December 20, 1999

Mr. John Hardy
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Mr. Kenneth Dunne
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PO Box 770352
Naples, Fl. 34107

**State Rd. 951, Collier County**
**FN 195320-1-52-01**
**FAP No. 3251-006-P**
**District 1**
**DRB Issue No. 1**

Dear Sirs:

The Florida Department of Transportation (Department) and Atlantic Civil Inc. (Contractor) requested a hearing concerning entitlement for indirect and acceleration costs relating to an unknown subaqueous waterline crossing. Summaries of the Department's and Contractor's positions were forwarded to the Disputes Review Board (DRB), and a hearing was held on December 6, 1999.

**ISSUE: Is the Contractor and/or his subcontractor entitled to recover acceleration costs caused by the subaqueous waterline obstruction, its removal and the delays associated thereto.**

**Background**

Gimrock Construction, Inc. (GCI) has entered into a contract with Florida Rock and Sand Co., Inc. (FR&S) for construction of two bridges on the referenced project. The agreement between GCI and FR&S required substantial completion of GCI's work by August 31, 1999, with final completion by September 30, 1999. Pile driving operations at the McIlvane Bay Bridge were critical to GCI achieving the subcontract milestones, per GCI's schedule submitted to FR&S.

On December 22, 1998, while installing piles at End Bent 1 of the McIlvane Bay Bridge, a waterline (not shown on the plans) was encountered, which prevented installation of Pile No. 9. GCI notified FR&S of the obstruction and requested direction. GCI shut down its operations over Christmas and New Years (12/24/98 through 01/03/99, inclusive), as planned. During this shutdown, FR&S investigated the obstruction with FDOT and Florida Water Services (FWS). FWS, who ultimately proved to be the waterline owner, claimed it did not have an in-service pipe in the vicinity of the obstructed pile.

Upon returning to work on January 4, 1999, GCI drove piles 8, 10, 11, 12, 13 and 14 in End Bent 1. On January 5, 1999, GCI was authorized by FR&S to break up the waterline under Pile No. 9. GCI attempted to do so, but was unable to break the pipe with the equipment available on site. GCI filed a notice of claim with FR&S and suspended work at End Bent 1. GCI requested that FDOT have the utility owner remove its pipe, in accordance with Subarticle 7-11.6.1 of the Standard Specifications.

GCI loaded its equipment and moved to the other end of the bridge to drive piles at End Bent 5. On January 8, 1999, the waterline was hit by Pile No. 9 in this bent. GCI attempted to break up the obstruction at this second location, but was unable to do so. The remaining piles in the bent were then driven to final bearing.

On January 12, 1999, GCI brought in and set up a clamshell to remove the obstruction at End Bent 5. During the course of excavation, an intact section of iron pipe with sealed knuckle joints was brought to the surface. GCI stopped digging pending receipt of direction from FR&S.

During the Weekly Progress Meeting on January 13, 1999, GCI was authorized to cut and remove the pipe by LBA. This work was scheduled for January 14, 1999; at 9:00 a.m. GCI and FR&S were to submit their costs for this extra work to FWS. FWS still denied having an active waterline obstructing the piles.

On January 14, 1999, before cutting the pipe, GCI drilled a hole in it to confirm it was abandoned. Water shot out of the hole, indicating the line was still pressurized. FWS sealed the leak and spent the rest of the day trying to find the valves to shut down the line. FWS performed a chemical analysis of the water in the line and confirmed that it was indeed theirs. Only at this point would FWS admit ownership of the line.

On January 15, 1998, GCI cut the pipe at End Bent 5 and drove Pile No. 9. The remainder of the pipe was removed between End Bent 5 and End Bent 1 over the next two days. On January 18, 1999 GCI drove Pile No. 9 in End Bent 1.

On January 19, 1999, FR&S directed GCI to accelerate to recover the time lost from the schedule. In accordance with instructions given by John Hardy of FR&S, GCI began to accelerate its work effort by working Saturdays, starting February 6, 1999.

**Contractor's Position**

Atlantic Civil, Inc. (f/k/a Florida Rock and Sand, Inc.) and its subcontractor, Gimrock Construction, Inc. believes that Sub article 8-13.1 of the contract is not enforceable because Florida Water Systems (FWS) is an outside party.

> *"Even if FDOT is unwilling to concede that the terms of the Incentive-Disincentive clause do not extend to parties outside the contract, it is generally held that for such a no damage for delay clause to be binding, the delay must be within the contemplation of the contracting parties at the time they entered into the contract. Clearly, GCI, FR&S, and FDOT did not contemplate and should not be expected to contemplate that the owner of an existing waterline in conflict with the new construction would:*
>
> 1. *Deny having an in-service waterline in the vicinity of the conflict;*
> 2. *Fail to take immediate steps to eliminate the conflict on its own;*
> 3. *Following removal of the conflicting waterline by the Contractor, refuse to negotiate a settlement with the Contractor for all cost impacts generated by the conflict.*
>
> *"Given these events, the Incentive-Disincentive clause must be considered nonbinding, rendering FR&S entitled to recover the acceleration costs.*
>
> *"FWS had opportunity to remove its waterline, but chose not to do so, needlessly damaging GCI, FR&S and FDOT. If FWS had removed its waterline, instead of stonewalling, the overall impact to the project, and to themselves, could have been minimized.*
>
> *"Based on the arguments made above, in negotiating a direct settlement of the claim with the Contractor, it is incumbent upon FDOT to recognize FR&S' entitlement to recovery of the acceleration costs, and to recover these monies from the utility owner, in accordance with FDOT policy."*

**Department's Position**

The Department believes that Subarticle 8-13.1 is enforceable for the following reasons:

*"Article 8-13.1 clearly provides the risk for utility conflict indirect cost rests solely with the contractor. FDOT should not be responsible for negotiating any alleged FWS liability for the indirects and for initially paying them under our contract with AC. The DRB has no jurisdiction to add provisions to the contract, nor any jurisdiction over FWS to determine what the legal rights are between the utility company and the contractors. For the DRB to attempt to assume jurisdiction to rule on legal rights or responsibilities other than those solely between the owner and the prime contractor, as related to the contract between the two parties, would be a violation of the agreed jurisdiction and scope of the DRB established for this project.*

*"GC has no direct contract with FWS. AC does have a separate and stand-alone contract with FWS. The DRB has no jurisdiction to address the AC/FWS contract. FDOT is not a party to the AC/FWS contract. For the DRB to consider GC's request for a favorable ruling in this instance, weighing (1) the express provision of Article 8-13.1, (2) the subcontract of AC/GC is not properly before the DRB (3) the separate and stand-alone contract between AC/FWS, (4) FWS is not under the jurisdiction of the DRB, the DRB should not consider GC's request on merits.*

*"If the DRB Chooses to accept jurisdiction for rendering a ruling or recommendation on GC's request, the contract between FDOT and AC is clear. Article 8-13.1 clearly, and as admitted by AC and GC, that utility conflicts are anticipated and the indirect costs and total risk lie with the contractor. FDOT has no liability. The contract is clear. There is no contractual language in the FDOT/AC contract whereby the DRB can interpret any FDOT obligation of any kind for the indirect cost alleged by GC."*

**DRB Findings**

The Board has examined all submittals from both AC/GC and FDOT in their entirety. The Board has chosen to ignore all references to the subcontract between AC and its subcontractor, Gimrock Construction, as they are not germane to the dispute between FDOT and the Prime Contractor.

The utility conflict in question did, in fact, delay the Contractor. All parties involved could not reasonably have contemplated the situation that occurred. The Contractor did accelerate the project in an attempt to recover time.

Notwithstanding the above, Subarticle 8-13.1 is very specific in that it states in part:

*"...Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to the expiration of the Original Contract Time ... shall be the sole responsibility of the Contractor in every instance."*

The Department has followed the spirit of the direction cited in the CPAM in that it has attempted to involve the utility company (FWS) in any and all negotiations. It does not appear that FWS employed due diligence both in its handling of the utility identification and in the negotiation process.

Former State Construction Engineer, Jimmy Lairscey's memo dated June 18, 1998 directs Department employees to negotiate fairly with Contractors in the event of non-responsiveness on the part of utility companies.

**DRB Recommendation**

FDOT is not responsible for payment of acceleration moneys to the Contractor.

The Board recommends that FDOT assist the Contractor with negotiations with the utility company (FWS) in question. The Incentive-Disincentive Clause is specific that the Department should not bear the cost of acceleration but it is silent to situations where recovery could be collected from a Third Party.

There is ample evidence that the contractor did act in good faith in attempting to overcome time lost by the utility interference, which is not contested by the Department. Plainly, the Department's desire was to expedite construction completion on this project. This is evidenced by the inclusion of the Incentive-Disincentive provision in the contract. Further, this incentive was extended by Supplemental Agreement because of the Department's interest in a more efficient flow of traffic and to allow for decreased response time for emergency purposes (SR 951 is the only access between Marco Island and the mainland.

The Department has the authority and the leverage, as owner of the project right of way, and through the language in the permits issued to utility owners occupying that right of way, to enforce those permit requirements that require the permitee to "defend any legal claims of the Department's contractor due to delays, etc", as stated in Article 12 of Form 592-03, Utility Permit, dated 05/90, attached.

The Department's Construction Project Administration Manual (CPAM) provides in Chapter 4, Section 4(2) that the Department notify the utility owner, after notification from the contractor to the Department, of the contractor's intent to file a claim for additional compensation. See attachments CPAM 4-4-6, 4-4-31.

The utility owner, along with the Department, has a responsibility to provide data, through the design plans, showing utilities locations. It is expected that those locations might not be precise, but should be reasonably accurate enough to allow for proper pile layout design.

Any time gained by early project completion is in the public's best interests, regardless of incentive payments. Had this situation occurred on a project without an incentive clause the FDOT would no doubt have pursued the matter with the utility, or simply given the contractor an extension of contract time so the acceleration would not have been necessary.

Although not bound by any particular directive to do so, because of the contract language, and in agreement with the FDOT position regarding the DRB jurisdiction, the DRB can only rule no entitlement, as outlined above. But the DRB does strongly suggest, due to the public benefit received, regardless of incentive money obtained by the contractor, FDOT provide assistance to the contractor on achieving an appropriate settlement from the responsible utility owner through the use of their control as set out by their permitting authority.

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
John Duke, DRB Member
Charles Sylvester, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

Rammy Cone, DRB Chairman

CC: Mr. Tom Tyner, FDOT
Mr. Steve Torcise, Atlantic Civil, Inc.

**August 15, 2000**

**Mr. John Hardy**
**Atlantic Civil, Inc. (f/k/a FRS)**
**9350 S. Dixie Highway**
**Miami, FL. 33034**

**Mr. Rick Roberts**
**FDOT District 1**
**PO Box 1249**
**Bartow, FL. 33831-1249**

**State Rd. 951, Collier County**
**FN 195320-1-52-01**
**FAP No. 3251-006-P**
**District 1**
**DRB Issue No. 3**

Dear Sirs:

The Florida Department of Transportation (Department) and Atlantic Civil Inc. (Contractor) requested a hearing to determine quantum on direct costs associated with the removal of a sub aqueous waterline discovered on the project site. The Contractor's subcontractor, Gimrock Construction, Inc. (GCI), believes that they are due more money than the Department has offered as compensation.

A hearing to determine quantum was held on August 1, 2000 at the Department's District Office located in Bartow, Florida. Representatives of ACI, FDOT, and LBA were in attendance. GCI did not attend the hearing.

**ISSUE: The Department has offered compensation to the Contractor in the amount of $61,460.00. The Contractor has requested $98,450.00**

**Background**

On December 22, 1998, while installing piles at End Bent 1 of the McIlvane Bay Bridge, a waterline (not shown on the plans) was encountered, which prevented installation of Pile No. 9. GCI notified FR&S of the obstruction and requested direction. GCI shut down its operations over Christmas and New Years (12/24/98 through 01/03/99, inclusive), as planned. During this shutdown, FR&S investigated the obstruction with FDOT and Florida Water Services (FWS). FWS, who ultimately proved to be the waterline owner, claimed it did not have an in-service pipe in the vicinity of the obstructed pile.

Both parties presented position packages to the Board at the Hearing. It should be noted that the position papers submitted by ACI's subcontractor, GCI, were copies of older correspondence which had been submitted to the Contractor on July 1, 1999.

**Contractor's Position**

The recommended amount does not account for disruption of the work on December 23, 1998 (i.e., on the day that the waterline was first encountered).

The recommended amount does not account for any piling equipment or support equipment associated with the pile driving operations.

The recommended amount does not account for waterline removal costs, although, in closing, Mr. Dunne states "waterline removal costs appear to be justified, and are the responsibility of Florida Water Services, Inc."

The costs associated with the items mentioned above are $3,138, $8,952 and $19,236, respectively These amounts, when combined with LBA's recommended amount of $67,124, give $98,450 as Gimrock's total direct cost, incurred as a result of the waterline interference/obstruction.

**Department's Position**

Gimrock did not schedule nor perform any project work between December 24, 1998 and January 3, 1999. Work resumed on January 4, 1999, and the obstruction was determined to be a Florida Water Services, Inc. (FWS) 12" diameter, steel river crossing pipe carrying treated effluent for irrigation at the Marco Shores Golf Club on January 14, 1999.

This 12" river crossing line was removed on January 15, 1999, and Pile No. 9 was driven at End Bent No. 5, and January 18, 1999 at End Bent No. 1. Bay Bridge production piling complete. Gimrock's CPM submittal indicates Activity No. 2001 - Drive Production Piles at E.B. # 1, Bay Bridge between 12/22/98 and 1/4/99. Gimrock agrees that it had a planned Christmas/New year Holiday shutdown between 12/24/98 and 1/3/99, with work resuming on 1/4/99.

Gimrock's request includes (2) vibratory hammers for the entire period from 12/23/98 to 1/18/99 when there was only one hammer on the jobsite until 1/5/99 when the second one arrived. The estimated Crew Man-Hour Rate of approximately $55/hour for a 9-11 man-crew was based on a Contractor Overhead rate of 175%, vs. the approximately 63.5% actual OH Rate submitted by Gimrock, which did not include the Jones Act Insurance general premium of approximately 110% of payroll expense, normally attributed to marine construction, as required by Federal Law, and as assumed by Berger in initial estimates. Therefore, the actual Crew Hour Rate has calculated to be $20.27/crew man-hour. Based on this OH rate for 633 crew man-hours, and 55.5 equipment hours of 55.5 for an equipment set.

Therefore, additional Labor + Mark-up Cost $20.27/c-hr. x 1.635% OH x 633 c-hr x

1.50 OT premium x 1.25 mark-up = $39,335.

Additional Equipment costs of $14,485 x 1.075% OH $15,571.

Total additional labor and equipment cost $54,906 + G.C. profit and Bond $60, 855. All mark-ups include all indirect costs such as increased Home Office Overhead, and mark-ups do not apply to Delay Claims, per Special Provisions Subarticle 4-3.2.3, pages 8 and 9. Gimrock's revised cost estimate requesting an additional $31,326 includes several discrepancies:

A. Crew Hourly rate of $55.75 is incorrect. Actual Rate is $33.14, a decrease of 41%

B. Contractor states that 30 crew-hours were lost on 12/23/98 when obstruction was hit at a cost of $2,510. This is incorrect since this is not a delay claim.

C. Contractor states that 4.5 crew hours were lost on 1/8/99 when obstruction (same waterline) was hit with Pile #9 at E.B.5. Not a delay claim. Not compensable as additional work.

D. Contractor, states that 40 crew hours were lost on 1/12/99 by exposing the waterline at E.B. #5. Berger included 44 man-hours for this additional work on 1/12/99, so it should not be included again.

E. Contractor states that 40.5 crew hours were lost on 1/14/99 to drill a hole in the pipe and determine which utility it belonged to. Berger included 40.5 hours for this work. Gimrock's crew spent 40.5 hours cutting off pile tops and installing temporary sheetpile at the Creek Bridge. Basically a 9-man crew split a 9-hour day on two areas of work.

F. Contractor states that at 85.5 crew hours were required on 1/15/99 for removing the water line at E.B. 5. Berger included 86 crew hours in the total of 633 crew hours compensated, and it should not be included again.

G. Contractor states that 13.5 crew hours were required to remove the waterline at E.B. #1 on 1/ 18/99. Berger included 60 crew hours for waterline removal and remobilization to drive Pile #9, at E.B. 1, and it should not be included again.

H. Contractor claims 49 hours of equipment time for an I.C.E. vibratory hammer when it was only used for 12 hours on 1/5/99 @ $37.58/hr. X 1.075% = $485.00. Add Air compressor for 12 hours @ $6.04/hr x 1.075% = $78,00. Add Work Float @ $41.65. Other equipment requested was not utilized or the Contractor states that it was delayed. Add Total Additional Equipment = $605.00

Total Revised Cost Estimate = **$61,460**

**DRB Findings**

The Board has examined all submittals from both ACI/GCI and FDOT in their entirety. FDOT Daily Reports and photographs (not included herein) were relied on for the Board to check equipment, manpower, etc.

The Board agrees with both parties that there is entitlement to quantum in this case as the presence of the FWS waterline was a complete unknown within the contract.

**DRB Recommendation**

The Board recommends that the Department compensate the Contractor as follows:

Payment to Contractor (ACI) $70,863.38

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
John Duke, DRB Member
Charles Sylvester, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

Rammy Cone, DRB Chairman

CC: Mr. Steve Torcise, Atlantic Civil, Inc.