

DISPUTE REVIEW BOARD RECOMMENDATION

Nov. 1, 2018

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RE: First Coast Expressway – North Section
Financial Project No.: 430565-3-52-01
Contract No.: E2Q19

Subject: Hearing Date: Oct. 17, 2018
Issue No. 31 and No. 32
Disputes Review Board Recommendation

Gentlemen:

Dragados USA (DUSA) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board (DRB) hearing of two disputed issues. The Disputes Review Board was requested only to consider the question of entitlement. The parties furnished the Board position papers prior to the hearing. Both parties provided a rebuttal response for review prior to the hearing. The initial hearing meeting was held on Oct. 17, 2018. The hearing was held at the FDOT Urban Operations Center in Jacksonville, FL. In accordance with your request the Disputes Review Board offers the findings and recommendations presented herein.

Project Scope

The principal elements of the project scope include widening and related improvements of SR 23 in Duval County, Florida.

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Issue 31: Is Dragados USA entitled to additional compensation as a result of two 6 inch under drain pipes discovered at 103 Street during the progress of the construction work? Only entitlement to monetary compensation will be considered. Entitlement to additional time will not be considered.

Contractor's Position Issue 31

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials and electronic files.

Summary of Claim

Dragados USA, Inc. (hereinafter referred to as "Contractor" or "DUSA") and the Florida Department of Transportation (hereinafter referred to as "the Department" or "FDOT") are parties to a contract ("**North Contract**") for package – E2Q19, awarded, April 23, 2013. The north project is a design-build of the SR23 Toll Road from north of Argyle Forest Boulevard to south of SR 8 (I-10), Duval County (the "Project").

This position paper is submitted to the DRB in support of DUSA's entitlement to additional compensation for the costs it incurred as a direct result of the discovery, removal, and relocation of the subject 6" underdrain pipes, which constitute an unforeseen, latent, and materially differing site condition under the Contract Documents. The question posed to the DRB is whether or not DUSA is entitled to compensation for extra work cause by the discovery of 6" underdrain pipes at 103rd Street. The answer to this question should be in the affirmative.

While performing excavation and finishing of grades for the 6" in-lieu subgrade of the 4LF widening at the 103rd Street Eastbound lane, a portion of the excavation caved in. Upon further investigation, DUSA discovered two existing 6" PVC underdrain pipes running under the 4LF widening section. The subject 6" underdrain pipes were not shown in, or reasonably inferable from, the bid documents or other information/documentation provided by FDOT during the bidding stage of the Project. The subject 6" underdrain pipes were not otherwise discovered during the bidding contractors' pre-bid investigations of the Project site.

The subject 6" underdrain pipes constitute an unforeseen, latent, and materially differing site condition under the Contract Documents because: (i) DUSA reasonably relied on the information provided by FDOT to price and schedule the work; (ii) FDOT provided inaccurate and/or incomplete information regarding existing site drainage conditions; (iii) the subject site drainage conditions materially differed from that which was inferable from a reasonable pre-bid investigation; (iv) the subject site drainage conditions were not patent or reasonably foreseeable; and (v) this unforeseen, latent, and materially differing site condition increased DUSA's cost to perform the Contract work.

FDOT will argue that the plans in the RFP (Preliminary Concept Plans) cannot be relied on and will further rely on the provisions in Article 4-1 Intent of Contract. Despite the presence of disclaimer language, there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. This is particularly the case where, as in the Contract Documents here, there are separate Contract provisions which specifically provide for additional compensation to DUSA in the event of unforeseen, latent, and/or materially differing site conditions. Accordingly, based on the express provisions of the Contract Documents, including, without limitation, Sections 4-3.7, 4-4 and 5-12.1 of DIVISION I of the FDOT STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION, DUSA's entitlement to additional compensation stands irrespective of any reference to the Preliminary Concept Plans.

In addition FDOT will argue that DUSA should have performed an "adequate" pre-bid investigation. While DUSA agrees it was responsible to perform an "adequate" investigation of the Project site at the pre-bid stage (and DUSA in fact did so), it is unreasonable – and well outside of standard practice in the construction industry – for bidding contractors to remove manhole covers within the confines of the Project site and perform visual subsurface inspections at each manhole location. Among other things, for manholes located in areas of vehicular traffic (*e.g.*, roads), this would require contractors to perform MOT activities at the pre-bid stage.

The Contract Documents define the standard for pre-bid investigations by what is “adequate” and reasonable, and not by what is merely “possible” without regard to common practice, industry standard, or feasibility. Indeed, as DUSA has previously noted, the subject 6” underdrain pipes were not found until the existing sidewalk, Curb and Gutter, and structure tops were removed. It is, therefore, unreasonable to expect DUSA (or any other bidding contractor) to have found the subject 6” underdrain pipes with the foregoing pre-existing structures and carriageway in place.

In sum, DUSA performed an adequate pre-bid investigation of the drainage structures, including at the location in question. If the subject 6” underdrain pipes had been discovered during the contractors’ pre-bid investigations, FDOT would have been required to compensate the winning bidder for the relocation of the underdrain pipes. Moreover, any reasonable contractor which had found the subject 6” underdrain pipes would have made it known at the time of “Bid Questions” that there would be extensive additional work and, therefore, additional costs, associated with its bid as a result thereof. Indeed, DUSA understands that no other bidding contractor found the subject 6” underdrain pipes during their respective pre-bid investigations.

Pursuant to, *inter alia*, Sections 4-3.2, 4-3.7, 4-4, and 5-12 of DIVISION I of the FDOT STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION, the two 6” underdrain pipes discovered at 103rd Street during the progress of the work constitute an unforeseen, latent, and materially differing site condition which entitles DUSA to additional compensation for the costs it incurred as a direct result of the discovery, removal, and relocation of the subject 6” underdrain pipes. Accordingly, DUSA respectfully requests that the DRB find that entitlement is due to DUSA and reject FDOT’s objections to this claim.

Contract Recitals

Procurement of this Contract relied upon FDOT issuing an RFP to solicit competitive bids and proposals from the selected Proposers.

The bidding process for the North Contract, required the Contractor to adhere to a protocol under which:

“Each Design-Build Firm is to develop design approaches with corresponding schedules in accordance with the scope described in the RFP that can be designed and built without exceeding this maximum price”.

Within Appendix C of the Request for Proposals¹, item 4-1 [Intent of Contract] the Department included:

“The terms and conditions of this Contract are fixed price and fixed time. The Contractor’s submitted bid (timer and cost) is to be a lump sum bid for completing the scope of work detailed in the Contract.”

1.1.1 The Engineer appointed by FDOT for the Project is JEA Construction Engineering Services Inc. (JEAcEs). DUSA was required to follow the Engineer’s instructions, and decisions.

1.1.2 T.Y. LIN International Group (TY Lin) is the designer for the Project, in accordance with a subcontract between TY Lin and DUSA.

1.1.3 The defined terms used in this submission are those used in the North Contract documents, unless otherwise indicated. References to Clauses Sub-Clauses are to Clauses and Sub-Clauses of the North Contract unless otherwise indicated.

1.1.4 Section 9 [Measurement and Payment] of Appendix C stipulates that:

“The Contract Lump Sum Price will include overhead, profits, and direct and indirect costs required to complete the project except as described below.”

Project Scope

Under the Contracts DUSA is to execute the following (Project Descriptions):

Design and construction of the SR 23 Toll Road (Toll 23) from north of Argyle Forest Boulevard to south of SR 8 (I-10). Additional improvements include construction of interchanges (3) at SR 134 (103rd Street), at SR 228 (Normandy Boulevard) and at New World Avenue; construction of cross road improvements at the previously indicated interchange locations; and construction of electronic tolling gantries, lighting, and an ITS system. This project is the initial segment of two

¹ Division I Design-Build Specifications and Special Provisions.

separate projects that will design and construct a toll road from SR 21 (Blanding Boulevard) to SR 8 (I-10). The improvements are anticipated to include the construction of a minimum of a four-lane limited access mainline facility, three interchanges and the construction of nine new bridges.

Contractor's Statement

DUSA is entitled to recover the costs it has incurred as a direct result of the discovery, removal and replacement of existing 6-inch diameter underdrain pipes located under the existing carriageway which is an unforeseen, latent, and differing subsurface site condition that differed materially from the conditions indicated by FDOT in the bid documents and made available during the bidding period.

The subject 6" underdrain pipes constitute an unforeseen, latent, and materially differing site condition under the Contract Documents because: (i) DUSA reasonably relied on the information provided by FDOT to price and schedule the work; (ii) FDOT provided inaccurate and/or incomplete information regarding existing site drainage conditions; (iii) the subject site drainage conditions materially differed from that which was inferable from a reasonable pre-bid investigation; (iv) the subject site drainage conditions were not patent or reasonably foreseeable; and (v) this unforeseen, latent, and materially differing site condition increased DUSA's cost to perform the Contract work.

DUSA performed an adequate pre-bid investigation which included a search for permits to determine if there were any underground drainage systems. DUSA's research of permits and/or plans was to confirm whether any SJRWMD and/or FDEP records existed which showed ongoing or prior work in the subject area. No such records were found. No reasonable contractor, at the pre-bid stage, would assume or foresee that an undocumented underdrain system would be in place without the knowledge of the responsible permitting agency(ies) or FDOT. If the permitting agency(ies) and FDOT, which hold the pertinent records and/or have superior knowledge through prior control of the existing construction at the subject location, were not aware of the existence of the subject 6" underdrain system, it is patently unreasonable to expect DUSA to somehow have knowledge of same with less information in hand. Rather, based on the information provided by FDOT and its own reasonable and adequate pre-bid investigation, DUSA reasonably concluded that there were no unidentified underdrain systems at the subject location.

DUSA met the standard for pre-bid investigations. The Contract Documents define the standard for pre-bid investigations by what is "adequate" and reasonable, and not by what is merely "possible" without regard to common practice, industry standard, or feasibility. Indeed, as DUSA has previously noted, the subject 6" underdrain pipes were not found until the existing sidewalk, Curb and Gutter, and structure tops were removed. It is, therefore, unreasonable to expect DUSA (or any other bidding contractor) to have found the subject 6" underdrain pipes with the foregoing pre-existing structures and carriageway in place.

If the subject 6" underdrain pipes had been discovered during the contractors' pre-bid investigations, FDOT would have been required to compensate the winning bidder for the relocation of the underdrain pipes. Moreover, any reasonable contractor which had found the subject 6" underdrain pipes would have made it known at the time of "Bid Questions" that there would be extensive additional work and, therefore, additional costs, associated with its bid as a result thereof. Indeed, DUSA understands that no other bidding contractor found the subject 6" underdrain pipes during their respective pre-bid investigations.

Despite disclaimer language, there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. This is particularly the case where, as in the Contract Documents here, there are separate Contract provisions which specifically provide for additional compensation to DUSA in the event of unforeseen, latent, and/or materially differing site conditions.

Article 4.3.7 provides DUSA with the right to recover additional compensation in the event of encountering unforeseen conditions that differ materially from what is represented in the contract documents, making the job more difficult, time consuming or expensive than anticipated at the time of contracting. The purpose the changed conditions provisions are to shift the risk of unknown physical conditions to FDOT by allowing a contractor to seek an equitable adjustment to the contract price when the contractor encounters unanticipated conditions.

Similarly, Article 4-4 Unforeseeable Work provides for an adjustment to the Contract when the work that is required is not covered by the price in the Contract.

Notice

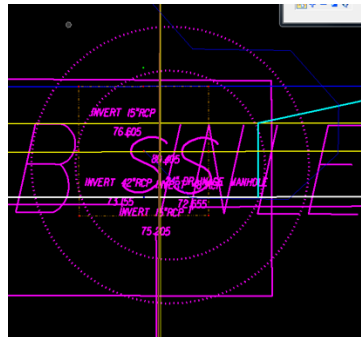
On March 22, DUSA informed the Engineer of the excavation problems encountered whilst working on the 103rd Street widening activity and issued a Notice of Intent to Claim for the additional costs and schedule impacts associated with the additional work required to remove the existing 6" Underdrain pipe and re-locate it.

Pre-Bid Investigations and Reliance on the Pre-Bid Documents

DUSA performed adequate pre-bid investigations and reasonably relied on the pre-bid documents. Adequate investigations did not reveal any additional information not contained in FDOT’s plans. To determine that the plans were inaccurate DUSA would have required a resurvey of the entire site which would have been impossible to carry out during bid time given that underdrain was not visible and under an existing carriageway.

DUSA relied on relevant survey data that failed to demonstrate the existence of this underdrain, which was not found until the existing sidewalk, C&G, and structure tops were removed as was not visible:²

- One of the sources was the Florida Environmental Protection Agency (FDEP) which is the agency authorized by the U.S. Environmental Protection Agency (EPA) responsible precisely for promulgating rules and issuing permits, managing and reviewing permit applications. However, no permit transpired through searches made with the FDEP.³
- No permit plans for the area were found for the west side of 103rd Street in the St John’s River Water Management District (SJRWMD).⁴
- No underdrain is shown on survey: Flowlines found for: 15” LT, 42” BK, 48” AH, 15” RT.



- Additionally, pictures shared with FDOT by DUSA show that the underdrain was not visible. As explained by DUSA, the Project survey carried out did not pick up flowlines of the underdrain system and the underdrain location was difficult to see while popping open the manhole top (as shown in pictures below).

² 16th February 2018; DUSA provided additional information from the designer TYLin, in support of the claim.

³ (<https://ca.dep.state.fl.us/mapdirect/?focus=tmdlvi>)

⁴ (http://www.flwaterpermits.com/agws10/fpperp1/_default.htm)



The fact that there were no permits available by the relevant authorities does demonstrate that there were no plans depicting the presence of the flowlines of the underdrain system. This, together with the underdrains not being visible nor shown in the plans provided by FDOT, it was more than for DUSA to rely on and conclude that there were no underdrain systems.

Entitlement under North Contract Provisions

DUSA is entitled to recover for the cost consequences of having encountered and dealt with unforeseen, latent subsurface conditions that materially differed from those stated in the Contract Documents. Relief for unforeseen, latent, and differing site conditions is found in several provisions.

3.2.1 Interpretation of Article 4-1

Indeed, paragraph two of Article 4-1 states that there are exceptions to the contractor's liability and responsibility for all "unknowns and/or differing site conditions..." should it be "... otherwise stated in the Contract...":

*"The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, **unless otherwise stated in the Contract**. In the event that **unforeseeable work** is provided for in the Contract, **such work shall be paid** for in accordance with 4-3.2."*

Such exceptions to the application of Article 4-1 are found in Articles 4-3.7, 4-4 -which provides relief for DSC as explained above- and other "change conditions" i.e. Section 125 and 440 of the Standard Specifications which refer to the compensation to be given to the contractor in case of *inter alia* "Removal of Obstructions" (125-4.2.3) as well as the Method of Measurement (440-7) and Basis of Payment (440-8).

These provisions deal with limitations to the responsibility placed on DUSA and the transfer of certain risks to FDOT in relation to "change conditions" i.e. excavation; removal of obstructions and underdrain cleanout:

125-4 Excavation.

125-4.2 Earth Excavation:

125-4.2.3 *Removal of Obstructions: Remove boulders, logs, or any unforeseen obstacles encountered in excavating. Compensation will be in accordance with the requirements of 4-3.4.*⁵

SECTION 440

UNDERDRAINS

440-7 Method of Measurement.

The quantities to be paid for will be the length, in feet, of underdrain, which includes underdrain cleanout structures, measured in place, along the centerline and gradient of the underdrain, completed and accepted. The quantities to be paid for will be the length, in feet, of outlet pipe measured in place, along the centerline and gradient of the outlet pipe, completed and accepted. The quantity of underdrain inspection boxes to be paid for will be the number completed and accepted.

440-8 Basis of Payment.

Price and payment will be full compensation for all the work, including all materials and all excavation except the volume included in the items for the grading work.

Payment will be made under:

Item No. 440- 1- Underdrain - per foot.

Item No. 440- 70- Underdrain Inspection Box - each.

Item No. 440- 73- Underdrain Outlet Pipe - per foot.

3.2.2 Unforeseeable Work and Differing Site Conditions

The Unforeseeable Work and Differing Site Conditions (DSC) provisions provide exceptions to Article 4-1. The purpose of these kinds of clauses is to transfer the risk associated with unforeseen conditions at site, thereby removing the pricing of such risk from a Contractors bid (as well as the effectiveness of any related owner's disclaimer of responsibility).

The contract expressly defines as "Extra Work": "Any "work" which is required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents, whether it be..., work **due to differing site conditions, or otherwise.** ...".

More specifically, DSCs are addressed in Article 4-3.7 which states:

*"4-3.7 **Differing Site Conditions:** During the progress of the work, if subsurface or latent physical conditions are encountered at the site **differing materially from those indicated in the Contract**, ...the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work. Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, ..."*

This article gives DUSA a right to an adjustment in order to recover the additional costs associated with having to deal with subsurface conditions that materially differ from those indicated in -or reasonably inferred from- FDOT's documents prior to bid "... if it is determined that [they]... cause

⁵ Standard Specifications **4-3.4. Conditions Requiring a Supplemental Agreement or Unilateral Payment:** A Supplemental Agreement or Unilateral Payment will be used to clarify the Plans and Specifications of the Contract; to provide for unforeseen work, grade changes, or alterations in the Plans which could not reasonably have been contemplated or foreseen in the original Plans and Specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims;

an increase ... in the cost or time required for the performance of any work under the Contract..."
as is the case here.

3.3 FDOT's Superior Knowledge

The existence of 6" pipes is a condition that should have been within FDOT's knowledge. FDOT had prior control of the Project and thus possessed or is deemed to have possessed superior or special knowledge that was vital to the performance of the contract, but that information was not made reasonably available to DUSA. There exists an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. DUSA reasonable relied on those plans. FDOT should bear some responsibility for the consequences of providing insufficient plans and specifications.

Records

22nd March 2017; the Contractor informed the Engineer of the excavation problems encountered whilst working on the 103rd Street widening activity and issued a Notice of Intent to Claim for the additional costs and schedule impacts associated with the additional work required to remove the existing 6" Underdrain pipe and re-locate it.

The Contractor also confirmed that the CEI had been informed of this extra work.

24th March 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending March 24, 2017, of resources employed on the claimed works.

3rd April 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending March 31, 2017, of resources employed on the claimed works.

10th April 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending April 7, 2017, of resources employed on the claimed works.

11th April 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a revised weekly cost reports and records for week ending April 7, 2017, of resources employed on the claimed works.

26th April 2017; the Contractor provide the Engineer with a copy of the designer's responses to RFI #452:
*"Please review the following question from the CEI:
JEAcēs pulled the manhole lids and found that the under drain ties into S-243A, S-243B and the existing inlet at STA 196+90 (reference Plan Sheet Nos. 69 and 70). How do we proceed?"*

"Revised Response (4/20/17)

As part of the coordination with DUSA, the TYLI recommendation is to remove the existing underdrain and provide a new system. DUSA asked if the underdrain could be located outside the proposed curb and gutter.

This was coordinated with PSI and PSI takes no exception to placing the underdrain from the proposed curb and gutter location to under the proposed sidewalk as allowed per Index 500 (see attached). The underdrain should be a minimum Type I and constructed per Index 286 and 500 (see attached). A detail will be coordinated for the connection to the inlets for the new underdrain. Isabel G. Nayab, P.E 4/21/17"

RFI Update

“RFI 452 - Unidentified Under Drain Between S-243A, S-243B and Existing Inlet on 103rd. Street
– *While working in the widening on 103rd St., an unidentified under drain between drainage structures (S-243A, S-243B and Existing Inlet) has been found. See attached pictures. Please review the following question from the CEI: JEAcēs pulled the manhole lids and found that the under drain ties into S-243A, S-243B and the existing inlet at STA 196+90 (reference Plan Sheet Nos. 69 and 70). How do we proceed?*

4/28/17 FDOT Update: These underdrains will need to remain or be relocated. Please provide the following additional information: 1. Limits of underdrain along 103rd. Please check if underdrain is located on both sides of the road. 2. Please provide the horizontal location of the underdrain so we can determine if the underdrains need to be relocated to a new offset. 3. Verify the underdrain pipe size 4. Please provide size and shape of the inlet structure bottoms. Are they square or round j-bottoms? 5. Please provide station/offset of areas where settlement is evident along 103rd and pictures of these locations. Revised Response (4/20/17) As part of the coordination with DUSA, the TYLI recommendation is to remove the existing underdrain and provide a new system. DUSA asked if the underdrain could be located outside the proposed curb and gutter. This was coordinated with PSI and PSI takes no exception to placing the underdrain from the proposed curb and gutter location to under the proposed sidewalk as allowed per Index 500 (see attached). The underdrain should be a minimum Type I and constructed per Index 286 and 500 (see attached). A detail will be coordinated for the connection to the inlets for the new underdrain. FDOT is reviewing.”

1st May 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending April 28, 2017, of resources employed on the claimed works.

9th May 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending May 5, 2017, of resources employed on the claimed works.

16th May 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending May 12, 2017, of resources employed on the claimed works.

16th May 2017; in response to RFI #452, the Engineer stated *“the Department has no comments. This issue is closed.”*

24th May 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending May 19, 2017, of resources employed on the claimed works.

25th May 2017; the Engineer passed on further minor comments from the Department with regard the proximity of existing UAO facilities.

2nd June 2017; the Engineer provided the Contractor with an update of the RFI #452 matter as follows;

“RFI 452 - Unidentified Under Drain Between S-243A, S-243B and Existing Inlet on 103rd. Street
– *While working in the widening on 103rd St., an unidentified under drain between drainage structures (S-243A, S-243B and Existing Inlet) has been found. See attached pictures. Please review*

the following question from the CEI: JEAcēs pulled the manhole lids and found that the under drains into S-243A, S-243B and the existing inlet at STA 196+90 (reference Plan Sheet Nos. 69 and 70). How do we proceed?

4/28/17 FDOT Update: These underdrains will need to remain or be relocated. Please provide the following additional information: 1. Limits of underdrain along 103rd. Please check if underdrain is located on both sides of the road. 2. Please provide the horizontal location of the underdrain so we can determine if the underdrains need to be relocated to a new offset. 3. Verify the underdrain pipe size 4. Please provide size and shape of the inlet structure bottoms. Are they square or round j-bottoms? 5. Please provide station/offset of areas where settlement is evident along 103rd and pictures of these locations. Revised Response (4/20/17) As part of the coordination with DUSA, the TYLI recommendation is to remove the existing underdrain and provide a new system. DUSA asked if the underdrain could be located outside the proposed curb and gutter. This was coordinated with PSI and PSI takes no exception to placing the underdrain from the proposed curb and gutter location to under the proposed sidewalk as allowed per Index 500 (see attached). The underdrain should be a minimum Type I and constructed per Index 286 and 500 (see attached). A detail will be coordinated for the connection to the inlets for the new underdrain. FDOT is reviewing.

5/12/17 FDOT Update: FDOT is reviewing.

6/2/17 FDOT Update: *the Department has no comments. This issue is closed. This is a minor issue that needs to be documented on the as-built drawings."*

6th June 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending June 1, 2017, of resources employed on the claimed works.

14th June 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending June 9, 2017, of resources employed on the claimed works.

14th June 2017; the Contractor provided the Engineer with written confirmation from the EOR that the Type II underdrain was acceptable to use.

20th June 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending June 16, 2017, of resources employed on the claimed works.

28th June 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending June 22, 2017, of resources employed on the claimed works.

14th August 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending August 10, 2017, of resources employed on the claimed works.

21st August 2017; in response to the EOR's confirmation regarding the use of the Type II underdrain, the Engineer stated *"Yes RFI 452 is closed. The Department has no further questions."*

5th October 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending August 18, August 25, September 1, September 8, September 15, September 22 and September 29 2017, of resources employed on the claimed works.

1st November 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending October 6, October 13, October 20 and October 27 2017, of resources employed on the claimed works.

22nd November 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending November 10 and November 17, 2017, of resources employed on the claimed works.

1st December 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending November 17 and November 24, 2017, of resources employed on the claimed works.

8th December 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending December 1, 2017, of resources employed on the claimed works.

18th December 2017; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending December 8 and December 15, 2017, of resources employed on the claimed works.

19th January 2018; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for weeks ending December 15 (updated) and December 22, 2017, of resources employed on the claimed works.

16th February 2018; the Contractor provided additional information from the designer TYLin, in support of the claim.

The designer provided evidence clarifying that at the time the Contractor's bid was being formulated there were no permits, either from the St John's River Water Management District (SJRWMD) or the Florida Department of Environmental Protection (FDEP) websites, which meant that there were no plans available depicting the presence of the flowlines of the underdrain system.

In addition, the concept plans and pre-contract survey did not reveal the underdrains.

23rd February 2018; the Engineer provided a response to the Contractor's email dated 16th February 2018 and concluded that;

"It is not understood how a search for permits could be relied on as a basis to support DUSA's claim that the existing underdrain pipe represents a differing site condition or an unforeseen condition. It is noted that the underdrain system appears to have been installed some time ago and would not be the subject of an active permit.

It is noted that the Preliminary Concept Plans referenced in DUSA's response were provided in the "Other Documents" Section of the RFP which includes the following language:

*"The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. **No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**" (emphasis added)*

Therefore, the Preliminary Concept Plans cannot be relied on as a basis to support DUSA's claim that the existing underdrain pipe represents a differing site condition or an unforeseen condition. In fact, the above language actually prohibits DUSA from such a reliance.

*Furthermore, Section 4-1, Intent of Contract from the Design-Build Specifications and Special Provisions states, in part, "**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.**"*

27th March 2018; Unidentified 6" Underdrain at 103rd Widening; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending March 1, 2018, of resources employed on the claimed works.

30th March 2018; DUSA sent the Engineer *“SR23 North Project, Jacksonville, Florida (the “Project”): Additional Cost Impacts to Dragados USA, Inc. Resulting from Unforeseen, Latent, and Materially Differing Site Conditions – Two Unidentified 6” Underdrain Pipes at 103rd Street Widening”* letter.

11th April 2018; the Engineer sent an email to DUSA with the response to the March 30. 2018 letter:

“Angel,

As discussed at today’s claim meeting, there are numerous concerns regarding DUSA’s statements in the attached letter. The Department continues to not agree with DUSA’s position.

This issue should be escalated to the District Construction Engineer’s level. I have copied Carrie Stanbridge on this response for scheduling purposes and so that she is aware of the matter.

Thanks,”

4th May 2018; Escalation Meeting held with Carrie Stanbridge and Will Watts.

16th May 2018; the Engineer sent a letter to DUSA with the response to the escalation meeting held in May 4, 2018:

“3. 103rd Street Underdrain (Claim No. 31) and Unsuitable Soil on Ramp R-2 Adjacent to Normandy Bridges (Claim No. 32).

a. Section V.G of the Design/Build Request for Proposal (RFP) which states:

i. “The Design-Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information.” and,

ii. “By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and

iii. being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.

b. Specification Section 4-1, Intent of Contract, which states, “The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including

but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.

Furthermore, DUSA is partially basing their claims on information provided in the "Other Documents" Section of the RFP. Please note that the RFP also states, "Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."

2nd July 2018; DUSA sent the DRB a hearing request: "DUSA is requesting the DRB a recommendation on entitlement".

5. Section V – Impact & Compensation

5.1 Costs

5.1.1 Summary of Weekly Cost Reports

Week ending	Labor	Mark-Up	Equipment	Mark-Up	Material	Mark-Up	Subcontractor	Mark-Up	Total
3/24/2017	\$ 284.00	\$ 152.99	\$ 500.40	\$ 87.57	\$ 117.50	\$ 20.56			\$ 1,163.02
3/31/2017	\$ 119.00	\$ 64.11	\$ 139.92	\$ 24.49	\$ 58.75	\$ 10.28			\$ 416.54
4/7/2017	\$ 50.00	\$ 26.94	\$ 94.23	\$ 16.49	\$ 11.75	\$ 2.06	\$ 1,845.19	\$ 184.52	\$ 2,231.17
4/28/2017	\$ 152.00	\$ 81.88	\$ 335.16	\$ 58.65	\$ 23.50	\$ 4.11	\$ 245.19	\$ 24.52	\$ 925.02
5/5/2017	\$ 829.00	\$ 446.58	\$ 1,599.51	\$ 279.91	\$ 47.00	\$ 8.23			\$ 3,210.23
5/12/2017	\$ 946.00	\$ 509.61	\$ 939.90	\$ 164.48	\$ 23.50	\$ 4.11			\$ 2,587.61
5/19/2017	\$ 856.00	\$ 461.13	\$ 1,717.36	\$ 300.54	\$ 47.00	\$ 8.23			\$ 3,390.25
6/2/2017	\$ 1,010.00	\$ 544.09	\$ 1,713.55	\$ 299.87	\$ 7,047.00	\$ 1,233.23			\$ 11,847.73
6/9/2017	\$ 4,038.00	\$ 2,175.27	\$ 4,950.86	\$ 866.40	\$ 7,155.10	\$ 1,252.14	\$ 281.73	\$ 28.17	\$ 20,747.68
6/16/2017	\$ 707.00	\$ 380.86	\$ 954.44	\$ 167.03	\$ 31.55	\$ 5.52			\$ 2,246.40
6/23/2017	\$ 392.00	\$ 211.17	\$ 845.31	\$ 147.93	\$ 29.20	\$ 5.11			\$ 1,630.72
8/11/2017	\$ 583.00	\$ 314.06	\$ 3,129.94	\$ 547.74	\$ 939.70	\$ 164.45			\$ 5,678.89
12/1/2017	\$ 802.00	\$ 432.04	\$ 1,571.98	\$ 275.10	\$ 2,139.70	\$ 374.45			\$ 5,595.26
12/8/2017	\$ 1,934.00	\$ 1,041.85	\$ 2,700.52	\$ 472.59	\$ 4,447.11	\$ 778.24			\$ 11,374.31
12/15/2017	\$ 1,508.75	\$ 812.76	\$ 2,140.78	\$ 374.64	\$ 35.25	\$ 6.17			\$ 4,878.35
12/22/2017	\$ 355.00	\$ 191.24	\$ 569.20	\$ 99.61	\$ 908.56	\$ 159.00			\$ 2,282.61
3/1/2018	\$ 774.00	\$ 416.95	\$ 1,067.06	\$ 186.74	\$ 602.26	\$ 105.40			\$ 3,152.40
	\$ 15,339.75	\$ 8,263.52	\$ 24,970.12	\$ 4,369.77	\$ 23,664.43	\$ 4,141.28	\$ 2,372.11	\$ 237.21	\$ 83,358.18

6. Section VI –Conclusions

- 6.1.1 DUSA is entitled to receive additional compensation in accordance with the express terms and conditions of the Contract, wherein change conditions, including Article 4-3.7 and Article 4-4, transfers the risk associated with unforeseen conditions at site, thereby removing the pricing of such risk from a Contractors bid (as well as the effectiveness of any related owner’s disclaimer of responsibility). As discussed herein, the subject 6” underdrain pipes constitute an unforeseen, latent, and materially differing site condition under the Contract Documents because: (i) DUSA reasonably relied on the information provided by FDOT to price and schedule the work; (ii) FDOT provided inaccurate and/or incomplete information regarding existing site drainage conditions; (iii) the subject site drainage conditions materially differed from that which was inferable from a reasonable pre-bid investigation; (iv) the subject site drainage conditions were not patent or reasonably foreseeable; and (v) this unforeseen, latent, and materially differing site condition increased DUSA’s cost to perform the Contract work.

FDOT's Position Issue 31

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials and electronic files.

It is the Department's position that the issue at hand - the existence of an underdrain system on 103rd Street – is in fact not a Differing Site Condition as DUSA claims.

The Department will demonstrate that:

- Encountering the existing underdrain system on 103rd Street occurred because of decisions made solely by the Design-Build Firm.
- The Design-Build Firm failed to perform the proper factual investigation required by the Contract.

Furthermore, the Department will demonstrate that, if this existing condition were somehow to be interpreted to represent a Differing Site Condition, then the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm.

Therefore, the Department requests that the DRB determine that DUSA is not entitled to the requested compensation.

RELEVANT CONTRACT PROVISIONS

The following Contract Provisions are relevant to this issue. Emphasis has been added via bold, underlined text. The referenced Contract Provisions are provided in Attachment No. 2.

1. Request for Proposal (RFP) Section (§) entitled Other Documents (Page iii) states, *“The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. **No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**”*
2. RFP§ I.A Design-Build Responsibility (Page Nos. 7 and 8) states, in part, *“The Design-Build Firm shall be responsible for survey, geotechnical investigation, design, acquisition of all permits not acquired by the Department, any required modification of permits acquired by the Department, maintenance of traffic, demolition, and construction on or before the Project completion date indicated in the Proposal. The Design-Build Firm will coordinate all utility relocations.*

The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data, and shall base their bid on their own opinion of the

conditions likely to be encountered. The submission of a proposal is prima facie evidence that the Design-Build Firm has made an examination as described in this provision.”

3. RFP § III.K Department’s Responsibilities (Page No. 14) states, “*This Request for Proposal does not commit the Department to make studies or designs for the preparation of any proposal, nor to procure or contract for any articles or services.*”

The Department does not guarantee the details pertaining to borings, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated.”

4. RFP § V.B.2 (f) Submittal of ATC Proposals (Page Nos. 19 and 20) states, in part, “*All ATC submittals shall be sequential numbered and include the following information and discussions:*

f) Risks: A description of added risks to the Department or third parties associated with implementation of the ATC;”

5. RFP § V.B.4 Incorporation [of ATC’s] into Proposal (Page No. 21) states, in part, “*The Design-Build Firm will have the option to include any ATC’s to which it received acceptance in their proposal and the Proposal Price should reflect any incorporated ATC’s.*”
6. RFP § V.C Geotechnical Services (Page No. 21) states, “*The Design-Build Firm shall be responsible for identifying and performing any geotechnical investigation, analysis and design of foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the Project needs in accordance with Department guidelines, procedures and specifications. All geotechnical work necessary shall be performed in accordance with the Governing Regulations. The Design-Build Firm shall be solely responsible for all geotechnical aspects of the Project.*”
7. RFP § V.G Verification of Existing Conditions (Page Nos. 23 and 24) states, “***The Design-Build Firm shall be responsible for verification of existing conditions,*** including research of all existing Department records and other information.

By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.”

8. RFP § V.N Quality Management Plan (Page No. 30) states, in part, “*The Design-Build Firm shall be responsible for the professional quality, **technical accuracy and coordination of all surveys, designs, drawings, specifications, geotechnical and other services** furnished by the Design-Build Firm under this contract.*

The Design-Build Firm shall, without additional compensation, correct all errors or deficiencies in the surveys, designs, drawings, specifications and/or other services.”

9. Item 2, Drainage Analysis in RFP § VI.D Roadway Plans (Page No. 43) states, in part, “***The Design-Build Firm shall be responsible for designing the drainage and stormwater management systems.*** All design work shall be in compliance with the Department’s Drainage Manual; Florida Administrative Code,

chapter 14-86; Federal Aid Policy Guide 23 CFR 650A; and the requirements of the regulatory agencies. **This work will include the engineering analysis necessary to design any or all of the following: cross drains, side drains, roadway ditches, outfall ditches, storm sewers, detention facilities, interchange drainage and water management, other drainage systems and elements of systems as required for a complete analysis.**”

10. Specification §4-1, Intent of Contract from the RFP’s Appendix C - Division I Design-Build Specifications and Special Provisions states, in part, **“The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract. In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.”**

DISCUSSION - GENERAL

On March 22, 2017, DUSA submitted a Notice of Intent (NOI) indicating that they had found an existing 6” underdrain while excavating for the 103rd Street roadway widening. The notice indicated that DUSA intended to claim for the additional costs and schedule impacts associated with this issue. (Ref. Attachment No. 3).

However, DUSA has since indicated that they are only requesting additional compensation for this issue. The Department acknowledges that DUSA has preserved their rights for additional compensation; however, DUSA has not preserved their rights for a Contract Time Extension request.

DISCUSSION – DESIGN DECISIONS MADE BY DESIGN-BUILD FIRM

The fact that the condition was encountered during widening of 103rd Street is important.

As has been discussed numerous times during the project’s Progress and DRB Meetings, several issues have developed because of the Design-Build Firm’s decision to elevate the intersecting streets (103rd Street, Normandy Boulevard, and New World Avenue) rather than elevate the mainline (SR 23). The issue at hand is a direct result of this decision that was made solely by the Design-Build Firm.

Had the mainline roadway been elevated (as was shown in the Concept Plans), the existing 103rd Street footprint would not have needed to be widened in this area.

Additionally, it is not expected that the 103rd Street profile would have needed to be adjusted at this location. Therefore, the existing underdrain pipes would not have been encountered had the mainline (SR 23) been elevated.

Ultimately, the Design-Build Firm’s decision created this situation and it is not appropriate for the Design-Build Firm to seek relief from the Department for the resultant impacts.

The Design-Build Firm presented the concept of elevating 103rd Street in lieu of the SR 23 mainline as an Alternate Technical Concept (ATC) No. 6 during the procurement phase. As noted above, Item f in RFP §V.B.2 required the Design-Build firm to include “A description of added risks to the Department or third parties associated with implementation of the ATC” in their ATC submittal.

The Design-Build Firm’s ATC submittal included the following statement, **“There will be no additional risks to the department or any third parties associated with the implementation of this ATC. The reversal of the profiles will not compromise the ultimate typical section of SR 23.”** (Ref. Attachment No. 4).

The consideration of this ATC – as well as the other ATCs – including the above statement that “*there will be no additional risks to the department*” was part of the Technical Proposal that was considered during the selection process. **Therefore, it is not appropriate for the Design-Build Firm to assign the “risk” associated with the Design-Build Firm’s inadequate research of the potential impacts of their design decision to the Department in the form of this claim. The “risk” is solely the Design-Build Firm’s responsibility.**

DISCUSSION – INADEQUATE INVESTIGATION BY DESIGN-BUILD FIRM

As noted above, Section V.G of the RFP is entitled Verification of Existing Conditions. This Contract Provision states, in part, “*By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated **for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm** and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.*”

The above provision places responsibility for investigating existing site conditions on the Design-Build Firm.

On February 16, 2018, DUSA replied to the CEI’s request that DUSA identify the investigative measures performed by the Design-Build Firm on which the design was based and how those investigative measures failed to identify the existing underdrain pipes. In this response, DUSA notes:

- The Design-Build Firm reviewed the St. Johns River Water Management District and Florida Department of Environmental Protection websites.
- The Design-Build Firm reviewed the Preliminary Concept Plans provided in the Request for Proposal (RFP).
- The Design-Build Firm conducted a project survey, which, as noted in DUSA’s February 16, 2018 response, “*did not pick up flowlines of the underdrain system*”. DUSA also notes, “*it looks like the underdrain location would be difficult to see while popping open the manhole top*”.

On February 23, 2018, the Department responded to DUSA’s February 16, 2018 correspondence and on March 30, 2018, DUSA issued a reply. These three (3) documents are provided in Attachment No. 5. Additional discussion of these issues is provided below:

- A. The Design-Build Firm reviewed the St. Johns River Water Management District and Florida Department of Environmental Protection websites.

DUSA’s February 16, 2018 response notes that there are no permits in this location (west side of 103rd Street); therefore, there are no plans available.

It is not understood how a search for permits could be relied on as a basis to support DUSA’s claim that the existing underdrain pipe represents a differing site condition or an unforeseen condition. It is noted that the underdrain system appears to have been installed some time ago and would not be the subject of an active permit.

In their March 30, 2018 response DUSA clarified their permit database search was not limited to active permits but rather “*was to confirm whether any SJRWMD and/or FDEP records existed which showed ongoing or prior work in the subject area.*” DUSA went on to note, “**No such records were found**” and

that “*Moreover, no reasonable contractor, at the pre-bid stage, would assume or foresee that an undocumented underdrain system would be in place without the knowledge of the responsible permitting agency(ies) or FDOT.*”

However, DUSA fails to address how the entire existing storm drain system on 103rd Street – not just the existing underdrain pipes - could be explained in the absence of any “*SJRWMD and/or FDEP records [which] existed which showed ongoing or prior work in the subject area*”. In other words, how does DUSA explain the existence of the entire storm drain system on 103rd Street as there were no “*SJRWMD and/or FDEP records*” that showed the system being installed?

Therefore, it is not understood how the apparent absence of these permits in DUSA’s search of the SJRWMD and FDEP database can be relied on as a basis that the existing underdrain system represented a differing site condition as there was obviously an existing storm drain system that was installed in the area for which “*No such records were found*”.

B. The Design-Build Firm reviewed the Preliminary Concept Plans provided in the Request for Proposal (RFP)

DUSA’s February 16, 2018 response notes that “*From the RFP concept plans provided by FDOT, there are no underdrain systems shown*”.

It is noted that the Preliminary Concept Plans referenced in DUSA’s response were provided in the “Other Documents” Section of the RFP that includes the following language:

*“The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. **No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**”*

Therefore, the Preliminary Concept Plans cannot be relied on as a basis to support DUSA’s claim that the existing underdrain pipe represents a differing site condition or an unforeseen condition. In fact, the above language prohibits DUSA from such a reliance.

Additionally, please note that RFP Section V.G, Verification of Existing Conditions states, in part, “**By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.**”

Furthermore, Section 4-1, Intent of Contract from the Design-Build Specifications and Special Provisions states, in part, “**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or**

differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.”

In their March 30, 2018 correspondence DUSA notes that the “*subject 6” underdrain pipes were not shown in, or reasonably inferable from, **the bid documents** or other information/documentation provided by the FDOT during the bidding stage of the project.*” The Department strongly objects to the inference that the Preliminary Concept Plans or any of the documents provided in the collection of “Other Documents” should be construed as “bid documents”.

As noted above, the Preliminary Concept Plans and the documents provided in the collection of “Other Documents” – which were provided to all prospective Design-Build Firms - are referenced on Page iii of the RFP. The RFP includes the following language, “**OTHER DOCUMENTS - The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**”

Therefore, DUSA’s inference that any of these documents are “*bid documents*” is misplaced and incorrect. Additionally, as noted in the above excerpt, by accepting these documents DUSA agreed not to use these documents as the basis for a claim; however, they are now doing so in direct contradiction to the terms of the Contract.

In their March 30, 2018 correspondence DUSA “*disputes the scope of enforceability of the RFP disclaimer language*” and notes “*there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes.*”

Notwithstanding the fact that in this referenced statement DUSA acknowledges that they relied on the information in the “Other Documents” for bidding purposes, the Department strongly disagrees with DUSA’s position. The RFP language is clearly enforceable as it is part of the Contract into which DUSA willingly entered.

Additionally, there is no “*implied warranty*” regarding the accuracy of the “Other Documents”. However, there are expressed conditions that

- “*No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract*”; and,
- “*The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.*”

C. The Design-Build Firm conducted a project survey, which, as noted in DUSA’s February 16, 2018 response, “*did not pick up flowlines of the underdrain system*”. DUSA also notes, “*it looks like the underdrain location would be difficult to see while popping open the manhole top*”.

While this effort may have been “*difficult*”, it was not impossible, as the survey effort was apparently able to obtain flowline elevations for all of the other pipes entering the drainage structures.

As noted above, “**By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm**”.

Therefore, DUSA was responsible to perform an adequate investigation that would “*pick up flowlines of the underdrain system*”. Any impact resulting from the Design-Build Firm’s failure to do so is solely DUSA’s to bear.

Of note in DUSA’s March 30, 2018 reply is the statement that “*The subject 6” underdrain pipes were not otherwise discovered **during the bidding contractors’ pre-bid investigations of the Project site.**” This statement, which has been supported by comments made by DUSA during meetings to discuss this issue, indicates that this project survey effort was performed prior to bidding the project.*

Elsewhere in their March 30, 2018 reply DUSA agrees that the Design-Build Firm “*was responsible to perform an ‘adequate’ investigation of the Project site at the pre-bid stage (and DUSA in fact did so)*”. They go on to note, “*it is unreasonable – and well outside of standard practice in the construction industry and probably illegal – for bidding contractors to remove manhole covers within the confines of the Project site and perform visual subsurface inspections at each manhole location. Among other things, for manholes located in areas of vehicular traffic (e.g., roads), this would require contractors to perform MOT activities at the pre-bid stage.*”

There are several observations concerning these statements:

- First, the Department and DUSA appear to agree on DUSA’s contractual responsibility to perform adequate pre-bid inspections.
- Second, DUSA acknowledges that the inspection was performed “*pre-bid*”.
- Third, based on the information DUSA provided in their February 16, 2018 correspondence identifying the extent of the pre-bid investigation, DUSA obviously did remove a manhole cover at one of the drainage structures on 103rd Street but failed to identify the openings for the existing underdrain pipes. Additionally, it is not understood why DUSA would have done so if they are seriously alleging that doing so is “*probably illegal*”.
- Fourth, the existing drainage structure on 103rd Street where DUSA performed their pre-bid survey effort was a curb inlet. Therefore, it was not in an area of vehicular traffic (e.g., road) and would not have required DUSA to *perform MOT activities at the pre-bid stage*” in order to remove the inlet cover and obtain the elevations.

DISCUSSION – DESIGN

The Design-Build Firm’s initial design did not call for the installation of an underdrain system in this area. However, in response to Request for Information No. 452 (Ref. Attachment No. 6) the Design EOR noted, “*These underdrains will need to remain or be relocated.*”

Item 2, Drainage Analysis in RFP § VI.D Roadway Plans (Page No. 43) states, in part, **“The Design-Build Firm shall be responsible for designing the drainage and stormwater management systems.”** This Section goes on to note, **“This work will include the engineering analysis necessary to design any or all of the following: cross drains, side drains, roadway ditches, outfall ditches, storm sewers, detention facilities, interchange drainage and water management, other drainage systems and elements of systems as required for a complete analysis.”**

It is not understood why the initial design omitted the underdrain system since the Design-Build Firm issued a plan revision that indicates that installation of an underdrain system was necessary.

The Department refers the DRB’s attention to RFP § V.N Quality Management Plan (Page No. 30) which states, in part, **“The Design-Build Firm shall be responsible for the professional quality, technical accuracy and coordination of all surveys, designs, drawings, specifications, geotechnical and other services furnished by the Design-Build Firm under this contract.**

“The Design-Build Firm shall, without additional compensation, correct all errors or deficiencies in the surveys, designs, drawings, specifications and/or other services.”

Therefore, the Design-Build Firm’s request for additional compensation to correct this oversight is not allowed by the Contract Provisions.

DISCUSSION – MISCELLANEOUS

One final point of interest regarding DUSA’s March 30, 2018 reply is their comment that *“If the subject 6” underdrain pipes had been discovered during the contractors’ pre-bid investigations, FDOT would have been required to compensate the winning bidder for relocation of the underdrain pipes.”*

The Department points to RFP § V.G Verification of Existing Conditions (Page Nos. 23 and 24) which states, in part, **“By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.”**

Therefore, the lump-sum bid amount that DUSA submitted for this Design-Build Contract has already compensated DUSA to perform the investigation necessary to support their design, which would include resolving the underdrain issue.

DISCUSSION – ISSUE ESCALATION

This issue was escalated through the District Two Director of Transportation Operations level. The Department’s response was provided to DUSA on May 15, 2018 (Ref. Attachment No. 7).

SUMMARY

The information presented above has demonstrated that:

1. Encountering the underdrain system on 103rd Street occurred because of decisions made solely by the Design-Build Firm. DUSA chose to elevate the side street, failed to identify the risk associated with their

design decision during the ATC process for the Department to consider, and is now claiming for the impacts resulting from a design choice that was 100% DUSA's decision.

2. Additionally, the Design-Build Firm failed to perform the proper factual investigation required by the Contract. There was no impediment that prevented DUSA from identifying the existence of the underdrain system. DUSA has acknowledged that their pre-bid investigation evaluated at one of the drainage structures on 103rd Street at a location the existing underdrain system was present and failed to identify the underdrain system.
3. The Design-Build Firm's initial design failed to identify the need for an underdrain system in this area and they issued a plan revision that indicated that an underdrain system was required. The Contract Documents clearly prevent the Design-Build Firm from requesting additional compensation to correct this oversight.
4. The Department contends that if this existing condition were somehow found to represent a Differing Site Condition, then the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm. Specification §4-1, Intent of Contract from the RFP's Appendix C - Division I Design-Build Specifications and Special Provisions states, in part, "***The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.***"

It should be sufficient to state that, regardless of the above arguments, such sole responsibility is sufficient reason for the DRB to determine that DUSA is not entitled to the requested compensation.

CONCLUSION

The Department requests that the DRB find that DUSA is not entitled to any additional compensation for this issue.

Disputes Review Board Relevant Findings Issue 31

1. During construction existing 6 inch diameter under drain pipes were discovered within the 4 foot section to be widened on 103 Street (east bound).
2. The existing underdrain pipes conflicted with the new construction and had to be relocated.
3. The existing 6 inch diameter underdrains were not indicated in the RFP documents or in the additional information given to bidders.
4. 103 Street is a Florida State road managed by the FDOT
5. The FDOT claimed to have no record of the underdrains installed on 103 Street
6. The existence of the 6 inch underdrains was not indicated in existing permit documents and as-built records obtained by DUSA.
7. DUSA conducted a pre-bid site investigation including the removal of one existing drainage manhole top, however, the 6 inch underdrain was not discovered.
8. DUSA makes the argument that despite disclaimer language, there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. However they cite no contract language supporting this claim.
9. Specification Section 4-3.7 provides relief to the Contractor for conditions that are
 - differing materially from those indicated in the Contract
 - or conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract
10. **Appendix C, Division I Design-Build Specifications and Special Provisions, Section 4-1 Intent of the Contract** provides that the Design-Build firm has all liability and responsibility for all unknowns and/or differing site conditions.

“The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract....”

11. Specification **Section 5-2 Coordination of Contract Documents** provides an order of precedence provision.

“In cases of discrepancy, the governing order of the documents is as follows:

- 1. Special Provisions.**
 - 2. Technical Special Provisions.**
 - 3. Plans.**
 - 4. Design Standards.**
 - 5. Developmental Specifications.**
 - 6. Supplemental Specifications.**
 - 7. Standard Specifications.**
- Computed dimensions govern over scaled dimensions.”**

Disputes Review Board Recommendation Issue 31

The apparent conflict between Standard Specification section 4-3.7 and section 4.1 of Appendix C, Design Build Specification and Special Provisions is resolved by Specification Section 5-2. Special Provisions and Supplemental Specifications are given precedence over Standard Specifications. Therefore, the Design Build contractor has the risks associated with the existence of unknown utilities. DUSA was unable to discover the existence of the underdrain pipe through a reasonable pre-bid investigation. Nevertheless, DUSA assumed the risk when bidding the project. The DRB must recognize the clear language of the contract.

In this hearing the Disputes Review Board is addressing only the issue of entitlement. The DRB recommendation is that DUSA is not entitled to compensation for additional cost associated with the existing 6 inch underdrains.

Issue 32: Is Dragados USA entitled to additional compensation as a result of muck discovered at the embankment under Ramp R-2 at Normandy Bridge during the progress of the construction work? Only entitlement to monetary compensation will be considered. Entitlement to additional time will not be considered.

Contractor's Position Issue 32

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials and electronic files.

Summary of Claim

Dragados USA, Inc. (hereinafter referred to as "Contractor" or "DUSA") and the Florida Department of Transportation (hereinafter referred to as "the Department" or "FDOT") are parties to a contract ("**North Contract**") for package – E2Q19, awarded, April 23, 2013. The north project is a design-build of the SR23 Toll Road from north of Argyle Forest Boulevard to south of SR 8 (I-10), Duval County (the "Project").

This position paper is submitted to the DRB in support of DUSA's claim for compensation due to unforeseeable work and differing site conditions at Ramp R-2 at Normandy Road ("Ramp R-2"). The question posed to the DRB is whether or not DUSA is entitled to compensation for extra work caused by the discovery of muck under Ramp R-2. The answer to this question should be in the affirmative.

By way of background, during the course of the Project, while performing the embankment compaction for Ramp R-2, at approximately STA 2310, DUSA noticed the embankment pumping. Upon further investigation, DUSA discovered that the subsoil/subsurface material in the subject area was muck, which was not suitable for the construction activities to be performed. This subsoil/subsurface condition (*i.e.*, the presence of muck) was not shown in, or reasonably inferable from, the bid documents or other information/documentation provided by FDOT during the bidding stage of the Project, and could not otherwise have been discovered during a contractor's pre-bid investigations of the Project site. Although the Department will rely on Article 4-1 Intent of Contract to argue that DUSA accepted this risk, the DRB must consider whether it was reasonable for a contractor to assume that muck should not exist under an active roadway that has been widened only a few years prior to the bid. DUSA made a reasonable assumption that the roadway had been constructed in accordance with FDOT's Standards. Moreover, it is not standard industry practice for contractors to close a live roadway to take borings, unless there was an unusual condition indicated on the drawings. During the bidding phase, most contractors do not have the resources or equipment to close active roadways. The drawings did not provide any information that indicated there were unsuitable soils under an active roadway. DUSA met the standard of care for the number and depth of borings taken during the proposal process (see letter from Professional Service Industries, Inc. stating that it is their opinion that the number and depth of borings at Normandy Boulevard meet the standard of care.)

The muck discovered under Ramp R-2 constitutes unforeseeable work and a latent, and materially differing subsurface site condition. DUSA is entitled to compensation in the amount of \$79,820.01 due to the discovery of muck at Ramp R-2. because:

- (i) DUSA reasonably relied on the information provided by FDOT to price and schedule the Ramp R-2 work, including, without limitation, as-built plans and geotechnical information provided by FDOT at the pre-bid stage of the Project.⁶

⁶ To the extent the CEI intends to rely upon disclaimer language in the DESIGN-BUILD MAXIMUM PRICE REQUEST FOR PROPOSAL ("RFP") as a purported basis to reject DUSA's Claim, DUSA disputes the scope of enforceability of same. Despite the presence of said disclaimer language, there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. This is particularly the case where, as in the Contract Documents here, there are separate contract provisions which specifically provide for additional compensation to DUSA in the event of unforeseen, latent, and/or materially differing subsurface site conditions. *See, e.g.*, Sections 4-3.7, 4-4 and 5-12.1 of DIVISION I of the FDOT STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION, both of which address additional compensation to DUSA for differing site conditions.

(ii) FDOT provided inaccurate and/or incomplete information regarding existing subsurface site conditions at Normandy Boulevard, despite holding the pertinent records and/or having superior knowledge through prior control of the existing construction at Normandy Boulevard. Specifically, the bid documents inaccurately and/or insufficiently depicted the subsoil/subsurface conditions at the embankment under Normandy Boulevard. If FDOT, with its superior informational position, was not aware of the existence of unsuitable subsoil/subsurface material (*i.e.*, muck) at the subject location, it is patently unreasonable to expect DUSA to somehow have knowledge of same with less information in hand.

(iii) The subject subsurface site conditions materially differed from that which was inferable from a reasonable pre-bid investigation. It was reasonable to infer that the area contained suitable soils given that the roadway was open to live traffic. Rather, based on the information provided by FDOT and its own reasonable and adequate pre-bid investigation, DUSA reasonably concluded that there was no muck or other unsuitable subsoil/subsurface material at the subject location. The number and depth of the borings taken at the Project, met the standard of care for a preliminary design and estimate.

(iv) The subject subsurface site conditions were not patent or reasonably foreseeable and could not be reasonably anticipated from information provided by FDOT. Specifically, no reasonable contractor, at the pre-bid stage, would assume or foresee that embankment under a previously completed FDOT project would have unsuitable subsoil/subsurface material (*i.e.*, muck).

(v) This unforeseen, latent, and materially differing subsurface site condition increased DUSA's cost to perform the Contract Work, as documented by, *inter alia*, Weekly Claim Records submitted by DUSA.

General

Procurement of the North Contract relied upon FDOT issuing an RFP to solicit competitive bids and proposals from the selected Proposers.

The bidding process for the North Contract, required the Contractor to adhere to a protocol under which:

“Each Design-Build Firm is to develop design approaches with corresponding schedules in accordance with the scope described in the RFP that can be designed and built without exceeding this maximum price”.

Within Appendix C of the Request for Proposals⁷, item 4-1 [Intent of Contract] the Department included:

“The terms and conditions of this Contract are fixed price and fixed time. The Contractor’s submitted bid (timer and cost) is to be a lump sum bid for completing the scope of work detailed in the Contract.”

The Engineer appointed by FDOT for the Project is JEA Construction Engineering Services Inc. (JEAcēs). DUSA was required to follow the Engineer’s instructions, and decisions.

T.Y. LIN International Group (TY Lin) is the designer for the Project, in accordance with a subcontract between TY Lin and DUSA.

The defined terms used in this submission are those used in the North Contract documents, unless otherwise indicated. References to Clauses Sub-Clauses are to Clauses and Sub-Clauses of the North Contract unless otherwise indicated.

Section 9 [Measurement and Payment] of Appendix C stipulates that:

“The Contract Lump Sum Price will include overhead, profits, and direct and indirect costs required to complete the project except as described below.”

Project Scope

Under the Contracts DUSA is to execute the following (Project Descriptions):

Design and construction of the SR 23 Toll Road (Toll 23) from north of Argyle Forest Boulevard to south of SR 8 (I-10). Additional improvements include construction of interchanges (3) at SR 134 (103rd Street), at SR 228 (Normandy Boulevard) and at New World Avenue; construction of cross road improvements at the previously indicated interchange locations; and construction of electronic tolling gantries, lighting, and an ITS system. This Project is the initial segment of two separate projects that will design and construct a toll road from SR 21 (Blanding Boulevard) to SR 8 (I-10). The improvements are anticipated to include the construction of a minimum of a four-lane limited access mainline facility, three interchanges and the construction of nine new bridges.

⁷ Division I Design-Build Specifications and Special Provisions.

Contractor’s Statement

DUSA is entitled to recover the costs it has incurred as a direct result of inter alia the discovery, excavation and removal of unsuitable material (muck) which is an unforeseen, latent, and differing subsurface site condition that differed materially from the conditions indicated by FDOT in the bid documents and made available during the bidding period.

2.1.2 DUSA reasonably relied on the information provided by FDOT to price and schedule the Ramp R-2, including, without limitation, as-built plans and geotechnical information provided by FDOT at the pre-bid stage of the Project.

2.1.3. FDOT provided inaccurate and/or incomplete information regarding existing subsurface site conditions at Normandy Boulevard, despite holding the pertinent records and/or having superior knowledge through prior control of the existing construction at Normandy Boulevard. Specifically, the bid documents inaccurately and/or insufficiently depicted the subsoil/subsurface conditions at the embankment under Normandy Boulevard. If FDOT, with its superior informational position, was not aware of the existence of unsuitable subsoil/subsurface material (*i.e.*, muck) at the subject location, it is patently unreasonable to expect DUSA to somehow have knowledge of same with less information in hand.

2.1.4 The subject subsurface site conditions materially differed from that which was inferable from a reasonable pre-bid investigation. Rather, based on the information provided by FDOT and its own reasonable and adequate pre-bid investigation, DUSA reasonably concluded that there was no muck or other unsuitable subsoil/subsurface material at the subject location.

2.1.5 The subject subsurface site conditions were not patent or reasonably foreseeable and could not be reasonably anticipated from information provided by FDOT. Specifically, no reasonable contractor, at the pre-bid stage, would assume or foresee that embankment under a previously completed FDOT project would have unsuitable subsoil/subsurface material (*i.e.*, muck).

2.1.6. The Article 4.3.7 provides DUSA with the right to recover additional compensation in the event of encountering unforeseen conditions that differ materially from what is represented in the contract documents, making the job more difficult, time consuming or expensive than anticipated at the time of contracting. The purpose the changed conditions provisions are to shift the risk of unknown physical conditions to FDOT by allowing a contractor to seek an equitable adjustment to the contract price when the contractor encounters unanticipated conditions.

2.1.8 Similarly, Article 4-4 Unforeseeable Work provides for an adjustment to the Contract when the work that is required is not covered by the price in the Contract.

2.1.9 The Standard Specifications also provide for a right for the contractor to compensation for “*unanticipated*” subsoil excavation and disposal of unsuitable material (**including muck**) or for unsuitable backfill material not shown in the specifications or in the plans. Below are excerpts from Sections 120 and 125 by way of example:

- “120-2.3 Subsoil Excavation: Subsoil Excavation consists of the **excavation and disposal of muck**, clay, rock, or any other material that is unsuitable in its original position and that is excavated below the finished grading template.
- 120-13.6 [Subsoil Excavation]: *“When **no item for subsoil excavation is shown in the proposal** but subsoil excavation is subsequently determined to be necessary, such **unanticipated subsoil excavation** will be paid for as provided in 4-4.”*
- 125-14.7 [Removal and Replacement of Material Unsuitable for Backfill]: ***When it cannot reasonably be anticipated from information contained in the Plans**, that material excavated for the structure will be unsuitable for use as backfill, and such material proves to be unsuitable for this use, **the work of disposing of such material away from the site will be paid for as Unforeseeable Work, ...”***

Notice

The Engineer received notification (notice of intent to claim (NOIC)) of the potential delay and costs on 23 March 2017, the same day the pumping was first discovered. DUSA was therefore in full compliance with the requirement at 5-12.2.1 *“Claims For Extra Work”*. For claims for compensation, 5-12.2-1 requires the Contractor to provide notice before beginning the work on which the notice is claimed. Full and complete documentation of the claim is required to be submitted 180 days after final acceptance of the Project.

Entitlement under the North Contract Provisions

DUSA is entitled to recover for the cost consequences of having encountered and dealt with unforeseen, latent subsurface conditions that materially differed from those stated in the Contract Documents. Relief for unforeseen, latent, and differing site conditions is found in several provisions.

- 3.1.1 Indeed, paragraph two of Article 4-1 states that there are exceptions to the contractor’s liability and responsibility for all “*unknowns and/or differing site conditions...*” should it be “*... otherwise stated in the Contract...*”:

“The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract. In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.”

The exceptions to liability and responsibility for *unforeseeable work* and *differing site conditions* are found in Articles 4-3.7, 4-4, as well as in other Change Conditions provisions of the contract, including Sections 120 and 125 of the Standard Specifications which determine the steps to follow as well as the relevant compensation to be given to the contractor in case of *inter alia* “*the excavation and disposal of ... muck, or any other material that is unsuitable in its original position*” (120-2.3 Subsoil Excavation).

- 3.1.2 Unforeseeable Work and Differing Site Conditions

The Unforeseeable Work and Differing Site Conditions (DSC) provisions provide exceptions to Article 4-1. The purpose of these kinds of clauses is to transfer the risk associated with unforeseen conditions at site, thereby removing the pricing of such risk from a Contractors bid (as well as the effectiveness of any related owner’s disclaimer of responsibility).

The contract expressly defines as “Extra Work”: “Any “work” which is required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents, whether it be..., work **due to differing site conditions, or otherwise.** ...”.

More specifically, DSCs are addressed in Article 4-3.7 which states:

*“4-3.7 Differing Site Conditions: During the progress of the work, if subsurface or latent physical conditions are encountered at the site **differing materially from those indicated in the Contract**, ...the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work. Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, ...”*

This article gives DUSA a right to an adjustment in order to recover the additional costs associated with having to deal with subsurface conditions that materially differ from those indicated in -or reasonably inferred from- FDOT’s documents prior to bid “*... if it is determined that [they]... cause an increase ... in the cost or time required for the performance of any work under the Contract...*” as is the case here.

The actual conditions at Ramp R-2, differed materially from the information or lack of information provided by FDOT during the RFP process and those conditions reasonably expected from the embankment. Furthermore, the extra work caused by the discovery of muck qualifies as

Unforeseeable Work because it was not foreseeable to expect to find muck under a recently constructed roadway. It was reasonable for DUSA to infer that there would be no muck under an existing live roadway. Having examined the as-builts and geotechnical information provided by FDOT-from which DUSA was entitled to draw reasonable inferences- DUSA made its own diligent interpretation of the subsoil investigations and other preliminary data and based its bid on its own opinion of the conditions likely to be encountered.

The bid documents inaccurately depicted the subsoil conditions at the embankment under the Normandy Bridge: the borings provided by FDOT in the concept plans indicated by implication the subsurface physical conditions to be reasonably expected: that the embankment was built according to FDOT's standards i.e. that prior to this project, *muck or any other material* that was unsuitable in its original position had been duly removed.

Burdens other than those contemplated by the contract may not be placed on the contractor without additional compensation. As mentioned, Article 4-3.7 and Article 4-4 remove the risk of DSC from the contractor, giving DUSA a right to an adjustment in order to recover the additional costs associated with those conditions that materially differs from what was indicated in the contract documents prior to bid.

3.1.3 Standard Specifications - Sections 120 and 125

As stated, in addition to the contract's DSC provisions, there are other terms dealing with limitations to the responsibility placed on DUSA and the transfer of certain risks to FDOT in relation to subsoil excavation and removal of unsuitable materials.

As an example of how the contract deals with these issues, below are extracts from Sections 120 [EXCAVATION AND EMBANKMENT] and 125 [EXCAVATION FOR STRUCTURES AND PIPE] of the Standard Specifications, that provide for the subsoil excavation, disposal and replacement of any material that is "unsuitable", particularly referring to **muck**, and for the relevant compensation:

Item 120-2 [Classifications of Excavation]

*"120-2.3 [Subsoil Excavation]: Subsoil Excavation consists of the excavation and disposal of **muck**, clay, rock, or any other material that is **unsuitable in its original position** and that is excavated below the finished grading template. ..."*

"The quantity of material required to replace the excavated material and to raise the elevation of the roadway to the bottom of the template will be paid for under Embankment or Borrow Excavation (Truck Measure)."

Item 120-4 Removal of Unsuitable Materials and Existing Roads]

*"120-4.1 [Subsoil Excavation]: Where **muck**, rock, clay, or other material within the limits of the roadway is **unsuitable in its original position**, excavate such material to the cross-sections shown in the Plans or indicated by the Engineer, **and backfill with suitable material**. Shape backfill material to the required cross-sections. ..."*

"120-13.6 [Subsoil Excavation]: The measurement will include only material excavated within the lines and grades indicated in the Plans (including the tolerance permitted therefore) or as directed by the Engineer.

*When no item for subsoil excavation is shown in the proposal but subsoil excavation is subsequently determined to be necessary, **such unanticipated subsoil excavation will be paid for as provided in 4-4**".*

125-4.2.3 [Removal of Obstructions]: *Remove boulders, logs, or any unforeseen obstacles encountered in excavating. **Compensation will be in accordance with the requirements of 4-3.4.***

125-14.7 [Removal and Replacement of Material Unsuitable for Backfill]: *When it cannot **reasonably be anticipated** from information contained in the Plans, that material excavated for the structure will be unsuitable for use as backfill, and such material proves to be unsuitable for this use, **the work of disposing of such material away from the site will be paid for as Unforeseeable Work**, and the work of bringing in substitute material for the backfill will be paid for as specified for the particular case shown below:...*

FDOT's Superior Knowledge

The existence of muck is a condition that should have been within FDOT's knowledge. FDOT had prior control of the project at the Normandy Bridge and thus possessed or is deemed to have possessed superior or special knowledge that was vital to the performance of the contract, but that information was not made reasonably available to DUSA. There exists an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. DUSA reasonable relied on those plans. FDOT should bear some responsibility for the consequences of providing insufficient plans and specifications.

Records (Copies Provided in Appendix A)

23rd March 2017; NOTICE OF INTENT TO CLAIM (NOIC); DUSA notified the Engineer of the “*embankment pumping*” and for this reason there was a need to remove unsuitable material which was unforeseen and discovered during the compaction of the embankment under the Normandy Bridge. DUSA stated that “*this issue has impacted our progress and is causing additional costs to the operation.*”

Relevant Drawings from RFP

Letter From Professional Service Industries, Inc., dated June 4, 2018

24th March 2017; DUSA issued RFI #451 [Muck Under Ramp R-2 Along Face of MSE Wall (W-3B) dated March 24, 2017 with the following question;

“During the compaction of the first layer of embankment on R 2 under Normandy Bridge, the surface area pumping water. DUSA made an excavation to review the material under the layer and found wet muck. We propose excavating 5’ down, place a geosynthetic and use 1’ of eembankment and repeat the process one more time if it is necessary. Please review for your concurrence.”

27th March 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending March 24, 2017, of resources employed on the removal of unsuitable material.

29th March 2017; NOTICE OF INTENT TO CLAIM (NOIC); DUSA notified the Engineer of the “*unexpected embankment pumping under Ramp R-2 under Normandy bridge – Preliminary Time Extension*” and stated;

“This issue is impacting the progress of activity “C-2-2A-R874 ML SB - Sta. 2308 to 2345 - Place Embankment” on the project schedule. DUSA understand that being the project beyond the Contract Completion Time every activity of the project is critical at this time. In any case, if the Department disagrees with DUSA’s understanding, and it is the Department position that only the activities in the longer path to complete the project are critical, this is our Preliminary Time Extension Request in case this activity becomes the longer path once the impact is resolved.”

29th March 2017; in response to DUSA’s email, The Engineer stated;

“As you acknowledge below the activity you have identified is not on the critical path as defined by the terms of the Contract. Therefore, your Preliminary Time Extension Request and the associated delay claim are denied. Be sure to comply with the Contract Provisions if this activity were to subsequently become critical.”

3rd April 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending March 31, 2017, of resources employed on the removal of unsuitable material.

4th April 2017; Progress Meeting No. 70

L. Notices of Intent to Claim

2. Claim Issues

"11. Claim #32 – Unsuitable Soil/Embankment Pumping Found on R2 Adjacent to Normandy Bridges – DUSA states that existing embankment at R2 below the Normandy Bridge is pumping (muck) and therefore needs additional investigation which will require extra work and could delay the project. DUSA/TYLIN are reviewing the issue."

10th April 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a weekly cost reports and records for week ending April 7, 2017, of resources employed on the removal of unsuitable material.

11th April 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a revised weekly cost reports and records for week ending April 7, 2017, of resources employed on the removal of unsuitable material.

12th April 2017; TY Lin provided a response to RFI #451;

"Based on the plan provided, the affected area is approximately 205 x 45 feet in plan area. The organic content testing result provided show 10 to 13% organics. PSI recommends over-excavation of the upper 5 feet of existing material within the limits shown on the plan provided. Then place a layer of Tensor BX1200 or equivalent over the bottom area of the excavation for the full limits of the excavation. Place a 1 foot lift of A-3 material and compact to the project requirements. Place 1 more layer of the approved geogrid material on top of the 1-foot thick layer of compacted A-3 material. Then restore the grade using A-3 material placed in lifts and compacted as stated in the project specifications. Dragados should submit this RFI response to the FDOT for concurrence."

12th April 2017; DUSA sent the Engineer a copy of the TY Lin response to RFI #451.

25th April 2017; in response to DUSA's email, The Engineer stated;

"The Department agrees with the PSI comments. This minor issue needs to be documented (STA, Offsets, Elevations) on the as-built drawings. This issue is closed."

1st May 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a revised weekly cost reports and records for week ending April 28, 2017, of resources employed on the removal of unsuitable material.

2nd May 2017; Progress Meeting No. 72

L. Notices of Intent to Claim

The following 12 claims are still being discussed by DUSA and the Department:

*"11. Claim #32 – Unsuitable Soil/Embankment Pumping Found on R2 Adjacent to Normandy Bridges – DUSA states that existing embankment at R2 below the Normandy Bridge is pumping (muck) and therefore needs additional investigation which will require extra work and could delay the project. DUSA/TYLIN are reviewing the issue under RFI 451. **4/18/17 Meeting:** RFI 451 was accepted by the Department. Partial subsoil and geogrid placement is in progress."*

RFI Updates

RFI 451 – Muck Under Ramp R-2 Along Face of MSE Wall (W-3B)

DUSA proposes to excavate 5' down, place a *place a geosynthetic and use 1' of embankment of cover. EOR stated based on the plan provided, the affected area is approximately 205x45 feet in plan area. The organic content testing result provided show 10 to 13% organics. PSI recommends over-excavation of the upper 5 feet of existing material within the limits shown on the plan provided.*

Then place a layer of Tensar BX1200 or equivalent over the bottom area of the excavation for the full limits of the excavation. Place a 1 foot lift of A-3 material and compact to the project requirements. Place 1 more layer of the approved geogrid material on top of the 1-foot thick layer of compacted A-3 material. Then restore the grade using A-3 material placed in lifts and compacted as stated in the project specifications. Dragados should submit this RFI response to the FDOT for concurrence. 4/14/17 FDOT Update: The Department is reviewing. 4/14/17 FDOT Update: The Department agrees with the PSI comments. This minor issue needs to be documented (STA, Offsets, Elevations) on the as-built drawings. This issue is closed."

9th May 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a revised weekly cost reports and records for week ending May 5, 2017, of resources employed on the removal of unsuitable material.

16th May 2017; Unexpected Embankment Pumping under Ramp R-2 under Normandy bridge; DUSA provided the Engineer with a copy of a revised weekly cost reports and records for week ending May 12, 2017, of resources employed on the removal of unsuitable material.

2.1.10 13th April 2018; DUSA sent the Engineer "SR23 North Project, Jacksonville, Florida (the "Project"): Additional Cost Impacts to Dragados USA, Inc. Resulting from Unforeseen, Latent, and Materially Differing Site Conditions – Muck under Ramp R-2 at Normandy Bridge" letter.

2.1.11 4th May 2018; Escalation Meeting held with Carrie Stanbridge and Will Watts.

2.1.12 7th May 2018; DUSA sent the Engineer an email with the documents used in the escalation meeting held on May 4, 2018 in CEI's office, to discuss the location of the demuck performed

2.1.13 16th May 2018; the Engineer sent a letter to DUSA with the response to the escalation meeting held in May 4, 2018:

"3. 103rd Street Underdrain (Claim No. 31) and Unsuitable Soil on Ramp R-2 Adjacent to Normandy Bridges (Claim No. 32).

a. Section V.G of the Design/Build Request for Proposal (RFP) which states:

i. "The Design-Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information." and,

ii. "By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and

iii. being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.

b. Specification Section 4-1, Intent of Contract, which states, "The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including

but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.

Furthermore, DUSA is partially basing their claims on information provided in the "Other Documents" Section of the RFP. Please note that the RFP also states, "Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."

2.1.14 2nd July 2018; DUSA sent the DRB a hearing request: *"DUSA is requesting the DRB a recommendation on entitlement"*.

5. Section V – Impact & Compensation

5.1 Costs

5.1.1 Summary of Weekly Cost Reports

Week ending	Labor	Mark up	Equipment	Mark Up	Material	Mark Up	Subcontractor	Mark Up	Total
3/24/2017	\$ 213.00	\$ 114.74	\$ 499.23	\$ 87.37	\$ 58.75	\$ 10.28	\$ -	\$ -	\$ 983.37
3/31/2017	\$ 29.50	\$ 15.89	\$ 56.13	\$ 9.82	\$ 47.00	\$ 8.23	\$ 90.00	\$ 9.00	\$ 265.57
4/7/2017	\$ 79.00	\$ 42.56	\$ 111.45	\$ 19.50	\$ 9.40	\$ 1.65	\$ 1,845.19	\$184.52	\$ 2,293.27
4/14/2017	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
4/21/2017	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
4/28/2017	\$ 3,233.00	\$1,741.62	\$ 6,104.79	\$1,068.34	\$5,389.13	\$ 943.10	\$ 3,720.00	\$372.00	\$ 22,571.97
5/5/2017	\$ 8,590.50	\$4,627.70	\$14,451.16	\$2,528.95	\$1,984.72	\$ 347.33	\$ -	\$ -	\$ 32,530.36
5/12/2017	\$ 4,362.50	\$2,350.08	\$11,658.58	\$2,040.25	\$ 481.75	\$ 84.31	\$ 180.00	\$ 18.00	\$ 21,175.47
									\$ -
	\$16,507.50	\$8,892.59	\$32,881.34	\$5,754.23	\$7,970.75	\$1,394.88	\$ 5,835.19	\$583.52	\$ 79,820.01

6. Section VI –Conclusions

- 6.1 DUSA is entitled to receive additional compensation in accordance with the express terms and conditions of the Contract, wherein changed conditions, including Article 4-3.7 and Article 4-4, transfer the risk associated with unforeseeable conditions at site, thereby removing the pricing of such risk from a Contractor's bid (as well as the effectiveness of any related owner's disclaimer of responsibility). DUSA maintains it was reasonable for a contractor to assume that muck should not exist under an active roadway that was reconstructed only a few years prior to the bid. DUSA made a reasonable assumption that the roadway would have been constructed in accordance with FDOT's Standards. The actual conditions at Ramp R-2 differed materially from the information or lack of information provided by FDOT during the RFP process and those conditions reasonably expected from the embankment. The bid documents inaccurately and/or insufficiently depicted the subsoil/subsurface conditions at the embankment under Normandy Boulevard. Furthermore, the extra work caused by the discovery of muck qualifies as Unforeseeable Work because it was not reasonable to expect to find muck under a recently reconstructed active roadway. Accordingly, DUSA is entitled to recover the costs incurred as a direct result of the discovery, excavation and removal of muck under Ramp R-2.

FDOT's Position Issue 32

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials and electronic files.

DEPARTMENT'S POSITION

It is the Department's position that the issue at hand - the existence of unsuitable material in the area in question – is in fact not a Differing Site Condition as DUSA claims.

The Department will demonstrate that:

- Encountering the unsuitable material in this location occurred because of decisions made solely by the Design-Build Firm.
- The Design-Build Firm failed to perform the proper factual investigation required by the Contract.

Furthermore, the Department will demonstrate that, if this existing condition were somehow to be interpreted to represent a Differing Site Condition, then the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm.

Therefore, the Department requests that the DRB determine that DUSA is not entitled to the requested compensation.

RELEVANT CONTRACT PROVISIONS

The following Contract Provisions are relevant to this issue. Emphasis has been added via bold, underlined text. The referenced Contract Provisions are provided in Attachment No. 2.

11. Request for Proposal (RFP) Section (§) entitled Other Documents (Page iii) states, *"The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. **No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**"*
12. RFP§ I.A Design-Build Responsibility (Page Nos. 7 and 8) states, in part, *"**The Design-Build Firm shall be responsible for survey, geotechnical investigation, design,** acquisition of all permits not acquired by the Department, any required modification of permits acquired by the Department, maintenance of traffic, demolition, and construction on or before the Project completion date indicated in the Proposal. The Design-Build Firm will coordinate all utility relocations."*

The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data, and shall base their bid on their own opinion of the conditions likely to be encountered. The submission of a proposal is prima facie evidence that the Design- Build Firm has made an examination as described in this provision.

13. RFP § III.K Department’s Responsibilities (Page No. 14) states, “*This Request for Proposal does not commit the Department to make studies or designs for the preparation of any proposal, nor to procure or contract for any articles or services.*”

The Department does not guarantee the details pertaining to borings, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated.

14. RFP § V.B.2 (f) Submittal of ATC Proposals (Page Nos. 19 and 20) states, in part, “*All ATC submittals shall be sequential numbered and include the following information and discussions:*”

f) Risks: A description of added risks to the Department or third parties associated with implementation of the ATC;”

15. RFP § V.B.4 Incorporation [of ATC’s] into Proposal (Page No. 21) states, in part, “*The Design-Build Firm will have the option to include any ATC’s to which it received acceptance in their proposal and the Proposal Price should reflect any incorporated ATC’s.*”

16. RFP § V.C Geotechnical Services (Page No. 21) states, “**The Design-Build Firm shall be responsible for identifying and performing any geotechnical investigation,** analysis and design of foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the Project needs in accordance with Department guidelines, procedures and specifications. All geotechnical work necessary shall be performed in accordance with the Governing Regulations. **The Design-Build Firm shall be solely responsible for all geotechnical aspects of the Project.**”

17. RFP § V.G Verification of Existing Conditions (Page Nos. 23 and 24) states, “**The Design-Build Firm shall be responsible for verification of existing conditions,** including research of all existing Department records and other information.

By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.”

18. RFP § V.N Quality Management Plan (Page No. 30) states, in part, “*The Design-Build Firm shall be responsible for the professional quality, **technical accuracy and coordination of all surveys, designs, drawings, specifications, geotechnical** and other services furnished by the Design-Build Firm under this contract.*”

The Design-Build Firm shall, without additional compensation, correct all errors or deficiencies in the surveys, designs, drawings, specifications and/or other services.”

19. Specification §2-4, Examination of Contract Documents and Site of Work, states, “**Examine the Contract Documents and the site of the proposed work carefully before submitting a proposal for the work contemplated. Investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents.**”

Direct all questions to the Department by posting them to the Department’s website at the following URL address:

<https://www3.dot.state.fl.us/BidQuestionsAndAnswers/Proposal.aspx/SearchProposal>.

Questions posted to this site before 5:00 P.M. (EST) on the day shown in the Schedule of Events in the Request for Proposal will be responded to by the Department. For questions posted after this time, an answer cannot be assured. For all questions posted before the deadline, the Department will provide and post responses at the same website before 8:00 A.M. (EST) on the second calendar day prior to bid opening. **Take responsibility to review and be familiar with all questions and responses posted to this website make any necessary adjustments in the proposal accordingly.** If the Department’s web site cannot be accessed, contact Nancy Bright at (386) 758-3715.

When, in the sole judgment of the Department, responses to questions require plans revisions, specifications revisions and/or addenda, the Contracts Office will issue them as necessary.

The Department does not guarantee the details pertaining to borings, as shown on the plans, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated. The Contractor shall examine boring data, where available, and make his own interpretation of the subsoil investigations and other preliminary data, and shall base his bid on his own opinion of the conditions likely to be encountered.

The bidder’s submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article.”

20. Specification §4-1, Intent of Contract from the RFP’s Appendix C - Division I Design-Build Specifications and Special Provisions states, in part, “**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions;** and including but not limited to any or all utilities, **subsoil conditions**, permits, etc. of any nature or kind, unless otherwise stated in the Contract. In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.”

DISCUSSION - GENERAL

On March 23, 2017, DUSA submitted a Notice of Intent (NOI) stating, “While performing the embankment for Ramp R-2 around STA 2310 we noticed the embankment pumping.” The notice indicated that DUSA intended to claim for the additional costs and schedule impacts associated with this issue. (Ref. Attachment No. 3)

However, DUSA has since indicated that they are only requesting additional compensation for this issue. The Department acknowledges that DUSA has preserved their rights for additional compensation; however, DUSA has not preserved their rights for a Contract Time Extension request.

DISCUSSION - PRE-BID QUESTION AND RESPONSE

Pre-Bid Question No. 2897 noted that the plans provided for a previous project in the “*Other Documents*” Section show that a geogrid had been installed just north of Normandy Boulevard. The question noted, “*The limits of subsoil are unclear in this location since cross sections for stations 765+00 and 766+00 were not in the plans.*” (Ref. Attachment No. 4)

The associated response explained why the geogrid was installed and noted it was “*to further stabilize over the muck area surrounding the gas main.*” The answer also noted that the geogrid was added to a previous project and provided the language included in the “*Changes to Contract*” and “*Reason*” Sections of that Contract Modification.

Of note is the portion of the “*Reason*” Section that states, “*At the SR 23/Normandy Boulevard crossing, Typical section Sheet No. 19 provides a detail for placing a flowable fill cap over an area of muck which contains a 16” gas main. Per the plan detail, the muck in the specified area around the gas main was to be left in place so as not to disturb the gas main.*”

As noted above, Specification §2-4 required the Design-Build Firm to “*Take responsibility to review and be familiar with all questions and responses posted to this website make any necessary adjustments in the proposal accordingly.*”

A review of this pre-bid question and the associated answer clearly indicates the presence of muck in the area. As required by Specification §2-4, the Design-Build Firm should have been familiar with the existence of muck in the area and they should have made “*any adjustments in the proposal accordingly*”.

DISCUSSION – DESIGN DECISIONS MADE BY DESIGN-BUILD FIRM

The fact that the condition was encountered during the embankment work associated with Ramp R-2 is important.

As has been discussed numerous times during the project’s Progress and DRB Meetings, several issues have developed because of the Design-Build Firm’s decision to elevate the intersecting streets (103rd Street, Normandy Boulevard, and New World Avenue) rather than elevate the mainline (SR 23). The issue at hand is a direct result of this decision that was made solely by the Design-Build Firm.

Had the mainline roadway been elevated (as was shown in the Concept Plans), Ramp R-2 would have been elevated over Normandy Boulevard on a bridge structure. Ultimately, the Design-Build Firm’s decision created this situation and it is not appropriate for the Design-Build Firm to seek relief from the Department for the resultant impacts.

The Design-Build Firm presented the concept of elevating Normandy Boulevard in lieu of the SR 23 mainline as an Alternate Technical Concept (ATC) No. 7 during the procurement phase.

As noted above, Item f in RFP §V.B.2 required the Design-Build firm to include “*A description of added risks to the Department or third parties associated with implementation of the ATC*” in their ATC submittal.

The Design-Build Firm’s ATC submittal included the following statement, “**There will be no additional risks to the department or any third parties associated with the implementation of this ATC.** *The reversal of the profiles will not compromise the ultimate typical section of SR 23.*” (Ref. Attachment No. 5).

The consideration of this ATC – as well as the other ATCs – including the above statement that “*there will be no additional risks to the department*” was part of the Technical Proposal that was considered during the selection

process. **Therefore, it is not appropriate for the Design-Build Firm to assign the “risk” associated with the Design-Build Firm’s inadequate research of the potential impacts of their design decision to the Department in the form of this claim. The “risk” is solely the Design-Build Firm’s responsibility.**

It is also noted that per the language of RFP § V.B.4 Incorporation [of ATC’s] into Proposal, “*The Design-Build Firm will have the option to include any ATC’s to which it received acceptance in their proposal and the Proposal Price should reflect any incorporated ATC’s.*”

DISCUSSION – INADEQUATE INVESTIGATION BY DESIGN-BUILD FIRM

As noted above, Section V.G of the RFP is entitled Verification of Existing Conditions. This Contract Provision states, in part, “*By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.*”

The above provision places responsibility for investigating existing site conditions on the Design-Build Firm.

On April 13, 2018, DUSA replied to the CEI’s request that DUSA identify the investigative measures performed by the Design-Build Firm on which their design was based and how those investigative measures failed to identify the existing muck. (Ref. Attachment No. 6) In this response, DUSA notes:

- “*This subsoil/subsurface condition (i.e., the presence of muck) was not shown in, or reasonably inferable from, the bid documents or other information/documentation provided by FDOT during the bidding stage of the Project, and was not otherwise discovered during the bidding contractor’s pre-bid investigations of the Project site.*”
- “*DUSA reasonably relied on the information provided by FDOT to price and schedule the Ramp R-2 work at Normandy Bridge, including, without limitation, as-built plans and geotechnical information provided by FDOT at the pre-bid stage of the Project.*”
- “*Specifically, the bid documents inaccurately and/or insufficiently depicted the subsoil/subsurface conditions at the embankment under Normandy Boulevard.*”
- “*The subject subsurface site conditions materially differed from that which was inferable from a reasonable pre-bid investigation. Rather, based on the information provided by FDOT and its own reasonable and adequate pre-bid investigation, DUSA reasonably concluded that there was no muck or other unsuitable subsoil/subsurface material at the subject location.*”
- “*The subject subsurface site conditions were not patent or reasonably foreseeable and could not be reasonably anticipated from information provided by FDOT.*”

Additional discussion of these comments is provided below:

- A. It is noted that the Preliminary *Other Documents* Concept Plans referenced in DUSA’s response were provided in the “” Section of the RFP that includes the following language:

*“The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. **They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**”*

Therefore, the Preliminary Concept Plans cannot be relied on as a basis to support DUSA’s claim that the existing muck represents a differing site condition or an unforeseen condition. In fact, the above language prohibits DUSA from such a reliance.

Additionally, please note that RFP Section V.G, Verification of Existing Conditions states, in part, *“**By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.**”*

Furthermore, Section 4-1, Intent of Contract from the Design-Build Specifications and Special Provisions states, in part, *“**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.**”*

In their April 13, 2018 correspondence DUSA notes that the *“subsoil/subsurface condition (i.e., the presence of muck) was not shown in, or reasonably inferable from, **the bid documents** or other information/documentation provided by FDOT during the bidding stage of the Project ...”* The Department strongly objects to the inference that the Preliminary Concept Plans or any of the documents provided in the collection of “Other Documents” should be construed as “bid documents”.

As noted above, the Preliminary Concept Plans and the documents provided in the collection of “Other Documents” – which were provided to all prospective Design-Build Firms - are referenced on Page iii of the RFP. The RFP includes the following language, *“**OTHER DOCUMENTS - The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.**”*

Therefore, DUSA’s inference that any of these documents are “bid documents” is misplaced and incorrect. Additionally, as noted in the above excerpt, by accepting these documents DUSA agreed not

to use these documents as the basis for a claim; however, they are now doing so in direct contradiction to the terms of the Contract.

- B. In their April 13, 2018 correspondence DUSA “*disputes the scope of enforceability*” of ‘*disclaimer language*’ in the RFP and notes “*there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes.*”

Notwithstanding the fact that in this referenced statement DUSA acknowledges that they relied on the information in the “*Other Documents*” for bidding purposes, the Department strongly disagrees with DUSA’s position. The RFP language is clearly enforceable as it is part of the Contract into which DUSA willingly entered.

Additionally, there is no “*implied warranty*” regarding the accuracy of the “*Other Documents*”. However, there are expressed conditions that:

- “*No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract*”; and,
- “*The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.*”

- C. In their April 13, 2018 response, the Design-Build Firm notes that the unsuitable material “*was not otherwise discovered during the bidding contractor’s pre-bid investigations of the Project site.*” Of interest is the fact that in this comment DUSA acknowledges that they performed an investigation prior to bidding the project.

The adequacy of the Design-Build Firm’s pre-bid investigation on which they based their design (i.e., ATC No. 7) and their bid as well as any impacts associated with the apparent fact that this pre-bid investigation failed to identify the presence of the muck in this area are solely the Design Build Firm’s responsibility. This is supported by the following Contract Provisions:

- RFP§ I.A Design-Build Responsibility (Page Nos. 7 and 8) states, in part, “***The Design-Build Firm shall be responsible for survey, geotechnical investigation, design, acquisition of all permits not acquired by the Department, any required modification of permits acquired by the Department, maintenance of traffic, demolition, and construction on or before the Project completion date indicated in the Proposal. The Design-Build Firm will coordinate all utility relocations.***

The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data, and shall base their bid on their own opinion of the conditions likely to be encountered. The submission of a proposal is prima facie evidence that the Design-Build Firm has made an examination as described in this provision.

- RFP § III.K Department’s Responsibility (Page No. 14) states, “*This Request for Proposal does not commit the Department to make studies or designs for the preparation of any proposal, nor to procure or contract for any articles or services.*”

The Department does not guarantee the details pertaining to borings, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated.

- RFP § V.C Geotechnical Services (Page No. 21) states, **“The Design-Build Firm shall be responsible for identifying and performing any geotechnical investigation, analysis and design of foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the Project needs in accordance with Department guidelines, procedures and specifications. All geotechnical work necessary shall be performed in accordance with the Governing Regulations. The Design-Build Firm shall be solely responsible for all geotechnical aspects of the Project.”**
- RFP § V.G Verification of Existing Conditions (Page Nos. 23 and 24) states, **“The Design-Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information.**

By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.”

Again, per the language of RFP § V.B.4 Incorporation [of ATC’s] into Proposal, *“The Design-Build Firm will have the **option** to include any ATC’s to which it received acceptance in their proposal and the Proposal Price should reflect any incorporated ATC’s.”*

By submitting their proposal - which included the ATC that included a statement that there was no risk to the Department - the Design-Build Firm indicated that they had performed an adequate investigation of the conditions that would be encountered and that their price proposal was sufficient to construct the project as proposed.

DISCUSSION – PRESENCE OF UNSUITABLE MATERIAL IN THE AREA WAS EVIDENT IN THE “OTHER DOCUMENTS”

The plans for a prior project that extended SR 23 from 103rd Street to I-10 (FIN 209659-5-52-01) were provided to all prospective Design-Build Firms as part of the *“Other Documents”*. The Cross Section Sheets for that project show that Soil Stratum No. 6 existed in numerous soil borings taken on the north side of Normandy Boulevard from STA 532+00 to STA 539+00. Plan Sheet No. 122 provides the Roadway Soils Survey for that project and Note No. 4 states, *“Stratum No. 6 is muck.”* (Ref. Attachment No. 7)

This is the location of the gas main referenced in the pre-bid question discussed above. Of note is the fact that information indicating that muck existed in the area could have been gleaned from a review of the *“Other Documents”*. This should have encouraged the Design-Build Firm to adequately investigate the conditions that they would encounter with the implementation of their ATC to elevate Normandy Boulevard instead of SR 23.

The Design-Build Firm’s failure to adequately investigate these conditions is solely their responsibility.

DISCUSSION – PRESENCE OF UNSUITABLE MATERIAL IN THE AREA WAS EVIDENT ON THE DESIGN-BUILD FIRM’S FEBRUARY 19, 2014 FOUNDATION PLAN FOR THE NORMANDY BRIDGES

Attachment No. 8 contains Plan Sheets B2-5 and B2-6 from the Design-Build Firm’s foundation design for the Normandy Bridges. Plan Sheet B2-6 shows Boring PSI 6 is located at the westernmost end bent that is adjacent to Ramp R-2. A review of the information provided on Plan Sheet B2-5 for Boring PSI 6 indicates the presence of several feet of “*Very Loose*” to “*Loose*” soil existed beneath the surface with Standard Penetration Test (SPT) blow counts that range from two (2) to six (6). This stratum is described as “*Brown dark gray silty fine SAND, some organics, (SM)*”

The DRB may recall that these borings were previously submitted by DUSA as Attachment A to their Position Statement for the previous DRB Hearing regarding their claim that the presence of the existing asphalt/concrete on Normandy Boulevard represented a Differing Site Condition. In their rebuttal for that DRB Hearing, the Department questioned how these borings could be considered as evidence of a differing site condition **beneath the paved portion** of Normandy Boulevard since the borings were taken in the **existing grassed median** on Normandy Boulevard.

However, this is an important observation when evaluated as part of the Design-Build Firm’s immediate claim that the presence of muck in the area “*was not otherwise discovered during the bidding contractor’s pre-bid investigations of the Project site*”. As the borings were taken in the existing grassed median on Normandy Boulevard and the borings indicated that unsuitable subsurface material existed in the area, then there was no reason why the Design-Build Firm could not have properly evaluated the subsurface conditions they would expect to encounter on the project.

This observation is further emphasized considering the Design-Build Firm’s design decision to elevate Normandy Boulevard as opposed to SR 23 that resulted in Ramp R-2 being installed at grade in this area. The Design-Build Firm is solely responsible for the impacts of this decision.

DISCUSSION – DESIGN

The Design-Build Firm’s initial design did not address the unsuitable material in the vicinity of Ramp R-2. However, in response to Request for Information No. 451 (Ref. Attachment No. 9) the Design-Build Firm provided a method to address the muck.

The Department refers the DRB’s attention to RFP § V.N Quality Management Plan (Page No. 30) which states, in part, “*The Design-Build Firm shall be responsible for the professional quality, **technical accuracy and coordination of all surveys, designs, drawings, specifications, geotechnical** and other services furnished by the Design-Build Firm under this contract.*

The Design-Build Firm shall, without additional compensation, correct all errors or deficiencies in the surveys, designs, drawings, specifications and/or other services.”

Therefore, the Design-Build Firm’s request for additional compensation to correct this oversight is not allowed by the Contract Provisions.

DISCUSSION – ISSUE ESCALATION

This issue was escalated through the District Two Director of Transportation Operations level. The Department’s response was provided to DUSA on May 15, 2018 (Ref. Attachment No. 10).

SUMMARY

The information presented above has demonstrated that:

5. Encountering the unsuitable material on Ramp R-2 occurred because of decisions made solely by the Design-Build Firm. DUSA chose to elevate the side street, failed to identify the risk associated with their design decision during the ATC process for the Department to consider, and is now claiming for the impacts resulting from a design choice that was 100% DUSA's decision.
6. Additionally, the Design-Build Firm failed to perform the proper factual investigation required by the Contract. There was no impediment that prevented DUSA from identifying the existence of the unsuitable material. The Design-Build Firm's borings in the existing grassed median of Normandy Boulevard shows that the unsuitable material could have been identified during their "pre-bid investigation".
7. The Design-Build Firm's initial design failed to identify the unsuitable material in this area and they subsequently issued a remedial action plan. The Contract Documents clearly prevent the Design-Build Firm from requesting additional compensation to correct this oversight.
8. The Department contends that if this existing condition were somehow found to represent a Differing Site Condition, then the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm. Specification §4-1, Intent of Contract from the RFP's Appendix C - Division I Design-Build Specifications and Special Provisions states, in part, "**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.**"

It should be sufficient to state that, regardless of the above arguments, such sole responsibility is sufficient reason for the DRB to determine that DUSA is not entitled to the requested compensation.

CONCLUSION

The Department requests that the DRB find that DUSA is not entitled to any additional compensation for this issue.

Disputes Review Board Relevant Findings Issue 32

1. Plans for an adjacent previous project SR 23 from 103rd Street to I-10 (FIN 209659-5-52-01) were provided to bidders and did indicate the existence of muck.
2. Request for Proposal, Section A Design-Build Responsibility, provides:

“The Design-Build firm shall be responsible for surveys, geotechnical investigation ,”

“The Design-Build firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid on their own opinion of the conditions likely to be encountered. The submission of a proposal is prima facia evidence that the Design-Build firm has made an examination as described in this provision.”

3. Specification Section 4-3.7 provides relief to the Contractor for conditions that
 - differing materially from those indicated in the Contract
 - or conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract
4. Appendix C, Division I Design-Build Specifications and Special Provisions, Section 4-1 Intent of the Contract provides that the Design-Build firm has all liability and responsibility for all unknowns and/or differing site conditions.

“The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract....”

5. DUSA makes the argument that despite disclaimer language, there is nonetheless an implied warranty with respect to the information provided to DUSA by FDOT, giving DUSA the right to reasonably rely on the plans and specifications provided to it for bidding purposes. However they cite no contract language supporting this claim.

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The existence of muck at Ramp R2 did not differ materially from what was indicated in the Contract. In this issue, the existence of muck at Ramp R2 does not qualify for relief under Specification Section 4-3.7. Additionally, Section 4-1 which has precedence, assigns all liability for differing site conditions including subsoil conditions to the Design-Build contractor. In this hearing the Disputes Review Board is addressing only the issue of entitlement. The DRB must recognize the clear language of the contract. The DRB recommendation is that DUSA is not entitle to compensation for additional cost associated with the existing muck at Ramp R2. The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr. – Chairman
Ron Klein – Member
David Donofrio - Member

Signed for all with the concurrence of all members.

Ralph D. Ellis, Jr.

Ralph D. Ellis, Jr.
Chairman