

# DISPUTES REVIEW BOARD RECOMMENDATION

30 June, 2008

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Ref: US 41 (SR45), From a Point North of Bonita Beach Road to Old US 41, Financial Project ID: 195737-1-52-01: WPI#: 1114707, Contract No.: T-1022: Lee County: Disputes Review Board hearing regarding entitlement to additional costs associated with the differing site conditions of the existing water and sanitary sewer force mains.

Dear Sirs:

The Florida Department of Transportation, (FDOT), and Astaldi Construction Corporation, (ACC), requested a hearing concerning the above referenced issue.

## **CONTRACTORS POSITION**

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

“The existing water and sanitary sewer force mains located between stations 109+50 (Rt.) and Sta. 114+00 (Rt.) were not as identified with the Contract Drawings Sheet No. 42, 43, and 179 through 186. The discovered location of the existing water main was approximately 6 inches east of the TECO gas main. In November 2004, BSU advised ACC that the line could not be isolated, which required ACC to proceed with the storm drainage pipe installation while the line remained pressurized. This condition affected the rate of production in which the excavation and installation of storm pipe could be achieved.

The water main was previously relocated as it was too close to the gravity wall.

The current location was approximately 6 inches east of the TECO gas main at 30 inches below grade. On or about November 18, 2004, ACC was advised by Bonita Springs Utilities that the line could not be isolated and would remain pressurized during the construction and installation of the storm drainage system. ACC was required to leave the trench shield in place longer than anticipated in order to provide support and protection to the utility and to the safety of its pipe crew. ACC had to backfill the excavated areas to the top of the trench box before advancing the trench box and pipe laying operation, thus causing ACC to work in an inefficient manner.

On March 25, 2005, ACC, in reference to its letter dated December 1, 2004, submitted its formal request for compensation and additional contract time in the amount of \$102,793.03 and eleven (11) days. The request for compensation and additional time was for work performed at the existing water and sanitary sewer force mains that were not shown on the Contract Plans between Sta. 109+75 (Rt) and Sta. 113+00 (Rt), and for the interruption to ACC work caused by the waterline found in conflict with the storm culvert at Station 112+60 (Rt.).

ACC requests this DRB Board recognize that the relocated water and sanitary sewer force mains located between stations 109+50 (Rt.) and Sta. 114+00 (Rt.) constituted a differing site condition pursuant to FDOT Standard Specification clause 4-3.7. ACC Request for Equitable Adjustment (REA) seeks \$64,031.85. ACC requests this DRB Board recognize that ACC is due recovery of its costs associated with this issue as this issue was unresolved at the time the parties entered into Supplemental Agreement SA No. 28.”

## **REBUTTAL**

“ACC did not find in the Department’s attachments the documentation which supports FDOT contention that ACC claim was denied based on ACC use of the “Measured Mile” approach. ACC did find that on August 19, 2005 and on September 13, 2005 KCCS requested ACC to certify its requests for this issue.

ACC proposal request was submitted on March 25, 2005 for \$102,793.03 and 11 days. ACC is of the position that certification of its proposal requests was not required in accordance with Standard Specification 5-12. In fact, Article 5-12 sets forth the requirements for Claims by the Contractor when the compensation requested by the contractor is beyond the amount agreed to by the Engineer (KCCS). Up to and including September 13, 2005, ACC had yet to receive FDOT entitlement for the delay encountered.

ACC proposal request submitted on March 25, 2005 requested compensation for the disruption as a result of installing the drainage pipe in a manner that was not depicted in the Plans and Specifications. ACC request was in the

amount of \$102,793.03 and 11 days. The 11 days were in the period from December 6, 2004, to January 3, 2005.

As part of its Request for Equitable Adjustment (REA) submission, ACC audited its previous cost proposal and found that ACC is due \$64,031.85.

ACC requests this DRB Board to recognize that entitlement is due and requests payment for the amount in dispute of \$64,031.85. In addition, ACC requests this DRB Board to recognize that ACC is also due interest costs in accordance to FDOT Standard Specification section 9-10 "Interest Due on Delayed Payments" for the \$9,564.00 recognized by FDOT to be paid, which as of this date has yet to be paid."

### **DEPARTMENT'S POSITION**

We will state the Department's position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Department's position paper has the following statements and references to document their claim for no entitlement to ACC for

"The contractor submitted a claim for the delays associated with slow production as it relates to the pipe installation in the area identified. Because of the conflicts encountered, ACC attempted to substantiate their claim through loss of production or "Measured Mile" approach. The claim was originally denied on the basis that the Department does not recognize the "Measured Mile" approach as a legitimate technique to derive actual costs as this would have eliminated any lost revenue due to the contractor's own inefficiencies, nor did the Department agree that the requirements of Supplemental Specification 4-3.7 were met which define a differing site condition.

Upon revisiting the issue, the daily reports of construction between 12/06/04 and 01/03/05 (the time frame indicated by ACC for the differing site condition) did reveal delays which occurred on 12/06/05, 12/20/05, and 01/03/05. Therefore, the Department recognizes an impact of **\$9,564.00 and zero (0) days**. This amount is included in Unilateral SA #79 which is currently being processed.

Supplemental Specification 4-3.7 Differing Site Conditions states in part, "During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as

inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work.

Upon written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of the work under the Contract, an adjustment will be made...”

On December 1, 2004 ACC letter 109 notified KCCS of their intent to claim based on the existing water and sanitary sewer force mains not being shown in plan sheets 42, 43, and 179 through 186. ACC stated this was a differing site condition that would impact their productivity because they would be forced to leave their trench shields in place longer than normally required.

Prior to beginning the work, ACC notified this office of a differing site condition with respect to the position of the water and sanitary force mains. However the utility adjustment plan sheets and the Bonita Springs Utilities Utility Work Schedule indicate that the BSU facilities are to be adjusted concurrent with construction.

Because this work was originally contemplated this condition does not differ materially or cause an increase or decrease in the cost or time required for the performance of the work. Therefore, this does not meet the requirements in the definition of “Differing Site Condition.”

As the project continued, it became apparent that the Contractor would not meet an acceptable finish date, and the Department directed ACC to accelerate via Supplemental Agreement #28. In that Agreement, the Department agreed to revisit this issue at a later date.

The Department revisited this issue and discovered that the daily reports of construction between 12/06/04 and 01/03/05 (the time frame indicated by ACC for the differing site condition) did reveal delays which occurred on 12/06/05, 12/20/05, and 01/03/05. Therefore, the Department recognizes an impact of **\$9,564.00 and zero (0) days**. This amount is included in Unilateral SA #79 which is currently being processed. Further details as to the nature of the delays are included in Appendix A-2 of Unilateral SA #79.

There still remains **\$54,467.85 and zero (0) days** in dispute for this issue, due to costs not recognized by the Department.

At this time, the Department's position is that ACC has been duly compensated in full as it relates to this issue. The Department does not believe that ACC is due any of the \$54,467.85 in dispute."

## **FINDINGS OF FACT**

The Board's decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above referenced documents, the hearing, and the following facts.

1. There was a changed condition of the utility locations as shown on the plans.
2. The Department granted 3 days of delays and/or inefficiencies costs for this issue. One of the days, (20 Dec. 2004), was for a conflict with gas line. A conflict with the water main occurred on 6 Dec. 2004 and no compensation was provided. No rationale was provided to the Board why one conflict was compensated and not the other.
3. The Department included \$9,564.00 in Unilateral SA #79 for the 3 days of compensation for the impact of the utility conflicts.
4. The Contractors method/progress of the storm drain installation was impacted by the location of the live water main.
5. The Department recognized that ACC was entitled to additional compensation for the utility impact. The amount due ACC was established by the Department in a teleconference on the 28<sup>th</sup> of February, 2008. The additional compensation was \$9,564.00 and was issued under Unilateral Payment #79. No reason, nor rationale, was provided by the Department in their position papers, or at the hearing as to why they delayed payment to ACC for the impact.
6. Fl. Statutes 215.422 (fy2000) **Warrants, vouchers, and invoices; processing time limits; dispute resolution; agency or judicial branch compliance.**—(b) *If a warrant in payment of an invoice is not issued within 40 days after receipt of the invoice and receipt, inspection, and approval of the goods and services, the agency or judicial branch shall pay to the vendor, in addition to the amount of the invoice, interest at a rate as established pursuant to s. 55.03(1) on the unpaid balance from the expiration of such 40-day period until such time as the warrant is issued to the vendor. Such interest shall be added to the invoice at the time of submission to the Comptroller for payment whenever possible. If addition of the interest penalty is not possible, the agency or judicial branch shall pay the interest penalty*

*payment within 15 days after issuing the warrant. The provisions of this paragraph apply only to undisputed amounts for which payment has been authorized. Disputes shall be resolved in accordance with rules developed and adopted by the Chief Justice for the judicial branch, and rules adopted by the Department of Banking and Finance or in a formal administrative proceeding before an administrative law judge of the Division of Administrative Hearings for state agencies, provided that, for the purposes of ss. 120.569 and 120.57(1), no party to a dispute involving less than \$1,000 in interest penalties shall be deemed to be substantially affected by the dispute or to have a substantial interest in the decision resolving the dispute. In the case of an error on the part of the vendor, the 40-day period shall begin to run upon receipt by the agency or the judicial branch of a corrected invoice or other remedy of the error.*

- 7      *Specification 9-6 states in part: The Engineer will make partial payments on monthly estimates based upon the amount of work that the Contractor completes during the month (including delivery of certain materials, as specified herein below). The Engineer will make approximate monthly payments, and the Department will correct all partial estimates and payments in the subsequent estimates and in the final estimate and payment. The Department will base the amount of such payments on the total value of the work that the Contractor performs to the date of the estimate, based upon the quantities and the Contract unit prices, less an amount retained and less payments previously made. ...*
- 8      *The request for compensation submitted by ACC for the delay constitutes an invoice for payment. The Department reduced this request for payment to \$9,564.00 as the amount due ACC.*
9.      **Specification 5-12.5 Pre-Settlement and Pre-Judgment Interest:** *Entitlement to any pre-settlement or pre-judgment interest on any claim amount determined to be valid subsequent to the Department's receipt of a certified written claim in full compliance with 5-12.3, whether determined by a settlement or a final ruling in a formal proceedings, the Department shall pay to the contractor simple interest calculated at the Prime Rate (as reported by the Wall Street Journal as the base rate on corporate loans posted by at least 75% of the nations 30 largest banks) as of the 60<sup>th</sup> calendar day following the Department's receipt of a certified written claim in full compliance with 5-12.3, such interest to accrue beginning 60 calendar days following the Department's receipt of a certified written claim in full compliance with 5-12.3 and ending on the date of final acceptance.*

**RECOMMENDATION**

The Board finds that there is entitlement to the Contractor for interest due on Unilateral SA. No. 79. This entitlement is based on the above specifications and Florida Statutes.

The Board finds that there is entitlement to the Contractor for this issue.

The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, Chairman   Jack Norton, Member   Frank Consoli, Member

Signed for and with concurrence of all members

A handwritten signature in blue ink, appearing to read "Don Henderson", is written over a horizontal line.

Don Henderson, PE