

Contract # E1E73  
FPN 414733-1-52-01

DATE: December 15, 2010

To: Miller Electric Company, ITS Div

AIM Engineering & Surveying, Inc

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**ISSUE:**

Is Miller Electric Company due additional Time and compensation for the delay in Final Acceptance of the Project due to additional Fire Inspections by the Local Authority?

**CONTRACTOR'S POSITION:**

It is Miller's contention that the FDOT has tried to delay Final Acceptance of the Project to increase the amount of Liquidated Damages. After all work had clearly been finally completed, the FDOT used a second Fire Inspection of the RTMC to delay final acceptance. The RTMC had passed inspection by the Fire Marshall prior to Lee County issuing the Certificate of Occupancy on April 8, 2008. The RTMC had also been subject to inspection and re-inspection by the FDOT prior to The Department's original agreement to substantial completion on October 8, 2008 and its second recognition of substantial completion on September 30, 2009. The FDOT was responsible for the building and building maintenance after substantial completion. It was not MECO's responsibility for the second Fire Marshall inspection. It was also evident that the inspector did not understand the system which had been approved earlier by the previous Fire Marshall.

The April 7, 2008 fire inspection was a Final Inspection as stated on the document. The Inspection Report stated that the building had passed inspection. The Lee County Certificate of Occupancy was issued on April 8, 2008. Another fire inspection was performed on November 17, 2009. This inspection listed 13 issues that needed correction. The inspection report did not state that these 13 items prevented occupancy of the building and the Fire Marshall did not invalidate the Certificate of Occupancy. The FDOT occupied the RTMC building shortly after the Certificate of Occupancy was issued back in April, 2008. All training classes were held in the RTMC, many meetings were held in the RTMC building. The FDOT fully occupied the RTMC building on or before September 30, 2009, and continued to occupy the RTMC building even after the November 17, 2009 Fire Marshall inspection.

**DESIRED RULING:**

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

### **DEPARTMENT'S POSITION:**

During the design phase of the RTMC portion of the contract, MECO's subcontractor Haskell submitted the Fire Suppression plans to the State Fire Marshall office in Tallahassee. The design was approved by that office in December of 2007. Despite the fact that there were a number of outstanding items that remained to be addressed by MECO/Haskell (roof, Liebert unit noise in the Traffic Control Center, landscaping, etc.), a Notice of Intermediate Inspection was conducted by the State Fire Marshall Office (February 2008) with the report generated noting fire hydrants had to be uncovered and functioning. Another State Fire Marshall Inspection was conducted in April of 2008; and while this Inspection Report listed four outstanding items that needed attention, it indicated that the building "passed". In November 2009, the State Fire Marshall Office in Ft. Myers conducted a Final Inspection of the RTMC building and found thirteen building violations that prohibited occupancy of the RTMC. MECO was notified and they responded by working on the thirteen items listed on the Report. This work culminated in a resolution of the inspection deficiencies by MECO/Haskell, and based on the Fire Marshall's discussions with Haskell's Engineer of Record and the installer for the system, the State Fire Marshall agreed that the RTMC could be occupied, thus moving the project to Final Acceptance on January 15, 2010.

It is the Department's position that the Division 1 Design Build Specification **7-1.5 Occupational Safety and Health Requirements**, clearly outlines that MECO is responsible *"...for the protection of the life, health, and general occupational welfare of all persons...until the Contractor has completed the work required under the Contract as provided in 5-10 and 5.11."*

Specification **5-10.1 Maintenance until Acceptance** requires the Contractor to *"Maintain all Work until the Engineer has given final acceptance in accordance with 5-11."*

**Specification 5-11** defines Final Acceptance as when the Engineer determines that the Contractor has satisfactorily completed the work.

**Specification 7-1.5** also requires the Contractor to *"Comply at all times with applicable Federal, State, and local laws, provisions, and policies governing safety and health..."*

It was the Engineer's determination at the time of the State Fire Marshall's issuance of the 13 item deficiency list on November 17, 2009, that the project had not met the criteria for Final Acceptance and that it was MECO's responsibility to address all outstanding items in the State Fire Marshall Report for occupancy of the RTMC building before Final Acceptance could be declared.

### **DESIRED RULING:**

The Department requests that the Disputes Review Board recommend no entitlement to the Contractor for this issue.

### **BOARD FINDINGS:**

The Board finds that the "Notice of Final Inspection" issued by the Fire Marshall on April 7, 2008 indicated that the results of the inspection were "Pass" and that Lee County issued a "Certificate of Occupancy" on April 8, 2008. FDOT began shortly thereafter to occupy and utilize the building for its intended use. The Fire Marshall performed another inspection on November 17, 2009 and listed 13 items that were deficient. The results of this inspection were "Fail" and a re-inspection was required. The Fire Marshall did not indicate that the Certificate of Occupancy was suspended. The Board finds that the items on the second Inspection Report are of the nature of housekeeping

(fuel in the generator tank) and routine maintenance (keeping yearly inspection reports current). These tasks should reasonably be assigned to and performed by the party occupying and using the building – FDOT. Further, the Board finds that the RFP is vague in defining responsibility for these tasks, where it should have been clear.

**BOARD RECOMMENDATION:**

The Board recommends that there is entitlement to 34 days additional time to the Contractor from the Department with a corresponding reduction of 34 days Liquidated Damages. The Board finds that any warranties commencing with the date of Final Acceptance should be adjusted accordingly.

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

Peter A. Markham

DRB Chairman