembrane in the Bridge 11 drawings prepared by Stantec.
3. It is undisputed that the Bridge 11 drawings showed the need for bridge barrier conduit and geomembrane at least by May, 2015. FZJV did not commence this action until more than three years thereafter and its claims are therefore barred by the statute of limitations.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully request that the Panel dismiss the structures claims, specifically relating to bridge barrier conduit and geomembrane at bridge abutments (designated as 3.3.3.4 and 3.3.3.6) as to Stantec.

This 13th day of September, 2021.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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Attorney for Defendant Stantec Consulting Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to the Structures Claims (MSJ #5), dated September 13, 2021, upon all parties of record via e-mail as follows:

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/s/ Ross D. Ginsberg
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IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Temporary Drainage - Post-Award (MSJ # 6).**

Stantec Consulting Services, Inc. ("Stantec") hereby moves for summary judgment on Flatiron-Zachry Joint Venture's ("FZJV") claim relating to temporary drainage – post-award. In the O'Connell & Lawrence Report, this claim is enumerated as 3.3.1.3.

As reasons therefor, Stantec states as follows:

1. There are no material facts in dispute and based on the undisputed material facts it is undisputed that FZJV did not suffer any damage due to the post-award drainage design.
2. The need for pre-award temporary drainage is covered in Stantec's MSJ # 2. Because Stantec's pre-award scope of services did not include specifying temporary drainage, it is not responsible for the cost of labor and materials for temporary drainage in the post-award phase.
3. In his Surrebuttal Report, Dr. O'Connell interposes a timing issue with respect to post-award temporary drainage implying that FZJV suffered delay damages. He

contends that FZJV had been asking for a temporary drainage design for Ramp 10 since October 2016 and that, while it was being developed, FZJV constructed the ramp. The undrained ramp caused a flood. This flooding event had the potential to cause delay damage. However, it is undisputed that it did not. FZJV's delay expert explicitly addressed the potential for the post-award temporary drainage claim to have caused delay damages and found that it did not. Therefore, there are no damages associated with this claim.

For the reasons stated herein and in the Omnibus Memorandum in Support of Stantec's Motions for Summary Judgment Numbered 1 through 6, Stantec respectfully request that the Panel dismiss the temporary drainage post-award claim (designated as 3.3.1.3 by OCL) as to Stantec.

This 13th day of September, 2021.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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Attorney for Defendant Stantec Consulting Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Motion for Summary Judgment Relating to Temporary Drainage – Post-Award (MSJ #6), dated September 13, 2021, upon all parties of record via e-mail as follows:

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/s/ Ross D. Ginsberg
Ross D. Ginsberg

Exhibit C

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON STANTEC'S MOTIONS FOR SUMMARY JUDGMENT

The Panel having read and considered Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motions for Summary Judgment and the documentation provided in support thereof, Claimant's Flatiron-Zachry JV ("FZJV") Response thereto and the documentation in support thereof and Stantec's Reply, finds as follows: Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED.

STANTEC'S MOTIONS

Stantec filed its first motion for summary judgment on January 11, 2021, shortly after the Claimant's submission of its expert's report on December 15, 2020. On February 9, 2021, the Panel denied the motion without prejudice based on the status of discovery. Stantec served its expert's report on May 28, 2021 and FZJV served its expert's sur-rebuttal report on July 27, 2021.

Stantec renewed its motion for summary judgment on September 13, 2021. The motion was divided into six parts, covering all claim items that FZJV contends were related in some part to services provided by Stantec. The six parts are:

1. Pre-award storm drainage design
2. Pre-award temporary storm drainage design
3. Pre-award roadway design including guardrails and impact attenuators
4. Pre-award MSE wall design
5. Design details relating to bridge barrier conduit and geomembrane at bridge abutments.
6. Post-award temporary drainage design

DISCUSSION

FZJV objects to Stantec's motion on the grounds that it is premature because discovery has not been completed. While the Panel is mindful that completing discovery is often necessary to determine whether there are genuine issues of material fact that would prevent issuing summary judgment, we find that based on the claims asserted against Stantec, the evidence presented Stantec, FZJV's responses to the summary judgment and progress of discovery to date there is sufficient evidence to conclude that there are no genuine issues of material fact relating to claims against Stantec on items 1-4 and 6.

Items 1-4 relate to pre-award services provided by Stantec. FZJV has withdrawn its claim for item 3. On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items. For items 1 and 2 relating to final and temporary storm water drainage design, FZJV's claim is based on deficiencies in the pre-award plans. Stantec's motion is based on the fact that Stantec did not perform any pre-award design services on these items. After receiving Stantec's expert's report which confirmed that Stantec did not perform pre-award drainage design of any kind, FZJV's expert issued a rebuttal report opining that Stantec was under an obligation to follow the pre-award design and its failure to do so was a breach of the standard of care. This position is illogical in that it suggests that Stantec was bound by the preliminary design and could not deviate from it. As FZJV's expert noted, the preliminary drainage design was inadequate and Stantec's post-award drainage design corrected some of these inadequacies. Further, FZJV's expert's interpretation that the contract required Stantec to follow the pre-award design is not

accurate. The provision requires the Designer "to the extent reasonably possible" to avoid deviation from the preliminary design. This does not require the Designer to follow the preliminary design when it is deficient or inaccurate. Therefore, FZJV has not shown that there is a genuine issue of material fact relating to Stantec's breach of the standard of care relating to the drainage design.

Regarding item 4, the MSE walls, while Stantec performed some pre-award services relating to the MSE walls, it is undisputed by the evidence provided that Stantec was not retained by CECS to provide input on the strap lengths needed for the MSE walls. Testimony from Stantec and CECS personnel confirmed that CECS was not relying on Stantec to provide input on the strap lengths. While FZJV's expert contends that the "design team" should have provided input on this issue, that does not create an issue of material fact relating to Stantec's services since there is no evidence to suggest that Stantec was required to provide this input for the "design team".

Stantec's motion for summary judgment on items 1, 2 and 4 is granted and item 3 was withdrawn by FZJV.

Regarding item 5, design details relating to the bridge barrier conduit and geomembrane at the bridge abutments, Stantec asserts that it is entitled to summary judgment on these items based on the statute of limitations. FZJV withdrew its claim on the bridge barrier conduit, so the only issue relates to the geomembrane at the bridge abutments.

South Carolina law requires a party to commence an action within three years of the discovery of its cause of action. S.C. Code Ann. § 15-3-530. The complaint in this action was filed on September 14, 2018. Therefore, claims that arose prior to September 14, 2015 are barred. It is undisputed that Stantec's pre-award Bridge 11 drawings did not include bridge barrier conduit or geomembrane at the abutments. Stantec delivered post-award final Bridge 11 plans depicting bridge barrier conduit and geomembrane at least by May 2015 and at least 4 revised sets of plans showing the geomembrane before September 8, 2015. Stantec contends that FZJV had adequate opportunity to note that the pre-award plans did not contain a geomembrane at the abutments and the post-award plans did contain a geomembrane. FZJV submitted an affidavit stating that FZJV did not discover that the geomembrane was not included in the final plans until September 2016 during the RFI process. Based on the affidavit, there is a genuine issue of material fact on when a reasonable design builder should have discovered the claim relating to the geomembrane in the bridge abutment.

Stantec's motion for summary judgment on item 5 is denied.

Regarding item 6, while Stantec was retained to provide some post-award temporary drainage services and there may be some dispute over the impact of the timing of providing these services, there is no dispute that FZJV did not sustain any damages due to the flooding that may or may not have been caused by the temporary drainage. It is undisputed that FZJV's damages expert concluded that this flooding event did not cause any damages. FZJV's contention that the flooding event could have caused "inefficiencies" that are "interwoven" among various cost codes is mere speculation and does not raise a genuine issue of material fact as to Stantec's liability for damages relating to the flooding event.

Stantec's motion for summary judgment on item 6 is granted.

Accordingly, Stantec's Motions for Summary Judgment are GRANTED for items 1-4 and 6. Stantec's Motion for Summary Judgment on item 5 is DENIED.

AND IT IS SO ORDERED, this 5th day of November, 2021.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit D

IN THE PRIVATE ARBITRATION BETWEEN

FLATIRON-ZACHRY, a Joint Venture, Plaintiff, v. CIVIL ENGINEERING CONSULTING SERVICES, INC. D/B/A CIVIL ENGINEERING CONSULTANT SERVICES, INC.; ECS SOUTHEAST, LLP F/K/A ECS CAROLINAS, LLP; MEAD AND HUNT, INC.; STANTEC CONSULTING SERVICES, INC.; AND T.Y. LIN INTERNATIONAL, Defendants.	)	**PLAINTIFF FLATIRON-ZACHRY, A JOINT VENTURE'S RESPONSE TO DEFENDANT STANTEC CONSULTING SERVICES, INC.'S INTERROGATORIES**

Plaintiff, Flatiron-Zachry, a Joint Venture (hereinafter "FZJV" or "Plaintiff"), by and through its undersigned attorney, responds to Defendant Stantec Consulting Services, Inc.'s ("Stantec") Interrogatories as follows[1]:

INTERROGATORIES

1. State the basis for Your contention that "[A]fter award of the Prime Contract, the Designers determined that modifications to the pre-award design were necessary in order to comply with the original RFP requirements." In answering this Interrogatory, specifically identify what scope(s) of work You contend were modified by Stantec between release of the preliminary design and the final design, in order to comply with the RFP requirements. Please also identify

[1] Stantec's Interrogatories were submitted under the case caption for the lawsuit in the Court of Common Pleas Thirteenth Judicial Circuit, State of South Carolina, County of Greenville; however, that lawsuit has been stayed pending this arbitration. FZJV submits these responses under the caption for this arbitration as the current, active proceeding.

EXHIBIT 5

the designer(s) who made the determination that modifications were necessary as alleged in page 3 of Your Statement of Claim.

RESPONSE: FZJV's Statement of Claim identifies specific instances where the Pre-Award design prepared by the Designers for FZJV's use did not conform to the RFP and Project requirements. In those instances, changes to the Pre-Award design were required to be made after FZJV was awarded the fixed-price contract. Fact discovery has not yet progressed to allow FZJV to form an opinion as to the specific scopes of work modified by Stantec between Pre-Award design and Post-Award design. No fact witness depositions have occurred and Respondents have not completed document productions. FZJV will amend this response as discovery progresses.

2. State with specificity each error or omission you contend was made by Stantec in its design. In answering this Interrogatory, specifically identify the document(s), including any contract document(s) that supports Your contention.

RESPONSE: Fact discovery has not yet progressed to allow FZJV to form an opinion as to which of the Designers' error and omissions were made by Stantec. No fact witness depositions have occurred and Respondents have not completed document productions. Further, CECS and Stantec negotiated and entered into a subconsultant agreement outlining Stantec's design responsibilities, and it is unclear at this time whether Stantec, CECS, or both are responsible for any errors or omissions made in the work performed under that agreement.

3. State with specificity each code section, design manual, or design element You contend Stantec failed to consider or include in its design as it relates to each scope of work You contend was the responsibility of Stantec.

RESPONSE: This request is vague in that it does not specifically identify what Stantec references as "its design." Fact discovery has not yet progressed such that FZJV can respond with any specificity as to what Stantec may, or may not have considered; however, in its Statement of Claim, FZJV identified a number of instances where the Pre-Award design failed to comply with specific design criteria contained within the RFP. FZJV is without sufficient information to form an opinion as to whether the failures mentioned in its Statement of Claim are specific to Stantec.

4. For each error or omission You contend was committed by Stantec, as provided in Your response to Interrogatory No. 2, please state with specificity the amount of damages or costs incurred by You as a result of the alleged errors or omissions, which You contend is the responsibility of Stantec.

RESPONSE: As stated in prior responses, FZJV is without sufficient information to respond to this request with any specificity.

5. If You contend that Stantec committed errors and omissions in its design, which caused You delay and/or disruption in completing the Project, please state with specificity the number of days of delay and/or disruption, which You contend is the responsibility of Stantec.

RESPONSE: As stated above, this request is vague in that it does not specifically identify what Stantec references as "its design." FZJV contends that the Designers committed errors and omissions in *their* design, and is without sufficient information to form an opinion as to whether Stantec, specifically, contributed to those errors or omissions. Accordingly, FZJV is unable to respond to this request with any specificity.

6. For each error or omission provided in Your answer to Interrogatory No. 5, please state with specificity the quantity of dollars or amount of costs You associate with the delay and/or disruption, which You contend is the responsibility of Stantec.

RESPONSE: As stated in prior responses, FZJV is without sufficient information to respond to this request with any specificity.

This 19th day of November, 2020.

SMITH, CURRIE & HANCOCK LLP

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I served a true and correct copy of the foregoing PLAINTIFF FLATIRON-ZACHRY, A JOINT VENTURE'S RESPONSE TO DEFENDANT STANTEC CONSULTING SERVICES, INC.'S INTERROGATORIES upon all parties of record via e-mail as follows:

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Harry Z. Rippeon III

Exhibit E

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2304740

Flatiron Zachry A Joint Venture
PLAINTIFF(S)

Civil Engineering Consultant Services Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

See Page 2

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☑ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/14/2022 .

Ross D Ginsberg for Stantec Consulting Services Inc
Adrianne Chillemi for ECS Southeast LLP,ECS Carolinas LLP

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

This matter was before the Court on March 11, 2022 for Plaintiff Zachary A Joint Venture's ("Plaintiff's") Motion to Vacate the decision of the arbitrator who previously heard this case, as well as Defendant T Y Lin International's ("Defendant's") Motion to Show Cause. The Court has carefully considered Plaintiff's argument regarding the arbitration and finds that the Plaintiff has not met its burden in showing why that decision should be vacated. Therefore, Plaintiff's Motion to Vacate is DENIED.

Defendant's Motion to Show Cause is related to a subpoena issued to one of Plaintiff's witnesses. Counsel for that witness made a special appearance to challenge the validity of the service upon the witness. The Court urges all parties to work together in the future to avoid the Court having to hear these types of disputes. However, the Court finds that service was technically incorrect and Defendant may serve witness' company in order to properly subpoena the documents sought. Defendant's Motion to Show Cause is DENIED.

Greenville Common Pleas

Case Caption: Flatiron Zachry A Joint Venture vs. Civil Engineering Consultant Services Inc , defendant, et al

Case Number: 2018CP2304740

Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Exhibit F

CONSTRUCTION

Construction

Industry Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Construction Disputes

AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/construction

Rules Amended and Effective July 1, 2015
Fee Schedule Amended and Effective May 1, 2022

R-51. Modification of Award

(a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

(b) If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(c) If applicable law provides a different procedural time frame, that procedure shall be followed.

R-52. Release of Documents

The AAA shall, upon the written request of a party to the arbitration, furnish to that party, at its expense, copies or certified copies of papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-53. Withdrawal of Claims or Counterclaims

(a) Once the AAA has provided notice to the parties that the filing requirements for a claim or counterclaim have been met, no claim or counterclaim may be withdrawn unless the parties agree or the arbitrator consents.

(b) Disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.

R-54. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.

Exhibit G

IN THE PRIVATE ARBITRATION BETWEEN

Flatiron-Zachry, A Joint Venture, Claimant, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International, Respondents.	)	**Stantec Consulting Services, Inc.'s Response in Opposition to Claimant Flatiron-Zachery, A Joint Venture's Second Motion for Clarification or, In the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services Inc.'s Motion for Summary Judgment**

Stantec Consulting Services, Inc. hereby opposes Flatiron-Zachry, A Joint Venture's Second Motion for Clarification or, in the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services, Inc.'s Motion for Summary Judgment.

Introduction

Recycling the same misrepresentations of the record that it has now advanced four times, FZJV asks for reconsideration. On page 12 of its Second Motion for Clarification, FZJV admits that "much of the evidence [supporting its motion] existed and was presented by FZJV in its prior responses for the Panel's consideration." In fact, the only new evidence that allegedly addresses the issue of Stantec's pre-award scope is the testimony of Betsy Watson who testified that she did not have personal knowledge of the specific scope discussions. Accordingly, Ms. Watson's testimony was incapable of contradicting CECS's corporate testimony that CECS did not expect Stantec to identify FZJV's Wall 32 excavation support requirements. While FZJV refers to Ms.

Watson as Stantec's 30(b)(6) deponent, she was not designated on the relevant topic of Stantec's scope. **Exhibit 1, ¶1.**[1]

Stantec's motion for summary judgment plainly addressed both the strap length and shoring issue. The Panel granted the motion and denied reconsideration when the shoring issue was the only aspect of Wall 32 at issue. The evidence showed that shoring in MOT plans for which Stantec was responsible was the shoring that would be associated with temporary detours and, explicitly, not excavation support for Wall 32. Recently, FZJV's expert on the issue of FZJV's adherence to the contractor standard of care confirmed that shoring to be shown in MOT plans relates to areas where temporary roads are at different elevations to adjacent roads. He further acknowledged that excavation support for Wall 32 was an item that FZJV should have understood on its own. **Exhibit 2.** This evidence is consistent with CECS' testimony that it expected Stantec to show shoring associated with temporary detours and expected FZJV to understand its own excavation support requirements for Wall 32.

Furthermore, as this experienced Panel knows well, excavation support is part of the contractor's means and methods. The Contractor/Designer Teaming Agreement entered by FZJV and CECS for the Pre-Award Phase provided "***Designer*** makes no other warranties, express or implied of any kind with regard to or in connection with its services and ***is not responsible for contractor's means and methods***." **Exhibit 3, ¶ 7.**

---

[1] David Taylor was designated as the 30(b)(6) deponent on the issue of Stantec's scope. **Exhibit 1, ¶ 1.** As happens sometimes, the individuals who were directly involved in scope discussions are no longer employed by Stantec. This required preparing a witness to testify about Stantec's position with respect to scope. *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)("The Rule 30(b)(6) designee...presents the corporations' position on the topic"). Despite Mr. Taylor's lack of personal knowledge of the scope discussions, he was designated and prepared to articulate Stantec's binding position about Stantec's scope – that excavation support for Wall 32 was not within Stantec's scope. FZJV could have sought to take depositions of the individuals who were involved in contract negotiations but did not. Nevertheless, the binding testimony of CECS was sufficient ground for the Panel to grant Stantec's motion and the Court of Common Pleas has rejected FZJV's argument that the Panel engaged in misconduct by having done so.

Therefore, even if the Panel had the authority to reconsider the granting of Stantec's Motion for Summary Judgment, which it does not, there is no new material evidence justifying reversal.

I. Procedural History

This case arises from pre-award engineering and design services performed in 2014. The final design was completed by December 2015. FZJV considered the need for a shored MSE wall at Wall 32 at least by February 2016. The complaint in the Court of Common Pleas was filed in September 2018. The Scheduling Order in this case required disclosure of expert reports in November 2020. Prior to Stantec's September 2021 Motions for Summary Judgment, FZJV's standard of care expert issued one supplemental report and one rebuttal report. The Panel considered all of these. All tolled, FZJV had seven years prior to Stantec's Motion for Summary Judgment, including three years of litigation, to articulate a claim against Stantec.

FZJV's arguments regarding Stantec's first motion for summary judgment and the Panel's order are inaccurate. In January 2021, believing that FZJV did not provide an expert report that met the burden of establishing a breach of the standard of care by Stantec, Stantec moved for summary judgment on the sole ground that the deadline for disclosing expert opinions had passed without the requisite opinion. As to that motion, the Panel held:

> In view of the current status of on-going discovery the Panel believes Stantec's Motion to be premature at this time.
>
> Accordingly, Stantec's Motion for Summary Judgment is dismissed without prejudice and with leave to be brought again at the close of discovery and in conformance with the other provisions of the current Scheduling Order in this case.

The Panel did not prevent Stantec from bringing a summary judgment on other grounds. The Panel did not state that Stantec could renew the January 2021 motion "only" at the close of discovery as FZJV argues. Nothing in the law or the Scheduling Order prohibited Stantec from filing a

summary judgment motion prior to the close of discovery. The only limitation was that summary judgment motions were required to be filed by January 31, 2022 (the same day as the deposition discovery cut off).

Following Stantec's first Motion for Summary Judgment, an additional nine months of discovery ensued. In September 2021, Stantec moved for summary judgment on new grounds. Stantec asserted that most of the items that FZJV's expert associated with Stantec were not in Stantec's scope. Stantec asserted that there were no damages associated with one of the claims. Stantec asserted that another claim was barred by the statute of limitations. The Panel ruled in Stantec's favor on all claims except the geomembrane claim.

Stantec's motion relating to Wall 32 explicitly addressed both the strap length and shoring issues. In the original memorandum, Stantec wrote:

> Again, Dr. O'Connell fails to address Mr. Amoroso's report head-on instead opining on an issue immaterial to this motion, i.e., the "Design Team's" responsibility. This trick is a convenient tool to avoid admitting that CECS did not retain Stantec in the pre-award phase to provide input on wall design, let alone the contractor's means and methods of constructing the wall, including the use of temporary shoring. **Exhibit 27, Deposition of CECS (Rocque Kneece)**. Because CECS was not relying on Stantec to determine strap length or excavation support in the pre-award phase, Stantec cannot be liable for either based on undisputed evidence.

Likewise, in Stantec's Reply Memorandum, it argued:

b. Stantec Was Not Responsible for Excavation Support for MSE Walls During the Pre-Award Phase.

Stantec did not have in its pre-award scope the determination of excavation support for MSE walls. The evidence supporting this fact consists of the following: Stantec's Teaming Agreement (Ex. 7, p. 8) and the testimony of CECS that it did not expect any of its subconsultants to identify temporary shoring requirements for walls in the pre-award phase and, in particular, with respect to Wall 32. (Ex. 27, pp. 336-38).[7]

In response, FZJV paraphrases CECS' deposition testimony, omitting other relevant and clarifying testimony of CECS. FZJV paraphrases CECS' testimony stating that "CECS would have expected Stantec's MOT plans to show temporary shoring." In fact, CECS testified that it would have expected "temporary shoring associated with *temporary ramps*" to show in Stantec's MOT plans. **Ex. 36, p. 336** (emphasis added). With respect to the relevant question of whether CECS expected Stantec to determine the contractor's excavation support requirements in connection with *MSE walls*, generally, and *Wall 32* (the subject of FZJV's claim), specifically, CECS' binding testimony is that it would not have expected "temporary shoring for MSE walls...to show up" in Stantec's plans. To the contrary, CECS's expectation was that excavation support requirements should have been determined by FZJV. **Ex. 36, pp. 336-38.**[8] There is no dispute that Stantec did not undertake responsibility for excavation support for MSE walls.

The Panel granted Stantec's motion, which unambiguously included all issues relating to Wall 32. Following this ruling, FZJV filed its first Motion for Clarification or, in the Alternative for Reconsideration. FZJV made similar, if not the same, arguments that it now makes, including that it was unclear to FZJV what the Panel meant when it granted the entirety of Stantec's Wall 32 motion. The Panel denied FZJV's Motion to Reconsider.

Then, FZJV filed a Motion to Lift Stay for Application to Vacate the Panel's summary judgment award in the Court of Common Pleas. FZJV raised many of the same arguments it now presents.

As discussed below, a motion to vacate can only be filed when an award is final. Therefore, FZJV's filing the motion signaled its understanding that, by granting Stantec's Motions for Summary Judgment and denying FZJV's Motion for Reconsideration, the Panel had concluded all matters relating to the Wall 32 claim. Under the FAA, if the Court vacated the award, the issues subject to the award would have been remanded to the Panel for reconsideration. However, the Court determined that FZJV did not present sufficient grounds to vacate the award. Nevertheless, FZJV just plows forward as though the motion to vacate had been granted reinstituting this Panel's authority over the claim.

II. The Panel Is Not Authorized to Revisit the Merits of an Issue Finally Decided

Although the Motion to Reconsider lacks merit and, if considered, should be denied, Stantec objects to the Panel's authority to alter its prior ruling. When FZJV filed its first motion to reconsider, Stantec pointed out that Rule R-51(a) of the AAA Rules explicitly states that "the arbitrator is not empowered to redetermine the merits of any claim already decided." Stantec reiterates this position.

FZJV's Application to Vacate likewise restricts the Panel's authority. Under the FAA, an Application to Vacate applies only to a final award. *Folse v. Richard Wolf Medical Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995). Partial awards that resolve an entire issue are final and subject to the Court's vacatur jurisdiction. *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231 (1st Cir. 2001). FZJV invoked the Court's vacatur jurisdiction impliedly representing to the Court that the award that it sought to vacate was final. On that representation, the Court entertained

FZJV's motion. Therefore, FZJV is judicially estopped from now taking a contrary position. *Quinn v. Sharon Corp.*, 540 S.E.2d. 474, 475 (S.C. Ct.App. 2000)("The doctrine of [judicial estoppel] precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts"). The summary judgment award is final.

The doctrine of *functus officio* prevents the Panel's reconsideration of the summary judgment award. *Sodexo Management, Inc. v. Detroit Public Schools*, 200 F.Supp.3d 679,696 (E.D. Mich. 2016)("Commercial Rule of Arbitration 50 permits an arbitrator to 'correct any clerical, typographical, or computational errors in the award,' however he or she 'is not empowered to redetermine the merits of any claim already decided.' '[T]he functus officio doctrine ... holds that an arbitrator's duties are generally discharged upon the rendering of a final award, when the arbitral authority is terminated'").

III. The Summary Judgment Award Was Premised on the Unremarkable and Undisputed Evidence that Excavation Support for Wall 32 Was a Contractor Means and Methods Issue Outside of Stantec's Scope.

FZJV recycles its allegation that CECS testified that certain scope for wall design was assigned to Stantec. Leaving aside that "wall design" is different from excavation support, the testimony relied upon related to Stantec's post-award services. By supplemental agreement in the post-award phase, Stantec agreed to "develop retaining wall ***plan and elevation sheets*** from layout information provided by CECS." **Exhibit 4, ¶ 9.** There is nothing in the record that supports

FZJV's implication that Stantec undertook any pre-award services relating to Wall 32, let alone the means and methods of constructing it. [2]

FZJV also seems unashamed to misrepresent CECS' testimony. On the key issue of whether CECS expected its subconsultants to identify temporary shoring for walls in the pre-award phase, FZJV strung together its own paraphrase with a partial quote to represent the following to this Panel (paraphrase in bold; quotation in italics): "**CECS does not recall whether they asked any of their** '*subconsultants to identify any locations for the joint venture where temporary shoring for walls would be required.*'" FZJV's Motion at pp. 10-11. FZJV did not attach the testimony as an exhibit.

FZJV intended this Panel to believe that CECS' testimony should be interpreted as leaving open the possibility that CECS did ask a subconsultant to identify temporary shoring for wall construction. The actual testimony stands in stark contrast and is excerpted below:

[2] The Panel asked that Stantec not attach exhibits that are already part of the summary judgment record. If the Panel requires any further information, we will gladly provide it.

Q. Did CECS expect any of its subconsultants to identify any locations for the joint venture where temporary shoring for walls would be required?
A. I don't believe we were looking for that in the conceptual plan post-award phase.
Q. You mean the conceptual plan pre-award phase?
A. Yes, yes.
Q. You said you don't believe you were looking for that. Do you know whether you were asked to identify that?
A. I don't recall.
Q. You're aware of -- are you aware of the joint venture's claim related to the shoring necessary for wall 32 in this arbitration?
A. Yes.
Q. What is CECS's position on that claim?
A. That shoring to support an excavation like that is a contractor means and methods and something the contractor can decide how he wants to do that.

CECS left no doubt as to whether it expected its subconsultants to identify shoring locations for walls. CECS was not looking for its subconsultants to provide that information in the pre-award phase.[3] CECS further testified that it did not recall ***whether CECS*** was asked to identify such shoring. On a second motion to reconsider after an appeal to the Court of Common

[3] The Panel will recall that CECS provided even more directly relevant testimony that CECS would not have expected temporary shoring for MSE walls to show up in Stantec's plans. **Exhibit 5.**

Pleas, the Panel should be able to trust what is written by FZJV in its motion. This is only one example of why that trust, if it exists, is misplaced.

FZJV's own expert agrees with CECS. The testimony above concludes with CECS' position that excavation support is a means and methods issue that FZJV should have understood on its own. Subsequent to the Panel granting Stantec's Motion for Summary Judgment, FZJV's expert on issues relating to the standard of care applicable to design-builders, David Grey, testified. Similar to Mr. Kneece's testimony, Mr. Grey testified that when two traffic lanes are pushed together temporarily and are at different elevations, the MOT designer should identify shoring.[4] Mr. Grey also agreed with Mr. Kneece that an experienced design-builder should understand when excavation support is necessary in connection with the design-builder's wall construction. Mr. Grey specifically testified that FZJV should have known of the requirement for excavation support associated with Wall 32 based on the cross-sections that were available during the proposal phase. **Exhibit 2.** In short, everything that supported the Panel's decision in Stantec's favor was confirmed by ***FZJV's expert on the issue of FZJV's adherence to the standard of care***.

IV. Ms. Watson's Testimony Does Not Create a Material Issue of Fact

Ms. Watson did not testify that excavation support for Wall 32 was within Stantec's scope. Therefore, her testimony is not in conflict with CECS' testimony that excavation support for Wall 32 was not within Stantec's scope. Ms. Watson testified that it would be Stantec's normal practice to discuss its scope with the design team but that she was not personally involved in those discussions. Nor was Ms. Watson designated as a 30(b)(6) witness to testify about Stantec's scope. **Exhibit 1, ¶1.**

[4] As the Panel is aware, there is no claim regarding such shoring in this case.

Conclusion

For the reasons stated herein and as previously stated in many prior memoranda, Stantec respectfully request that FZJV's Second Motion for Clarification, or in the Alternative, Motion for Reconsideration be DENIED.

This 23rd day of March, 2022.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

/s/ Ross D. Ginsberg
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South Carolina Bar No. 80061
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Attorney for Defendant Stantec Consulting Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I served a true and correct copy of the foregoing Stantec Consulting Services, Inc.'s Response in Opposition to Claimant Flatiron-Zachery, A Joint Venture's Second Motion for Clarification or, In the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services Inc.'s Motion for Summary Judgment upon all parties of record via e-mail as follows:

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Exhibit H

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Flatiron-Zachry, a Joint Venture,	)	C. A. No. 2018-CP-023-04740
	)	
Plaintiff,	)	
	)	
v.	)	**STANTEC CONSULTING SERVICES, INC.'S OPPOSITION TO PLAINTIFF'S [SECOND] APPLICATION TO VACATE ARBITRATION AWARD**
	)	
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	

Introduction

Flatiron Zachry Joint Venture's ("FZJV") Second Application to Vacate Arbitration Award is untimely and must be denied. Applications to Vacate must be filed within 3 months of the date of award. The award in this matter was issued on November 5, 2021. This Application to Vacate was filed more than 7 months after the date of award. FZJV's earlier timely-filed Application to Vacate was previously denied by this Court (Verdin, J.) on March 14, 2022 following oral argument on March 11, 2022. This second Application to Vacate, in addition to being late, is a near-verbatim reiteration of the arguments that Judge Verdin previously rejected.

In addition to being an unauthorized second-bite of the apple, this Application to Vacate is untimely. The plain language of the governing statute and settled law establish that timeliness of an Application to Vacate is not measured from the date a motion to reconsider is denied. FZJV implies that its Application is timely because it was filed within three months of the Panel's denial of a Motion to Reconsider that FZJV sent to the Panel after FZJV's earlier Application to Vacate

was denied by this Court. If this argument was considered persuasive, disappointed litigants would be empowered to extend the statutory deadline for filing an application to vacate and thereby eviscerate the plain language of the Federal Arbitration Act ("FAA"). As recently as two months ago, a federal court interpreting the FAA directly rejected such an argument.

Furthermore, the Motion to Reconsider, which serves as the trigger date for FZJV's argument, was itself untimely. For that reason and others described below, the Panel was unauthorized to consider the motion to reconsider and the Panel's denial is, in effect, an unnecessary legal nullity that cannot provide the date from which timeliness is measured anyway. Finally, as with its original Application to Vacate, FZJV merely complains that the arbitration panel committed error which is not a sufficient ground for vacatur.

I. The Application to Vacate Was Untimely

As FZJV acknowledges, the FAA governs these proceedings. Under 9 U.S.C. § 12, an Application to Vacate must be filed within three months after the award. The statute provides in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months ***after the award is filed or delivered...***

Id. (Emphasis added). The award in this action was issued on November 5, 2021 rendering untimely any Application to Vacate filed after February 5, 2022.

FZJV's implication that timeliness should be measured from denial of a motion to reconsider is incorrect. The plain language of the FAA provides that timeliness is measured from award. Furthermore, case law interpreting 9 U.S.C. § 12 confirms that timeliness is not measured from denial of a motion to reconsider. This very issue was articulately addressed just two months

ago by the United States District court for the Eastern District of Texas in *Gonzalez v. Mayhill Behavioral Health, LLC,* No. 4:21-MC-00188, 2022 WL 1185889 (E.D. Tex. 2022).

In *Gonzalez*, the arbitrators issued an award adverse to the claimant on March 29, 2021. The claimant filed a timely motion to reconsider with the arbitrator on April 9, 2021 which the arbitrator denied on May 3, 2021. Three months after the denial of the motion to reconsider, the claimant filed an application to vacate the arbitration award pursuant to 9 U.S.C. § 12. Despite having timely filed a motion to reconsider, the claimant's application to vacate was deemed untimely because it was not filed within three months of the date of the award. The Court rejected the claimant's argument that the application to vacate was timely because it was filed within three months of the denial of the reconsideration motion, articulately describing the reasons as follows:

> Under the FAA's applicable limitations provision, 'notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.' 9 U.S.C. § 12. This three-month time limit is strictly construed by the courts. *See e.g., Am. Income Life Ins. v. Alkurdi*, No. 6:19-CV-00016, 2019 WL 2022220, at * 2 (W.D. Tex. Apr. 25, 2019)(***stating that even one day late 'alone would be sufficient to bar' the plaintiff's motion to vacate 'as untimely'***). Simply put, 'a party may not raise a motion to [modify] ... an arbitration award after the three-month period has run.' [Citations omitted]...
>
> The Court finds that in this case, the filing of delivery of the initial March 29 Award triggered the limitations period, not the arbitrator's subsequent denial of reconsideration. First, as previously noted, arbitration is intended to be a final and binding determination of the parties' claims. And here, the parties agreed to arbitrate their claims pursuant to the FAA and in accordance with the rules of the American Arbitration Association ("AAA"). Under both, a party's ability to modify an award is extremely limited.
>
> For example, the AAA Rules permit a party to request reconsideration or modification up to 20 days after an award is filed. See AM. ARB. ASSOC. R. 40 (2007). However, a request for reconsideration or modification is limited to "clerical, typographical, technical, or computational errors in the award." *Id.* The initial award is considered "final and binding" in all other aspects. AM. ARB. ASSOC. R. 39(g) (2007). Similarly, the time period under § 12 in which a party may request a court intervene with an arbitrator's decision is intentionally short. *See* 9 U.S.C. § 12. ***The purpose of these expedited timelines would be thwarted "if the***

> ***limitations period ... were tolled every time a losing party filed the functional equivalent of a motion for reconsideration."*** *Halliburton Energy Servs. v. NL Indus.*, 618 F. Supp. 2d 614, 627 (S.D. Tex. Mar. 31, 2009) (internal citations omitted); *see also Russ v. United Servs. Auto. Ass'n,* No. CV-18-042222, 2019 WL 3083015, at *5 (D. Ariz. July 15, 2019) ***("[p]arties should not be able to delay the intentionally short limitations period for challenging an award merely by filing for a post-award decision"***); *Olson v. Wexford Clearing Servs. Corp.*, 397 F.3d 488, 492 (7th Cir. 2005) (comparing reconsideration under § 12 to reconsideration under Fed. R. Civ. P. 60(b) where the filing of a "motion to reconsider outside the ten-day window after the judgment does not toll the time for filing an appeal"). ***From the plain language of these provisions, the operative date relates to the arbitrator's award—not the denial of a reconsideration of the award.***

Id. at *3-4 (emphasis added). Accordingly, even where the claimant timely files a motion to reconsider, the application to vacate must be filed within three months of the award, or the application is barred. As the *Gonzalez* court and other authorities cited by it explained, if the rule was different then disappointed litigants could unilaterally extend the statutory deadline simply by filing a motion to reconsider. This is not the law.

II. The Reasons to Deny FZJV's Application Are More Compelling than in *Gonzalez*.

The procedural history of this case places FZJV in a much less sympathetic position than the claimant in *Gonzalez*. FZJV has already applied for vacatur, had its Application denied, and failed to appeal the decision. Conversely, the claimant in *Gonzalez* never had her day in court; nor did she choose to forego appeal.

FZJV's Motion to Reconsider was filed untimely. Subsequent to this Court's denial of the earlier Application to Vacate and approximately four months after the Panel issued the award, FZJV filed its Second Motion for Clarification, or in the Alternative, Reconsideration. However, unlike the claimant in *Gonzalez*, FZJV filed this motion late. As in *Gonzalez*, the parties to this proceeding agreed that the FAA and the AAA Construction Industry Arbitration Rules would apply. As in *Gonzalez*, the AAA rules in this case, specifically Rule R-50, require that Motions to Modify be filed within 20 days of the award. Therefore, unlike in *Gonzalez*, here, the Court is

asked to measure timeliness from the date of denial of a motion to reconsider that was, itself, filed months late. If allowed, the effect would be to afford FZJV over seven months to file its Application to Vacate. In fact, if FZJV's argument is accepted, there would literally be no end to this case because FZJV would file a third and fourth motion to reconsider followed by a third and fourth Application to Vacate, and so on.

Additionally, the Panel lacked the authority to consider FZJV's Motion to Reconsider. The doctrine of *functus officio* prevented the Panel's reconsideration of the merits of the award. *Sodexo Management, Inc. v. Detroit Public Schools*, 200 F. Supp. 3d 679, 696 (E.D. Mich. 2016)("Commercial Rule of Arbitration permits an arbitrator to 'correct any clerical, typographical, or computational errors in the award,' however he or she is not empowered to redetermine the merits of any claim already decided.' '[T]he *functus officio* doctrine ... holds that an arbitrator's duties are generally discharged upon the rendering of a final award, when the arbitral authority is terminated'"). The Panel's order did not alter its prior merits determination. But, if the Panel had redetermined the merits, such action would be a legal nullity because of *functus officio*. Here, the motion to reconsider followed not only the award but also this Court's (Verdin, J.) denial of the first Application to Vacate the award. These extreme circumstances certainly require that FZJV's renewed Application be denied.

III. FZJV Does Not Articulate a Legitimate Ground for Vacatur.

FZJV's second Application to Vacate is a near-verbatim replica of its previously-denied Application to Vacate. FZJV recycles arguments that have previously been rejected. These arguments consisted of baseless allegations that the Panel refused to hear evidence and manifestly disregarded the law. In response to FZJV's first Application to Vacate, Stantec showed that the Panel considered all evidence presented and applied the summary judgment standard. Stantec

showed then, and it remains true, that FZJV's self-serving interpretation of the Panel's order asserts nothing more than that the Panel erred in concluding that FZJV's claims should be dismissed. Such an argument does not justify vacatur:

> Under the FAA, "[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *D.H. Blair & Co., Inc. v. Gottdiener,* 462 F.3d 95, 110 (2d Cir.2006). "Arbitration awards are not reviewed for errors made in law or fact." *British Ins. Co. of Cayman v. Water St. Ins. Co.,* 93 F.Supp.2d 506, 514 (S.D.N.Y.2000). Accordingly, arbitral awards may only be vacated on extremely limited grounds. *See, e.g., Hall St. Assoc's, LLC v. Mattel, Inc.,* 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008); *Seed Holdings,* 5 F.Supp.3d at 585–86.

Ecopetrol, S.A. v. Offshore Exploration and Production LLC, 46 F. Supp. 3d 327, 340 (S.D.N.Y. 2014); *Landmark Ventures, Inc. v. InSightec, Ltd.*, 63 F. Supp. 3d 343, 351 (S.D.N.Y. 2014) ("The party challenging an arbitration award generally bears a heavy burden of proof, and courts will conduct only limited review of arbitration decisions").

The Court in *Landmark Ventures, Inc. v. InSightec, Ltd.*, 63 F.Supp. 3d 343 (SDNY 2014) held:

> Under the manifest disregard standard, an arbitration award may be vacated if an arbitrator is fully aware of the existence of a clearly defined governing legal principle, but refuses to apply it, in effect, ignoring it. The manifest disregard standard is severely limited, highly deferential, and confined to those exceedingly rare instances of egregious impropriety on the part of the arbitrator. A party objecting to an arbitration award on the grounds of manifest disregard of the law must establish that the law allegedly ignored was clear, improperly applied, and led to an erroneous outcome, and that the arbitrator not only knew of the law but intentionally disregarded it.

Id. at 355 (internal citations and quotations omitted). Knowing the law and erring, even if true, does not equate to manifest disregard of the law. *Harris v. Bennett,* 332 S.C. 238, 244-45, 503 S.E.2d 782, 786 (Ct. App. 1998) ("Our Supreme Court has stated this non-statutory ground requires ***something more than a mere error in construing or applying the law***") (emphasis

added). Stantec has rebutted FZJV's arguments in its Opposition to FZJV's prior Application to Vacate which, if necessary, is incorporated herein by reference.

Conclusion

For the reasons stated above, namely that FZJV's Application to Vacate is untimely, that FZJV's Motion to Reconsider upon which the current motion is based was untimely, that the Panel lacked authority to consider FZJV's motion to reconsider, and that FZJV merely complains that the Panel erred, and for the reasons stated in Stantec's Opposition to FZJV's first Application to Vacate which is incorporated herein by reference, Stantec respectfully requests that the Court **DENY** the second Application to Vacate filed by FZJV and order such further relief as the Court deems appropriate.

WEINBERG WHEELER HUDGINS
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June 27, 2022
Atlanta, Georgia

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Flatiron-Zachry, a Joint Venture,	)	C. A. No. 2018-CP-023-04740
	)	
Plaintiff,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	
	)	

I hereby certify that on June 27, 2022, I electronically filed the foregoing **Stantec Consulting Services, Inc.'s Opposition to Plaintiff's [Second] Application to Vacate Arbitration Award** using the Court's electronic filing system and served a true and correct copy of the foregoing via the Court's electronic filing system and/or via e-mail:

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Exhibit I

IN THE PRIVATE ARBITRATION BETWEEN

FLATIRON-ZACHRY, a Joint Venture, Claimant, v. CIVIL ENGINEERING CONSULTING SERVICES, INC. D/B/A CIVIL ENGINEERING CONSULTANT SERVICES, INC.; ECS SOUTHEAST, LLP F/K/A ECS CAROLINAS, LLP; STANTEC CONSULTING SERVICES, INC.; AND T.Y. LIN INTERNATIONAL, Respondents.	)	**CLAIMANT FLATIRON-ZACHRY, A JOINT VENTURE'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION REGARDING THE ORDER ON STANTEC CONSULTING SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT**

Flatiron-Zachry, a Joint Venture ("FZJV") files this Motion for Clarification or, in the alternative, Motion for Reconsideration regarding the Panel's November 5, 2021 Order on Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motion for Summary Judgment ("MSJ") and, in support thereof, states as follows:

I. Introduction

The Panel's November 5th Order addressed six motions for summary judgment filed by Stantec:

- MSJ No. 1 – Pre-Award Storm Drainage Design
- MSJ No. 2 – Pre-Award Temporary Storm Drainage Design
- MSJ No. 3 – Pre-Award Roadway Design, including Guardrails and Permanent Attenuators
- MSJ No. 4 – Pre-Award MSE Wall Design
- MSJ No. 5 – Design Details related to Bridge Barrier Conduit and Geomembrane at Bridge Abutments

- MSJ No. 6 – Post-Award Temporary Drainage

FZJV withdrew the claims included in MSJ No. 3 and the bridge barrier conduit claim in MSJ No. 5. Despite evidence supporting the presence of significant disputed material facts on the remaining issues, and the lack of a full and fair discovery process on these issues,[1] the Panel granted Stantec's Motions Nos. 1-4 and 6 in their entirety and denied Stantec's Motion No. 6. In doing so, the Panel has ignored the deposition testimony that does exist supporting a material disagreement as to the contractual obligations and expectations of the Parties for the design deliverables to be provided during the Pre-Award phase. The Order prejudices the Parties by jeopardizing confirmation of any subsequent final award in this arbitration. As discussed further below, the Order should be reconsidered and vacated.

II. Motion for Clarification – MSJ Nos. 2, 4, and 6

As set forth in more detail in FZJV's response in opposition to Stantec's MSJ and discussed below, there are significant issues of material facts present on these claims through the evidence presented to date, and FZJV has not been afforded a sufficient opportunity to develop the facts and issues relevant to Stantec's MSJ through discovery because not a single deposition has been concluded as of the date of the Order. FZJV must be afforded the opportunity to develop the facts and issues relevant to these issues through discovery including, without limitation, completion of the depositions of Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.'s ("CECS") corporate representative deposition; the conclusion of FZJV's corporate representative deposition; the deposition of Dr. O'Connell; the deposition of Dr. Amoroso; the

[1] Depositions began with the corporate deposition of FZJV, which is still ongoing after five (5) days of testimony by FZJV's corporate representatives. The corporate deposition of CECS has also started but not concluded, as has the corporate deposition of T.Y. Lin International ("TY Lin). The corporate deposition of Stantec was scheduled but postponed after notice the day before of sudden unavailability. It is tentatively rescheduled for early December, but Stantec's counsel has expressed reservation as to allowance of the scope of the deposition given the Order.

deposition of Stantec's corporate representative; and the deposition of ECS Southeast, LLP f/k/a ECS Carolinas, LLP's ("ECS") corporate representative.

A. MSJ No. 2 – Pre-Award Temporary Drainage Design

On February 3, 2021, pursuant to the Parties' Arbitration Agreement, FZJV presented its identification of claims in this arbitration against the Design Team, which included several arising out of errors and omissions in the Pre-Award drainage design. There was, and is, no claim by FZJV against the Design Team for "Pre-Award Temporary Storm Drainage", as stated in Stantec's MSJ No. 2; therefore, any grant of summary judgment on a non-existent claim exceeds the Panel's authority. The *temporary* storm system claim asserted by FZJV is for specific direct costs incurred by FZJV due to the Design Team's (specifically, Stantec's and CECS's) failure to provide a complete Post-Award temporary drainage design, which will be further addressed below.

B. MSJ No. 4 – Pre-Award MSE Wall Design

FZJV asserted two claims against the Design Team related to MSE Walls – one dealing with the required longitudinal reinforcement, or strap length, design during Pre-Award, and the second related to the shoring ultimately required at MSE Wall 32 and not shown by the Design Team during the Pre-Award phase. In its MSJ No. 4, Stantec sought dismissal of the "entire" MSE Wall claim (but primarily focused on the strap length issue) on the basis that "CECS did not retain Stantec in the pre-award phase to provide input on wall design..." *See* Stantec Omnibus Memorandum in Support of MSJ No. 4, ¶ 25. Stantec then made a short reference to not being retained for input on the "contractor's means and methods of constructing the wall, including the use of temporary shoring" but ignored all testimony and evidence contradicting the specific design

deliverables to be provided. *Id.* Other than a self-supporting affidavit[2] and a citation to a single line of questioning in the first part of the CECS corporate representative deposition (which testimony itself creates a genuine issue of material fact based on the disagreement of the design deliverables), Stantec did not offer any further evidence to demonstrate that FZJV agrees with this position.

In response to FZJV's criticisms of the sufficiency of Stantec's evidence, Stantec pivoted in its reply memorandum to focus on whether two of the parties collectively defending against the claims – CECS and Stantec – agree among themselves on the issue. However, FZJV previously identified testimony and evidence that unequivocally shows that the scope of the design deliverables from the Design Team (including Stantec) are very much in dispute. *See* FZJV's Response, pp. 8-10, Exhibit E thereto. For example, it is undisputed that CECS received the design deliverables from FZJV on at least two occasions – October 24, 2013 (Deposition of Rocque Kneece, Vol. I, pp. 106-108) and February 11, 2014 (Vol. I, pp. 119-120; Exhibit 63 thereto):

[2] Stantec's Affidavit in support of its MSJ was executed by Betsy Watson, who has also been designated by Stantec as one of its corporate representatives. FZJV is, at a minimum, entitled to depose Ms. Watson on her knowledge of the facts at issue in this case, similar to the five (5) days (to date, with two additional days scheduled), afforded Stantec to depose FZJV's corporate designees.

Q. The e-mail to you from Mr. Lamm states, Please find attached Flatiron's design deliverables template for design-build pursuits. Please note the add info tab within the spreadsheet. This sheet specifically spells out the expectations of the deliverables for estimating purposes. This spreadsheet will also be tailored to fit the pursuits' needs over the next couple of weeks.

Do you see that?

A. I do.

Q. And there is an attachment that you can see attached to this list. What did you do with this list when you got it from Mr. Lamm other than just forwarding it to Mr. Raad?

A. I don't recall. This -- we got two versions of this. One version was forwarded to the subs, but I can't recall whether this version was forwarded to the subs or not.

See **Exhibit A**, attached hereto.

Q. 63 is an e-mail string between you and Mr. Lamm, and the most recent e-mail is at the top of the first page, from Mr. Lamm to you, dated February 11th of 2014. Do you see that?

A. I do.

Q. And it says, Attached is the -- excuse me. Attached is the design deliverables list for the project. There is a tab named task force that has all of the names of the estimators that are currently assigned to the task force. The design contact tabs has the contacts that you assigned.

Do you see that?

A. I do.

See **Exhibit B**, attached hereto. The design deliverables referenced as the "list for the project" in the above testimony and incorporated exhibit specifically identifies the need for shoring to be shown in the Pre-Award design:

6) MOT Specifications, Plans Provide:

a. Provide signing standards for MOT details for closing or moving roads, driveways and provide traffic control signing for construction detour roads

b. Provide MOT drawings for Contractors phasing plans

c. Provide shoring locations within the MOT phasing plans and access points for construction traffic.

d. Provide reference to State Standard Specifications and Drawings

Vol. I, p. 119, Exhibit 63 thereto (FZJV's Response, p. 9, Exhibit H thereto).

It is further undisputed that CECS not only understood the purpose of the design deliverables, but explained that purpose to its subconsultants, including Stantec.

From: Rocque Kneece <kneecerl@cecsinc.com>
Sent: Tue, 22 Oct 2013 16:18:24 -0400
To: raheel.malik@tylin.com, David Link <dslpan@sc.rr.com>, "Day, Rick" <Rick.Day@stantec.com>, "Reiff, Rick" <Rick.Reiff@stantec.com>, RNance <RNance@ecslimited.com>, Tony Steffee <Tony.Steffee@meadhunt.com>
CC: Berry Still <Berry.Still@meadhunt.com>, "'J. Dean Collins'" <dean.collins@tylin.com>, Paul Raad <raadph@cecsinc.com>, "'Newman, Paul'" <Paul.Newman@Zachrycorp.com>, "'Kirk, Ted'" <tkirk@flatironcorp.com>, "White, Sam" <Sam.White@Zachrycorp.com>
Subject: I-85 385 Interchange - Proposal Development

bridges, and staging/maintenance of traffic for inclusion in the proposal. The JV wants the design effort to be sufficient for estimating quantities. The JV will also be calculating quantities based on our designs. Therefore, we will need to provide

See **Exhibit C**, attached hereto.

Attendees:	
Flatiron	Chris Lamm, Trevor Farnam
Zachry	Ryan Ilg
CECS	Rocque Kneece, Paul Raad, Warren Davis, Mike Almassri, Brian Nickerson, Fred Barnes, David Wertz
Stantec	Rick Reiff
TY Lynn	Raheel Malik
M&H	Tony Steffee
Others	Richard Nance (ECS)

MEETING AGENDA for February 26
MEETING NOTES for February 19

FLATIRON ZACHRY

	A brief	
Design	**B. Design Deliverables:** 1. Each Task Force will review the deliverables required and develop a schedule for the deliverables. Chris has provided a draft listing of deliverables to serve as a starting point.	

See **Exhibit D**, attached hereto.

Despite this testimony and evidence clearly identifying a dispute as to what the Design Team, and specifically Stantec, was to provide FZJV in the Pre-Award phase on the Wall 32 shoring, Stantec contends "it is undisputed that Stantec's employer, CECS, did not assign Stantec any responsibility for evaluating slope stability and excavation support requirements for Wall 32." MSJ No. 4, ¶ 3. However, the evidence in the record thus far (and even the Panel's November 5th Order) highlights the disputed material facts regarding Stantec's responsibility for identifying MSE Wall shoring requirements. *See* Exhibit E previously attached to FZJV's Response in Opposition to Stantec's MSJ; Vol. II, p. 337:3-15 (CECS does not recall whether they asked any of their "subconsultants to identify any locations for the joint venture where temporary shoring for walls would be required")[3]; Vol. II, p. 226:18-20 (MSE wall design was within Stantec and/or ECS's scope of working, depending on the particular issue); Vol. II, p. 372:2-7 ("Stantec did the internal design of the wall [32] and the detailing").

In its November 5th Order, the Panel stated that "[o]n items 1, 2, and 4, it is undisputed that Stantec did *not* provide pre-award services for these items." *See* Order, p. 2 (emphasis added). However, in its Order the Panel also stated that "[r]egarding item 4, the MSE walls, while Stantec performed *some* pre-award services relating to the MSE walls, it is undisputed by the evidence provided that Stantec was not retained by CECS to provide input on the strap lengths needed for the MSE walls." *Id.* at p. 3 (emphasis added). Not only does the Panel's Order contradict itself as to Stantec's Pre-Award design duties - highlighting the disputed material fact undermining an award of summary judgment - but the Order does not

[3] Again, contrary to Stantec's conclusory statements, the scope of services to be provided by the Design Team, including Stantec, is a disputed material fact. At a minimum, FZJV is entitled to depose Stantec on the design deliverables during the Pre-Award phase.

specifically address the second part of Stantec's MSJ No. 4 regarding FZJV's MSE Wall claim for Wall 32 shoring.

Therefore, FZJV requests this Panel clarify whether its Order finds that the undisputed evidence establishes that Stantec was not involved in Pre-Award services for *any* issues related to the MSE walls, or only as to its design involvement on the longitudinal reinforcement (i.e. strap length) issue. If the Panel's Order regarding Stantec's MSJ No. 4 dismisses the entirety of FZJV's MSE walls claim against Stantec, then FZJV requests this Panel vacate its Order as it pertains to the portion of FZJV's claim related to shoring for Wall 32, as discussed further below.

C. MSJ No. 6 – Post-Award Temporary Drainage

In its MSJ No. 6, Stantec sought dismissal of the temporary drainage Post-Award claim based on its misplaced contention that "FZJV's delay expert explicitly addressed the potential for the post-award temporary drainage claim to have caused delay damages and found that it did not. Therefore, there are no damages associated with this claim." *Id.* at ¶3. Stantec improperly relies upon a statement by FZJV's delay expert in his supplemental report regarding *delay* damages for the proposition that "there are *no* damages associated with this claim." *See* Stantec MSJ No. 6 at ¶ 3 (emphasis added). However, FZJV's damages expert, Delta Consulting Group, explained that the Post-Award temporary drainage design was not sufficient for a 2-year storm event and that, as a result, after significant rainfall in February 2017, FZJV had to implement certain remedial actions including "creat[ing] a slot drain that allowed water to properly drain away from the inner roadway surface", covering the slot drain "with a temporary steel plate to allow traffic to travel over the drain, removing the temporary drainage system, repairing the pavement, milling and repaving travel lanes, and removing large volumes of sediment and debris." *See* **Exhibit E**, ¶ 89, the pertinent section of which is below and was specifically addressed at oral argument:

89. After a significant rainfall in February 2017, the SCDOT mandated a Project-wide shutdown.[93] Among other remedial actions, FZJV saw cut the new pavement on points on the new outer lanes to create a slot drain that allowed water to properly drain away from the inner roadway surfaces. The slot drain was then covered with a temporary steel plate to allow traffic to travel over the drain. When it was no longer required, the temporary drainage system was removed, and the pavement was repaired during a later phase. In addition, the excess water damaged existing travel lanes that had to be milled and repaved, as well as the removal of large volumes of sediment and other debris to allow for the operation of travel lanes.

Summary of Claims

Cost Code	Cost Code Description	Additional Quantities	Units	Claim Amount
87000600	CECS Temp Drainage	1.00	LS	$ 17,445
87000600	CECS Temp Drainage	1.00	LS	19,806
87000600	CECS Temp Drainage	1.00	LS	116,227
80001500	Ramp 10 Drainage-CECS	1.00	LS	10,394
80001500	Ramp 10 Drainage-CECS	1.00	LS	9,964
	Repair and Remediation	1.00	LS	10,992
	Total			$ 184,827

It is these costs for remedial work necessitated by Stantec's failure to timely provide the Post-Award temporary drainage design that FZJV is seeking, and that Delta specifically quantified and included in the above-referenced Section 3.1.3 of its damage report.

The direct damages incurred by FZJV totals $184,827.00 *Id.* at p. 46, Summary of Claims. Stantec's expert acknowledges these direct damages in his report as related to the February 2017 flood event but attempts to dispose of these costs on alleged grounds that "[t]he Ramp 10 repairs were required not because of any deficiency in Stantec's temporary drainage design but rather because FZJV commenced paving before that design was complete." *See* Exponent Report by Dr. Amoroso dated May 28, 2021, pp. 14-17, attached hereto and incorporated herein by reference as

Exhibit F. There is a genuine issue of material fact as to whether Stantec, specifically, is responsible for failing to provide this Post-Award design in a timely manner.

Based solely on Stantec's misrepresentations of the actual statements in FZJV's expert reports, this Panel granted Stantec's MSJ No. 6 despite counsel's attempt to note Stantec's misrepresentations during the motion hearing. In its Order, the Panel stated that "there is no dispute that FZJV did not sustain any damages due to the flooding that may or may not have been caused by the temporary drainage" and "[i]t is undisputed that FZJV's damage expert concluded that this flooding event did not cause any damages." *See* Order, p. 4. The Panel also dismissed FZJV's claim of damages relating to inefficiencies as "mere speculation." *Id.* That language simply does not comport with the opinions expressed by FZJV's experts, so the only reasonable interpretation of the Panel's Order in light of the evidence presented is that the Order did not address FZJV's claim for direct costs related to the temporary drainage system repairs.

FZJV requests this Panel clarify whether its Order is limited to any delay or inefficiency damages against Stantec arising from the Post-Award temporary drainage system repairs, or whether the Panel is disposing of *all* damages against Stantec on this issue, including the direct costs identified by FZJV's expert witness. If the Panel's Order regarding Stantec's MSJ No. 6 dismisses the entirety of FZJV's Post-Award temporary drainage system repair claim against Stantec, then FZJV requests this Panel vacate its Order as it pertains to the portion of FZJV's direct cost claim as discussed further below.

III. Motion For Reconsideration

In light of the disputed material facts presented and further discussed herein, and the extensive amount of fact discovery yet to be completed, the Panel could not have reasonably intended its Order to dismiss claims against Stantec in their entirety. In the unlikely event that the

Panel did intend to dismiss the aforementioned claims against Stantec in their entirety, then FZJV requests reconsideration.

Dismissal of FZJV's claims against Stantec, despite the presence of disputed material facts and without the opportunity to develop and further support the existence of disputed material facts deprives FZJV of its "basic right to present and test evidence" on the issues, deprives this Panel of evidence necessary to make a determination regarding the merits of FZJV's claims, and, ultimately, deprives FZJV of a full and fair hearing. *See Cofinco, Inc. v. Bakrie & Bros.*, N. V., 395 F. Supp. 613, 615 (S.D.N.Y. 1975) (finding panel denied the "basic right to present and test evidence on issues of fact had not been accorded" thus requiring vacatur of the arbitration award where the arbitration panel found plaintiff's claim was time-barred without taking any evidence.); *Westvaco Corp. v. Loc. 579, United Paperworkers, Int'l Union*, No. CIV. A. 90-30091-F, 1992 WL 121372, at *8 (D. Mass. Mar. 5, 1992) (finding arbitrator's exclusion of evidence "deprived himself of the evidence necessary" to determine the dispute thus denying plaintiff a fair hearing and necessitating vacatur); *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 390 (4th Cir. 2000) (finding vacatur of arbitration award was appropriate where arbitrator issued his award without holding an evidentiary hearing thus depriving a signatory of the arbitration agreement a full and fair hearing); *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Loc.* 901, 763 F.2d 34 (1st Cir. 1985) (finding arbitrator's failure "to afford each of the parties sufficient latitude to present evidence central to the dispute and so prejudiced the Company's right to a full and fair hearing as to require that the award be vacated.").

IV. Conclusion

For reasons set forth herein, FZJV respectfully requests this Panel provide clarification on the above issues regarding Stantec's MSJ Nos. 4 and 6 - specifically, to confirm that FZJV's claims against Stantec related to Wall 32 shoring and the Post-Award temporary drainage system direct costs remain in this Arbitration. To the extent the Panel indeed intended to dismiss these claims in their entirety against Stantec, then FZJV requests a hearing before the Panel on this Motion.

Submitted this 24th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I served a true and correct copy of the foregoing CLAIMANT FLATIRON-ZACHRY, A JOINT VENTURE'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION REGARDING THE ORDER ON STANTEC CONSULTING SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT upon all parties of record via e-mail as follows:

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/s/ Harry Z. Rippeon III
Harry Z. Rippeon III

Exhibit J

IN THE PRIVATE ARBITRATION BETWEEN

FLATIRON-ZACHRY, a Joint Venture, Claimant, v. CIVIL ENGINEERING CONSULTING SERVICES, INC. D/B/A CIVIL ENGINEERING CONSULTANT SERVICES, INC.; ECS SOUTHEAST, LLP F/K/A ECS CAROLINAS, LLP; STANTEC CONSULTING SERVICES, INC.; AND T.Y. LIN INTERNATIONAL, Respondents.	)	**CLAIMANT FLATIRON-ZACHRY, A JOINT VENTURE'S SECOND MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION REGARDING THE ORDER ON STANTEC CONSULTING SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT**

Flatiron-Zachry, a Joint Venture ("FZJV") files its Second Motion for Clarification or, in the alternative, Motion for Reconsideration regarding the Panel's November 5, 2021, Order on Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motion for Summary Judgment ("MSJ") and in support thereof states as follows:

I. Introduction

On January 11, 2021, Stantec filed its first motion for summary judgment in this case. The Panel denied Stantec's first motion for summary judgment as "premature" based on the "current status of on-going discovery" and indicated that Stantec could pursue summary judgment only "at the close of discovery." **Exhibit A**.

Undeterred, and months before the close of discovery, Stantec filed its second motion for summary judgment on September 13, 2021, which the Panel ruled on in its November 5, 2021, Order (the "November Order").[1]

[1] As the Panel is aware, the circumstances surrounding this second motion were essentially the same as the first: Stantec filed its motion without making prior written application under Rule 34, discovery remained incomplete, having advanced no further than the "premature" status of discovery at the time of Stantec's first motion.

The November Order addressed six Stantec motions for summary judgment:

- MSJ No. 1 – Pre-Award Storm Drainage Design
- MSJ No. 2 – Pre-Award Temporary Storm Drainage Design
- MSJ No. 3 – Pre-Award Roadway Design, including Guardrails and Permanent Attenuators
- MSJ No. 4 – Pre-Award MSE Wall Design
- MSJ No. 5 – Design Details related to Bridge Barrier Conduit and Geomembrane at Bridge Abutments
- MSJ No. 6 – Post-Award Temporary Drainage

The Panel granted Stantec's Motions Nos. 1-4 and in their entirety and partially denied Stantec's Motion No. 6 regarding geomembrane.[2] The Panel based its ruling on evidence provided by Stantec regarding what CECS and Stantec expected of each other during the Pre-Award design phase, stating in one sentence that "[o]n items 1, 2, and 4, it is undisputed that Stantec did *not* provide pre-award services for these items" but several sentences later stated "[r]egarding item 4 [MSE Walls], while Stantec performed *some* pre-award services relating to MSE walls, it was undisputed that Stantec was not retained by CECS to provide input on the strap lengths needed for the MSE walls." **Exhibit B**, p. 3 (emphasis added). Further, the November Order failed to address the second part of Stantec's MSJ No. 4 regarding FZJV's claim related to the Wall 32 shoring requirement.

FZJV filed its first motion for clarification, or, in the alternative, motion for reconsideration with this Panel on November 24, 2021, based on inconsistent and ambiguous statements in the

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[2] FZJV withdrew the claims in MSJ No. 3 and the bridge barrier conduit claim in MSJ No. 5.

Panel's November Order. The Panel denied FZJV's motion without further explanation on December 8, 2021.[3]

On December 10, 2021, Stantec submitted yet another dispositive motion on the same geomembrane claim item addressed, and denied, in at least two prior motions.[4] Again, Stantec relied upon an argument that summary judgment was proper because "CECS did not ask Stantec to provide plans depicting details for geomembrane and did not request Stantec to provide a quantity for geomembrane." **Exhibit C**, Stantec December 2021 Motion, p. 1. The Panel again denied that motion on January 13, 2022 (the "January Order"), stating that "Stantec argues that its motion should be granted because it performed work that CECS requested and nothing more." **Exhibit D**, p. 1. The January Order continued, "[t]his does not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care. The Tribunal therefore finds that these issues involve questions of material fact that are in dispute…" *Id.*

Stantec provided the same argument for MSE walls as for geomembrane – i.e. it cannot be liable for those claims because it only did what CECS asked of it – with no discerning factual distinctions between them, yet contradictory orders by the Panel as to whether that is an undisputed fact despite clear evidence to the contrary. As stated in each of FZJV's prior responses to the multiple dispositive motions by Stantec, which are incorporated herein by reference for sake of brevity, a material fact exists as to whether Stantec performed the work that was expected of it,

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[3] FZJV was forced to file a Motion to Vacate that order with the South Carolina Court of Common Pleas, concurrently seeking limited relief from the stay in place in that action for considering FZJV's motion to vacate. That motion, filed on February 3, 2022, was denied by the Court on March 15, 2022; however, FZJV's appellate deadline does not expire until April 14, 2022. S.C. App. Ct. R. 203(b)(1).

[4] Stantec has since filed *another* dispositive motion on that same issue that was denied by the Panel on March 17, 2022.

and whether the work it actually did perform was done so with the proper standard of care. The Panel acknowledged that the proper consideration is *not* whether Stantec simply did what it was asked (or did not do what it was not asked) by CECS, but whether it should have done more or whether it, in fact, satisfied its professional engineering standard of care. That same analysis should apply to the November Order on MSE walls.

In addition to the inconsistencies between the November and January Orders, the November Order fails to address whether Stantec was granted summary judgment (incorrectly) on just the strap length portion of the MSE wall claims, or also with respect to its shoring obligations on the MSE walls, specifically Wall 32. Despite a prior request, the Panel has not provided clarification on that point.

FZJV again requests the Panel reconsider its refusal to clarify or reconsider its November Order with specific respect to the MSE wall claims, and to reconsider its grant of summary judgment in Stantec's favor on those issues.

II. Argument

A. The Applicable Standard of Review Precluded Summary Judgment.

As set forth in more detail in FZJV's response in opposition to Stantec's previous motions and discussed below, there are significant issues of material facts present on the MSE Wall claims through the evidence presented to date. At the time the Panel issued its November Order, FZJV had not been afforded a sufficient opportunity to develop the facts and issues relevant to Stantec's MSJ #4 through discovery because depositions had just started. Illustrating the prejudice FZJV suffered when this Panel, prior to completion of any depositions (and well before the close of discovery) issued its November Order, are contested facts contained within deposition testimony

of Stantec's corporate representatives, which FZJV had not been given the opportunity to obtain until recently.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp.*, LLC, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). Six times throughout the Panel's November Order it referenced this standard of "genuine issue of material fact." The Panel was thus aware of the legal principle governing summary judgment, but failed to properly apply it, as evidenced by its January Order. In the January Order the Panel denied yet another round of unauthorized motions for summary judgment, finding that a genuine issue of material fact precluded summary judgment on *the very same argument* that the Panel found undisputed in the award that is the subject of this motion.

For these reasons, FZJV respectfully requests the Panel to clarify, or in the alternative, reconsider its November Order, particularly in light of its January Order, and deny Stantec's Motion for Summary Judgment No. 4.

FZJV's MSE Wall Claims

FZJV asserted two claims against the Design Team related to MSE Walls – one dealing with the required longitudinal reinforcement, or strap length, design during Pre-Award, and the second related to the shoring required at MSE Wall 32 and not identified by the Design Team during the Pre-Award phase. In its MSJ No. 4, Stantec sought dismissal of the "entire" MSE Wall claim (but primarily focused on the strap length issue) because "CECS did not retain Stantec in the pre-award phase to provide input on wall design…" **Exhibit E**, Omnibus Memorandum in Support of Stantec's MSJ Nos. 1-6, p. 25. Stantec then made a short reference to not being retained

for input on the "contractor's means and methods of constructing the wall, including the use of temporary shoring" but ignored all testimony and evidence contradicting the specific design deliverables to be provided. *Id.* Other than a self-supporting affidavit[5] and a citation to a single line of questioning in the first part of the CECS corporate representative deposition (which itself creates a genuine issue of material fact based on the disagreement of the design deliverables), Stantec did not offer any further evidence to demonstrate that FZJV agrees with this position.

In response to FZJV's criticisms of the sufficiency of Stantec's evidence, Stantec pivoted in its reply memorandum to focus on whether two of the parties collectively defending against the claims – CECS and Stantec – agree among themselves on the issue. FZJV, however, previously identified testimony and evidence that unequivocally shows that the scope of the design deliverables from the Design Team (including Stantec) are very much in dispute. *See* **Exhibit F**, FZJV's Response, pp. 8-10, Exhibit E thereto. For example, it is undisputed that CECS received the design deliverables from FZJV on at least two occasions – October 24, 2013 and February 11, 2014:

[5] Stantec's Affidavit in support of its MSJ was executed by Betsy Watson, who was also designated by Stantec as one of its corporate representatives.

Q. The e-mail to you from Mr. Lamm states, Please find attached Flatiron's design deliverables template for design-build pursuits. Please note the add info tab within the spreadsheet. This sheet specifically spells out the expectations of the deliverables for estimating purposes. This spreadsheet will also be tailored to fit the pursuits' needs over the next couple of weeks.

Do you see that?

A. I do.

Q. And there is an attachment that you can see attached to this list. What did you do with this list when you got it from Mr. Lamm other than just forwarding it to Mr. Raad?

A. I don't recall. This -- we got two versions of this. One version was forwarded to the subs, but I can't recall whether this version was forwarded to the subs or not.

See **Exhibit G**, CECS's 30(b)(6) Deposition of Rocque Kneece, Vol. I, pp. 106-108, attached hereto.

Q. 63 is an e-mail string between you and Mr. Lamm, and the most recent e-mail is at the top of the first page, from Mr. Lamm to you, dated February 11th of 2014. Do you see that?

A. I do.

Q. And it says, Attached is the -- excuse

me. Attached is the design deliverables list for the project. There is a tab named task force that has all of the names of the estimators that are currently assigned to the task force. The design contact tabs has the contacts that you assigned.

Do you see that?

A. I do.

See **Exhibit H**, CECS's 30(b)(6) Deposition of Rocque Kneece, Vol. I, pp. 119-120; Exhibit 63 thereto, attached hereto. The design deliverables referenced as the "list for the project" in the above testimony and incorporated exhibit specifically identifies the need for shoring to be shown in the Pre-Award design:

6) MOT Specifications, Plans Provide:

a. Provide signing standards for MOT details for closing or moving roads, driveways and provide traffic control signing for construction detour roads.

b. Provide MOT drawings for Contractors phasing plans.

c. Provide shoring locations within the MOT phasing plans and access points for construction traffic.

d. Provide reference to State Standard Specifications and Drawings.

Id., Exhibit 63.

It is further undisputed that CECS not only understood the purpose of the design deliverables, but explained that purpose to its subconsultants, including Stantec.

From: Rocque Kneece <kneecerl@cecsinc.com>
Sent: Tue, 22 Oct 2013 16:18:24 -0400
To: raheel.malik@tylin.com, David Link <dslpan@sc.rr.com>, "Day, Rick" <Rick.Day@stantec.com>, "Reiff, Rick" <Rick.Reiff@stantec.com>, RNance <RNance@ecslimited.com>, Tony Steffee <Tony.Steffee@meadhunt.com>
CC: Berry Still <Berry.Still@meadhunt.com>, "'J. Dean Collins'" <dean.collins@tylin.com>, Paul Raad <raadph@cecsinc.com>, "'Newman, Paul'" <Paul.Newman@Zachrycorp.com>, "'Kirk, Ted'" <tkirk@flatironcorp.com>, "White, Sam" <Sam.White@Zachrycorp.com>
Subject: I-85 385 Interchange - Proposal Development

bridges, and staging/maintenance of traffic for inclusion in the proposal. The JV wants the design effort to be sufficient for estimating quantities. The JV will also be calculating quantities based on our designs. Therefore, we will need to provide

See **Exhibit I**, which was Exhibit 59 to CECS's 30(b)(6) Deposition of Rocque Kneece Vol. I, attached hereto.

On February 5, 2014, CECS provided the design deliverables list to its subconsultants, including Stantec.

From: Rocque Kneece <kneecerl@cecsinc.com>
Sent: Wed, 05 Feb 2014 12:07:25 -0500
To: David Link <dslpan@sc.rr.com>, "Day, Rick" <Rick.Day@stantec.com>, Dean Collins <dean.collins@tylin.com>, Don Turner <dsturner@bellsouth.net>, "'Newman, Paul'" <Paul.Newman@Zachrycorp.com>, Paul Raad <raadph@cecsinc.com>, raheel.malik@tylin.com, "Reiff, Rick" <Rick.Reiff@stantec.com>, RNance <RNance@ecslimited.com>, Tony Steffee <Tony.Steffee@meadhunt.com>, "Wagner, Diane" <DWAGNER@flatironcorp.com>
CC: "'Boyles, Scott'" <scott.boyles@stantec.com>
Subject: I-85 385 Interchange - Management Meeting
Attachments:
· 140205 Agenda REV.pdf *(154 kb)*
· I-85 - 385 Design Deliverables_140205.xlsx *(103 kb)*

Gentlemen,

Attached is today's 2:00 meeting agenda and a draft deliverables chart for use in the meeting. We will have copies for those attending in person.

See **Exhibit J**, which was Exhibit 263 to the Stantec's 30(b)(6) Deposition of Betsy Watson.

In discussing that exhibit, Stantec's corporate representative testified that it, too, understood the purpose of the design deliverables list was the information Stantec, and the other designers, were asked to provide in the pre-award plans.

Did Stantec understand this was the information that was being requested for it to provide in the preaward plans?
A. I would agree with that, yes.

Id., 51:12-18.

In April of 2014, Mr. Boyles, another member of Stantec's team, notes that the deliverables schedule and requirements would force Stantec "to condense a lot of work in a short time frame,

thus increasing the risk on some of the bid items. We will be sure to note these items for pricing purposes that will be a risk because of the condensed timeframe." *See* **Exhibit K**, which was Exhibit 267 to Stantec's 30(b)(6) Deposition of Betsy Watson, attached hereto. But Stantec, through Ms. Watson, testified that it does not believe Stantec noted those items for pricing purposes that would be a risk, particularly because of a condensed time frame within which Stantec had to prepare its plans.

Q. So is it your testimony that you don't -- you don't believe Stantec noted those items for pricing purposes that would be a risk because of the condensed time frame?
A. I don't believe he did -- that we did, excuse me.

See **Exhibit L**, Stantec's 30(b)(6) Deposition of Betsy Watson, 59:7-17.

Despite this testimony and evidence clearly identifying a dispute over what the Design Team, and specifically Stantec, was to provide FZJV in the Pre-Award phase on the Wall 32 shoring, Stantec contends "it is undisputed that Stantec's employer, CECS, did not assign Stantec any responsibility for evaluating slope stability and excavation support requirements for Wall 32." **Exhibit M**, Stantec's MSJ No. 4, ¶ 3. But the evidence in the record - and even the Panel's November Order - highlights the disputed material facts regarding Stantec's responsibility for identifying MSE Wall shoring requirements. *See* **Exhibit N**, attached thereto as Exhibit A to FZJV's Response in Opposition to Stantec's MSJ (Panel's November Order); CECS's 30(b)(6) Deposition of Rocque Kneece Vol. II, 337:3-15 (CECS does not recall whether they asked any of their "subconsultants to identify any locations for the joint venture where temporary shoring for

walls would be required")[6]; CECS's 30(b)(6) Deposition of Rocque Kneece Vol. II, 226:18-20 (MSE wall design was within Stantec and/or ECS's scope of working, depending on the particular issue); CECS's 30(b)(6) Deposition of Rocque Kneece Vol. II, 372:2-7 ("Stantec did the internal design of the wall [32] and the detailing"). And, as this Panel recognized in denying summary judgment in its January Order, assignment (or not) by CECS to Stantec of a task is not, in and of itself, dispositive as to whether Stantec satisfied the standard of care necessary for a design engineering professional.

More telling, and without a doubt creating a dispute about what was within Stantec's scope for the project (a material fact), is Stantec's representation that there is nothing you could look at that would explain how Stantec identified the specific design deliverables that it needed to provide for its design scope in the pre-award phase. *See* **Exhibit O,** Stantec's 30(b)(6) Deposition of Betsy Watson, 74:20-75:5. Moreover, Stantec testified that it is unaware of any way to understand exactly which specific design deliverables Stantec actually provided in the pre-award stage.

Q. So what did -- sorry. What did Stantec understand this document to be that CECS was providing it?

[6] Again, contrary to Stantec's conclusory statements, the scope of services to be provided by the Design Team, including Stantec, is a disputed material fact.

A. It appears to be a description of deliverables.

Q. How did Stantec identify which deliverables it was responsible for?

A. Through communications with CECS.

Q. Do you know how those communications took place, whether they were in meetings or by e-mails?

A. I do not.

Q. Do you know whether or not CECS identified for Stantec the specific deliverables within this list that it expected Stantec to provide or whether Stantec selected the deliverables on this list that it would be providing?

A. I do not know.

See **Exhibit P**, Stantec's 30(b)(6) Deposition of Betsy Watson, 35:23-36:16.

Much of the above evidence existed and was presented by FZJV in its prior responses for the Panel's consideration. Some, however, was not available at the time the Panel considered these arguments because the motion and subsequent ruling were premature in that Stantec's own corporate representative had not yet been deposed.

FZJV requests this Panel clarify whether its November Order finds that the undisputed evidence establishes that Stantec was not involved in Pre-Award services for *any* issues related to the MSE walls, or only as to its design involvement on the longitudinal reinforcement (i.e., strap length) issue. If the Panel's November Order regarding Stantec's MSJ No. 4 dismisses the entirety of FZJV's MSE walls claim against Stantec, then FZJV requests this Panel reconsider its

November Order as it pertains to the portion of FZJV's claim related to shoring for Wall 32 as discussed below.

B. Specific Motion for Reconsideration

Given the disputed material facts presented and discussed herein and in FZJV's first motion for clarification, or in the alternative, reconsideration, the Panel could not have reasonably intended its November Order to dismiss the claims for MSE Walls against Stantec in their entirety. In the unlikely event that the Panel did intend to dismiss them against Stantec in their entirety, then FZJV requests reconsideration based on the legal principles and facts laid out above.

Dismissal of FZJV's MSE Wall claims against Stantec despite the presence of disputed material facts and without the opportunity to develop and also support the existence of disputed material facts deprives FZJV of its "basic right to present and test evidence" on the issues, deprives this Panel of evidence necessary to make a determination regarding the merits of FZJV's claims, and, ultimately, deprives FZJV of a full and fair hearing. *See Cofinco, Inc. v. Bakrie & Bros.*, N. V., 395 F. Supp. 613, 615 (S.D.N.Y. 1975) (finding panel denied the "basic right to present and test evidence on issues of fact had not been accorded" thus requiring vacatur of the arbitration award where the arbitration panel found plaintiff's claim was time-barred without taking any evidence.); *Westvaco Corp. v. Loc. 579, United Paperworkers, Int'l Union*, No. CIV. A. 90-30091-F, 1992 WL 121372, at *8 (D. Mass. Mar. 5, 1992) (finding arbitrator's exclusion of evidence "deprived himself of the evidence necessary" to determine the dispute thus denying plaintiff a fair hearing and necessitating vacatur); *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 390 (4th Cir. 2000) (finding vacatur of arbitration award was appropriate where arbitrator issued his award without holding an evidentiary hearing thus depriving a signatory of the arbitration agreement a full and fair hearing); *Hoteles Condado Beach, La Concha &*

Convention Ctr. v. Union De Tronquistas Loc. 901, 763 F.2d 34 (1st Cir. 1985) (finding arbitrator's failure "to afford each of the parties sufficient latitude to present evidence central to the dispute and so prejudiced the Company's right to a full and fair hearing as to require that the award be vacated.").

III. Conclusion

For reasons set forth herein, FZJV respectfully requests this Panel provide clarification on the above issues regarding its November Order - specifically, to confirm that FZJV's claims against Stantec related to Wall 32 shoring have not been disposed. To the extent the Panel indeed intended to dismiss these claims in their entirety against Stantec, then FZJV requests the Panel reconsider its grant of summary judgment on these claims in Stantec's favor based on the disputed facts identified above and the Panel's acknowledgement in its January Order of the distinction between contractual obligations and satisfaction of the professional engineering standard of care.

Respectfully submitted this 18th day of March, 2022.

SMITH, CURRIE & HANCOCK LLP

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Eugene F. Rash
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245 Peachtree Center Avenue, NE
Atlanta, Georgia 30303
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Fax: (404) 688-0607
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gfrash@smithcurrie.com

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I served a true and correct copy of the foregoing CLAIMANT FLATIRON-ZACHRY, A JOINT VENTURE'S SECOND MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION REGARDING THE ORDER ON STANTEC CONSULTING SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT upon all parties of record via e-mail as follows:

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SMITH, CURRIE & HANCOCK LLP

/s/ Harry Z. Rippeon III
Harry Z. Rippeon III

Exhibit K

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON FZJV's MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR RECONSIDERATION

The Panel having read and considered Claimant Flatiron-Zachary, A Joint Venture's ("FZJV") Motion for Clarification or in the Alternative for Reconsideration, Respondent Stantec Consulting Services, Inc.'s ("Stantec") Opposition thereto, FJIV's reply and Stantec's Sur-reply, as well as all briefs, materials and documentation provided in support thereof, the Panel denies FJIV's Motion. The Panel's Order dated November 5, 2021 is hereby confirmed.

Accordingly, Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED.

AND IT IS SO ORDERED, this 8th day of December, 2021.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit L

IN THE MATTTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents

ORDER ON FZJV's 2nd MOTION FOR CLARIFICATION or in the alternative MOTION FOR RECONSIDERATION

The Panel having read and considered Claimant Flatiron-Zachry JV's (FZJV) 2nd Motion for Clarification or in the alternative Motion for Reconsideration of Panel's Order on Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motion for Summary Judgment and Stantec's Response thereto finds as follows:

The sentence *"On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items"* in the original order should have read *"On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items."* Additionally, the original order granting summary judgment for Stantec on Wall 32 issues was intended to include the shoring issues along with the strap length issues. The original order is amended accordingly.

Respondent FZJV's motion for reconsideration of the Stantec summary judgment order is DENIED.

AND IT IS SO ORDERED, this 24th day of March, 2022.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit M

Ginsberg, Ross D.

From: Rippeon, Zack <ZRippeon@smithcurrie.com>
Sent: Monday, September 12, 2022 2:56 PM
To: Hal Gray; frank@fjsadr.com; George Reid
Cc: Rash, Gene; 'Ryan Earhart, Esq.'; 'Adrianne Chillemi, Esq.'; Kenneth B. Dantinne; Ginsberg, Ross D.
Subject: FZJV/TY Lin

This Message originated outside your organization.

Panel – Following up on our call last Thursday, FZJV and TY Lin have now executed their settlement agreement so there is no need to move forward on those claims (or on the geomembrane claim against Stantec). We are still working with ECS and will report back later today on those issues. Thanks.

Harry Z. "Zack" Rippeon III
Partner

Exhibit N

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**C.A. No. 2018-CP-23-04740**
Flatiron-Zachry, a Joint Venture,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO LIFT THE STAY FOR APPLICATION TO VACATE**
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Flatiron-Zachry, a Joint Venture (FZJV), under the Federal Arbitration Act,[1] and non-statutory grounds, hereby files this, its Notice of Motion and Motion to lift the Stay for Application to Vacate, showing that vacatur is warranted where the parties' private arbitration panel issued an order attempting to clarify a prior award in which the panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. This Motion will be heard at such time as this Court may direct. In support thereof, FZJV relies on the following:

INTRODUCTION

FZJV previously sought vacatur of an arbitration panel's (the Panel) November 5, 2021, award granting summary judgment in favor or Defendant-Respondent Stantec Consulting Services, Inc. (Stantec) (the November Award). This Court denied FZJV's prior application to

[1] Plaintiff does not believe the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann. §§ 15-48-130(a)(3)–(4), is applicable, but should the Court find it is, this motion would also be brought pursuant to the corresponding section.

vacate on March 15, 2022. Subsequent to the denial, the Panel issued an order on March 24, 2022, attempting to clarify its prior award; however, the "clarification" provided by the Panel undermined the basis upon which summary judgment was originally granted, yet the Panel denied FZJV's motion to reconsider, confirming the award of summary judgment in Stantec's favor (the March Award).

In the November Award, the Panel identified the six parts of Stantec's second motion for summary judgment – the pertinent parts being numbers 1 (Pre-award storm drainage design), 2 (Pre-award temporary storm drainage design), and 4 (Pre-award MSE wall design). In its argument supporting summary judgment on number 4, Stantec contends it included *both* of FZJV's MSE wall design issues, temporary shoring and excavation and backfill. The Panel's November Award granted summary judgment in Stantec's favor on several of these parts based on what it believed at the time was the undisputed evidence, specifically stating "[o]n items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items." *See* **Exhibit A**.

The Panel issued its March Award after FZJV's second motion to clarify or, in the alternative, reconsider, the basis for the above-cited statement. In that March Award, the Panel stated:

> "The sentence "*On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items*" in the original award should have read "*On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items.*"

See **Exhibit B**. Given the clarification (or correction) now provided by the Panel, it is *not* undisputed that Stantec did not provide pre-award services for item 4 (MSE wall design). Rather, the Panel's March Award acknowledges that it is, in fact, disputed as to the pre-award services

Stantec provided for item 4, which is supported by the evidence repeatedly provided by FZJV, and, thus, summary judgment is not appropriate as originally held by the Panel.

For these reasons, FZJV respectfully requests that this Honorable Court enter an Order vacating the Panel's November 21, 2021, and March 24, 2022 awards regarding Stantec's Motions for Summary Judgment.

FACTUAL BACKGROUND

The dispute that forms the basis for the parties' underlying arbitration arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina. FZJV seeks to recover nearly $60 million dollars in damages that were caused directly by the Designers', including Stantec's, negligent and deficient performance of its work.

PROCEDURAL HISTORY

1. On or about September 14, 2018, FZJV filed its original complaint in this Court, as required under S.C. Ann. § 15-36-100.

2. On or about November 18, 2019, the parties filed a Joint Motion to Stay Proceedings and Compel Arbitration, which included in the filing a copy of the parties' arbitration agreement (the "Arbitration Agreement").

3. On November 19, 2019, the Court issued an Order granting the parties' Joint Motion to Stay Proceedings and Compel Arbitration, compelling the parties to arbitrate the matter as set forth in the Arbitration Agreement.

4. On January 11, 2021, without making prior written application to submit a dispositive motion as required under AAA Rule R-34 (Rule 34), Stantec filed its first motion for summary judgment. The Panel denied Stantec's first motion for summary judgment as "premature" based on the "current status of on-going discovery." At that time, discovery had just begun - months of discovery remained, multiple defendants, including Stantec, had not completed their

document productions, no depositions had occurred, there had been no opportunity for the parties to present final evidentiary support for their positions, and there had been no opportunity for the parties to present expert testimony. For those reasons, the Panel indicated that Stantec could pursue summary judgment only "at the close of discovery."

5. Undeterred, and prior to the close of discovery, Stantec filed a second motion for summary judgment on September 13, 2021. The circumstances surrounding this second motion were essentially the same as the first: Stantec filed its motion without making prior written application as required under Rule 34, the Panel again violated Rule 34 by entertaining Stantec's motion, and discovery remained incomplete, having advanced no further than the "premature" status of discovery at the time of Stantec's first motion.

6. The Panel granted Stantec's second motion on November 5, 2021, notwithstanding the following facts: Stantec had no authority to file its motion, the Panel had no authority to rule on the motion, discovery was ongoing and depositions of corporate representatives had just begun, the discovery period had not closed, the Panel manifestly disregarded the rules governing submission of dispositive motions, the Panel had no authority to undermine the discovery process, and the Panel had no more information available to it than it did at the time it denied Stantec's first motion as premature.

7. An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). In this case, the parties to this action agreed to arbitrate their claims pursuant to the Arbitration Agreement. Under

those terms, the Panel received certain authority, including the authority to arbitrate the parties' claims in accordance with the Federal Arbitration Act (FAA) and the American Arbitration Association's Construction Industry Rules (AAA). One such rule applicable to the parties' arbitration is AAA Rule R-48(b), which allowed the Panel to make interim, interlocutory, or partial rulings, orders, and awards, as it did here. It is the Panel's interim, interlocutory, or partial rulings, orders, and award that is the subject of the instant application to vacate.

8. Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, which would be final as to these claims, if not lifted.

9. Under 9 U.S.C. § 10(a)(3), vacatur is appropriate where an arbitrator or panel refused "to hear evidence pertinent and material to the controversy[.]"

10. Under 9 U.S.C. § 10(a)(4), vacatur is appropriate where an arbitrator or panel "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

11. The Panel exceeded its powers and refused to hear evidence pertinent and material to the controversy when it granted Stantec's motion for summary judgment.

12. Under 9 U.S.C. § 10(b), "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

13. The arbitration as to certain remaining claims is still underway, and thus this Motion and Application are timely.

ARGUMENT

The legal basis for vacatur of the Panel's March Award is nearly identical to that previously provided by FZJV for vacatur of the Panel's November Award. The factual basis for vacatur of the Panel's March Award is further supported by the language of the March Award itself, removing

the very basis upon which summary judgment was granted to Stantec (i.e. that there was no dispute of material fact as to pre-award MSE wall design services). The Federal Arbitration Act (FAA), which applies to this matter pursuant to the Arbitration Agreement, provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. § 10. There are four such statutory grounds under the FAA, two of which are relevant to this application:

> (3) where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In addition to the four statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground of "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This non-statutory "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

Among the various grounds for arbitral vacatur, three are present here—the Panel refused to hear evidence material to the controversy under 9 U.S.C. § 10(a)(3),[2] the Panel exceeded its power under 9 U.S.C. § 10(a)(4),[3] and the Panel manifestly disregarded the law.

[2] Or S.C. Code Ann. § 15-48-130(a)(4), should the Court determine that the SCUAA is applicable.
[3] Or S.C. Code Ann. § 15-48-130(a)(3), should the Court determine that the SCUAA is applicable.

I. The Panel refused to hear evidence material to the controversy by issuing an award before the parties conducted meaningful discovery.

Vacatur under the FAA is appropriate when an arbitrator or panel refuses to hear evidence pertinent and material to the controversy. *See* 9 U.S.C. § 10(a)(3). Such a refusal to hear evidence material to the controversy is what happened here.

The FAA required the Panel to hear all evidence pertinent and material to the controversy. The Panel was similarly required by the rules governing the underlying arbitration to ensure a fair hearing, specifically when managing discovery. *See* AAA Rule R-24(a) ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and *safeguarding each party's opportunity to fairly present its claims and defenses.*" (emphasis added)); *see also* AAA Rule R-33(a) ("The arbitrator has the discretion to vary [the proceedings], *provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.*"). If, however, an arbitrator does not provide for a full and fair hearing as the AAA rules require, then "courts owe no deference to an arbitrator who has failed to provide the parties with a full and fair hearing." *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (citation omitted) (concluding arbitrator committed misconduct by failing to provide parties with full and fair hearing); *see also Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir. 1985) (holding that arbitrator's refusal to consider a trial transcript submitted by one of the parties denied them "adequate opportunity to present its evidence and arguments"); *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1417 (N.D. Okla. 1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy").

In *International Union*, for example, the arbitrator told the parties to meet, gather information, negotiate further, and, if not resolved, present evidence and argument at an arbitration hearing. *See Int'l Union*, 232 F.3d at 390. The arbitrator then "issued his award without ever holding that hearing or affording the Union the opportunity to present the evidence it had been prepared to offer[.]" *Id.* The United States Court of Appeals for the Fourth Circuit, in holding that the arbitrator had engaged in misconduct, noted that the arbitrator had made no findings that the Union's evidence was "cumulative," "irrelevant," or "immaterial," nor did the record show "that [the] evidence was, in fact, cumulative or anything less than highly material and relevant." *Id.*

The facts here are analogous. The Panel denied Stantec's first motion for summary judgment as premature based on the status of the evidence, saying that summary judgment could not be pursued again until "the close of discovery"—like the *International Union* arbitrator instructing the parties to meet, gather information, and negotiate further before there could be a hearing. Then, before the parties could move past the "premature" status of discovery that warranted denying Stantec's first motion, and before "the close of discovery," the Panel issued its award based on Stantec's second motion for summary judgment—like the *International Union* arbitrator issuing his award before the parties could meet, gather information, and negotiate further. In granting Stantec's motion, the Panel made no findings that the discovery it had cut short would be "cumulative," "irrelevant," or "immaterial"—like the *International Union* arbitrator who failed to do the same. And like *International Union*, where "the Union claimed that [the additional] evidence would demonstrate [certain] facts," the additional discovery that FZJV was deprived of the opportunity to conduct and present would have demonstrated - at the absolute very least - a

genuine issue of material fact.[4]

Had it been given the opportunity, FZJV would have conducted the following material discovery: (i) the conclusion of Defendant Civil Engineering Consulting Services, Inc. corporate representative deposition; (ii) the conclusion of FZJV's corporate representative deposition; (iii) the deposition of expert witness Dr. O'Connell; (iv) the deposition of Stantec's expert witness, Dr. Amoroso; (v) the deposition of Stantec's corporate representative; (vi) the deposition of Stantec's engineer, Betsy Watson; and (vii) the deposition of ECS's corporate representative.

Based on that discovery, and if it had been given the opportunity to fairly present its case, FZJV would have presented pertinent and material evidence showing: (i) Stantec's involvement in, and responsibility for, the temporary shoring and design of the MSE Walls; (ii) that Stantec breached the standard of care by deviating from the Pre-Award design and is liable for such negligence; (iii) that FZJV did not know and should not have known an issue with the geomembrane would give rise to a cause of action against Stantec; and (iv) that Stantec's failure to timely provide the Post-Award temporary drainage design caused the inefficiencies and related damages suffered by FZJV.[5] But FZJV did not have the opportunity to present any of this pertinent and material evidence. Instead, the Panel based its decision on the same record it had previously found premature and insufficient to allow for an award. In fact, the Panel's March Award further

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[4] In fact, the existence of a genuine issue of material fact is something that the Panel has since acknowledged in its January 13, 2022 Order. In that Order, the Panel denied additional motions for summary judgment, finding there was a genuine issue of material fact on *the very same issue* it had determined was undisputed in the award that is the subject of this application.

[5] *Cf. e.spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 910 (4th Cir. 2002) ("At the outset, we note that CNS has not identified, either to the arbitral panel or this court, any evidence that it would have presented at the hearing but for the panel's limitation on its right to present evidence. Consequently, it is impossible to determine whether any evidence that was excluded was 'pertinent and material' to the controversy.").

clarifies that the evidence presented in support and opposition to summary judgment on the pre-award MSE Wall design issues is not undisputed. Further, the Panel denied other summary judgment motions on similar grounds – that the specific contractual scope of services is not dispositive of whether or not the standard of care was satisfied.

Because FZJV was denied the opportunity to fairly present its case, because the Panel refused to hear material evidence that it had not found to be "cumulative," "irrelevant," or "immaterial," and because the Panel subsequently acknowledged in its March Award that FZJV's basis for opposition was warranted, this Court should, under 9 U.S.C. § 10(a)(3), vacate the Panel's November Award and March Award granting summary judgment in Stantec's favor on the pre-award MSE Wall design services.

II. The Panel exceeded its power by disregarding the parties' agreement to conduct discovery.

The parties agreed "that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel." *See* Joint Motion to Stay Proceedings and Compel Arbitration at 5, ¶ 9. By disregarding the parties' agreement to conduct discovery, the Panel exceeded its power, providing additional statutory grounds for vacatur.

As an initial matter, the agreement states that discovery "will" be conducted. The parties did not agree that discovery *may* be conducted, nor did they agree that discovery will be conducted only in part. Instead, the parties' agreement reflects an intent to conduct meaningful discovery—something that did not take place. And although the parties carved out two caveats within their agreement, neither is applicable here. First, the parties agreed that discovery would be subject to further agreement between the parties. There was no further agreement between the parties, and there certainly was no further agreement to cut off discovery just as it was beginning. Second, the

parties' agreement provides that the scope and process of discovery may be subject to the direction of the Panel. Here, the Panel did not direct the discovery scope or process (for example, by setting a deadline within which to complete discovery or by expanding the scope of document discovery to include text messages). Instead, the Panel constructively terminated it by issuing an award just as meaningful discovery was beginning. If, however, there was any direction by the panel regarding discovery, it was an implied direction to conduct *more* discovery. Indeed, at the time the Panel granted Stantec's second motion for summary judgment, (1) discovery had not meaningfully progressed further than when the Panel denied Stantec's first motion as premature, and (2) discovery had not closed, despite the Panel expressly stating that summary judgment could not be sought again until the close of discovery.

Because the parties agreed to conduct discovery, and because neither carveout in that agreement applies here (except for the implied direction to conduct more discovery), the Panel exceeded its authority when it disregarded the parties' discovery agreement, effectively terminating the same discovery process that the Panel, itself, had stated was insufficient to support a grant of summary judgment. The Court should find that the Panel exceeded its authority and vacate the award accordingly.

III. The Panel manifestly disregarded the law.

In addition to the five statutory grounds for vacatur, South Carolina recognizes an additional, non-statutory ground of manifest disregard or perverse misconstruction of the law.

"[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated*

and remanded on other grounds, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003)); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). The focus is thus on whether the arbitrator refused to apply a legal principle of which he or she was aware. *See Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

In this case, the Panel knew of two well-defined, explicit, and clearly applicable legal principles, yet refused to apply them until *after* FZJV's prior application to vacate the November Award and only after two attempts by FZJV to seek clarification or reconsideration. "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp.*, LLC, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). The Panel, like any lawyer, knew of this well-defined, explicit, and clearly applicable legal principle, yet refused to initially apply it.

Six times throughout the Panel's award it referenced this standard of "genuine issue of material fact." The Panel was thus aware of the legal principle governing summary judgment. Nonetheless, the Panel manifestly disregarded and refused to apply it, as evidenced by a separate Order issued on January 13, 2022. *See* **Exhibit C**. In that Order, the Panel denied yet another round of unauthorized motions for summary judgment, finding that a genuine issue of material fact precluded summary judgment on *the very same issue* that the Panel found undisputed in the award that is the subject of this application. In other words, and with respect to the Stantec motion for summary judgment on same underlying basis, the Panel (1) knew the summary judgment standard; (2) recognized a genuine issue of material fact, as demonstrated by its January 13, 2022 Order; and (3) granted summary judgment notwithstanding that genuine issue of material fact.

Not until FZJV submitted its second request for clarification or reconsideration of the basis for the November Award on pre-award MSE Wall design services did the Panel acknowledge that there were disputed material facts on this particular claim item, such that summary judgment was improper; however, the Panel denied FZJV's motion in spite of the about-face on the basis for summary judgment.

For these reasons, FZJV respectfully requests that this Court find that the Panel manifestly disregarded the law when it granted and confirmed summary judgment on the pre-award MSE Wall design issue in the November Award despite the Panel acknowledging a genuine issue of material fact on that issue in its March Award.

CONCLUSION

For the foregoing reasons, this Honorable Court should enter an Order vacating the Panel's November 5, 2021 and March 22, 2022 awards, where the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law in granting summary judgment in Stantec's favor on the pre-award MSE Wall design issue.

Respectfully submitted,

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June 22, 2022

Charlotte, North Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 22, 2022, a true and correct copy of the foregoing Application to Vacate was served in accordance with South Carolina Electronic Filing Policies and Guidelines Section 4(e)(2) and (3) on the following counsel:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2023, I electronically filed the foregoing **Stantec Consulting Services, Inc.'s Reply in Support of Its Motion to Dismiss Appellant Flatiron-Zachry, a Joint Venture's Appeal** using the Court's electronic filing system and served a true and correct copy of the foregoing via electronic mail to:

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