

DISPUTES REVIEW BOARD RECOMMENDATION

25 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 of direct and indirect costs associated with the Coast Guard Permit issue.

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.

“FDOT was the party responsible for the procurement of the U.S. Coast Guard permit and to provide ACC access to perform contract work. The Project records reflect that the parties agreed to the fifty-six (56) days of additional Contract time for this owner caused delay however the parties did not agree to amount due.

ACC requests this DRB Board recognize that ACC is due recovery of its direct and indirect costs associated with this issue as this issue was unresolved at the time the parties entered into Supplemental Agreement SA No. 28. Further, ACC is due interest costs on the delayed payment in accordance to FDOT Standard Specification section 9-10 Interest Due on Delayed Payments.

On August 6, 2003, ACC was directed by KCCS to delay the start of the Imperial River Bridge widening for thirty (30) days as a result of developments involving the Coast Guard permit.

On February 17, 2004, ACC informed KCCS of its formal notice of intent to claim for the work stoppage caused by FDOT's failure to procure the Coast Guard permits at Imperial River Bridge. On March 26, 2004, KCCS provided ACC with a copy of the approved Coast Guard Permit.

On February 8, 2005, the Department issued a Unilateral Payment for Supplemental Agreement No. 12 in the amount of \$206,094.97 and fifty-six (56) calendar days.

FDOT acknowledged that additional funding was due, and on March 29, 2007 issued Supplemental Agreement (SA No. 75) for \$90,395.11. Nearly seven months later, on October 8, 2007, FDOT issued Unilateral Payment for SA No. 75 for payment. The amount of \$90,395.11 was again acknowledged by KCCS on May 7, 2008 to be paid, however this amount has yet to be paid.

ACC seeks recovery of the \$98,740.31 included in its REA, and interest costs on the \$90,395.11 delayed payment in accordance to FDOT Standard Specification section 9-10 "Interest Due on Delayed Payments".

REBUTTAL

"Several delays affected the Original Finish date of the Project. Some of these delays were not the fault of ACC. Page 2 of the Supplemental Agreement SA #28, Section entitled "Reason for Change" clearly stated that several delays had impacted the completion schedule of the Project. The delays which affected ACC from performing its work were attached to SA#28 and identified as the "List of Outstanding Issues".

Item #5 of SA #28 held the Department to revisit the outstanding claims identified on the "List of Outstanding Issues" and attempt to resolve the contractor's claims within 30 days. This did not occur as over 2 years later on October 8, 2007, FDOT recognized that ACC was due additional funding and issued Unilateral Payment #75 in the amount of \$90,395.11 and 0 days, however this amount has yet to be paid.

As part of its Request for Equitable Adjustment (REA) submission, ACC audited its previous cost proposal in accordance with KCCS August 5, 2005 letter, and found that ACC was due \$304,835.28 for this issue. The amount in dispute is \$98,740.31 (\$304,835.28 - \$206,094.97). ACC did not receive FDOT estimating details to determine the estimating differences.

ACC requests this DRB Board to recognize that additional entitlement is due and requests payment for the amount in dispute of \$98,740.31. 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 \$90,395.11 recognized by FDOT to be paid for SA#75, 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.

"Section 7-2 Permits and Licenses states in part, "Whenever the work under or incidental to the Contract requires structures or dredge/fill/construction activities in 'Navigable Waters of the U.S.,' 'Waters of the U.S.,' and 'Waters of the State,' the Federal, State, county, and local regulatory agencies may require the Department to obtain a permit."

For this project, the Department did not obtain a Coast Guard permit prior to bid. After construction began, the Coast Guard informed the FDOT that a permit would be required. On August 6, 2003, the Department directed ACC to delay the start of the Imperial River Bridge widening. The Coast Guard permit was obtained by FDOT on March 26, 2004. Production piling resumed on March 29, 2004, thereby marking the end of the delay.

ACC submitted a notice of intent to claim on February 17, 2004, and submitted a Request for Change Order on May 5, 2004 in the amount of \$256,030.57 and fifty-two (52) days. Negotiations were not met and on October 12, 2004, ACC revised their claim to \$327,249.69 and 66 days. On that same day, ACC revised the claimed amount again to \$409,574.22 and 56 days.

FDOT analyzed the claim and after negotiations were not met, issued Unilateral SA #12 in the amount of \$206,094.97 and 56 days.

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. Pursuant to that Agreement, the Department revisited this issue and agreed to additional entitlement. Unilateral SA #75 is currently being processed in the amount of \$ 90,395.11 and 0 days.

Unilateral SA #12 compensated ACC for 50% cost for the idle equipment. Upon revisiting the issue, Unilateral SA #75 compensated ACC for the other 50% of the idle equipment due to the fact that the equipment was rented rather than owned, and ACC provided the necessary invoices to show what they were being charged for the rented equipment.

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 \$8,345.20 in dispute."

REBUTTAL

"At this time, the Department's position is that ACC has been duly compensated in full as it relates to this issue. Unilateral SA #75 is being processed on a progress estimate. ACC is not due interest on the amount due to their failure to provide the required backup documentation necessary to revisit the issue in a timely manner pursuant to SA #28."

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. Department did deduct two days of crane time in their entitlement analysis.
2. ACC pointed out in the hearing that the deduction was in error.
3. The Department agreed and said that the crane would be included in their analysis with mark ups.
4. ACC agreed and this closed one part of the issue.
5. Specification 9-10 states that *interest on delayed payments will be made in accordance with Section 337.141 of the Florida Statutes.*
6. FS 337.141 (3) states *"For each day after 75 days, or 30 days after settlement of a claim, the Department shall pay to the Contractor interest at the rate set forth in s.55.03."*
7. The Department issued a Unilateral SA No. 75 in the amount of \$90,740.31 on 8 Oct., 2007.

8. The Department recognized that ACC was entitled to additional compensation for the Coast Guard permit delay. The additional compensation was \$90,395.11 and was issued under Unilateral Payment #75 dated 5 Oct. 2007. The funds were encumbered 28 Sept. 2007. The Department did not compensate ACC the \$90,395.11 until 9 Jun. 2008. No reason, nor rational, was provided by the Department in their position papers, or at the hearing as to why they delayed payment to ACC for the work.
9. 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.*
10. 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. ...*

11. The request for compensation submitted by ACC for the delay constitutes an invoice for payment. The Department reduced this request for payment to \$90,740.31 as the amount due ACC dated 8 Oct. 2007. This amount was not paid until June 2008.
12. 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 60th 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.

ACC did submit their cost for the delay and impacts for the Coast Guard issue. The Department, in their analysis, reduced the compensation requested by ACC. The Department then issued a USA for \$90,740.31 to ACC for the impact. In issuing the USA the Department agreed that ACC was entitled to the compensation.

RECOMMENDATION

The Board finds that there is entitlement to the Contractor for interest due on Unilateral SA. No. 75. This entitlement is based on the above specifications and Florida Statutes.

The Board finds entitlement to ACC for additional compensation. This additional compensation was provided at the hearing when the Department corrected their allocation of the crane time.

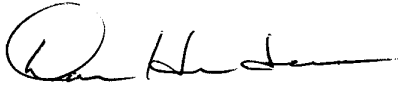
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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 black ink, appearing to read "Don Henderson". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

Don Henderson, PE