

DISPUTES REVIEW BOARD RECOMMENDATION

September 18, 2011,

Mr. Allan Wander, P.E.
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Ref: Project: US-27 (SR-25) from North of SR-540 to North of SR-542
FIN No: 197706-1-52-01
FAP: 3611047P
Contract ID No. T-1328
Polk County

Dear Madam / Sir:

This hearing was requested by the Contractor relating to Entitlement for Recovery of Idle Equipment and Mobilization Costs relating to the discovery of an Eagles Nest at approximately Station 1632+00.

CONTRACTOR'S POSITION

Is Ranger entitled to recover additional compensation for idle equipment and mobilizations resulting from an unforeseen, differing site condition?

As you are aware from your monthly visits to the project, an active eagle nest was discovered by the department on November 10th, 2010 in an area along the edge of the West ROW at approximately station 1632. The Contract Plans did not show the presence of the eagle nest. On November 10th, 2010 the department directed Ranger to cease operations within 660 ft. radius of the eagle nest as a result of governmental rules restricting work areas near eagle's nests. This directive caused a disruption as well as delay to Ranger's work. Ranger filed timely notice of intent to claim for impacts to our work activities as a result of the presence of the eagle's nest.

Among the impacts to our work was the inability to continue the milling, ARMI layer, resurfacing and road widening in the rural section of the project. This work had begun prior to the November 10th stop work directive. Our crews were on site, ready to continue this work on November 10th when we received the stop work directive.

Although the area of this work is not within the 660 foot radius, the aggregate needed to construct the ARMI layer was stockpiled within the 660 foot no-work radius at the end of October, prior to any knowledge of the eagle's nest. As such, no milling, ARMI layer, resurfacing or widening could take place because the aggregate could not be accessed.

Once approval was received and access was gained to the aggregate, the milling, ARMI and resurfacing resumed for two nights, Monday and Tuesday November 29th and 30th. Subsequently cold weather restrictions prevented continuation of this work until February 13th, at which time over the course of seven nights the ARMI and resurfacing was completed followed by the continuation of road widening. The subject of this Position Paper is entitlement consideration for the additional idle equipment and mobilization costs during this time period that would not have been incurred but for the eagle's nest.

As you will see the department has an obligation to investigate the potential impact of threatened or endangered species prior to initiating a construction project, and if found, indicate any limitations to the work in the plans. The as-bid plans did not indicate the presence of the eagle nest nor any limitations to our work as a result. As such, Ranger did not have the ability to put costs into our bid for any related impacts.

Ranger mitigated this situation as best possible by offering several alternatives and encouraging the department to participate in the decision-making process.

The presence of the eagle detrimentally effected our production resulting in added costs for idle equipment and mobilizations that Ranger is entitled to recover.

A timely claim notice was filed for effects of the eagle's nest. The department has rejected our request for recovery. They have offered multiple reasons for their denial, each being a new argument when the *prior is refuted by Ranger*.

Issue Statement

Ranger is seeking entitlement for additional compensation for idle equipment and mobilization costs associated with the impact of the department's stop work directive due to the presence of an unforeseen eagle's nest. The Contract Documents did not indicate the presence of this eagle's nest, nor any restriction on work relative to it. As such, Ranger did not have the knowledge, nor should we have had the knowledge, that a stop work directive would be issued and result in our inability to continue road building operations in the rural section of the project causing added expense.

The contract specifications are clear in entitlement and quantification of such impacts. At this time we ask the Board only to consider entitlement.

Statement of Facts

Ranger and the Department entered into a contract for the widening and reconstruction of US 27 (SR 25) from SR 540 to a point north of SR 542 in Polk County on August 31, 2010. Construction began on October 4th, 2010. This contract is governed by the FDOT 2010 Standard Specifications for Road and Bridge Construction with applicable supplements thereto along with the 2010 Design Standards and Contract Plans dated July 19, 2010. These and all Contract Documents are made part of this Position Paper by reference.

1. On November 10th, the department notified Ranger of the presence of an eagle's nest at approximately station 1632 Lt, just outside the Right of Way. This resulted in a suspension of work issued by the department for all work within a 660 foot radius of the eagle's nest. Since the stop work directive was in the evening of November 10th, the next day Ranger filed timely claim notice.¹
2. Ranger was in the initial stages of performing milling, ARMI layer and resurfacing in the rural section when the eagle was identified on November 10th. This work was performed at night since lane closures were needed and the plans only allowed closures from 7:00 pm to 6:00 am. Although this work was not within the 660 foot restricted radius, the aggregate needed for the ARMI layer was stockpiled several weeks earlier within the 660 foot restricted area. The stockpile was placed at a time prior to knowing the eagle nest was present. The 660 foot restriction prevented accessing the aggregate which in turn prevented the milling, ARMI layer and resurfacing from continuing on the night of November 10th and immediately thereafter to its completion.
3. Over the course of the next few weeks, attempts were made to mitigate the impact of the eagle's nest. This included investigating the acquisition of a new source of aggregate to be delivered or possibly a special exemption be granted to access the current stockpile within the restricted zone. The latter was approved by the department and on November 22nd, Ranger moved the stockpile to a location outside the restricted area.²
4. Once the aggregate was moved, Ranger rescheduled the milling and paving crews as well as the subcontractor who was performing the ARMI layer. Considering November 22nd was the Monday of Thanksgiving week and these crews were demobilized to other projects when the work restriction was issued by the department, Ranger and our subcontractor worked diligently to mitigate further impacts by rescheduling the resumption of this work for the Monday night following Thanksgiving, November 29th.
5. Work resumed for two nights, November 29th and 30th at which time following the 30th, cold weather prevented the installation of the ARMI layer. The specification for ARMI layer requires air temperature to be 50 degrees and rising. Had work not been interrupted by the stop work directive, the milling, ARMI and resurfacing would have continued from November 10th for the next approximately 6 to 8 shifts to its completion with no detrimental effect from cold weather during this time. This is evidenced by the actual temperatures recorded between November 10th, and November 30th, 2010 which are shown in the appendix C pages 4 thru 18. This in-turn would have allowed road-widening work to continue in the rural area. However, due to the cold nighttime temperature restrictions after November 30th, the milling, ARMI layer and resurfacing, along with subsequent road-widening, did not resume until February 13th when temperature outlooks were favorable and Ranger was able to reschedule our crews to return.³

³ See Appendix C, pages 1 to 3 – ARMI Spec; pages 19 to 46 – temperature readings after Nov. 30th

6. Ranger reasonably mitigated the impacts from the eagle's nest and additionally offered many suggestions to the department to reduce the effects of the impact. Our mitigation efforts and suggestions included the following:⁴
- Demobilized that equipment that could be used on other jobs
 - Suggested securing a new source of aggregate, this was rejected by the department, however, eventually the department approved accessing the existing stockpile
 - Suggested utilizing day time lane closures since the temperatures are higher during the day, the department rejected this (Ranger even absorbed the expense of setting an experimental day-time lane closure)
 - Requested accessing the restricted area to obtain all necessary supplies and material to continue constructing the project, the department only gave selective approval
 - Suggested elimination of ARMI layer, this was denied by the department;
 - Suggested the use of Limerock in lieu of Stabilized Subgrade in the eagle zone, this was rejected by the department
 - Encouraged the department to participate in decisions related to resumption of work; the department indicated that such decisions are at the contractors discretion;
 - Searched, found, negotiated and obtained a new source for off-site dirt for embankment to allow urban road construction to continue
 - Sought and found suitable disposal for nearly 5000 cy of surplus dirt which resulted from the eagle nest restriction at no additional cost to the department
7. Ranger had numerous meetings with the department to discuss possible solutions and to provide the department notice of potential impacts to the project due to the eagle's nest.
8. Ranger submitted the cost for the idle equipment and additional mobilization to the department on May 2nd, 2011. The department replied on June 7th that they denied Ranger's request stating that since this work was not a controlling work item, standard specification 8-7.3.3[sic], (should actually reference 8-7.3.2) states no additional compensation will be made for delays caused by the effects of inclement weather.⁵
9. Upon disagreeing with the department's position, a meeting was held on June 21st between Ranger and the department's Operations Engineer. At this meeting it was agreed that the referenced specification 8-7.3.2 was not applicable and Ranger was in fact entitled to recovery. Later that same day Ranger received an email correspondence once again denying entitlement. This was contrary to the agreement made at the meeting earlier that same day. Upon inquiring as to the basis of the denial at this point, the department replied on June 21st at 3:40 pm with an email that is confusing at best.⁶
10. On July 21st Ranger requested a DRB hearing to be scheduled to hear this issue. On July 29th, the Engineer in a letter to the Board, now indicates that the reason for denial of our request to recover is failure to preserve our rights and file a timely notice of intent to claim. This is the first time the department has raised this argument on this issue. In fact as recently as the progress meeting on July 27th, the department's position is that they are

⁴ See Appendix D

⁵ See Appendix E

⁶ See Appendix F

denying entitlement because the costs are a result of weather days. Ranger in fact did provide timely and proper notice to the Engineer.⁷

Applicable Contract Provisions

1. Florida Statute 337.11 paragraph (2)⁸ - requires the department to ensure that all design plans are *complete, accurate and up to date prior* to advertisement for bids. The department failed to identify the eagle's nest in the plans and further failed to indicate any restrictions on work as a result of the eagle's nest prior to advertisement of the project. This is a direct violation of this Florida Statute.
2. Supplemental Specifications, Section 7-1.4 Compliance with Federal Endangered Species Act and Other Wildlife Regulations⁹ - this section states that the Federal Endangered Species Act requires the department to investigate the potential impact to a threatened or endangered species *prior to* initiating an activity performed in conjunction with a highway project. This section goes on to state that when such is found and there is a need for mitigation measures, those measures and conditions will be shown in the plans. The department failed in this obligation since no identification of an eagle's nest, nor any limitations on work activities associated with the highway construction were identified in the plans. Thus Ranger had no way to include any effects of the eagle's nest in our bid.
3. Standard Specification, Section 4-3.7 Differing Site Conditions¹⁰ - this section allows either party during the progress of the work, when finding a condition differing materially from that indicated on the plans to promptly notify the other party in writing. It further states upon such event the Engineer will investigate the condition. This was done by the Engineer and resulted in the stop work order within 660 feet issued on November 10th, 2010. The section goes on to state that when a differing site condition such as this causes an increase in cost or time required for performance of *any* work, an adjustment to the contract will be made. But for the eagle's nest, the milling, ARMI layer, resurfacing and subsequent road-widening would have been completed as intended and not three months later. As such, Ranger would not have incurred idle equipment or additional mobilization costs. This is precisely the type of increased cost expressly contemplated and intended by this specification for recovery by the Contractor.
4. Standard Specification, Section 4-3.2 Increase, Decrease or Alteration in the Work¹¹ - this section clearly gives the Engineer the right to make alteration to the character of the work which involve a substantial change in the nature of design, or type of construction or which materially increase the cost of performance. However, this right is not absolute in that the Contractor does not have to bear the costs of these material changes. The

⁷ See Appendix G

⁸ See Appendix H

⁹ See Appendix I

¹⁰ See Appendix J, page 6

¹¹ See Appendix J, pages 1 thru 5

subsection to this section clearly establishes the method to calculate recovery for the Contractor in instances when the Engineer exercises his right to change the character of work and that change causes a material increase in cost to the Contractor. Issuing a 660 foot no-work zone which resulted in having to wait three months to complete the milling, ARMI, resurfacing and road-widening clearly is a substantial and material change to construction causing increased cost. Having to wait three months to complete work that, but for the eagle, would have been completed in accordance with our bid is a material change.

5. Standard Specification, Section 5-12.2 Notice of Claim¹² – this section requires notice be given to the department if the contractor intends to seek additional compensation or time extension as the result of an issue the Contractor deems has the potential to result in additional cost or time. It is required to be in writing in order to afford the Engineer opportunity to keep records. Initial notice was given in a letter dated November 11th, 2011 when the department notified Ranger of the presence of the eagle's nest.¹³ Written notice of potential costs was also given in a questionnaire response that Ranger was asked by the department to fill out and return to them for discussions at an issue meeting with them.¹⁴ On December 10th, Ranger attended the requested meeting with the department and painstakingly discussed the questionnaire, along with the several issues on the project, possible solutions and potential impacts of each. Moreover, notice was continually provided, reaffirmed, reiterated, reviewed and revisited numerous times through the course of progress meetings, DRB meetings, emails, updated schedules, and a Time Extension Request submitted on December 23rd, 2010.¹⁵ Therefore, the department had proper notice of claim and the opportunity to keep records.
6. Standard Specification, Section 5-12.2.2 Claims for Delay¹⁶ – the last paragraph of this section states that an exception to denying entitlement for delays to anything but controlling work items is when a delay to a non-controlling work item has occurred resulting in idle equipment or labor. In such instances the Contractor is to be compensated at the rates set forth in section 4-3.2.1 (c). There is a requirement that the contractor make reasonable efforts to mitigate. These efforts are discussed in paragraph 6 in the Statement of Facts above.
7. Standard Specification, Section 5-12.6.2.1 Compensation for Direct Costs, Indirect Costs, Expenses, and Profits thereon, of or from Delay¹⁷ – this section states for any delay the Contractor shall be entitled to monetary compensation for actual idle labor and equipment in accordance with section 4-3.2.1 (d) [note, paragraph (d) is a misprint in the specifications, it should refer to paragraph (c)].

¹² See Appendix K, pages 1 thru 3

¹³ See Appendix K, page 4

¹⁴ See Appendix K, pages 5 thru 9

¹⁵ See Appendix K, pages 10 thru 50

¹⁶ See Appendix K, page 2 & 3

8. Standard Specification, Section 4-3.2.1 (c) Allowable Costs for Extra Work – this section specifies the method for calculating idle equipment¹⁸. Since this hearing is for entitlement only, methods for calculating quantum are not included in this position paper
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Conclusion

The plans did not indicate the presence of an eagle's nest nor any restrictions on the work area. The Florida Statutes clearly establish the burden the department holds in providing complete, accurate and up to date plans prior to advertisement. Failing to supply such plans clearly establishes the department's liability. Ranger was detrimentally affected by the department's failure and by the work restriction imposed. Ranger could not have reasonably contemplated such effects in the bid. The Contract Documents clearly state what remedy the Contractor has when the department fails in their obligation to provide complete, accurate and up to date plans. Since these costs are associated with non-controlling work, contract time is not at issue. As such, section 8-7.3.2 of the Standard Specifications related to granting time for weather days is inapplicable. The crux of the matter is – but for the eagle nest restriction, Ranger would not have incurred these costs. Ranger simply requests the department to properly compensate Ranger for the impacts associated with the idle equipment and added mobilization costs and respectfully asks the Board to render a recommendation in support of our request.

DEPARTMENTS POSITION

November 10, 2010 an eagle's nest was discovered within the project limits, the contractor Ranger Construction Industries Inc. was directed to stop work within the 660 ft. buffer zone (*Record Pg. 10*) Ranger submitted a Notice of Intent to Claim (NOI) for the eagles nest on 11-11-2010 (*Record Pg.11*).

This affected work on the northern, urban section of the project, but would not have affected the milling and resurfacing on the southern end of the project except that the stone for the ARMI layer was stockpiled under the eagles nest, and could not be accessed until permission was received from the Fish and Wildlife Commission (FWC). Ranger Construction had been working on this milling and resurfacing until work was stopped because of the nest on 11-10-2010. Permission was received to move the stockpile of stone with a biologist present and the stockpile was moved on 11-22-2010 (*Record Pg.12*). Ranger Construction states in their request for DRB Hearing (*Record Pg. 13*) "*Once the department authorized continuation of the work near the end of November, restrictive nighttime temperatures hindered and prevented milling, ARMI and resurfacing from progressing*". Based on these statements Ranger recognizes the fact that this issue is based on inclement weather. Ranger further states in their request for DRB Hearing that "*The inability to perform the milling, ARMI and resurfacing in turn severely impacted the road widening operations leading to idle equipment and additional mobilizations*". The department has compensated Ranger for the delays associated with the eagles nest, which included the idle equipment for the paving crew on SA # 013 in the amount of \$89,751.38 (*Record Pg.15*), on this SA the department also granted a 24 day time extension due to the effects of the eagles nest. Ranger also confirms in their request for DRB Hearing "*The department has compensated Ranger for the effect on labor and equipment from the time of*

issuing the stop work directive until resumption, however they have not recognized the impacts after resumption....”

Ranger stated in their request for DRB Hearing that they suggested solutions to mitigate, none of which were accepted by the department. This suggestion consisted of a request to perform daytime lane closures and perform this work during the day. Note No. 2 on page 202 of the contract plans do not permit lane closures during the hours of 6:00 am to 7:00 pm (*Record Pg.792*). However in an effort to work with Ranger the department agreed to let Ranger try a trial daytime lane closure to see what effect it would have on traffic. This trial closure was made on Tuesday 1-4-11, at 9:00 am, however in the afternoon traffic was delayed as much as 17 minutes going through the closure, so the lanes had to be reopened at 2:00 pm, as documented in the minutes of the project meeting held on 1-5-11 (*Record Pg.126*) and the inspector daily work report dated 1-4-11 (*Record Pg. 82*). Based on this trial lane closure the department denied the daytime closures.

Monday May 2, 2011, Ranger submitted a request for additional cost for the eagle impact; however these costs were not for idle paving equipment but for grading equipment. Upon further discussion with Ranger it was discovered the costs submitted were for the grading equipment because since the milling and resurfacing of the rural section was delayed, the grading on the widening was not started until the milling and resurfacing was completed. The alleged idle equipment costs were for the grading equipment in January and February 2011.

Entitlement Analysis:

The department request the board deny entitlement based on the above information and based on the contractor not providing a timely Notice of Intent, this work was not on the Critical Path of the project schedule and the specifications do not provide for payment of idle equipment and labor for weather delays. In support of these points the department offers the following:

The contractor did not provide a timely Notice of Intent as required by the specifications. Section 5-12.2.1 of the specifications requires the contractor to notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based if the contractor is making a claim for extra work (*Record Pg.42*)

Section 5-12.2.2 requires the contractor to submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation (*Record Pg.42*) . Since this work was not a controlling work item on the original accepted project schedule or the revised accepted schedule (*Record Pg.796-808*) this section does not apply.

Ranger combined this issue with the eagles nest delay, however this is a separate issue and the contractor should have submitted a separate Notice of Intent (NOI) for this issue. In the e-mail accompanying their submittal Ranger referred to this issue as “Additional Eagle cost” and stated it was for additional cost for the eagle impact (*Record Pg.66*), additionally the cost spreadsheet submitted by Ranger was titled *Idle Equip. & Remob Cost due to Unforeseen Condition – Eagles nest* (*Record Pg.67*), and the equipment listing included with the submittal was titled *Eagle nest-idle Equipment December* (*Record Pg. 68*), *Eagle nest – idle Equipment for January* (*Record Pg. 71*), and *Eagles Nest - idle Equipment for February* (*Record Pg.73*). However, it was agreed at previous meetings that once the contractor started back to work outside the eagle buffer zone

there would be no more delays associated with the eagles nest. During the weekly progress meeting # 11, 12-22-2010, for the project (*Record Pg.115*) Ranger stated that there may be a delay for the milling and resurfacing however these crews were reassigned to other projects and their delay was mitigated. At no time in the project meeting minutes is it documented that the grading equipment in the rural section of the project was delayed. Further this issue is not part of the eagles nest delay because in the Project meeting minutes for meeting #12 held on 1-5-11, meeting # 13 held on 1-12-11, meeting # 14 held on 1-19-11, meeting # 15 held on 1-26-11, meeting #16 held on 2-2-11 and meeting #17 held on 2-9-11 (*Record Pg.123-177*) Ranger agreed in item #11 that there are currently no delays with the eagles nest.

If there were no delays associated with the eagles nest in January and February, how could the department receive a request to reimburse additional eagle nest costs for idle equipment in January and February? The idle grading equipment must be considered a separate issue and by not submitting a proper Notice of Intent for this issue Ranger denied the department the ability to track this delay. Section 5-12.1 of the specifications states *"The failure to provide such notice of intent, preliminary time extension request, time extension request, certified written 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."* (*Record Pg. 41-42*) Further section 5-12.7, Mandatory Claim Records states *" the Contractor must keep daily records of all labor, material and equipment costs incurred for operations affected by the extra work or delay. These daily records must identify each operation affected by the extra work or delay and the specific locations where work is affected by the extra work or delay, as nearly as possible."* (*Record Pg.45*), the daily records submitted by the Contractor do not meet these requirements, as the specific location of the delay is not identified on the records, nor is this issue broken out separately from any other issue that was being tracked at the time. (*Record Pg.269-786*)

The grading of the rural section of the project was not on the critical path of the project schedule. All associated work in the rural section was completed on or before the late Finish date of the original and revised project schedules. Section 8-3.2.5 (Float) of the specifications states that float is not for the exclusive use or benefit of either the Department or the Contractor (*Record Pg.51*). A critical path item on the CPM Schedule is defined as an activity that has zero float. Therefore, an activity that has float is not a critical path activity. The grading operations in the rural section of the project all have float and are not critical path activities (*Record Pg.796-808*). Section 8-3.2.5 of the specifications shows that if a non-critical path activity is delayed regardless of which party, the owner or the contractor, causes the delay, either party can use the available float. If the available float is used up then that activity becomes a critical path activity. This specification does not allow for the payment of idle equipment due to the use of available float on the schedule.

The Contractor states that after the eagles nest issue was resolved the weather was too cold to place the ARMI layer, which resulted in the extra costs for idle equipment. Ranger stated in their request for the DRB hearing (*Record Pg.13-14*) *"restrictive nighttime temperatures hindered and prevented milling, ARMI and resurfacing from progressing"*. Once the direction was given to Ranger to resume work outside the eagle buffer zone on 12-3-2010, the eagles nest delay was effectively ended. From that point on the delay to the milling and resurfacing

operation was weather related. As stated in Ranger's request for the DRB Hearing restrictive nighttime temperatures hindered and prevented milling, ARMI and resurfacing from progressing.

Section 8-7.3.2 of the specifications (*Record Pg. 59*), states that the Department will grant time extensions, on a day for day basis, for delays caused by the effects of rains or other inclement weather conditions, related adverse soil conditions or suspension of operations due to holidays that prevent the Contractor from productively performing controlling items of work. This section further states "*No additional compensation will be made for delays caused by the effects of inclement weather*". No remedy is given under the weather specifications to compensate the contractor for idle equipment due to a weather delay to a non-controlling work item. Even if the delay had been to a controlling work item the only remedy based on this specification is to grant additional time. Section 8-7.3.2 expressly prohibits the payment of additional compensation for the delays caused by the effects of inclement weather other than granting a time extension for each day a controlling work item is affected by weather.

Section 8-7.3.2 of the specifications explicitly notes that "no additional compensation will be made for delays caused by the effects of inclement weather." All delay costs related to the eagle/ARMI stone issue have been negotiated as a separate agreement in SA #013; therefore Ranger did not provide a timely Notice of Intent for the delay to the grading equipment.

CONTRACTORS REBUTTAL

To effectively rebut the department's position paper each paragraph in their paper has been numbered by Ranger for ease of reference. Please refer to the attached copy of the department's position paper.

Although it is somewhat difficult to pinpoint the exact basis for denial it appears the department is denying entitlement based on four arguments as stated in the first sentence of paragraph 5 of their position paper. These four arguments are,

1. the information contained in the above History section of the department's paper,
2. Ranger not providing timely notice,
3. the work not being on the Critical Path and,
4. the specifications not providing for payment of idle equipment and labor for weather delays

Each of the four bases for denial will be discussed individually.

1. Based on the "above information" in the History Section

As stated in paragraph 5 of the department's paper they are requesting the Board deny entitlement based on the information discussed in the History Section of their paper. It is unclear what information in the History Section is the foundation of this denial. In fact paragraph 1 acknowledges Ranger submitted notice of intent for the eagle nest on November 11, 2010.

Paragraph 2 of the department's paper appears to be reciting facts on the record. Regarding the last part of paragraph 2 that speaks to SA 13, Ranger has in fact been paid for the effects of the eagle but

only during the time the project was being delayed. This includes a 24 day time extension from November 10th to December 5th and direct cost from November 10th through November 30th. The reason for the SA being limited to these dates is because when a controlling item of work is delayed, (initially median detour was controlling and was delayed) the contractor has to submit all costs within the delay period no more than 30 days after the end of the delay. Those were submitted on December 23rd with a letter stating that future cost not yet realized will be submitted when known. Refer to Ranger's Position Paper for a copy of the December 23rd letter.

Regarding paragraph 3 in the History Section of the department's paper it is unclear what exactly the basis of denial is. Ranger's only conclusion is that the department believes Ranger did not attempt to reasonably mitigate the eagle nest issue. Ranger's mitigation efforts are discussed in detail in our position paper; refer to paragraph 6 under Statement of Facts in Ranger Position Paper. As to the department's statements regarding Ranger's suggestion to use day time lane closures, this was only one of many mitigation efforts.

Regarding paragraph 4 of the department's paper in the History Section, again it is unclear as to the relevance this has to deny our claim for recovery. The specifications do not differentiate classification of equipment nor preclude or limit recovery only to certain types of idle equipment. Idle equipment is idle equipment, be it paving equipment, excavating equipment, grading equipment or any other classification of equipment.

1. Ranger Did Not Provide Timely Notice

Paragraph 6 under Entitlement Analysis states *"The contractor did not provide timely notice as required by the specifications"*. However, paragraph 1 under History, last sentence states *"Ranger submitted a Notice of Intent to Claim for the eagles nest on 11-11-2011"*. In order to take these two statements as non-contradictory, it appears the department's basis for denial turns on the term "timely" and that Ranger's 11-11-2010 notice was not "timely". Since Ranger received word of the eagle in a phone call on the evening of November 10th, verbal notice was given at that time with written notice given upon the first available opportunity the next morning, November 11th. The department has recognized this as proper timely notice as evidenced by the record. Therefore, denial due to not providing timely notice is invalid.

Paragraph 8 under Entitlement Analysis states *"Ranger combined this issue with the eagles nest delay, however this is a separate issue and the contractor should have submitted a separate NOI."* There is no basis for this under the contract. The cause of idle equipment and mobilization is the eagle nest; had there been no eagle nest, Ranger would not have incurred this expense. It is well documented that proper, timely notice was given and that the department was aware of the potential impacts after the end of the time delay. Separate notice is not required based on the type of resource affected.

Paragraph 8 also states *"it was agreed at previous meetings that once the contractor started back to work outside the eagle buffer zone there would be no more delays associated with the eagle nest"*. Again, the department is confusing the term 'delay'. They are correct in that no further delay to the project schedule would occur when controlling items of work resumed. As such, contract time was no longer effected when work resumed. However, the milling, ARMI layer, resurfacing and road widening were not controlling work items and as such no time is being sought.

Paragraph 8 also states that *“At no time in the project meeting minutes is it documented that the grading equipment in the rural section of the project was delayed”*. However, Ranger not only discussed this issue extensively at several meetings, grading and road building equipment was specifically mentioned during DRB meeting #2; refer to CD 1 track 5 of 6 in department’s position paper. This was mentioned in clear, unequivocal terms. Also the weekly records submitted by Ranger clearly showed the disposition of equipment effected.

Paragraph 9 states *“The idle grading equipment must be considered a separate issue and by not submitting a proper notice of intent for this issue Ranger denied the department the ability to track this delay”*. To reiterate Ranger’s position discussed in our Position Paper, proper, timely notice was given on November 11th, 2010. The specifications do not require separate notice of intent to claim for each independent resource e.g. separate notice is not required for direct labor vs. idle labor vs. active equipment vs. idle equipment vs. material etc. The specifications simply require notice when a contractor is going to seek ‘additional costs’ for an issue. Again, the issue is the eagle nest and the additional costs are for idle equipment and mobilization. The department had been given proper notice effectuating their ability to keep records to whatever extent they deemed necessary.

1. Work Not Being on Critical Path

Ranger agrees that the milling, ARMI layer, resurfacing and road-widening in the rural section was not critical path work. As such Ranger is NOT seeking a time extension. The subject of this dispute is simply direct costs. Therefore, any reference to section 8 of the Standard Specification as a basis for denying our request for recovery of direct cost is irrelevant.

2. The Specifications Do Not Provide for Payment of Idle Equipment and Labor for Weather Delays

Paragraph 13 of the department’s position paper indicates the weather specification, spec 8-7.3.2 states *“No additional compensation will be made for delays caused by the effects of inclement weather”*. This specification is completely irrelevant since this work was not on the Critical Path and thus not a controlling work item. Since time extensions for effects of inclement weather only apply to controlling work items, this section does not apply. Section 8 of the Standard Specification is clearly for issues related to time. This dispute is not.

Paragraph 14 indicates all delay costs related to the eagle nest have been negotiated in a separate SA, no. 13. The initial impact of the eagle nest delayed a controlling work item, construction of the median detour. As such, in accordance with the specifications Ranger had 30 days after the end of the delay to submit a Time Extension Request along with costs during the delay period. SA 13 only compensated Ranger for the costs from 11-10-10 thru 11-30-10. In fact the department’s first draft of the SA language was unacceptable to Ranger because it prevented Ranger from seeking compensation beyond the end of the delay. After discussing this with the department the current SA language was inserted into the SA to expressly allow Ranger to seek compensation for direct costs not yet known.

Lastly, paragraph 15, Desired Ruling, it appears the department is requesting the Board deny entitlement based only on effects of inclement weather. As stated above in this rebuttal, the weather specification is irrelevant since contract time is not at issue.

DEPARTMENTS REBUTTAL

The Contractor was compensated for the affects of the eagle's nest delay in the amount of \$89,751.38 on SA #013 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010"* and they were granted 24 days additional contract time on this SA.

In their request for a DRB hearing (see department's position paper page 13-14) the contractor states "Once the department authorized continuation of the work near the end of November, restrictive nighttime temperatures hindered and prevented milling, ARMI and resurfacing from progressing". The department agrees that this is a weather related issue. Specification 8-7.3.2 provides the only available remedy for delays due to the effects of weather, which is to grant a contract time extension on a day for day basis if the work item affected is a controlling work item and the delay meets the requirements set forth in 8-7.3.2. This work was not a controlling work item so additional contract days could not be granted as allowed by specification 8-7.3.2. This specification also states that *"No additional compensation will be made for delays caused by the effects of inclement weather."* Therefore, regardless of the work being a controlling item or a non-controlling item, no additional compensation will be made for delays caused by the effects of inclement weather, in accordance with 8-7.3.2.

It would be unfair and unreasonable for the board to ignore the terms of the contract in order to find entitlement for additional compensation for the effects of inclement weather. Therefore the department requests the board find the contractor is not entitled to additional compensation for this issue.

The Contractor's position paper has identified the inability to continue the milling, ARMI layer, resurfacing and road widening in the rural section of the project as an impact in which additional compensation is due. The Contractor has specifically identified entitlement consideration for the additional idle equipment and mobilization costs related to this work between 11/30/2010 and 2/13/2011, non-inclusive. The Contractor was unable to perform the work due to temperatures being below restrictions identified in the contract. Thus, weather was the sole cause for the Contractor being unable to work on the activities in which the Contractor is requesting compensation for. The Contract specifically states in 8-7.3.2, "No additional compensation will be made for delays caused by the effects of inclement weather.

In their Issue Statement the contractor states that *" The Contract Documents did not indicate the presence of this eagle's nest, nor any restriction on work relative to it. As such Ranger did not have the knowledge, nor should we have the knowledge, that a stop work directive would be issued and resulting our inability to continue road building operations in the rural section of the project causing added expense."*

The department does not dispute that this was an unforeseen eagle's nest, and as stated in the department's position paper (position paper page 2) the contractor was compensated for the delays associated with the eagle's nest on SA #013 in the amount of \$89,751.38, this SA compensated the contractor for *"all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."* All of the dates referenced in the contractors position paper are in the timeframe they received compensation for under SA #13. The date of December 5, 2010 was added in case the eagles returned in the 2011 nesting season before the work in the buffer zone was completed causing another delay for the 2011 nesting season. SA # 013 covered all costs associated with the 2010 nesting season and was agreed to and signed by the contractor.

The department met with Ranger on November 24th to discuss the possibility of eliminating the work on the northern end of the project from the contract due to the presence of the eagle's nest, however Ranger argued that they needed this project to keep their personnel busy and would be willing to work with the Department to minimize the effects of the eagles nest. At that meeting Ranger made a commitment that if the department allowed Ranger to resume work in the northern end of the project, once work resumed Ranger would not claim any further delays associated with the eagle's nest. And as stated in the department's position paper (position paper page 4) Ranger confirmed at the project meetings on 1-5-11, 1-12-11, 1-19-11, 1-26-11, 2-2-11 and 2-9-11 that there were no current delays associated with the eagle's nest.

The Contractor's position paper mentions several items in the Statement of the Facts section, Item No. 1- Ranger states that on November 10th 2010 they were directed to stop work in the area of the 660 ft. buffer zone and that a timely notice of intent was filed. The department does not dispute this section of the position paper and the contractor was reimbursed for the cost associated with stopping work in the buffer zone on SA #013 which stated *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."* However the timely Notice of Intent they refer to was for the eagle's nest delay. The contractor does not mention the idle equipment cost that is the subject of this dispute is for grading equipment after the eagle's nest delay was resolved; no timely Notice of Intent was ever submitted for this claim.

Item No. 2- Ranger states that the milling, ARMI layer and resurfacing in the rural section of the project was affected due to the aggregate needed for the ARMI layer being stockpiled in the eagle buffer zone. The department does not dispute this position and the contractor was compensated for these costs on SA #013 which stated *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1530+80 Lt. from November 10, 2010 to December 5, 2010."* The paving equipment for Ranger and their

ARMI layer subcontractor was included in SA #013. Item No. 3- The Contractor's position paper states that *"over the next few weeks attempts were made to mitigate the impact of the eagle's nest. This included investigating the acquisition of a new source of aggregate to be delivered or possibly a special exemption be granted to access the current stockpile within the restricted zone."* The department does not dispute this section and any cost related to this was compensated to Ranger on SA #013 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."*

Item No. 3- The Contractor's position paper states that *"over the next few weeks attempts were made to mitigate the impact of the eagle's nest. This included investigating the acquisition of a new source of aggregate to be delivered or possibly a special exemption be granted to access the current stockpile within the restricted zone."* The department does not dispute this section and any cost related to this was compensated to Ranger on SA #013 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."*

Item No.4- the Contractor states that once the aggregate was moved they rescheduled the paving crews for resumption of this work on Monday night following Thanksgiving November 29th. The Department does not dispute this section which is why the Contractor was reimbursed for any cost related to this on SA #013 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."*

Item No. 5- The Contractor states that work resumed for two nights November 29th and 30th at which time following the 30th cold weather prevented the installation of the ARMI layer. Contract Specification 8-7.3.2 (department's position paper page 59), states that *"The Department will grant time extensions, on a day for day basis, for delays caused by the effects of rains or other inclement weather conditions....that prevent the contractor from performing controlling items of work."* The milling and resurfacing in the rural section of the project was not a controlling item of work. Section 8-7.3.2 further states that *"No additional compensation will be made for delays caused by the effects of inclement weather."* Because

this work was not a controlling work item no contract time could be granted and "No additional compensation will be made for delays caused by the effects of inclement weather"

In Bullet Number 6 the contractor's position paper (page 2) outlines several items they said were suggestions to the department to reduce the effects of the impact.

1. *Demobilized that equipment that could be used on other jobs* - The paving equipment was demobilized from the project. Any idle time for the paving equipment on the project was reimbursed to Ranger on SA# 013 which states "*Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010.*"

2. *Suggested securing a new source of aggregate, this was rejected by the department, however, eventually the department approved accessing the existing stockpile* – This statement by the contractor is misleading, On November 16, 2010, the department requested Ranger provide an estimated cost and delivery time for ARMI stone to replace the on-site stockpile that was in the eagle buffer zone. A price was provided by Ranger on November 16, 2010 stating that they needed 1200 tons to complete the project at a price of \$44.83 per ton delivered and that once the order was placed it would take 3 weeks for delivery (see e-mails page 9-12) which would place the delivery time approximately December 7, 2010. In the meantime the department received approval from the Fish and wildlife Commission to move the stockpile of stone from the eagle buffer zone, with a biologist present, and the stockpile was moved on 11-22-11. Therefore the stone was accessed approximately two weeks sooner than it would have been if the department had approved the contractor's purchase of additional stone.

3. *Suggested utilizing day time lane closures* – This issue is discussed in detail in the department's position paper (page ...) which explains that the trial daytime lane closure resulted in an unacceptable delay to the traveling public.

4. *Requested accessing the restricted area to obtain all necessary supplies and material to continue constructing the project, the department only gave selective approval* – The Department approved obtaining all materials that the Fish and Wildlife Commission allowed. The affects of any delays associated with any material that could not be obtained was compensated to the contractor in SA#013 which states "*Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010.*"

5. *Suggested elimination of the ARMI stone* – This was a design consideration and based on the design issues the ARMI stone could not be eliminated. However the cost associated with the delay to the ARMI layer was compensated to the contractor in SA #013 which states "*Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010.*"

6. *Suggested the use of Limerock in lieu of Stabilized Subgrade in the eagle zone, this was rejected by the department* – this suggestion was made as an idea to expedite work in the eagle buffer zone to increase the chances of completing this work prior to the 2011 nesting season.

Section 160-2.4 of the specifications states "The Engineer may allow, at no additional cost to the Department, the substitution of 6 inches of Granular Subbase meeting the requirements of 290-2 and 290-3, when 12 inches of Stabilization requiring a Limerock Bearing Ratio (LBR) value of 40 is specified." The department did not reject this idea but declined to participate in the costs.

7 *Encouraged the department to participate in decisions related to resumption of work; the department indicated that such decisions are at the contractor's discretion* — Ranger asked the department to tell them specifically when to bring the paving crews back to the project. It is the Contractor's responsibility to schedule the work.

8. *Searched, found, negotiated and obtained a new source for off-site dirt for embankment to allow urban road construction to continue* —the department approved the use of off-site embankment and reimbursed the contractor for the trucking cost for this off-site material on SA# 014 in the amount of \$28,350.00 (see page 8).

9. *Sought and found suitable disposal for nearly 5000 cy of surplus dirt which resulted from the eagle nest restriction at no additional cost to the department* — The department offered to pay the trucking cost for any of the 5000 cy that could not be disposed of locally. Any other cost associated with this was reimbursed on SA #013 which states "*Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010.*"

Bullets 7 and 8 of the contractor's position paper discusses the costs that were submitted to the department and the department's subsequent denial of the costs which are the subject of this dispute. Ranger's position paper is misleading in the fact that it refers to eagles nest delays and delays to the paving crews. Ranger was reimbursed for these costs on SA# 013 which states "*Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010.*" The contractor's position paper does not make clear the fact that the costs they are requesting are costs for the grading equipment in the rural section of the project. Once the contractor resumed work on 12-2-10, the eagle's nest delay effectively ended. From that point the project was handled by the specifications as any other project would be. Weather delays were subjected to specification 8-7.3.2.

Item No. 9- This item refers to the meeting with the Bartow Operations Center Engineer to discuss this issue, this is addressed in the department's response to the contractor's request for a hearing (see page 7-9 of the department's position paper).

The next portion of the Contractor's position paper covers applicable contract provisions:

1. Florida Statute 337.11 paragraph (2) — The department does not dispute that the project plans did not indicate the presence of the eagle's nest and the necessary restrictions prior to being advertised. Due to this the department approved SA #013 in the amount of \$89,751.38 to compensate the contractor for "*Negotiated settlement for all costs and time*

2. Supplement Specifications, Section 7-1.4 Compliance with Federal Endangered species Act and Other Wildlife Regulations – In the Contractor's reference to Contract Specification 7-1.4 they fail to mention that the second paragraph of that section states "In addition, in cases where certain protected, threatened or endangered species may unexpectedly be found or appear within close proximity to the project boundaries, the Department has established guidelines that will apply when interaction with certain species occurs, absent of any special mitigation measures or permit conditions otherwise identified for the project. " These guidelines were followed in this case.

3. Standard Specification, Section 4-3.7 Differing Site Conditions- The department does not dispute the differing site condition of the eagles nest, and SA # 013 which states "Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010" compensated the contractor \$89,751.38 and granted 24 days of additional contract time. Therefore the contractor was compensated for the cost and time impacts of this issue.

4. Standard Specification, Section 4-3.2 Increase, Decrease or Alteration in the Work- The Contractor did not bear the costs of issuing the 660 ft. no work zone, the contractor was compensated on SA #013 in the amount of \$89,751.38 which states "Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."

5. Specification Section 5-12.2 Notice of Claim- The department does not dispute that proper Notice of Claim was issued for the eagle's nest delay, however the dispute at hand is over idle equipment cost to the grading equipment for the earthwork in the rural widening section of the project, due to weather delays to the milling and paving operations, the Contractor never submitted a Notice of Claim for this issue. The fact that Ranger "Painstakingly discussed the questionnaire" at the December 10th meeting with the department confirms the point made at the beginning of this rebuttal that Ranger wanted to continue the project to keep their personnel busy, when the department was considering eliminating the northern end of the project from the contract.

6. Standard Specification Section 5-12.2.2 Claims for Delay- The Contractor was compensated for the effects of the eagle's nest delay on SA #013 in the amount of \$89,751.38 which states "Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010." This Contract Specification does not apply to the current dispute, which is a weather related delay to the milling and resurfacing of the rural section, which is not a controlling work item. Specification 8-7.3.2 states that "No additional compensation will be made for delays caused by the effects of inclement weather".

impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."

7. Standard Specification Section 5-12.6.2.1 Compensation for Direct Costs, indirect Costs, Expenses and Profits thereon, of or from Delay- The Contractor was compensated for the effects of the eagles nest delay on SA #013 in the amount of \$89,751.38 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."* This Contract Specification does not apply to the current dispute, which is a weather related delay to the milling and resurfacing of the rural section, which is not a controlling work item. Specification 8-7.3.2 states that *"No additional compensation will be made for delays caused by the effects of inclement weather"*.

8. Standard Specifications Section 4-3.2.1c0 Allowable Costs for Extra Work- The Contractor was compensated for the affects of the eagle's nest delay on SA #013 in the amount of \$89,751.38 which states *"Negotiated settlement for all costs and time impacts caused by the bald eagle's nest located at approximate station 1630+80 Lt. from November 10, 2010 to December 5, 2010."* This Contract Specification does not apply to the current dispute, which is a weather related delay to the milling and resurfacing of the rural section, which is not a controlling work item. Specification 8-7.3.2 states that *"No additional compensation will be made for delays caused by the effects of inclement weather"*.

CONCLUSION

The Contractor was compensated for the effects of the eagle's nest on SA #13 in the amount of \$89,751.38. When the delay to the milling and resurfacing ended with the acquisition of the ARMI layer aggregate on November 22, 2010, the contractor resumed milling and paving operations on November 29th and 30th and were stopped by "restrictive nighttime temperatures". This became a weather delay and as per specification 8-7.3.2, no contract time could be granted because this was not a controlling item of work and as per specification 8-7.3.2 *"No additional compensation will be made for delays caused by the effects of inclement weather"*. The Department request the board base their decision on the contract documents and deny entitlement on this issue.

BOARDS FINDINGS AND ANALYSIS

Timely Notice of Intent

The Department's position:

Ranger is not entitled to additional compensation for idle equipment and mobilization resulting from the eagle's nest issue because Ranger did not provide timely Notice of Intent as required by Specification Section 5-12.2.1. The Department calls the request by Ranger for payment for idle equipment and additional mobilization a delay issue and states that the eagle's nest delay issue ceased when Ranger started back to work outside the eagle buffer zone. Thus,

Ranger had to provide a separate Notice of Intent to Claim for the idle equipment and additional mobilization issue.

Ranger's Position

Ranger provided timely Notice of Intent as required by The Standard Specifications for Road and Bridge for Road and Bridge Construction Section 5-12.2 and did not have to provide a separate Notice of Intent to claim for the idle equipment and additional mobilization.

Facts

At 7:51 PM on November 10, 2010, the Department notified Ranger via E-mail of the eagle nest and directed Ranger to stop all work within 660 feet of the eagle nest location until mitigation measures could be determined.

On November 11, 2010, in accordance with Contract Specification Section 5-12.2, Ranger provided to the Department a Notice of Intent to Claim for "impacts associated with cessation of work activities due to the presence of an eagles nest..."

Contract Specification Section 3-1 defines "Controlling Work Items" as: "The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity."

Both parties acknowledged that Ranger's request for additional compensation for idle equipment and mobilization issue is not for a controlling work item under the Contract.

Boards Findings

1a The Board finds Ranger provided a timely Notice of Intent to Claim for the additional compensation for idle equipment and mobilization resulting from the eagle's nest issue in accordance with Contract Specification Section 5-12.2, Notice of Claim.

1b The Board finds that the impacts associated with eagle nest issue did not cease when Ranger started back to work outside the eagle buffer zone.

1c The Board finds Ranger's request for additional compensation for idle equipment and mobilization to be a result of the impacts associated with the presence of the eagle nest and not a separate issue requiring a separate Notice of Intent to Claim from that Ranger provided by its November 11, 2010, Notice of Intent to Claim.

Supplemental Agreement No. 13

The Department's position:

All delay costs related to the eagle/ARMI stone issue were negotiated and were included in SA #13.

Rangers Position

The additional costs of impacts associated with the eagles nest issue (idle equipment and mobilization) which Ranger incurred after December 5, 2010 were not included in SA #13.

Facts:

SA #13, dated May 31, 2011, granted Ranger additional compensation and additional Contract Time as a result of a negotiated settlement for all costs and time impacts caused by the eagle's nest from November 10, 2010, to December 5, 2010.

Ranger's November 30, 2010, answers to the Department's questions regarding the eagle nest issue noted Ranger wanted to be reimbursed for asphalt/milling/ARMI crews and equipment until that work was completed. The Department inquired of Ranger "would Ranger have any additional mobilization costs for which they would seek compensation in the future". Ranger's response was; "Yes, as to the current eagle nest issue, for the demobilization and remobilization of the asphalt/milling/ARMI crews and the idling of other equipment.

Ranger's letter to the Department, dated December 23, 2010, noted the cost impact related to the eagle nest through November 30, 2010, and also stated that since the effects of the impact of the eagle nest were on going, costs for subsequent months would be submitted when realized.

Ranger's narrative for the December 2010 CPM schedule update stated the impacts related to the eagle nest had been submitted for the period through December 5, 2010, however, there were additional costs related to idle equipment that would be submitted at a later date. That same notice was

included in Ranger's narrative for the January 2011 and February 2011 CPM schedule updates.

Boards Findings

2, The Board finds the additional compensation granted by SA #13 for the eagle nest issue was only through the period ending December 5, 2010, and does not include additional compensation for idle equipment or additional mobilization costs for impacts associated with the presence of the eagles nest after December 5, 2010.

Inclement Weather

Department's position:

The idle equipment and additional mobilization costs were a result of effects of inclement weather and in accordance with Contract Specification Section 8-7.3.2, no additional compensation will be made for delays caused by the effects of inclement weather.

Rangers Position

The root cause of the idle equipment and additional mobilization costs was impacts associated with eagle nest issue that impacted Ranger's ability to complete the milling, ARMI layer, and resurfacing work in the rural section of the project as Ranger had planned. Ranger would have completed the work activities in the rural section of the project prior to December 1, 2010, if not for impacts associated with eagle nest issue. Ranger mitigated the idle equipment costs and additional mobilization costs associated with impacts of the eagle nest issue.

Facts:

Contract Specification Section 8-7.3 addresses "Adjusting Contract Time" and Section 8-7.3.2 specifically addresses "Contract Time Extensions" for delays to the controlling items of work.

Contract Specification Section 3-1 defines "Controlling Work Items" as: "The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity."

Contract Specification Section 5-12.2 states that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2.1(c), and then only to the extent the Contractor could not reasonably mitigate such idleness.

The eagle nest issue resulted in Ranger being unable to complete the milling/ ARMI layer, and the resurfacing work in the rural section of the project as the Contractor had planned.

Both parties acknowledge that Ranger's requests for additional compensation for idle equipment and additional mobilization are not for adjusting Contract Time and are not related to delays to the controlling items of work, but are in fact for non-controlling items of work.

Both parties acknowledge that the items of work related to Ranger's request for idle equipment and additional mobilization costs are not controlling items of work.

Both parties acknowledge that Ranger is not seeking, nor has the Department granted, a Contract Time extension for the days that Ranger is seeking compensation for idle equipment and additional mobilization.

Prior to December 1, 2010, the actual lowest daily weather temperatures were greater than the lowest threshold permitted by the Specifications for the installation of the ARMI layer material. December 1, 2010, through February 12, 2011, the nighttime temperatures were mostly lower than the lowest temperature threshold permitted by the Specifications.

Ranger mitigated the additional cost of the idle equipment impacts associated with cessation of work activities due to the presence of an eagles nest by moving some equipment that would have been idle to other projects as possible and by utilizing some equipment, that remained on the project site and would have been idle, for other items of work at the project site when possible and appropriate.

Ranger also attempted to mitigate the additional costs by requesting that the completion of the milling, ARMI layer, and resurfacing work in the rural section of the project be performed during daylight hours. However, the Department prohibited Ranger from doing so.

Boards Findings

3, Contract Specification Section 8-7.3.2, referenced by the Department, states “No additional compensation will be made for delays caused by the effects of inclement weather.” That Specification is specifically for Contract Time extensions when controlling items of work are delayed. That Specification does not prohibit additional compensation for effects of inclement weather to non-controlling items of work.

Contract Specification Section 5-12.2 references compensated for the direct costs of idle equipment for a non-controlling item of work and does not prohibit additional compensation for effects of inclement weather to non-controlling items of work.

The idle equipment and additional mobilization costs were the result of the eagle nest situation that prevented Ranger from completing the milling, ARMI layer, and resurfacing work in the rural section of the project as Ranger had planned. Ranger would have completed the work activities in the rural section of the project, for which Ranger is seeking compensation for idle equipment and additional mobilization costs, prior to December 1, 2010, if not for the direction given by the Department on November 10, 2010, to cease operations due to the presence of the active eagle nest.

Ranger could have completed that work without incurring additional idle equipment and mobilization costs if not for the eagle nest situation and the Department prohibiting Ranger from performing that work during daylight hours when the weather temperatures were greater than the lowest temperature threshold permitted by the Specifications.

In this case, the eagle nest situation was the root cause of the idle equipment and additional mobilization costs. The weather impact was a resulting domino effect that impacted the contractor’s ability to install the ARMI layer because of nighttime temperatures after November 30, 2010 that were lower than the threshold required by the Specifications for the installation of this material.

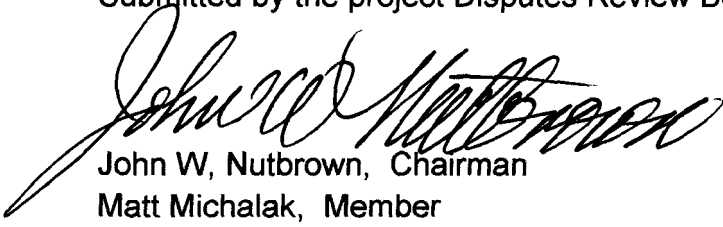
Board Recommendation

The Board’s recommendation is based upon the review and analysis of the information provided by the Department and Ranger in their position papers, rebuttal papers, and their presentations and comments made at the DRB Hearing held September 7, 2011.

The Board recommends Ranger is entitled to recover additional compensation for idle equipment and unforeseen additional demobilization/mobilization costs, in accordance with the terms and conditions of Contract Specification Section 5-12, that Ranger incurred after December 5, 2010, and that were a result of impacts associated with cessation of work activities due to the presence of an eagles nest at approximately Sta. 1632 LT.

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 project Disputes Review Board

A handwritten signature in black ink, appearing to read "John W. Nutbrown", written in a cursive style. The signature is positioned above the printed names of the board members.

John W, Nutbrown, Chairman

Matt Michalak, Member

James G. Weeks, Member