

DISPUTES REVIEW BOARD RECOMMENDATION
ISSUE #29 POLE #64 REPLACEMENT

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 replacement of light pole.

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.

A light pole, pole #64 was damaged as a result of a third party hit and run incident. ACC informed KCCS of the incident on December 19, 2006, and submitted its costs to replace the pole, with the understanding that payment for the damaged work was recoverable under section 7-11.4. ACC repair costs were denied by the Department.

On December 19, 2006, ACC informed KCCS that light pole #64 had been knocked down during the construction period. The local police department had no record of the guilty party. ACC requested a unilateral supplemental agreement for the direct costs in the amount of \$5,094.10 and 1 day of additional Contract time for MasTec to reinstall the damaged pole.

On December 23, 2006, KCCS denied ACC's request, as ACC did not include the necessary documents to support its claim for third party damage.

On January 20, 2007, KCCS confirmed it would be preparing a work order for MasTec's price proposal of repairing the damaged pole #64.

On February 27, 2007, FDOT confirmed that it was processing a unilateral payment to compensate ACC for replacing the light pole and requested KCCS to provide justification supporting the payment. On March 2, 2007, KCCS responded to FDOT's request and reiterated the events and reasoning for the payment. On the same day, FDOT replied and informed KCCS that the contractor was responsible for repairing the light pole based on its interpretation of article 7-11.4, and the definition of permanent installation.

Following receipt of FDOT's reply, on March 2, 2007, KCCS confirmed it would be retracting USA 69.

Article 7-11.4, the Standard Specifications for Road and Bridge Construction, requires the contractor to protect the existing traffic signal equipment, lighting and guardrails during construction. Article 7-11.4, also recognizes and establishes that should the existing or permanent installation be damaged through no fault of the contractor, the Department would compensate the contractor for the costs associated with the repairs.

REBUTTAL

The applicable Contract specification is 7-11.4, which clearly establishes that should the existing or permanent installation be damaged through no fault of the contractor, the Department would compensate the contractor for the costs associated with the repairs.

The Department recognized its obligation to compensate ACC for the repairs on February 27, 2007; however, when provide with KCCS entitlement analysis for the cost, the Department in a change of faith denied ACC's costs.

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 light pole #64 replacement.

Standard Specification 7-11.4 Traffic Signs, Signal Equipment, Highway Lighting and Guardrail states in part, “**Protect all existing** roadway signs, signal equipment, **highway lighting**, and guardrail, for which permanent removal is not indicated, **against damage or displacement.**”

Standard Specification 7-12 Responsibility for Damages, Claims, etc. states in part, “The Contractor shall indemnify, defend, and hold harmless the Department and all of its officers, agents, employees, from all claims, losses, damages, costs, charges, or expenses arising out of any acts, action, neglect, or omission by the Contractor during the performance of the Contract, whether direct or indirect, and whether to any person or property to which the Department or said parties may be subject...”

Standard Specification 7-13.3 Contractors’ Protective Public Liability and Property Damage Liability Insurance states in part, “Furnish evidence to the Department that, with respect to the operations performed by subcontractors, regular Contractors’ Protective Public Liability Insurance providing for a limit of not less than \$1,000,000 for all damages arising out of bodily injuries to, or death of, one person and, subject to that limit for each person, a total limit of \$5,000,000 for all damages arising out of bodily injuries to, or death of, two or more persons in any one occurrence; **and regular Contractors’ Protective Liability Insurance providing for a limit of not less than \$50,000 for all damages arising out of injury to, or destruction of, property in any one occurrence** and, subject to that limit per occurrence, a total (aggregate) limit of \$100,000 for all damages arising out of injury to, or destruction of, property during the policy period carried.”

Standard Specification 7-14 Contractor’s Responsibility for Work states, “Until the Department’s acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the nonexecution of the work. Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance, except that in case of extensive or catastrophic damage. **The Department may, at its discretion**, reimburse the Contractor for repair of such damage due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy, or of governmental authorities.”

On December 19, 2006, ACC notified KCCS that Light Pole #64 had been struck by a phantom vehicle and requested \$5,094.10 and a contract time extension of one (1) day to replace the pole.

KCCS responded to ACC on December 23, 2006 stating that further documentation would be necessary.

... KCCS proceeded to perform an Entitlement Analysis and Engineer's Estimate in accordance with CPAM and found the cost to be \$4,718.61. No time was considered as the work was non-critical, as other activities were still incomplete.

On March 28, 2007, ACC submitted letter no. 420 which disagrees with the Department's interpretation of Specification 7-11.4 and requests \$5,094.10 and 57 days. This request was also denied by the Department.

Entitlement Analysis: The Department's interpretations of Specifications 5-10.1, 7-11.4, 7-12, 7-13.3, and 7-14 conclude that ACC is not entitled to additional compensation for the replacement of Light Pole #64.

REBUTTAL

The Department has determined that the contractor is not entitled compensation pursuant to the following Specifications:

Standard Specification 5-5 Authority of the Engineer
Standard Specification 5-10.1 Maintenance until Acceptance
Standard Specification 7-11.4 Traffic Signs, Signal Equipment, Highway Lighting and Guardrail Standard
Specification 7-12 Responsibility for Damages, Claims, etc.
Standard Specification 7-13.3 Contractors' Protective Public Liability and Property Damage Liability Insurance
Standard Specification 7-14 Contractor's Responsibility for Work

The applicable portions of the aforementioned specifications are outline in the Department's position paper. Upon review of ACC's position paper, there are no new arguments or references to the Contract Documents that would overturn the Department's previous interpretations of the aforementioned specifications.

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. This light pole, #64, was constructed according to the plans and specifications. It was paid for on a monthly estimate. There was no

notation in the plans to indicated that this light pole was temporary or to be removed and replaced at a later date. It was a permanent light pole in the required location.

2. Light pole #64 was destroyed by unknown causes and no documentation could be provided (i.e. police reports). Therefore, the Contractor could not seek reimbursement for replacement costs under any type insurance.
- 3, Standard Specification 5-5 states in part: “The State Construction Engineer will decide all questions, difficulties, and disputes, of whatever nature, that may arise **relative to interpretation of the plans**, (emphasis added) construction, prosecution, and fulfillment of the Contract”. Damage to the light pole was not an interpretation of the plans as the indicated by the Department.
4. Standard Specification 5-10.1 states: Maintain all work until the Engineer has given final acceptance in accordance with 5-11”. It says maintain all work, not repair work damaged by others, or work damaged by unknown causes.
5. Supplemental Specifications 5-12.2.2 and 8-7.3.2 were complied with. ACC immediately requested, upon learning that the Department had refused to make payment for the damaged light pole as previously expected, a claim for time and money.
6. The replacement of the light pole was neither a significant, nor controlling, item of work.
7. Specification 7-11.4 states; *If the Department determines that damage to such existing **or** (emphasis added) permanent installations of traffic signs, signal equipment, highway lighting or guardrail is caused by a third party(ies), and is not otherwise due to any fault or activities of the Contractor, **the Department will**, (emphasis added) with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs.*
8. The American Heritage Dictionary defines or as; *Used to indicate. An alternative, usually only before the last term of a series: hot or cold: this, that, or the other.*
9. Standard Specification 7-12 states in part: “The Contractor ...from all claims, losses, damages, costs, charges, or expenses arising out of any acts, action, neglect, or omissions by the Contractor during the performance of the Contract, ...”. The Department has not produced information that ACC performed any acts, actions, neglect, or omissions that caused damage to Light Pole #64.

10. Standard Specification 7-13.3 states: “Furnish evidence to the Department, that with respect to the operations performed by subcontractors ... regular Contractors’ Protective Liability insurance ...”. **This is liability insurance and does not cover damage to the light pole.**
11. Specification 7-14 states in part that: Rebuild, repair, restore and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before it’s completion and acceptance, except that in the case of **extensive or catastrophic** (emphasis added) damage. The Department stated at the hearing that the damage to pole #64 was catastrophic.

RECOMMENDATION

The Board finds that there is entitlement to the Contractor for this issue.


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