

DISPUTES REVIEW BOARD RECOMMENDATION

26 October, 2010

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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 entitlement to General Disruption costs (issue #33).

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.

ACC contends that it is entitled to additional costs incurred as a result of FDOT's interference and failure to pothole ahead of underground work. ACC requests this DRB to recognize that the delay/conflict issues previously heard by the DRB prevented completion of scheduled construction activities, disrupted ACC's balance of Contract work, and forced ACC to alter its planned execution of work.

The unforeseen delays, additional work, and the resulting impacts forced ACC to work out-of-sequence, re-mobilize crews to other areas of the Project, and impacted the overall productivity of crews. Taken together, these delays and impacts constitute a change in which the character of the work was performed

which materially increased the cost and time of performance. The extra work resulting from the delaying events referenced above was directed by KCCS/FDOT in writing as per Standard Specification Section 4-3.2 and is compensable under Section 4-3 and 5-12.

ACC is entitled to contract adjustments pursuant to Special Provisions Section 4-3.2 for the additional costs, labor, fuel, materials and equipment.

During the performance of the Project, the Original Contract Completion date of September 18, 2005, was extended one hundred and ninety five (195) calendar days by FDOT to April 1, 2006 for delays that had previously affected the Project. At the time the agreement was negotiated, the original Contract Value of \$17,859,918.00 was amended by FDOT with a supplemental agreement in the amount of \$622,734.00. This represented an increase of 3% over the original Contract Value...

In the period following the execution of the Supplemental Agreement (SA) No. 28, from April 17, 2005, to Final Completion on May 25, 2007, the remaining \$10,682,188.00 Contract work further increased by \$1,782,581.00 due to FDOT recognized supplemental agreements. The recognized supplemental agreements added to the remaining Contract work reflected an increase of 17%.

ACC contends that the Contract work following the execution of SA No. 28 was disrupted by the acts and omissions of FDOT/KCCS. Therefore, ACC is entitled to contract adjustments pursuant to Special Provisions Section 4-3.2 for the additional costs, labor, materials and equipment. ACC's request seeks recovery and payment for the craft labor, material, fuel, and heavy equipment costs maintained on the Project to overcome the disruptive effects of the delay events previously heard by the DRB. These delays were thrust upon ACC but known and within the control of FDOT/KCCS.

ACC requests this DRB recognize that the delay/conflict issues previously heard by the DBR forced ACC to work out-of-sequence, re-mobilize crews to other areas of the Project, and impacted the overall productivity of crews. ACC further requests this DRB recognize entitlement to additional costs (labor, fuel, materials and equipment) expended by ACC due to this general disruption.

REBUTTAL

The Department contends:

“Each of the claim issues has been independently analyzed and proper compensation has been made for those issues in both time and money.”

ACC Response

FDOT/KCCS is correct that all discrete issues have been submitted to the DRB for a ruling on entitlement; however, “proper compensation” has not been made for those issues in both time and money. Despite the fact that Astaldi has prevailed on virtually all of the discrete issues, FDOT/KCCS refuses to recognize entitlement and issue “proper compensation” for these delays/conflicts.

The Department contends:

“There is no contractual basis to then apply an ‘umbrella’ over the entire project to compensate the contractor for loss costs and/or profits due to a so-called ‘cumulative effect’.”

ACC Response

While the Specifications do not specifically address General Disruption damages, it is Astaldi’s position that the DRB can analyze and apply recognized industry practices to rule entitlement to disruption damages caused by the active interference of FDOT/KCCS.

The Department contends:

“To compensate ACC for General Disruption based upon the costs they submitted would be to exonerate ACC from any inefficiency, delays, re-work, or other causes for lack of production which may have been brought upon themselves through their own action or inactions.”

ACC Response

Astaldi is not requesting the DRB “exonerate” Astaldi from any self-caused inefficiencies or delays; however, it should be noted that FDOT/KCCS has not submitted any documentation of same. Astaldi is simply requesting the DRB recognize that the delay/conflict issues previously heard by the DRB prevented completion of scheduled construction activities, disrupted Astaldi’s balance of Contract work, and forced Astaldi to alter its planned execution of work.

ACC requests this DRB recognize that the delay/conflict issues previously heard by the DBR forced ACC to work out-of-sequence, re-mobilize crews to other areas of the Project, and impacted the overall productivity of crews.

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 General Disruption costs.

Astaldi Construction Corporation (ACC) has requested additional reimbursement based upon what they call "General Disruption due to Unforeseen conditions" as identified in Section 33 of their Request for Equitable Adjustment (REA) dated November 15, 2007.

The calculations for the claimed amount were based upon craft, equipment, and fuel costs incurred from May 1, 2005 through May 30, 2007. The calculation derives a cost per day of each of these categories and then multiplies them by 180 days of claimed compensable delay. Markups of 25%, 7.5%, and 7.5% are then applied to labor, equipment, and fuel respectively.

To date, the Department has not entertained paying any additional compensation to ACC for General Disruption.

Entitlement cannot be found for this issue for the following contractual reasons:

1. The Specifications are silent to "General Disruption" as claimed by the contractor. Specification 9-3.1 General, page 89 of the 2000 edition of the Standard Specifications for Road and Bridge Construction states in part, "... the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor, resulting either directly from such alterations, or indirectly from unbalanced allocation among the Contractor items of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefore, or from any other cause."
2. ACC failed to meet the contract requirements by submitting a written claim in accordance with Supplemental Specification 5-12.2, 5-12.2.2 and 5-12.3. As a result, "the failure to provide such notice of intent, preliminary time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute, and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim."
3. Each of the claim issues has been independently analyzed and proper compensation has been made for those issues in both time and money.

There is no contractual basis to then apply an “umbrella” over the entire project to compensate the contractor for loss costs and/or profits due to a so-called “cumulative effect.”

4. To compensate ACC for General Disruption based upon the costs they submitted would be to exonerate ACC from any inefficiency, delays, re-work, or other causes for lack of production which may have been brought upon themselves through their own actions or inactions.

Astaldi Construction Corporation has failed to comply with the requirements set forth above, therefore Astaldi is not entitled to additional reimbursement for “General Disruption” in part or in whole.

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. There is no specification that addresses General Disruption on a project.
2. Both parties agreed that there were multiple crew moves due to conflicts.
3. ACC failed to meet the contract requirements by submitting a written claim for general disruption in accordance with Supplemental Specification 5-12.2, 5-12.2.2 and 5-12.3.
4. The Board has not found any industry standards regarding General Disruption on a FDOT contract.

RECOMMENDATION

The Board finds that there is no entitlement to the Contractor for the General Disruption 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

Don Henderson, PE