

DISPUTES REVIEW BOARD RECOMMENDATION
ISSUE 25 BAY COMMONS DRIVE

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
additional costs associated with the Bay Commons Drive 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.

“The roadway elevations shown on Contract drawing sheet 34 were incorrect. KCCS provided the correct elevations to ACC on May 5, 2005, and the Temporary Easement for the turnout to Bay Commons Drive on May 26, 2005, allowing ACC to perform the modified work. On January 10, 2006, FSA 2-999-25-10 was issued which addressed the means of Payment for the extra work. The late release of funding for the extra work and the unrecognized days of impact by the Department affected ACC revenue curve and progress payment that was being measured against the monthly bonus payment provision included in the SA No. 28 Acceleration Agreement article 3, thus contributing to ACC not achieving the monthly revenue milestone. The disruptive effect of funding contributed to ACC’s ability to complete the remaining Contract work.

On December 6, 2006, KCCS recognized that ACC was due a Contract time extension for only 6 of the 7 days included in ACC cost proposal. However, on December 21, 2006 withdrew its offer of the 6 days previously recognized.

On December 10, 2004, in an internal electronic message, the Department recognized that the elevations shown on plan view sheet 34 were incorrect and provided to a FDOT representative the correct elevations by electronic message. On May 5, 2005 some 5 months later, KCCS forwarded the electronic message and directed ACC to proceed with the driveway turnout road work with the correct elevations provided, but did not recognize that a Temporary Easement would be required to allow ACC to work outside of the right of way.

By May 14, 2005, ACC had yet to receive a sufficient response by the Department with regards to the roadway grading at Bay Commons Drive, and was prevented from stabilizing the sub-grade from Station 95+66 to Station 95+96Lt. ACC notified KCCS of its intent to recover any additional costs associated with the delay.

On May 26, 2005, KCCS informed ACC that the Temporary Easement for the turnout to Bay Commons Drive had been executed which released ACC to begin construction in the area.

On July 25, 2005, ACC submitted its cost proposal for the additional roadway grade work at Bay Commons Drive in the amount of \$11,464.18 and 7 additional Contract days.

Daily records reflect that the preparatory work at the Bay Commons Drive Area was performed in 8 days from August 10, 2005 to August 16, 2005, and on August 20, 2005.

On January 10, 2006, FDOT issued Field Supplemental Agreement (FSA) 2-999-25-10 to ACC in the amount of \$11,294.76 and 0 days for the construction of a new driveway connecting the outside limits of the Project at Bay Commons Drive, Station 95+80 Lt. FSA 2-999-25-10 included KCCS' January 9, 2006 entitlement analysis, which noted that no time extension was considered as the extra work was deemed not to meet the requirements of Supplemental Specification 4-3.2 (e).

On June 19, 2006, the Department issued Unilateral Payment for SA No. 47 in the amount of \$11,294.76 and 0 days.

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

REBUTTAL

“The roadwork for Bay Commons Drive was commonly reported by ACC Superintendent to be located at Station 80+25 to 82+93, at Station 91+60 to 93+20, at Station 90+00 to 93+00, and at 90+00 to 91+27.

KCCS has recognized only 5 of the 8 days claimed by ACC in its REA. KCCS, failed to recognize 3 days of work at Bay Commons Drive. These 3 days are supported by ACC Daily reports which reflect that ACC performed roadwork at Bay Commons Drive on August 18, 2005, reported as median widening at Station 80+25 to Station 82+93; August 19, 2005, reported as Lt. roadway widening between Station 91+62 to Station 93+20; and August 20, 2005, with the embankment work between Station 93+00 to 98+00 Lt..

ACC requests this DRB Board to recognize that ACC is due additional entitlement for this issue. FDOT recognized that ACC was due funding and issued Unilateral Payment for SA No. 47 for the extra work. FDOT did not recognize the additional Contract time to perform the extra work. ACC seeks to recover the 7 compensable days, 6 of which were recognized by the Department and later rescinded. ACC seeks this DRB Board to recognize that should entitlement be due, then ACC is also due interest costs in accordance with FDOT Standard Specification section 5-12.5 “Pre-Settlement and Pre-Judgment Interest” for the amounts recognized.”

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 Bay Commons Drive issue.

“During Construction it was noticed that vehicles exiting the Bay Commons Drive entrance were “bottoming out” at the R/W connection. The DOR was requested to provide a new profile that would allow for a smooth transition and a temporary easement was acquired to allow for construction outside the RW.

ACC originally submitted a cost proposal of \$11,464.18 and zero (0) contract days for additional grade work at Bay Commons Drive. Within the proposal ACC recognized the work would take an estimated seven (7) days but added that these days are addressed in the Acceleration Supplemental Agreement. KCCS accepted the Contractor’s Cost Proposal but reduced it by \$169.42. The

bond was deducted because this work was to be paid as a Field Supplemental Agreement and bond was already accounted for in the initial contingency pay item.

A review of the REA indicates ACC is requesting \$18,037.75 and 8 days. The REA stated that the work had been done from August 10, 2005 to August 20, 2005. However a review of the Inspector Daily Reports indicated that the work was accomplished on the following days: 8/10/2005, 8/11/2005, 8/12/2005, 8/15/2005 and 8/16/2005. The SRT 6 schedule update indicated that activity RW1473 Const. Bay Commons Drive Intersection had an early start of September 1, 2005 and an early finish of September 8, 2005 with -2 days of float. We can find no further entitlement for this claim and therefore our position remains unchanged.”

REBUTTAL

“ACC's position is that they are due additional entitlement of eight (8) days and associated indirect costs in the amount of \$18,037.75. Their position is that the work done at Bay Commons Drive was a controlling item of work.

This office has reviewed the Position Paper # 25 from Astaldi Construction Corporation and takes exception to some of the statements as they were presented. The first sentence of ACC's position paper states that the roadway elevations on sheet 34 were incorrect. In addition, a copy of an e-mail in ACC's Position paper, indicates elevations were reasonably close to field elevations. What was explored was the opportunity to make a smoother transition for the community. ACC agreed, the easement was provided, and a very small quantity of curb as well as limerock base and asphalt were required to accomplish this task. Contract pay items were used to compensate for additional quantities.”

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 recognized that the driveway into Bay Commons needed to be modified to accommodate larger vehicles. ACC was notified.
2. On May 5, 2005 KCCS directed ACC to proceed with modifications.
3. The Daily Work Report from KCCS verifies that work in the area of Bay Commons Drive did take place on 8/11/2005, 8/12/2005, 8/15/2005, and 8/16/2005. The same reports show that paving work took place in

this area on 10/03/2005 and 10/04/2005. The report has a check mark that implies that no staff was present for this operation. The Board does not know if the asphalt work was for Bay Commons or the main roadway. Neither the Department nor ACC had anyone at the hearing to present the facts of the October work. Therefore, the Board takes the work in October on Bay Commons Drive as factual.

4. The modification to Bay Commons was not listed as a Controlling Item of Work. The contract was not in delinquency at this time; therefore, the accepted schedule dictates the controlling items of work.
5. The paving on 10/03/2005 and 10/04/2005 was shown as a controlling item of work. The paving work was part of the Bay Commons Drive Modifications.
6. The schedules that were given to the Board, SRT-5 (data date 7/31/05) and SRT-6 (data date 8/14/05) were reviewed for this issue. SRT-5 showed activity RW1470 with a successor of RW1471 with a finish/start relationship with no lag. Both activity RW1470 and RW1471 were shown on the critical path. SRT-5 did not show activity RW1473. SRT-6 added activity RW1473, with a duration of 7 days, between activities RW1470 and RW1471. On SRT-6 the relationship between RW1470 and RW 1473 is shown as Finish/Start with a lag of 3 days. The relationship between RW1473 and RW1471 is shown as Start/Start with a lag of 4 days. All three of these activities are shown as critical path activities, but none of these activities were completed on the Data Date of SRT-6. At this time SRT-5 was the controlling schedule, as referenced by KCCS, but since it did not include activity RW1473 then we must look at KCCS's schedule SRT-6 shown as an exhibit in their position paper, and previously furnished to the Board.
7. In a December 6, 2006, letter KCCS recognized that the request from ACC for a contract extension for the Bay Commons Drive modification was reasonable and accurate. Schedule SRT-6 indicates that the work was critical. This letter did not state that the offer was a settlement offer or that a time constraint was associated with the offer.
8. In a December 21, 2006, letter KCCS rescinded the offer of a contract time extension for the Bay Commons Drive modification.
9. The Department did compensate ACC for the direct cost of the modification in Unilateral Payment No. 47.

RECOMMENDATION

While the activity, Construct Bay Commons Drive, was not shown as a controlling item of work on the Department's Controlling Items of Work, it is obvious from the SRT-6 schedule that the activity was on the critical path. The Department in their letter dated December 6, 2006, found that the request for time from ACC was reasonable and accurate. The Board finds that there is entitlement to the time requested by ACC.

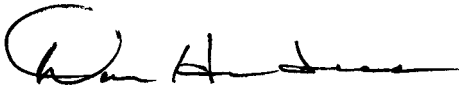
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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