

DATE: December 2, 2010

To: Miller Electric Company, ITS Div

AIM Engineering & Surveying, , Inc

Attn: Steve Pristas

18810 State Road 84, Suite 104
Fort Lauderdale, FL 33315

Attn: Tony Chin

5301 Dr. Martin Luther King, Jr., Blvd. Unit 1
Fort Myers, FL 33905

ISSUE:

Is Miller Electric Company due additional Time and compensation to replace the rejected pull boxes supplied by CDR.

CONTRACTOR'S POSITION:

At the start of the project Miller Electric (MECO) submitted the CDR Pull Boxes for approval to use on the project. At that time the pull box that Miller intended to use on the project was on the Approved Product List (APL). After installation some of the pull boxes were found to be "bowing". FDOT made the untimely decision to replace all CDR electric and fiber optic pull boxes installed on the project and directed that ITS testing was to cease until all replacements were complete.

The pull boxes purchased and installed by MECO were on the FDOT's APL. The FDOT ultimately required replacement of CDR pull boxes installed on several FDOT projects because of alleged CDR misrepresentations and/or violations in connection with the APL process. The FDOT was aware of the APL issues with the pull boxes for months but failed to act with reasonable promptness and delayed its decision to require CDR to replace all the pull boxes on this project. When that decision was made, only a small percentage of pull boxes field tested by FDOT on this particular project had actually failed the criteria agreed to by CDR and the FDOT. In resolving this issue, the FDOT dealt directly with CDR and required CDR to remove and replace all pull boxes installed at CDR's expense as part of its settlement of the APL issues. MECO became involved in the replacement only because a) CDR was required to coordinate with MECO, b) CDR chose to subcontract the labor to replace the pull boxes to MECO and its subcontractors, and c) the FDOT chose to void all previously completed subsystem tests on the ITS and prevented MECO from performing the 14-day Operational Test (and in turn final acceptance) until the boxes were replaced pursuant to the FDOT's agreement with CDR. The replacement of the boxes did not require or result in breaking the fiber cable or interruption of service. The FDOT's actions in this regard obstructed completion of the Project and appear to have been done to maximize liquidated damages.

Once the FDOT released CDR to replace the pull boxes, MECO moved quickly to accomplish the work. Replacement of the pull boxes did not functionally prevent the testing or operation of the system. Nevertheless, the FDOT made this extra work critical because it refused to allow MECO to commence the 14-day Operational Test until CDR replaced all the pull boxes. MECO is entitled to a compensable time extension because: 1) all boxes were replaced pursuant to an independent agreement between the FDOT and its approved supplier; 2) there was not a basis to compel MECO to replace all boxes under the Contract Documents; 3) the FDOT caused delay by

failing to act with reasonable promptness in its decision to replace the pull boxes and 4) the FDOT elected to put the pull boxes on the critical path by refusing to allow the 14-day Operational Test, which was not affected by the pull box replacement.

DESIRED RULING:

Miller requests that the Board finds that there is entitlement to additional money and time.

DEPARTMENT'S POSITION:

In April of 2006 MECO began their submittal process for acceptance of the pull boxes for inclusion into the Project. In August 2006 after several submittals and reviews from different pull box suppliers, MECO opted to use pull boxes supplied by CDR Systems Corp. On August 29, 2009, the CDR Electric Pull Boxes were accepted as noted: *"Approval of the fiber optic pull box is pending based on submittal of additional information...Please have the manufacturer verify that...The pull box can support a lateral load (on the pull box wall) of 1,200 pounds. The pull box and cover shall comply with the structural capacity requirements of the FDOT State Materials Office as detailed in Florida Method (FM) 5-539."* As required in the Minimum Technical Requirements (MTR) for the project, MECO provided CDR's additional information for the Department's Traffic Engineering Research Laboratory (TERL) review. Based on TERL's review of this additional information, MECO was advised on September 19, 2006 that TERL rejected the *"...Alternate Fiber Optic Pull Box (CDR)...for use on this project...the additional information supplied in the September 5, 2006 CDR letter was rejected..."* and that in order for the CDR pull boxes to be used on this project, the manufacturer must submit (to TERL) an independent lab report certifying that it meets Florida Specifications and FM 5-539.

MECO's supplier, CDR, pursued the process of getting their CDR Fiber Optic (24"x 30"x 30") pull boxes certified by TERL for inclusion in the Approved Products List (APL). Based on TERL's approval and placement of the CDR Pull Box on the APL, MECO's Submittal # 40 (B) was accepted by HNTB for inclusion into the project. In October 2008, HNTB observed that pull boxes installed by MECO on the project were "bowing" and their walls were cracking. Following a series of investigations, it was determined that the actual pull boxes that MECO had installed on the project were not the same pull boxes that were certified and placed on the APL. **(Exhibit 19)** This fact was later attested to by MECO's Supplier, CDR, in their Agreement with FDOT. Because this situation turned out to be a statewide problem and not just limited to the RTMC/ITS project, the solution came under the purview of the State Construction Office in Tallahassee where an Agreement was reached between Hubbell/CDR and the Department to remove all of the unapproved pull boxes (both fiber optic and electric), and replace them with an equivalent product on the APL.

It should be noted that in the Agreement, Hubbell/CDR, MECO's Supplier, specifically acknowledged that *"The pull boxes supplied and installed on the projects fail to meet the DEPARTMENT specification criteria used by the Traffic Office for listing on the Approved Products List (hereinafter, "APL"). The majority of the products were manufactured in a CDR facility that was not DEPARTMENT approved. The products supplied and installed exhibit physical characteristics that vary materially from the product previously approved."* In referring to MECO's contention that *the FDOT chose to void all previously completed subsystem tests on the ITS and prevented MECO from performing the 14-day Operational Test (and in turn final acceptance),* as well as their claim that *the FDOT's actions in this regard obstructed completion of the Project and resulted in compensable delays to MECO's work,* it is

important to note the requirements of Articles 5-10 and 5-11 of the Design-Build Specifications (Rev. 12-06-04):
5-10 Final Inspection.

5-10.1 Maintenance until Acceptance: Maintain all Work until the Engineer has given final acceptance in accordance with 5-11.

5-10.2 Inspection for Acceptance: Upon notification that all Contract Work, or all Contract Work on the portion of the Contract scheduled for acceptance, has been completed, the Engineer will make an inspection for acceptance. The inspection will be made within seven days of the notification. If the Engineer finds that all work has been satisfactorily completed, the Department will consider such inspection as the final inspection. If any or all of the Work is found to be unsatisfactory, the Engineer will detail the remedial work required to achieve acceptance. Immediately perform such remedial work. Subsequent inspections will be made on the remedial work until the Engineer accepts all Work. Upon satisfactory completion of the Work, the Department will provide written notice of acceptance, partial, conditional or final, to the Contractor. Until final acceptance in accordance with 5-11, replace or repair any damage to the accepted Work. The cost of such Work will be negotiated.

5-10.3 Partial Acceptance: At the Engineer's sole discretion, the Engineer may accept any portion of the Work under the provisions of 5-10.2.

5-10.4 Conditional Acceptance: The Engineer will not make, or consider requests for conditional acceptance of a project.

5-11 Final Acceptance. When, the Engineer determines that the Contractor has satisfactorily completed the work and the required final documents are complete and submitted, the Engineer will give the Contractor written notice of final acceptance. Please note specifically, **5-10.2** which requires the Contractor to immediately perform such remedial work that the Engineer has detailed in order to achieve acceptance. Please note also **5-11** which provides the contractual basis for final acceptance as when the Engineer determines that the Contractor has satisfactorily completed the work. In addition, as noted in the Trauner report, MECO did not submit an approved CPM beyond December 8, 2008, thus pursuant to the Division I Design Build Specification 8-7.3.2, Time Extension, such a condition "...will result in any entitlement determination as to time or money for such period of potential impact being limited solely to the Department's analysis and identification of the actual controlling or non-controlling activities." The activity of the CDR pull box replacements was not a controlling item of work during this period on the project.

ENTITLEMENT ANALYSIS:

MECO has stated that their claim is a result of *the FDOT's untimely decision to replace all CDR electric and fiber optic pull boxes installed on the Project...* MECO also stated, *"Long after the boxes were installed on this Project, the FDOT demanded replacement of CDR pull boxes installed on several FDOT projects (including this Project) because of alleged CDR misrepresentations and/or violations in connection with the APL process."*

Design-Build Specifications (Rev. 12-06-04), Article **5-3 Conformity of Work with Contract Documents**, states, in part, *"In the event that the Engineer finds that the Contractor has used material or produced a finished product that is not in reasonably close conformity with the Contract Documents, and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace or otherwise correct the work or materials at no expense to the Department."* This contract language sets the construction activity in the past tense (i.e. ... *finds that the Contractor has used material or produced a finished product... and that the Contractor has produced an inferior or unsatisfactory product...*) There is no time set for the discovery of unacceptable material

or work. Design-Build Specifications (Rev. 12-06-04), Article **5-9.2 Failure of Engineer to Reject Work During Construction**: *"If, during or prior to construction operations, the Engineer fails to reject defective work or materials, whether from lack of discovery of such defect or for any other reason, such initial failure to reject in no way prevents the later rejection when such defect is discovered, or obligates the Department to final acceptance. The Department is not responsible for losses suffered due to any necessary removals or repairs of such defects."*

MECO also stated: *"The pull boxes purchased and installed by MECO were on the FDOT Approved Products List (the "APL"). MECO also alleges that FDOT demanded the removal of these boxes because of alleged CDR misrepresentations and/or violations in connection with the APL process."*

Based on the confirmation by Hubbell/CDR, MECO's supplier of all of the pull boxes on the project, in their May 28, 2009 Agreement with FDOT that the pull boxes installed were NOT the boxes which were on the APL, and that the boxes exhibited physical characteristics which vary materially from the product previously approved (on the APL), this is NOT an alleged misrepresentation. MECO has stated in their Position Paper that: *"there was not a basis to compel MECO to replace all boxes under the Contract Documents..."* In the Agreement with the Department, Hubbell/CDR stated that *"The Pull Boxes supplied and installed on the projects failed to meet the Department specification criteria used by the Traffic Operations Office for listing on the Approved Products List (APL) and that the products supplied and installed exhibited physical characteristics that vary materially from the product as previously approved."*

Design-Build Specifications (Rev. 12-06-04), Article **5-3 Conformity of Work with Contract Documents**, states, in part, *"In the event that the Engineer finds that the Contractor has used material...that is not in reasonably close conformity with the Contract Documents, and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace or otherwise correct the work or material at no expense to the Department."* Also, Design-Build Specifications (Rev. 12-06-04), Article **5-10.2 Inspection for Acceptance**: *If any or all of the Work is found to be unsatisfactory, the Engineer will detail the remedial work required to achieve acceptance. Immediately perform such remedial work. Subsequent inspections will be made on the remedial work until the Engineer accepts all Work...* Again, Design-Build Specifications (Rev. 12-06-04), Article **6-11 Defective Materials**: *All materials not meeting the requirements of these Specifications...will be considered defective. Do not use defective materials. The Engineer will reject all such materials, whether in place or not. Remove all rejected material immediately from the site of the work and from storage areas, at no expense to the Department.* (Underlining added) MECO also stated that *"...the pull box issue was directly between the FDOT and its approved supplier..."* The fact is that CDR was Miller Electric Company's supplier of both electric and fiber optic pull boxes for this project; the CDR Fiber Optic (24"x 30"x 30") pull boxes were only placed on the APL after they were initially submitted by MECO for inclusion into this project, and after CDR was able to successfully pursue certification by TERL to place the box on the APL.

MECO asserts that *the FDOT chose to void all previously completed subsystem tests on the ITS and prevented MECO from performing the 14-day Operational Test (and in turn final acceptance) until the boxes were replaced pursuant to the FDOT's agreement with CDR.*

At the time this decision was made, FDOT was uncertain as to whether or not there would be any damage caused to the fiber optic backbone and the electrical systems by the removal and replacement operations. Had any such damage occurred, there would have been the need for repair and re-testing before the system could be properly tested through all phases prior to Final Acceptance.

On Page II-16 of the Trauner Report, MECO acknowledges that *"The pull box replacement was completed on July 30, 2009"*. Below is a summary of actual finish dates of activities during the project.

- **CDR Pull Box Replacement** = July 30, 2009
- **DMS Structures** = September 18, 2009
- **Alleged Roof Issues** = September 30, 2009
- **Alleged Site Drainage Issues** = December 10, 2009

Completion of the DMS Structures, RTMC Roof Issues, and RTMC Drainage Issues were not impacted by the work associated with the CDR Pull Box Replacement. As shown above, completion of these three activities finished after the CDR Pull box replacement and were the controlling items of work on the project.

The Department's determination that the CDR Pull Box Replacement was not a controlling item of work between February 12, 2009 and July 30, 2009 is with reasonable factual basis.

DESIRED RULING:

Based on the above, the Department requests the Board to find and recommend that there is no entitlement for additional money or time to the Contractor for alleged delay to the Final Completion of the Project.

BOARD FINDINGS:

The Board finds that the supplier of the pull boxes (CDR) used pull boxes that were manufactured in a facility that was not approved by FDOT. CDR was supplier to MECO and admitted providing non-complying materials to MECO.

The non-complying pull boxes were supplied by CDR to several FDOT projects statewide. Several months passed between the discovery of the problem and FDOT agreeing with CDR on the remedy. The Director of the State Construction Office issued a directive that contractors whose projects had a controlling item of work delayed by the pull box issue would receive a non-compensable time extension.

The Design Build contract requires the contractor (MECO) to replace all defective materials at no cost to the owner. The pull box replacement work was completed by July 30, 2009. The Board finds that the Department acted within the Contract and was not unreasonable in requiring that all pull boxes be replaced before allowing system testing. The project did not reach final completion until December 10, 2009, due to work activities not associated with pull box replacement. The Board finds that the pull box replacement was not a controlling item of work.

BOARD RECOMMENDATION:

The Board recommends that there is no entitlement for additional money or time to the Contractor from the Department.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required in 15 days. Failure to respond constitutes an acceptance of this recommendation by that party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully submitted on behalf of the Board.

A handwritten signature in black ink, appearing to read "Peter A. Markham", written in a cursive style.

Peter A. Markham

DRB Chairman