

DISPUTES REVIEW BOARD RECOMMENDATION
ISSUE #21 UTILITY CONFLICT S-533

21 August, 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 unpaid
costs associated with a Utility conflict at S-533.

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.

“On Saturday, March 11, 2006, ACC encountered a conflict with an existing utility while attempting to install the drainage structure S-533. ACC remobilized its drainage crew to a different area while the conflict could be resolved by the utility owner. ACC informed KCCS of the conflict on March 13, 2006.

On March 14, 2006, KCCS informed ACC that the utility owners, RCS and BSU were notified.

On March 20, 2006, ACC confirmed that the existing utility encountered belonged to Bonita Springs Utility (BSU). ACC reminded KCCS that the ACC

drainage crew had demobilized from installing the S-533 structure due to the conflict, and that the delay would force its sidewalk subcontractor to skip over the affected area so as to progress with his work. The utility conflict at Station 125+55 would impede the progress of releasing the traffic into the 6 lanes north of Sta. 114+00.

On March 23, 2006, Stevens & Layton, subcontractor to BSU, diverted force main and cut & capped abandoned water main to resolve the conflict at structure S-533.

On March 28, 2006, ACC provided its cost proposal for the utility conflict encountered in the amount of \$30,881.21, and 10 days of additional Contract time, as the conflict directly impacted the completion of the roadway work.

On March 30, 2006, FDOT issued Work Order 2999-26-05 in the amount of \$2,104.45 and 0 days. On October 14, 2006, the Department issued a Unilateral Payment for SA No. 51, including payment for the Utility conflict at structure S-533 in the amount of \$2,104.45 and 0 days.

On December 6, 2006, KCCS recognized that ACC was due 10 additional Contract days. However, on December 21, 2006, KCCS withdrew its offer of the 10 days previously recognized.

The record is clear that the installation of structure S-533 and subsequent completion of the drainage system installation was disrupted by an existing Bonita Springs Utility (BSU) utility, thus delaying the completion of the Road Works (ditch swells/side walks) in this area. The utility was encountered on March 11, 2006. The ACC Daily report of that day confirmed that the drainage crew had encountered the conflict. FDOT Controlling item of Work form for the week also confirmed that the drainage work was a controlling item of work.

ACC requests this DRB Board to recognize that ACC is due entitlement for this issue. ACC seeks to recover the unpaid portion of its cost proposal and the indirect costs associated with the time extension recognized by the Department. ACC seeks this DRB Board to recognize that should entitlement be due, then ACC is also due interest costs in accordance to FDOT Standard Specification section 5-12.5 "Pre-Settlement and Pre-Judgment Interest" for the amounts recognized."

REBUTTAL

"The Department fails to recognize that the Department, not ACC, was the party responsible to coordinate the relocation of the existing utilities with respect to Utility owners in advance of the Contract work performed the Contractor. In fact, the Department recognized its responsibility and provided its commitment to resolve these issues under the Acceleration Agreement SA

No. 28. Item #2 of the SA No. 28 committed the Department to perform “potholing” in advance of ACC underground work so as to locate the interferences.

The language included in Attachment A, (SA 28), applies to the “Bonus” Payments only, and is in contradiction to Article 2.d of the Acceleration Agreement, which clearly defines that future impacts encountered by the Contractor following April 18, 2005 would be administered in accordance to the Contract.

Further, ACC contends that the Department has waived its rights to enforce the added language cited by the Department and included in the Acceleration Agreement SA No. 28 as the Department did recognize additional Contract time following the execution of the Agreement for utility conflicts, some of which have been presented and recognized by the DRB, for weather days after the execution of the Acceleration Agreement and for Supplemental Contract Agreements such as USA No. 44 recommended by KCCS on August 17, 2006 for 3 days, USA No. 48 recommended by KCCS on June 23, 2006 for 9 days, and USA No. 53 recommended by KCCS on October 24, 2006 for 25 days.”

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 Utility conflict at S-533.

“ACC is claiming for \$29,593.48 and twelve (12) days for delays associated with a utility conflict at S-533 (REA Volume 1, page 125).

On 3/11/2006 a force main conflict was encountered while attempting to set the u-end wall at S-533. The Contractor was required to demobilize men and equipment and mitigate a delay in accordance with Article 5-12.6.2.1 of the Supplemental Specifications. After the conflict was resolved, the Contractor remobilized to the scene.

The Contractor submitted a cost proposal of \$30,627.90 and a request for a ten (10) day time extension. This proposal incorrectly inflated labor rates by including per diem and hotel costs. Also equipment was listed as standby that was not authorized by the Engineer. Subcontractor mobilization and demobilization charges were applied that were not justified. This proposal also included \$23,903.76 for overhead. Supplemental Specification 5-12.6.2 allows

compensation for indirect impacts and jobsite overhead provided that a delay to a controlling item of work is greater than ten (10) days and is caused solely by the Department. This delay was caused by a third party's (Bonita Springs Utilities) failure to accurately identify locations of their facility to the DOR during the design phase. In addition BSU was not able to quickly mobilize forces to eliminate the conflict after notification. Thus this cost is not reimbursable. The Engineer's estimate of \$2,104.45 took into account only the labor and equipment costs incurred that could not reasonably be mitigated in accordance with Article 4-3.2 of the Supplemental Specifications. Therefore the Engineer's estimate was the basis for payment

No time extension was considered. This extra work did not meet the requirements for entitlement as expressed by Supplemental Specification 4-3.2 (e)."

REBUTTAL

"The Department performed potholing in advance of the ACC underground work at numerous locations. There is no record on file where ACC requested potholing in the vicinity of S-533.

ACC contends that the work at S-533 was a controlling item. They have failed to provide sufficient evidence of this statement. ACC did not provide a CPM schedule showing the work to be critical, nor did they provide a controlling item of work form, signed and agreed to by the project administrator that the work was controlling.

The Department did recognize a cost of \$2,104.45 and zero (0) days for disruption. As required by specification 5-12.6.2.1 of the Supplemental Specifications, the Contractor is required to demobilize labor and equipment and mitigate delay. This is what occurred...Our analysis of the schedule does not reveal that the work associated with S-533 to be critical."

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 conflict with the drainage structure S-533 installation and an existing utility line. ACC did notify KCCS of the conflict.
2. ACC did move their drainage crew to different location while conflict was resolved.

3. FDOT Controlling item of work showed drainage to be a controlling item of work.
4. March 23, 2006 the relocation of utility (BSU) was completed.
5. In a December 6, 2006 letter from KCCS they recognized that the request for 10 days time extension from ACC was reasonable and accurate. This letter did not state that it was a settlement offer nor did it have a timeframe for response from ACC.
6. In a December 21, 2006 KCCS rescinded the offer of 10 days time for this conflict.
7. In the Departments position paper they recognized and stated that this work was a controlling item of work. Therefore Supplemental Specification 4-3.2 is applicable.

RECOMMENDATION

The Board is unable to express an action or opinion, nor make a recommendation, concerning a general disruption to the contract on any single issue, but must wait to review the general disruption claim, if any, as a whole before making any recommendations as to entitlement or quantum.

The Board finds that there is entitlement to ACC for the S-533 drainage structure issue. This entitlement is based on the work being a controlling item of work. Also the Department recognized that the request for time (10 days) was reasonable and accurate.

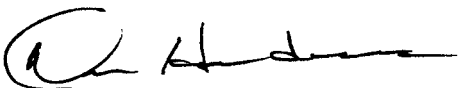
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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