

## 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 its direct and indirect costs for the stop work order due to the gas main 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 presented by the Contractor.

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

“On November 20, 2003, ACC was ordered by FDOT to Stop All Work in the vicinity of the Imperial River Bridge as Piore Communications, a subcontractor of Bonita Springs Utilities, had struck and ruptured an 8” main gas line. The road work construction was closed at the area, and FDOT allowed TECO Peoples Gas to keep the leaking gas line on-line while a temporary by-pass line was constructed to run over the Imperial River Bridge. A new 8” gas main line was constructed under the river and completed on January 7, 2004. The water main was removed from the Bridge by January 20, 2004 which released the road work to resume.

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 #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 November 21, 2003, following the rupture of the gas main line, ACC notified KCCS of its intent to claim for a work stoppage due to the disruption of the gas main. ACC also advised KCCS that all amounts would have to be renegotiated and that it intended to make a claim for delays. KCCS acknowledged the claim on that day.

Also on November 21, 2003, ACC issued a formal notice of a request for a preliminary time extension based on the verbal order of to stop from the FDOT. The road area under construction was closed as a result of the work stoppage and a 4" replacement line was run over the bridge

On October 12, 2004, ACC requested a Supplemental Agreement in the amount \$257,539.36 and fifty (50) days. FDOT issued Unilateral SA No. 11 to ACC in the amount of \$230,755.31 and fifty (50) days on January 28, 2005 . Unilateral SA No. 11 was paid by FDOT in its Final Pay Estimate No. 44.

On August 4, 2005, KCCS recognized the amount of \$9,998.46 and zero (0) days. On February 9, 2007, FDOT recognized that additional funding was due and issued Supplemental Agreement, SA No. 58 in the amount of \$20,906.46. The amount of \$20,906.46 was again acknowledged by KCCS on May 7, 2008 to be paid.

On March 24, 2004, ACC provided KCCS with its extra work cost breakdown for the delay through January 20, 2004, in the amount of \$328,829.96 and sixty (60) days. FDOT Unilateral Payment for Supplemental Agreement (USA) No. 11 was issued on January 28, 2005, and recognized fifty (50) days, but only authorized payment for \$230,755.21. FDOT recognized that additional funding was due and issued Supplemental Agreement (SA No. 58) on February 9, 2007, for \$20,906.46. SA No. 58 was not signed by ACC at the time as SA No. 58 did not fully compensate ACC. ACC Request for Equitable Adjustment (REA) was seeking \$68,162.56. ACC is due recovery of these costs as this issue was unresolved at the time the parties entered into Supplemental Agreement SA #28. The amount of \$20,906.46 was again acknowledged on May 7, 2008 by KCCS 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 \$20,906.46 delayed payment in accordance to FDOT Standard Specification section 9-10 "Interest Due on Delayed Payments".

## **REBUTTAL**

“FDOT recognized funding was due and on January 28, 2005 issued Unilateral Payment #11 in the amount of \$230,755.21 and 50 days. 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 nearly two years later on February 9, 2007, FDOT recognized that ACC was due additional funding and issued Unilateral Payment #58 for \$20,906.46 and 0 days, however this amount has yet to be paid.

ACC did not find in the Department’s attachments the alleged ACC backup document supporting the \$10,908.00 MOT cost recognized by the Department.

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 \$298,917.77 for this issue. The amount in dispute is \$68,162.56 (\$298,917.77 - \$230,755.21). ACC did not receive FDOT estimating details to determine the estimating differences. FDOT has not recognized MOT expenses, although it did so in SA#58, and only recognized 40 days of ACC home office overhead costs pursuant to Specification 5-12.6.2.2. ACC should be due recovery of its home office overhead costs in its entirety, as a portion of the 10 days was previously removed under SA#4.

ACC requests this DRB Board to recognize that additional entitlement is due and requests payment for the amount in dispute of \$68,162.56. ACC finds that FDOT has erred, in its 10 day reduction of home office overhead costs, as a portion of the 10 days was removed by KCCS in the previous Supplemental Agreement SA#4 on October 29, 2003. 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 \$20,906.46 recognized by FDOT to be paid for SA#58, 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 additional compensation.

“On November 20, 2003, Piore Communications ruptured an 8” TECO gas main in the vicinity of Imperial River Bridge, thereby delaying the work taking place for the bridge widening. The Department received an intent to claim on November 21, 2003. On March 24, 2004, the Department received a Request for Change Order in accordance with the Contract Requirements stated above in the amount of \$328,829.96 and 60 days.

In accordance with the Specifications, the Department analyzed the claim and offered \$230,755.31 and 50 days. (10 days were deducted from the request in accordance with the Specifications.) ACC did not agree to this amount, therefore, Unilateral SA #11 was prepared in the amount of \$230,755.31 and 50 days.

The Department conducted its second review and recognized an additional \$9,998.46 and 0 days entitlement, but relayed to ACC that even more entitlement could be recognized if ACC would provide required backup to justify extended MOT costs. The documentation was eventually received, and the Department then recognized the additional entitlement to be \$20,906.46 and zero (0) days.

This agreement was reached between the Department and ACC at the project level, and a Supplemental Agreement (SA) was prepared for that amount. ACC’s corporate office then refused to sign it.

Consequently, the Department processed Unilateral SA #58 in the amount of \$ 20,906.46 and 0 days. This brings the total amount recognized by the Department to **\$251,661.77 and 50 days.**

Unilateral SA #11 compensated ACC for 50% cost for the idle equipment. Upon revisiting the issue, Unilateral SA #58 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. Unilateral #58 also takes into account extended MOT costs.

ACC has since audited their records, and revised the amount requested in their Request for Equitable Adjustment. They are currently requesting **\$298,917.87 and 0 days.**

The Department conducted its second review and recognized an additional \$9,998.46 and 0 days entitlement, but relayed to ACC that even more entitlement could be recognized if ACC would provide required backup to justify extended MOT costs. The documentation was eventually received, and the Department then recognized the additional entitlement to be \$20,906.46 and zero (0) days.

There still remains **\$ 47,256.10 and 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 \$47,256.10 in dispute."

### **REBUTTAL**

"ACC is not due interest on the amount due to their failure to provide then required backup documentation necessary to revisit the issue in a timely manner pursuant to SA #28. Specifically, backup documentation was not provided to assess the costs associated with extended MOT."

### **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. At the hearing the Department agreed that they would adjust their latest entitlement analysis dated 19 Oct. 2006 to provide compensation for an additional 10 days of extended MOT.
2. ACC agreed with this proposal.
3. ACC states that interest is due on the on the amount owed in Unilateral SA #58 issued on 9 Feb. 2007. This amount is \$20,906.46. This SA did not settle the issue with ACC.
4. Specification 9-10 states that *interest on delayed payments will be made in accordance with Section 337.141 of the Florida Statutes.*
5. 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."*
6. The Department recognized that ACC was entitled to additional compensation for the stop work order due to the gas main rupture at the Imperial River Bridge. The additional compensation was \$20,906.46 and was issued under Unilateral Payment #56 dated 9 Feb. 2007. The Department did not compensate ACC the \$20,906.46 until 9 June, 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.

7. 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.*
8. 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. ...*
9. The request for compensation submitted by ACC for the delay constitutes an invoice for payment. The Department reduced this request for payment to \$20,906.46 as the amount due ACC dated 9 Feb. 2007. This amount was not paid until June 2008.

10. 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.*

ACC did submit their cost for the delay and impacts for the Sheet Pile issue. The Department, in their analysis, reduced the compensation requested by ACC. The Department then issued a USA for \$20,906.46 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. 58. This entitlement is based on the above specifications and Florida Statutes.

Astaldi is entitled to additional compensation as was discussed the hearing with the Department correcting the days for extended MOT.

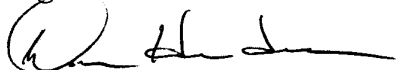
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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



Don Henderson, PE