

June 25, 2008

Armondo A. Cardona Sr.
President
CMA Corporation
7252 NW 25 Street, Miami, Fl. 33122
Miami, Florida 33122

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

Re: FPN: 417646-2-52-01;
Bridge Repair – CR 664A Bridges 060017 and 060031
DRB Recommendation – *Additional Costs for Specialty Engineer.*

Dear Mr. Autry and Mr. Cardona,

Florida Department of Transportation (Department) and CMA Corporation (CMA) requested a hearing concerning the referenced issue.

Summaries of the Department's and CMA's positions, as well as rebuttals (CMA did not provide a written rebuttal) were forwarded to the Disputes Review Board (DRB), and a hearing was held on June 13, 2008.

ISSUE:

1. Is the contractor entitled to reimbursement of its costs for a specialty engineer, Kan Mehta & Associates, Inc.?

(There are references below to **Issue 2**: Errors in the plans increased the actual SIP form dimensions from 20" to 30" for the pile jackets; and **Issue 3**: A bid item for Clearing & Grubbing was not provided in the contract. It is the Boards understanding that these items were settled prior to the hearing. Consequently, the Board is not providing a recommendation on these issues)

Contractor's Position

CMA Corporation (CMA) proposed constructing the project the same way as when it bid the project. Since the time the project was bid, CMA interpreted the plans in a way that had been consistent with the interpretations of several Professional Engineers that it had consulted, including Tallahassee and Gainesville Engineers.

CMA position on construction methodologies never changed since the bid. The Sarasota Operation

Center could not understand what the contract documents directed the Contractor to do. In the Control of the Work Section 5-2 (page 26 of the Contract) indicates the order of the coordination of contract documents, and CMA followed it.

CMA had no other alternative but to hire a well-known Professional Engineer with a Doctorate Degree that could basically educate the Sarasota Operation Center in how to read and understand the contract Plans & Specifications. The Engineer studied the plans and specifications, consulted with various FDOT personnel, attended a partnering meeting, consulted with CMA personnel, prepared a brief showing conflicting information within the contract documents, and participated in a telephone conference with District 1 Construction and Sarasota Engineering resolving issues and agreement for proceeding with construction.

To date the Sarasota FDOT has come 360 degrees back to the position CMA was on January 30, 2008 the bid date.

Department's Position

CONTRACTOR'S CLAIM / DISPUTED ISSUES

The Contractor, CMA Corporation, Inc. (CMA), has disputed the method of constructing pile jacket repairs and pile jacket extensions depicted within the plans and contract specifications for CR 664-A Bridge Nos. 060017 and 060031 (FPID 417646-2-52-01). CMA has also notified the Department of an apparent plan error in the size of the existing bridge pile jackets at the Heardbridge Road Bridge as well a missing pay item for clearing and grubbing.

The following provides a breakdown of CMA's disputed issues:

- **Issue 1:** Additional costs for Legal Adviser & Specialty Engineers not normally required in any other normal project. CMA Corporation employed the services of these advisors in order to communicate to the FDOT what they perceived was the proper interpretation of the contract documents and method of construction.
- **Issue 2:** Errors in the plans increased the actual SIP form dimensions from 20" to 30" for the pile jackets. The increase in the cost of the forms is not covered by any other item in the contract, as the pay item Integral Pile Jacket 457-70-401 is a LF item.
- **Issue 3:** A bid item for C & G was not provided in the contract. There is a need to perform clearing & grubbing under force account, as magnitude of work is not fully known.

DEPARTMENT POSITION

The Department analysis reveals that there is no contractual basis for CMA's presented position of entitlement to additional costs for use of legal advisors or specialty engineers. Further, the facts related to Issue 1 reveal that appropriate Contract provisions do not support the Contractor's interpretation of the plan documents regarding their option to eliminate the fiber

reinforced composite system as part of the pile protection. Accordingly, we believe that the Disputes Review Board should deny entitlement for the Contractor on Issue 1 and uphold the provisions of Contract Special Provision 457, Standard Specification 5-12.10 and the Technical Special Provisions.

The Department's recommendation is to compensate CMA for the additional cost associated with providing the increased size SIP forms and performing clearing and grubbing. The Department and CMA have agreed to payment for Issue 2.

The Department agrees that clearing and grubbing is required and has added this pay item to the contract in accordance with the provisions of the contract based on the Engineer's determination of a fair and equitable cost to perform the work. The Department recommends that the Disputes Review Board deny entitlement to CMA for payment of clearing and grubbing based on force accounts and upholds the provisions of Contract Standard Specification 4-4.

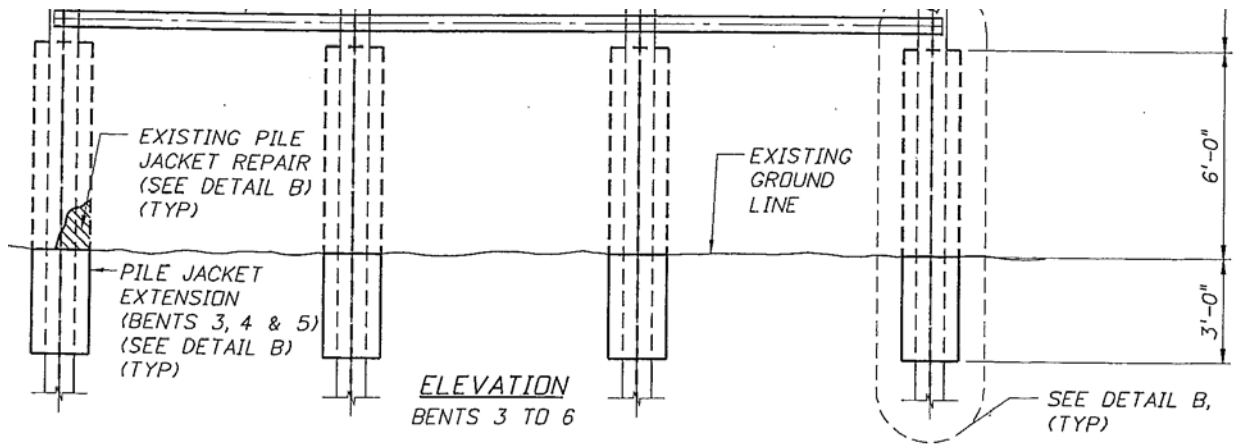
ENGINEER'S ANALYSIS OF CONTRACTOR'S DISPUTES/CLAIMS

ISSUE 1: The Contractor requests payment for additional costs for a Legal Adviser and Specialty Engineers not normally required in any other normal project. CMA states that they employed the services of these advisors in order to communicate to the FDOT the proper interpretation of the contract document and method of construction. Specifically, CMA disputes that the Contract Plans, Special Provisions and Technical Special Provisions require the installation of the Fiber Reinforced Composite System for the repair and extension of the pile jackets.

Issue 1 Background

Prior to April 9, 2008, CMA had not formally requested compensation for fees associated with a legal advisor. Through various meetings and phone conversations they had previously indicated they would be seeking compensation for fees associated with employment of a specialty engineer. To date, CMA has not submitted cost proposals for the employment of a legal advisor or specialty engineer to the Department. The Department's position on this issue is that Attorney Fees and Specialty Engineer Fees are non-recoverable costs in accordance with the contract documents.

Fact: The foundations for the two existing bridges consist of 10x42 steel H-pile at Heardbridge Road Bridge (Heardbridge) and 12x53 steel H-pile at Lake Branch Road Bridge (Lake Branch). The existing steel H-pile for both bridges include deteriorating pile jackets, which extend to the ground line. The plans depict repairing the 12 existing pile jackets at Bent Nos. 3, 4, and 5 of Heardbridge and extending each pile jacket 3-feet below the existing ground line (Exhibit 1, Plan Sheet B1-5, page 20). The plans also depict similar repairs and extension of the 16 existing pile jackets at Bent Nos. 5, 6, 7 and 8 of Lake Branch (Exhibit 1, Plan Sheet B2-4, page 26). The illustration below depicts the bents at Heardbridge from Plan Sheet B1-5.



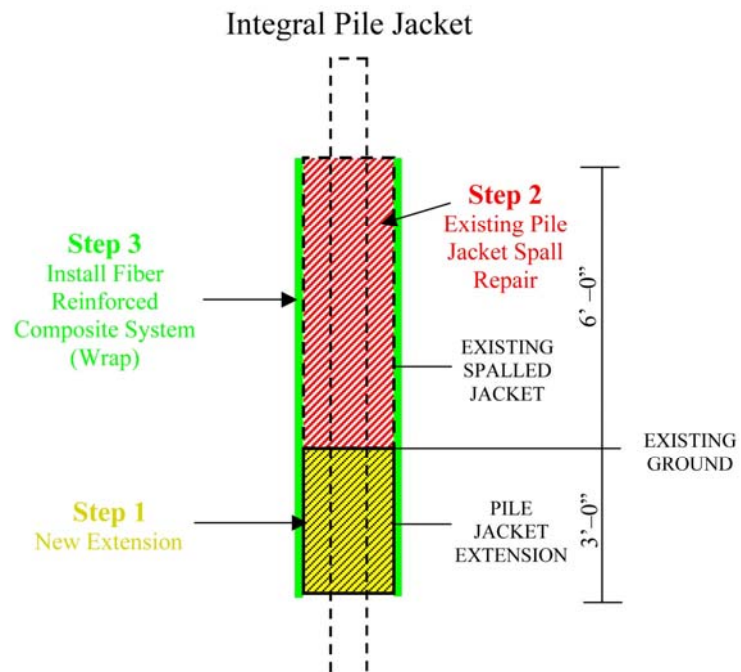
CMA has indicated that it is their desire to build the project per plan and specifications but, they also believe that the Fiber Reinforced Composite System, as described within the plan notes of the above plan sheets is to be installed at their option and not a requirement of the contract.

Fact: The details and notes provided on Plan Sheet B1-5 [Exhibit 1, page 20] specify the intent and method for repair and extension of the existing pile jackets. These notes and the details shown clearly indicate that the repair and extension of the existing pile jackets is to include the use of a Fiber Reinforced Composite System (composite wrap) outlined by the Technical Special Provisions [Exhibit 2, pages 30 - 45]. Payment for the pile jacket repairs and extension as depicted within the plans are provided by pay item 457-70-401, Integral Pile Jacket (other)(12-inch), pay item 401-70-4, Restore Spalled Areas, Portland Cement Grout, and 400-4-5, Concrete Class IV Substructure.

For clarification purposes the pile jacket repair and installation procedure depicted by the plans is summarized below. This procedure is verified within the e-mail correspondence dated 2/26/08 from the Engineer of Record [Exhibit 4, page 91] as his intent. The repair and installation procedure includes:

Step 1 (Yellow): Expose, inspect and repair the steel pile below the existing pile jacket and repair the deteriorated steel flange and web per the pile splice details shown on Plan Sheet B1-6 [Exhibit 1, page 21]. Construct the 3-foot pile jacket extension below the existing ground line to match the cross section of the existing pile jacket. Plan Note 4 indicates use of either removable or stay-in-place forms as acceptable for the extension.

Step 2 (Red): Clean and patch the spalled areas of the existing 6-foot existing pile jackets (shown above existing ground line).



Step 3 (Green): Install the composite wrap in accordance with the provided TSP (epoxy resin/fabric wrap system). The composite wrap extends across the new 3-foot pile jacket extension constructed during Step 1 and the existing 6-foot pile jacket repaired during Step 2. The composite wrap is paid for as pay item 457-70-401 Integral Pile Jacket.

CMA has stated that they intended to construct the project under an “option granted to the contractor” [Exhibit 4, page 96] in accordance with Special Provision 457. They also state that it is their understanding that with the “option granted to the contractor” for selecting the method of constructing the pile jacket protection system, they are not required to install the fiber reinforced composite system (composite wrap) as indicated in the TSP. Within this correspondence CMA stated the following:

“CMA early on expressed to the FDOT the intent to construct the project under the “option granted to the contractor” as stated in accordance with Special Provision 457 Integral Pile Jackets by utilizing permanent stay in place fiberglass forms in lieu of temporary forms as depicted in the contract plans, sheet B1-5 and B2-4, Note number 4, pile jacket extension, “the contractor may use either removable or stay-in-place forms.”

“...CMA is not proposing anything new in construction the pile jacket repairs and its extensions as shown in contract documents and Section 457 of the contract plans.”

“...It is my understanding that with the option granted to the contractor by the executed contract, for selecting the method of constructing the pile jacket protection system neither you or FDOT or the EOR can force the contractor to install the “Wrap System” as indicated in the Technical Special Provisions. This is an option to be exercised by the contractor only.”

Fact: Plan Note 4 refers to the New Pile Jacket Extension described in Step 1 above and states, “The Contractor may use either removable or stay-in-place forms.”

Since the new pile jacket extension must be constructed prior to placement of the composite wrap, the Department has no preference as to which type form the Contractor uses.

Fact: Special Provision 457, Integral Pile Jackets does not provide the Contractor with the option of not installing the composite wrap as called for in the plans. SP 457 specifically states,

“Furnish, fabricate and install a permanent outer form made of durable, inert, corrosion resistant materials and fill the annular space between the pile and the permanent form with portland cement grout, concrete, epoxy compounds or combinations of these materials as indicated in the plans. Use integral pile jackets composed of compatible materials as described above, and install around a pile as indicated on the plans to furnish a durable, corrosion resistant pile protection system.”

Fact: The plans depict use of Class IV concrete (within Note 4) with a minimum compressive strength of 4,000 psi to fill the annular space between the steel pile and the outer form for the pile jacket extensions.

Fact: The plan Notes and Detail B [Exhibit 1, Plan Sheet B1-5, page 20] depict installation of the fiber reinforced composite system in accordance with the Technical Special Provisions for the protection of the existing steel bridge piles.

It is apparent from thorough review of the contract documents in their entirety that the intended pile protection system includes the extension and repair of the existing pile jackets using the fiber reinforced composite system. The plan sheets appropriately identify the locations, character, dimensions and details of the work and the Special Provisions (and TSPs) provide the methods and manner for performing the work.

The Department's intent in specifying use of the fiber reinforced composite system was to provide durable, long lasting protection of the 3-foot pile jacket extensions and the repaired 6-foot existing pile jackets by sealing the joint between the two. CMA's desire to construct the planned improvements without use of the composite wrap appears to be one of preference and its elimination **is not an option provided within the Special Provisions. Any additional costs associated with the use of legal advisors and/or specialty engineers by CMA in an effort to convince the Department to eliminate the use of the composite wrap as the integral pile jacket as depicted within the plan documents is not the responsibility of the Department.**

Fact: The plans fully detailed the pile protection system including the extension and repair of the pile jackets utilizing the composite wrap. The Plans, Special Provisions and Technical Special Provisions **do not** provide CMA with an option, "for selecting the method of constructing the pile jacket protection system" as they have claimed.

Department Summation on Issue 1: The Engineer's recommendation is to deny entitlement to CMA for this issue. Our analysis reveals that there is no contractual basis for CMA's presented position of entitlement to additional costs for use of legal advisors or specialty engineers and that CMA's interpretation of the contract documents with respect to the fiber reinforced composite system is incorrect. We believe that the Disputes Review Board should find NO ENTITLEMENT for this issue and uphold the cited terms of the Contract.

Issue 2: Errors in the plans increased the actual SIP form dimensions from 20" to 30" for the pile jackets. The increase in the cost of the forms is not covered by any other item in the contract, as the pay item Integral Pile Jacket 457-70-401 is a LF item.

Issue 2 Background

The Department has acknowledged this plan error and has agreed to compensate CMA for the additional costs associated with the increased cost to provide the larger forms. The Department and CMA are in agreement on the additional costs related to this issue. The Department is processing a Supplemental Agreement adding the Pay Item 4999-3 – Integral Pile jacket (other)(30-inch) with a quantity of 108 LF and unit price of \$338.54.

Fact: The plans depicted the existing pile jacket diameter at Heardbridge (Bridge 060017) as 20-inches on Plan Sheet B1-5. The plans included Pay Item 457-70-410, Integral Pile Jacket (other)(12-inch) with a quantity of 108 LF for work at this location. The dimension depicted within the plans was found to be in error.

Fact: The actual dimension of the existing pile jacket installation of a 30-inch pile jacket forms.

Fact: The Department acknowledges the error and has agreed to pay the actual material cost of the 30-inch pile jacket forms presented by CMA with applicable mark-ups in accordance with Standard Specification 4-3. Supplemental Agreement No. 4 [Exhibit 5, pages 114 - 132] is currently being processed by the Department.

Department Summation on Issue 2: The Engineer's recommendation is to compensate CMA for costs associated with the plan error. The Department and CMA have agreed to the additional costs and the Department is processing a Supplemental Agreement adding the funds and method of payment for this work. This issue has been resolved and no additional action is required by the DRB.

ISSUE 3: A bid item for Clearing and Grubbing was not provided in the contract. The Contractor expressed a need to perform clearing & grubbing under force account, as magnitude of work is not fully known.

Issue 3 Background

The Department recognizes the need for a Clearing and Grubbing item and is in the process of adding this pay item to the Contract. The plans show Riprap being replaced and expanded into areas of dense foliage. The Department acknowledges CMA cannot prepare the soils or install the new Riprap until clearing and grubbing is complete. The requirements for clearing and grubbing within the project area comply with Section 110 of the Standard Specifications.

The Department has requested cost proposals from CMA for this work. No cost proposals have been provided. In order to minimize impact to the project the Department has prepared a Unilateral Payment Document that is currently in process to add the appropriate pay item and compensate CMA for what the Department believes is a fair and equitable amount.

Fact: Bridge #060017 (Heardbridge) requires the replacement of a portion of the existing damaged Riprap at Bents 1 and 8 [Exhibit 1, Plan Sheet B1-2, page 17]. The cost of removing the damaged existing Riprap, dressing/shaping of the embankment, and placement of the new Riprap is included within the Pay Item 530-1, Riprap, Sand Cement. No clearing & grubbing are required at these locations.

Fact: Bridge #060031 (Lake Branch) requires the extension of Riprap beyond the existing limits of Riprap beneath Bent 10, between Bents 8 and 10 [Exhibit 1, Plan Sheets B2-1, B2-2, pages 23

- 24]. Since the removal and disposal of debris and other material in this area is not included in any other items, the Contractor should be paid for clearing & grubbing in this area.

Fact: No pay item exists for clearing & grubbing. The Department agrees that clearing and grubbing is required and the Contractor should be compensated for this work.

When it has been determined that work that is essential to the completion of the intended scope is required and is not covered by a price in the Contract, an adjustment can be made to the Contract as long as the required work is not a significant change. In such a case the Engineer will determine the basis of payment in a fair and equitable manner in accordance with Standard Specification 4-4, Unforeseeable Work. The plans always depicted the requirement for clearing and grubbing however, based on a simple oversight, the pay item to compensate the Contractor for this work was inadvertently omitted from the contract documents.

Fact: The Department is processing a Unilateral Payment Document for the addition of Pay Item 110-1, Clearing and Grubbing with a unit cost of \$9,353.34 per acre for an estimated ¼ acre area.

Since CMA has not provided the Department with an estimate of cost for clearing and grubbing, the Department has estimated what we believe to be a fair and equitable amount based on the following basis.

The bridges are located in Area 9 (Hardee County) [Exhibit 6, pages 140, 141] where the average unit cost for clearing and grubbing is \$1,898.71 per acre. **The Department's estimate of the clearing and grubbing cost within the Unilateral Payment Document is based upon the average unit cost for Area 6 (Marion, Volusia, Alachua Counties) which is \$9,353.34 per acre** [Exhibit 6, page 150]. The Engineer's estimate of the cost is conservatively high in an effort to be as fair and equitable with CMA as possible.

The Contractor's contention that the magnitude of the clearing and grubbing is not known is inaccurate. Standard Specification 110-2 indicates that clearing and grubbing work includes the removal and disposal of timber, brush, stumps, rubbish, debris, and all other obstructions protruding through the surface of the existing ground and the surface of excavated areas for which other items of the Contract do not specify the removal. The plans depict all areas of the proposed work that require either excavation for the repair and extension of the pile protection system or Riprap. The only area of the work where clearing or excavation is required that are not covered by existing pay items is in the vicinity of Bents 8 and 10 to extend the Riprap.

Department Summation on Issue 3: The Engineer's recommendation is to deny entitlement to CMA for payment of clearing and grubbing based on force accounts. The Department agrees that clearing and grubbing is required and has added this pay item to the contract in accordance with the provisions of the contract based on the Engineer's determination of a fair and equitable cost to perform the work.

GOVERNING SPECIFICATIONS

A complete specifications package is bound separately and provided as Exhibit 9 for reference. Sections of the specifications relevant to these issues are included within Exhibit 3. Below are the applicable excerpts.

Special Provision Sections

457 – Integral Pile Jackets.

457-1 Description: “Furnish, fabricate and install a permanent outer form made from durable, inert, corrosion resistant materials and fill the annular space between the pile and the permanent form with Portland cement grout, concrete, epoxy compounds or combinations of these materials as indicated in the plans. Use integral pile jackets composed of compatible materials as described above, and install around a pile as indicated on the plans to furnish a durable, corrosion resistant pile protection system.”

- *The plans depict construction of a pile protection system that includes the extension and repair of the existing pile jackets. The Special Provisions do not offer the Contractor an option for selecting the method of constructing the pile jackets. Instead, the Special Provisions clearly indicate that the pile jackets are to be installed “as indicated in the plans”. The plans indicate that the pile jackets are to be constructed of the fiber-reinforced composite wrap system detailed by the Technical Special Provisions. The only option provided to the Contractor by the TSP is in the selection of the type of composite casing [Exhibit 9, page 339].*

457-2.1 Forms: “Use forms composed of durable, inert, corrosion resistant material with an interlocking joint along one side that permits the form to be assembled and sealed in place around the pile. Fabricate the forms from fiberglass and polyester resins, having a minimum thickness of 1/8th inch unless otherwise shown on the plans. The form dimensions shown in the plans are minimum dimensions permitted. Upon opening to place around the pile, ensure that the form is capable of returning to its original shape without assistance or damage. Ensure that the inside face of the jacket has no bond inhibiting agents in contact with the cementitious or epoxy grouts. Provide the forms with bonded-on, non-corrosive standoffs, which will maintain the forms in the required positions. Sandblast or score the inside surface of the forms with an abrasive material to provide a texture equal to a sandblasted surface. Equip the forms with a compressible sealing strip at the bottom which will effectively seal the annular space between the pile and form.”

- *While the Special Provision indicates providing a permanent outer form, it is clear from the plan notes and details that the 3-foot pile jacket extension is to be covered by the composite wrap (the integral pile jacket). As such, the Contractor is provided the option of using either a removable or stay-in-place form. The composite wrap outlined in the plans and TSP serves as the (9-foot pile jacket) permanent outer*

form.

Supplemental Specifications

5-2 Coordination of Contract Documents: “These Specifications, the plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in such pay items additional, incidental work, not specifically mentioned, when so shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items.”

“In cases of discrepancy, the governing order of the documents is as follows:

1. Special Provisions.
2. Technical Special Provisions.
3. Plans.
4. Design Standards.
5. Developmental Specifications.
6. Supplemental Specifications.
7. Standard Specifications.

Computed dimensions govern over scaled dimensions.”

- *The plans depict construction of the pile jacket extension and repair including the fiber reinforced composite system. The Technical Specification for the fiber reinforced composite system specifies the specific material properties, products, performance requirements, application procedures, testing requirements, etc. It does not specify the Contractor has the option to eliminate its use as outlined by the plans. The description of integral pile jackets given within Special Provision 457 indicates furnishing materials “as indicated in the plans” and installing them “as indicated in the plans”. The plans, Special Provisions and Technical Special Provisions compliment one another without conflict.*

530-5 Basis for Payment (Riprap, Sand Cement): “Price and payment will be full compensation for all work specified in this Section, including all materials, labor, hauling,

excavation, and backfill. Include the cost of dressing and shaping the existing fills (or subgrade) for placing riprap in the contract unit price for Riprap (Sand-Cement).”

Standard Specifications

1-3 Definitions

Plans: “The approved plans, including reproductions thereof, showing the location, character, dimensions, and details of the work.”

Specifications: “The directions, provisions, and requirements contained herein, together with all stipulations contained in the Contract Documents, setting out or relating to the method or manner of performing the work, or to the quantities and qualities of materials and labor to be furnished under the Contract. “

4-4 Unforeseeable Work: “When the Department requires work that is not covered by a price in the Contract and such work does not constitute a “Significant Change” as defined in 4-3.1, and the Department finds that such work is essential to the satisfactory completion of the Contract within its intended scope, the Department will make an adjustment to the Contract. The Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount.”

- *CMA did not provide the Department with requested cost information related to clearing and grubbing. In the absence of this information the Engineer has fairly and equitably estimated the costs for clearing and grubbing and is adjusting the Contract by adding pay item 110-1.*

5-1.2 Department’s Plans: “Plans consist of general drawings showing such details as are necessary to give a comprehensive idea of the construction contemplated. In general, roadway plans will show alignment, profile grades, typical cross-sections and general cross-sections. In general, structure plans will show in detail all dimensions of the work contemplated. When the structure plans do not show the dimensions in detail, they will show general features and such details as are necessary to give a comprehensive idea of the structure.”

5-4 Errors or Omissions in Contract Documents: “Do not take advantage of any apparent error or omission discovered in the Contract Documents, but immediately notify the Engineer of such discovery. The Engineer will then make such corrections and interpretations as necessary to reflect the actual spirit and intent of the Contract Documents.”

5-12.10 Non-Recoverable Items: “The parties agree that for any claim the Department will not have liability for the following items of damages or expense:

- a. Loss of profit, incentives or bonuses;

- b. Any claim for other than extra work or delay;
- c. Consequential damages, including, but not limited to, loss of bonding capacity, loss of bidding opportunities, loss of credit standing, cost of financing, interest paid, loss of other work or insolvency;
- d. Acceleration costs and expenses, except where the Department has expressly and specifically directed the Contractor in writing, “to accelerate at the Department’s expense”; nor
- e. Attorney fees, claims preparation expenses and costs of litigation.”

110-2 Standard Clearing and Grubbing.

110-2.1 Work Included: “Completely remove and dispose of all buildings, timber, brush, stumps, roots, rubbish, debris, and all other obstructions resting on or protruding through the surface of the existing ground and the surface of excavated areas, and all other structures and obstructions necessary to be removed and for which other items of the Contract do not specify the removal thereof, including septic tanks, building foundations, and pipes.”

110-2.4 Boulders: Remove any boulders encountered in the roadway excavation (other than as permitted under the provisions of 120-7.2) or found on the surface of the ground. When approved by the Engineer place boulders in neat piles inside the right of way. The Contractor may stockpile boulders encountered in Department-furnished borrow areas, which are not suitable for use in the embankment construction, within the borrow area.

530-1 Riprap Description: “Construct riprap composed of sand-cement or rubble (consisting of broken stone or broken concrete) as shown in the plans. When specified in the plans, place bedding stone under the rubble riprap.”

530-5.1 Basis of Payment, Riprap, Sand-Cement: “Price and payment will be full compensation for all work specified in this Section, including all materials, labor, hauling, excavation, and backfill. Include the cost of dressing and shaping the existing fills (or subgrade) for placing riprap in the contract unit price for Riprap (Sand-Cement).”

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

Central to the Department’s position is the fact that the Contract Plans clearly show that the work contemplated includes the installation of the fiber-reinforced composite wrap system and that the fiber-reinforced composite wrap system is to be installed in accordance with the

Technical Special Provision (Plan Sheet B1-5 and B2-4). Special Provision 457 indicates furnishing materials “as indicated in the plans” and installing them “as indicated in the plans” and therefore compliments the Plans and Technical Special Provisions without conflict. No part of the contract documents provided CMA with an option for selecting the method of constructing the pile jacket protection system or for eliminating the use of the fiber-reinforced composite wrap system.

CMA fails to support their position of entitlement for payment of either legal advisors or specialty engineering costs associated with their preference to construct the project without use of the fiber-reinforced composite system as specified by the contract documents.

The following comments are specifically offered in response to CMS’s Position Paper provided on May 29, 2008.

The first paragraph of CMA’s Position Paper states, “*CMA Corporation has proposed to construct the project the same way as when we bid the project until now. Please see Exhibit #1 dated January 30, 2008 and #2 dated April 21, 2008.*”

- It is apparent from the correspondence and CMA’s position paper statements that CMA’s interpretation is based upon a bid price to construct pile jackets that is inconsistent with the intent of the contract documents.
- CMA’s statement confirms that they never intended to construct the fiber-reinforced composite system as shown in the plans and outlined by the Technical Special Provisions. Their bid price does not reflect their cost to perform the work shown in the plans. It reflects an alternative based upon their incorrect interpretation of the contract documents.
- CMA’s bid unit price for the integral pile jacket item [FDOT Exhibit 7, page 159] is \$250.00 per LF. The next lowest bidder’s unit price was \$1,370.00 per LF. This is a difference of 548%. The Contract Award Committee Meeting Minutes [FDOT Exhibit 7, pages 162 through 165] reflect that CMA was contacted concerning “major differences” between their bid and the Department’s estimate. This major difference was not questioned (since only one contract price was found throughout the State during 2007 to compare it to, Exhibit 7, page 169). However, had it been known at the time of the bid review that CMA’s bid price for the integral pile jackets did not include the cost of the fiber-reinforced composite system as specified by the plan documents, the Department might have rejected the proposal in accordance with Standard Specification 2-6, Rejection of Irregular Proposals.

Also within the first paragraph of CMA’s Position Paper, CMA states, “*we interpreted the plans in a way that has been consistent with the interpretations of several professional engineers that we have consulted, including Tallahassee’s and Gainesville’s.*”

- The Department takes exception to this statement. This statement is inaccurate. If CMA’s intent is to infer that FDOT officials agree with CMA’s interpretation of the contract documents, it is absolutely false and it is not supported by the documentation provided within their position paper.

- The Department has accurately identified the intent of the work within the contract plans, Technical Special Provisions and Special Provisions. These contract documents compliment one another. CMA’s collective opinions concerning this matter are for the acceptability of an alternative pile protection system from that shown in the plans. CMA’s efforts to convince the Department to accept this change appear to be based on their incorrect interpretation of the contract documents, which are reflected in their bid unit price.

Within the third paragraph of CMA’s Position Paper, CMA states, *“In the Control of the Work Section 5-2 (page 26 of the contract) indicates the order of the coordination of contract documents, and we followed it.”*

- CMA’s bid unit price is inconsistent with the integral pile jacket system depicted within the plan documents. CMA has inaccurately interpreted the coordination of the contract documents in an effort to support their position. It appears that CMA could not construct the fiber-reinforced composite system depicted within the plans at their bid unit price.
- Article 5-2 states that the Specifications, the Plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. The governing order of documents is outlined for cases involving discrepancies. As summarized below, there is no discrepancy.
 1. The plans depict construction of the pile jacket extension and repair including the fiber-reinforced composite system.
 2. The Technical Specification for the fiber reinforced composite system specifies the specific material properties, products, performance requirements, application procedures, testing requirements, etc. It does not specify the Contractor has the option to eliminate its use as outlined by the plans.
 3. The description of integral pile jackets given within Special Provision 457 indicates furnishing materials “as indicated in the plans” and installing them “as indicated in the plans”.
 4. The plans, Special Provisions and Technical Special Provisions compliment one another without conflict.
- The Department has remained consistent in our interpretation of the contract documents yet, expressed a willingness to review a plan change by CMA in accordance with Specification 4-3.9, Value Engineering Incentive. CMA’s position appears to be the result of the bid price, which does not represent the cost of the system shown in the plans (it appears to represent an unauthorized alternative).

Within the fourth paragraph of CMA’s Position Paper, CMA states, *“To date Sarasota FDOT has come 360 degrees back to the position CMA Corporation position was on January 30,*

2008.”

- The Department takes exception to this statement, as it is not accurate. The FDOT does not agree with CMA’s position as it reflects an inaccurate interpretation of the contract documents.
- The Department has maintained a partnering approach to resolving this issue with CMA. Within e-mail correspondence dated **3/14/08** [FDOT Exhibit 4, page 97-98] the Department expressed their willingness to allow CMA to pursue their proposed changes and the elimination of the fiber-reinforced composite system without having to submit them as a VECP in order to save time.
- On **3/21/08** a teleconference was held involving members of the FDOT, CMA and CMA’s specialty engineer (Kan Mehta & Associates). Discussion points included the doubling of Class IV Concrete quantity resulting from elimination of the fiber-reinforced composite system specified by the plans; CMA’s desire to not pursue the change as a VECP; and the lack of additional hurricane restoration funds to augment the contract.
- On **3/24/08**, Mr. Kan Mehta forwarded a Possible Alternate Proposal from CMA to the Department [Exhibit R-1, pages 5, 6]. CMA’s proposal stated that if the Department would allow CMA to construct the pile jacket repairs per SP 457 without the fiber-reinforced composite system, they would:
 - Not request additional quantities of Class IV Concrete or any other missing items;
 - The total cost would be within the \$1,252,400 bid amount; and
 - **No claims for legal or engineering fees would be made.**
- On **4/4/08**, the FDOT agreed to allow CMA to construct the integral pile jackets using “Riverbend Fiberglass” forms in lieu of the plan specified fiber-reinforced composite system. This agreement was made in the spirit of partnering and based on several contributing factors including the Department’s own effort to communicate with other State officials and industry experts regarding advantages of using the fiber-reinforced composite system. The Department’s Construction Resident Engineer confirmed this by e-mail correspondence dated **4/5/08** [Exhibit R-2, pages 7 - 8].
- Why is CMA still requesting compensation for the specialty engineer after all of the concessions made on the part of the Department? The FDOT is processing a Supplemental Agreement reflecting the above-described changes however; CMA still seeks to be reimbursed for the cost of their specialty engineer. We believe that their current position contradicts the alternate proposal submitted to the Department on 3/24/08 where they had agreed not to pursue specialty engineer costs, is contrary to the agreement confirmed on 4/5/08 and is not supported by the terms of the contract.

SUMMARY

As stated within our Position Paper, the Department has accurately and appropriately interpreted the contract documents with regard to this issue. The plans fully detail the fiber-reinforced composite system and the Contractor should have based his bid price on installing this system. The Plans, Special Provisions and Technical Special Provisions **do not** provide CMA with an option, “for selecting the method of constructing the pile jacket protection system” as CMA has claimed.

Based on the information presented within CMA’s Position Paper, it is clear that they did in fact, include a bid unit price for integral pile jackets that did not involve installation of the fiber-reinforced composite system. CMA’s effort to eliminate its required use is one of preference and is not an option provided within the Special Provisions. Any additional costs associated with the use of legal advisors and/or specialty engineers by CMA in an effort to convince the Department to eliminate the use of the fiber-reinforced composite system as depicted within the plan documents is not the responsibility of the Department.

We recommend that the Disputes Review Board uphold the cited terms of the contract and deny entitlement to CMA for this issue. Our analysis reveals that there is no contractual basis for CMA’s presented position of entitlement to additional costs for use of legal advisors or specialty engineers and that CMA’s interpretation of the contract documents with respect to the fiber reinforced composite system is incorrect.

Regional 1 DRB Findings:

1. Is the contractor entitled to reimbursement of its costs for a specialty engineer, Kan Mehta & Associates, Inc.?

*The Board finds the Contractor **IS NOT ENTITLED** to reimbursement of its costs for a specialty engineer, Kan Mehta & Associates, Inc.*

The Board cites the following supportive facts:

- *The contract documents were confusing, leading to the differing opinions on what methodology should be utilized to construct the project.*
- *No formal claim was ever submitted by CMA for cost recovery and the Department issued a no cost supplemental agreement to change the construction methodology as understood by the Department’s “jacket extension and wrap method”, to the methodology as-bid by CMA, the “full jacket method”.*
- *Therefore, Section 5-12 (as Mehta was not a claims consultant, nor acted as one), nor any other specification precludes the Contractor from recovery;*

however,

- *There was no definitive evidence the Department relied on Mehta's opinions in allowing CMA to build the project in accordance with CMA's as-bid plan, the "full jacket method".*
- *There was no definitive evidence that CMA could not have convinced the Department without the use of Mehta.*
- *The board feels the specialty engineering costs falls under the category of Contractor overhead costs.*

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