

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 additional costs and interest on funds that are due for the sheet pile 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.

“ACC purchased the sheet piles in compliance with the Contract document section modulus required. ACC attempted to drive sheet piling at the Imperial River Bridge but could not reach the minimum tip elevation due to the soil condition encountered. The revised Plan sheet T-4 issued on March 12, 2004 contained the soil boring data that was omitted from the bid documents. A re-design of the temporary sheeting was suggested by ACC but not accepted by FDOT on June 17, 2004. ACC ceased driving sheet piling on June 21, 2004 as it could not achieve the minimum tip elevation with the specified material purchased. On July 1, 2004, ACC resumed driving sheet piling and still only achieving a 1.0 meter penetration. A final solution was arrived on July 20, 2004 to eliminate the soil anchors, which required ACC to construct an earthen

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ACC has submitted its cost proposal for the lost time and cost caused by delay. The Department has not fully compensated ACC for its costs. ACC requests this DRB Board to recognize that ACC is due recovery of its costs associated with this delay 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 June 7, 2004, a site meeting was held to review the temporary sheeting piling in place and determine if a re-design was required. On June 17, 2004, FDOT informed ACC that a re-design would not be issued, and that ACC was instructed to install all sheeting in full compliance with the specifications and to ensure that the piling would be driven to the minimum tip elevation as indicated in the Plan.

KCCS entitlement review attached to Unilateral Payment No. 13 reported that ACC resumed driving the sheet piles on July 1, 2004 still only achieving penetration of 1.0 meter. A final solution was arrived on July 20, 2004 prompting ACC to eliminate the soil anchors but requiring the construction of an earthen berm.

On February 2, 2005, FDOT issued Unilateral Payment for Supplemental Agreement No. 13 in the amount of \$58,185.19 and nine (9) days. FDOT acknowledged that additional funding was due, and on October 8, 2007 issued Supplemental Agreement No. 74 for \$2,560.27. SA No. 74 was not signed by ACC at the time as the total of both SA No. 13 and SA No. 74 did not fully compensate ACC for its unabsorbed overhead expenses. ACC Request for Equitable Adjustment (REA) was seeking \$3,993.36. 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.

The \$2,560.27 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 \$3,993.96 included in its REA, and interest costs on the \$2,560.27 delayed payment in accordance to FDOT Standard Specification section 9-10 "Interest Due on Delayed Payments."

REBUTTAL

"The total funding released by the Department for Unilateral SA#13 and SA#74 was \$60,745.46 and 9 days. To date ACC has only been paid for SA#13, or \$58,185.19 and 9 days.

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 \$62,178.55. The amount in dispute is \$3,993.36 (\$62,178.55 – \$58,185.19). ACC did not receive FDOT estimating details to determine the estimating differences. ACC contends that FDOT not recognized the MOT expenses in their entirety.

ACC requests this DRB Board to recognize that additional entitlement is due and requests payment for the amount in dispute of \$3,993.36. ACC finds that FDOT has not recognized in its entirety ACC MOT expenses. 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 \$2,560.27 recognized by FDOT to be paid for SA#74, 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 temporary sheet pile issue.

“The contractor submitted a claim for the delays associated with the installation of a temporary sheet pile wall in the vicinity of the Imperial River Bridge.

The plans called for the installation of a temporary sheet pile wall from Station 85+40 to 86+75 Lt. for the construction of a drainage outfall. The minimum tip elevation called for in the plans is -3.368m. Plan Sheet T-1 details the section modulus for steel sheets. The Contractor purchased sheet piles based on that data that exceeded the minimum requirements shown in the plans. Plan Sheet T-4, which contains the soil boring data, was omitted from the bid documents. The contractor requested this information and it was provided on March 10, 2004. Prior to commencement of the work, the Contractor stated that based on the information on Plan Sheet T-4, there appeared to be a dense layer that might prevent him from achieving minimum tip elevation of -3.368m. During driving operations, absolute refusal was achieved at +1.0m. The Designer of Record and the FDOT Structures Department were consulted and an alternative method of construction was reached. On October 15, 2004, the contractor submitted a request for compensation of lost time and money due to the delay.

The Department performed its original review of the claim which resulted in an offer of \$58,185.19 and nine (9) days to ACC. ACC refused to sign the SA, therefore KCCS processed Unilateral Supplemental Agreement No. 13 in the amount of \$58,185.19 and nine (9) days. This USA was processed and paid for on Progress Estimate No. 19 dated 02/14/05.

The Department conducted its second review and recognized an additional \$2,560.27 and 0 days entitlement. ACC refused to agree to this offer. KCCS then processed USA No. 74 in the amount of \$2,560.27 and zero (0) days. This additional entitlement brings the total recognized by the Department to **\$ 60,745.46 and 9 days.**

Unilateral SA #13 compensated ACC for 50% cost for the idle equipment. Upon revisiting the issue, Unilateral SA #74 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 #74 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 **\$ 62,178.55 and 0 days.**

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 \$1,433.09 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 #74 is being processed on a progress estimate....The amount of Unilateral #74 would have actually been higher had an error in manpower from the original Unilateral SA #13 not been found. Therefore, the Department can find no additional entitlement."

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. During the hearing discussion took place regarding the idle crane time on 24 Jun. 2005 and 25 Jun. 2005.

2. The Department reconsidered the compensation for the two days of crane time.
3. Unilateral SA #74 was issued on 8 Oct., 2007 for \$2,560.27 for costs recognized by the Department. This USA was paid 9 June, 2008.
4. Funds were approved for USA #74 on 28 Sept. 2007.
5. The Department recognized that ACC was entitled to additional compensation for the sheet pile impact. The additional compensation was \$2,560.27 and was included in Unilateral Payment #74 dated 8 Oct. 2007. The funds were encumbered 28 Sept. 2007. The Department did not compensate ACC the \$2,560.27 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.
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 sheet pile delay constitutes an invoice for payment. The Department reduced this request for payment to \$2,560.27 as the amount due ACC dated 8 Oct. 2007. This amount was not paid until June 2008.
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 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 Sheet Pile issue. The Department, in their analysis, reduced the compensation requested by ACC. The Department then issued a USA for \$2,560.27 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 the interest due on USA #74. Our recommendation is based on the above facts, specifications and Florida Statutes.

The monetary and time issue was settled at the hearing as both parties agreed to the 2 days of crane time, 6-24-05 and 6-25-05.

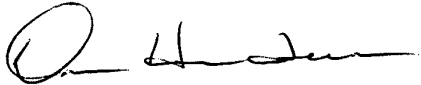
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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", written in a cursive style.

Don Henderson, PE