

DISPUTES REVIEW BOARD RECOMMENDATION
ISSUE #27 LUMINARIES

12 October, 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 for the changes to the luminaries.

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 DMS50 Lumec luminaire specified in Contract Plan Sheet L-5 did not accommodate the required 400 watt ballast in the lamp head.

Contract Plan sheet L-5 note 2 called for ACC to supply and install a Lumec 400HPS-DMS50-SGI-480 luminaire. Note 4 to Plan sheet L-5 also stated that the poles were to have a transformer base to meet frangibility requirements. The Project correspondence reflects that the Owner specified luminaire submittal was issued by ACC on or about March 5, 2004. The submittal was approved by the Department on or about June 9, 2004.

On October 6, 2006, MasTec, the lighting subcontractor, issued a Request for

Information (RFI) to ACC requesting clarification of the installation of the 400 watt remote ballast for 12 light poles. The 12 light poles identified on the RFI were bridge mounted poles that did not have transformer bases (Tbases). Included with the RFI, MasTec attached the manufacturer's correspondence which identified three different options to resolve the design conflict.

ACC forwarded MasTec's RFI including the manufacturer's recommendation to KCCS for consideration on October 6, 2006. On October 11, 2006, the Designer of Record (PBS&J) accepted the manufacturer's third option, and requested ACC to change the Contract specified luminaire to the different model which could accommodate the 400 watt ballast in the lamp head.

MasTec placed the order for the 400 watt luminaries on or about December 27, 2006. On February 16, 2007, the Department issued Unilateral Payment for SA No. 68 in the amount of \$21, 805.25 and 0 days. ACC did not find in its project files the KCCS evaluation for the change to determine the estimating differences.

MasTec's receiving tickets reflect that the equipment was received on February 28, 2007. The installation of the balance of the light poles was completed and ready for the 7 day burn test by May 19, 2007.

Had there not been a design conflict with the 12 bridge lights, the 12 bridge lights could have been installed with the balance of the pedestrian bridge lights, such that MasTec could have started the 7 day burn-in for the pedestrian bridge lighting at the same time as the roadway lighting, on January 12, 2007. However, MasTec completed the balance of the light poles by May 19, 2007. Therefore there was a delay caused by the change of these luminaries from January 12, 2007, until May 19, 2007, a total of 128 days, for which an extension of time is requested. One hundred and seven (107) of these days are concurrent with the EOT for the change to fiber optic cable, and to the truncated domes.

REBUTTAL

The documents included in the Department's Position Paper for this issue fail to support KCCS' position that ACC was aware of the problem as early as July 2006. The electronic message sent by Mr. Trevin on July 21, 2006 is addressed to other Department members in response to KCCS RFI #72 and not to ACC. This internal message was sent to KCCS and carbon copied to other Department members later in the day. ACC was not copied on the Departments message, nor was ACC or MasTec requested to provide a response to Mr. Trevin's question.

The Department fails to acknowledge that the scheduled works as depicted in the Acceleration Agreement schedule designated SRT2 was impacted by

weather, by owner changes (some of which ACC was granted time extensions), for unforeseen conditions (such as utility conflicts, which have been raised in ACC's certified claim and were subject to these DRB Hearings), and by owner changes (which ACC was not granted time extensions). The aggregate of these events impacted the scheduled dates depicted in the SRT2 schedule.

The records provided by the Department clearly show that KCCS and the Department alone were aware of the design problem on July 21, 2006. The Department and KCCS failed to provide correspondence to support their contention that ACC was requested in July 2006 to clarify the need for a remote ballast. The first piece of correspondence in ACC's file on this issue is MasTec's RFI No. 1467 dated October 6, 2006. To imply that ACC was aware of the problem in July 2006 and took no action until October to resolve the design problem is deceitful.

The basis of ACC's contention is that the DMS50 luminaire specified in Contract Plan Sheet L-5 did not accommodate the required 400 watt ballast in the lamp head. When ACC first raised this design discrepancy to KCCS on October 11, 2006, the Designer of Record (PBS&J) accepted the manufacturer's third option, and requested ACC to change the Contract specified luminaire to the different model such that the 400 watt ballast could fit in the lamp head. The procurement and installation of the 12 changed luminaires was added and occurred during the same period in which the Department was assessing Liquidated Damages against ACC. This late addition of the extra work disrupted ACC's ability to complete the remaining Contract work and delayed ACC's overall progress of work.

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 additional entitlement to ACC for the luminaire issue.

ACC submitted RFI #59 to KCCS on 10/06/06 stating that there was a problem with installing 400W remote ballasts in the bridge because the luminaire poles have no T-base.

(Please note, this issue first became known to ACC and KCCS in July of 2006. KCCS immediately coordinated with the EOR's electrical consultant, Pedro Trevin of PBS&J. Mr. Trevin responded with a question back to ACC/MasTec asking why a remote ballast was necessary. KCCS did not receive response

from ACC until an RFI was submitted on 10/06/06, approximately three months later. During those three months, it was not evident to KCCS that a problem even existed.)

After the RFI was received by KCCS, it was forwarded Mr. Trevin. The RFI was answered and sent back to ACC on 10/11/06.

On November 13, 2006 (over ten days beyond the initial notification of the delay) ACC submitted a price of \$51,356.52 and requested that an unspecified and unlimited amount of Contract time be added until the completion of this work. The offer was rejected by KCCS because of an overestimate of MOT as this work was to be done concurrent with the pedestrian lighting issue. (Please note, in addition to the problem with the ballasts in the T-bases on the bridge, there was concurrently another issue involving the pedestrian lighting that was to be attached to the same bridge mounted poles. ACC/MasTec requested additional days and MOT costs for this issue, but the fact of the matter was that both the pedestrian lighting issue, and the T-Base issue could be worked on concurrently and within the same timeframe, Therefore, no additional time was warranted for this issue.)

ACC revised their price proposal and on December 12, 2006, resubmitted a cost of \$32,045.99 and still asked for time to be extended throughout the end of the work. KCCS performed an Engineer's Analysis and prepared an Engineer's Estimate totaling \$21,805.25 and zero (0) days, and prepared Work Order 26-22. ACC refused to sign the Work Order, so USA #68 paid ACC \$21,805.25 and zero (0) days.

The work was completed on May 19, 2007, and a request for a time extension was not received until the certified claim was submitted in November, 2007, well after the 30-day requirement of the specifications. Furthermore, ACC is now claiming for \$76,661.69 and one hundred twenty-eight (128) days, twenty-one (21) of which they are claiming to be compensable, thus increasing the amount of compensation originally sought by ACC.

This (a schedule in the position papers) shows that ACC had only scheduled one day to perform the lighting work on Imperial Bridge. Before the acceleration agreement, the work was planned to occur on 7/19/04. After the delays early on the project and after the acceleration agreement went into effect, the planned date to perform the lighting work on the bridge was changed to 2/03/06.

ACC failed to demonstrate why the above task did not start until July 2006 at which time the problem with the T-base was presented to ACC by the subcontractor. The lighting works on the bridge was only a successor to the completion of the parapet walls and installation of conduit in the parapet walls. The work on the Imperial River Bridge had advanced enough to the point that

the lighting could have begun well before July, 2006, when the problem first presented itself. Furthermore, KCCS was unaware that the issue was ongoing from July to October, at which time ACC submitted the official RFI to which KCCS promptly responded. The FDOT cannot be held responsible for the lack of planning and delays caused by ACC's subcontractor, MasTec's failure to maintain the project schedule.

With respect to the duration of the task, ACC states that the work began on February 28, 2007 and was completed on May 19, 2007. This implies that MasTec was working exclusively on the bridge lighting for this entire time duration. This was not the case. MasTec was also working on the installation of interconnect cable, conduit, and making corrections to signalization, signs, and highway lighting previously constructed incorrectly. Both the original CPM schedule and the Accelerated Schedule assign one (1) day to perform the Imperial River Lighting works. This duration seems low and may have been estimated erroneously, however, the implied actual duration from 2/28/07 to 5/19/07 (81 days) is not accurate to construct 12 lights on the bridge.

With respect to liquidated damages, please note that ACC was already behind schedule and being assessed liquidated damages for reasons unrelated to this issue and within their control. The other incomplete or incorrect Contract work (such as signal-related items) being performed was at no fault of the Department, and to return liquidated damages for this issue has no merit.

REBUTTAL

It is the Department's position that ACC's subcontractor was not prudent in maintaining the project schedule as it relates to the luminaires on the bridge. At the time the Department received an RFI for this issue, contract time had already expired, and the poles were already erected, meaning the Department should have already been notified of the issue. Also, at that time, several other items of work not related to the bridge luminaires (in other words — incomplete contract pay item work) was occurring such as but not limited to: drainage, asphalt, roadway work, signalization, highway lighting, and sodding, etc.

Further, it is the Department's position that the change to the plans during this time does not constitute a "significant" change as defined by Standard Specification 4-3.1.

... ACC did not give proper notice to the Department in that they did not request a time extension within 10 days after the beginning of the delay, nor did they request for a time extension and provide proper backup information within 30 days after the end of the delay in accordance with Specification 8-7.3.2.

In summary, had the Department been notified of the error by February 3, 2006, and sent a proper RFI, the solution could have been obtained by February 8 (5

days). A work order could have been executed by February 9, 2006, and taking into account that the parts had a 12-week lead time, work could have been started by May 9, 2006. Based on the estimate provided by Mastec, it would have taken 28 hrs (or four (4) 7-hour days) to complete the work, meaning that if the contractor had been prudent in pursuing the work, it should have been completed by May 13, 2006, well within allowable contract time. Furthermore, the Contractor waives their right to a time extension for not meeting the requirements of Specification 8-7.3.2.

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 submittal, from the Contractor, for the luminaries specified in the plans was submitted in March, 2004. The Department approved the submittal in June, 2004.
2. The bridge lighting plans specified Lumec 400HPS-DMS50-SGI-480, luminaries with a remote 400 watt ballast.
3. The specified luminaries, Lumec 400HPS-DMS50-SGI-480, could be supplied with an internal ballast, 250 watt, but that was too small to supply the required illumination for the bridge. A remote ballast of the size required could not be installed because the ballast would not fit within the pole base. Therefore, a change to the bridge lighting was required.
4. The contract plans contained an error, in that they required luminaries with remote ballast, which would not fit in the light pole base.
5. The change from the Lumec DMS50 to the DMS55 was not a significant change as described in Specification 4.3.1.
6. The subcontractor had apparently not notified ACC upon their discovery of the problem with the remote ballast. KCCS was notified upon ACC's discovery that the DMS50 would not work. ACC did not take advantage of an error in the contract documents.
7. KCCS seems to be saying that ACC should have notified them of every item that missed its scheduled start date on the approved schedule at the time the scheduled start date was passed. This would produce an extraordinary amount of unnecessary paperwork on the project and does not appear to be the meaning of specification article 5.4.

8. ACC's subcontractor, MasTec knew of the problem prior to August 3, 2006, because that is the date MasTec received an e-mail stating that, "As per our conversations recently", answer from their supplier concerning three possible solutions to the problem with the remote ballast not fitting in the pole hand hole.
9. ACC's Subcontractor, MasTec, submitted their supplier's suggested three options to the Department in the form of a RFI on October 6, 2006. Replacing the DMS50 fixtures with DMS55 fixtures was the option selected by the Department.
10. The Department issued Unilateral Payment #68 to compensate the Contractor for the cost of the new luminaries. No time was granted. Unilateral payment #68 did not include any labor or equipment because at the time it was written it was anticipated that the work would be done concurrent with the pedestrian lighting. The work was actually accomplished later.
11. The Department was noticed that the procurement would be 10 to 12 weeks once the cost was approved.
12. At the hearing the Board was told that the process to install the DMS55 was to remove the old DMS50 luminaire and replace with the new. The Contractor had installed the DMS50 before realizing the ballast would not work. This constituted extra work for the Contractor.
13. During the hearing the Subcontractor, Atlas (MasTec), stated that the work to install the new luminaries took four days.
14. This was not added work to the contract. The original plans called for luminaries on the bridge. This work was to install a different type of luminaire which included the ballast within the fixture itself not in the pole base.
15. This work took place during the time the contract was in liquidated damages, therefore all work was critical.
16. Supplemental Specification 5.12.2.2, Claims for delay does not come into play here as a unilateral payment was provided for replacing the light fixtures.
17. Specification 8.7.3.2 applies to this claim for delay and no request for a time extension was provided by ACC within the required time.

18. The luminaries were not a controlling item of work.

RECOMMENDATION

The Board finds that there is entitlement to the Contractor for this issue. There was extra work required for the Contractor to remove and replace the existing luminaries, DMS50, previously installed on the bridge with the new DMS55 fixtures.

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 blue ink, appearing to read "Don Henderson", with a long horizontal flourish extending to the right.

Don Henderson, PE

DISPUTES REVIEW BOARD RECOMMENDATION

FDOT Requested Clarification

8 December, 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: Clarification of Issue #27 Luminaries.

Dear Sirs:

The Florida Department of Transportation, (FDOT), has asked for a clarification on the recommendations made by the Board on the issues listed above.

DRB Issue #27: Luminaries

15. This work took place during the time the contract was in liquidated damages, therefore all work was critical. Please provide Contractual Language to support this "fact".

Response: This is an accepted industry standard that all work being done after contract time has expired is critical. There is no Department specification that states differently. I have personally served on a previous Board in District 1 where the construction manager stated in a DRB meeting/hearing that all work performed during liquidated damages assessment time was critical.

17. Specification 8.7.3.2 applies to this claim for delay and no request for a time extension was provided by ACC within the required time. Since Specification 8-7.3.2 indicates timely notification of a Time Extension is a condition precedent to the Contractor being entitle to said Time Extension, how was a determination of entitlement rendered for this issue.

The Board requested additional information from both parties regarding this issue. Upon reviewing the additional information the Board recognizes that the Contractor did not comply with Specification 8.7.3.2 regarding notification of the delay. There was a construction awareness of the delay (by the Department, CEI and the Contractor) but no formal notification as required. The Board made an error in our

recommendation for entitlement on this issue based on the numerous e-mails between the parties.

18. The luminaries were not a controlling item of work. This is not only an obvious contradiction to Finding of Fact 15 but would also warrant a recommendation of “No Entitlement” for this issue. Please justify the recommendation of Entitlement based on this fact.

Response: The Board’s recommendation dealt with entitlement only. The Board did not state what that entitlement was because the parties requested that the Board only rule on entitlement. The parties wanted the option to negotiate the issue if entitlement was recommended. The Board believes there is entitlement to the Contractor for the time to remove and replace the luminaires. In the future the Board can tie down exactly what we consider that the entitlement is if the parties desire. This may clear up the future requested clarifications for the District. However, it may also impede the negotiation on that issue.

The Board, based upon a misunderstanding of e-mails exchanged between the parties, hereby rescinds its 13 October 2008 recommendation for entitlement on this issue. There is no entitlement to the Contractor for this issue

Submitted by the Disputes Review Board

Don Henderson, Chairman Jack Norton, Member Frank Consoli, Member

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17. Specification 8.7.3.2 applies to this claim for delay and no request for a time extension was provided by ACC within the required time. Since Specification 8-7.3.2 indicates timely notification of a Time Extension is a condition precedent to the Contractor being entitle to said Time Extension, how was a determination of entitlement rendered for this issue.

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