

# DISPUTES REVIEW BOARD RECOMMENDATION

3 February, 2011

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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 additional reimbursement for extended survey control (issue34C).

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.

Supplemental Agreement (S.A) No. 28 extended the survey period and related costs through to the completion of the Project on April 1, 2006. After the execution of S.A. No. 28 the Department extended the Contract Completion date by 110 calendar days, or to July 20, 2006. The time extensions recognized and granted by the Department did not compensate ACC for its time related costs associated with surveying the Project. In addition to the time extensions granted by the Department, this DRB has ruled entitlement on the majority of the issues argued under 5 separate DRB sessions. These issues were addressed in ACC's claim issues #1 to #25 included in its certified claim.

In light of the one hundred and ten (110) days of time extensions, it is ACC's position that FDOT has already recognized entitlement to additional survey control costs from April 2006 to July 20, 2006. Further, ACC contends 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. The time extensions granted by FDOT and recognized by the DRB warrant the recovery of the additional survey costs plus the allowable contractual mark-ups under article 5-12.6.1 and 4-3.2 of the Contract specifications

ACC requests this DRB recognize that ACC is due recovery for the additional survey costs incurred over the period beyond the revised Contract Completion date April 1, 2006. Further, ACC seeks this DRB to recognize that should entitlement be due, then ACC is also due interest costs in accordance with FDOT Standard Specification section 5-12.5 "Pre-Settlement and Pre-Judgment Interest" for the amounts recognized.

## **REBUTTAL**

The Department contends:

*"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."*

## **ACC Response**

Astaldi incurred additional survey costs as a result of numerous plan errors, utility conflicts, construction delays, and additions to contract work. While Astaldi did not issue a separate notice of claim related exclusively to additional survey costs, Astaldi did submit detailed cost proposals after SA No. 28 that were in compliance with the Contract requirements. The Department could not agree with Astaldi on time or time related indirect costs (i.e. survey costs) associated with its cost proposals. Instead, the Department issued unilateral supplemental agreements in response to Astaldi's cost proposals and Astaldi reserved its right to claim.

The Department contends:

*"ACC failed to submit a preliminary request for a Contract Time Extension as well as the required documentation for a Contract Time extension and detailed cost analysis with 30 days after the elimination of the delay to a controlling item of work, in accordance Supplemental Specification 8-7.3.2 (pp 3 & 4 above) and as such have waived any entitlement to an extension of Contract Time or additional compensation for the delay."*

### **ACC Response**

A “preliminary request for a Contract Time Extension” is not applicable to Astaldi’s request for extended survey costs as Astaldi is not “seeking a time extension”. Astaldi’s claim for this issue is for the recovery of additional costs associated with extended surveying as a result of delays that were incurred through no fault of Astaldi. These delays were issues included in Astaldi’s certified claim and have been heard by this DRB board. Notably, this DRB board has ruled entitlement on the majority of the issues which confirms and qualifies Astaldi’s recovery of the extended survey costs.

The Department contends:

*“As surveying is an ancillary function that is performed in conjunction with pay item work, ‘surveying’ is not a critical path activity. Also, the amount of surveying necessary to complete the project is a function of the quantity of pay item work included in the project scope, not duration.”*

### **ACC Response**

The unit price for a specific scope of work represents the direct cost per unit of measure only and does not include the indirect cost such as surveying. The Contractor’s indirect costs, including surveying, are included in the Contractors general field condition costs. These indirect costs are constants or near constants that are expended during the performance period of the Contract. A Contractor is compensated for its indirect costs when it has been delayed through no fault of the Contractor. As stated above in detail, this DRB has recognized entitlement to Astaldi for the vast majority of issues presented. A finding of entitlement to the related and necessary indirect cost of surveying is necessary to compensate Astaldi for all related additional costs.

The Department contends:

*“Fully executed Supplemental Agreement 28 paragraph 4 and 4C (pp. 9-10), contains the language stating that this agreement shall “constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs.”*

### **ACC Response**

The Department breached SA No. 28 and therefore cannot now rely on the above cited “waiver”. Astaldi entered into SA No. 28 based on the Department’s representation that it would “pothole” ahead of underground work so as to avoid utility conflicts. The Department never followed through with this promise and as a result Astaldi experienced numerous delays. Simply, the

Department cannot now seek protection from an agreement they repeatedly breached and

Astaldi requests this DRB recognize that Astaldi is due recovery for the additional survey costs incurred over the period beyond the revised Contract Completion date April 1, 2006. Further, Astaldi seeks this DRB to recognize that should entitlement be due, then Astaldi is also due interest costs in accordance with FDOT Standard Specification section 5-12.5 "Pre-Settlement and Pre-Judgment Interest" for the amounts recognized.

## **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 to additional reimbursement for extended survey control

Astaldi Construction Corporation (ACC) has requested additional reimbursement for extended survey control as identified in Section 34c of their Request for Equitable Adjustment (REA) dated November 15, 2007.

To date, the Department has not entertained paying any additional compensation to ACC for survey for the following reasons:

1. Astaldi failed to provide proper notice of claim.
2. The cost is incidental to the work, and is a function related to the quantity of work performed.

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

1. 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."** The letters submitted by ACC as described under the Background topic, the REA, or the information presented to the DRB Board cannot in any way be construed as a notice of intent to claim. Therefore, this issue has no merit.

2. ACC failed to submit a preliminary request for a Contract Time Extension as well as the required documentation for a Contract Time extension and detailed costs analysis within 30 days after elimination of the delay to a controlling item of work, in accordance with Supplemental Specification 8-7.3.2 (pages 3 and 4 above) and as such has waived any entitlement to an extension of Contract Time or additional compensation for the delay.
3. As surveying is an ancillary function that is performed in conjunction with pay item work, “surveying” is not a critical path activity. Also, the amount of surveying necessary to complete the project is a function of the quantity of pay item work included in the project scope, not duration. As such, it follows that any request for a time extension due to extended surveying is fallacious, and should be dismissed.
4. There is no separate line item to pay for surveying in the contract. All costs associated with surveying are embedded in the unit prices of the work. The Contractor has been paid for all work completed at the established contract unit prices, and has therefore been paid for surveying as set forth in Specification 5-7.6. As such, no additional compensation for surveying, regardless of the project duration, can be considered.
5. Standard Specification 9-2.1 and 9-2.3 (see page 4 above), describe the scope of payments and make no provisions for additional payment for costs incurred under the provisions of Division I of the Standard Specifications.
6. Fully executed Supplemental Agreement 28 paragraph 4 and 4c, contains the language stating that this agreement shall “constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs...” In addition, “Astaldi Construction Corporation waives, indemnifies, releases and forever discharges the State of Florida Department of Transportation against any and all issues, claims, causes of action, demands, disputes and rights whatever nature or kind, known and unknown, that Astaldi Construction Corporation has or may have against the State of Florida Department of Transportation...”

Based upon Astaldi’s failure to comply with the Contract Requirements as set forth in Specifications 5-7.6, 5-12.1, 5-12.2, 5-12.3, 8-7.3.2, 9-2.1, and 9.3.1, the Department respectfully asks the Board to find no entitlement as it pertains to this issue.

## **REBUTTAL**

FDOT maintains that costs for survey are embedded in the contract pay items per Specification 5-7.6, and therefore all survey costs have been paid for, including both original contract work and additional work added by SA or work order.

ACC Statement: “Supplemental Agree (SA) No. 28 extended the survey period and related costs through to the completion of the Project on April 1, 2006.”

Response: There is no language in SA No. 28 which addresses extending survey costs.

ACC Statement: Paragraph 2 of page 1 states in part, “The time extensions recognized and granted by the Department did not compensate ACC for its time related costs associated with surveying the Project.”

Response: There is no language in Specification 5-7.6 that addresses or allow for payment of surveying as it relates to granting time extensions. Again, the cost of surveying is incorporated in the work and there is no separate pay item for it.

ACC Statement: Fist paragraph, page 2 states, in part, “The DRB rulings of entitlement on the previously argued issues represents an additional time extension of 309 calendar days.”

Response: This statement is false. The DRB has not rendered any rulings on quantum, therefore, although the Board did find entitlement on certain issues, there is no evidence that the Board supports granting 309 calendar days.

The Department stands firm in its position that ACC is not entitled to any compensation for the extended survey costs. ACC has failed to demonstrate and provide evidence that payment for surveying is warranted or permitted under the conditions of the contract. Therefore, we respectfully request that the Board find for no entitlement on this issue.

## **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.

The project completion date was extended by the Department from April 1, 2006, by Supplemental Agreement #28 to July 20, 2006, a period of 110 calendar days. The Department has not compensated Astaldi for the extended survey costs associated with the additional 110 days of contract time. However, the Department did agree to consider an additional 43 days of indirect costs as part of Supplemental Agreement #28.

Survey is not a contract pay item, but is an integral part of contract pay items as long as the project completes within the allowed contract time. The

Department appears to recognize that by agreeing to consider an additional 43 days of indirect costs under Supplemental Agreement #28. Astaldi was required to have surveyor help available during this extended contract duration and any additional contract time negotiated or granted by the Department as a result of delays incurred through no fault of Astaldi.

The Department makes the argument that surveying is an ancillary function that is performed in conjunction with pay item work, surveying is not a critical path activity and the amount of surveying to complete the project is a function of the quantity of pay item work included in the scope, not the duration. This is true until survey becomes an indirect cost when the contract time is extended by the Department resulting from delays or extra work incurred through no fault of Astaldi.

Astaldi did not make a written claim for Survey under the Supplemental Specification 5-12.2, 5-12.2.2 or 5-12.3, but did make detailed cost proposals in compliance with the contract requirements for work following Supplemental Agreement #28. The Department and Astaldi could not reach agreement on time related indirect costs, including survey, associated with these cost proposals. As a result the Department issued unilateral supplemental agreements in an effort to pay for, at least to their understanding, the direct cost involved with the extra work. This left the indirect costs to be determined, and Astaldi reserved their right to make claim for these additional indirect costs.

Astaldi does not claim additional time for survey, but for the indirect costs of maintaining a surveyor on site to assist with the survey information required by the Department for the affected work.

Weekly utility meetings were held in addition to the weekly progress meetings to assist Astaldi by discussing the upcoming work and its location. The Department did attempt to pothole ahead of Astaldi's crews. However, due to continuing problems with location of buried utilities Astaldi was often forced to move their crews such that the potholing was ineffective.

## **RECOMMENDATION**

The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

The Board finds that there is entitlement to the additional survey costs associated with the additional work that required survey. This is work that was required after the original contract completion date.

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

A handwritten signature in blue ink, appearing to read "Don Henderson", with a long horizontal flourish extending to the right.

Don Henderson, PE