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District
Construction Dept.

February 28, 2008

Katherine G. Worth
President
Worth Contracting, Inc.
2112 Jernigan Road
Jacksonville, Florida 32207-8608

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

Re: FIN 198087-6-5201;
Replace Existing Fender System Bridge No. 130057
DRB Recommendation For – *Claim #1 "Unforeseen Site Conditions"; Claim #2 "Standby Time"; Claim #3 "Unforeseen Riprap at Northeast Corner"; Claim #4 "Standby Time"; Claim #5 "Timber Spacer Blocks"; Claim #6 "Riprap Removal at Southeast Corner"; Claim #7 "Unabsorbed and Extended Overhead"; Claim #8 "Defective Specifications"*

Dear Mr. Autry and Mrs. Worth,

Florida Department of Transportation (Department) and Worth Contracting, Inc. (Worth) requested a hearing concerning the referenced issues.

Summaries of the Department's and Worth's positions, as well as rebuttals (Worth did not provide a written rebuttal) were forwarded to the Disputes Review Board (DRB), and a hearing was held on February 7, 2008.

ISSUES:

1. Is the contractor entitled to 100% of equipment blue book rates if the Department does not specifically direct the equipment to be Idle? Or, is equipment considered idle when not currently in use and is chargeable at 50% of the blue book rates as described in Section 4-3.2?
2. Is the Contractor entitled to operating costs while a piece of equipment is not currently in operation—when the piece of equipment is turned off?
3. Is the contractor due additional compensation for removal of Rip-rap rubble other than for the use of divers?

4. Is the Contractor due additional compensation above and beyond the criteria proscribed in Sections 4 and 5 of the specifications because of alleged "defective plans and specifications", alleged "breach of contract" or "substantial change" in the scope of work? Is the contractor entitled to compensation as calculated in the "total cost doctrine" for the circumstances encountered during construction of this project?

Contractor's Position

The subject contract was awarded to Worth Contracting, Inc. on September 26, 2006, in the amount of \$944,167.00. (Tab 1) The contract included the replacement of the Fender Systems for Bridge No. 130057 in Manatee County and for Bridge No. 090016 in Highlands County. The contract was required to be completed in 135 calendar days. The contract plans and specifications were prepared by H. C. Driver & Associates, Inc.

The project for the Manatee Bridge involved the removal and replacement of the existing fender system, including the extraction and disposal of the existing 14" concrete fender system piling and the timber whaler system. (Tab 2)

The Contractor assembled the appropriate equipment for the project in Jacksonville, commencing on January 8, 2007. The barge, crane, hammer, bucket, welding machines and jet pump were rented from John Salonen. The floats and spuds were rented from Dell Marine. The diesel Pile hammer was rented from Pile Equipment Co. The floating barges, tugboat, workboats and other equipment were Contractor owned.

The barge and equipment were towed by a commercial tug, through the Intracoastal Waterway and Lake Okeechobee, to the jobsite at the Manatee County Bridge.

The Notice to Proceed was issued on January 15, 2007.

Claim #1 - Differing Site Conditions:

In accordance with the approved Progress Schedule the Contractor mobilized its equipment at the jobsite of the Manatee Bridge Fender System on January 15, 2007. (Tab 3) After setting up the rig, the Contractor began pile extraction process on January 23rd. The Contractor was unable to extract any of the existing 14" concrete piling.

The Contractor advised the Department by letter dated January 25, 2007, that it had encountered differing or unforeseen site conditions on the project and that it had been unable to extract any fender piles after two days of intense work. (Tab 4) The Contractor advised the Department by letter dated January 31, 2007 of further unsuccessful efforts to extract the existing piling. (Tab 5) The Contractor was forced to shut down all operations and secure the barge and equipment pending the Engineer's investigation and directions to proceed.

Investigation by the Engineer indicated that the existing piles were embedded in a clay, marl or hardpan stratum. This condition was not indicated in the contract documents nor could it be determined with a

normal pre-bid site investigation. The differing site conditions impacted the contract work from January 23, 2007 until January 31, 2007, a total of 9 calendar days. During this period the Contractor attempted various methods to extract the existing piles. All methods attempted were unsuccessful.

By letter dated April 18, 2007, the Contractor submitted and justified Claim #1.(Tab 6) By letter dated September 11, 2007, the Contractor revised and certified Claim #1 in the amount of \$51,624.55.(Tab 7)

The Department agreed that the Contractor was entitled to compensation for the costs incurred as a result of the differing site conditions, but did not agree on the monetary damages.

Claim #2 – Standby Time, February 1-11:

The shutdown on January 31, pending further investigation and redesign of the fender system, delayed the contract work from February 1 until February 11, 2007, a total of 11 calendar days. During this period no productive work was performed.

The Engineer re-designed the fender system by leaving the existing 14" concrete piling in place and relocating the new fender system outboard of the existing fender system piling. The re-design was forwarded to the Contractor by E-mail on February 5.(Tab 8) The re-design included an alternative installation plan involving the cutting off of existing concrete piling below the mud line. The Engineer requested the Contractor to perform an underwater investigation to determine if there were any obstructions that would prevent construction of the fender system at the proposed new alignment.

The Contractor performed the underwater visual survey on February 6. The underwater survey clearly showed abandoned cans used by a contractor on previous projects in an unsuccessful attempt to extract existing concrete fender piles. (Tab 9) The underwater survey also disclosed an abandoned timber pile fender system. These existing concrete and timber piling were not shown on the contract drawings nor the as-built record drawings included in the contract documents.

The Engineer's letter of February 9 attached a revised installation plan for the fender system that included additional requirements.(Tab 10) The Contractor was requested to submit a cost proposal for restoring spalled areas on the existing concrete piling to remain and be incorporated into the re-designed fender system. The Contractor's proposal of February 13 submitted prices for restoring spalled areas and for cutting off concrete piles under the mud line. (Tab 11)

By letter dated April 20, 2007, the Contractor submitted and justified Claim #2.(Tab 12) By letter dated September 11, 2007, the Contractor revised and certified Claim #2 in the amount of \$30,384.35.(Tab 13)

The Department agreed that the Contractor is entitled to compensation for the costs incurred as a result of the shut down from February 1 to February 11, but did not agree on the monetary damages.

Claim #3 – Unforeseen Riprap at Northeast Corner:

The Contractor re-mobilized to start work on the re-designed fender system at the northeast fender wing on February 12. The Contractor immediately encountered a large amount of riprap rubble that was not indicated of the contract plans or the record drawings. The existing riprap at the northeast fender wing was not visible at the pre-bid site inspection.

The removal of the riprap was required in order to install the new concrete fender piles. The removal of the riprap was hampered by the existence of abandoned timber and concrete piles. (Tab 14) The clamshell bucket was unable to grab some of the large riprap located between the existing piles. Divers were employed to assist in the removal of riprap and to start jetting the existing piles prior to cutting the off at the mud line. (Tab 15)

The Contractor's letter of March 5, 2007 advised the Department of notice of intent to file a claim for the costs incurred due to the unforeseen riprap at the northeast fender wing wall. By letter dated April 20, 2007, the Contractor submitted and justified Claim #3. (Tab 16) By letter dated September 11, 2007, the Contractor revised and certified Claim #3 in the amount of \$35,680.85. (Tab 17) The Department agreed that the Contractor is entitled to compensation for the costs incurred as a result of the unforeseen riprap at the northeast fender wing wall, but did not agree on the monetary damages.

Claim #4 - Standby Time, February 14-20:

On February 14 the Contractor was verbally instructed by the Inspector to stop the cutting-off of the existing piling pending Department approval of a supplemental agreement to cut off the piles. The Contractor stopped work as directed and moved the barge back to the staging area. Since the barge was loaded with riprap removed from the northeast fender wing, there was no other productive work that could be performed. (Tab 18) The Contractor was forced to shut down from February 15 to February 20.

The Engineer issued a verbal notice to proceed with the cutting-off of the existing concrete piles on February 21. The Contractor completed the removal of the riprap on February 21 with the assistance of divers. The existing riprap encountered at the rest pier at the north side of the bridge impacted the contract work from February 12 to 14 and on February 21.

As a result of the differing site conditions, the direction to stop cutting off the piling, and the re-design of the fender system, the Contractor was unable to perform productive work until February 22.

By letter dated April 23, 2007, the Contractor submitted and justified Claim #4. (Tab 19) By letter dated September 11, 2007, the Contractor revised and certified Claim #4 in the amount of \$17,305.06. (Tab 20) The Department agreed that the Contractor is entitled to compensation for the costs incurred as a result of the directed work stoppage from February 14 to February 20, but did not agree on the monetary damages.

Claim #5 - Timber Spacer Blocks:

The Contractor proceeded to cut off the existing concrete piles at the mud-line as directed and to install the new concrete piling and whalers for the northeast fender wing on February 22. This area was completed on March 1.

The Engineer's letter of February 9 instructed the Contractor to leave the existing concrete piling under the bridge in place. (Tab 10) The existing piles were out of alignment and many of the piles had been installed out of plumb. Work Order #999-25-02 dated February 20, 2007, directed the Contractor to cut off the existing wing-wall piles and leave the pile ends in place. (Tab 21) The new wing wall piles could

not be installed at the locations shown on the plans since the existing cut-off piles and other existing piles obstructed the designed locations.

During the period from April 3 to May 9, 2007, the Contractor fabricated and installed timber spacer blocks in order to properly align and plumb the whaler system both horizontally and vertically. This extra work involved the following:

- 1 Detailed measurements at each spacer location;
- 2 Procurement of additional timber material;
- 3 Custom cutting of each spacer block to fit at each location;
- 4 Drilling new holes in each spacer block;
- 5 Procuring new bolts of suitable longer lengths;
- 6 Installing the spacer blocks.

The contract documents showed that the joints in the timber whalers were aligned vertically. Design changes issued at the Progress Meeting of March 7, 2007 directed the Contractor to stagger timbers to eliminate stress. (Tab 22) This direction resulted in the following extra work:

1. Measuring the existing conditions;
2. Layout of the staggered joints so that no whaler beared on less than two piles and no two cuts were in the same vertical plane;
3. Procuring additional 10" x 10" whaler stock;
4. Fabricating whalers to custom lengths;
5. Installing additional whaler pieces on each of the three levels.

This extra work was difficult and time consuming as shown on the Summary of Daily Report Comments dated August 23, 2007. (Tab 23) In addition the contract work was disrupted resulting in a significant loss of productivity.

By letter dated June 26, 2007, the Contractor submitted and justified Claim #5. (Tab 24) By letter dated September 11, 2007, the Contractor revised and certified Claim #5 in the amount of \$54,205.85. (Tab 25)

The Department agreed that the Contractor is entitled to compensation for the costs incurred to install timber spacer blocks required to align the timber whaler system as a result of the re-design of the fender system using the existing piling, but did not agree on the monetary damages.

Claim #6 – Extra Costs of Riprap Removal:

The contract required the removal of riprap and debris at the southeast wing wall of the Manatee Bridge fender system prior to the installation of the new concrete piling. The Contractor planned to extract the existing concrete piling prior to removal of the riprap and debris. The Contractor was unable to extract the existing piling. A Supplemental Agreement was issued directing the Contractor to cut off the existing concrete piling at the mud line since the piling could not be extracted. (Tab 26)

In order to cut off the existing piling, the riprap and debris had to be removed first so as to gain access to the concrete piling to be cut off. Although the removal of the riprap and debris was a contract requirement, the differing site conditions which prevented the extraction of the concrete piling made that task much more difficult and expensive than it would have been had the project been able to be constructed as shown on the contract documents.

The Contractor planned to accomplish the removal of the riprap and debris with a clamshell bucket in one 10-hour day without the use of divers. The Contractor actually worked 26 hours during the period from March 19 through March 22, to remove the riprap and debris. Divers were necessary for these days in order to assist the Contractor in getting the large riprap boulders and abandoned wood piles out from between the concrete piles. The large riprap boulders had to have cables attached in order to remove them since the clamshell bucket could not gain access to them because of the existing piling. The wood piles had to be cut up by the divers so that they could be removed from between the concrete piles. The daily reports document the difficulties encountered. (Tab 23)

Divetech letter dated March 23 noted that the existing concrete piles that could not be pulled were hampering the clam bucketing operations. (Tab 27)

By letter dated September 13, 2007, the Contractor submitted and certified Claim #6 in the amount of \$23,791.10. (Tab 28) The Department agreed that the Contractor is entitled to compensation for the costs incurred for removing riprap and debris at the southeast corner as a result of the differing site conditions and the Supplementary Agreement to cut of the existing piles, but did not agree on the monetary damages.

Claim #7 – Unabsorbed and Extended Overhead:

FDOT Standard Specifications, paragraph 5-12.6.2.2 states that the Department will compensate the Contractor for jobsite overhead and other indirect impacts of delay for delays greater than 10 calendar days that were caused solely by the Department. The delays encountered were not due to the fault or negligence of the Contractor but were a direct result of the differing site conditions, the necessity for the Department to redesign the Manatee Bridge fender system and the stand-by time while waiting for direction. The Contractor is entitled to 24 days of unabsorbed and extended overhead according to the formula set forth in that paragraph.

By letter dated September 11, 2007, the Contractor submitted and certified Claim #7 in the amount of \$13,428.15. (Tab 29) The Department agreed that the Contractor is entitled to compensation for the costs of 24 days of unabsorbed and extended overhead but did not agree on the monetary damages.

Claim #8 – Defective Specifications:

The Contractor contends that the differing or unforeseen site conditions encountered at the Manatee Bridge fender system were the result of defective specifications. The Department was negligent in preparing the design for the fender system. The subject Contract specified a fender system that could not as was not constructed as designed.

- The Department failed to adequately review the historical records and previous contracts for the Manatee Bridge prior to designing the fender system. Had this review been conducted, the Department would have discovered that there was a stratum of clay, marl or hardpan at the bridge location and that previous fender system repair work was unable to remove the existing piles.
- Soil borings, clearly showing the stratum of clay, marl or hardpan, were available but not

provided with the contract documents. The Department had "superior knowledge", which it failed to disclose in the bid documents.

- The Department failed to conduct a geotechnical study prior to designing the fender system. Had a geotechnical study been conducted, the Department would have discovered that there was a stratum of clay, marl or hardpan at the bridge location and that existing concrete piling were embedded in this stratum and could not be removed by normal construction methods. Instead, numerous existing piles were either left in place or cut off at the mud line.

- The Department failed to conduct a subsurface survey prior to designing the fender system. Had a subsurface survey been conducted, the Department would have discovered that there were numerous existing piles that were either left in place or cut off at the mud line. These existing piles interfered and conflicted with the removal of riprap and the construction of the new fender system required by the Contract.

- The Department failed to perform its due diligence prior to designing the fender system. If it had, the Department would have been aware of the conditions that prevailed at the site and provided a design for a new fender system that could be constructed.

- The Department failed to design the fender system in conformance with the existing site conditions. It was therefore forced to re-design the fender system after the subject contract was underway. This resulted in extensive changes, delays disruptions, and loss of productivity to the contract work.

The FDOT Standard Specifications do not provide for compensation for the impact of changes and delays, other than extended and unabsorbed home office overhead for delays in excess of 10 calendar days. The FDOT Standard Specifications do not provide for compensation for disruption and/or loss of productivity. As a result, the claims submitted in accordance with the FDOT Standard Specifications did not provide for equitable compensation for the extra costs incurred by the conditions encountered, the re-designed fender system at the Manatee Bridge, and the resulting delays, disruption, loss of productivity, and impact of the defective specifications.

A cardinal change is defined as a contractor's claim for breach of contract resulting from an owner-ordered change or changes, which so substantially modify the original contract work that the contractor's performance becomes inherently different from the work the parties bargained for when the contract was awarded.

The changes and delays encountered at the Manatee Bridge represent a cardinal change.

- For the first 38 calendar days, representing 51% of the 75 day scheduled duration of the Manatee Bridge fender system, no productive work could be performed as a result of the defective specifications.
- Out of the 84 working days required to perform the changed work at the Manatee Bridge the work of the Contractor was impacted on 67 working days by delays, disruption or changes. (Tab 30)
- The quantity of the 14" concrete piling installed based on the re-design was 56% less than the piling required by the contract.

- The original crew quit in frustration due to the confusion, delays and lack of progress. A replacement crew was quickly mobilized, but at greater hourly cost.
- The Contractor worked many overtime hours in order to mitigate the delays resulting from the defective specifications.
- The project was continuously disrupted by differing site conditions, work stoppages while awaiting directions, and changed work that had to be performed in conjunction with contract work.
- Due to the defective specifications and the delays and changed work required, the Manatee Bridge fender system work never achieved the momentum and rhythm necessary for productive efficiency on this type of project.
- There was a significant loss of productivity at the Manatee Bridge site.
- The Contractor incurred substantial impact costs as a result of the delay due to defective specifications because the rig could not be transported to the Highlands Bridge site as planned, due to the low level of Lake Okeechobee.
- The unforeseen impact of the delays resulting from the defective specifications was that the barge and equipment had to be towed back to Jacksonville via the Florida Straits. This resulted in significant additional costs to WCI that could not be anticipated and would not have been required if the project could have been constructed as designed. (Tab 31)

As a result of the changed work, resulting from the failure of the Department to provide a contract design that was based on existing site conditions that were known or should have been known, the Contractor incurred excessive costs of delay, disruption and loss of productivity. The FDOT Standard Specifications do not provide for adequate and/or equitable compensation for these costs. As a result, while performing the changed work with diligence, with the proper equipment and supervision, and to the satisfaction of the Department, the Contractor sustained substantial losses.

By letter dated September 13, 2007, the Contractor submitted and certified Claim #8 in the amount of \$232,627.48. (Tab 32) The Department agreed that the fender system had to be re-designed after the Contractor had mobilized and commenced work. The Department has not agreed that there were defective specifications. The Department has not agreed that the Contractor is entitled to compensation for the costs incurred as a result of the delays and disruptions and loss of productivity resulting from the defective specifications.

Monetary Damages

The Contractor has filed the following certified claims, which were prepared based on the daily reports, payrolls, and paid invoices:

Claim #1: Differing Site Conditions: (Tab 7)	\$51,624.55.
Claim #2: Stand-by Time, February 1 to 11, 2007: (Tab 13)	\$30,384.35
Claim #3: Unforeseen Riprap at Northeast Corner: (Tab 17)	\$35,680.85
Claim #4: Stand-by Time, February 14 to 20, 2007: (Tab 20)	\$17,305.06

Claim #5: Timber Spacer Blocks: (Tab 25)	\$54,205.85
Claim #6: Riprap Removal at Southeast Corner: (Tab 28)	\$23,791.10
Claim #7: Impact Costs – Extended Overhead: (Tab 29)	\$13,428.15
Claim #8: Defective Specifications: (Tab 32)	<u>\$232,627.48</u>
Total Claim	\$459,047.39

The position of the Department is that the Contractor is entitled to additional compensation in the amount of \$122,240.64.

Claims 1, 2, 4 and 5 – Equipment Costs:

The Contractor submitted equipment costs based on 100% of the Blue Book rates in accordance with FDOT Standard Specifications, paragraph 4-3.2. The Contractor's position is that it is entitled to the invoice amounts paid for all equipment rented from vendors. It is also entitled to 100% of the Blue Book rates for all Contractor owned equipment. The Department did not, at any time, direct any equipment to standby and to remain on the project site as required by paragraph 4-3.2 for use of the Standby rate.

The Department's position is that any piece of equipment not being used is considered on standby, and if Blue Book rates are used to calculate costs, the charged rate must be 50% of the Blue Book rate per section 4-3 of the Specifications for idle and/or standby equipment. The Department contends that operating costs should only be charged when a piece of equipment is currently operating.

The Department's position is not in accordance with FDOT Standard Specifications, paragraph 4-3.2, which states: "... the Contractor will receive ... 50% of the Rental Rate Blue Book for the time the equipment is directed to standby and remain on the project site". The Department did not direct the Contractor to standby.

The Department's position does not recognize that the pile-driving rig used to construct this project was an assembly of components to perform a specific function, and was a unit. The tugboat and other equipment were necessary elements of the rig whether or not they were continuously in use. The Department's position is wrong.

Claim 3 and 6 – "Riprap Removal":

The contract plans, sheet B2-1, Note 11, states that "previously placed rock rubble riprap" exists around the bascule pier. The record drawings for State Project No. 13080-3501, dated 9/1/98, and included in the contract documents, indicate that "previously placed rock rubble riprap" exists only around the bascule pier. (Tab 2)

The riprap encountered at the rest pier at the north side of the bridge was not indicated on either the contract drawings or the record drawings. The existing riprap at the northeast corner was not visible at the pre-bid site inspection. The Contractor contends that the existing riprap encountered in this location represents a differing site condition as defined by FDOT Standard Specification, paragraph 4-3.7. Wilson Miller letter of August 6, 2007 refers to "Rip Rap NE Corner" and states: "The contractor performed additional work due to a differing site condition". (Tab 33)

The Department's position is that riprap rubble removal is considered underwater debris removal as defined in the specifications and is properly paid for with pay item number 110-8, Underwater Debris Removal. The Department's position is not in accordance with the Contract documents. General Notes, Note 11 on sheet B2-1 defines debris as "timber, concrete piles, miscellaneous structural steel, etc.". Riprap rubble is not defined as debris. The Department's position is wrong.

Claim 8 - "Defective Specifications"

The Contractor's position is that the differing or unforeseen site conditions encountered at the Manatee Bridge fender system were the result of defective specifications. The Department was negligent in preparing the design for the fender system. The subject Contract specified a fender system that could not be constructed as designed because of existing conditions, which were known or should have been known.

It is a general principal in construction contracts that the Owner impliedly warrants the adequacy of the plans and specifications it supplies. The Contractor is not liable for damages that are the direct result of defective plans and specifications furnished by the Owner. The Contractor is entitled to damages for breach of contract as a result of the defective specifications.

The Contractor contends that the conditions encountered, and the extra work required as a result of the redesign of the Manatee Bridge fender system, represent a cardinal change to the contract. A cardinal change occurs when there are changes that are so excessive or extensive in scope as to fundamentally alter the contract to the point that the normal change-order system will not serve to properly protect the contractor. The Contractor is entitled to be compensated for the extra costs incurred as a result of the defective specifications that resulted in a cardinal change and/or a breach of contract by the Department, under the "Total Cost" doctrine.

The United States Court of Claims has ruled that the total cost approach is applicable when it meets the following criteria.

- 1) No other method will provide an accurate evaluation of the extra costs incurred by the Contractor.
 - 2) The Contractor's bid was reasonable.
 - 3) The extra costs were the responsibility of the Owner.
 - 4) The actual construction costs were reasonable.
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- 1) There is no other method to evaluate the cost of delay and disruption resulting from the defective specifications, the re-design and the cardinal change. The FDOT Standard Specifications do not provide for adequate and equitable compensation for delays and disruptions.
 - 2) The bid was reasonable. The bid of Worth Contracting, Inc. was 3% lower than the second low

bid from Coastal Marine Construction, Inc.

3) The extra costs incurred were caused by defective specifications and were the responsibility of the Owner. None of these costs were the responsibility of the Contractor.

4) The Contractor mobilized the project on schedule with the proper equipment and crew to perform the project efficiently. The Contractor performed the Manatee Bridge fender system diligently, working 10 hours per day, including some weekends, in order to make up time lost due to the defective specifications. The Contractor demonstrated its high productivity by completing the Highlands Bridge fender system in 33 calendar days instead of the scheduled 44 calendar days. The Department issued a Contractor's Performance Rating for the work for this contract of 99.1%.

The Contractor is entitled to use the total cost approach to recover the extra costs incurred as a result of the defective specifications and the cardinal change. FDOT Standard Specifications do not contain provisions for defective specifications, cardinal changes, or the total cost approach. The Contractor contends that both the defective specifications and the cardinal change are breaches of the contract.

Conclusion:

If the position of the Department is upheld, the result of this improperly designed contract would be that the Department obtained a re-designed fender system for the Manatee Bridge at a savings of more than \$80,000. At the same time, the Contractor, who diligently performed the changed work with a performance rating of 99.1%, would sustain a loss of more than \$250,000. This result would be unconscionable and should not be allowed to stand.

Worth Contracting, Inc. requests that the Board determine that the Contractor is entitled to additional compensation in the amount of \$459,047.39.

Worth Contracting, Inc. requests that the Board determine that the Contractor is entitled to interest on the amount awarded in accordance with paragraph 5-12.5 of the FDOT Standard Specifications.

Department's Position

The contract was awarded to Worth Contracting, Inc. on September 26, 2006, in the amount of \$944,167.00. The contract included the total removal and replacement of the Fender Systems for Bridge No. 130057 in Manatee County and for Bridge No. 090016 in Highlands County. The contract included 135 calendar days. The contract plans and specifications were prepared by F. C. Driver & Associates, Inc. The Manatee County Bridge (No. 130057) included the extraction and disposal of the existing 14" concrete fender system piling and the timber whaler system. The Notice to Proceed was issued on January 15, 2007. The plans included a detour for vehicular traffic during the time when the fender piles would be extracted from the parts of the fender system under the bridge. It was envisioned that the bridge would be raised during the time that the existing fender pilings under the bridge would be extracted and the new fender pilings would be driven.

Claim 1: The Contract Record Plans and scope of work stipulated the complete removal and replacement of the existing bridge fender system. The existing fender system was comprised of pre-

stressed concrete piles, timber "wales," steel cable wrap, steel fasteners and other appurtenances. The new fender system was to be constructed of essentially the same kinds of materials. The original design required that the new fender system was to be constructed in the same location as the existing fender system. Therefore, the normal progression of the work would be as follows:

- First: removal of the existing timber wales
- Second: extraction of the existing concrete piles
- Third: underwater debris removal
- Forth: driving new concrete piles
- Fifth: installing new timber wales

During construction it became clear that the existing piles could not be removed by any method that would normally be used for pile extraction. The contractor used a 100-ton barge mounted crane and attempted the extraction using any and all combinations of pulling with the crane, vibratory hammers, water jets and a steel auger can. During construction it was discovered by the Contractor's divers that the existing piles were subject to previous failed attempts of extraction evidenced by abandoned auger cans, broken off piles and other underwater debris. Several historic piles associated with previous removed or rehabilitated fender systems were left in place or cutoff at the mud line. The Contractor attempted and failed to remove piles for a total of five days: January 23, 24, 25, 30, 31, 2007. (TAB 7)

After exhausting all methods and being unable to remove the existing piling, the contractor proposed cutting off the existing piles in lieu of removal. In an effort to keep the project moving, the contractor requested that the Engineer of Record redesign the fender configuration to not conflict with the cut-off pile locations. The Engineer of Record issued a set of revised plans on February 08, 2007. (TAB 6, SHEET 47) The revised plans changed a portion of the details of the work. The revised set of plans provided for the piles parallel to the channel to remain in place and to be repaired. The wing piles would be removed and replaced if possible or cut-off below the channel bottom. New wing piles would be driven as needed.

The Contractor is requesting to be compensated for the costs of all not productive work performed while attempting to remove the existing piles. This cost includes labor, travel, equipment and transportation costs. All involved parties, the Department, Engineer of Record, the Contractor and the CEI consultant apparently did not foresee the difficulty that the contractor would encounter while attempting to remove the existing piles. This resulted from a lack of information as to the sub-aqueous soil layers. Therefore, the Contractor's claim of "differing site conditions" is justifiable. And therefore, it follows that the Contractor is entitled to recover one hundred percent (100%) of the costs as stipulated in Section 4-3 of the Standard Specifications.

Due to the nature of the work and because the work was performed prior to the settlement of this issue, the Engineer's Estimate is based on the "Resource Approach". The resource approach is a detailed tabulation of the actual costs of equipment, labor, materials, supplies general liability insurance and bond with markups as described in Guidance Document 7-3-A of the CPAM and Section 4-3 of the Standard Specifications.

The Contractor's claim is also based on the resource approach. However, the contractor's

equipment costs calculations assume that all equipment is operational at all times during the claim period. This approach is not realistic but it has the affect of maximizing the equipment costs. This approach is contrary to Section 4-3 of the Standard Specifications. The engineer's Estimate differentiates between the active (Hrs Used) and the idle equipment hours recorded on daily work reports for equipment costs pursuant to Section 4-3 of the Standard Specifications.

The engineer's estimate and the contractor's claim are based on the personnel hours recorded on the Contractor's payroll records to calculate the labor costs.

The Contractor included material costs for turbidity barrier. This is contrary to the specifications because the contract includes a pay item for turbidity barrier and material costs are included in the contract unit price. The engineer's estimate excluded this questionable amount.

Claim 1 Summary:

The Contractor submitted equipment costs based on 100% of the Blue Book rates for all equipment whether or not it was in use. Operating costs were charged for an entire day when a piece of equipment may have been used for a portion of a day. (TAB 5, sheets 2, 3, 4, 5 and 6) The Department's position is that any piece of equipment not being used is considered on standby and if blue book rates are used to calculate costs, the charged rate must be 50% of the blue book rate per section 4-3 of the Specifications for idle and/or standby equipment. (TAB 2, sheets 7, 8 and 9) Operating costs should only be charged when a piece of equipment is currently operating. The Contractor included material costs for turbidity barrier. This is contrary to the specifications because the contract includes a pay item for turbidity barrier and material costs are included in the contract unit price. The engineer's estimate excluded the material cost amount for turbidity barrier. The contractor submitted Claim 1 for an amount of \$51,624.55. The engineer's estimate concludes that the contractor is entitled to \$30,221.85. Question 1 for the DRB: Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 1?

Claim 2 was caused by the same issue as claim 1. However, the contractor chose to separate the impacts because the claim 2 periods involves delay costs only and no work. The Engineer of Record issued a set of revised plans on February 08, 2007. The revised plans altered the scope of work and the contractor was unable to perform any work while the revised plans were being developed. As a result, the contractor was delayed from February 01 through February 11, 2007. This period of delay included 5 scheduled workdays: February 1, 5, 6, 7 and 8, 2007. (TAB 7)

The Contractor is requesting to be compensated for the costs of idle equipment and labor during the delay period. Therefore, the Contractor's claim for "standby time" is justifiable. And, it follows that the Contractor is entitled to recover one hundred percent (100%) of the costs as stipulated in Section 4-3 of the Standard Specifications.

Claim 2 Summary:

The Contractor submitted equipment costs based on 100% of the Blue Book rates for all equipment whether or not it was in use. (TAB 5, sheets 7, 8, 9 and 10) The Department's position is that any piece of equipment not being used is considered on standby and if blue book rates are used to calculate costs, the charged rate must be 50% of the blue book rate per section 4-3 of the Specifications for idle and/or standby equipment. Operating costs should only be charged when a piece of equipment is currently operating. (TAB 2, sheets 15, 16 and 17) The contractor submitted Claim 2 for an amount of \$30,384.35. The engineer's estimate concludes that the contractor is entitled to \$21,909.60. **Question 2 for the DRB:** Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 2?

Claim 3: The contractor submitted a claim for \$35,680.85 due to alleged "differing site conditions" in connection with the required removal of riprap at the northeast corner of the fender system. The contractor points out in his letter dated April 20, 2007 the following: (TAB 6, sheet 29)

"The contract plans, sheet B2-1, note 11 states that "previous placed rock rubble riprap" exists around the bascule pier. This note also references existing bridge drawings. The record drawings for State Project No. 13080-3501, dated 9/1/98, and included in the contract documents, indicates that "previous placed rock rubble riprap" exists only around the bascule pier."

"The riprap encountered at the rest pier at the north side of the bridge was not indicated on either the contract drawings or the record drawings. The existing riprap at the northeast corner was not visible at the pre-bid site inspection. WCI contends that the existing riprap encountered at this location represents a differing site condition as defined by TDCI Standard Specification, paragraph 4-3.7."

Please refer to the attached letter from WCI dated April 20, 2007. (TAB 6, sheet 29)

The engineer does not dispute that the preponderance of the information in the plans would lead the Contractor to assume that there would be no riprap rubble at the rest pier (northeast corner of the fender system). However, General note 11 on plan sheet B2-1 includes the following sentence: "Other debris from previous construction projects, including timber, concrete piles, miscellaneous structural steel, etc. may be located on the channel bottom, within the construction limits. Remove and dispose of this debris. See existing bridge drawings." (TAB 8, plan sheet B2-1) Additionally, the contract includes a pay item 110- 8 "Underwater Debris Removal." This item is paid as an EACH DAY (ED) unit. (TAB 8, plan sheet B-2) The reason this pay unit was selected is because of the uncertainty of the effort that would be required to remove debris. This is because the location and quantity of debris removal necessary to drive the new piling was unknown. Since cost of construction is based principally on time and equipment, this was an equitable way to compensate the contractor for an unknown condition. The specification for this pay item was included in the Technical Special Provision. (TAB 3, sheet 3) This document is higher in rank than the plans. The Specification reads as follows: "110-10.5 Underwater Debris Removal: Completely remove and dispose of all timber, brush, vegetation, rubbish, debris, and all other obstructions resting on or protruding through the surface of the existing channel bottom within the areas where the fender system piles will be constructed. Relocate and then replace previously placed rock rubble riprap serving as scour countermeasures. Comply with the requirements of 110-9 for disposal of materials. 110-10.5.1 Acceptance Criteria: Certify that an area has been cleared of debris before beginning construction of the fender system piles. Certify that the relocated scour countermeasures

rubble riprap has been replaced. 110-11.8 Underwater Debris Removal: The work will be paid for at the Contract unit price for Underwater Debris Removal."

The plan quantity for this pay item is 10 ED and the final quantity is also 10 ED based on the daily work reports and the final estimate documents.

Section 9-3 of the Standard Specifications states as follows: "... Compensation for alterations in plans or quantities of work requiring a supplemental agreement, shall be stipulated in such agreement, except when the Contractor proceeds with the work without change of price being agreed upon, the Contractor shall be paid for such increase or decreased quantities at the Contract unit prices bid in the Proposal for the items of work."

The project record documents the fact that the Contractor started and completed all the Debris removal work prior to submitting a notice of intent specifically with respect to debris removal and the Contractor started and completed the debris removal prior to the Department agreeing to a new unit price as part of an approved supplemental agreement. Therefore the Contractor is not entitled to additional compensation with respect to debris removal. The Contractor is not entitled to additional compensation for excavation of soils around piles to be cutoff below the mud line. The daily work reports document that debris was removed on February 12, 13, and 21, 2007. The Contractor was compensated for this debris removal in accordance with the contract. On February 14, 2007, no debris removal occurred but soil was excavated around the base of a pile to prepare for cutoff. Field Supplemental Agreement Number 02 was negotiated and executed to compensate the contractor for pile cutoffs. (TAB 4, sheets 6, 7 and 8) This FSA-02 included the cost of divers for pile cutoffs. Therefore, the contractor is only entitled to the cost of the divers used for debris removal in connection with this claim. This is fair because the use of divers for debris removal was necessary but this requirement was not addressed in the specifications

Claim 3 Summary:

The project scope of work included the removal and replacement of the fender system for Bridge No. 130057 in Manatee County. The bridge is located between the north end of Longboat Key and Anna Maria Island. The Contract includes a pay item, "Underwater Debris Removal". The plan quantity is 10 per each day (ED). The final quantity is 10 per each day (ED). The Contractor is asserting that riprap rubble is not debris and therefore the contractor is due additional compensation to remove riprap rubble. The Department's position is that riprap rubble removal is considered underwater debris removal as defined in the Technical Specifications (TAB 3, sheet 3) and is properly paid for with pay item number 110-8, Underwater Debris Removal. The contractor submitted Claim 3 for an amount of \$35,680.85. The engineer's estimate concludes that the contractor is entitled to \$3,264.81. (TAB 2, sheets 23, 24, and 25) Therefore, the contractor is only entitled to the cost of the divers used for debris removal in connection with this claim. This is fair because the use of divers for debris removal was necessary but this requirement was not addressed in the specifications. The sum of \$3,264.81 reflects the costs of the use of divers during the debris removal operation. **Question 3 for the DRB:** Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 3?

Claim 4 was caused by the same issue as claim 1. However, the contractor chose to separate the impacts because the claim 4 periods involves delay costs only and no work. The Engineer of Record

issued a set of revised plans on February 08, 2007. The revised plans changed a portion of the details of the work. The revised plans included cutting off the existing piles below the mud line and driving new piles in locations that would not conflict with the pile cutoff locations. The Contractor was asked to provide a price proposal to cutoff the piling below the mud line. A price proposal was received on February 13, 2007 and the Contractor started to cutoff piles on February 14, 2007. The contractor was stopped from performing pile cut offs because negotiations for the field supplemental agreement were not yet finalized and the contractor had not signed the field supplemental agreement. The Contractor was stopped because the Contractor's initial price to cutoff existing piles was excessive, \$2878.38 per pile. On February 20, 2007 price negotiations were finalized; and the Contractor executed the field supplemental agreement. (TAB 4, sheet 6) The negotiated price was \$490.88 per pile. The Contractor was unable to perform any productive work from February 14, 2007 through February 20, 2007. As a result, the Contractor was delayed. This period of delay included 3 scheduled workdays: February 15, 19, 20, 2007.

The Contractor is requesting to be compensated for the costs of idle equipment and labor during the delay period. The Contractor's claim for "standby time" is justifiable. And therefore, it follows that the Contractor is entitled to recover one hundred percent (100%) of the costs as stipulated in Section 4-3 of the Standard Specifications.

Claim 4 Summary:

The Contractor submitted equipment costs based on 100% of the Blue Book rates for all equipment whether or not it was in use. (TAB 5, sheets 16, 17, 18, and 19) The Department's position is that any piece of equipment not being used is considered on standby and if blue book rates are used to calculate costs, the charged rate must be 50% of the blue book rate per section 4-3 of the Specifications for idle and/or standby equipment. (TAB 2, sheets 31, 32, and 33) The contractor submitted Claim 4 for an amount of \$17,305.06. The engineer's estimate concludes that the contractor is entitled to \$12,757.15.

Question 4 for the DRB: Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 4?

Claim 5: The original plans required that all existing fender piles be removed and replaced. On February 08, 2007, the Contractor was issued a plan revision that required the channel piles to remain in place. (TAB 6, sheets 47, 48 and 49) Therefore, the new timber fender system had to be installed on existing piles. The existing piles were out of alignment and many of the piles had been installed out of plumb. During the period from April 3, 2007 to May 9, 2007, the Contractor fabricated and installed timber spacer blocks to properly align and plumb the timber fender system both vertically and horizontally. The fabrication and installation of spacer blocks was not included in the original scope of work. Therefore, the contractor is entitled to additional compensation for the fabrication and installation of spacer blocks. The contractor is entitled to recover 100% of the additional costs as stipulated in Section 4-3 of the Standard Specifications.

Claim 5 Summary:

The Contractor submitted equipment costs based on 100% of the Blue Book rates for all equipment

whether or not it was in use. Operating costs were charged for an entire day when a piece of equipment may have been used for a portion of a day. (TAB 5, sheets 20, 21, 22, 23, 24 and 25) The Department's position is that any piece of equipment not being used is considered on standby and if blue book rates are used to calculate costs, the charged rate must be 50% of the blue book rate per section 4-3 of the Specifications for idle and/or standby equipment. (TAB 2, sheets 38, 39, and 40) Operating costs should only be charged when a piece of equipment is currently operating. The contractor submitted Claim 5 for an amount of **\$54,205.85**. The engineer's estimate concludes that the contractor is entitled to **\$32,274.08**. **Question 5 for the DRB:** Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 5?

Claim 6: The contractor submitted a claim for \$23,791.10 due to alleged "differing site conditions" in connection with the required removal of riprap.

The contract includes a pay item 110-8 "Underwater Debris Removal." This item is paid as an EACH DAY (ED) unit. The reason this pay unit was selected is because of the uncertainty of the effort that would be required to remove debris. This is because the location and quantity of debris removal necessary to drive the new piling was unknown. Since cost of construction is based principally on time and equipment, this was an equitable way to compensate the contractor for an unknown condition. The specification for this pay item was included in the Technical Special Provision. The Specification reads as follows: (TAB 3, sheet 3)

"110-10.5 Underwater Debris Removal: Completely remove and dispose of all timber, brush, vegetation, rubbish, debris, and all other obstructions resting on or protruding through the surface of the existing channel bottom within the areas where the fender system piles will be constructed. Relocate and then replace previously placed rock rubble riprap serving as scour countermeasures. Comply with the requirements of 110-9 for disposal of materials. 110-10.5.1 Acceptance Criteria: Certify that an area has been cleared of debris before beginning construction of the fender system piles. Certify that the relocated scour countermeasures rubble riprap has been replaced. 110-11.8 Underwater Debris Removal: The work will be paid for at the Contract unit price for Underwater Debris Removal."

The plan quantity for this pay item is 10 ED and the final quantity is also 10 ED based on the daily work reports.

Section 9-3 of the Standard Specifications, 2004 (top of page 90) states as follows: "... Compensation for alterations in plans or quantities of work requiring a supplemental agreement, shall be stipulated in such agreement, except when the Contractor proceeds with the work without change of price being agreed upon, the Contractor shall be paid for such increase or decreased quantities at the Contract unit prices bid in the Proposal for the items of work."

The project record documents the fact that the Contractor started and completed all the Debris removal work prior to submitting a notice of intent specifically with respect to debris removal and the Contractor started and completed the debris removal prior to the Department agreeing to a new unit price as part of an approved supplemental agreement. Therefore the Contractor is not entitled to additional compensation with respect to debris removal. The Contractor is not entitled to additional compensation for excavation of soils around piles to be cutoff below the mud line. The Contractor is entitled to compensation for the cost of divers to assist in the debris removal. This is fair because the use of divers was necessary for debris removal but this requirement was not addressed in the specifications. The daily

work reports document that debris was removed on March 22, 2007. (TAB 7) The Contractor was compensated for this debris removal in accordance with the Contract as provide for in the Technical Specifications, Section 110, Underwater Debris Removal. On March 19 and 20, 2007, no debris removal occurred but the divers were on site to map debris for removal. On March 21, 2007 the divers were on site to assist with pile cutoff operations. The Contractor is not entitled to compensation for the use of divers to assist with the work of soil removal and pile cutoffs because Field Supplemental Agreement Number 02 was negotiated and executed to compensate the contractor for pile cutoffs and diver assistance for pile cutoffs. (TAB 4, sheet 6) Therefore, the contractor is entitled to be compensated for the cost of divers used on March 19, 20 and 22, 2007.

Claim 6 Summary:

The project scope of work included the removal and replacement of the fender system for Bridge No. 130057 in Manatee County. The bridge is located between the north end of Longboat Key and Anna Maria Island. The Contract includes a pay item, "Underwater Debris Removal". The plan quantity is 10 per each day (ED). The final quantity is 10 per each day (ED). The Contractor is asserting that riprap rubble is not debris and therefore the contractor is due additional compensation to remove riprap rubble. The Department's position is that riprap rubble removal is considered underwater debris removal as defined in the Technical Specifications and is properly paid for with pay item number 110-8, Underwater Debris Removal. (TAB 3, sheet 3) The contractor submitted Claim 6 for an amount of \$23,791.10. (TAB 5, sheets 26 thru 32) The engineer's estimate concludes that the contractor is entitled to \$9,123.58. (TAB 2 sheets 46, 47 and 48) Therefore, the contractor is only entitled to the cost of the divers used for debris removal in connection with this claim. This is fair because the use of divers for debris removal was necessary but this requirement was not addressed in the specifications. The sum of \$9,123.58 reflects the costs of the use of divers during the debris removal operation. **Question 6 for the DRB:** Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 6?

Claim 7: The contractor is requesting compensation for the delay costs of 34-days based on Section 5-12.6.2.2. The Contractor arrives at the 34-days delay as follows: (TAB 5, sheets 33 and 34)

<u>Description</u>	<u>Contractor</u>	<u>CEI Recommends</u>
Claim 1 Attempt to extract piles from 1/23/2007 to 1/31/2007.	9-days	9-days
Claim 2 Standby time from 2/1/2007 to 2/11, 2007	11-days	11-days
Claim 4 Standby time from 2/14/2007 to 2/20/2007	7-days	7-days
Weather adjustment 1/29/2007	-(1)-day	-(1)-day
Claim 5 Timber spacer blocks 4/3/2007 to 5/5/2007	8-days	5-days
TOTALS	34-days	31-days

The daily work reports supports the contractor's claims for indirect delay costs as submitted except for claim number 5. During the period from April 3, 2007 to May 9, 2007 the Contractor fabricated and installed spacer blocks on the new fender system. This work was not part of the original scope of work. The contractor spent approximately 54.5 hours performing this unforeseen additional work. (TAB 7) Since the Contractor was working 10-hour days, this corresponds to a 5-day delay. This effort delayed

the controlling item of work: 470-1, Treated Structural Timber. The attached daily summary of claims substantiate this effort. (TAB 7) The Contractor is entitled to recover indirect delay costs for five (5) of the eight (8) days requested in accordance with Section 5-12.6 of the Standard Specifications with respect to Claim 5.

Claim 7 Summary:

The contractor submitted claim 7 for 13,428.15. The engineer's estimate concludes that the contractor is entitled to \$12689.602. **Question 7 for the DRB:** Is the contractor entitled to additional compensation greater than the engineer's estimate for claim 7?

Claim 8: The Contractor submitted a claim for \$232,627.48 due to "defective specification," "cardinal change" and Breach of Contract. (TAB 5, sheets 35 thru 44) The Contractor did not submit a notice of intent to inform the Department that a breach of contract had occurred or will occur if the revised plans were to be followed. The Department was relying on the fact that the Contractor was continuing to pursue the work. In fact, the Contractor executed a work order to perform pile cutoffs and executed a supplemental agreement to perform pile spall repairs. (TAB 4) These contract modifications were essential to carrying out the intent of the revised plans. The contractor freely signed the supplemental agreements and was not protesting the events that led to the final decisions and did not object to the final design configuration that was eventually implemented. In fact, the Contractor assisted in developing a solution to the differing site conditions encountered. (TAB 6, sheets 14 and 15) All parties were executing the Contract, and executing modifications to the Contract, in good faith.

The Contractor's assertion that a breach of contract occurred does not negate the actions of the contracting parties and does not negate the Specifications. Section 5-12 Claims by Contractor, Paragraph 5-12.11, Exclusive Remedies, States as follows: "Notwithstanding any other provision of this Contract, the parties agree that the Department shall have no liability to the Contractor for expenses, costs or items of damages other than those which are specifically identified as payable under 5-12. In the event of any legal action for additional compensation, whether on the account of delay, acceleration, **Breach of Contract**, or otherwise, the Contractor agrees that the Department's liability will be limited to those items which are specifically identified as payable in 5-12." Also refer to TAB 3 sheet 54.

The Worth Contracting Inc. asserts that entitlement is based on the "Total Cost Doctrine". This method of compensation is not recognized by the Contract and therefore entitlement cannot be established herein. The "total cost" as may be defined by the contractor is not relevant to the contract. The Department does not control how the contractor manages his/her business. A written agreement is the only way a public agency can conduct business. The contractor is essentially asking for an "open checkbook" after the fact. If the contractor asked during construction that because of all the necessary changes in the plans he/she must be compensated for all their costs beyond that which is stipulated in the contract and at a number to be determined after the fact, the Contractor knows that the Department could never agree to such an arrangement. That is why we have Section 4 of the specifications. It is a standard, agreed to, between the Department and the construction industry, to be used in the event that unforeseen conditions are encountered.

The Department was not afforded the opportunity to terminate the contract or portion of the contract as provided in Section 8-9.2 of the Specifications because the Department was not informed of the

intent of the Contractor to Claim "Breach of Contract." Therefore the Contractor has no entitlement to any part of this claim based on the specifications.

Claim 8 Summary:

The contractor submitted claim 8 for \$232,627.48 to an alleged breach of contract. (TAB 5, sheets 35 thru 44) The Department believes that the contractor is not entitled to any compensation that is not specifically addressed in the contract documents. The contractor admits that this claim is not based on the contract (TAB 5, sheet 36) but the contractor is asserting entitlement based on the "total cost method". **Question 8 for the DRB:** Is the contractor entitled to additional compensation that is not based on the specification due to "Breach of Contract"?

A General Summary of the disputed issues are as follows:

Claims 1, 2, 4 and 5 - "Equipment Costs"

The Contractor submitted equipment costs based on 100% of the Blue Book rates for all equipment whether or not it was in use. Operating costs were charged for an entire day when a piece of equipment may have been used for a portion of a day. The Department's position is that any piece of equipment not being used is considered on standby and if blue book rates are used to calculate costs, the charged rate must be 50% of the blue book rate per section 4-3 of the Specifications for idle and/or standby equipment. Operating costs should only be charged when a piece of equipment is currently operating.

Claims 3 and 6 - "Riprap Removal" - Summary of Dispute:

The project scope of work included the removal and replacement of the fender system for Bridge No. 130057 in Manatee County. The bridge is located between the north end of Longboat Key and Anna Maria Island. The Contract includes a pay item, "Underwater Debris Removal". The plan quantity is 10 per each day (ED). The final quantity is 10 per each day (ED). The Contractor is asserting that riprap rubble is not debris and therefore the contractor is due additional compensation to remove riprap rubble. The Department's position is that riprap rubble removal is considered underwater debris removal as defined in the specifications and is properly paid for with pay item number 110-8, Underwater Debris Removal. The Specification reads as follows:

"110-10.5 Underwater Debris Removal: Completely remove and dispose of all timber, brush, vegetation, rubbish, debris, and all other obstructions resting on or protruding through the surface of the existing channel bottom within the areas where the fender system piles will be constructed. Relocate and then replace previously placed rock rubble riprap serving as scour countermeasures. Comply with the requirements of 110-9 for disposal of materials. 110-10.5.1 Acceptance Criteria: Certify that an area has been cleared of debris before beginning construction of the fender system piles. Certify that the relocated scour countermeasures rubble riprap has been replaced. 110-11.8 Underwater Debris Removal: The work will be paid for at the Contract unit price for Underwater Debris Removal."

CLAIM 7 - Unabsorbed and Extended Overhead

The contractor is requesting compensation for delay cost in accordance with Section 5-12.6.2.2 of the Specifications. There is not a substantial disagreement with respect to claim no. 7 however the

Contractor asserts that any negotiated settlement with respect to claim #7 and any other issue (claims 1, 2, 3, 4, 5 or 6) will spill over into claim no. 8. Therefore, the Contractor will increase claim number 8 by any amount that the other claims are reduced. So there is no benefit to the Department to try and negotiate the merits of any particular issue.

CLAIM 8 - "Defective Specifications" - Summary of Dispute

Facts Not in Dispute: The project scope of work included the removal and replacement of the fender system for Bridge No. 130057 in Manatee County. The bridge is located between the north end of Longboat Key and Anna Maria Island. The plans and specifications required the total removal and replacement of the existing concrete fender piles. During construction it was determined that removal of the fender piles could not be accomplished by extraction. Therefore the Engineer of Record submitted revised plans that allowed the cutoff of existing piles and patching of several existing piles that could not be removed due to differing site conditions.

Disputed Issue: The Department believes that the Contractor is due additional compensation as described in applicable parts of the specifications. The Contractor asserts that the Department breached the Contract by substantially changing the scope of work. Therefore the Contractor believes that they are not bound by the Specifications with respect to compensation and is entitled to a "total cost approach" for determining acceptable compensation.

Additional Questions for the District 1 Regional Disputes Review Board:

9. Is the contractor entitled to 100% of equipment blue book rates if the Department does not specifically direct the equipment to be Idle? Or, is equipment considered idle when not currently in use and is chargeable at 50% of the blue book rates as described in Section 4.3.2?
10. Is the Contractor entitled to operating costs while a piece of equipment is not currently in operation—when the piece of equipment is turned off?
11. Is the contractor due additional compensation for removal of Rip-rap rubble other than for the use of divers?
12. Is the Contractor due additional compensation above and beyond the criteria proscribed in Sections 4 and 5 of the specifications because of alleged "defective plans and specifications", alleged "breach of contract" or "substantial change" in the scope of work? Is the contractor entitled to compensation as calculated in the "total cost doctrine" for the circumstances encountered during construction of this project?

The Department's rebuttal to the Contractor's Position Paper is as follows:

Claim #3 "Unforeseen Riprap at Northeast Corner"

The Contractor's Position Paper states the following with respect to claim #3:

"the Department agreed that the Contractor is entitled to compensation for the cost incurred as a result of the unforeseen

riprap at the northeast fender wing wall but did not agree on the monetary damages."

REBUTTAL: This above statement tends to be misleading--although maybe not intentionally. The Department asserts that the Contractor is entitled to be compensated at the contract unit price of \$2500.00 ED for every day that the Contractor engaged in rip-rap removal and/or riprap replacement. This is contractual compensation at the contract unit price for "Underwater Debris Removal". The Department also believes that the Contractor is entitled to additional compensation to cover the cost of diver assistance in debris removal. Additional compensation for the cost of divers only is fair because the specifications do not address the need for divers. The Contractor is asserting that riprap is not debris, therefore should not be paid for at the contract unit price for underwater debris removal. However, The Specification reads as follows: "110-10.5 Underwater Debris Removal: Completely remove and dispose of all timber, brush, vegetation, rubbish, debris, and all other obstructions resting on or protruding through the surface of the existing channel bottom within the areas where the fender system piles will be constructed. Relocate and then replace previously placed rock rubble riprap serving as scour countermeasures. Comply with the requirements of 110-9 for disposal of materials. 110-10.5.1 Acceptance Criteria: Certify that an area has been cleared of debris before beginning construction of the fender system piles. Certify that the relocated scour countermeasures rubble riprap has been replaced. 110-11.8 Underwater Debris Removal: The work will be paid for at the Contract unit price for Underwater Debris Removal."

REBUTTAL: So the specifications for underwater debris removal clearly address the existence of previously placed rock rubble riprap serving as scour countermeasures. And payment for relocating and replacing riprap is included in the contract unit price for pay item 110-11.8, underwater debris removal.

Claim #7 "Unabsorbed and Extended Overhead"

At the bottom of page 9, the Contractor's Position Paper states that "The Department agreed that the Contractor is entitled to compensation for the cost of 24 days of unabsorbed and extended overhead but did not agree on the monetary damages." **REBUTTAL:** This statement is incorrect. The Department agrees that the Contractor is entitled to compensation for the cost of 21 days not 24 days.

Claim #8 "Defective Specifications"

1. Page 10, Paragraph 2 of the Contractor Position Paper states the following: "The Department failed to adequately review the historical records and previous contracts for the Manatee Bridge prior to designing the fender system. Had this review been conducted, the Department would have discovered that there was a stratum of clay, marl or hardpan at the bridge location and that previous fender system repair work was unable to remove the existing piles." **REBUTTAL:** Historical records and previous contracts were reviewed prior to designing the fender system. A field review was made, the latest Bridge Inspection Report was reviewed, and previous fender system repair plans were reviewed. There was no indication or requirements to remove the existing piles in the previous projects. Such piles are typically cut off in accordance with the provisions of the Specifications. Please refer to Supplemental Specification 110-6.2.1 of the Contractor's Position Paper, Tab 2, page 95.
2. Page 10, Paragraph 4 of the Contractor's Position Paper states the following: "The Department failed to conduct a geotechnical study prior to designing the fender system. Had a geotechnical study been conducted, the Department would have discovered that there was a stratum of clay, marl or hardpan at the bridge

- location and that the existing concrete piling were embedded in this stratum and could not be removed by normal construction methods. Instead, numerous existing piles were either left in place or cut off at the mud line."*
- REBUTTAL:** Review of previous fender projects at the site indicated geotechnical information was not provided for these projects either. There is no geotechnical information that could have been provided that would indicate the existing piles could not be removed. Cutting off piles at the ground line is typical construction practice and is not an indication the piles could not be fully extracted.
3. Page 10, Paragraph 5 of the Contractor's Position Paper states the following: *"The Department failed to conduct a subsurface survey prior to designing the fender system. Had a subsurface survey been conducted, the Department would have discovered that there were numerous existing piles that were either left in place or cut off at the mud line. These existing piles interfered and conflicted with the removal of riprap and the construction of the new fender system required by the Contract."* **REBUTTAL:** Historical documents including as-built drawings of previously completed fender repair projects were reviewed and in fact included in the contract documents. The Contractor was aware there were piles cut off at the mud line or left in place. The contract documents include plan notes and Technical Special Provisions indicating this and provide for payment such that the Contractor would be compensated despite any interferences or conflicts.
 4. Page 10, Paragraph 6 of the Contractor's Position Paper states the following: *The Department failed to perform its due diligence prior to designing the fender system. If it had, the Department would have been aware of the conditions that prevailed at the site and provided a design for a new fender system that could be constructed."* **REBUTTAL:** Due diligence was performed by conducting a field review and reviewing all related documentation (inspection reports, previous plans). The Contractor was made aware of the site conditions by plan notes and Technical Special Provisions as well as inclusion of as-built drawings from recently completed fender repair projects.
 5. Page 10, Paragraph 6 of the Contractor's Position Paper states the following: *"The Department failed to design the fender system in conformance with the existing site conditions. It was therefore forced to re-design the fender system after the subject contract was underway. This resulted in extensive changes, delay disruptions, and loss of productivity to the contracted work."* **REBUTTAL:** The fender system was designed in conformance with the site conditions. The Contractor was made aware of the conditions and provisions for payment were provided in the contract documents. The Contractor also participated in the re-design effort. Solicitation was sought in the form of comments for proposed concepts. These comments were incorporated to facilitate the Contractor's ability to perform the work.

Scope of Regional Dispute Review Board Ruling

In reviewing the Worth Position Paper, it was noted that the Contractor was asking for a ruling on entitlement and quantum.

The Department has recognized entitlement (at least in some form) to claims 1, 2, 3, 4, 5, 6 and 7. Therefore, with respect to claims 1 through 7, the RDRB should only issue a ruling on whether the Contractor is entitled to an amount in excess of the Engineer's Estimate. If this is so, the Department reserves the right to negotiate quantum with the Contractor after we receive the entitlement

recommendations from the RDRB.

With respect to claim number 8, the Department does not agree on entitlement in any form. Therefore, the RDRB should only issue a ruling on entitlement. The Department reserves the right to negotiate quantum with the Contractor after we receive the entitlement recommendations from the RDRB.

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

1. Is the contractor entitled to 100% of equipment blue book rates if the Department does not specifically direct the equipment to be Idle? Or, is equipment considered idle when not currently in use and is chargeable at 50% of the blue book rates as described in Section 4-3.2? (Applies to Claims 1,2,4 and 5).

*The Board finds the Contractor **IS NOT ENTITLED** to 100% of equipment blue book rates when the equipment is considered idle. The Contractor **IS ENTITLED** to 50% of the blue book rates as described in by specifications 4-3.2.*

2. Is the Contractor entitled to operating costs while a piece of equipment is not currently in operation—when the piece of equipment is turned off? (Applies to Claims 1,2,4 and 5).

*The Board finds the Contractor **IS NOT ENTITLED** to operating costs while a piece of equipment is turned off, in accordance with Finding 1, above.*

3. Is the contractor due additional compensation for removal of Rip-rap rubble other than for the use of divers? (Applies to Claims 3 and 6).

*The Board finds the Contractor **IS ENTITLED** to additional compensation for removal of Rip-Rap rubble in addition to the use of divers.*

4. Is the Contractor due additional compensation above and beyond the criteria prescribed in Sections 4 and 5 of the specifications because of alleged "defective

plans and specifications", alleged "breach of contract" or "substantial change" in the scope of work? Is the contractor entitled to compensation as calculated in the "total cost doctrine" for the circumstances encountered during construction of this project? (Applies to Claim 8).

The board recommends the Department conduct a financial audit of the Contractors costs which should provide pertinent information to allow both parties to resume negotiations.

The Board finds the Contractor **IS ENTITLED, PENDING A CORROBORATIVE OUTCOME OF A FINANCIAL AUDIT,** to additional compensation above and beyond the criteria prescribed in Sections 4 and 5 of the specifications because of alleged "defective plans and specifications" and/or, alleged "breach of contract" and/or or "substantial change" in the scope of work; and the Board finds the Contractor **IS ENTITLED, PENDING A CORROBORATIVE OUTCOME OF A FINANCIAL AUDIT,** to additional compensation as calculated by the "total cost doctrine" or the "modified total cost doctrine" for the circumstances encountered during the construction of this project.

The Board cites the following supportive facts:

- Use of the Total or the modified total cost computation of damages may be applicable when liability of the owner is clearly established.
- The nature of the construction methodology to implement and realize the new design was significantly different from the planned construction methodology.
- The construction costs appear reasonable. The Department documented the construction activities (and lack thereof) with Daily Field Reports of Construction; and in fact, due to the problems encountered on the jobsite, had the Contractor sign them in concurrence. There is no record of the Contractor creating additional costs. To the contrary, the Engineer stated the Contractor was "exemplary in the field".
- The Contractor's bid appears reasonable, as it was 3% lower than the second lowest bidder, less than the typical 5-10% range.
- The nature of the losses may have made it impossible to substantiate the precise amount of the Contractor's quantum damages by direct and specific proof as provided for in the Contract specifications. The project suffered numerous interrelated impacts.
- In essence, the Contractor became a business partner with the Department as it assisted in the various aspects of the re-design and maintained a presence during the design phase.
- The final contract amount is approximately 40% less than the original Contract amount due to the fact the Department deleted items of work to make the new design functional.

➤ *The second bridge (Bridge Number 090016 in Highlands County) under the contract went very well. The Department may be benefiting and sharing in the efficiency of costs from its construction in the event a modified or total cost method is utilized.*

Finally, on all matters above, the Board reminds the parties that as entitlement has now been determined, the parties should timely, within 60 calendar days, negotiate monetary changes.

Respectfully Submitted,

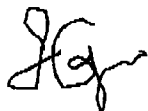
Region 1 Disputes Review Board

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

FAY:

Attn: Alan Autry

263-534-0071

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