

DISPUTE REVIEW BOARD RECOMMENDATION

January 19, 2014

Mr. Eric Juhl
Russell Engineering, Inc.
10704 Portal Crossing
Bradenton, FL. 34211

Mr. Paul W. Wingard, PE, LEED AP, CGC
KCCS
1400 Colonial Blvd.
Suite 260
Ft. Myers, FL. 33907

Re: SR 45 (US Hwy 41) – Corkscrew Road to San Carlos Blvd.
FIN 195765-1-52-01, Contract No. T1407
F.A.P. No. 3012095P (Delegated Project)
Lee County

Dear Sirs:

Russell Engineering (REI) requested a hearing concerning alleged delays and monetary damages caused by Lee County's (LC) failure to remove a 12" Ductile Iron Pipe in a timely fashion. Summaries of the Department's and REI's positions were forwarded to the Disputes Review Board (DRB), and a hearing was held on December 19, 2013.

ISSUE: ISSUE NO. 1 – Alleged Lee County Utilities 12" WM-DIP Removal Delay

Is REI entitled to a compensable time extension for the failure of LC to timely remove a 12" Ductile Iron Pipe? Both entitlement and quantum are requested by REI with the exception that entitlement only is requested for the MOT portion of the dispute.

Contractor's Position

Please refer to **ISSUE NO. 1** in TIA02 for background, problem definition, milestones, controlling items of work affected, time impact analysis, schedule fragments and other evidence related to **ISSUE NO. 1** supporting Russell's entitlement to an adjustment of time and monetary compensation as a result of the Lee County Utilities 12" WM-DIP Removal Delay. The documented evidence in TIA02 referenced above relating to **ISSUE NO. 1** has been extracted and formatted as a standalone document for ease of reference and attached hereto as **EXHIBIT "F"**.

The Engineer denied Russell's entitlement to time and compensation for delay costs resulting from **ISSUE NO. 1**, because Schedule Activity ID P4-270-40 was not listed as controlling item of work on weekly form, Russell did not take all reasonable measures to minimize the effect of utility work on the job progress, Russell stopped the utility work and directed the crew to work elsewhere and because Russell did not notify the utility owner of possible impact.

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The Contract Documents issued by the Department for the Project in its Bid Advertisement to Russell on the 23rd Day of July, 2010 included a Utility Work Schedule (UWS) for Lee County Utilities construction items to be performed by Lee County Utilities during FDOT Project Construction. All Lee County utility work items were built in the As-Bid CPM Baseline Construction Schedule for the Project using the dependent activities, MOT phase and duration specified in the UWS.

As per the UWS and current accepted Schedule, Schedule Activity **UDC-LC-170 – LC – 12" WM DIP/REMOVE EXISTING WM 129+80 LT SR 45** was required and scheduled to finish prior to drainage improvements in Phase IV, yet the succeeding dependent drainage Schedule Activity **PIV-130-180 –CONST. (INLET-S158) 334' OF 36" PIPE (S151, S150, S145) 131+50>127+93 LT - PH IV (CONST. INPIVB)** started on February 25, 2013, before Schedule Activity **UDC-LC-170** started, so Lee County was already not meeting their required work schedule before Schedule Activity **PIV-270-40-B** was affected. Russell notified the Department that Lee County is causing a delay on February 7, 2013 during the weekly progress meeting, again on March 7, 2013 during the weekly progress meeting, and on March 15, 2013, Russell submitted a Preliminary Time Extension Request/NOI for the Lee County Utilities 12" WM-DIP Removal Delay.

On March 11, 2013, Lee County Utilities Schedule Activity **UDC-LC-170 – LC - 12" WMDIP/REMOVE EXISTING WM 129+80 LT SR 45** became a controlling item of work after the critical path shifted due to Lee County Utilities failing to complete their Contract work in accordance with the accepted Contract Schedule and UWS before the total float elapsed and the actual start of Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was delayed beyond the Late Start Date, which resulted in the activity becoming a controlling item of work on March 11, 2013.

Lee County Utilities did not complete Schedule Activity **UDC-LC-170 – LC - 12" WMDIP/REMOVE EXISTING WM 129+80 LT SR 45** in accordance with the schedule included in the Contract Documents. Lee County Utilities lack of progress actually affected Russell's progress toward completing controlling item of work **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)**. Russell took all reasonable measures to minimize the effect of utility work on job progress.

The primary reason the Engineer has denied Russell's entitlement for **ISSUE NO. 1** is because Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was not listed as a controlling item of work on the weekly form. Controlling items of work are only predetermined by the Schedule. Russell agrees that as of February 17, 2013, Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was not on the critical path yet, however, it was a near-controlling activity with only nine (9) days of total float. The Engineer is only looking at the Schedule as of February 17, 2013, and is not taking into account that the critical path shifts in-between updates. Delays are

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not controlled events and are not fixed to only start and stop on the progress estimate cut-off dates, which is why the Data Date for the Before Impact Fragnet in TIA02 is scheduled through March 11, 2013 with actual progress.

The critical path did in fact shift after Schedule Update No. 24 (DD: 02/17/13), this is reflected in Schedule Update No. 25 (DD: 03/17/2013), both updates were accepted by the Engineer. The driver of

the most critical-longest path as of March 17, 2013 was Schedule Activity **UDC-LC-170 – LC - 12" WMDIP/REMOVE EXISTING WM 129+80 LT SR 45** and Schedule Activity **PIV-270-40-B – SPREAD/MIXTYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was now also a controlling item of work on the most critical-longest path. The critical path will shift if progress is not completed on near-controlling items of work. See Schedule Update No. 24 (DD: 02/17/13) attached hereto as **EXHIBIT "G"** and Schedule Update No. 25 (DD: 03/17/13) attached hereto as **EXHIBIT "H"**.

The Engineer's method for calculating this delay does not comply with the requirements of **Special Provision Sub Article 8-3.2.6 Time Extensions** for analyzing time impacts. Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was a controlling item of work in the accepted Contract Schedule as of March 11, 2013, not February 17, 2013, and was delayed by the Lee County failing to complete Schedule Activity **UDC-LC-170 – LC – 12" WM DIP/REMOVE EXISTING WM 129+80 LT SR 45** on time.

Russell did not enter into any three-party agreement with Lee County Utilities and Strickler Brothers, Inc., so whatever lack of performance Lee County Utilities experienced from electing to utilize Strickler Brothers, Inc. to complete the County's contract work is through no fault of Russell's.

Russell submitted a time extension request in accordance with the **Special Provision Sub Article 8-3.2.6 Time Extensions**, attached hereto as **EXHIBIT "I"**, **Section 8-7.3.2 Contract Time Extensions** of the **2010 Standard Specifications**, attached hereto as **EXHIBIT "J"** and **Section 5-12 Claims by Contractor**, attached hereto as **EXHIBIT "K"**.

Russell is requesting a recommendation on entitlement only from the Board on time and compensatory delay costs for all time-cost elements requested in Time Impact Analysis No. 2 (TIA02) due to the Lee County Utilities 12" WM-DIP Removal Delay.

Pursuant to the Contract UAO Utility Work Schedule for this project, Lee County Utilities is required and scheduled to remove their existing 12" WM-DIP facilities from Sta. 109+40 to Sta. 129+80 LT SR 45 during Phase IV Construction within 5 consecutive calendar days, prior to the commencement of drainage improvements. On February 19, 2013, Russell began working on Phase IV drainage construction activities between Sta. 131+50 and Sta. 127+00 LT SR 45, however, Lee County Utilities had not yet completed or started their required 12" WM-DIP removal work from

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Sta. 131+50 to Sta. 127+00 LT SR 45 in accordance with their UWS and Contract Schedule. Moreover, Russell utilized its own resources to remove portions of the existing 12" WM-DIP in conflict with the proposed drainage that Lee County failed to remove prior in order to advance progress.

On March 11, 2013, as Russell's resources proceeded to commence with the scheduled construction of stabilized subgrade between Sta. 131+00 and Sta. 117+80 LT SR 45, Lee County Utilities had not yet removed their existing 12" WM-DIP as required by the Contract, therefore the stabilization operation with said limits was stopped due to the existing utility conflict. On March 15, 2013, Russell submitted a Preliminary Time Extension Request and Notice of Intent (NOI) to Claim Additional Compensation. See Preliminary TER / NOI attached hereto as **EXHIBIT "2"**.

Lee County Utilities did not finish removing their existing 12" WM-DIP facilities from Sta. 109+40 to Sta. 129+80 until March 25, 2013. Clearly Russell's resources were assigned to out-of-sequence activities during this delay period in order to advance progress. As a result of reassigning resources during this delay period.

The essential cause of this critical delay to Stabilization CIW Activity #P4-270-40-B in the current approved schedule was attributed to Lee County Utilities not finishing Activity # UDC-LC-170 prior to the start of drainage improvement and stabilization activities in Phase IV. The effect of this critical delay to the controlling item of work listed below resulted in the total float being exceeded and extended the project complete date. This schedule impact was through no fault of Russell.

1. ISSUE NO. 1 (TIA02-1) – MILESTONES

No	Description of Event	Date
01	Russell's Progress on Activity PIV-270-40-B Affected By Incomplete Lee County 12" WM Removal	03/11/13
02	Preliminary TER / NOI to Claim Additional Compensation Submitted for Lee County WM Removal Delay	03/15/13
03	Lee County Utilities Finished Activity UDC-LC-170 – LC - 12" WM-DIP/REMOVE EXISTING WM 129+80 LT SR 45	03/25/13
04	Russell Started Activity PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT	03/28/13

The Engineer decided Russell has no entitlement to time or compensation for delay costs resulting from the Lee County Utilities 12" WM-DIP Removal Delay. See the Engineer's Entitlement Analysis and UL Payment to be processed attached hereto as **EXHIBIT "D"**. The difference between the time-cost amounts requested vs. agreed is as follows:

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TIME REQUESTED BY REI (CD): 6
TIME AGREED BY FDOT (CD): 0
VARIANCE: -6
% VAR: -100%

COST		COST AMOUNT REQUESTED BY REI ON 07/29/2013 FOR ISSUE NO. 1						
NO.	DESC RIPTI	U/M	QTY	UNIT RATE	AMOUNT	MARKU		EXTENSION
						%	AMO	
1	AVERAGE OVERHEAD PER DAY	CD	6.00	\$ 1,422.09	\$ 8,532.54	0%	\$	\$ 8,532.54
2	EXTENDED MOT	CD	6.00	\$ 1,427.07	\$ 8,562.42	0%	\$	\$ 8,562.42
					\$17,094.96		\$	\$17,094.96

COST ELEMENTS (CONT'D)		COST AMOUNT AGREED BY FDOT AS OF 10/31/13 FOR ISSUE NO. 1					
NO.	DESC RIPTI	ENTITLEMENT	QTY	UNIT RATE	AMOUNT	VARIANCE	% VAR.
1	AVERAGE OVERHEAD PER DAY	DENIED	0.00	\$ 1,422.09	\$ -	\$ (8,532.54)	-100%
2	EXTENDED MOT	DENIED	0.00	\$ 1,423.09	\$ -	\$ (8,562.42)	-100%
					\$ -	\$ (17,094.96)	-100%

Pursuant to **Section 4-3.2 Increase, Decrease or Alteration in the Work** of the **2010 Standard Specifications**, Russell has certified the time and monetary compensation amounts requested on July 29, 2013 in association with the two extra work delay issues, with the exception of Extended MOT cost, which the Department is currently disputing entitlement. See Certification of Request for Equitable Adjustment attached hereto as **ATTACHMENT "1"**.

EXHIBITS

- A. Time Impact Analysis No. 2 (TIA02) - Overall
- B. Email Exchange Between Russell and the Engineer (10/08/13 thru 10/15/13)
- C. DRB Request for Hearing
- D. Engineer's Entitlement Analysis and UL Payment
- E. Time-Cost Comparison Table of Amounts Requested vs. Agreed
- F. Time Impact Analysis No. 2 (TIA02) – Issue No. 1 Only
- G. Schedule Update No. 24 (DD: 02/17/13)
- H. Schedule Update No. 25 (DD: 03/17/13)
- I. Special Provision Sub Article 8-3.2.6 Time Extensions
- J. Section 8-7.3.2 Contract Time Extensions of the 2010 Standard Specifications
- K. Section 5-12 Claims by Contractor
- L. Time Impact Analysis No. 2 – Issue No. 2 Only
- M. Plan Revision No. 11
- N. Section 4-3.2 Increase, Decrease or Alteration in the Work of the 2010 Standard

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Specifications

- O.** Time Impact Analysis No. 2 (TIA02) – Issue No. 3 Only
- P.** Plan Revision No. 10
- Q.** Plan Revision No. 12
- R.** WO 9999-21-07

ATTACHMENTS

1. Certification of Disputed Elements of Entitlement
2. Electronic Copy of Russell's Position Statement [CD-R]

Progress Schedule No. 24 (DD: 02/17/2013) was utilized as the baseline schedule for analyzing the time impact associated with this Lee County Utility Water Main Removal Delay. Since this impact was encountered on 03/11/2013, therefore the Data Date was adjusted to 03/10/2013 and the physical progress reflected in the before impact schedule was updated through 03/10/2013 to include the most current physical progress as of the day before the actual impact started.

(See Next Page)

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III-A-1. SCHEDULED DAYS – PS24 (DD: 02/17/13) / BEFORE IMPACT SCHEDULE (DD: 03/11/13)

Early Start Date: 31-JAN-11
 Early Finish Date: 01-OCT-13

III-A-2. START OF DELAY PERIOD #1 – LEE COUNTY 12” WM-DIP REMOVAL DELAY

DATE: 11-MAR-13

This delay period started after Activity PIV-270-40-B – SPREAD/MIX STABILIZATION 131+00 to 117+80 RT BDWY did not start due to incomplete progress on removing the existing 12” WM-DIP by Lee County Utilities from Sta. 109+40 to Sta. 129+80 LT SR 45, thus stopping Russell resources from starting stabilization work within said station limits.

III-A-3. END OF DELAY PERIOD #1 – LEE COUNTY 12” WM-DIP REMOVAL DELAY

DATE: 27-MAR-13

This delay period finished after Lee County Utilities finished removing their existing 12” WM-DIP facilities from Sta. 109+40 to Sta. 129+80 LT SR 45 and Russell’s resources finished mobilized back to stabilization Activity PIV-270-40-B after completing other alike work on the project in an effort to advance progress throughout this delay period.

III-A-4. DAYS OF IMPACT – PS24 / TIA02-1-BI (DD: 03/10/13) VS. AFTER IMPACT / TIA02-1-AI (DD: 03/10/13)

SCHEDULE	PS24/TIA02-1-BI	TIA02-1-AI
Construction Start	31-JAN-11	31-JAN-11
Construction Duration (C/D)	975	981
Substantial Completion	01-OCT-13	07-OCT-13
Variance BL Finish Date	--	-6

Activity Name	AD	Early Start (PS24)	Early Finish (PS24)	Early Start (TIA02-1)	Early Finish (TIA02-1)	Var. Start	Var. Finish
TIA02-1 IMPACT DURATION	975	31-JAN-11	01-OCT-13	31-JAN-11	07-OCT-13	0	6

III-A-5. MILESTONE DATES

- Project Completion Date Before the Change 01-OCT-13
Before TIA Delay Start – Without Impact

- Project Completion Date After the Change 07-OCT-13
After TIA Delay finish – With Impact

Department’s Position

During the initial stages of the project, Lee County was utilizing a contractor, Southwest Utilities to handle all of their utility removals and adjustments. Prior to beginning the Phase IV construction, to improve coordination with the prime contractor, REI, Lee County employed a new contractor to

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perform this work, Strickler Brothers. This was done because Strickler was also doing all of the storm drainage work for REI.

The 12" water main in question is located within the Phase IV area of the project between approximately station 109+40 and 129+80. REI began work in this area prior to Lee County removing all of the existing water main within the Phase IV area. REI actually began work (IE, clear & grub, excavation, etc.) on approximately February 19th, 2013 for Phase IV.

At the March 14th progress meeting, as is typical for all progress meetings, the question was raised, are there any on-going or upcoming utility issues/concerns. REI responded that there are no issues.

On March 15th, REI submitted an NOI stating that the work was being impacted by the failure of Lee County to complete all water main removal within the Phase IV area. At the time, REI was working the area south of the bridge. Lee County was immediately notified. On March 18th Strickler, at the request of Lee County Utilities, began removal of the water main in the area north of the bridge utilizing staff assigned to the project. REI directed Strickler to move those resources elsewhere on the project. Strickler brought in additional resources to the project on approximately March 20th to remove the water main. Again REI directed their subcontractor to move those resources elsewhere on the project. Finally, Strickler brought in more resources on Friday March 22nd and completed the water main removal that day.

During the period of March 15th through March 22nd, the contractor's forces were working south of the bridge. The list of critical work activities (controlling items of work), that are submitted weekly at each progress meeting, including the meetings of March 14th and March 21st, did not show any critical work activities in the area immediately north of the bridge that were affected by the water main removal; the area which is the subject of this issue. See attachment B-4 & B-5 for the controlling items of work submitted. Also see attachment B-2 for Lee County's position on the matter.

REI alleges that their work efforts were impacted, specifically Activity #P4-270-40-B, and that they were forced to work out of sequence. However, this item did not appear as part of the controlling items of work. In fact, all their forces were committed south of the bridge prior to March 14th and continued to work south of the bridge until approximately March 28th.

NOI issued by REI – March 15

LC Water Main removal, work completed March 22, see attached DWR B-32.

The Standard Specifications in Article 7 require that the prime contractor must coordinate all work efforts with impacted utility relocations. While the contractor, in this case REI, has no control over the completion of any utility relocations, by specification there is an implied coordination effort that must take place. In accordance with Article 7-11.6.4 Weekly Meetings, the contractor is to provide the work progress schedule and work plan in accordance with 8-3.2 to conduct sufficient liaison and provide sufficient information to indicate coordination activities. At the March 14th meeting the contractor clearly stated that there were no upcoming conflicts to coordinate and the

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Two-Week "Look Ahead" required by Article 8-3.2.4 did not indicate any issues or concern, see progress meeting minutes, Attachment B-10. It is unrealistic for the contractor to then, the next day, file a claim for a delay. This is further reinforced by the fact that the weekly list of critical activities (controlling items of work) did not indicate any issues. Therefore REI is not entitled to any further compensation, either for additional time or monetary payment.

Furthermore, Article 5-12.2.1 Claims for Extra Work state that the contractor must submit a request for contract time extension within 30 calendar days after the elimination of the delay per 8-7.3.2. The final package was not initially submitted by REI until July 28th, well after this 30 day time period had expired. Article 8-7.3.2 states that failure to submit the complete request including all documentation to substantiate the additional time and include a detailed cost analysis, will result in the contractor waiving all rights for any entitlement.

REI Rebuttal

This Rebuttal is Russell Engineering, Inc. (Russell) response to the Position Paper to the above captioned request for recommendation by the Board submitted by the Florida Department of Transportation (the Department) on December 4, 2013.

The Department states in ¶1 on Page 2 of their Position Paper, ...*"At the conclusion of the meeting, REI was to provide some additional detail information to support their position. At each subsequent progress meeting KCCS questioned the status of the submittal of the additional information"*... The Department continues to make the claim that because Russell did not submit so called *"additional detail information"* to support our position, as the Department calls it, after our meeting on August 15, 2013, when our Request for Contract Time Extension/Equitable Adjustment (Request) was already supported, the Department decided not to respond to our Request. The Department included no reference(s) to *"additional detail information"* requirements specified in the Contract to support not responding to our Request. See Department's Position Paper attached hereto as **EXHIBIT "1"**.

There is no requirement specified in the Contract that the Contractor must submit *"additional detail information"*, as the Department calls it, in order for the Engineer to accept or reject a Request made by the Contractor. Moreover, Russell did not communicate to the Engineer during our meeting on August 15, 2013, or any other progress meeting, that any such information would be submitted for the purpose of supplementing our Request with so called *"additional detail information"* to further support or position on entitlement or quantum. Russell did not even know which time-cost elements of entitlement the Department was even disputing prior to October 31, 2013.

The Department states in ¶1 on Page 2 of their Position Paper, ...*"No additional information was submittal and no additional discusses took place until REI submitted their October 8th email demanding a response to their Request within seven (7) days and if this was not possible,*

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*requesting the issuance of a unilateral work order.”... Russell made no such demand, we asked the Department to please acknowledge our Request and process a UL Payment for quantum not being disputed. As of October 8, 2013, seventy- one (71) days had already elapsed since Russell first submitted its Request without a single written response from the Department, which is why Russell requested that the Department at least process a Unilateral Payment for time and compensatory cost amounts agreed by the Department. This seemed like a reasonable request to Russell, not a demand, especially since **Section 7.2.5(4)** of the **CPAM** states, “*The Resident Engineer shall provide written acknowledgment of each Contractor’s time extension request.*”... **Section 7.2.5(5)** of the **CPAM** states, ... “*The denial or approval should include a concise response explaining the findings and decision for each issue raised by the Contractor’s request.*”... See Section 7.2 Time Extensions of the CPAM attached hereto as **EXHIBIT “2”**.*

Therefore, since the Engineer failed to respond to our Request after ninety-four (94) days elapsed since making our submission, Russell considered our Request denied by the Engineer’s failure to respond, and referred the dispute to the Board for timely resolution as a result.

The Department states in ¶1 on Page 2 of their Position Paper, ... “*It should be noted that as of October 8th no certified claim package had been submitted by REI. Furthermore, once a certified claim package is submitted, the Department has 120 days to review and respond to the submittal in accordance with specification section 5-12.4.*” It is still Russell’s position that none of the three issues brought to the Board for recommendation have become a formal dispute, because Russell has not submitted a written demand “Contract Claim (Claim)” as defined by the Contract.

The Contract defines a Contract Claim (Claim) as, “*A written demand submitted to the Department by the Contractor in compliance with 5-12.3 seeking additional monetary compensation, time, or other adjustments to the Contract, the entitlement or impact of which is disputed by the Department.*”, which activates legal rights and obligations as to the Contractor or Department, whereas a Request for Contract Time Extension/Request for Equitable Adjustment does not. See definition of Contract Claim (Claim) attached hereto as **EXHIBIT “3”**.

The Contract does not specify that the Department is allowed 120 days to review and respond to a Request for Contract Time Extension/Request for Equitable Adjustment. In our last DRB Meeting held on November 14, 2013, the Department acknowledged that Russell submitted a Request for Equitable Adjustment, not a Contract Claim (Claim).

On November 5, 2013, the Department stated in an email to the DRB Chairman, ... “*we are only at an impasse because the contractor has failed to meet with us following one initial meeting.*” The Department’s reason for not responding to our Request for ninety-four (94) days in their Position Paper is not their basis for rejecting entitlement and quantum. See email from the Department to Russell dated November 5, 2013 attached hereto as **EXHIBIT “4”**.

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a. Department Statement:

(Page 2 of 6 – Paragraph 2)

“...Prior to beginning the Phase IV construction, to improve coordination with the prime contractor, REI, Lee County employed a new contractor to perform this work, Strickler Brothers. This was done because Strickler was also doing all of the storm drainage work for REI.”

a. Russell Rebuttal:

Lee County Utilities (LCU) contracted Strickler Brothers to finish their Contract work because they were unable to get Southwest Utilities to come back to the job and finish the water main removal, not because Strickler Brothers was also doing all of the storm drainage work for Russell.

b. Department Statement:

(Page 2 of 6 – Paragraph 3)

“...REI began work in this area prior to Lee County removing all of the existing water main within the Phase IV area. REI actually began work (IE, clear & grub, excavation, etc.) on approximately February 19th, 2013 for Phase IV.”

b. Russell Rebuttal:

Russell’s daily records and accepted schedule update reflect that Activity **PIV-120-80-B – CLEARING AND GRUBBING 131+00>117+80 LT (S4) - PH IV (CONST. IN PIVB)** started on February 4, 2013, not February 19, 2013. Russell started drainage Activity **PIV-130-180 – CONST. (INLET-S158) 334' OF 36" PIPE (S151, S150, S145) 131+50>127+93 LT - PH IV (CONST. IN PIVB)** on February 25, 2013. Pursuant to LCU Utility Work Schedule (UWS) and the accepted Contract Schedule, LCU is required to complete Activity **UDC-LC-170 – LC - 12" WM-DIP/REMOVE EXISTING WM 129+80 LT SR 45** prior to drainage improvements in Phase IV, however, LCU did had not even started water main removal in the area prior to **PHASE IVB - STA. 137+00 TO STA. 117+80 LT - SR 45** drainage improvements starting on February 7, 2013.

c. Department Statement:

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“At the March 14th progress meeting, as is typical for all progress meetings, the question was raised, are there any on-going or upcoming utility issues/concerns. REI responded that there are no issues.”

c. Russell Rebuttal:

On February 7, 2013, Russell informed the Department that LCU is causing a delay on February 7, 2013 during the weekly progress meeting, again on March 7, 2013 during the weekly progress meeting and ultimately submitted a Preliminary Time Extension Request/NOI on March 15, 2013 for the LCU 12” WM-DIP Removal Delay. In addition to Russell informing the Department of the effect LCU progress is having on the project and submitting a Preliminary Time Extension Request, the Department was also made aware of LCU progress in the schedule updates and they had

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inspectors in the field. Therefore, the Department knew what LCU work was remaining, and that it must be completed before drainage improvements begin. See Meeting Minutes from February 7, 2013 and March 7, 2013 attached hereto as **EXHIBIT "5"**.

Russell informed the Department on March 14, 2013 at the progress meeting that LCU incomplete water main removal work is still affecting Russell's progress. Clearly the Department knew LCU had not yet completed all of their Contract work, so the problem was not eliminated. The Department acknowledges that Russell was working south of the bridge. Russell had to move its earthwork resources from working on a controlling item of work within the limits of Phase IVB where LCU still had not removed water main to a non-controlling items of work. The Meeting Minutes from March 14, 2013 states on Page 2 under Utility Status, "*Lee County Utilities – (Not Present) KCCS stated that Lee County is scheduled to remove the existing water main located between station 128+00 to 116+00 Left Roadway.*" The Department only acknowledges that LCU is scheduled, not actually working, and no start date was provided to Russell. Furthermore, Lee County was **not present** at any of the referenced progress meetings in the Department's Position Paper, which resulted in a lack of coordination by LCU to finish their Contract work, so as to not delay Russell's progress.

d. Department Statement:

(Page 2 of 6 – Paragraph 5)

"On March 15th, REI submitted an NOI stating that the work was being impacted by the failure of Lee County to complete all water main removal within the Phase IV area. At the time, REI was working the area south of the bridge. Lee County was immediately notified. On March 18th Strickler, at the request of Lee County Utilities, began removal of the water main in the area north of the bridge utilizing staff assigned to the project. REI direct Strickler to move those resources elsewhere on the project. Strickler brought in additional resources to the project on approximately March 20th to remove the water main. Again, REI directed their subcontractor to move those resources elsewhere on the project. Finally, Strickler brought in more resources on Friday March 22nd and completed the water main removal that day."

d. Russell Rebuttal:

Russell could not start controlling item of work Activity **PIV-270-40-B** – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB) due to LCU not finishing the water main removal, so Russell had to move its earthwork resources to the following Activities north of the bridge in the Left Roadway to mitigate the LCU delay event:

- **PIV-250-50-D** – CONST. REGULAR EXCAVATION 103+71>90+45 LT (S5) - PH IV (CONST. IN PIVD)
- **PIV-260-50-D** – CONST. EMBANKMENT 103+71>90+45 LT (S8) - PH IV (CONST. IN PIVD)
- **PIV-270-30-A** – SPREAD/MIX TYPE B STABILIZATION 156+00>137+00 LT (S4) - PH IV (CONST. IN PIVA)
- **PIV-360-30-A** – GRADE DITCH/PONDS 3A, 2D/FINISH SOIL LAYER 156+00>137+00 LT (S4) - PH IV (CONST. IN PIVA)

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It is evident to Russell that LCU did not have resources of Strickler Brothers scheduled to start removing the water main on March 18, 2013. It was only because Russell submitted a Preliminary Time Extension Request/NOI that LCU requested Strickler Brothers to complete their Contract work. Strickler stopped working on Activity PIV-130-180 - CONST. (INLET-S158) 334' OF 36" PIPE (S151, S150, S145) 131+50>127+93 LT – PH IV (CONST. IN PIVB) after receiving a call from Lee County. Just because Russell put the Department on notice for LCU delaying a controlling item of work, LCU is not entitled to utilize resources already “assigned to the project” under the Prime Contractor in an attempt to circumvent their own lack of coordination, resources and delay to the Contract Schedule. While LCU excavated the water main in conflict on Friday, March 22, 2013, the materials were still left on the ground and the trench had not been backfilled, so LCU work was not 100% complete. LCU did not complete 100% of the water main removal until Monday, March 25, 2013; all materials removed and backfill complete. Russell did not finish mobilizing resource back to the delayed stabilized subgrade work area to complete Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** until Wednesday, March 27, 2013. Whatever lack of performance Lee County Utilities experienced from electing to utilize Strickler Brothers, Inc. to complete the County’s contract work is through no fault of Russell’s.

e. Department Statement:

(Page 2-3 of 6 – Paragraph 6)

“...The list of critical work activities (controlling items of work), that are submitted weekly at each progress meeting, including the meetings of March 14th and March 21st, did not show any critical work activities in the area immediately north of the bridge that were affected by the water main removal; the area with is the subject of this issue.”

e. Russell Rebuttal:

The schedule was updated on March 17, 2013, Progress Schedule No. 25 (PS25) and the driver of the most critical-longest path was Schedule Activity **UDC-LC-170 – LC - 12" WM DIP/REMOVE EXISTING WM 129+80 LT SR 45** and Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was now also a controlling item of work on the most critical-longest path. The Department is completely ignoring the results of PS25 and the fact that the critical path shifted after February 17, 2013, as if PS25 is not part of the Contract Schedule. The controlling items of work submitted weekly throughout the period are the same reports included with the schedule update for the entire period, no different, as of the Data Date. **Sub Article 8- 3.2.2(3)(b)** states, *“The report will describe the current critical path of the project and indicate if this has **changed** in the last 30 days. Discuss current successes or problems that have **affected either the critical path’s length** or have **caused a shift in the critical path** within the last 30 calendar days. Identify specific activities, progress, or events that may reasonably be anticipated to impact the critical path within the next 30 days, either to affect its length or to shift it to an alternate path.”* Clearly the Contract acknowledges that the critical path will shift, but the Department refuses to acknowledge this fact. The critical path did in fact shift after Schedule Update No. 24 (DD: 02/17/13), this is reflected in Schedule Update No. 25 (DD: 03/17/2013), both updates were accepted by the Engineer.

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f. Department Statement:

(Page 3 of 6 – Paragraph 1)

"...Also see attachment B-2 for Lee County's position on the matter." (Attachment B-2 – Letter from Lee County Utilities – Russell – LCU Claim - Luis Soto, P.E.)

- *"2/20/2013 Phase IV commenced after Russell switch traffic to the other side of the road. See progress meeting minutes No. 104."*
- *"2/28/13 no outstanding issues with LCU. See progress meeting minutes No. 105."*
- *"3/14/13 LCU stated that the abandoned water main was scheduled to be removed on 3/18/13."*
- *"3/18/13 LCU's contractor Strickler Brothers started the removal of the abandoned water main as scheduled. However, Russell Engineering, instructed Strickler Brothers not to perform the water removal. Instead, Russell Engineering redirected Strickler Brother to perform other tasks. See e-mail sent by LCU to KCCS/FDOT on 3/18/13."*
- *"3/22/13 LCU's contractor Strickler Brothers removed the abandoned water main. See progress meeting minutes No. 109."*

"LCU was very diligent during the entire project. LCU even incurred extra expense to accommodate Russell Engineering by performing Phase IV work during the initial phases of the project. Per Utility Work Schedule, LCU had a total of 69 calendar days to perform work between the Estero Bridge and the south side of Broadway during phase IV. It only took a couple of days to perform the removal of the abandoned water line."

f. Russell Rebuttal:

- Russell switched traffic for Phase IV on September 25, 2012, not February 20, 2013. This date is reflected in the accepted schedule.
- How can LCU say there's no outstanding issues as of February 28, 2013, the water main removal in Phase IV was not complete and Russell had already started constructing storm drain. On February 7, 2013, Russell informed the Department that LCU is causing a delay on February 7, 2013
- during the weekly progress meeting and again on March 7, 2013 during the weekly progress meeting. LCU was not present for either progress meeting.
- The minutes for the progress meeting held on March 14, 2013, which LCU was not present for, does not reflect a start date of March 18, 2013.
- Russell did not instruct Strickler Brothers not to perform the water removal. The Department nor the County has produced any evidence of such direction. Strickler abandoned their assigned work on the project, Activity PIV-130-180 – CONST. (INLET-S158) 334' OF 36" PIPE (S151, S150, S145) 131+50>127+93 LT - PH IV (CONST. IN PIVB), so Russell directed Strickler to comply with their Subcontract, which has nothing to do with LCU work.
- LCU excavated the water main in conflict on Friday, March 22, 2013, however, the materials were still left on the ground and the trench had not been backfilled, so LCU work

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was not 100% complete. LCU did not complete 100% of the water main removal until Monday, March 25, 2013; all materials removed and backfill complete.

- LCU was not diligent when it came to attending progress meetings, coordinating the removal of their water main in Phase IV or supplying adequate resources to complete their Contract work in a timely manner. Russell is not responsible for any costs associated with LCU Contract work. As per LCU Utility Work Schedule and the Contract Schedule, Schedule Activity **UDC-LC-170 – LC – 12" WM DIP/REMOVE EXISTING WM 129+80 LT SR 45** was required and scheduled to finish prior to drainage improvements, it was not. This issue is about the water main in conflict with Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)**, which LCU had a total of five (5) calendar days to complete, not sixty-nine (69) calendar days. It took longer than a couple of days for LCU to complete the water main removal activity in Phase IV, LCU is only looking at the time it took to excavate the water main. LCU is not including the days of delay to the Contract Schedule before they physically started the work, the time it took to backfill and cleanup, and the time it took for Russell to mobilize our resources back to the area to complete stabilized subgrade.

g. Department Statement:

(Page 3 of 6 – Paragraph 2)

"...However, this item did not appear as part of the controlling items of work...LC Water Main Removal, work completed March 22..."

g. Russell Rebuttal:

The schedule was updated on March 17, 2013, Progress Schedule No. 25 (PS25) and the driver of the most critical-longest path was Schedule Activity **UDC-LC-170 – LC - 12" WM DIP/REMOVE EXISTING WM 129+80 LT SR 45** and Schedule Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** was now also a controlling item of work on the most critical-longest path. LCU excavated the water main in conflict on Friday, March 22, 2013, but the materials were still left on the ground and the trench had not been backfilled, so LCU work was not 100% complete. LCU did not complete 100% of the water main removal until Monday, March 25, 2013; all materials removed and backfill complete. Russell did not finish mobilizing resource back to the delayed stabilized subgrade work area to complete Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) – PH IV (CONST. IN PIVB)** until Wednesday, March 27, 2013. The critical path did in fact shift after Schedule Update No. 24 (DD: 02/17/13), this is reflected in Schedule Update No. 25 (DD: 03/17/2013), both updates were accepted by the Engineer.

If controlling item of work Activity **PIV-270-40-B – SPREAD/MIX TYPE B STABILIZATION 131+00>117+80 LT (S6) - PH IV (CONST. IN PIVB)** in the accepted Contract Schedule was affected for a period of seventeen (17) days due to a utility adjustment delay, and a the project completion date is extended six (6) days beyond what it was prior to the delay, that's the time impact duration variance. Additionally, Contract Time is in calendar days, not work days, therefore, so is a Time

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Extension. Russell has not been compensated for any delay costs that resulted from the project completion date being extended six (6) days additional days due to this utility adjustment delay.

FDOT/KCCS Rebuttal

On page 2 of REI's position paper REI claims that the Engineer did not provide written acknowledgement as to the Department's position on the issues raised. That is a correct statement, since REI had not submitted a certified package for review as required by Specification Section 4-3.

On page 3 of REI's position paper REI claims that the Engineer did not respond timely to the July 29th submittal. Again, no certified request for equitable adjustment had been submitted in accordance with Specification Section 4-3. Further, Specification Section 5-12.4 states that the Engineer has 120 days to review the certified submittal.

On page 4 of REI's position paper REI states that the Department agreed to grant a certain quantum in time and costs (compensable days) as shown in a draft Unilateral. At that time, no certified claim package had been submitted, the CEI and Contractor were still in negotiations and the document was only written as a draft.

Any agreement was only in general terms and as quoted on page 3 of REI's position paper, the statement was made that if a Unilateral is processed "it will be for the associated days we documented that you worked on these issues and the appropriate extended overhead..." The appropriate overhead could be any amount, including zero dollars.

On page 8 of REI's position paper REI claims that they notified the Engineer of the impending delay at the February 7 progress meeting and again at the March 7th progress meeting. The meeting minutes do not support that claim.

No issues were raised at the Feb 7th meeting regarding any Lee County Utility conflicts other than a statement that removal at Broadway would commence shortly. This water line is outside of the limits claimed by REI as being impacted.

At the March 7th meeting, REI did state that they were being delayed by Lee County Utilities due to work on the waterline at Broadway.

Lee County Utilities – (Not Present)

- KCCS stated that they are working on the water main at Broadway Avenue. Russell stated that Lee County is causing them a delay. Strickler Brothers stated that the first diversion was completed today and the second one will be started tomorrow and next week they will proceed across Broadway Avenue.

However, again this work is outside of the limits claimed by REI as being delayed and it is not associated with any of the activities outlined by REI in their claim.

Further, on page 8 REI references the utility schedule included as part of the contract bid. Within the stations referenced by REI in the claim, 109+40 to 129+80, the Utility Schedule includes two

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work activities, a deflection at S-122 and removal/relocation from 116+00 to 128+20. These two activities have durations of 5 days and 23 days respectively. The work is clearly indicated to be completed during the Phase IV portion of the contract. It does not specify a specific start date, only that the Dependent Activities are drainage improvements included in the Phase IV work. Using REI's start date of Phase IV work as February 19th and adding 28 calendar days and assuming zero days to complete the drainage work (which is totally unrealistic), would yield a late finish of these two utility activities on March 19th. The work was completed on March 22nd.

On page 8 and 9 of REI's position paper REI claims that the Lee County water line removal became a controlling item of work on March 11. However, the issue was not raised by REI until they filed the NOI on March 15th; no other notice was provided to the Engineer or Lee County Utilities. And further, the controlling items of work, submitted at each weekly progress meeting did not show Activity PIV-270-40-B as a controlling item of work.

In REI's position paper REI includes a fragnet for each of the issues in question. They claim the fragnet has been prepared in accordance the Specification Section 8-3.2.6. However, each alleged delay is shown only as a single bar on the CPM, with no breakdown or detailed information. Specification Section 8-3.2.3, Schedule Content, details how the project schedule is to be prepared. According to section 8-3.2.3 all non-procurement items must be less than 20 days in duration. Each activity must include the quantity of work and must clearly communicate the amount of work. This is to allow the Engineer the opportunity to evaluate the activity duration. If this is not done, which is the case here, the contractor has the ability to create a work item which inflates the overall schedule duration.

Applicable Specifications

For the sake of brevity the Board will only list and refer to the specification numbers rather than repeat them *verbatim*. Relevant specifications are as follows:

Article 4-4 Unforeseeable Work	as amended by Special Provision
Subarticle 8-3.2 Submission of Working Schedule	as amended by Special Provision
Subarticle 8-3.3 Beginning Work	as amended by Supplemental Specification
Subarticle 8-7.3.2 Contract Time Extensions	as amended by Supplemental Specification
Section 4 Scope of the Work	Standard Specifications
Section 5-12 Claims by Contractor	Standard Specifications
Section 7-11.6 Utilities	Standard Specifications
Section 8-3 Prosecution of Work	Standard Specifications
Section 8-7 Computation of Contract Time	Standard Specifications

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Discussion and Findings

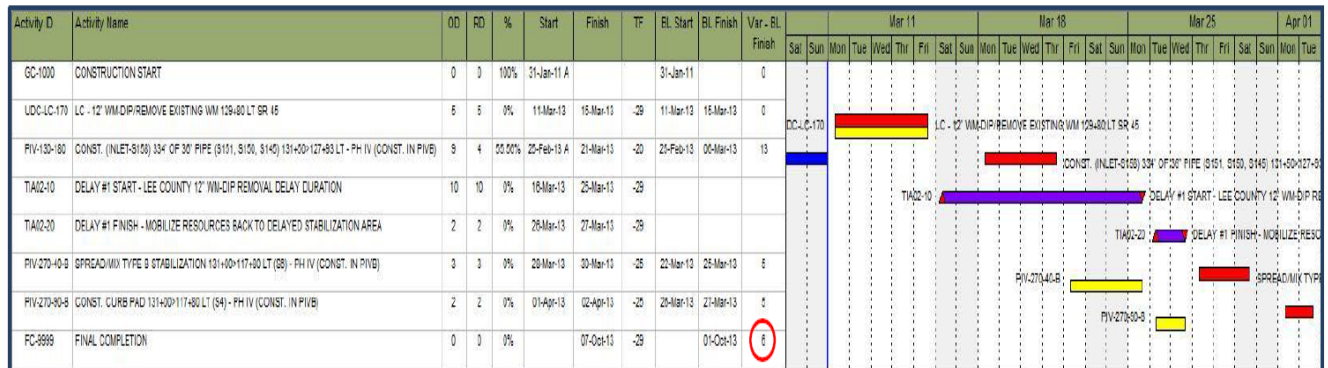
KCCS/FDOT contends that REI made statement in weekly meetings that there were no impacts stating:

“At the March 14th progress meeting, as is typical for all progress meetings, the question was raised, are there any on-going or upcoming utility issues/concerns. REI responded that there are no issues.”

While the statement was made that *“...there are no issues”* this does not negate the fact that written communication of notice was supplied to KCCS the following day by REI. Therefore, proper notice was afforded the Engineer.

REI submitted a “before and after” fragnet of the alleged delay as follows:

EXHIBIT “5.2” – ISSUE NO. 1 – LEE COUNTY 12” WM-DIP UTILITY ADJUSTMENT DELAY AFTER IMPACT FRAGNET – TIA02-1-AI (DD: 03/11/13) – PROGRESS THRU 03/27/13



Activity IDs TIA02-010 and TIA02-20 show a total delay of 12 calendar days. However, the final completion of the project (FC-9999) was impacted by only 6 contract days. This is the amount of time REI is requesting as compensable delay.

Section 8-3.2.6, Time Extensions states:

“The Contractor is responsible for submitting a request for Contract Time extension in accordance with 8-7.3.2 of the standard specifications. An extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule. As a minimum, time extension requests shall contain:

- A descriptive summary of the changes*
- An analysis of project impact*
- A fragnet that shows the impacted activities before the change.*

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d. A fragnet that shows the impacted activities after the change.”

While REI did not meet the 30 day time window required in 8-7.3.2, they did comply with 8-3.2.6 by submitting a detailed time impact analysis with fragnets. During the oral arguments REI maintained that there was verbal agreement between the parties to combine Issues 1, 2, and 3 into a single package and therefore the 30 day time window would not apply to Issue 1. KCCS seemed to concur that there was an agreement to combine the Issues but not necessarily an agreement to waive the 30 day time window. When asked by the Board if the Department was asserting the 30 day time window as a defense or not, KCCS and the Department responded that theoretically it could, but that it was not decisively doing so, however.

Moreover, the Engineer was afforded the opportunity to track the damages and delay; therefore there was no harm (or advantage) created by waiting over 30 days. KCCS argues *“each alleged delay is shown only as a single bar on the CPM, with no breakdown or detailed information.”* The Board finds no requirement in the specification for more information other than what REI provided. The Board believes the fragnet, as inserted in the schedule, accurately depicts the delay.

Section 8-7.3.2, as amended by Special Provision states in part:

“...The Department will consider the affect of utility relocation and adjustment work on job progress as the basis for granting a time extension only if all the following criteria are met:

- (1) Delays are the result of either utility work that was not detailed in the plans, or utility work that was detailed in the plans but was not accomplished in reasonably close accordance with the schedule included in the Contract Documents.*
- (2) Utility work actually affected progress toward completion of controlling work items.*
- (3) The Contractor took all reasonable measures to minimize the effect of utility work on job progress, including cooperative scheduling of the Contractor’s operations with the scheduled utility work at the preconstruction conference and providing adequate advance notification to utility companies as to the dates to coordinate their operations with the Contractor’s operations to avoid delays...”*

The Board finds that all of the above factors were present.

Section 7-11.6.2, Cooperation with Utility Owners states:

“Cooperate with the owners of all underground or overhead utility lines in their removal and rearrangement operations in order that these operations may progress in a reasonable manner, that duplication or rearrangement work may be reduced to a

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minimum, and that services rendered by the utility owners will not be unnecessarily interrupted...”

Cooperation is a relative term. Synonyms to this word are:

- Collaboration
- Assistance
- Help
- Support
- Teamwork
- Aid

While the position paper by KCCS does not go in to detail regarding this, the specification was included and there were verbal suggestions that perhaps REI did not “cooperate”. The statement was made that “*REI had a duty to cooperate.*” While, at face value, this is true, the Board does not believe any evidence was presented that indicated REI did not cooperate. They provided a schedule; they complied with the specification. It appears they mitigated damages by moving forces to other work, thereby preventing idle equipment and labor charges. It was mentioned several times during the life of the contract how well the utilities and the contractor were working together, except per KCCS, in this one instance.

DRB Recommendation

The Board finds **entitlement** to the Contractor’s position and recommends that it be compensated for all costs involved with this delay. Therefore the Board recommends a contract time extension of **6 days** and recommends associated costs to be computed and summed as follows:

1. Extended Overhead (Average Overhead Per Day):

\$8,532.54

2. Extended MOT: **Entitled**

6 days multiplied by a MOT daily rate that reflects the estimated time sensitive costs that were borne by the Contractor. Reimbursement for extended MOT costs are not specifically defined but are a direct cost analogous to extended labor and equipment as defined in 4.3.2.1 (a) and (c). It should be noted that the Board was specifically requested to rule on entitlement only on the MOT portion of the issue. The Board is unsure if KCCS remains in agreement to the unit costs or has denied them simply due to its position of “No

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Entitlement". Therefore we are addressing cost entitlement in detail even though the Contractor did not specifically ask the Board to do so.

The Contractor is **not entitled** to recover a daily rate by calculating the Lump Sum MOT costs divided by the Original Contract Time. There are certain fixed costs included in the pay item which are not time sensitive (i.e. temp asphalt, temp embankment, etc.). The Contractor **is entitled** to remuneration for any daily crew costs, signs or devices not covered under pay items. This will most likely require further negotiation between the parties.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in all of the meetings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board

Rammy Cone, DRB Chairman as appointed by the Members

James Guyer, DRB Member

Roy Adams, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in blue ink, appearing to read 'Rammy Cone', written over a horizontal line.

DRB Chairman

CC: file