

DISPUTES REVIEW BOARD RECOMMENDATION
Water Use Permit Delay

18 July, 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 contract time and recovery of costs for the Water Use Permit Delay.

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 proper Water Use Permits to cover all necessary Project work on site. On December 14, 2005, ACC was directed to stop dewatering operations while the Department procured the necessary Water Use Permit. The suspension of ACC’s dewatering operation disrupted the drainage pipe installation work. The Department obtained the permit on December 29, 2005, such that ACC was able to resume the dewatering operations required for the drainage work.

On December 15, 2005, KCCS reiterated the events of the previous day and directed ACC to cease the dewatering operations within the Project until the dewatering permit issue was resolved. ACC was requested to maintain records of the impacts the shutdown would have on its construction work.

On December 21, 2005, KCCS reiterated that S.F.W.M.D. had requested all pumping for dewatering operations to stop due to the lack of a dewatering permit. KCCS noted that the storm sewer installation was a critical activity and failure to complete the storm sewer works could impact the completion date of the Project. In an effort to expedite the permit application process, KCCS requested ACC pay for the permit application.

On December 29, 2005, ACC resumed its dewatering operations.

On April 25, 2006, ACC issued its cost proposal the Water Use Permit delay in the amount of \$55,681.36 and 15 days of additional Contract time.

KCCS entitlement analysis of May 11, 2006, recognized that ACC was due \$30,218.26 and 7 days for the Water Use Permit delay.

On October 4, 2006, FDOT issued Unilateral Payment for Supplemental Agreement (SA) No. 51 which included payment for the Water Use Permit delay in the amount of \$30,218.26 and 0 days.

On March 14, 2008, the Department recognized that additional funding was due in the amount of \$5,291.82 and 2 days. The Department did not provide an analysis detail of its additional funding and Contract time recognized.

The FDOT Standard Specifications for Road and Bridge Construction article 7-2.2 bound FDOT to secure all permits necessary for work on the Project and its surrounding waters from the Federal, State, county and local regulatory agencies governing them prior to commencement of the project in April of 2003.

On December 14, 2005, ACC had to stop its dewatering operations in order for FDOT to secure the necessary permit. The permit was obtained fifteen (15) days later, on December 29, 2005, at which time ACC resumed its dewatering operations and proceeded with the critical storm sewer pipe installation work. The storm sewer work was acknowledged by KCCS to be critical and a controlling item of work in its letter of December 21, 2005.

ACC requests this DRB Board to recognize that ACC is due additional entitlement for this issue. ACC seeks the additional Contract time recognized in its cost proposal and recovery of the unpaid portion for its extended overhead and MOT costs associated with the delay.”

REBUTTAL

“A copy of the submittal for the SWFMD permit application was sent by KCCS to ACC on December 16, 2005. On December 19, 2005, ACC started the excavation for the sediment basin required for, the dewatering program.

On December 21, 2005, KCCS confirmed reimbursement for the dewatering permit including extra contractual erosion control devices would be made

through a Field SA. The formal confirmation of a Field SA released ACC to begin procurement of the additional erosion control devices and establish an account with the "Floc Log" supplier (ACF environmental).

The "Floc Logs" were delivery by December 28, 2005, upon which ACC began the installation of the sediment basin and silt fence. On December 29, 2005, ACC resumed its dewatering operations.

ACC requests this DRB Board to recognize that ACC is due entitlement for this issue. ACC seeks the additional contract time recognized in its cost proposal and recovery of its extended overhead and MOT costs associated with the delay. ACC requests this DRB Board to recognize that ACC is also due interest costs in accordance with to FDOT Standard Specification section 9-10 "Interest Due on Delayed Payments".

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 water use permit delay.

"On December 15, 2005, in accordance with the authority of SFWMD, a stop work order was issued to ACC for discharging turbid water into Spring Creek. Immediately, ACC, KCCS, and Department personnel cooperated and worked very hard together to prepare the permit application and it was submitted to SFWMD the very next day. Seven (7) days of delay were associated with the approval process and to acquire the necessary materials to perform the work with the exception of the floc logs, which were a required part of the permit. (Floc logs are a gelatinous material that is pinned down to the ground for the purpose of discharged water to run over them. They cause erodibles to coagulate and subsequently settle out, thus reducing the turbidity.) We were told by ACC personnel that the floc logs were immediately available from a Jacksonville manufacturer. However, for some unknown reason, the ACC corporate office refused to purchase the floc logs, even though the Department agreed to reimburse the contractor for the cost and shipping. This lack of cooperation by ACC caused an additional eight (8) days of unnecessary delay.

Therefore, in the Department's original analysis, ACC had already been paid for all costs associated with the Water Use Permit delay: the cost of constructing the settlement pond, the cost of the materials, and the indirect costs for seven (7) days of delay.

Upon revisiting the issue, however, an additional two (2) days were recognized with an associated entitlement of \$5,291.82. This was included as part of Unilateral SA #79.

As ACC was the cause for the additional delay for refusing to acquire the necessary and available materials, no further entitlement is justified.

At this time, the Department's position is that ACC is due no additional entitlement for this issue. It can be shown by our project records that the additional entitlement sought by ACC is not justified because they caused themselves eight (8) days of unnecessary delay due to their own failure to procure the materials required by the permit (namely, the floc logs) and have them installed prior to resuming the drainage installation."

REBUTTAL

"ACC acknowledged the \$30,291.26 granted in USA #51. They have also acknowledged the \$5,291.82 shown in the final settlement offer letter. That letter offered two (2) days. However, in processing USA #79, KCCS recognized that seven (7) days should have been added to USA #51. Therefore, on USA #79, the seven (7) were added to the Unilateral, bringing the total number of days granted for this issue to nine (9).

As stated in the Department's position paper, the additional days of delay were caused by ACC in their refusal to purchase the required materials in a timely manner for this issue. Therefore, no additional entitlement is due."

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. The Department under Standard Specification 7-2.2 *"Work or Structures in Navigable Waters of the U.S., Waters of the U.S., Waters of the State, was to secure all permits necessary for work on the Project and its surrounding waters from the Federal, State, county and local regulatory agencies governing them prior to commencement of the project."*
2. Considering that this issue took place during the Christmas holiday season the permits, and then the required "Floc Logs", were obtained in a reasonable time.
3. ACC restarted their dewatering operation the day following the delivery of the "Floc Logs" (December 29, 2005).

4. Specification 9-6, Partial Payments states in part: *"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."*
5. Specification 9-10 Interest due on Delayed Payments states the following: *"The Department will determine and pay any interest due the Contractor for delays in final payment in accordance with Section 337.141 of the Florida Statutes."*

RECOMMENDATION

The Board finds that there is entitlement to the time and associated costs as requested by ACC.

The Board does not find entitlement to ACC for interest on this issue. The amount of compensation was not recognized by the Department until June 2008, and there has been no final payment paid on this contract. This recommendation on interest is different from our earlier recommendation due to the fact that it did not have a unilateral agreement where the Department agreed to compensation and did not make timely payments.

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