

To: Rolando Luis, Jr.
Project Administrator, Transportation,
14812 Tamiami Trail (US 41) North Port, FL 34827, USA

Eric Juhl
Vice President
Russell Engineering, Inc.
2530 SW 36th Street
Fort Lauderdale, FL 33312

Subject; DRB Hearing Recommendation



**SR 45
(U.S. 41)**
FROM SALFORD BLVD. TO SUMTER BLVD.

FINANCIAL PROJECT NO.: 42271055201
FEDERAL AID NO.: N/A
CONTRACT NO.: E1P91
DISTRICT: 1
COUNTY: SARASOTA

Hearing January 22, 2018

ALTERNATE TRAFFIC CONTROL PLAN STOP WORK ORDER
EXTRA WORK DELAY
ENTITLEMENT TO COMPENSATION
CONTRACT TIME, DIRECT COST AND INDIRECT COST

PROJECT

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FINANCIAL PROJECT NO.: 42271055201
FEDERAL AID NO.: N/A
CONTRACT NO.: E1P91
DISTRICT: 1
COUNTY: SARASOTA

OWNER

FLORIDA DEPARTMENT OF TRANSPORTATION

CEI

AMEC FOSTER WHEELER

CONTRACTOR

RUSSELL ENGINEERING, INC.

DISPUTES REVIEW BOARD

Mr. Thomas Rice
DRB Chairman
Rice Consulting, Inc.
1301 Brooker Road
Brandon, FL 33511

Mr. James Guyer
DRB Member
Resolve-Construction-
Dispute Resolution, Inc.
P.O. Box 67347

Mr. Allen Adderley, PE
DRB Member
AEM Consulting, Inc.
7963 Rooks Rd.
Floral City, FL 34436

Issue brought to the Board by Russell Engineering, Inc.:

ALTERNATE TRAFFIC CONTROL PLAN STOP WORK ORDER EXTRA WORK DELAY
ENTITLEMENT TO COMPENSATION
CONTRACT TIME, DIRECT COST AND INDIRECT COST

Russell Engineering Position

Date: 8th, January, 2018 (01.08.2018)

INTRODUCTION

1. Russell Engineering, Inc. ("Russell") entered into Contract Number E1P91 ("Contract") with the Florida Department of Transportation ("Department") on the 18th day of May, 2017 for the construction of Financial Project No.: 422710-5-52-01 ("Project"). The Contract provides 560 Calendar Days and \$10,071,503.20 to construct the Project. The first chargeable day of contract time was the 10th day of July, 2017.
2. The Department is the sole Author of the Special Provisions, Plans, FY2016-17 Design Standards eBook, Supplemental Specifications and January 2017 Standard Specifications for Road and Bridge Construction that govern this Project ("Contract Documents").
3. On November 22, 2017, Russell referred this issue to the Board for resolution centered on a disputed interpretation of whether or not the **TRAFFIC CONTROL PLANS** are inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** and whether or not the Contract Documents allow Russell to restore drop-off conditions within the same work period in lieu of installing barriers.
4. Russell is of the position that **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** is a component of the **TRAFFIC CONTROL PLANS**, to be utilized for widening operations, and therefore does not require the submission of a signed and sealed approved Alternate Traffic Control Plan when electing to restore drop-off conditions within the same work period in lieu of installing barriers in order to maintain compliance with the Contract Documents
5. The Department is of the position that the **TRAFFIC CONTROL PLANS** are not inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** and therefore do not govern, so Russell must either a) install barriers shown in the **TRAFFIC CONTROL PLANS** or b) pursue submitting a signed

and sealed Alternate Traffic Control Plan that specifies drop-off conditions restored within the same work period in lieu of installing barriers at no expense to the Department.

BACKGROUND

6. On April 24, 2017, in response to the Notice of Contractor for E1P91 concerning Pay Items 0102-71-13 Barrier wall, Temporary, F&I, Concrete and 0102-71-23 Barrier Wall, Temporary, Relocate, Low Profile, Concrete, prior to Contract Award, Russell submitted to the Department that **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** will be utilized.

*See Notice of Contractor for E1P91 attached hereto as **EXHIBIT 1**.*

7. On June 20, 2017, representatives of the Department, Amec Foster Wheeler (“CEI”), Russell, Subcontractors and Utility Agency Owners attended the Project Partnering Meeting (“Partnering”). While the Partnering Submittal generated by the Partnering Facilitator is not part of the Contract Documents, it serves as the record of the content presented, discussed and acknowledged by said representatives in attendance. Russell believes the Action Plan established at Partnering was developed to be carried out in good faith.

- a. The Partnering Submittal reflects the following “Topic” and “Action Item” concerning this issue.

Figure 7.a.1 – Partnering Submittal – Topics

TOPICS	
MOT - PUBLIC	
◆	Maintenance of traffic - low profile barrier wall use or change
◆	How are we going to handle the public
◆	On site Awareness - Internal Traffic Control
◆	Process for handling property damage claims from the public

Figure 7.a.2 – Partnering Submittal – Action Plan – Discussion Item

ACTION PLAN - DISCUSSION ITEM	
<i>Using the standard index and site conditions, we will adjust the locations of low profile barrier wall where necessary for constructability.</i>	
•	Have a site meeting/review where necessary - Dave Sr/Rolando as soon as traffic switch occurs in Phase 1
•	Follow the standard index for proper use and safety

*See Partnering Submittal attached hereto as **EXHIBIT 2**.*

- b. The Partnering Submittal does not support the submission of an approved signed and sealed Alternate Traffic Control Plan by Russell as being a prerequisite to utilizing the Design Standards with respect to restoring drop-off conditions, i.e., slope protection, daily in lieu of installing barriers as per the **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**. To the contrary, it actually acknowledges the utilization of Design Standards to adjust the locations of Low Profile Barrier where appropriate and safe without Russell being required to submit an approved signed and sealed Alternate Traffic Control Plan.

8. On June 27, 2017, subsequent to Partnering, Russell submitted in writing to the CEI that the Traffic Control Plans and applicable Design Standards will be utilized. **NOTE NO. 8** on **SHEET 9 OF 12** of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** is a governing component of the Contract Documents. Neither the Department nor CEI rejected the Preconstruction Submittal or directed Russell to submit a signed and sealed Alternate Traffic Control Plan in response.

*See 27-Jun-17 Preconstruction Submittal attached hereto as **EXHIBIT 3**.*

9. On June 29, 2017, during the Preconstruction Meeting, Russell reiterated to the CEI its intent to utilize the **TRAFFIC CONTROL PLANS**, inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**, for widening operations to restore drop-off conditions, i.e., slope protection, daily in lieu of installing Low Profile Barriers.

Figure 9.1 – No. 7 Maintenance of Traffic of Preconstruction Meeting Minutes

<p>7. MAINTENANCE OF TRAFFIC</p> <ul style="list-style-type: none">a. Traffic Control Plan – Alternate (if applicable) <i>Submitted and using plan TCP.</i>b. PCMS onsite 14 days prior to proposed construction start per TCP <i>Contractor has installed PCMS.</i>c. Advanced notification of lane closures – RoadWatchd. Proposed Worksite Traffic Supervisors and copies of their qualifications to be submitted to AMECFW <i>Submitted and under review</i>e. Approved Independent Channelizing Device Supplier per 102-9.1.1 <i>REI to provide all additional information, per Contract.</i>f. ATSSA Quality Guidelines for Temporary Traffic Control Devicesg. Inspection Reports – FDOT Form No. 700-010-08 for MOT devices to be submitted weekly.
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As shown in **Figure 9.1** above, the submission of an approved signed and sealed Alternate Traffic Control Plan was not discussed and recorded as being required in response to the Preconstruction Submittal by Russell.

Figure 9.2 – No. 9.d Other Submittals Required of the Preconstruction Meeting Minutes

- d. Other submittals required
 - i. Supplier List
 - ii. Actual rates for items listed in Table 4-3.2.1
 - iii. Global Navigation Satellite Systems (GNSS) Work Plan per 5-7.6 due at Pre-Con or 30 days prior starting work using GNSS . *REI to look into and submit necessary information*
 - iv. Anticipated DBE Participation Statement in EOC System at or before Pre-Con per 7-24.4. *Currently, REI has 0% committed, but may change when Bernice returns from vacation.*

As shown in **Figure 9.2** above, the submission of an approved signed and sealed Alternate Traffic Control Plan by Russell was not discussed and recorded as being a submittal required.

Figure 9.3 – No. 19 Specific Project Concerns of the Preconstruction Meeting Minutes

- 19. SPECIFIC PROJECT CONCERNS
 - a. Monitoring of Existing Structures
Three structures/businesses to be monitored during compaction efforts for base, asphalt, etc
 - b. Potential for Contaminated Soil / CAR Contractor
Meeting will be held with CAR Contractor to coordinate any potential issues
 - c. Bus Pads and Shelters / Coordinate with Sarasota County Area Transit
Need to keep SCAT informed on when to remove bus shelters, and when closing bus stops for pad constructions.

- d. Pre-Operations Meetings
(Asphalt Paving, Concrete placement, etc)
- e. Drill Shaft Installation
- f. FDOT Approved Concrete Mix Designs

As shown in **Figure 9.3** above, the submission of an approved signed and sealed Alternate Traffic Control Plan by Russell was not discussed and recorded as being a specific project concern.

Figure 9.4 – No. 28 Safety of the Preconstruction Meeting Minutes

- 28. SAFETY
 - a. Lighting Plan
To be submitted before any night work for review and approval
 - b. Ingress/Egress
REI has the responsibility to maintain access to all the businesses and property owners on the project.
 - c. Florida Trench Safety Act
 - d. OSHA

As shown in **Figure 9.4** above, the intent of Russell to utilize the **TRAFFIC CONTROL PLANS**, inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**, to restore drop-off conditions, i.e., slope protection, daily in lieu of installing Low Profile Barriers, was not discussed and recorded as a safety issue or concern.

Figure 9.5 - No. 37 Requested Documentation From Contractor of the Preconstruction Meeting Minutes

<p>37. REQUESTED DOCUMENTATION FROM CONTRACTOR</p> <p>a. Certification by an officer or director of the Contractor with authority to bind the Contractor of the following:</p> <ul style="list-style-type: none">i. A listing of on-site clerical staff, supervisory personnel and their pro-rated time assigned to the contractii. Actual rates for items listed in Table 4-3.2.1iii. Existence of employee benefit plan for Holiday, Sick, Vacation & Retirementiv. Payment of Per Diem is a company practice for instances when compensation for Per Diem is requested <p><i>All information above was provided prior to Pre Con</i></p>

As shown in **Figure 9.5** above, the submission of an approved signed and sealed Alternate Traffic Control Plan by Russell was not discussed and recorded as being requested.

*See Preconstruction Meeting Minutes attached hereto as **EXHIBIT 4**.*

10. On July 19, 2017, subsequent to Russell submitting to the Department that **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** will be utilized in response to the Notice of Contractor for E1P91 on April 24, 2017; representatives at the Partnering meeting on June 20, 2017 acknowledging that the standard index will be utilized to determine the locations as to where barriers are necessary in lieu of daily restoration of drop-off conditions as per **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**; Contractor written notice to the Department on June 27, 2017 that both the Traffic Control Plans and applicable Design Standards will be utilized; which was again reiterated on June 29, 2017 at the Preconstruction Meeting, Russell receives an email from the CEI that states,

...“I discussed Russell's current proposed use of barrier wall on the project with David Jr., today. In previous discussions, Russell suggested eliminating only a few of the walls in certain locations. It appears the new proposal calls for almost total elimination of barrier wall. I do not see any issue with your proposal, if properly maintained, but proceed with submission of alternative traffic control plan, per S.S 102-4 for review and approval.”...

*See 19-Jul-17 email from CEI attached hereto as **EXHIBIT 5**.*

It's evident that Russell did not execute an Alternate Traffic Control Plan or deviate from the Notice of Contractor for E1P91, Partnering Action Plan, Preconstruction Submittal or from that which was previously submitted, presented, discussed and recorded.

11. Between July 19, 2017 and July 31, 2017, Russell and the CEI exchanged emails disputing whether or not a signed and sealed Alternate Traffic Control Plan is now somehow required if the Contractor elects to utilize **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** for widening operations by restoring drop-off conditions daily in lieu of installing Low Profile Barriers.

12. On August 1, 2017, Russell reached an impasse with the CEI and requested this issue be escalated to Manatee Operations for resolution pursuant to Escalation Matrix developed at Partnering. Concurrently, Russell submitted its Notice of Intent to Claim and Preliminary Time Extension for this issue and contested the CPPR – Category 8 Score for the month of July-17 by requesting a meeting with the District Construction Engineer (“DCE”).

*See 01-Aug-17 NOI and Partnering Escalation Matrix attached hereto as **EXHIBIT 6**.*

13. On August 3, 2017, Manatee Operations responded to Russell's escalation request with the following written direction:

...“Russell Engineering has two options:

1. Immediately install all necessary MOT devices required per Plan Sheets 144 thru 154, including but not limited to identified Low Profile Barrier.
- OR
2. If you wish to pursue an alternate Traffic Control Plan, Submit for review & approval an Alternate Traffic Control Plan in accordance with the Standard Specification 102-4. If approved, the plan needs to be implemented at no additional cost to the department. The contractor will not be entitled to any additional pay for barricades, drums, or any MOT devices or related work operations required to implement the alternate plan.

...we consulted with the District Construction Office and this response considers their views.”

*See 03-Aug-17 email from Manatee Operations attached hereto as **EXHIBIT 7**.*

14. Russell elected to pursue option 2 under duress as directed by Manatee Operations and District. The direction given by Manatee Operations and District **was not if Russell wishes to pursue an Alternate Traffic Control Plan, Low Profile Barrier must be installed immediately and remain in place until the review and approval of a signed and sealed Alternate Traffic Control Plan is finished.** Therefore, Russell pursuing Option 2, not Option 1 and 2, did in fact adhere to the direction from Manatee Operations and District, thus complying with the Contract Documents.

15. On August 10, 2017, while pursuing Option 2 as directed, Russell received a Deficiency Warning Letter for Performance Category No. 2 – Proper MOT-Minimize Impact to Traveling Public of the CPPR from the CEI for not having submitted an Alternate TCP as requested or installed Low Profile Barrier Wall.

*See 10-Aug-17 Deficiency Warning Letter attached hereto as **EXHIBIT 8.***

16. On August 14, 2017, while pursuing option 2 as directed, Russell received a Deficiency Letter for Performance Category No. 2 – Proper MOT-Minimize Impact to Traveling Public of the CPPR from the CEI for not having submitted an Alternate TCP as requested or installed Low Profile Barrier Wall.

*See 14-Aug-17 Deficiency Letter attached hereto as **EXHIBIT 9.***

17. On August 15, 2017, while still in pursuit of option 2 as directed, Russell received a Deficiency Letter for Performance Category No. 5 – Coordination/Cooperation with Construction Engineering Inspection Personnel, Property Owners & Utility Companies of the CPPR from the CEI for not having submitted an Alternate TCP as requested or installed Low Profile Barrier Wall.

*See 15-Aug-17 Deficiency Letter attached hereto as **EXHIBIT 10.***

18. On August 15, 2017, Russell sent an email to the CEI contesting both Deficiency Letters and requested a meeting with the DCE. Additionally, Russell reiterated to the CEI in writing that

direction is being followed and when to expect receipt of an Alternate Traffic Control Plan with the following statement:

“As directed, REI is pursuing Option 2; submit what the Department has defined as an alternate traffic control plan. REI is working with its Specialty Engineer on the preparation and transmittal of an alternate traffic control plan, as defined by the Department in previous correspondence, within the next few days.”

*See 15-Aug-17 email from Russell to CEI attached hereto as **EXHIBIT 11**.*

19. On August 16, 2017, the day after Russell had just reiterated to the CEI in writing that direction is being followed and, when to expect receipt of a signed and sealed Alternate Traffic Control Plan, Russell receives a Stop Work Order from the CEI, suspending all operations until an approved signed and sealed Alternate Traffic Control Plan is provided or immediately install Low Profile Barrier Wall. In addition, this was the first time safety to the travelling public was ever referenced by the CEI as being an issue.

*See 16-Aug-17 Stop Work Order attached hereto as **EXHIBIT 12**.*

20. On August 18, 2017, Russell submitted a signed and sealed Alternate Traffic Control Plan under duress, as directed, to the CEI for review and approval, which was later rejected on August 21, 2017.

*See Alternate Traffic Control Plan and rejection letter attached hereto as **EXHIBIT 13**.*

21. On August 22, 2017, Russell submitted a revised signed and sealed Alternate Traffic Control Plan under duress, as directed, to the CEI, which was approved the same day, lifting the Stop Work Order. In the end, the approved signed and sealed Alternate Traffic Control Plan directed by Manatee Operations and District does not differ from how traffic was being maintained on the Project or the **TRAFFIC CONTROL PLANS** presented in the Contract Documents. Drop-off conditions are still being restored daily in lieu of barriers as per **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**.

*See revised Alternate Traffic Control Plan and approval letter attached hereto as **EXHIBIT 14**.*

22. On October 11, 2017, two months after Russell submitted its written request to meet with the DCE, Russell met with the DCE to contest the DWL, DLs, non-conformance days and the Stop Work Order issued concerning this issue.

23. On October 26, 2017, Russell submitted a Time Extension Request and Certificate of Claim for the time-cost impact of 5 days and \$23,235.16 encountered between August 1, 2017 and October 15, 2017, even though this cost impact resulting from this issue is still ongoing.

*See Time Extension Request and Certificate of Claim attached hereto as **EXHIBIT 15**.*

24. On November 13, 2017, Russell received an email from the CEI, not the DCE, that they were informed by District that all DLs contested by Russell concerning this issue will be upheld. The CEI wrote,

... "Russell Eng. was requested to submit an Alternate Traffic Control Plan (ATCP) on multiple occasions (July 19th, July 31st, August 3rd, August 7th, August 10th and August 12th), and sufficient time had been given along with six requests for submission of the ATCP before proceeding to the issuance of the referenced Deficiency Letters." ...

This delayed response from the CEI on behalf of District is not an accurate account of the actual events that transpired concerning this issue. Moreover, the Contract Documents do not provide the Engineer with the authority to deny Russell entitlement to utilize **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** for widening operations without submitting an approved signed and sealed Alternate Traffic Control Plan. Therefore, Russell had no choice but to refer this ongoing good faith dispute to the **BOARD** for timely resolution.

*See response from CEI on behalf the District attached hereto as **EXHIBIT 16**.*

25. In summary, some of the significant time frames and durations as outlined above are as follow:

- a. **April 24, 2017 to July 19, 2017 (87 days):** Russell notices transmitted and/or discussions concerning the use of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** in lieu of installing barriers.
- b. **August 3, 2017 to August 18, 2017 (16 days):** Russell directed to submit signed and sealed Alternate Traffic Control Plan and initial submittal received/rejected by the Department.

- c. **August 19, 2017 to August 22, 2017 (4 days):** Russell directed to submit revised signed and sealed Alternate Traffic Control Plan and received submittal/approved by the Department.
- d. **August 15, 2017 to October 11, 2017 (58 days):** Russell able to schedule meeting with DCE to contest Deficiency Letters.
- e. **October 11, 2017 to November 13, 2017 (34 days):** DCE issue Deficiency Letter meeting determination through CEI.

ENTITLEMENT ANALYSIS

26. The Contract Documents provide Russell with entitlement to utilize **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** for widening operations. The **TRAFFIC CONTROL PLANS** are inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS**.

- a. **NOTE NO. 1** on **SHEET NO. 140** of the **TRAFFIC CONTROL PLANS** states, "1. WIDENING OPERATIONS ARE TO UTILIZE INDEX NOS 611, 612, 613, and 616."

*See **TRAFFIC CONTROL PLANS** attached hereto as **EXHIBIT 17**.*

- b. **NOTE NO. 7** on **SHEET NO. 1 OF 1** of **INDEX 611** of the **FY2016-17 DESIGN STANDARDS** states, "For general TCZ requirements and additional information, refer to Index No. 600."

*See **SHEET NO. 1 OF 1** of **INDEX 611** attached hereto as **EXHIBIT 18**.*

- c. **NOTE NO. 7** on **SHEET NO. 1 OF 1** of **INDEX 612** of the **FY2016-17 DESIGN STANDARDS** states, "For general TCZ requirements and additional information, refer to Index No. 600."

*See **SHEET NO. 1 OF 1** of **INDEX 612** attached hereto as **EXHIBIT 19**.*

- d. **NOTE NO. 9** on **SHEET NO. 1 OF 2** of **INDEX 613** of the **FY2016-17 DESIGN STANDARDS** states, "For general TCZ requirements and additional information, refer to Index No. 600."

*See **SHEET NO. 1 OF 2** of **INDEX 613** attached hereto as **EXHIBIT 20**.*

- e. **NOTE NO. 6** on **SHEET NO. 1 OF 3** of **INDEX 616** of the **FY2016-17 DESIGN STANDARDS** states, "For general TCZ requirements and additional information, refer to Index No. 600."

*See **SHEET NO. 1 OF 3** of **INDEX 616** attached hereto as **EXHIBIT 21**.*

- f. **NOTE NO. 8** on **SHEET NO. 9 OF 12** of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** states, "For Conditions 1 and 3 provided in Table 1, any drop-off condition"

that is created and restored within the same work period will not be subject to the use of barriers; however, warning devices will be required.”

See **SHEET NO. 9 OF 12** of **INDEX 600** attached hereto as **EXHIBIT 22**.

27. **SECTION 102-9.1 INSTALLATION AND MAINTENANCE** of the **JANUARY 2017 STANDARD SPECIFICATIONS** states,

“Install and maintain temporary traffic control devices as detailed in the **Plans, Index 600** of the **Design Standards** and when applicable, in accordance with the approved vendor drawings, as provided on the Department’s Approved Product List (APL).” ...

See **SECTION 102-9.1** of the **JANUARY 2017 STANDARD SPECIFICATIONS** attached hereto as **EXHIBIT 23**.

28. **SECTION 102-11.1 GENERAL** of the **JANUARY 2017 STANDARD SPECIFICATIONS** states,

“Devices installed/used on the project on any calendar day or portion thereof, within the Contract Time, including time extensions which may be granted, will be paid for at the Contract unit price for the applicable pay item. Include the cost of any work that is necessary to meet the requirements of the Contract Documents for MOT under Maintenance of Traffic, lump sum when separate payment is not provided.”

See **SECTION 102-11.1** of the **JANUARY 2017 STANDARD SPECIFICATIONS** attached hereto as **EXHIBIT 24**.

29. **SECTION 102-11.5 WORK ZONE SIGNS** of the **JANUARY 2017 STANDARD SPECIFICATIONS** states,

“The number of temporary post-mounted signs (temporary regulatory, warning and guide) certified as installed/used on the project will be paid for at the Contract unit price for work zone signs.” ...

See **SECTION 102-11.5** of the **JANUARY 2017 STANDARD SPECIFICATIONS** attached hereto as **EXHIBIT 24**.

30. **SECTION 102-11.8 CHANNELIZING DEVICES** of the **JANUARY 2017 STANDARD SPECIFICATIONS** states,

“The number of drums, vertical panels, pedestrian LCDs, and Type I, Type II, Type III, or direction indicator barricades, certified as installed/used on the project meeting the requirements of **Design Standards, Index No. 600** and have been properly maintained will be paid for at the Contract unit prices for channelizing device.” ...

See **SECTION 102-11.8** of the **JANUARY 2017 STANDARD SPECIFICATIONS** attached hereto as **EXHIBIT 24**.

31. Russell is not required to submit an approved signed and sealed Alternate Traffic Control Plan that specifies drop-off conditions will be restored within the same work period in lieu of installing barriers at no expense to the Department. The **TRAFFIC CONTROL PLANS**, inclusive of **INDEX 600** of the **FY 2016-17 DESIGN STANDARDS**, presented in the Contract Documents, provides Russell with entitlement to utilization and compensation.

32. Pursuant to the **TRAFFIC CONTROL PLANS** inclusive of **INDEX 600** of the **FY2016-17 DESIGN STANDARDS** and **SECTIONS 102-9** and **102-11** of the **JANUARY 2017 STANDARD SPECIFICATIONS**, Russell is entitled to restore drop-off conditions within the same work period in lieu of installing barriers and payment for each warning device furnished and installed at the Contract unit price for the applicable pay item.

33. Russell's compliance with the Contract Documents and direction given supports rendering a decision that recommends entitlement to an equitable adjustment of both time and additional monetary compensation resulting from the Department suspending operations without justification from August 15, 2017 to August 22, 2017, the cost of extra work resources expended as directed and payment for warning signs and devices furnished and installed in lieu of installing barriers in accordance with the Contract Documents. At no time did Russell's performance on the Project warrant suspension of operations.

34. Russell respectfully requests the **BOARD** recommend entitlement to the following time-cost elements.

Extension of Contract Time

- a. Direct Cost – Labor – Standby
- b. Direct Cost – Equipment – Idled
- c. Direct Cost – Material – Warning Signs and Channelizing Devices
 - 0102 74 1 Channelizing Device – Types I, II, DI, VP, Drum, or LCD
 - 0102 74 2 Channelizing Device, Type III, 6'

- 0102 60 Work Zone Sign

Direct Cost – Other – Professional Engineering Services

Please Note: In the interest of brevity exhibits are included by reference and may be viewed utilizing official project records.

Florida Department of Transportation Position Papers

Department's Position

I. ISSUE 1 - Alternate Traffic Control Plan Submittal

The Contractor started work and chose not to follow the Contract Traffic Control Plans. Specifically, Plan Sheets #140, 142, & 144 thru 154 describing utilization of Low Profile Barrier Wall.

The Department acknowledges that the Design Standards allow for utilization of shoulder treatment rather than barrier wall; however, the contract clearly defines that the Plans are higher than the Design Standards in the governing order of documents as defined in Section 5-2.

The Engineer of Record (EOR) evaluated this specific project and made the determination that the traveling public as well as the Contractor's work forces would be safer with the utilization of the low profile barrier wall option. At the time of bid, the Traffic Control Plan had specific placement details on TCP plan sheets, which were signed and sealed as required by a Professional Engineer/Engineer of Record.

The Contractor proposed utilizing the shoulder treatment option as per Index 600; however, the contract requires an approved Alternate Traffic Control Plan, prior to beginning work (Section 102-4: Alternate Traffic Control Plan).

As-Built Final Plans clearly require the TCP sheets to reflect all changes and subsequently be signed and sealed. The EOR and CEI have no incentive or legal responsibility to sign and seal a Contractor's proposal to deviate from a higher governing document to a lower one when there is no error. Since the EOR, on behalf of the Department, evaluated the project and took responsibility and liability for the TCP it becomes the Contractor's obligation to assume the responsibility and liability if changes are made. It was the Department's position that the responsibility could be assumed by the Contractor by simply having a Professional Engineer sign and seal a list of areas where the shoulder treatment alternative would be utilized in lieu of low profile barrier wall. That would satisfy the transfer of Alternate Traffic Control Plan requirements and associated liability.

II. ISSUE 2 - Stop Work Order

The Engineer directed the Contractor to submit an Alternate Traffic Control Plan for approval, in accordance with contract documents.

The Contractor repeatedly failed to follow the Engineer's direction, continued working in violation of Contract Plans and failed to communicate their intentions.

The contract requires the Contractor to follow the Engineer's direction (Section 5-5, Authority of the Engineer, 5-6 Authority and Duties of Engineer's Assistants & 5-8.1 Prosecution of Work)

The Engineer issued a Stop Work letter as authorized by contract (Section 8-6, Temporary Suspension of Contractor's Operations).

BACKGROUND

Contract time started on July 10, 2017 on the above-referenced project. Russell Engineering Inc. (REI) began installing drums, in lieu of barrier wall, on July 18, 2017.

On July 19, 2017, REI was requested by PA in an email (*See below*) to provide an Alternate Traffic Control Plan, since the use of low profile barrier wall, as shown in the project's Traffic Control Plan was not being used, but substituted by drums.

*"Eric,
I discussed Russell's current proposed use of barrier wall on the project with David Jr., today. In previous discussions, Russell suggested eliminating only a few of the walls in certain locations. It appears the new proposal calls for almost total elimination of barrier wall. I do not see any issue with your proposal, if properly maintained, but proceed with submission of alternative traffic control plan, per S.S 102-4 for review and approval."*

REI was requested on several occasions, through conversation, email, and at Weekly Progress Meetings to provide an Alternate Traffic Control Plan, and was provided deadlines for submittals. After a failure to meet a July 26, 2017 deadline submittal, REI had been informed that they would be held in non-compliance to the Contract Documents (TCP) in CPPR until submitted.

On August 2, 2017, REI submitted a NOI #002 – Sign & Seal Alternate Traffic Control Plan for additional Compensation and Preliminary Time Request, but did not provide an Alternate Traffic Control Plan or information on a submittal.

Upon failure to meet another deadline on August 10, 2017, a Deficiency Warning Letter was issued in Category 2 - Proper MOT & Minimize Impacts to Traveling Public. A deadline of August 14, 2017, for submittal of an Alternate Traffic Control Plan was requested.

Upon failure of meeting the August 14, 2017 deadline for submittal of their Alternate Traffic Control Plan, REI was given a Deficiency Letter in Category 2 - Proper MOT & Minimize Impacts to Traveling Public. REI did not respond or provide any information on the status of their compliance with providing an Alternate Traffic Control Plan.

On August 15, 2017, a Deficiency Letter was given in Category 5 - Coordination/Cooperation with Construction Engineering Inspection (CEI) Personnel, Property Owners & Utility Companies for failure to follow Engineer's direction and failure to provide the status of their compliance with an Alternate Traffic Control Plan.

At 5:05PM on August 15, 2017, in an email (*See below*) from Eric Juhl to PA rejecting Deficiency Letters issued by Engineer; Category 2 and 5. REI states:

"As directed, REI is pursuing Option 2; submit what the Department has defined as an alternate traffic control plan. REI is working with its Specialty Engineer on the preparation and transmittal of an alternate traffic control plan, as defined by the Department in previous correspondence, within the next few days."

As noted in August 15, 2017 email above, REI was aware of the concerns of the Department, and REI acknowledges past correspondence and requests from the Department for an Alternative Traffic Control Plan. Even after the severity of actions by the Department of holding REI in Non-compliance since July 26, 2017 and issuing a DWL and two DL's, REI would not provide an Alternative Traffic Control Plan or a date for the anticipated submittal.

On August 16, 2017, REI was issued a Stop Work Order by the Engineer stating:

"All operations on the above reference project are to be suspended at the end of the day, and project safed up, effective August 16, 2017, and is to remain under suspension until Russell Engineer, Inc. (REI) provides an approved Alternate Traffic Control Plan (TCP), or immediate installation of all MOT devices as required, per the Contract Plans."

Please Note: In the interest of brevity exhibits are included by reference and may be viewed utilizing official project records.

RECOMMENDATION:

The Majority of the Board Recommends:

With the inclusion of Note No. 1 on Sheet No. 140 of the *TRAFFIC CONTROL PLANS* stating "*WIDENING OPERATIONS ARE TO UTILIZE INDEX NOS. 611, 612, 613, and 616*", the designer allowed for the optional use of slope protection. This in lieu of the low barriers shown on project MOT drawings. Each of the Indexes contains a note directing the user to Index 600 for additional information. Index 600 contains clarifying notes for the use and application of barrier wall and drop-off conditions. Note 8 directs that any drop-off conditions that is created and restored within the same work period will not be subject to the use of barriers; however, warning devices will be required.

Had the designer's intent been to mandate the exclusive use of barrier wall, it would have been incumbent upon the designer to clearly indicate this restriction. There was no such indication. In the Majority of the Board's opinion, the existence of the *Design Standard's* (including the Index 600 Series) main purpose is to eliminate "reinventing the wheel" each and every time a like situation arises, as well as to encourage continuity, predictability and consistency. The Majority of the Board can find no requirement in plans or specifications for the use of options provided by the *Design Standards* to be signed and sealed prior to use. The entire section is already signed and sealed by the Department.

References to the specifications presented by the Department reference "modification" and "alternate MOT plans". The Majority of the Board does not feel that the use of the *Design Standards* constitute a "modification" of the original MOT plan and does not rise to the level of an "alternate MOT plan". The clarifications requested by the CEI when the first sealed MOT submittal was presented (by the contractor at the direction of the owner's representative) were minor and only served to clarify specifics shown and allowed by the *Design Standards*.

As a result of the above, the Majority of the Board recommends that the contractor is entitled to reasonable costs for the signing and sealing of an "alternate MOT plan" as well as the required warning devices.

After reviewing the time line of the project relating to the Department's request for signed and sealed drawings, the Entire Board feels that any DLs and resulting delays were self-inflicted. The Contractor was told to 'proceed' with a revised MOT plan on July 19, 2017. Though the Department's subsequent 'requests' could be construed to diminish its initial directive appearing to send a mixed message and coupled with the Contractor attempting to use the escalation process available to it, which was delayed, seemed to dissuade the Contractor from submitting the requested revised MOT plan.

Nevertheless, the contractual and prudent course of action for the Contractor was to immediately proceed, under protest, with a revised MOT plan per the CEI's July 19, 2017 correspondence. After agreeing to several deadlines, the contractor failed to produce the material requested by the Department, thus resulting in DLs and the ultimate cease operations order.

As a result, the Entire Board recommends NO entitlement for recovery of costs related to the "Stop Work Order" and its purported delay.

At the specific request of the Minority Opinion Author below is the entire (unaltered) Minority Opinion presented on a separate page.

January 22, 2018 Disputes Review Board Hearing
FDOT Project No. 42271055201
Contract No. E1P91
Contractor: Russell Engineering, Inc.
Dissenting Opinion

The Department supplied a Traffic Control Plan (TCP) signed and sealed by a professional engineer which specified low profile barrier wall as protection for drop off conditions. The Contractor substituted slope protection for the barrier wall thereby changing the design of the TCP. Separating through-traffic from the work zone with slopes and plastic drums differs materially and operationally from separating them with a concrete barrier. Citing Standard Specification 102-4 the Engineer required the Contractor to submit an Alternate TCP signed and sealed by his Engineer of Record for approval before beginning the work. The Contractor started the work under this changed condition without an approved Alternate TCP and continued to work until shut down as per the Authority and Duties of the Engineer's Assistants (Section 5-6).

The Contractor maintains that references to the Design Standards on the Contract Plans and back references to Index 600 in other Design Standards Indices called out in the TCP allowed the use of slope protection without the need for an Alternate TCP. Slope protection is another method shown in Index 600 for this purpose.

The Contractor's interpretation of the contract documents in this case is incorrect. The non-specific, incidental, and informational references to the Design Standards in the Contract Plans and TCP are just that. These are standard references used on every contract. Since the Plans rank higher in the governing order of contract documents (Section 5-2), the Contractor cannot, at his convenience, select alternative methods for construction in the Design Standards at odds with the TCP without the permission of the Engineer. Ultimately the Contractor submitted an acceptable Alternate TCP for his chosen work method.

In addition to not being entitled to damages, direct or indirect, for delay as a result of the Engineer's Stop Work Order, the Contractor, as per Section 102-4, must also bear all costs for implementation of his Alternate TCP (professional services for signing and sealing the Alternate TCP) and any resulting increases to the contract amount (additional MOT devices).

The Board thanks all parties for their professionalism and thoroughness during this process.

Sincerely for the Board

Tom Rice
Allen Adderley
James Guyer