

January 1, 2008

To: Miller Electric Company
ITS Div
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I-75 RTMC and I-75 Corridor FMS and ITS Integration Project
414733-1-52-01; 416412-1-52-01; and 416413-1-52-01

ISSUE:

Is the Contractor entitled to an "Equitable Adjustment" to his contract due to the project being delayed by events beyond the Contractor's control, thereby extending the start of work by subcontractors and suppliers resulting in higher than anticipated bids due to changed market conditions?

CONTRACTOR'S POSITION:

The Department delayed the completion of design consequently putting the bidding or "buy-out" period into a very unfavorable bidding climate due to the hurricanes and resulting work loads. Material prices increased during this delay period due, in part, to overseas market influences. The Department made a multitude of comments at the final design submittal stage that should have been made at earlier submittal stages. During the design period there were many changes required by the Owner, including adding tenants to the RTMC, thus further delaying the bid period. The Water Management District changed its approach to the permit during the permit application period resulting in the permit application taking a year before permits were issued.

The request for Equitable Adjustment is to compensate the contractor for the cumulative effect of the many changes, the design approval period being extended as well as the late issue of the Water Management permit. None of the aforementioned issues were the fault of the Contractor.

OWNER'S POSITION:

The Owner's position is that the Request for Equitable Adjustment is based on a change in market conditions and there is no basis in the contract for any relief to the contractor due to changed market conditions. The project was bid in June of 2005 which was well after the 2004 hurricane season that the contractor states precipitated the unfavorable market conditions. Therefore, the contractor should have been aware of the market conditions and bid accordingly. The Owner readily admits that there were design changes and has agreed to deal with each instance as an individual change and will consider time and money if warranted for each instance. The Owner has already issued supplementary agreements

totaling over \$900,000 for design changes and has currently extended the project completion to March, 2008. The Owner feels he has complied with the contract by addressing changes as they occur. However, the Owner states that there are no provisions in the contract to increase the compensation due to unfavorable market conditions.

The Owner states that the contractor requested a 70 day delay in issuing the notice to proceed which the Owner granted. The Contractor agreed in signing the SA for this extension that the Agreement covered damages, if any, as a result of the 70 days.

BOARD FINDINGS:

The Board reviewed the contract, specifically the RFP and the specifications, and could find no provisions for changing the contract price based on unfavorable or changed market conditions brought about by a delay. Division I, Section 5-12.2.2 provides that there shall be monetary compensation for delays or delay impacts only to the extent provided for expressly under 4-3 or 5-12. The delay relief in these two Sections does not include the relief sought by the Contractor, i.e., compensation for price increases from the bid date to the point in time when subcontracts and purchase orders can be written. Section 5-12.11, Exclusive Remedies, reemphasizes the contract limits on what is recoverable for a delay.

BOARD RECOMMENDATIONS:

The Board recommends no entitlement for the equitable adjustment sought by the Contractor.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent or preclude the parties for negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.


Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required in 15 days. Failure to respond constitutes an acceptance of this recommendation by that party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully submitted
Disputes Review Board

Peter A. Markham	DRB Chairman
Michael Bone	DRB Member
Felix A. Peguero	DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS


DRB Chairman.

**The Haskell Company
Request for Equitable Adjustment Response
DRB Hearing Date December 17, 2007**

The Haskell Company (Haskell) is in receipt of the Board's recommendation with respect to the Request for Equitable Adjustment (REA). The Board has found insufficient contractual language to support compensation of this request. Neither the Department, nor the Board, have contested that Haskell's mobilization was delayed by action of the Department and its' consultants.

Section 5-12.6.2 does address compensation for delays. Said clause is an exculpatory clause allowing only for delays which are deemed willful and intentional. At this time, Haskell is not prepared to make the case that the delays were willful and intentional resulting in active interference. There is, however, sufficient legal precedent for exceptions to exculpatory clauses of this nature. Of the various exceptions that have been held to preclude the application of exculpatory clauses, the delays to this project qualify as follows:

- *"A delay that has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract."*¹

The delays shown to this project total 13 months. Based on market conditions and the bid practices of the subcontract community, it is unreasonable to hold Haskell responsible for a delay of this length.

- *"A delay that, in light of the relationship of the parties and objective and attendant circumstances, was not intended or contemplated by the parties to be within the purview of the no damage provision."*¹

The primary delay to this project was the design and permitting of the stormwater system. Haskell has reasonable right to rely on the information within the criteria documents as accurate. Delays arising from inaccurate stormwater criteria were in no way contemplated. Additionally, Haskell had no contemplation of the Arborwood development and resulting permit issues.

The Department has stated on a number of occasions that delays will be addressed on an individual basis and that compensation for changes thus far have addressed the delays within the bounds of the contract. Haskell maintains that change orders issued to date have in no way addressed the costs claimed under this REA. Further, Haskell fails to see any effective means, other than this REA, to do so.

Haskell does not accept the recommendation of the Board and respectfully requests the Board to reconsider its' position.

¹ Construction Disputes: Representing the Contractor; Cushman, Carter, Gorman, Coppi; Aspen Law & Business; 2001

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Subject: Request for reconsideration--REA

Steve, Tony, Mary,

The Board acknowledges receipt of the response by Miller/Haskell to the Board's recommendation made on January 1, 2008 re their Request for Equitable Adjustment.

The Board has carefully reviewed the information provided and found that the Contractor has now introduced legal theory and claims precedent for setting aside parts of Section 5-12.6.2 as "exculpatory" clauses. The Board was aware of such theory when it made the decision against entitlement. We found the circumstances were not sufficient for setting aside the contract language and therefore reaffirm our previous recommendation in this matter.

I certify that all members of the Board participated in this reconsideration.

Peter A. Markham, P.E.
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