

DATE: November 6, 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 Compensation and additional Time to correct the Drainage problems (water seeping under the sidewalk onto the asphalt paving) at the RTMC building site.

CONTRACTOR'S POSITION:

In 2008 and early 2009 FDOT brought up some site and drainage issues in connection with the RTMC that MECO satisfactorily addressed. The Trauner Report identifies the pertinent documentation related to this claim in detail. The Certificate of Occupancy for the RTMC had already been issued on April 8, 2008, and the FDOT stipulated to substantial completion of the RTMC effective October 8, 2008. These drainage issues at best could be characterized as punch list items and did not affect substantial completion of the RTMC or, for that matter, the entire project.

During the months after the FDOT's second acceptance of substantial completion, the FDOT complained to MECO about puddles in various areas around the building and the site that it claimed did not drain quickly enough after a rain. MECO requested some references by FDOT to a standard which MECO should refer with respect to the alleged drainage issues. FDOT was unable to cite any relevant standard in more than 1,399 pages of technical and other descriptions relating to the RTMC Site and Building.

The Drainage problems were added to the punch list at the insistence of the FDOT. Neither Haskell (Contractor for the RTMC) nor Miller conceded that any corrective work was necessary on the site drainage, as evidenced by Miller's notice of intent to claim for this issue. The responsibility to resolve the drainage question lies with the Civil Engineer of Record, which is Bermello Ajamil & Partners (B&A). B&A wrote a letter on Mar 10, 2009 that stated, "The results of our findings suggest that the area under review was graded and is draining in general conformance with the plans and specifications. B&A provided an amended Plan Sheet C-502 showing the proposed installation of 6" Perforated Pipe and two additional Structures ST-3A and ST-3B to cure the drainage problems. The only reason B&A provided the revised drawings was to satisfy the FDOT's new demands/requirements, that were added scope and that were not specified in the RFP documents.

After the FDOT refused to accept the determination of the Civil EOR, Miller proposed additional work in an effort to obtain the FDOT's agreement to Final Acceptance. These mitigation efforts around the RTMC building are outside the contractual requirements and therefore are added scope that FDOT has directed Miller to perform.

DESIRED RULING:

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

DEPARTMENT'S POSITION:

On November 6, 2009, MECO sent by email, a full packaged attachment entitled "RTMC: Field Design 11-5-09" from Haskell, with the comment: *"...for your use in deciding to proceed with this work."* This package included Plan Sheet C-502, amended as RTMC-11-03-09-1 (shown on upper right corner) to show the proposed installation of 6" Perforated Pipe and Structures ST-3A and ST-3B to cure the drainage problem. This proposed solution was accepted by the Department, with the exception that the SE and East sides of the building were not addressed. Per email dated November 10, 2009, the CEI explained that: *"All areas adjacent to the building, with the exception of the rear (north side) have been retaining water during the rainy season...Your first mitigation efforts involved repair of a broken drainage pipe (south west side) and the reworking the flag pole area. They were unsuccessful. We have conveyed numerous requests, both verbal and written; to have someone investigate this situation and believe you have not adequately done so. In fact are(sic) requests have gone unanswered until your recent submittal involving the south west and flag pole areas."*

By way of an email dated November 16, 2009, Haskell distributed a "Drain field Precon November 18 2009", arranging for a preconstruction meeting in the CEI trailer for November 18, 2009 at 10:30 AM. In the "Schedule" section of the Pre-Con Agenda, Haskell showed that they planned to extend the drain field to the SE of the building. The work began on November 20, 2009 and was completed on December 10, 2009. MECO is requesting a compensable time extension of 31 calendar days.

ENTITLEMENT ANALYSIS:

MECO's basis for claiming that the work of installing the drain field delayed final acceptance is that this drain field installation work was based on complaints which *at best could be characterized as punch list items*. As clearly demonstrated, the Department advised MECO/Haskell that because the water was not percolating into the ground fairly quickly, but was in fact ponding on one side of the sidewalk, in the front of the RTMC building, the likelihood of water seeping under the sidewalk and eventually under the asphalt paving. As shown in the pictures sent to the Contractor, the water appears to have actually seeped under the concrete sidewalk and shows up on top of the asphalt paving of the parking area. The picture Exhibit 8 of 9 shows the water ponding at the area by the flag pole and appears to be seeping under the sidewalk in that area. With such a potential for major damage to the concrete sidewalk and asphalt paving in the parking lot at the entrance to the RTMC Building, this issue was seen by the Department as a major issue and especially since MECO/Haskell appeared to be taking a potential for major damage to the concrete sidewalk and asphalt paving in this matter so lightly, the Department determined that this was a major issue which needed to be properly addressed prior to the Department granting Final Acceptance.

MECO, in their Position Paper also noted that *"For months after the FDOT's second acceptance of substantial completion the FDOT complained to MECO about puddles in various areas around the building and the site that it claimed did not drain quickly enough after a rain. MECO requested some reference by FDOT to a standard to which MECO should refer with respect to the alleged drainage issues. [App. 63] FDOT was unable to cite any relevant standard in more than 1,399 pages of technical and other descriptions relating to the RTMC Site and Building."*

This was a Design-Build Project. The client provided general design criteria for the proposers, and eventually the selected Design-Build Contractor (in this case The Miller Electric Company Design-Build Team) on which to complete the detailed designs that will translate into a final, workable set of plans for construction. The fact that the rain water resulting from any heavy rain event was not being effectively removed from the areas around the building was considered by the Department as a function of the details that the Design-Build Team had not properly considered and designed for. The "proof of the pudding is in the eating". As it turned out, the Design-Build Team's designed solution to install a drain field with perforated pipe and appropriate structures to accommodate the changes in pipe direction was successful in eliminating the ponding of the water.

The Department is of the opinion that MECO/Haskell should have considered the issue properly, after verifying the existing conditions as required by the contract documents.

(e.g. RFP III THRESHOLD REQUIREMENTS, Section **O. Verification of Existing Conditions** (Pg. 21 of 71)).

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...

Final Acceptance is NOT determined by receipt of a Certificate of Occupancy.

DESIRED RULING:

Based on the above, the Department requests the Board to rule 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 contractor had sufficient time after being advised of an unsatisfactory condition to complete the solution prior to the contract completion date. As was pointed out in the verbal presentations "at various times when personnel walked on the sidewalk after a rain, water would squirt up through the sidewalk joints". The Board finds that the subject drainage issue was significant and well within the Owner's right to demand a change to the drainage system prior to final acceptance.

BOARD RECOMMENDATION:

The Board recommends that there is no entitlement for additional money 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.



Peter A. Markham

DRB Chairman