

## Dispute Review Board Recommendation

November 13, 2010

To: Miller Electric Company, ITS Division  
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Fort Lauderdale, FL 33315  
Attn: Steve Pristas

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Fort Myers, FL 33905  
Attn: Tony Chin

**Project: RTMC/ITS Project**  
**Contract No. E1E73**  
**FIN's: 414733-1-52-01, 416412-1-52-01 and 416413-1-52-01**

### **ISSUE:**

Is Miller Electric Company (MECO) entitled to \$3,784.15 in costs and 49 days of compensable delay due to FP&L changing the power drop at Alico Road from overhead to underground.

### **CONTRACTOR'S POSITION:**

MECO had already installed an overhead power drop at Alico Road and connected eight ITS devices to same when, on April 20, 2009, HNTB notified MECO the power company would be changing to an underground feed. HNTB asked MECO to submit a change order proposal for the work.

On April 22, 2009, MECO submitted its proposal (PCO#062) for converting the power drop as requested by HNTB. Despite having received the requested Proposal, FDOT refused to issue a work order, citing the fact that MECO was in liquidated damages as their reason for not issuing one. MECO submitted RFI #74 on June 25, 2009, asking FDOT to point out the contract language on which the Department's actions were based. No such language was cited by FDOT.

On August 20, 2009, HNTB wrote MECO advising that all subsystems must be functional before the ITS System Operational Test and that the Contractor should perform the Alico Road power drop work as soon as possible to avoid further liquidated

damages. Although lacking a work order, MECO proceeded to complete the Alico Road power drop renovations on September 14, 2009. FP&L restored power on September 17<sup>th</sup>.

MECO claims that, had a work order been issued in a timely manner, operational testing could have begun on July 30, 2009, after work involving the replacement of pull boxes was completed. FDOT's failure to issue a work order placed the Alico Road work on the critical path and caused a compensable delay of 49 days in completing the project. MECO is also seeking to recover \$3,784.15 in direct costs and to have 49 days subtracted from the January 15, 2010, date on which certain warranties commenced.

The FDOT clearly breached its duty of cooperation and good faith by arbitrarily refusing to issue an extra work order to pay MECO for the Alico power drop. The FDOT's actions were calculated to obtain extra work without paying for it and to increase the contract time and assessment of liquidated damages, rather than to obtain quicker completion and utilization of the Project.

**DEPARTMENT'S POSITION:**

The Department does not dispute the fact that MECO should be reimbursed for the direct cost of the work in the amount of \$3,784.15. The Department rejects MECO's request for a compensable time extension, as well as the requested adjustment to the final acceptance date for the purpose of commencing warranties.

The Alico power drop work was concurrent with installation of the DMS structures. Problems with these structures required remedial work and inspection by the EOR before system testing could begin. DMS work was not complete until after power was converted at Alico Road. Further, the Alico Road work did not impact completion of the RTMC building, which was finished well afterward.

The Department cites Design-Build Specification Articles 8-7.3.2 and 5-12.2.2 in denying the time extension because the Alico power drop was not a controlling item of work. FDOT requests the Board rule that there is no entitlement for an extension of contract time.

In its Rebuttal Paper, the Department significantly departs from its Position Paper by denying that MECO is due compensation by the Department for the direct cost of the Alico Road work. FDOT cites in its rebuttal contract language requiring the Contractor to maintain the work until final acceptance and alleges that the power drop change should have been anticipated by MECO's utility coordinator.

**BOARD FINDINGS:**

The Board finds that it is reasonable for proposers on this design-build contract to have anticipated one power drop installation per location. Reconfiguring a completed power drop to meet the utilities needs or those of a property owner is extra work and should be paid for as such.

The Board finds that FDOT's assessment of the Project's critical path is valid. Their reasons for holding the start of operational testing until the DMS issues were resolved are justified, as is their position that the RTMC building completion overrode both the Alico and DMS issues. The power drop at Alico Road was not a controlling item of work.

**BOARD RECOMMENDATION:**


The Board recommends that MECO is entitled to \$3,784.15 in compensation from the Department. MECO is not entitled to delay costs or an adjustment of the contract completion date.

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  
Disputes Review Board

Felix A. Peguero  
Michael C. Bone  
Peter A. Markham, DRB Chairman



For PETER A. MARKHAM