

DISPUTES REVIEW BOARD RECOMMENDATION
ISSUE 26 TRUNCATED DOMES

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 additional entitlement
to Truncated Domes 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.

“On June 2, 2006, nearly one month before the amended July 8, 2006 Final Contract Completion date, KCCS recognized funding for the installation of 24 Detectable Warnings on Walking Surfaces. On January 5, 2007 the Department again added an additional 38 Detectable Warning on Walking Surface mats to ACC’s Contract. The procurement and installation of the additional 38 mats was added 181 calendar days after the amended Final Contract Completion date and during the same period in which the Department was assessing Liquidated Damages against ACC. The Department has failed to recognize this time in accordance to article 8-7.3.1 and 8-7.3.2. The late addition of the extra work contributed and disrupted ACC’s ability to complete the remaining Contract work.

On July 25, 2005, ACC was advised of the Department's desired to modify the contract by adding developmental specification 527 - Detectable Warnings on Walking Surfaces. ACC was requested by KCCS provide a unit price for 20 detectable warning surfaces that would be included in the proposed pay item 2903-527-1.

On October 10, 2006, the Department issued Unilateral Payment for SA No. 44 which included payment for 24 Detectable Warning on Walking Surfaces mats in the amount of \$17,383.20 and 0 days.

On January 5, 2007, KCCS requested ACC's proposal for the installation of an additional 38 mats that were not included in the previous USA No. 44. On January 26, 2007, ACC submitted its cost proposal for the additional 38 mats in the amount of \$22,340.16, or \$587.89 per mat and a time extension through to the completion of the additional work that was being added to its Contract.

KCCS' entitlement analysis of February 1, 2007 estimated a unit cost of \$502.90 per mat. KCCS did not recognize that ACC was due a time extension for the extra work. On March 15, 2007, FDOT issued Unilateral Payment for SA No. 72 in the amount of \$19,110.20 and 0 days for the installation of 38 additional detectable warnings on walking surfaces.

The installation of the additional 38 mats was performed over a period of 10 days during the period in which the Department was assessing Liquidated Damages. ACC contends it is due a time extension for the added Contract work of 191 calendar days, of which 181 calendar days (July 8, 2006 to January 5, 2007) are non-compensable, and 10 compensable calendar days, representing the time to perform the additional work.

This Contract time extension entitles ACC to relief from the liquidated damages imposed. It is an established principle that FDOT cannot recover liquidated damages relating to delays which FDOT caused or to which FDOT contributed. Further, this principle states that where the owner causes delays after the contract completion date, the owner is not entitled to recover any liquidated damages, even for delays that may have been caused by the contractor, where the owner directs additional work after the contract completion date. At a minimum, this entitles Astaldi to relief from liquidated damages until the issuance of a Supplemental Agreement plus the actual number of days to perform the extra work and thus relieves Astaldi of any liability for liquidated damages. FDOT's direction of the additional 38 Detectable Warning on Walking Surface mats waived any expectation that the work would be completed by the previous Contractual completion date and waived any assessment of liquidated damages."

REBUTTAL

“Developmental Article 527.2.1 included in Section 527 was issued on July 25, 2005 and was part of an extra work order requested by the Department. Developmental Article 527.1 – Description clearly calls for the Contractor to;

*“Furnish and install Detectable Warnings on newly constructed and/or existing concrete curb ramps and sidewalks that were constructed **with the Design Standards, where indicated in the plans.**”*[Emphasis added]

Standard Specifications Article 4-3.4 clearly requires the CEI to issue a Supplemental Agreement when revisions to the plans and specifications are contemplated by the Department. The Department failed to issue a Supplemental Agreement for the addition of Developmental Article 527.2.1 in accordance with Article 4-3.4.

The extra work initially requested by the Department was for the procurement and installation of 20 Detectable Warnings on Walking Surfaces only. Contrary to Article 527.2.1, plans showing the location of the initial 20 units were not included with the extra work order request, nor were provided by the Department under a Supplemental Agreement. On March 17, 2006, KCCS’ internal estimate recognized that 24 units were required as opposed to the 20 units originally requested. Unilateral Payment for SA No. 44, issued during the Contract period, did not include the Development Specifications desired by the Department, but only payment for the 24 units requested.

The 38 additional units were not part of the Contract as alleged by KCCS. Article 527.2.1 called for plans to be provided to the Contractor showing the location of the mats in keeping with the requirements of Americans with Disabilities Act Accessibility Guideline (ADAAG) Section 4-29. FDOT’s direction to add the additional 38 Detectable Warnings on Walking Surfaces waived any expectation that the work would be completed by the previous Contractual completion date and waived any assessment of liquidated damages.

ACC requests this DRB Board to recognize that ACC is due additional entitlement for this issue. In addition, 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.”

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 Truncate Domes issue.

"On July 25, 2005 KCCS requested a price proposal for Detectable Warnings on Walking Surfaces. On May 22, 2006 ACC submitted a unit price of \$691.08 Ea. This price compared favorably to the Engineer's estimate of \$724.30 Ea. The Contractor's price proposal included items not allowed by Supplemental Specifications and inadvertently left out necessary equipment required for the installation. Thus the Engineer's estimate was the basis for payment. USA 44 was prepared that added Developmental Specification Section 527, Detectable Warnings on Walking Surfaces. Also included was pay item 2903-527-1, Detectable Warnings on Walking Surfaces 24 Ea. This document was executed on 10/9/2006.

On January 5, 2007 KCCS letter 644 was transmitted to ACC requesting an additional price proposal for the installation of 38 mats for use at side street locations. It was recognized that Developmental Specification Article 527.2.1 (**previously incorporated into this contract**) requires the Contractor to provide detectable warnings in accordance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) Section 4-29.2. As part of the ADA requirement, truncated domes are also required on driveways or side streets without curb for widths greater than 24 feet. Therefore ACC was responsible as part of the contract to install the 38 additional mats and USA 72 provided for payment in the amount of \$19,110.20

KCCS has reviewed all of the pertinent back up related to this issue. Despite the time frames presented in the REA, KCCS can find no basis for granting time, compensable or otherwise. Contract work was still incomplete at the time this work was authorized, and this work was never shown in an approved CPM schedule, nor could it possibly have been a controlling item of work, or on the critical path, as this work was independent of all other work commencing at the time. Therefore, no additional entitlement is warranted."

REBUTTAL

"ACC's position is that the Department added extra work to the contract in June, 2006, and again on January 5, 2007, the latter of which was 181 calendar days after the amended Final Contract Completion date of July 8, 2006. They are seeking 191 days to be added to the contract (181 days non-compensable, plus 10 days compensable for the time it took to perform the work.)

The Department's position is that the truncated domes do not constitute extra work. The work performed was included in the original contract, and the

addition of the detectable warning surfaces (rubber mats) was required by an updated specification. This work was not on the critical path as it was incidental to the sidewalk construction. Additionally it did not delay the completion date as other work activities were ongoing that were critical to the completion date.”

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. On July 25, 2005, KCCS notified ACC of a modification to the contract that added developmental specification 527-Detectable Warnings on Walking Surfaces.
2. Developmental Specification 527 was added to the contract by Unilateral Payment No.44 on October 10, 2006, while the contract was being assessed Liquidated Damages. Also in this Unilateral Payment No. 44 was a pay item for the 24 devices as recognized by the Department and the Contractor.
3. On January 5, 2007 KCCS requested ACC add an additional 38 mats according to Developmental Specification 527.
4. The additional 38 mats were installed between January 26, 2007 and February 4, 2007.
5. This was extra work since it was not identified in the original contract plans nor documents used for bidding the project.
6. Statements were made at the hearing that the signalization and lighting were delaying the contract completion during this time frame. Therefore this appears to be a concurrent delay. The Board, at this time, does not know if the signalization and/or lighting delay is a Department or Contractor caused delay. No one at the hearing clarified this issue.
7. Specification 8-7.3.1 Increased Work states: *The Department **may (emphasis added)** grant an extension of Contract time when it...adds new work items, or provides for unforeseen work.* The key word here is may.
8. Specification 1-3 Definitions. Unilateral Payments. States: *A payment of money made to the Contractor by the Department pursuant to Section 337.11(11), Florida Statutes (1997), for the sums the Department*

determines to be due to the Contractor for work performed on the project,...
This definition does not mention nor imply that a Unilateral Payment can be used for anything but payment.

9. Florida Statutes (1997), Section 337.11(11) states: *Notwithstanding any other provision of law to the contrary, the department has unilateral authority to pay the contractor the sums the department determines to be due to the contractor for work performed on a project. This unilateral authority to pay by the department does not preclude or limit the rights of the department and the contractor to negotiate and agree to the amounts to be paid to the contractor. By acceptance of any such unilateral payment, the contractor does not waive any rights the contractor may have against the department for payment of any additional sums the contractor claims are due for the work.* Again the Statute only addresses a payment to the Contractor. There is no mention that a specification change can be made to a contract with a unilateral payment.
10. In a letter, (#410), dated January 26, 2007 from ACC to KCCS the Contractor told KCCS they would be seeking a Contract Time Extension through the completion of this additional work. This letter put KCCS on notice that ACC wanted the liquidated damages excused through the time of performing the extra work. KCCS had the opportunity to go forward with the work or not do the work under this contract. The Department chose to go forward with ACC performing the extra work.
11. The Department acknowledged at the hearing that they would not have given final acceptance to ACC for the project without this extra work being done.
12. Specification 8-7.3.2 Contract Time Extensions: States: *The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period.* The significance of this specification is that it speaks only to time extensions during Contract Time. It is silent on how to treat projects that are out of Contract time.
13. This contract was out of Contract Time when this extra work was required; therefore the Board looked at industry practices in Florida to determine how this issue is normally handled. The Board checked with construction personnel in five FDOT districts regarding this issue. The response was that if a contractor was out of time and extra work was required by the Department the Contractor was granted relief from any assessed liquidated damages thru the time required to complete the extra

work. Upon completion of the extra work the assessment of liquidated damages would begin.

14. At the hearing KCCS and the Department stated that the Contractor should have known these additional mats were required by the Developmental Specification. The Department unilaterally added this Developmental Specification on October 9, 2006, while the contract was under Liquidated Damages. The Board is not sure when the Contractor should know, and the significance of knowing, since contract time had expired.
15. The Roadway and Traffic Design Standards, January 2000, Index 304, make no mention of the Americans with Disabilities Act Accessibility Guidelines (ADAAG) Section 4-29.2, nor do they indicate treatment required at driveways or side streets more than 24 feet wide without curb.

RECOMMENDATION

The Board finds that there is entitlement to the Contractor for the time. This recommendation is based on standard industry practice as verified by several FDOT districts. The specifications are silent on how issues such as this are to be handled, therefore industry practice is used.

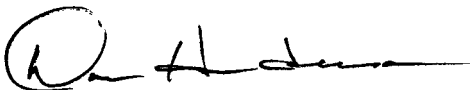
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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