

February 28, 2008

Robert A. Parks, III
Vice President
Westwind Contracting, Inc.
501 West Hallandale Beach Blvd.
Pembroke Park, Florida 33023

Mr. Alan Autry
Construction Services Manager
District 1
P.O. Box 1249
Bartow, Florida 33831

Re: FIN's 195756-2-52 and 195756-2-56-03;
State Road 78 in Lee County, Florida

DRB Recommendation For – ***ADDITIONAL COMPENSATION ARISING FROM CHANGES ORDERED IN THE WORK, FOR EXTENSIONS OF TIME, AND FOR ADDITIONAL COMPENSATION ARISING FROM EXTENDED CONTRACT PERFORMANCE***

Dear Mr. Autry and Mr. Parks,

Florida Department of Transportation (Department) and Westwind Contracting, Inc. (Westwind) and its subcontractor, K&J's Traffic Services, Inc. (K&J's) requested a hearing concerning the referenced issues.

Summaries of the Department's and Westwind/K&J's positions, as well as rebuttals were forwarded to the Disputes Review Board (DRB), and a hearing was held on February 6, 2008.

ISSUES:

1. Is K & J's entitled to additional compensation for the extra work of modifying the street lighting electrical services? If so, what amount of compensation is K & J's entitled to? The additional work has been completed and accepted. The amount of compensation requested by K & J's in its claim was \$18,221.28
2. Is K & J's entitled to additional compensation for the extra work of replacing the twenty-two pull boxes for the interconnect conduit system? If so, what amount of compensation is K & J's entitled to? The amount of compensation requested by K & J's in its claim was \$14,531.91.
3. Westwind requests a recommendation by the DRB that Westwind is entitled to 10 percent of the total amounts due and owing K&Js for the extra work it performed.

4. Are Westwind and K & J's entitled to a time extension for any or all of the three items of extra work ordered by the Department after contract time had expired? If so, how many days of time extension are the contractors entitled to? The three items of extra work are:
 - Modify the street lighting electrical services.
 - Replace the twenty-two pull boxes for the interconnect conduit system.
 - Install three traffic loops in the pavement at the intersection of Chiquita Blvd. and SR 78.

K&Js is seeking a contract time extension of 80 calendar days.

5. Remission of liquidated damages that have been withheld by FDOT. FDOT has withheld liquidated damages totaling \$298,400.00 from Westwind as a result of Westwind's alleged failure to complete the Project within the contract time.
6. Westwind seeks extended maintenance of traffic costs at the unit contract rate of \$460.00 per day for the 80 day period, for a total of \$36,800.00
7. Westwind seeks to recover the additional costs for maintaining a field office during the extended performance of the contract at the rate of \$92.00 a day. For the 80 day time extension due, the extended field office compensation due Westwind totals \$7,360.00.
8. Westwind seeks to recover its extended job site overhead costs for the 80 day delay. The job site overhead amount for the 80 day extension totals \$43,152.00.
9. Westwind seeks the award of interest on the amounts that were withheld as liquidated damages.
10. Westwind seeks compensation for the costs of its bond that will be incurred as a result of this claim.

Contractor's Position

A summary of Westwind and K&J's position and rebuttal papers is as follows:

K&J:

It is K & J's position that K & J's and Westwind are entitled to a time extension, and that K & J's is entitled to additional compensation, for the following change order work performed by K & J's as described below:

Additional Compensation

- A. (Dispute Item A.) The Department required K & J's to modify the street lighting electrical services to Lee County Electric Cooperative (LCEC) specifications after the work had already been constructed according to the design included in the Department's contract. As a result of this extra work K & J's incurred additional cost.

- B. (Dispute Item B.) The Department required K & J's to replace twenty-two pull boxes for interconnect conduit that had already been furnished and installed by K & J's. The replacement pull boxes were larger than those first installed. It is K & J's position that replacing these pull boxes was extra work. As a result of this extra work K & J's incurred additional cost.

Additional Contract Time

- C. (Dispute Item C.) There were three change order items directed by the Department well after contract time had expired. The work was performed by K & J's after it was directed by the Department. It is K & J's position that Westwind and K & J's are entitled to a time extension as a result of the Department ordering these items of extra work after contract time had expired. It is also K & J's position that as a result of these change orders issued by the Department after contract time had expired the Department cannot assess liquidated damages. The change order work for which Westwind and K & J's are entitled to a time extension includes:

1. Modify the street lighting services to LCEC specifications. See Item A., Additional Compensation, above.
2. Replace twenty-two pull boxes for the interconnect conduit system. See Item B., Additional Compensation, above.
3. Install three new Type F vehicle detection loops (traffic loops) at the intersection of Chiquita Boulevard and SR 78. This work was not included in the original contract. The work was ordered by FDOT after contract time had expired. The Department issued Field Supplemental Agreement No. 99-25-07 to provide for compensation for the work and for a two-day time extension for the construction time to install the loops. However, the Department has not granted a time extension for the impact of having ordered this additional work well after contract time had expired.

K & J's respectfully requests that the Disputes Review Board consider the facts pertinent to these change order issues and to the requirements of the contract, and issue a recommendation regarding both entitlement and quantum for time extensions and for additional compensation for the matters that are the subject of this dispute and this hearing.

HISTORY OF THIS DISPUTE

According to the Department contract time expired on June 4, 2006. The date of Final Acceptance was August 23, 2006. On January 17, 2007, K & J's submitted a certified claim to Westwind. The K & J's certified claim included the issues described in Introduction, above. Westwind, in turn, submitted its claim, including the pass-through claim of K & J's, to the Department. Westwind's claim was certified on February 5, 2007. Westwind's claim, including K & J's claim, is enclosed herein as **Exhibit 1, pages 1 – 40**.

On March 2, 2007, AIM Engineering responded to the Westwind and K & J's claims in a letter to Westwind. A copy of this letter is enclosed as **Exhibit 3, Pages 1 – 2**. This letter addressed four issues:

1. AIM's response to Item I. of K & J's January 17, 2007, claim - Temporary signalization work at Hancock Ridge Parkway. This work was paid for under Field Supplemental Agreement No. 999-25-02.

This previous claim item is no longer an issue. It is not a matter that is being submitted to the Disputes Review Board for a recommendation at this time.

2. AIM's response to Item II. Of K & J's January 17, 2007, claim - Modifications to the street lighting system. AIM advised the contractors that it was AIM's position that the contractors were not entitled to a time extension due to K & J's "failure to show good faith in this issue by not communicating that there were discrepancies between the contract plans and the power company's specifications in a timely manner to reduce the impacts to contract time and dollars..." AIM offered additional compensation in the amount of \$6,780.00. (The amount requested by K & J's in its claim is \$18,221.28.)

3. AIM's response to Item No. III of K & J's January 17, 2007, claim – Replace interconnect conduit pull boxes. AIM advised the contractors that it was AIM's position that no additional compensation was due for this claim item.

4. AIM's response to Item No. IV of K & J's January 17, 2007, claim – Time extension for extra work added after contract time had expired. AIM addressed the change order work that consisted of installing three vehicle detection loops at the intersection of Chiquita Blvd. and SR 78. This work was directed by the Department approximately two months after contract time had expired. AIM offered a time extension of 40 calendar days for this work. (There was no explanation concerning how the 40 days was determined. In its claim K & J's had requested a time extension of 80 calendar days, which is the number of days between expiration of contract time and final acceptance of the project.) Payment for the work was included in Field Supplemental Agreement No. 99-25-07.

The amount of compensation included in FSA No. 99-25-07 for K & J's direct work of installing the three traffic loops is not in dispute and is not a matter that is being submitted to the Disputes Review Board for a recommendation. The number of days of time extension is in dispute (40 days offered versus 80 days claimed) and is a matter that is being submitted to the Board for a recommendation at this hearing.

Subsequent to AIM's March 2, 2007, letter in response to the Westwind and K & J's claims, the Department and the contractors made an attempt to settle the contractors' claims. No agreement could be reached. On November 7, 2007, Westwind sent a letter to AIM Engineering requesting a Disputes Review Board hearing for the claim issues certified by Westwind on February 5, 2007, and submitted to the Department at that time. On December 19, 2007, Westwind sent a letter to FDOT District One and to AIM Engineering requesting that Westwind's claim, including the pass-through claim of K & J's, be submitted to a Regional Disputes Review Board for a recommendation as to the contractors' entitlement to contract time and to price adjustments. Westwind requested that the Board also consider quantum at this hearing.

Please note that on December 31, 2007, Mary F. Wiley, Florida Department of Transportation, sent an e-mail to Robert Parks, Westwind Contracting. A copy of Ms. Wiley's e-mail is enclosed herein as **Exhibit 2** (one page). In this e-mail Ms. Wiley indicated that it was her opinion that since the contractors had not agreed to accept the Department's offer of a 40-calendar day time extension (in lieu of the 80 days requested) for delays to completion of the project resulting from extra work ordered by the Department after contract time had expired, Westwind and K & J's should request that the Disputes Review Board consider this issue (of a time extension) at the hearing requested by the contractors. The intent of this e-mail is not entirely clear to K & J's. If it is now the Department's position that because K & J's would not accept the 40-day time extension previously offered by the Department on March 2, 2007, K & J's is therefore not entitled to *any* time extension, then K & J's does not agree with the Department's position. To the extent that the Department is taking the position that K & J's is not entitled to any time extension then K & J's is requesting that the Disputes Review Board offer its recommendation regarding the full 80 days requested in K & J's claim. If it is the Department's position that K & J's is entitled to a time extension of only 40 calendar days then K & J's is requesting that the Board offer its recommendation as to K & J's entitlement to an additional 40 calendar days of time extension.

As of this time no extension of contract time has been granted for any of the items of extra work directed by the Department after contract time expired, including the 40 days previously offered for installing the traffic loops.

Westwind:

In February 2007, Westwind submitted its Certified Claim to FDOT for compensation for extra work, a time extension, and compensation for extended contract performance. Westwind's Certified Claim incorporated a certified claim submitted by K&Js Traffic Services, Inc. ("K&Js"), Westwind's signalization subcontractor on this Project. For purposes of this DRB, Westwind adopts and incorporates the arguments and support set forth in its February 2007 Certified Claim. In addition, Westwind relies on the information set forth in this position paper to support its position before the DRB. Included with and incorporated into this position paper, Westwind presents the position paper of K&Js, dated January 17, 2008. The position paper of K&Js is attached hereto.

Initially, K&J's seeks a recommendation from the DRB that it is entitled to additional compensation for performing extra work ordered by or on behalf of FDOT. K&J's asserts that the work it was required to do was outside the scope of Westwind's contract and therefore entitles it to additional compensation. K&Js details the work performed and establishes that it was outside the scope of Westwind's contract. K&Js also details the amount it is due for this extra work.

In conjunction with K&Js claim for extra work, Westwind seeks the appropriate overhead and profit markup on the direct costs for the additional work performed. Westwind is entitled to a markup of 10 percent on extra work performed by a subcontractor pursuant to Standard Specification 4-3.2. Westwind requests a recommendation by the DRB that Westwind is entitled to 10 percent of the total amounts due and owing K&Js for the extra work it performed.

K&J's also presents a claim for additional contract time under the provisions of Westwind's contract with FDOT. As explained in K&J's position paper, K&J is seeking a contract time extension of 80 calendar days. This time extension is justified as a result of various changes ordered by FDOT after the scheduled completion date of the contract. A more complete explanation of the events that created these delays and the justification for the 80 day time extension is set forth in K&J's position paper. Based on the arguments presented by K&J's, Westwind seeks a recommendation from the DRB for a contract time extension of 80 days.

In conjunction with seeking this time extension, Westwind seeks the remission of liquidated damages withheld by FDOT for the time extension it is due, and the recovery of appropriate compensation for its extended performance. Specifically, Westwind seeks the following relief arising from the delay in performance:

A contract time extension of 80 calendar days. Remission of liquidated damages that have been withheld by FDOT. FDOT has withheld liquidated damages totaling \$298,400.00 from Westwind as a result of Westwind's alleged failure to complete the Project within the contract time. The amount withheld by FDOT represents 80 calendar days of liquidated damages. Westwind seeks to recover all these liquidated damages based on the time extensions being claimed by Westwind and K&J's.

REBUTTAL TO SPECIFIC ITEMS INCLUDED IN FDOT POSITION PAPER

The Department's position on the claim items – General

(This is FDOT position paper Item No. 1)

The Department's positions as stated in Item No. 1, General, of its position paper (page 2) are reiterated later in the Department's position paper in Item 2, Extra Compensation, and in Item 3, Additional Time. K & J's will address the FDOT positions with which K & J's does not agree in its rebuttals to Item Nos. 2 and 3.

The Department's position on the claim items – Extra Compensation

(This is FDOT position paper Item No. 2)

The Department's position regarding claim items for additional compensation is found on pages 2, 3, and 4 of the Department's position paper.

2.a) – Modifications to street lighting system:

Department: *"The claims for compensation with regard to the Electrical Services and Lighting Poles are without merit."*

K & J's response – K & J's does not agree that K & J's is not entitled to compensation for the work necessary to modify the street lighting system to meet the requirements of Lee County Electric Cooperative after the system had already been installed by K & J's in strict accordance with the contract plans and specifications.

The Department has apparently changed its position regarding entitlement to additional compensation since the time that the Department directed Westwind/K & J's to perform the work. At the time that the Department ordered the work, the Department advised Westwind/K & J's that the contractor

would be compensated. Based upon the Department's directive, K & J's ordered the necessary materials and performed the work. See AIM's August 2, 2006, letter to Westwind (copy behind Tab 1, K & J's position paper, page 22). This letter includes "This letter serves as a directive to perform the required work to the electric services as required by the Lee County Electric Co-operative. *As compensation, the Florida Department of Transportation will pay for the services that have already been constructed, and an additional 2 each for the reconstruction of the services to the requirements of LCEC (italics added).*"

The amount offered by the Department for payment was not accepted by K & J's. K & J's, at the request of the Department, had submitted a price proposal for the additional work on August 1, 2006, the day before the Department directed Westwind to proceed with the work. The amount of compensation requested for the work was \$18,221.28. Regardless of the dispute concerning the amount of compensation, entitlement should not be an issue. The Department agreed to pay for the work when it ordered the work.

In part 2.a) of the Department's position paper the Department cites the requirements of the contract that apply to the street lighting load centers (electric service for the project street lighting system). These include:

1. Lighting Plans, Sheet L-3, Note No. 6 – "Comply with Index 17504, Detail "B", Service Specifications and Notes. A copy of the Lighting Plans is behind Tab 15 in K & J's position paper. A copy of FDOT Index 17504 is Exhibit "B" in the Department's position paper.

The Index 17504 Notes include:

- a. "It shall be the contractor's responsibility to provide a complete service assembly as per the plans and service specifications."
 - Plans - The requirements for the two load centers (service assemblies) in the plans are found on Sheets L-3, L-4, L-7, L-12, and L-15. The service assemblies installed initially by K & J's met every requirement of the FDOT plans.
 - Service Specifications – There is a list of nine technical specifications (Service Specifications) on the Index No. 17504 drawing. The service assemblies installed initially by K & J's met every requirement of the Service Specifications.
- b. "The service installation shall meet the requirements of the national electric code and applicable local codes." The service installations installed initially by K & J's met the requirements of all applicable electric codes. It is K & J's opinion that the Department, in its position paper, may be referring to "electric codes" as if these were "specifications". Design specifications and codes are not the same thing. Of course the system designed by the Department's designer should have met the requirements of all applicable codes. Design was a Department responsibility. The contractor's responsibility was to use installation means and methods that met the requirements of the applicable codes.
- c. "Shop drawings are not required for service equipment, unless noted in the plans." It was a requirement of the contract that shop drawings be submitted for the load centers. These were submitted by the contractor, and were approved by the Department.

2. Lighting Plans, Sheet L-3, Note No. 9 – “Contractor shall contact Lee County Cooperative, Inc. for pedestal location and electric service location”.

K & J’s complied with this requirement. The location of the load centers was not only already shown on the contract drawings (see Sheet L-7 for Load Center “A” and Sheet L-12 for Load Center “B”), but the location was obvious in the field. There was an existing LCEC utility pole, with a transformer, at each of the two load center locations shown on the contract plans. It seems evident that the Department’s designer had contacted LCEC during the design phase and asked LCEC where the service drops should be located in order for the Department to obtain power for the proposed lighting system. The load center locations in the Departments plans are each adjacent to an existing LCEC pole with transformer. K & J’s did coordinate with LCEC and did locate K & J’s concrete pole for the load center near the existing LCEC pole and transformer that already existed in the field and was shown in the plans.

3. Lighting Plans, Sheet L-4 – See legend description. Includes the legend symbol for the service drops for the street lighting system. “Distribution point – For specifications see Index 17504 of Roadway and Traffic Design Standards.” See 1., above, for Index 17504 requirements.
4. Lighting Plans, Sheet L-7 – Shows location for Load Center “A”. Includes note “100A 480 V single phase underground service, 3 wire service. Sta. 1169+80, Circuits A-1 thru A-4, 40A 480V 4P Breaker. See service point details L-15. Photo electric control required”. Load Center “A” was installed by K & J’s at the location shown on Sheet L-7. The system initially installed by K & J’s met the requirements of the note for Load Center “A”. **But**, the system required by LCEC did not meet the requirements of this note. LCEC informed the Department that it wanted a two phase system and not a single phase system. The Department directed K & J’s to change the system from single phase to poly phase. K & J’s was also instructed to add a disconnect between the transformer and the meter.
5. Lighting Plans, Sheet L-12 – Shows location for Load Center “B”. Same note as on Sheet L-7 for Load Center “A” (except different station number). K & J’s was also required to change this load center from single phase to poly phase, and add a disconnect.
6. Lighting Plans, Sheet L-15 – Service Point Details. Includes detailed design specifications for the two load centers for this project. Number of circuits, circuit breaker sizes, demand loads in amps, size of conductors, number of lighting contactors. Also includes two notes:
 - “Electrical service point will be secondary power at 480 volts, single phase, three wire, furnished by electric company.” Again, the system installed by K & J’s was single phase and met the requirements of this note. FDOT directed that K & J’s change the lighting system to poly phase.
 - “Service point details will be in accordance with Standard Index 17504, Detail B, Underground Feed.” Discussed previously in this rebuttal. The service systems installed initially by K & J’s met all of the requirements of Index 17504.

7. 2004 edition of FDOT Standard Specifications for Road and Bridge Construction, Article 715-4, Furnishing Electric Service. Includes (as *partially* cited by FDOT in its position paper) “The power company will provide service to the areas in the vicinities indicated. Consult and cooperate with the power company in locating its distribution transformer and service pole so that the lines will be as short and direct as possible. Bear any line-extension costs up to the first 2,000 feet (600 m). Furnish or install only those parts of the metering equipment or connections that are customary and required by the power company in the locality involved.” As explained previously in this rebuttal, LCEC’s power poles and transformers for the two load centers for the project lighting system were already in place before work began on this project. Further, the Department indicated on the contract drawings where to locate the two load centers (adjacent to two of LCEC’s existing poles and transformers). The requirement to “Furnish or install only those parts of the metering equipment or connections that are customary and required by the power company in the locality involved” does not, in K & J’s opinion, mean that it is the contractor’s responsibility to ask the power company to review the Department’s design, and if the power company does not like the Department’s design then it is the contractor’s responsibility to build the system to a different design at no additional cost to the Department. This appears to be the position that the Department is taking in its position paper.

8. 2004 edition of FDOT Standard Specifications for Road and Bridge Construction, Article 715-16, Method of Measurement, subarticle (c), Load Center (cited by the Department in its position paper). “Load Center: The Contract unit price will include the service pole, insulators, weatherheads, transformers, enclosures, panel boards, breakers, safety meter base, and all external and internal conduit and conductors for the service *as indicated in the plans and the Design Standards* (italics added).” See previous comments by K & J’s in this rebuttal. The two load centers initially furnished and installed by K & J’s met all requirements of the plans and the Design Standards.

In part 2.a) of the Department’s position paper the Department includes the following:

Department - *The Department, through its plans, specifications and Design Standards made it clear that it expected the Contractor to provide completed Electrical Services and that those services would act as an integral part of a functional lighting system which includes the light poles.*

K & J’s response – K & J’s did provide a completed lighting system, including load centers (services), light poles and fixtures, conduits and wiring, and pull boxes, all in strict accordance with the plans and specifications. The design in the plans and specifications, including the Design Standards, was detailed, complete, and specific. It was K & J’s responsibility to build the lighting system in accordance with the plans and specifications, and this is what K & J’s did.

Department – *The Department had a right to expect that the Contractor would consult and coordinate with LCEC to see that the installation would meet the intent of the Plans and Specifications which was to “provide complete service installation” that “met all the requirements of the national electric code and applicable local codes”.*

K & J’s response – There is no requirement in the contract that the “Contractor will consult and coordinate with LCEC to see that the installation would meet the intent of the Plans and Specifications...” The “intent” of the plans and specifications was clearly shown in a very detailed design. It was K & J’s responsibility to install the lighting system (and the signalization system) in strict accordance with the plans and specifications. There was nothing in the contract that required K & J’s

to “consult” with the power company concerning the Department’s design. Conversely, it was the Department’s responsibility to consult with the power company during the design phase of the project to see where electricity was available for the proposed lighting system, and what kind of electricity was available. It seems likely that the Department’s designer *did* consult with LCEC during the design phase because the designer, in the contract drawings, located the two load centers right next to LCEC poles and transformers. It would also have been necessary for the Department’s designer to find out from LCEC what type of power was available (voltage, phases, etc.) for the lighting system. Since the lighting requirements in the plans, including the requirements for the load centers, are very detailed and very specific it seems likely that the Department did consult with LCEC during the design phase. It is not clear why it is now the Department’s position that it was the contractor’s responsibility to ask LCEC to check the Department’s design. Again, this is not a requirement of the contract. The contractor’s responsibilities according to the contract were to:

- “The contractor shall contact Lee County Electric Cooperative, Inc. for pedestal location and electrical service coordination”. K & J’s did this. K & J’s located the service poles right next to LCEC poles and transformers. K & J’s notified LCEC when K & J’s was ready for electric service to be turned on (electrical service coordination).
- “Consult and cooperate with the power company in locating its distribution transformer and service pole so that the lines will be as short and direct as possible.” As stated previously in this rebuttal, LCEC’s poles and transformers were already in place before work began on this project. The Department showed in the plans where the contractor was to install the load centers. The two locations shown in the plans were next to existing LCEC poles, with transformers.

Department – Had K & J’s consulted with the Lee County Electric Cooperative in a timely manner, the power service could have been installed in conformance with LCEC requirements well before the last contract day so that installation and acceptance of the Highway Lighting System by LCEC would not hold up acceptance of the project by the Department. K & J’s did not contact LCEC prior to the installation of the electric power service and the light poles and appurtenances and therefore extra cost due to this lack of coordination should be borne by K & J’s.

K & J response –

1. K & J’s did coordinate with LCEC in a timely manner. K & J’s responsibility was to notify LCEC that the lighting system was ready for electrical power so that the street lighting could be energized in time to avoid a delay to completion of the overall project. K & J’s did this.
2. If FDOT’s design had been acceptable to LCEC then there would have been no additional work necessary, and there would have been no delay.
3. It was a requirement of the contract that the load centers be installed in accordance with the contract, not in accordance with “LCEC requirements”. If design coordination was necessary then this was the requirement of the designer (FDOT) and not the contractor.
4. There was no requirement in the contract that the contractor contact LCEC before installing the lighting system. It was a requirement of the contract that the contractor install the lighting system in accordance with the plans and specifications.

It is K & J's position that if there was a failure to coordinate then the failure was by the Department. It seems likely that the Department did consult with LCEC during the design phase concerning location of the two load centers and the voltage available for the street lighting. The Department has not offered an explanation concerning why the Department's design was for a single phase system when LCEC wanted a poly phase system. It is also not clear why the Department designed a system without a disconnect between the transformer and the meter when this is a requirement of the LCEC.

K & J's requests that the Board consider these two points:

1. The system installed initially by K & J's met all the requirements of the plans and specifications. The system that K & J's was directed by the Department to install (to satisfy LCEC) did not meet the requirements of the FDOT plans and specifications.
2. The load centers submitted to the Department by K & J's for approval (the systems required by the contract), and installed by K & J's, were approved by the Department.

2.b) – Replacement of pull boxes for the interconnect conduits.

Department – *Attached as Exhibit "E" is Sheet T-3 of the Plans. The left side of the plan sheet has a series of notes with the heading "Pay Item Notes". We have highlighted in yellow Item 635-1-11 which states in part "...Pull boxes shall have polymer Concrete (24" X 36") lids or equivalent...". The Department listed the Pay Item on the Plans and then told the Contractor what it expected the Contractor to provide in connection with that Pay Item.*

K & J's response –

1. The note referenced by the Department reads *in full* "Contractor is responsible for appropriately sizing each pull box so the communication and/or interconnect cable does not exceed manufacturer's recommended bending radius. Pull boxes shall have polymer concrete (24" X 36") lids or the equivalent. All interconnect pull boxes shall be placed 800 feet apart." There are two parts to this specification. One has to do with the Contractor sizing the box so that the interconnect cable is not bent too sharply at the box. Then there is a reference to a box with a 24" X 36" polymer concrete lid. These two specifications are in conflict if copper cable (as opposed to fiber optic) is used, and if the cable is small enough so that the minimum bending radius recommendation is not exceeded if a box smaller than 24" X 36" is used. In the case of the interconnect cable used on this project the bending radius requirement was satisfied by using a 17" X 30" X 12" pull box. K & J's submitted a 17" X 30" X 12" box to the Department for approval and the box was approved. The approved box was installed.
2. The 17" X 30" X 12" box was installed by K & J's at all locations on the project where a pull box was required. The Department directed K & J's to replace only the boxes for the interconnect conduit. All other 17" X 30" X 12" boxes were left in place, as installed. The Department is now taking the position that it is clear that the pay item note makes it a requirement of the contract that only a 24" X 36" X 24" box is acceptable. If this note is clear then the Department should have ordered K & J's to replace all pull boxes, not just the interconnect conduit pull boxes. It is K & J's understanding that Lee County wanted the large boxes installed in the event the County decided at a later date to use an fiber optic, and not a copper, cable for the interconnect system. It is K & J's position that its responsibility to "appropriately size the pull boxes" did not include agreeing to install whatever size the County might decide that it wanted for a future installation.

It is K & J's position that because K & J's installed the size pull box that was approved by the Department, and because the pull boxes installed were sized appropriately for the cable to be installed, and because with only one bid item K & J's could not have anticipated that it would be required to install two different sized pull boxes, and because the Department initially asked K & J's to submit a price proposal for changing the interconnect conduit pull boxes, K & J's is entitled to compensation for the cost of replacing the 22 pull boxes in question.

Department – K & J's has brought up conversations he had with FDOT Maintenance and Lee County Traffic Operations, who is the maintaining agency at this location, but these agencies told AIM Engineering that no agreement was reached with K & J's and no documentation of these conversations was presented so that a contract change could be initiated. In fact both agencies deny agreeing to any such change.

K & J's response – K & J's disagrees with the Department's characterization of this matter. Representatives of Lee County, FDOT, AIM Engineering, and K & J's met prior to the start of the signalization work to agree on a plan for the work. Two decisions were reached. First, at the request of Lee County, K & J's agreed to install three 1-1/4" interconnect conduits in lieu of the one 4" conduit required by the contract signalization plans. Secondly, Lee County and the Department agreed to the use of a 17" X 30" X 12" pull box. Now the Department is taking the position that the 17" X 30" X 12" pull boxes do not meet the requirements of the contract and therefore K & J's should bear the cost of replacing the 22 boxes used in the interconnect system. But at the same time there is no mention that neither do the three 1-1/4" conduits installed by K & J's (at greater expense to K & J's) meet the requirements of the contract. Again, the Department has not explained why it approved the 17" X 30" X 12" pull boxes before these were installed, and has not explained why in many locations the 17" X 30" X 12" boxes were accepted.

It remains K & J's position that changing these 22 pull boxes was extra work and that K & J's is entitled to compensation accordingly.

2.c) – Furnish and install three Type F vehicle detection loops at the intersection of Chiquita Boulevard and SR 78.

Department – The installation of Type F Loops was ordered by AIM Engineering because of a plan error in which the designer failed to anticipate that the milling and resurfacing at this location would damage the existing loop detectors and provide for their replacement in the plans. In order for the traffic signals at this location to function properly the replacement was ordered and payment was made to the contractor.

K & J's response – In its position paper the Department included the above description of this issue in the "claims for extra compensation" portion of its position paper. K & J's agrees that payment for the actual work of installing the new traffic loops is not in dispute. It is K & J's understanding that Westwind has been paid for this work. What is in dispute is a time extension for this extra work. See the next portion of this rebuttal.

The Department's position on the claim items – Additional Time

(This is FDOT position paper Item No. 3)

The Department's position regarding claim items for additional contract time is found on pages 4 and 5 of the Department's position paper.

3.a) – Modifications to street lighting system:

Department – *A time extension for changing the Electric Service and light poles to meet LCEC standards cannot be justified by the Contract for this project. The Department did not direct the Contractor to do extra work after contract time had expired in connection with these items.*

K & J's response – This is not a factually correct statement. The Department did direct the contractor to do extra work, and the work was ordered after contract time had expired. See AIM's letter to Westwind dated August 2, 2006, or 59 days after contract time had expired (copy behind Tab 1 in K & J's position paper, page 22). In its letter AIM directs Westwind to do the work, and advises Westwind that the contractor will be paid extra for the modification work. The work directed was clearly extra work because the work directed was not the work shown in the plans and required by the contract. As stated previously, the load centers, as modified to meet LCEC requirements, did not meet the requirements of the plans and specifications. The initial installation did. The modifications to the load centers and poles was extra work.

Department – *K & J's did not consult and coordinate with LCEC until it was time to request power from LCEC...It is the Department's contention that Westwind through its subcontractor K & J's did not diligently pursue the required consultation and coordination with LCEC and that if they had done so at a much earlier date, both the Electric Services and the lighting poles would have been completed to LCEC Standards within the Contract time.*

K & J's response – K & J's request to LCEC for electricity to power the streetlights was timely. The required and appropriate time for K & J's to coordinate with LCEC was when K & J's was ready to energize the street lighting system, and that is what K & J's did. If the Department's design had reflected what LCEC wanted, then modifying the load centers and poles would not have been necessary. As a result of the modifications to the lighting system, completion of the project was delayed. There was no requirement in the contract that K & J's contact LCEC in advance of the time that electricity was needed to test the streetlights. It was the Department's responsibility to design the lighting system. It was K & J's responsibility to construct the system according to the Department's design. If there was a design coordination problem, and if the design problem delayed completion of the project, then the designer (the Department) is responsible, not the contractor.

The project could not be completed until the street lighting system was completed. The Department ordered the changes to the street lighting system 59 calendar days after contract time had expired. The change order work was completed as quickly as possible, which was on August 14, 2006, or 71 days after time had expired. It was a requirement of the contract to test the street lighting system for 10 days after the system was energized. Testing was completed on August 21, 2006, or 78 days after time had expired. After the testing was completed two days were consumed in final inspections and acceptance of the project. Therefore, as a result of the modifications to the lighting system ordered by the Department, the project could not have been completed any earlier than August 23, 2006, or 80 days after time had expired. It is K & J's position that the contractors are entitled to a time extension for this delay to completion of the project.

3.b) – Change twenty-two previously furnished and installed pull boxes for the signalization interconnect conduit system:

Department – *A time extension for changing the pull boxes to those required by the Plans cannot be justified under the terms of the Contract. The plans are clear as to what was expected for this item of work.*

K & J's response:

1. It is K & J's position that changing the boxes was extra work and that a change order, including compensation and a time extension, can be justified under the terms of the contract. Please see K & J's rebuttal to the Department's Item 2.b), compensation for changing pull boxes, above. The pull boxes initially installed by K & J's did meet the requirements of the plans, and were approved by the Department prior to installation.
2. As stated previously in this rebuttal, it is K & J's position that the plans are not completely clear regarding what size pull box to install. But what is clear is that the Department approved the pull boxes, and K & J's installed what was approved. The pull boxes installed were more than adequate for the signalization interconnect system. It is also K & J's position that if there is an inconsistency in the specifications then the party that drafted the specifications (the Department) is responsible for any impacts resulting from the inconsistency. And again, K & J's, in an effort to deal with this inconsistency, did its part by submitting the pull box for approval before installing the pull boxes.

Department – *The pull box shown on Sheet T-3 of the plans should have been supplied.*

K & J's response – There is no pull box “shown” on Sheet T-3 of the plans. There is a pay item note describing what is included in the pull box pay item. See previous discussion in this rebuttal regarding the pull box pay item note on Sheet T-3. And as stated previously, many of the pull boxes originally approved and installed by K & J's were left in place. The Department required that only the interconnect pull boxes be changed. It is K & J's opinion that it is likely that K & J's was directed to change these 22 pull boxes to accommodate a possible future change by Lee County (to fiber optic cable) and not because the pull boxes installed did not meet the requirements of the contract.

Department – *Requiring K & J's to supply the proper pull box does not constitute extra work and therefore a time extension for this work cannot be justified by the Contract Documents and we ask the DRB to deny the Contractor's request for additional time on this issue.*

K & J's response – It is K & J's position that changing the pull boxes was extra work, and that since this work delayed completion of the project a time extension can be justified according to the contract.

The work was ordered by the Department on or about August 1, 2006, or 58 days after contract time had expired. The pull box replacement work was completed on or about August 12, 2006, or 69 days after contract time had expired. This does not include time for inspection, testing, and acceptance of the signalization system and the overall project. The project could not be completed until the signalization was completed. Changing the pull boxes delayed completion of the signalization system. Therefore changing the pull boxes delayed completion of the project. Since this was extra work, and since the project could not be completed and accepted on any date earlier than the date that this extra work was completed, inspected, tested, and accepted, the contractors are entitled to a time extension accordingly.

3.c) – Furnish and install three Type F vehicle detection loops at the intersection of Chiquita Boulevard and SR 78:

Department – *A time extension because of the replacement of Type F Loop Detectors cannot be justified under the terms of the Contract other than for the time it took to install the replacement loops. This work was added due to a plan error in which the designer assumed that the loops were deep enough to avoid damage during the milling operation. The loops, in fact, were not deep enough to avoid damage during the milling operation.*

K & J's response:

1. The Department is apparently trying to make a distinction between time extensions for extra work necessary to overcome a “plan error” and time extensions for other categories of extra work. It is K & J’s position that there is nothing in the contract that supports the Department’s position. It is K & J’s position that when work not included in the original contract is added by the Department, and when this work delays completion and acceptance of the project, then according to the contract a time extension should be granted. Regarding time extensions for additional work, there is no distinction in the FDOT Standard Specifications for Road and Bridge Construction between alteration in the work to accommodate a design change, alteration in the work to change the type of construction, unforeseen work, added quantities of work, extra work, work added to accommodate a differing site condition, etc. It is K & J’s position that the test for a time extension is not what “category” of extra work is involved. The test is whether the extra work delayed completion of the project. The traffic loops were ordered by the Department on August 1, 2006, or 58 days after time had expired. The loops were installed on August 3, 2006, or 60 calendar days after time had expired. This does not include inspection, testing, and acceptance of the signalization work. The project could not be completed until the signalization was completed. The signalization could not be completed until the traffic loops were installed. Therefore, as a result of the traffic loop change order, acceptance of the project was delayed for more than 60 days.
2. It is (now) the Department’s position that the contractor is entitled to a time extension for only the two days necessary to install the loops. These two days were added in a supplemental agreement. These two days extended the required contract completion date from June 2, 2006, to June 4, 2006. However, the extra work to install the three traffic loops was not ordered by FDOT until August 1, 2006, and the loops were not installed until August 3, 2006. Obviously it was impossible for the contractors to complete the project by June 4, 2006. Since one reason that it was impossible to complete all work by June 4, 2006, was the extra work to install the three traffic loops, and since this extra work was the responsibility of the Department, it is K & J’s position that the Department cannot assess liquidated damages after June 4, 2006.
3. The Department did not mention in its position paper that it previously offered a time extension of 40 calendar days for this delay. See the Department’s March 2, 2007, response to K & J’s and Westwind’s claim. A copy is behind Tab 3 in K & J’s position paper. The letter includes “Due to this work being added after the last allowable contract day the Department is offering a time extension of 40 days.” The Department acknowledged that the contractors are entitled to a time extension. K & J’s agrees with the Department’s previous position regarding entitlement, but does not agree with the number of days offered. It is unclear to K & J’s how the Department determined that a 40-day time extension was appropriate when the work was not even ordered until 58 days after time had expired.

The Department’s position on the claim items – Summary and Conclusions

(This is FDOT position paper Item No. 4)

The Department’s Summary and Conclusions does not appear to include any positions that are not included in the Extra Compensation and Additional Time sections of the Department’s position paper. Therefore K & J’s does not feel that there is any need for K & J’s to offer a rebuttal to the Department’s Summary and Conclusions.

Department's Position

1. General: Westwind claims that K&J was asked by the Department through its CEI, AIM Engineering & Surveying, Inc. to perform work outside the scope of the Contract and that this additional work was directed beyond the last day of the Contract. The Department maintains that the lighting system and pull box work that K&J was asked to perform was a part of the original Contract and because this work was a part of the Plans and Specifications for the project extra compensation and extra time should not be granted. K&J was directed to complete work required to deliver the Department a completed and functional Highway Lighting System that complied not only with the Plans and Specifications but the requirements of the local power supplier Lee County Electrical Cooperative (LCEC) and the National Electric Code. It is also the position of the Department that the pull boxes originally supplied by K&J were not the same size as those specifically called for in the Plans and therefore needed to be replaced with the correct size pull boxes. Additionally, it is the Department's position that the installation of the Type F Loops for traffic detection were a result of a plan error and that Contract Time added thru a Field Supplemental Agreement for this installation should be the only additional time granted.

2. The Department's position on claims for extra compensation.

- a) The claims for compensation with regard to the Electrical Services and Lighting Poles are without merit. The plans clearly state that the Contractor is coordinate with Lee County Electric Cooperative (LCEC) in providing power to the lighting system so the work will comply with local and national codes. Attached as Exhibit "A", is a copy of Sheet L-3 of the Lighting Plans for this project. Note No.6 on this Sheet is highlighted in yellow and tells the Contractor to comply with Standard Design Index 17504, Detail "B". This Standard Index is also attached (Exhibit "B") and in the upper left of the sheet is a note that applies to the entire Standard Drawing, also highlighted in yellow. The note states that
- "It shall be the Contractor's responsibility to provide a complete assembly as per the plans and service specifications.
The service installation shall meet the requirements of the national electric code and applicable local codes."

Still referring to Sheet L-3 (Exhibit "A") of the Plans General Note No. 9 is highlighted in yellow and states:

"The Contractor shall contact Lee County Electric Cooperative, Inc. for pedestal location and Electric Service Coordination."

Another attachment is Sheet L-15 of the Plans (Exhibit "C") contains a note for Service Point "A" and "B" is highlighted in yellow that again refers the contractor to Standard Index 17504. The Standard Specifications for Road and Bridge Construction. 2004 Edition, in **Section 715-4 Furnishing Electric Service** (Exhibit "D") requires the Contractor to

"Consult and cooperate with the power company in locating its distribution transformer and service pole..."

"Furnish and install only those parts of the metering equipment or connections that are customary and required by the power company in the locality involved."

The Standard Specifications **Section 715-16 Method of Measurement** (Exhibit D-2) States:

"(c) Load Center: The Contract Unit Price will include the service pole, insulators, weatherhead, transformers, enclosures, panel boards, breakers, safety switches, H.O.A. switches, lightning protectors, fuses, photo electric assembly, meter base, and all external conduit and conductors for the service as indicated in the Plans and Design Standards."

The Department through its plans, specifications and Design Standards made it clear that it expected the Contractor to provide completed Electric Services and that those services would act as an integral part of a functional lighting system which includes the light poles. The Department had a right to expect that the Contractor would consult and coordinate with LCEC to see that the installation would meet the intent of the Plans and Specifications which was to *"provide complete service installation"* that *"met all the requirements of the national electric code and applicable local codes"* had K&J consulted with the Lee County Electric Cooperative in a timely manner the power service could have been installed in conformance with LCEC requirements well before the last contract day so that installation and acceptance of the Highway Lighting System by LCEC would not hold up acceptance of the project by the Department. K&J did not contact LCEC prior to the installation of the electric power service and the light poles and appurtenances and therefore extra cost due to this lack of coordination should be borne by K&J. The fact is that K&J did not contact LCEC until after Contract Time had expired is demonstrated by Exhibit "F".

b) The Claim for extra compensation with regard to the replacement of undersized pull boxes is also without merit. Attached as Exhibit "E", is Sheet T-3 of the Plans. The left side of the plan sheet has a series of notes with the heading *Pay Item Notes*. We have highlighted in yellow, Item 635-1-11 which states in part

".....Pull boxes shall have polymer Concrete (24" x 36") lids or equivalent....."

The Department listed the Pay Item on the Plans and then told the Contractor what it expected the Contractor to provide in connection with that Pay Item.

Providing what the plans call for is not extra work. The Contractor was merely asked to install what the Plans require. K&J has brought up conversations he had with FOOT Maintenance and Lee County Traffic Operations, who is the maintaining agency at this location but these agencies told AIM Engineering that no agreement was reached with K&J and no documentation of these conversations was presented so that a contract change could be initiated. In fact both agencies deny agreeing to any such change. K&J has also stated that the Pay Item Number is for a smaller box. The Plans state what is required and the Plans would take precedence over pay item numbers per Section 5-2 of the Standard Specifications.

Because the work for which Westwind and K&J are claiming as extra work is clearly required by the Contract Documents, extra compensation for these items can not be justified under the terms of the contract. No extra compensation for this work should be awarded by the DRB.

c) The Installation of Type F Loops was ordered by AIM Engineering because of a plan error in which the designer failed to anticipate that the milling and resurfacing at this location would damage the existing loop detectors and provide for their replacement in the plans. In order for the traffic signals at this location to function properly the replacement was ordered and payment was made to the Contractor.

3. Claims for Additional Time.

a) A time extension for changing the Electric Service and light poles to meet LCEC standards can not be justified by the Contract for this project. The Department did not direct the Contractor to do extra work after contract time had expired in connection with these items. The Contractor was directed to provide electric service and a functional lighting system as required by the Contract. K&J did not consult and coordinate with LCEC until it was time to request power from LCEC. The contract for the project was executed on September 20, 2004, the Notice to Proceed stated work was to begin on November 6, 2004 and the last allowable day under the Contract after approved time extensions was June 4, 2006, yet K&J did not contact LCEC to consult and coordinate as required by the Contract until July 11, 2006 which was well after contract time had expired. (See Exhibit "F"). It is the Department's contention that Westwind through its Subcontractor K&J did not diligently pursue the required consultation and coordination with LCEC and that if they had done so at a much earlier date, both the Electric Services and the lighting poles would have been completed to LCEC Standards within the Contract time. We do not believe that under the terms of the Contract a time extension can be justified and we ask that the DRB deny the Contractors request for additional time on this issue.

b) A time extension for changing the pull boxes to those required by the Plans can not be justified under the terms of the Contract. The plans are clear as to what was expected for this item of work. The Contractor did not request a

change in the Contract and could not provide documentation that FDOT Maintenance and Lee County Traffic Operations had requested a change in the pull box size from that specified on the plans. The pull box shown on Sheet T-3 of the plans should have been supplied. Requiring K&J to supply the proper Pull Box does not constitute extra work and therefore a time extension for this work can not be justified by the Contract Documents and we ask the DRB to deny the Contractors request for additional time on this issue.

c) A time extension because of the replacement of Type F Loop Detectors can not be justified under the terms of the Contract other than for the time it took to install the replacement loops. This work was added due to a plan error in which the designer assumed that the loops were deep enough to avoid damage during the milling operation. The loops, in fact, were not deep enough and damage occurred. Westwind was directed to replace the loops and a Field Supplemental Agreement was issued allowing two additional contract days. In signing the Field Supplemental Agreement both the Department and the Contractor agreed that the additional money and time granted were final settlement for this item. We request that the DRB not grant any additional time for this issue.

d) The Department does not dispute the Westwind's additional costs per day in the amount of \$1091.40 for each Calendar Day granted by the DRB.

4. Summary and Conclusions.

It is the Department's position that the Department and its C.E.I., Aim Engineering and Surveying, Inc. were correct in denying claims for additional money and time relating to the electrical service and light poles for the highway lighting system for this project because the Plans, Specifications and Standard Drawings required the Contractor to coordinate with the local electric company (LCEC) and provide the Department a functional highway lighting system within the Contract Time. The Contractor through its subcontractor should have consulted and coordinated with LCEC prior to the start of installation of the lighting system to avoid additional cost and the need for additional time. In delaying any contract with the power company until after contract time had expired shows a lack of a good faith effort to complete this work within the allotted contract time. The Department maintains its position that no additional money or time should be granted by the DRB for this work.

The same is true for the replacement of the undersized pull boxes supplied by K&J with the size specified in the plans. The Department requested a definite size pull box and without a contract change, K&J should have supplied that size. The Department, in requiring K&J to replace the undersize boxes, was not adding extra work only attempting to have K&J supply what was set forth in the plans. The Department maintains its position that no additional money or time should be granted by the DRB for this work.

The Department recognizes that the Contractor was asked to replace the Type F Loops after time had expired on the Contract. This work was needed because these loops were damaged during milling operations. The loop replacement was a design error and the Department has paid the Contractor for the work and granted a two day time extension which is the time it took to make the repair. The work was authorized by a Field Supplemental Agreement in which the Department and the Contractor accepted as final compensation for both money and time. We request that the DRB grant no additional compensation or time for this work.

THE DEPARTMENT'S REBUTTAL TO THE CONTACTORS POSITION PAPER

Position Paper Claims by Westwind:

The Department rejects the claim entirely. Attached is Exhibit "G", Pages 1 and 2, which is a copy of **Section 5-12.2.1 Claims for Extra Work** of the Standard Specifications for Road and Bridge Construction, 2004 Edition, the portion highlighted in yellow states "Where the Contractor deems that additional compensation or a time extension is due for work not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to **4-3**, the Contractor shall notify the Engineer in writing of the intention to file a claim for additional compensation before beginning the work on which the claim is based, and if seeking a time extension, The Contractor shall also submit a preliminary request for time extension pursuant to **8-7.3.2** within ten calendar days after the commencement of a delay". Further in **Section 5-12.2.1** is stated "Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation are **each** a precedent to the Contractor bringing any circuit court, arbitration or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractors written claim, and failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time period required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any such right to additional compensation or a time extension for such claim." And this paragraph is also highlighted in yellow. **Section 5-12.2.2 Claims for Delay** (Exhibit "G", Pages 2 and 3) contains the same wording. Similar wording is also found in **Section 8-7.3.2** (Exhibit "H") and that paragraph is also highlighted in yellow.

No such notice of intent to file a claim and no preliminary request for a time extension was received by the Engineer within the time frame specified and the Contractor was notified the of that on October 30, 2006 see Exhibit "P". Notice was not received until well after the Contract was accepted.

On this same issue concerning the claims by K&J on pages 5, Thru 8 in the "**Brief Chronology of Events and Correspondence Relevant to This Dispute**" there is no mention of submitting of a "notice of intent to file a claim" or of a "preliminary request for an extension of Contract Time" as required by the Standard Specifications. Because the Contractor did not submit these required notices within the time required his inaction "constitutes a full, complete absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension."

Position Paper Claims by K&J:

Please Refer to Item A, Item B and Item C on Pages 1 and 2 of the Position of K&J as a point of reference for rebuttal not only for additional compensation but additional time:

Item A. The plans and specifications directed the Contractor to coordinate the street lighting electrical services with LCEC. K&J chose not to do this until after Contract Time had expired. Had they coordinated and consulted with LCEC, 90 Days prior to time expiring, the light poles and electrical service would have been installed per LCEC requirements and no extra cost or delays would have been experienced by the Contractor. The contract duration was 576 calendar days, including extensions, so the Contractor had 486 days to coordinate with LCEC and still have time to install the system correctly. (See Exhibit "J"). During the entire contract time the LCEC "Service and Meter Requirements Handbook" was available to K&J to help with coordination for power service metering and all other requirements. See Exhibit "K. The Department maintains that K&J did not make a diligent effort prior the last day of the Contract to determine what was needed to install the Highway Lighting System correctly per LCEC requirements and within the contract time limit. Even after time had expired K&J failed to attempt to complete the work in a timely fashion as evidenced by the correspondence to Westwind shown in Exhibit J, Pages 2 thru 10.

Item B. K&J was asked to install the Pull Boxes as per plan as indicated in our Position Paper, Exhibit "E" that stated the Pull Boxes were to be 24"x 36". There is not documentation to the contrary and not a request by Westwind or K&J for a Contract change. K&J, Exhibit 5 does not show the size pull box to be supplied only the Item Number described on our Exhibit "E" as 24"x 36". The claim by K&J that the Item Number controls the size of the pull box to be something other than 24"x36" is in error because the plans give the size to be installed. In the case of a discrepancy between the item number description, somewhere else in the Contract Documents and the Plans, the Plans would take precedence unless K&J can show that the Project Special Provisions or the Project Technical Specifications indicate otherwise. See Attached Exhibit "L". We did not find that to be the case.

Item C. There were not three change order items directed by the Department. The only change was a Field Supplemental Agreement to repair loop detectors that were damaged during the Contractors milling operation prior to the final allowable Contract Day. A copy of that Field Supplemental Agreement No. 999-25-07 is attached as Exhibit "M". Please note the paragraph just above the signatures highlighted in yellow which states "The Department and the Contractor agree that the contract time adjustment and sum agreed to in this document constitute a full and complete settlement of the matters set forth hear in, including all direct and indirect costs for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in this document." and the document is signed by both the Contractor and the Department.

K&J has stated that the Department had previously offered a 40 day Time Extension without any rationale for the 40 Days. The rationale was to effect a settlement without having the Department or the Contractor go to the expense of preparing for a hearing. Since a hearing was requested by the Contractor there was no longer a benefit to a negotiated settlement and therefore Ms. Wiley withdrew the Department's offer of settlement.

Exhibit 17 of the K&J claim gives several examples of case law regarding extra work added by the Owner after contract time expired on a project. None of these cases appear relevant to this case. First of

all, in two of the K&J claims regarding the street lighting system and the pull boxes, the Contractor was directed to fulfill his contract obligations and this work can in no way be considered extra work requested after the Contract Time expired. Had K&J diligently pursued the requirements of the plans and specifications, the project could have been completed on time without additional cost. The damage to the loops occurred prior to time expiring but was found after time had expired. If the project had been completed on time, K&J may not have been asked to repair this damage after the date of acceptance.

The Contractor signing the Supplemental Agreement shown in Exhibit "M" along with the fact he did not follow the procedures set forth in **Sections 5-12.2.1, 5-12.2.2 and 8-7.3.2** of the Standard Specifications disallows the Westwind / K&J contention that the Department can not assess damages for all work after June 4, 2006. In fact failure to follow the procedures set forth in **Sections 5-12.2.1, 5-12.2.2 and 8-7.3.2** of the Standard Specifications eliminates the Contractors right to make claim

NOTE: The above position and rebuttal statements are summarized from the points established from the numerous documents provided to the Board. In arriving at its decision, the Board gave due and proper consideration to all documents provided prior to the hearing, all documents provided at the hearing, all documents provided after the hearing and all testimony provided during the hearing.

Regional 1 DRB Findings by Majority of Board:

1. Is K & J's entitled to additional compensation for the extra work of modifying the street lighting electrical services? If so, what amount of compensation is K & J's entitled to? The additional work has been completed and accepted. The amount of compensation requested by K & J's in its claim was \$18,221.28

*The Department offered \$6,780.00 for this work. However, the Department provided no quantum calculations on how it arrived at its offer. The Board finds the Contractor ***IS ENTITLED*** to the quantum amount of \$18,221.28. The Contractor installed as per the plans and specification section 4-3.2. The Department's design was defective and could not be implemented as designed.*

2. Is K & J's entitled to additional compensation for the extra work of replacing the twenty-two pull boxes for the interconnect conduit system? If so, what amount of compensation is K & J's entitled to? The amount of compensation requested by K & J's in its claim was \$14,531.91.

*The Board finds the Contractor **IS ENTITLED** to the quantum amount of \$14,531.91. The Contractor supplied and installed as per the plans and specifications and as per approved shop drawings. Therefore, the Department's plans and specifications were arbitrary, leading to the confusion, and ultimately to the extra work.*

3. Westwind requests a recommendation by the DRB that Westwind is entitled to 10 percent of the total amounts due and owing K&J's for the extra work it performed.

*The Board finds the Contractor **IS ENTITLED** to the quantum amount of %10 percent of the total amounts in 1 and 2 above as per specifications section 4-3.2.1.*

4. Are Westwind and K & J's entitled to a time extension for any or all of the three items of extra work ordered by the Department after contract time had expired? If so, how many days of time extension are the contractors entitled to? The three items of extra work are:
 - Modify the street lighting electrical services.
 - Replace the twenty-two pull boxes for the interconnect conduit system.
 - Install three traffic loops in the pavement at the intersection of Chiquita Blvd. and SR 78.

K&J's is seeking a contract time extension of 80 calendar days.

*The Board finds the Contractor **IS ENTITLED** to a contract time extension of 80 days for the extra work related to the street lighting electrical services and replacing the twenty-two pull boxes for the interconnect conduit system.*

Both parties in this dispute have placed undue credence in the term "coordinate" on plan sheet L-3 note 9 which states the "Contractor shall contact LCEC for service pedestal location, and electrical service coordination." It is the opinion of the majority of the Board that the term "coordinate" means to work out timing and convenience issues, not to get approval of plans or specifications from the City of Cape Coral, which was the duty of the FDOT to provide a complete workable design that met the requirements of all local agencies and all applicable codes. It would make no sense for the City, or any agency for that matter, to have input into the technical aspects of the project once it is designed properly, put out for bid, under contract and being constructed.

This situation is analogous to the scenario where two separate contractors working on adjoining projects with different owners join at one common point. When the statement is placed in each specification that the contractor is to "coordinate" their work with the adjoining contractor per standard specification section 8-4.4, that means the contractors are to work out the timing and convenience issues for tie-in, not seek out approval of their plans and specifications from the other's owner; that is the responsibility and duty of each respective owner to have provided that service prior to letting each project out for bid.

It is also Board's Opinion that had the contractor in this instance played a more "active" roll in the diligent seeking out of assistance from the electric company the delays would have been avoided. This does not relieve the FDOT of its responsibility to provide a correct set of plans & specifications that meets all local requirements and codes, unless specifically stated otherwise.

*Therefore, the Board finds there to be a **SHARED RESPONSIBILITY AND CONCURRENCY** between the FDOT and Westwind Contracting for the delays to the project and the extended overhead costs incurred resulting from these delays. In this regard, the Board has made the decision to **DISALLOW** the additional costs requested by Westwind for all of the extended overhead, MOT, office costs and interest associated with this item as shown in Items 6, 7, 8, 9 & 10 below. The Board also **DISALLOWS** the use of Liquidated Damages by the FDOT for delays as a result of each party's failure to complete their contractual responsibilities associated therein as shown in Item 5 below.*

The Traffic Loops was addressed via Field Supplemental Agreement No 07 for 2 days, which was "full and final".

5. Remission of liquidated damages that have been withheld by FDOT. FDOT has withheld liquidated damages totaling \$298,400.00 from Westwind as a result of Westwind's alleged failure to complete the Project within the contract time.

*The Board finds the Contractor **IS ENTITLED** to remission of liquidated damages that have been withheld by the Department, totaling \$298,400.00 for the extra work added to the contract as per issues 1 and 2 above. Since the Board has ruled that a contract time extension of 80 days for the extra work related to the street lighting electrical services and replacing the twenty-two pull boxes for the interconnect conduit system in Item 4 above, the full amount of the monies withheld by the FDOT for Liquidated Damages should be returned to the contractor.*

6. Westwind seeks extended maintenance of traffic costs at the unit contract rate of \$460.00 per day for the 80 day period, for a total of \$36,800.00

*The Board finds, for the reasons described in Item 4 above relative to each party's **SHARED RESPONSIBILITY AND CONCURRENCY** in this matter, Westwind Contracting **IS NOT ENTITLED** to any extended maintenance of traffic costs related to the 80 day contract time extension.*

7. Westwind seeks to recover the additional costs for maintaining a field office during the extended performance of the contract at the rate of \$92.00 a day. For the 80 day time extension due, the extended field office compensation due Westwind totals

\$7,360.00.

*The Board finds, for the reasons described in Item 4 above relative to each party's **SHARED RESPONSIBILITY AND CONCURRENCY** in this matter, Westwind Contracting **IS NOT ENTITLED** to any costs for maintaining a field office related to the 80 day contract time extension.*

8. Westwind seeks to recover its extended job site overhead costs for the 80 day delay. The job site overhead amount for the 80 day extension totals \$43,152.00.

*The Board finds, for the reasons described in Item 4 above relative to each party's **SHARED RESPONSIBILITY AND CONCURRENCY** in this matter, Westwind Contracting **IS NOT ENTITLED** to any extended job site overhead costs related to the 80 day contract time extension.*

9. Westwind seeks the award of interest on the amounts that were withheld as liquidated damages.

*The Board finds, for the reasons described in item 4 above relative to each party's **SHARED RESPONSIBILITY AND CONCURRENCY** in this matter, Westwind Contracting **IS NOT ENTITLED** to any interest payment in regards to the Liquidated Damages that were withheld.*

10. Westwind seeks compensation for the costs of its bond that will be incurred as a result of this claim.

*The Board finds the Contractor **IS ENTITLED** to bond costs on the amounts in 1 and 2 as per specification 4-3.2.1.*

Comments Regarding the Issue of Notice of Claim:

The Issue of Notice of Claim and whether the Claim was properly noticed to the FDOT by Westwind Contracting was not identified directly as an item that the Board was to rule on but the Board has decided to comment on Notice in both the DRB Findings section and also the Dissenting Opinion. In that regard, the Board reviewed all the documents and all comments made at the Hearing on February 6, 2008 and a majority of the Board has concluded that there is **NOT A NOTICE OF CLAIM PROBLEM**. The following is a summary of the relevant aspects related to the issue of Notice:

- In K&J's Position Paper page 1 dated February 5, 2008 they describe this as a request for time and "extra work".

- FDOT only made one comment in the Hearing about no Notice of Intent from the contractor and it was minor or trivial.
- The FDOT was not prejudiced by any non-notice, if in fact there was not an official notice.
- The primary reason a written notice of intent is required is for the FDOT to have the opportunity to mitigate the cost and time impacts to the contract; neither of these situations occurred due to notice or non-notice of this issue and therefore the FDOT was not injured due to the subject of notice.
- The FDOT was well aware of this problem all along and in fact on March 7, 2007 the FDOT made an offer of 40 days extension of time and increasing certain MOT items a total of \$760.94; on December 31, 2007 FDOT email from Mary F Wiley withdrew this offer (said the original offer was made February 2007 in her email) due to impending DRB Hearing; no comment on notice of intent was brought up at that time.
- Once the FDOT denied the contractor the return of all LD's the contractor filed a Certified Claim within the allowable time as per Specification Section 8-7.3.2.

Respectfully Submitted,

Region 1 Disputes Review Board

George Seel, DRB Member

Robert Lindquist, DRB Member

James T. Guyer, DRB Chairman

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



DRB Chairman
James T. Guyer

DISSENTING OPINION

All of the details regarding these issues have been discussed in the Position Papers, Presentations, and Rebuttals that were heard at the Hearing. Without repeating these details, dissenting opinions of the Board's Findings are herein presented.

First and foremost, a Notice of Intent to claim was not given to the Department in accordance with the requirements of the Contract Documents. This is a Claim for

“Additional Work” as identified by the Contractor in his Position Paper and Rebuttal. The governing contract documents clearly state in Specification Section 5-12.2.1, Claims for Extra Work:

“Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the contract or which by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based, and if seeking a time extension, the Contractor shall also submit a preliminary request for a time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay. If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment and time, the Contractor waives the claim for additional compensation or a time extension.”

The above is self-explanatory, and given the fact that a written, timely Notice of Intent was not given to the Engineer, the consequences state that the Contractor clearly waives his right to claim. The Project Final Completion date was June 4, 2006. Re-work was accomplished during the August 2 through August 9, 2006 time period. The claim was not submitted until February 5, 2007, without the necessary prior notice. For this reason alone, the entire claim is without entitlement for time and compensation and should not be recognized.

The Contractor had submitted an earlier claim on the project regarding embankment quantities and should have been aware of this requirement for “Notice of Intent”. This is documented in the Project Minutes for the April 4, 2006 through July 5, 2006 time period.

Secondly, the Contractor presents his claim as a claim for “Extra Work” outside the original scope of the Contract. Following the discussions that took place during the hearing, it would seem that the completed project, as finally accepted, was all within the intent of the original contract scope. Nothing new had been added to the scope of the contract and no change orders for additional work had been issued. The claim is not for additional work, but for corrective work that was required for compliance with the intent of the original contract documents. As such, there is no entitlement to the claim.

Now, consider some of the elements of the claim in light of the above overall observations.

Modify Street Lighting Electrical Service:

The Project Final Completion Date with all time extensions granted was June 4, 2006. At the Project Meeting on June 20, 2006, K&J reported, “All equipment has been shipped but waiting on cabinets to be received. Lighting should be complete by June 30, 2006.” This would imply that K&J had not completed the lighting within the contract time allotted, June 4th being the job completion date. It was not until July 6, 2006, one month after the date for

final project completion that the power tie-in was requested from Lee County, and a two-week burn-in was required on the project. On July 10, 2006, the Contractor was advised that Lee County would not energize the circuit.

In a letter to the Contractor dated July 25, 2006, the CEI attached a list of uncompleted Punch List items, and notified the Contractor that very little was being accomplished toward completing the project, in that "Our records show that last week your subcontractors spent only one partial day apiece on the project. So far this week, no one has worked on the project including Westwind."

On August 2, 2006, the Engineer directed the Contractor to complete the project and perform the required work to the electrical services as required by the Lee County Electric Co-operative. This required modifications to 2 power services and 108 street poles, according to the K&J claim. This work was finally completed on August 9, 2006, and the Project received Final Acceptance on August 23, 2006.

The detailed information submitted by both sides is included in the documents submitted and will not be repeated here. However, many references to having the Contractor coordinate with Lee County during the Project such as General Note 9 on plan sheet L-3, which states, "Contractor shall contact Lee County Electrical Cooperative, Inc. for pedestal location and Electrical Service Coordination", as well as Section 715-4 of the Standard Specifications which reiterates the need for the Contractor to consult and cooperate with the power company furnishing the electrical service.

The Contractor stated in his rebuttal that there is no requirement in the contract that the "Contractor will consult and coordinate with LCEC to see that the installation would meet the intent of the Plans and Specifications...". The Contractor further stated that LCEC's poles and transformers were already in place before work began on this project.

The contractor failed to coordinate his installation with Lee County as required by the Contract Documents and the cost and time of the re-work required to bring the electrical service into compliance has no entitlement.

Pull Boxes:

Included in the Contractor's claim is the issue requesting additional compensation and time for the replacement of some 22 out of 124 pull boxes installed under this contract. On sheet T-3 of the plans, entitled "General Notes and Pay Item Notes", Pay Item Note 635-1-11 states, "Contractor is responsible for approximately sizing each pull box so the communication and/or interconnect does not exceed manufacturers recommended bending radius. Pull boxes shall have polymer concrete (24"x 36") lids or the equivalent. All interconnect pull boxes shall be placed 800 feet apart." This established the size for all pull boxes as 24" x 36" which the Contractor was to install.

K&J suggested that in subsequent conversations with FDOT Maintenance and with Lee

County Traffic Operations, that 17" x 30" pull boxes would suffice, and so, K&J installed the smaller pull boxes. There was no change order or any other contractual change or acknowledgement made to authorize the smaller boxes on the project.

When directed to replace 22 of the boxes, K&J claimed for time any costs for this re-work. This appears to be installing what was originally required by the contract, and certainly does not qualify as an "out of scope" change. The costs and time requested for the pull boxes is totally without entitlement.

Replacing the Type F Loop Detectors:

Loop detectors had to be replaced at an intersection following the asphalt milling operation due to a plan error which indicated the original loops were deeper in the asphalt than the milling depth. The loops, in fact, were not as deep as shown and damage occurred. A Field Supplemental Agreement was signed by both parties, and the contractor agreed to two additional days to complete this work.

The Field Supplemental Agreement signed by both parties contains the following specific agreement language: "The Department and the Contractor agree that the contract time adjustment and the sum agreed to in this document constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs for equipment, manpower, materials, overhead, profit, and delay relating to the issues set forth in this document." The Contractor has signed the FSA agreeing to two days and \$ 3,696.00; therefore there is no entitlement to further requests for time or costs regarding this issue.

To summarize, in this dissenting opinion, it is recommended that the Claim is totally without merit or entitlement. This applies to both the sub-contractor's (K&J) pass-through claim and the claim of Westwind as the General Contractor.

(End).