

## DISPUTES REVIEW BOARD RECOMMENDATION

26 October, 2008

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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 recovery of Liquidated Damages Issues #34A.

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 should be released of the liquidated damages imposed by FDOT. It is ACC's position that it has demonstrated through the DRB hearings held to date, and with the support of the Board's rulings on entitlement, that a time extension of at least three hundred and nine (309) calendar days is due. This time extension would extend the completion date of the Contract to May 25, 2007, when ACC achieved Final Completion.

It is clear that delay events that were outside the control of ACC were occurring while FDOT was assessing liquidated damages. In fact, FDOT was adding extra work at the same time it was assessing liquidated damages. The DRB specifically recognized this in its ruling on the Truncated Domes issue. The

Board's ruling went on to point out that the industry consensus was that this was improper. Instead, liquidated damages should only be assessed upon the completion of extra work. Because the DRB ruled entitlement on a delay that ended on May 25, 2007, ACC contends that it should be released of all liquidated damages imposed by FDOT. At the very least, the DRB must rule that Astaldi is entitled to recover some portion of liquidated damages as a result of the previous delay/conflict and extra work issues on which the DRB ruled entitlement.

ACC requests this DRB recognize that ACC is due the entitlement for this issue. ACC seeks to recover **\$1,878,102.00** for the liquidated damages improperly assessed by FDOT. ACC seeks this DRB to recognize that should entitlement be due, then ACC is also due interest costs in accordance to FDOT Standard Specification section 5-12.5 "Pre-Settlement and Pre-Judgment Interest" for the amounts recognized.

### **REBUTTAL**

The Department contends:

*"All time extensions in which the Department has determined entitlement have already been granted and included in the allowable contract time."*

### **ACC Response**

Since Astaldi submitted its certified claim, FDOT/KCCS has recognized entitlement to additional delay days; however, they have refused to release the liquidated damages improperly assessed for those days. Moreover, Astaldi has prevailed on virtually all of the discrete issues presented to the DRB; however, FDOT/KCCS refuses to recognize entitlement and issue proper compensation for these delays/conflicts.

The Department contends:

*"Astaldi failed to complete the work within contract time included granted time extensions."*

### **ACC Response**

This issue of whether Astaldi failed to complete work within contract time is irrelevant to this issue due to the fact that FDOT/KCCS was adding extra work while at the same time imposing liquidated damages.

The Department contends:

*"The Department required Astaldi to pay liquidated damages in accordance with FDOT Standard Specification 8-10."*

## **ACC Response**

FDOT/KCCS did not assess liquidated damages in accordance with Specification 8-10. Specification 8-10.4 provides that liquidated damages can only be assessed after consideration of the “extra time” the Department may have granted. FDOT/KCCS recognized entitlement to additional delay days after Astaldi submitted its certified claim; however, they have refused to release the liquidated damages improperly assessed for those days. These time extensions were related to weather days FDOT/KCCS granted and then rescinded during the Project.

Astaldi requests that the DRB recognize entitlement for a release of all liquidated damages assessed in connection with “extra work” and all delays/conflicts for which Astaldi has already been awarded entitlement by the DRB.

## **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 the release of the Liquidated Damages.

ACC is claiming for \$1,951,038.00 for the Recovery of Liquidated Damages assessed on this project. (REA Volume 1, page 194.) According to ACC’s concise issue statement, they contend that they are due a time extension of least 309 calendar days.

The Department disagrees. All time extensions in which the Department has determined entitlement have already been granted and included in the allowable contract time. Astaldi failed to complete the work within contract time including granted time extensions. The Department required Astaldi to pay liquidated damages in accordance with FDOT Standard Specification 8-10.

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## **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. This Board has made several recommendations regarding issues that recommended entitlement to the Contractor.
2. The parties have not settled those issues.
3. The Department stated at the hearing that they were waiting until all issues had been heard and recommendations made before negotiating a resolution of those issues.

## **RECOMMENDATION**

The Board finds that there is entitlement to the Contractor for those issues that this Board has previously made recommendations. If time is granted for any of the issues that the Board has issued a recommendation on, then the Liquidated Damages are reduced by that amount of time.

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