



Florida Department of Transportation

RON DESANTIS
GOVERNOR

1109 South Marion Avenue
Lake City, Florida 32025-5874

JARED W. PERDUE, P.E.
SECRETARY

August 9, 2024

Mr. James Davis
Regional Disputes Review Board Chairman

RE: District Two Regional Disputes Review Board (RDRB) Hearing, Phase One, July 16, 2024
SR-21 Reconstruction from 4-lanes to 6-lanes from CR-218 to Black Creek
Financial Project Nos.: 208211-5-52-01
Contract No.: E2Y80

Dear Mr. Davis,

The Florida Department of Transportation is in receipt of the July 28, 2024, recommendation of the Regional Disputes Review Board (“Board”) regarding the utility global impact claim and whether issues were duly preserved on the above referenced contract. The Department accepts the Board’s findings.

The Department values the Regional Disputes Review Board process and thanks the Board for their time and deliberations.

Sincerely,

Scott Lent, P.E.
District Construction Engineer - Florida Department of Transportation - District 2

cc: Richard Roundtree
Paul Harkins
Joaquin Olivella
Rusty Cheshire
Antonio Pingarron
Enrique Alonso
Mercedes Rodriguez
Kellie Loper
Brannon Chatwood
Tim Lattner

FINDINGS

District 2 Regional Disputes Board Hearing, Phase One

FDOT Contract #E2Y80 Financial Project Nos.: 208211-5-52-01

**SR 21 Reconstruction from 4-lanes to 6-lanes from CR 218 to Black
Creek**

Contractor: Sacyr Construccion SA, Inc

CEI: KCA, Kisinger Campo and Associates

July 15, 2024

DISPUTE:

Sacyr has filed a certified claim alleging it was impacted and disrupted by at least 60 utility conflicts throughout the period between August 2020 and October 2022. “ Each individual conflict was the consequence of a global utility problem on the Project. While the impact of each conflict individually may vary, it is precisely the cumulative impact of these conflicts that resulted in delay, disruption, and extra costs. These continuous impacts and disruptions together caused significant damage to Sacyr.”

The final completion date moved from November 19, 2021 to March 21, 2023. This is an alleged total delay of 394 days. Sacyr’s claim is one global claim not 60 individual claims. Sacyr is seeking relief in the amount of \$3,838,273 and 286 days of compensable time.

Introduction and Background

Sacyr contracted with the Department in 2019 to perform construction on SR 21 in Clay County for an original contract amount of \$16,439,211. The initial schedule prior to any impacts included an estimated final completion date of November 19, 2021. The final completion date was March 21, 2023, 394 days beyond the original contract completion date. There were no liquidated damages on the project. Final cost was : \$17,725,387.99

Timeline

April 4, 2023: Sacyr submitted a “Certified Claim-Global Utility Conflicts” to the Department seeking relief as stated in the Dispute above. Sacyr’s claim incorporated an independent report by J.S. Held, Construction Advisory: J.S. Held Independent and Expert Report on Quantum and Delay Matters Related to Utility Conflicts, SR 21 Contract No. E2Y80. The report was dated March 20, 2023 and is attached to the claim.

November 10, 2023: Sacyr rejected the Senior Engineer’s evaluation of the Certified claim and Sacyr requested the claim be referred to the Disputes Review Board.

January 29, 2024: a prehearing meeting was held at the project site with the Department, DRB members and the Contractor. Sacyr explained their “Global Utility Claim” and various methods of moving forward were discussed with all parties present. It was stated by the Board that The Regional DRB could not hear a “Global Claim” but could hear any of the 60 conflicts that had been “Duly Preserved”. Both parties agreed to waive the 180-day rule per 8-3.7.7 Limitation for Referral of Disputes or Claims to the Board with the Department agreeing it had taken extra time to try to resolve the claim.

May 28, 2024: The Board recommend a two phased hearing with the initial phase to determine if any of the 60 issues had not been “Duly Preserved” and therefore not eligible for the Board to hear.

June 7, 2024: Sacyr requested an “Omnibus” approach with a single hearing. This was denied by the Board, based on the logic above, and a date of 15 and 16 July were set for the Phase one hearing. There was agreement by all parties to allow for virtual participation in the hearing.

July 1, 2024: Phase one, position papers were received by the Board and each party with rebuttal papers received on 10 July 2024.

July 15, 2024: Phase one of the Dispute was heard by the Board at the FDOT Facility in Gainesville, Fl.

Sacyr Position Paper Highlights

- Sacyr’s claim is a global claim not 60 individual claims. The damage experienced by Sacyr exceeds the individual impacts of each of the 60 conflicts and could not be properly evaluated until after the project was completed.
- “Duly Preserved” is not defined in the contract
- The Department found entitlement on 31 of the 60 conflicts which did not have an NOI
- Requiring an NOI specifically is putting form over substance.
- Florida Law allows for “actual notice”. Sacyr cites several court cases in support of this statement.
- FDOT was aware of the issues throughout the project via emails, meetings and other forms of communication therefore was not prejudiced by the lack of an actual NOI.
- 35 of the 60 disputed issues had NOIs submitted.
- There should be no DRB hearing solely to determine “Duly Preserved” based on an email from Tim Lattner, FDOT Director of the Office of Construction.
- The Department evaluated all 60 of the conflicts contained in the Global Claim thus acknowledging knowledge of the conflicts.
- Failure to provide a written NOI cannot be deemed a waiver of Sacyr’s claim.
- The Department waived any alleged failure of Sacyr to provide an NOI by the Department’s substantial consideration of a claim.
- The Department paid \$446,202.05 via Supplemental Agreement including settlement for issues with no NOI.
- Supplemental Agreements for claims were written for issues that were not “duly preserved”.
- Sacyr’s claim has been “duly preserved” the Department was put on notice for the conflicts by an NOI or actual notice.
- Sacyr was compensated for five conflicts not supported by an NOI.
- The Department did not deny the existence of the 60 conflicts.

- Florida Law has a much broader interpretation of notice than exclusively an NOI.
- Sacyr has preserved its right for the claim.

Department Position Paper Highlights

- Sacyr has waived its rights to the claim by failing to follow the procedures within the contract.
- The Department cites contract specifications, Item 3.4 RDRB Guidelines of Operations stating that “only disputes or claims that have been duly preserved under the terms of the contract can be heard by the Board”.
- The Department cites Contract Specification 8-3.7.1 stating the Board determines if a claim or dispute is duly preserved also that claims must be compliant with Specification Section 5-12.
- Failure of the contractor to comply with specific requirements regarding claims, including notice and preservation of a claim are a condition precedent to a Contractor’s right to claim or request to be heard by the RDRB.
- The Department contends that of the 60 conflicts 18 were resolved and compensated and should not be considered.
- The Department contends that only one of the remaining 42 conflicts (60 minus the 18 mentioned above) was for a controlling item of work as required by the contract.
- The Department contends that Sacyr submitted a timely notice of intent to claim on only 3 of the remaining 42 conflicts.
- The Department contends that Sacyr failed to comply with the requirements of Section 8-7.3.2 within the required time for a time extension.
- The Department contends that of the conflicts where additional time was requested only one conflict was to a controlling item of work.
- “The fact is that for all the remaining alleged conflicts the Contractor failed to meet most or all the requirements of the Contract Provisions and subsequently has waived any right to file a claim.”
- Based on the above information the Department contends that “0” of the 42 remaining conflicts should move to phase two of the hearing.

Sacyr’s Rebuttal Summary

- The Department’s position paper ignores the limited scope of Phase one of the hearing.

- The Department's position that the 18 issues that have been resolved via SA79 and other work orders should not move forward to Phase two is beyond the limited scope of the Phase one which is determine if an issue was "duly preserved" only.
- The Department's second argument as to whether the claims were "properly preserved" such that they "meet the requirements outlined in the Contract Provisions blatantly ignores FDOT Director of the Office of Construction, Tim Lattner's directive not to have a DRB hearing solely to consider the preservation of a claim".
- The Board should ignore any such arguments made by the Department.
- Florida Law requires a much broader standard for compliance with contractual notice requirements than the strict compliance standard sought to be applied by the Department.
- The Department was provided notice of each of the conflicts as evidenced by the Department's substantive review of each conflict.
- The Board should recommend that the claim for the cumulative impact of the 60 utility conflicts as "duly preserved".

Department's Rebuttal

- Sacyr's Global Utility Claim was/is not in compliance with Specification 5-12
- The term "duly preserved" means "properly preserved" and the language in the contract is very clear on what must be done to preserve one's rights.
- Sacyr fails to meet most if not all of the requirement to "preserve" their right to submit a claim.
- Sacyr is confused or attempting to blur the line between notification of a potential conflict and notification to file a claim. Notification of a potential conflict does not mean one intends to file a claim.
- A NOI to claim affords the Department the opportunity to track the impacts of a dispute/claim.
- All construction projects have issues most of which are resolved without an NOI or claim.
- Sacyr was clearly aware of the requirement to submit a written NOI as evidenced by the 49 NOIs they submitted.
- Sacyr is attempting to misconstrue the Department's review of the submitted Certificate Claim Package as acknowledgement/acceptance that Sacyr properly preserved their right to file a claim per the contract. The Departments review of the claim package was an attempt at partnering and an attempt to negotiate in good faith. The Department included specific language as part of the review clearly stating that the review did not consider if Sacyr had preserved its rights.

- In SA79 Sacyr agrees that the Supplemental Agreement constitutes a full and complete settlement of the matters set forth in the SA.
- The Department having knowledge of conflicts is expected, but this is not a factor in determining if Sacyr followed all Contract requirement of preservation of a claim.
- 18 conflicts have been settled and should not be considered.
- NOIs 11,12, and 16 had a timely submitted NOI
- NOI 11 had 5 conflicts associated with it, incorrectly.
- None of the court cases cited by Sacyr are associated with FDOT.
- “0” of “42” conflicts should move forward to Phase two of the Hearing.

Applicable References

1. DRB Operating Procedures

GENERAL:

1.1 These procedures are for the purpose of providing processes for operation of the **Disputes Review Board (DRB) and are intended to be flexible to meet circumstances** that may arise during the life of the project. “Dispute” as referenced in this procedure is defined as a disagreement between the Florida Department of Transportation (“Department”) and the Contractor (referred to herein as the parties) where the Contractor has submitted, in accordance with *Standard Specification 5-12*, a notice of intent to seek additional compensation but has not yet submitted a written claim in accordance with *Standard Specification 5-12*. “Claim” as referenced in this procedure is defined as a written demand submitted to the Department by the Contractor in compliance with *Standard Specification 5-12.3* seeking additional monetary compensation, time, or other adjustments to the Contract, the entitlement or impact of which is disputed by the Department.

2. 6.4 The party referring a dispute or claim to the DRB shall submit to the Chairman a written request for a hearing with copies to the other DRB members and concurrently to the other party to the contract. Referral to the DRB is accomplished by providing an issue statement outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. **Only disputes or claims that have been duly preserved under the terms of the Contract will be eligible to be heard by the DRB.** Requests for equitable adjustment that are disputed must be certified as required by 4-3.2. **Claims that are referred to the DRB must be in compliance with 5-12.3.** This request shall be accompanied by a summary of the issues on which the dispute or claim is based, in sufficient detail for the DRB to gain an understanding of the dispute or claim and for the other party to prepare a response.

3. 5-12 Claims by Contractor. 5-12.1 General: When the Contractor deems that extra compensation or a time extension is due beyond that agreed to by the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, or for any other cause, the **Contractor shall follow the procedures set forth herein for preservation**, presentation and resolution of the claim. **Submission of timely notice of intent to file a claim**, preliminary time extension request, time extension request, and the certified written claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's certified written claim. **The failure to provide such notice of intent, preliminary time extension request, time extension request, certified written claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.**

4. **5-12.2** Notice of Claim: 5-12.2.1 Claims For Extra Work: Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the **Contractor shall submit written notification to the Engineer of the intention to make a claim** for additional compensation before beginning the work on which the claim is based, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay and a request for Contract Time extension pursuant to 8-7.3.2 within thirty calendar days after the elimination of the delay. If such written notification is not submitted and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the Contractor waives the claim for additional compensation or a time extension.

5. **5-12.2.2** Claims for Delay: Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, **the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation**, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay, and a request for Contract Time extension pursuant to 8-7.3.2 within thirty calendar days after the elimination of the delay.

6. **8-3.7.1 Purpose:** The Board will provide special expertise to assist in and facilitate the timely and equitable resolution of disputes and claims between the Department and the Contractor in an effort to avoid construction delay and future claims. **It is not intended that the Department or the Contractor default on their normal responsibility to cooperatively and fairly settle their differences by indiscriminately assigning them to the Board.** It is intended that the Board encourage the Department and Contractor to resolve **potential disputes or claims without resorting to this alternative resolution procedure.** The Board will be used when normal Department-Contractor dispute or claim resolution is unsuccessful. Either the Department or the Contractor may refer a dispute or claim to the Board. Referral to the Board should be initiated as soon as it appears that the normal dispute resolution effort is not succeeding. Referral to the Board is accomplished by providing a position paper outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. **Only disputes or claims that have been duly preserved under the terms of the Contract as determined by the Board will be eligible to be heard by the Board. Requests for equitable adjustment must be certified as required by 4-3.2. Claims that are referred to the Board must be in compliance with 5-12.** It is a condition of this Contract that the parties shall use the Dispute Review Board.

7. **8-7.3.2 Contract Time Extensions** As a condition precedent to an extension of Contract Time the Contractor must submit to the Engineer: A preliminary request for an extension of Contract Time must be submitted in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. **If the Contractor fails to submit this required preliminary request for an extension of Contract Time, the Contractor fully, completely, absolutely and irrevocably waives any entitlement to an extension of Contract Time for that delay.** In the case of a continuing delay only a single preliminary request for an extension of Contract Time will be required. Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement date of the delay, the cause of the delay, and **the controlling item of work affected by the delay.** Furthermore, the Contractor must submit to the Engineer a request for a Contract Time extension in writing within 30 days after the elimination of the delay to the controlling item of work identified in the preliminary request for an extension of Contract Time. Each request for a Contract Time extension shall include as a minimum all documentation that the Contractor wishes the Department to consider related to the delay, and the exact number of days requested to be added to Contract Time.

8. **8-3.7.7 Limitation for Referral of Disputes or Claims to the Board:** Any disputes or claims that were not resolved prior to Final Acceptance of the project pursuant to 5- 11 must be referred to the Board within 90 calendar days after Final Acceptance for projects with an original Contract amount of \$3,000,000 or less, and within 180 calendar days after Final Acceptance on projects with an

original Contract amount greater than \$3,000,000. Only duly preserved disputes or claims will be eligible to be heard by the Board. Failure to submit all disputes or claims to the Board within aforementioned timeframe after Final Acceptance constitutes an irrevocable waiver of the Contractor's dispute or claim.

9. **Extract from the Three-Party Agreement, District 2, Regional DRB:** "It is not intended for hearings to last longer than a single day, however, in some cases they may".

DISCUSSION

The Contract

Contract E2Y80, SR 21 Reconstruction from 4-lanes to 6-lanes from CR 218 to Black Creek, is a contract for one mile of construction through an existing urban area. These types of contracts are routinely impacted by unknown utility conflicts. It is impractical, if not impossible, for the Department to identify every potential conflict on this type of project prior to construction. However, the Department has prescribed a clear procedure for a contractor seeking additional compensation for damages resulting from unforeseen conflicts. Sacyr successfully followed this procedural protocol on multiple occasions and was compensated accordingly.

Both parties agreed to waive the 180 day time limitations of Spec 8-3.7.7.

Two Phased Hearing

Given the large number of the conflicts, 60, presented in this hearing, the Board opted, as an exception to common protocol, to conduct a two-phased hearing in order to provide each party the, in-person, opportunity to present their position to the question: have any of the 60 conflicts not been "Duly Preserved"? This approach provided the Board with an additional level of assurance that each parties' position was fully understood and considered by the Board. Phase One of the hearing was limited to the question: were any of the 60 conflicts not "Duly Preserved" in accordance with Standard Specification 5-12 and Spec 8-3.7.1. and thus, determined ineligible to be heard by the Board. Phase two would be the consideration by the Board of each conflict determined to meet the criterion of "Duly Preserved".

The Board acknowledges Sacyr's position opposing the two-phased hearing and their preference for an "omnibus" approach. Sacyr references an email from Mr. Lattner dated May 24, 2023, which states "For hearing scheduling purposes, a claim is considered "duly preserved" upon the receipt of a written NOI. We should not have a DRB meeting solely for determining preservation of a claim." Mr. Lattner's email was based on a 28 November, 2022 meeting with Mr. Lattner, Mr. Prasad (FTBA), all of the District Construction Engineers, and the Florida Chapter of the Disputes Review Board Foundation. The question posed to the group was: what is the minimum requirement to be considered "Duly

Preserved". Mr. Lattner clarified this as a written NOI. His email simply clarified current contract language and did not create any new requirement or otherwise change current contract language.

Mr. Lattner's email also states the DRB should not meet exclusively to consider the question of "Duly Preserved". With the narrow definition provided in the Lattner email the Board agrees no special meeting would be warranted under normal circumstances where hearings are limited to a small number of issues. However, with 60 conflicts to consider the additional step was warranted. Reference 9 implies this when it states that most hearings will be one day. Clearly this is not the case when considering the Sacyr Global Claim.

The Board does acknowledge a two-phased hearing is not a standard procedure. However, given the particulars of this hearing – mainly the number of alleged conflicts – the two-phased hearing was a better option and more likely to ensure equity for both parties and a thorough understanding of each party's position by the Board.

Notice of Intent to File a Claim, NOI

The Contract clearly specifies the procedural requirements to file a claim, and provides that the contractor must provide a written Notice of Intent to File a Claim (hereinafter "NOI") to preserve their rights to subsequently file a claim. The NOI is not synonymous with any type of notice, or any other information provided to the Department to alert it of a conflict or other project issue.

Notice of an issue "actual notice" alerts the Department of a potential problem/issue and provides the Department an opportunity to provide assistance, guidance or at a minimum, monitor the progress of the resolution of the issue.

An NOI puts the Department on notice of a pending claim, thereby alerting the Department to the need to carefully track an issue and collect data subsequently needed to satisfy a claim. This NOI also preserves the contractor's rights to subsequently file a claim.

As listed in the References above, Contract #E2Y80 is replete with guidance and requirements for dealing with unforeseen issues and prescribes processes and procedures to deal with unknown conflicts. Consistent within the contract are references to compliance with Spec 5-12 and 8-3, which specify actions that must be taken by the Contractor to preserve his/her right to pursue a claim/dispute with the Department. Failure to comply with these requirements forfeits the contractors' right to claims. Dispute Review Boards are prohibited from hearing issues that are not "Duly Preserved" as mentioned above.

Global Claim

The contract has no provisions for a “Global Claim”, however the 60 conflicts within the claim can be considered by the Board consistent with the terms of the contract.

Findings:

1. Contract E2Y80, contains no language to address a “Global Claim”. Accordingly, the Regional Disputes Review Board is prohibited from hearing the “Global Claim”.
2. Sacyr has not preserved its rights to pursue all 60 conflicts.
3. Sacyr has preserved its rights to pursue 35 of the 60 conflicts for which Notice of Intents were issued, per page 7 of the Sacyr position paper. Thirty-five of the conflicts have met the threshold to move forward to Phase Two of the DRB hearing.

A review of the contract documents reveals 17 of the 35 conflicts were settled via Supplemental Agreement 79, Work Orders or were rescinded. These include conflicts, 8, 47, 37, 50, 29, 30, 31, 32, 52, 39, 33, 35, 46, 59, 58, 60, and 4 are considered by the Board to be closed based on the agreement by the Contractor and the Department in SA79: “The Department and the Contractor agree that the contract time adjustment and sum agreed to in the Supplemental Agreement constitute a full and complete settlement of the matters set forth here in

The remaining 18 conflicts are 3, 5, 8, 10, 11, 12, 14, 16, 17, 19, 21, 22, 28, 48, 49, 51, 53, and 54. Of these 18 conflicts numbers 10, 11, 12, 16, 17, 19, 21, 22, and 53 were submitted between 45 to 108 days late defeating the purpose of the NOI by not providing timely notice to allow the Department to accurately track activities and resources associated with the conflict as it developed in preparation of a claim. These conflicts were not compliant with the requirement for timely submission and will not be heard by the Board in Phase two of the Hearing.

The remaining 9 conflict are: 3, 5, 8, 14, 28, 48, 49, 51 and 54. These 9 conflicts have met the requirement for “Duly Preserved” and will be heard by the Board in Phase two of the Hearing.

The DRB findings herein are based on the contract, on the documents and information previously provided by both parties, information provided by the parties in their position and rebuttal papers and their presentations at the Phase one hearing.

The DRB wishes to thank both parties for their submissions and presentations and the professional and courteous manner of their performances at the presentation.

These Findings are unanimous with all three members in agreement.

The Disputes Review Board members: Mr. Paul Harkins, Mr. Richard Rountree and Mr. James Davis.

Signed for the Board

James H. Davis
RDRB Chairman

August 9, 2024

SR21-SAC-DRB-L-24-0885

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Richard Rountree
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Project Description: SR 21 (Blanding Blvd.) from CR 218 to Black Creek
Fin No.: 208211-5-52-01
Contract: E2Y80

Subject: Sacyr Construccion SA, Inc. Rejection

Dear Messrs. Davis, Rountree, and Harkins,

Sacyr respectfully rejects the Board's Findings provided on July 28, 2024.


The Board's Findings ignore Florida law, disregarding the standards for actual notice and lack of prejudice. Moreover, the Board ignores the undisputed fact that the Department had notice, and was aware, of the global utility problem. In fact, the Department tried to help manage the issue and had enough information as to the conflicts to allow a substantive review of all 60 conflicts.

Additionally, the Board refuses to acknowledge this claim for what it is—a global impact claim. While the impact of each conflict individually may vary, it is precisely the cumulative impact of the conflicts that resulted in the delay, disruption, and extra costs to Sacyr. A year before Final Acceptance, Sacyr provided notice to the Department that the piecemeal discovery and resolution of these conflicts had a disrupting effect on Sacyr's ability to execute the work as planned and Sacyr made the intention to file a claim for the same clear.

Accordingly, Sacyr respectfully rejects the Board's Findings. Further, having found that Sacyr "duly preserved" nine (9) conflicts, there is nothing left for the Board to determine with regard to

entitlement. There is no dispute these conflicts occurred; therefore, the only question that remains is in regard to the quantum of Sacyr's claim. As the Board made clear at the Pre-Hearing Meeting that the Board will not be evaluating or determining quantum, the Board's Phase One determination has completed the DRB process.

Sincerely,
Sacyr Construccion SA, Inc.

By: 

Enrique Alonso Zuñiga
Country Manager