

David Barton

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Sent: Tuesday, November 22, 2016 10:42 AM
To: Julius W. Hunter; Bob Worley
Cc: David Barton; Dominic Richard; P. E. Eric Benson (eric.benson@dot.state.fl.us); Ed Hudec; Joseph Beard; Ernie Howard; Bill Bredesen; Mark Kirby; Cynthia Snow White; David
Subject: Yellow River DRB Hearing #1
Attachments: FINAL, FINAL yellow river hearing.docx

To All:

Please find attached the electronic copy of the DRB findings and recommendation for Hearing No.1 conducted on November 10, 2016.

A signed hard copy will be mailed to each party. The DRB thanks you all for the time and consideration you put into the hearing. Please remember that both parties have 15 working days from the time they receive the hard copy to respond (accept or reject) the Board's recommendation.

Tom Shafer
Chairperson

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DRB Hearing

November 10, 2016

GLF Construction Corporation vs. FDOT District 3

Denial of Environmental Permit Modifications

Project No.: FM 22044275201(Segment 7)

Contract: T3543

**Contract Description: Design-Build S.R. 87 from 2miles South of Yellow River Bridge
To C.R. 184 (4-lane and Bridge in Santa Rosa County**

Contractor: GLF Construction Corporation

Engineer of Record: Hatch Mott McDonald

Consultant Engineering & Inspection for the FDOT: Eisman & Russo, Consulting Engineers

Members of the Dispute Review Board (DRB)

Cynthia Snow White, Member

David Van Leuven, P.E., Member

Thomas P Shafer, P.E., Member, Chair

Project Information:

The improvements under this contract consist of the reconstruction of SR 87 from two miles south of the Yellow River Bridge to just south of CR 284 (Hickory Hammock Road) for a distance of 4.156 miles in Santa Rosa County. The existing two-lane roadway will be widened to a four-lane divided typical section. The new rural typical section will consist of two 12-foot travel lanes in each direction separated by a 40-foot depressed median and 10-foot outside shoulders, 5-foot paved. Storm water ponds and improved roadside ditches, outfalls, side drains, culverts and inlets are included in the construction. Clearing and grubbing of the right of way and an extra 20-foot stripe along the eastern right of way is included along with the construction of fencing along the entire project limits. Constructing a new bridge parallel along the east side of the existing bridge over the Yellow River and the construction of this bridge will require the temporary closure of the existing boat ramp and launch located on the east side of SR 87 south of the Yellow River. Construction of the new bridge will require a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to the wet lands. The work south of the Yellow River is within the Eglin Air Force Base Boundary and no work shall occur beyond the limits shown with the plans.

Contractors Position

Issue for Escalation

GLF Construction Corporation (GLF) seeks additional time and compensation due to the Florida Department of Transportation's (FDOT) denial of GLF's planned "means and methods" to construct the SR 87 Yellow River Bridge (SR 87 Project) in accordance with the contract documents. The following items specifically support GLF's position:

- The Bid documents, including both the USCOE Permit (Exhibit 1) and FDEP environmental permit (Exhibit 2), expressly allow for variation in the approach for construction of the SR 87 Project.

- Structure Plan sheet B1-12 (Exhibit 3) specifies that the work bridge depicted on that plan sheet represents “one possible method to construct the proposed bridge” and directs the Contractor to develop his own “means and methods”.
- The FDOT, in a letter to GLF dated January 12, 2016 (Exhibit 4), rejected GLF’s planned temporary work structure, a mix of temporary haul road and elevated work bridge, by stating “**GLF’s proposal is denied because the NEPA Document will require new analysis**”. The “NEPA” document was not provided to the bidding contractors as part of the Contract Documents. Consequently, FDOT’s rejection of GLF’s means and methods was not based on the Contract Documents.

Monetary and Delay Impacts

GLF has been monetarily impacted and delayed by the FDOT imposing a singular method for construction of the project which conflicts directly with the documents provided at the time of bidding. The documents provided at the time of bidding allowed for innovative means, methods, and sequencing by the bidding contractors. The monetary impacts are directly related to the specific requirement that GLF construct a 4751 ± foot long elevated work bridge in lieu of bid Item 103-1-13 (Temporary Work Structure). The time delay reflects the impacts to our scheduled operations to complete the construction of the proposed Yellow River Bridge utilizing the FDOT’s mandated elevated work bridge in lieu of the temporary work structure pay item as bid by GLF. The time delay also reflects the impacts to our scheduled operations due to a singular point of access for construction and the mandated “built and relocated as construction advances” (USCOE Permit/USFWS Biological Opinion Page 6) construction method for the elevated work bridge.

GLF Approach to the Project Bidding

GLF approached the bid for the SR 87 Project based on the controlling parameters of the contract pay item 103-1-13 Temporary Work Structure. Pay item 103 is defined in the 2015 FDOT Standard Specifications for Road and Bridge Construction as:

103-1 Description.

103-1.1 Scope of Work: Construct temporary work structures used solely to support construction equipment. Temporary structures include but are not limited

to work bridges, elevated platforms and rail systems. Items such as barges, mats, or items such as falsework or scaffolding are not included in this Section. If a temporary structure type other than the structure type shown in the plans is chosen, assume responsibility for obtaining all necessary permit revisions and the Engineer's approval. Conform to any limitations contained in the plans and permits. Do not place embankment outside the limits shown in the plans. The cost of the embankment, placing, compaction, and removal will be included in the lump sum price for Temporary Work Structure.

Recognizing the restrictions of Pay item 103-1-13, GLF developed the bid for the SR 87 Project based on Specification 103 and on GLF's successful construction of the US90 Yellow River Bridge Project (US90 Project) in Okaloosa County. The US90 Project was designed and permitted by the FDOT with a combination of encased earthen haul roads and elevated work bridge. The design and permits were developed to allow for access and construction from both ends of the project simultaneously once the temporary work structures were constructed. Comparing the environmental conditions at the US90 Project with the environmental conditions at the SR 87 Project revealed nearly identical conditions. The environmental permits for both of these bridge projects, as approved by FDEP and USCOE, over the Yellow River are nearly identical. The environmental permits for both projects also required protection plans for nearly identical threatened or endangered environmental species.

Based on review of the contract documents and the project site conditions prior to submitting bids, GLF developed its estimate for the SR 87 Project temporary work structure to include a combination of encased haul road and elevated work bridge. This approach was considered the most accurate approach based on the contract plans, the contract permits, the successful construction of the US90 Yellow River Bridge Project (US90 Project) in Okaloosa County, and the safety of all involved in the project construction.

- Plan Sheet B1-12 specifically includes the following notes which encourage competition, innovation, and cost savings in the "means and methods" for construction.
 - Plan Note 1. Schematic construction sequence shown is one possible method to construct the proposed bridge. Contractor is to develop his own means and methods.
 - Plan Note 3. Contractor is to obtain the permits required for the proposed construction method.
 - Plan Note 4. Construction means and methods will meet all environmental commitments contained in the contract documents.
- The USCOE Permit/USFWS Biological Opinion Page 6 details "A temporary work bridge located east of the proposed bridge **may be** used for construction, which **could be** built and relocated as construction advances to eliminate the need for a full-length work bridge."
- Page 3 of the FDEP Permit, **PERMIT/SOVEREIGNTY SUBMERGED LANDS CONDITIONS** details that the activities described must be conducted in accordance with "**The limits, conditions and work shown in the attached drawings**" The FDEP Permit attached drawings do not reflect the final construction plans for all contractors to utilize during the bid development. Specifically, the final construction plan sheets B1-12

and B1-13 completely conflict with the FDEP permit drawings included in the FDEP Permit on pages 52/69 and 53/69 (Exhibit 5). Specifically, the low member elevation was increased by over 300% from the 5.4 elevation depicted on the permit drawings and the permit drawing do not include any of the plan notes included on sheet B1-12.

- None of the contract documents associated with construction and permitting of the SR 87 Project address or reflect safety of GLF or FDOT employees. The bid approach developed by GLF allowed for unimpeded access to the construction site for emergency vehicles in the event of a project accident. The current singular method for construction imposed by FDOT for the project does not take into account the lack of emergency vehicle access to the project. As such, in the event of an accident on the project, GLF will be required to use man baskets and project cranes to lift and place emergency technicians on the elevated work bridge and to use man baskets and project cranes to lift and relocate emergency technicians and injured personnel to awaiting emergency vehicles.

In an effort to practice due diligence prior to the bid submittal, GLF approached Scheda Ecological Associates, who GLF had used as their environmental consultant for permit modifications for the US 90 Bridge over the Yellow River in Okaloosa County, to review GLF's plans for a Temporary Work Structure and the possibility of procuring the needed permit modifications. Specifically, GLF requested that the SR 87 Plans and Permits be reviewed to determine if the Temporary Work Structure construction approach and permitting could be utilized as had been on the US 90 Yellow River Bridge Project. After review, Mr. Tidwell of Scheda confirmed that the approach for the Temporary Work Structure for SR 87 "would require a permit modification" but "it should be viewed more favorably than what is currently permitted" (Exhibit 13).

Utilizing the contract documents, GLF developed a project schedule (Exhibit 6) and a Temporary Work Structure construction plan (Exhibit 7) to construct the project using a combination of encased haul road and elevated work bridge. The Temporary Work Structure construction plan contained two (2) options. These Options were included to reflect different approaches to construction of the South landfall of the Proposed SR 87 Yellow River Bridge. Following execution of the Contract by FDOT and GLF, but prior to the Pre-Construction Conference, GLF procured the professional services of Cardno, a global environmental and engineering firm, to review the project documents, review the project site, and to act as GLF's engineering representative in approaching USCOE and FDEP for feedback/reactions to GLF's proposed "means and methods" for the Temporary Work Structure construction. Minutes and action items from the meeting held between representatives of GLF, Cardno, USCOE, and FDEP are attached (Exhibit 8). Based on the meetings and phone conversations between GLF, Cardno, and the permitting agencies, the construction plan developed by GLF was well received. The only feedback comments were provided by FDEP. FDEP requested that the terminus of the elevated bridge be extended to the North by 30 feet on the Northern side of the Yellow River and the inclusion of drainage equalization pipes through the haul road fill to reduce or eliminate the possibility of erosion of the earthen fill from the haul road. Otherwise, neither the USCOE nor FDEP objected to the detailed Temporary Work Structure construction plans developed by GLF.

The project schedule and the proposed Temporary Work Structure construction plan were presented to the FDOT at the Pre-Construction Conference on December 2, 2015. GLF also provided names and dates for the meetings with the permitting agencies at the Pre-Construction Conference. (Exhibit 8). During this meeting, GLF was told for the first time of the existence of a “NEPA” document. This “NEPA” document was not provided as part of the contract permits or provided to any of the contract bidders. GLF was informed that the “NEPA” document may be impacted by the “means and methods” proposed by GLF since the “NEPA” jurisdiction extended to the limits of the Eglin AFB Property (from the center of the Yellow River to the South). The Temporary Work Structure approach, and the associated coordination with the permitting agencies was discussed at the Pre-Construction Conference and all agreed that the environmental aspects of the project would be discussed in further detail at the Pre-Construction Environmental Commitment Meeting.

The Project Pre-Construction Environmental Commitment Meeting was held on December 9, 2015 (Exhibit 9). During this meeting, the “NEPA” document was again discussed. As previously detailed, the “NEPA” document was not provided as part of the contract permits or provided to any of the contract bidders. On December 10 and 11, 2015, GLF sent an Email detailing clarifications need for the completion of the Temporary Work Structure drawings to the FDOT CEI Consultant (Exhibit 11). On December 11, 2015, emails related to the coordination with Eglin AFB and USFWS were shared between GLF and FDOT (Exhibit 11). By these emails, GLF was informed that Representatives of Eglin AFB and USFWS had been provided with copies of the GLF proposed Temporary Work Structure options. The FDOT Email also stated that coordination with Representatives of Eglin AFB and USFWS related to the GLF proposed Temporary Work Structure options would be pursued but coordination and permit modifications affecting the FDEP and USCOE Permits were the responsibility of GLF.

FDOT Denial of GLF Means and Methods

No correspondence related to GLF’s proposed construction “means and methods”, either Option 1 or Option 2, was received between the dates of December 12, 2015 and January 11, 2016. On January 12, 2016, the FDOT rejected GLF’s planed Temporary Work Structure construction and proposed “means and methods” by stating “**GLF’s proposal is denied because the NEPA Document will require new analysis**” (Exhibit 4). To date, GLF has received no other denials from any of the entities involved in the Project. On January 21, 2016, GLF filed written notice of disagreement with the FDOT’s denial of the proposed Temporary Work Structure and provided official notice of Intent to claim for monetary and delay damages (Exhibit 12).

Conclusion

GLF is entitled to additional contract time and compensation due to the FDOT mandating a singular method of construction for the Temporary Work Structure. GLF’s entitlement is supported by the following:

1. Bid documents (plan notes) detailed and encouraged the bidding contractors to be competitive and innovative in the development of a construction “means and methods” plan for the proposed Yellow River Bridge construction.
2. The contract permit conditions, and permitting agencies, support the physical construction of a temporary work structure constructed with a combination of encased fill road and an elevated work bridge for the temporary work structure pay item (Exhibit 8).

3. The Contract drawings provided only a partial schematic construction sequence of a temporary work bridge, not a singular or mandatory construction method. The partial construction sequence identified in such drawings is consistent with the fully engineered plan that GLF originally anticipated to use (Exhibit 7), a combination of trestle and earthen fill system. The only instruction provided in the construction plans in relation to the Temporary Work Structure is for the Contractor *“to develop his own means and methods”* and *“to obtain the permits required for the proposed construction method”*.
4. FDOT rejected GLF’s proposed Temporary Work Structure by stating **“GLF’s proposal is denied because the NEPA Document will require new analysis”**. The “NEPA” document was not provided to the bidding Contractor’s as part of the Contract Documents and is not a part of the T3543 construction contract. Consequently, FDOT’s denial of GLF’s “means and methods” is without contractual support, as the denial is based on a document that is not a part of the contract. This fact is further supported by the actions and written direction of the FDOT in entering into coordination with Eglin AFB and USFWS related to the GLF proposed Temporary Work Structure while mandating that GLF was responsible for coordination and permit modifications affecting the FDEP and USCOE Permits (Exhibit 11).
5. GLF Construction Corporation submitted our bid for the SR 87 Project in good faith and after exercising due diligence in developing a successful work plan for construction. GLF had the permits and Plans reviewed by an environmental consulting Firm both prior to and after our project bid submittal. Both Consulting Firms, Scheda Ecological Associates and Cardno, Inc., agreed the approach to the Temporary Work Structure was valid. In order to further demonstrate GLF’s efforts of good faith, GLF offered to construct the Temporary Work Structure on the Southern end within the Eglin AFB jurisdictional Limits as a full elevated work trestle at no additional costs to the FDOT if GLF could pursue the use of a hall road on the Northern side of the Yellow River as detailed in our Option 2 Temporary Work Structure Drawings. This offer was categorically rejected by the FDOT and the letter of January 12, 2016 was issued (Exhibit 4).

POSITION PAPER

Prepared For The Florida Department of Transportation – District 3

The Florida Department of Transportation (the Department) awarded Contract T3543 (Contract) to GLF Construction Corporation (GLF) on October 20, 2015. The Contract was executed on November 03, 2015 with the Notice to Proceed dated December 04, 2015. The Contract was in the amount of \$29,686,176.89 and included 830 Contract days to construct this traditional Bid Build project in accordance with the Contract Documents. The Contract incorporated the July 2015 Edition of the FDOT Standard Specifications and the 2015 Edition of the Design Standards, as amended by Contract Documents.

STATEMENT OF ISSUE

Is GLF due entitlement resulting from the Department's Denial of GLF's Proposed Permit Modification to replace portions of the temporary work bridge shown in the Contract Documents with a temporary earthen fill road within the wetlands adjoining the Yellow and Dead Rivers?

BACKGROUND / SUMMARY DESCRIPTION OF GLF'S PROPOSED PERMIT MODIFICATION

During the bidding process, GLF's proposed approach to the Project included utilization of a different method of constructing the temporary work structure required for construction of the new bridge. GLF has stated that GLF's approach was in accordance with Notes 1 and 3 of Plan Sheet B1-12 (Exhibit 1). All notes (1 – 5) from Plan Sheet B1-12 are reproduced below:

- 1. Schematic construction sequence shown is one possible method to construct the proposed bridge. Contractor is to develop his own means and methods.***
- 2. Submit a load rating of the existing bridge No. 580094 with the proposed construction loads to the EOR for review prior to construction.*
- 3. Contractor is to obtain the permits required for the proposed construction method.***
- 4. Construction means and methods will meet all environmental commitments contained in the contract documents.***
- 5. The Yellow River boat ramp will be closed during construction.*

GLF proposed to modify the existing environmental permits to allow the utilization of a temporary earthen fill road within the Yellow River wetlands (permits required construction of a 4,756 foot long temporary work bridge). GLF proposed to construct the temporary work bridge (as currently permitted) from the south end of the bridge / wetlands to north of the Yellow River at Station 1794+94 (approx. 966 linear feet). From that point northward, for a distance of 2,440 linear feet, GLF proposed to modify the permits to construct a 35 foot wide temporary earthen fill road across the wetlands to Station 1819+34. At Station 1819+34 GLF proposed to construct an approx. 345 linear foot temporary work bridge across the Dead River (as currently permitted). For the final approx. 1,000 linear feet from the north end of the Dead River temporary work bridge GLF proposed to modify the permits to construct a 35 foot wide temporary earthen fill road across the wetlands to Station 1832+79 (end bridge). In summary, GLF proposed to construct a temporary earthen fill road over approx. 3,440 linear feet of wetlands adjoining the Yellow and Dead Rivers which were permitted for construction of a temporary work bridge.

GLF also proposed to modify the permits to allow a 50 foot width of temporary earthen fill at every other bridge span, with the extra 15 feet extending under the new bridge to allow “for crane movement and increase maneuverability”. The requested additional 15 foot of temporary earthen fill impacts would occur at twenty span locations extending off of the proposed temporary earthen fill road. GLF proposed to construct the top of the temporary earthen fill road at an elevation of 7.0 NAVD 88 and the top of the temporary work bridges at an elevation of 10.0 NAVD 88 (GLF proposed a “ramp transition” to adjoin the temporary earthen road and temporary work bridge sections).

DEPARTMENT’S POSITION

Through this Position Paper, the Department will prove that GLF’s approach was not valid and that the Department acted appropriately when denying GLF the ability to move forward with pursuing a Permit modification to construct a temporary earthen fill road over approx. 3,440 linear feet of wetlands adjoining the Yellow and Dead Rivers.

The Department’s position is as follows:

- 1. The Department expedited the reviews and vetted GLF’s proposal through the appropriate agencies in a timely manner to determine the practicality of GLF’s Proposed Permit Modification. The Department denied GLF’s requested Permit Modification on January 12th, 2016 (Contract Day #9).**
- 2. The Contract Documents at the time of bid were clear that a *Temporary Work Bridge was permitted to construct the new bridge*, and that *construction means and methods will meet all environmental commitments contained in the contract documents*. The use of a Temporary Work Bridge was an environmental commitment**

listed during the permitting process. GLF's requested permit modification to utilize a temporary earthen fill road violated the environmental commitment requiring "***a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands***" as stated in **Special Provisions Article 4-1** of the **Contract Specifications Package** (Exhibit 2) and as stated in the **Bid Solicitation Notice** (Exhibit 3).

3. Agency responses from **Eglin AFB (signatory authority on the NEPA Document) and FHWA (NEPA Document Cooperating Agency)** state that GLF's Proposed Permit Modification to construct a temporary earthen fill road **would require new NEPA analyses necessitating at least an Environmental Assessment (EA). An EA averages approximately 4 years (1460 days) to complete whereas the Contract includes 830 Contract Days. Due to the time constraints within the Contract, GLF's Proposed Permit Modification is not practical.**
4. **The increased likelihood of: sediment loss, hydraulic impacts and inundation also support the Department's position to deny GLF's Proposed Permit Modification.**

The Department's position is that GLF is not due entitlement resulting from the Department's Denial of GLF's Proposed Permit Modification to replace portions of the temporary work bridge shown in the Contract Documents with a temporary earthen fill road within the wetlands adjoining the Yellow and Dead Rivers.

ISSUE IN DISPUTE

The Department contends that the Contract Documents clearly note that the "***construction of the new bridge will require a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands***" as stated in **Special Provisions Article 4-1** of the **Contract Specifications Package** (Exhibit 2). This identical statement is also contained in the **Bid Solicitation Notice** (Exhibit 3).

The Department acknowledges that **Section 103-1.1** of the **FDOT Standard Specifications (Temporary Work Structures Scope of Work)** (Exhibit 4) states that "***If a temporary structure type other than the structure type shown in the plans is chosen, assume responsibility for obtaining all necessary permit revisions and the Engineer's approval. Conform to any limitations contained in the plans and permits. Do not place embankment outside the limits shown in the plans.***" With that acknowledgement The Department maintains:

- 1- The Special Provisions supersede the Standard Specifications and as such a temporary work bridge was required. (See Page 40 Section 5-2 of the 2015

- Standard Specifications for the governing order of documents)
- 2- GLF's proposed permit modification to construct a temporary earthen fill road for the majority of the Yellow River wetlands (in lieu of a temporary work bridge as shown and permitted) did not conform to the limitations and commitments contained in the Contract Documents.
 - 3- GLF did not obtain the Engineer's approval as required by Specification.

As detailed in the following pages, GLF's Proposed Permit Modification would require a new analysis of the NEPA Document (EA/FONSI/FONPA) previously completed for this project. Agency responses stated that GLF's Proposed Permit Modification would necessitate at least an Environmental Assessment (EA). The Department's position is further reinforced since an EA averages approximately 4 years (1460 days) to complete whereas the Contract includes 830 Contract Days. Due to the time constraints within the Contract, GLF's Proposed Permit Modification is not practical.

The Department is not in agreement that GLF's proposed alternate means and methods of a temporary earthen fill road were viable given the contract requirements, environmental commitments, allowable contract time and potential environmental impacts. The Department's denial of GLF's requested permit modification did not interfere with GLF's ability to construct the project within the contract requirements. The Department takes exception to GLF's statement in their Notice of Intent (Exhibit 18) that, *"We consider the Department's denial to constitute both a cardinal change to the project and interference with GLF's means and methods."* The Department maintains they acted within the confines of the Contract.

BACKGROUND ON NEPA AND ENVIRONMENTAL ASSESSMENT (EA)

The following paragraphs are intended to provide a general background on the environmental permitting process for the project. This summation shall not be considered a comprehensive compilation of the documents, comments, content or intent of the Permits and processes.

The National Environmental Policy Act (NEPA) requires environmental assessments (EA)'s to be performed on all federally funded projects. SR 87 is a transportation facility under the jurisdiction of the Federal Highway Administration (FHWA) which included federal permits and federal funds for Right of Way acquisition. Furthermore, as stated in **Special Provisions Article 4-1** of the **Contract Specifications Package** (Exhibit 2), ***"The work south of the Yellow River is within the Eglin Air Force Base Boundary"*** through perpetual easement with Eglin Air Force Base (Eglin).

The EA and its supporting documents are commonly known as the 'NEPA documents'. There are many components of the EA which were used to develop the plans and environmental permits for this project, especially the FDEP and Army Corps Permits. One of the actions supporting the EA is the US Fish and Wildlife Service's (USFWS) Biological Opinion (BO).

Eglin Air Force Base (Eglin) personnel have been involved in the development of the NEPA documents, Biological Opinion and Environmental Permits. Any proposed modifications to these documents would require the ***“advance collective review and approval of the Department, Eglin AFB and all impacted environmental permitting agencies”*** as stated in **Item 7 of the Mandatory Pre-Bid Meeting** (Exhibit 5).

TIMELINE RELATED TO THE ISSUE

- 07/24/15 - T3543 Bid Solicitation Notice (Exhibit 3)
- 08/05/15 – T3543 Mandatory Pre-Bid Meeting (attended by three (3) GLF Representatives) (Exhibit 5)
- 12/02/15 – Preconstruction Conference was held (Exhibit 6), in a brief meeting held following this meeting GLF verbally discusses their proposal with the Department. GLF was verbally notified that GLF’s proposed permit modification must be reviewed by the Department prior to submittal to the permitting agencies. GLF was also notified that the Department would not entertain GLF’s proposal if the NEPA Documents would have to be reopened (due to time constraints).
- 12/04/15 – The Department issues the Notice to Proceed stating that time will begin 31 calendar days following NTP (01/04/16) or the date on which GLF begins work, whichever date is earlier. (Exhibit 7)
- 12/07/15 – GLF submitted their initial *“Temporary Work Structure – Detailed Description”* (Proposed Temporary Earthen Fill Road Permit Modification) (Exhibit 8) to be discussed following the December 9th, 2015 Environmental Commitment Meeting.

- 12/08 – 12/09/15 – The Department requests additional information and clarification. GLF provides additional information on two of the five items requested by the Department prior to the Environmental Commitment Meeting. (Exhibits 9 - 11)
 - GLF did not provide the requested hydraulic analysis, additional erosion control details / information and summary of permit changes as requested.
- 12/09/15 – Environmental Commitment Meeting is conducted (Exhibit 12). After this meeting GLF is given an opportunity to present the concept of their Proposed Temporary Earthen Fill Road Permit Modification and to field preliminary comments. The Department, USFWS, Eglin and FDEP are in attendance (ACOE not present).
- 12/17/15 – GLF issues *“Revised Temporary Work Structure Submittal”* (Exhibit 13) following preliminary comments received at December 9th, 2015 meeting.
- 12/23/15 – The Department issues letter to GLF (Exhibit 14) to clarify the Department’s position of GLF’s proposal. The key points of this letter are noted below.
 - Paragraph 1: *“This letter is being issued as a follow up to GLF Construction Corporation’s requested Permit Modification Meeting on December 9th, 2015 and subsequent Revised Temporary Work Structure Submittal emailed by GLF on*

December 17th, 2015.”

- Paragraph 2: “The December 9th Meeting was an opportunity for GLF to present their proposal and to field preliminary comments. **The preliminary comments and open table discussion on 12/09/15 shall in no way be considered an all- inclusive list of comments and / or concerns associated with GLF’s Proposal.**”
- Paragraph 3: “GLF’s Revised Temporary Work Structure Submittal issued on December 17th is currently under review. **Our review of your submittal shall not in any way be construed as validation of the Contractor’s submitted documents related to this request. Furthermore, it should be understood that the Department is by no means whatsoever contractually obligated to grant time associated with the Contractor’s Proposed Permit Modification (or review thereof). The Department is not responsible for any delays associated with the Contractor’s Proposed Permit Modification (or review thereof).**”
- 01/04/16 (Contract Day # 1) – First Contract Day (Begin Time / Begin Work) (Exhibit 15)
- 01/11/16 – **Eglin AFB (signatory authority on the NEPA Document)** notifies the Department that the **Contractor’s requested permit modification will require “new NEPA analyses (and then ESA Section 7 Consultation)”**. (Exhibit 16)
- 01/12/16 (Contract Day #9) – The Department issues a letter entitled “**GLF’s Proposed Environmental Permit Modification Denial**” (Exhibit 17) **denying GLF’s requested permit modification**. The key points of this letter are noted below.
 - Paragraph 1: “**It has been determined that GLF Construction Corporation’s proposed Permit Modification will require new analysis of the NEPA Document (EA/FONSI/FONPA) previously completed for this project.**”
 - Paragraph 2: “Section 103-1.1 of the Specifications (Temporary Work Structures Scope of Work) states “*If a temporary structure type other than the structure type shown in the plans is chosen, assume responsibility for obtaining all necessary permit revisions and the Engineer’s approval.*”
 - Paragraph 3: “*As stated on multiple occasions, the Department is not willing to re-open the NEPA Document due to the duration of the initial review and approval, the commitments made during that process and the anticipated length of time required for the revision. **GLF’s proposal is denied because the NEPA Document will require new analysis.***”
- 01/21/16 – GLF issues “*Notice of Claim – (Denial of Environmental Permit Modification)*” (Exhibit 18) notifying the Department of GLF’s intent to claim for additional compensation and time. GLF’s Notice of Intent was issued within the ten day timeframe required per the Contract.
- 01/22/16 – Department issues *Acknowledgement GLF’s Notice of Claim (2) – Denial of Environmental Permit Modification* (Exhibit 19)
- 02/18/16 – **FHWA (NEPA Document Cooperating Agency)** notifies the Department that the **Contractor’s requested permit modification “would necessitate a COA of at least an EA, possibly an EIS. Average time to complete an EA is approximately 4 years.”**

(1,460 days) (Exhibit 20)

As it can be seen in this timeline the Department expedited the reviews and vetted GLF's proposal through the appropriate agencies in a timely manner to determine the practicality of GLF's Proposed Permit Modification. **The Department responded to GLF's request on January 12th, 2016 (Contract Day #9).**

INTERPRETATION OF CONTRACT DOCUMENTS

The following paragraphs contain numerous references within the Contract which require / permit a temporary work bridge in order to construct the new bridge. Also included within this section are Contract references related to examination of the Contract Documents.

The **Bid Solicitation Notice** (Exhibit 3) for the project states ***"construction of the new bridge will require a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands"***

Special Provisions Article 4-1 of the **Contract Specifications Package** (Exhibit 2) states that ***"construction of the new bridge will require a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands"***

Special Provisions Subarticle 7-2.1 of the **Contract Specifications Package** (Exhibit 2) states the following: ***"All Permits procured by the Department are posted on the Department's website at the following URL address: <ftp://ftp.dot.state.fl.us/permitsandorutilityworkschedules/>. Take responsibility to obtain this information and comply with all requirements posted on this***

this website up through five calendar days before the opening of bids. Comply with the provisions contained in these permits.

Page 2 of 14 Project Description Section of the **FDEP Permit 57-0329719-001-EI** (Exhibit 21) states the following: ***"The temporary work bridge will be 4,756 feet long, but 30 feet wide. The project includes 5.258 acres of direct impact, 4.513 acres of shade impact, and 2.756 acres of temporary impacts to wetlands for construction and use of a temporary work bridge."*** The paragraph concludes in its final statement that ***"Authorized activities are depicted on the attached exhibits."*** The wetland impact drawings enclosed within the FDEP Permit depict the temporary work bridge and quantify the impacts as described above. **There is no reference to temporary fill within the FDEP Permit.**

The opening paragraph of **ACOE Permit SAJ-2014-02879(RGP-MMW)** (Exhibit 22) states ***"A review of the information and drawings provided shows the proposed work is to impact 5.26 acres of jurisdictional wetlands for direct road widening, approach fill, and Stormwater system impacts adjacent to a proposed bridge."*** The ACOE Permit does not include any temporary impacts whatsoever (pile supported structures are not regulated by the ACOE).

There is no reference to temporary fill within the ACOE Permit.

The ACOE Permit SAJ-2014-02879(RGP-MMW) (Exhibit 22) also states ***“You must comply with all of the special and general conditions of the permit; and, any project-specific conditions noted below, or you may be subject to enforcement action.”*** The ACOE Permit includes twelve (12) project-specific conditions including the **Biological Opinion (BO)** as condition #9 / Attachment #2 within the ACOE Permit. Section 1.0 “Description of Proposed Action” within the **BO** states ***“A temporary work bridge located east of the proposed bridge may be used for construction, which could be built and relocated as construction advances to eliminate the need for a full-length work bridge.”*** This verbiage indicates that the Biological Opinion was predicated around the use of a temporary work bridge that may be “leap frogged” to eliminate the need for a full-length work bridge. **There is no reference to temporary fill in the BO (within the ACOE Permit)**

Contract Plans Sheets: **264** (Exhibit # 23) Traffic Control Plans Cross Sections (Phases 1-3 Bridge Construction (Typ.)), **B1-12** (Exhibit 1) Bridge Plans Construction Sequence Sheet 1 of 2 and **B1-13** (Exhibit 24) Bridge Plans Construction Sequence Sheet 2 of 2 **include schematic representations of the Temporary Work Bridge. There is no depiction of temporary fill within the Contract Plans.**

Item 7 of the Mandatory Pre-Bid Meeting (Exhibit 5) contained additional information related to the Traffic Control Plans and Bridge Construction Method.

- a. “There is a very detailed Traffic Control Plan and bridge construction method outlined in the plan set. This is certainly not the only way to construct this new sister bridge.*

However, if an alternate plan is proposed or considered, it shall be required to reduce the collective environmental impacts outlined in the plans.”

- b. “Any alternative plan will require the advance collective review and approval of the Department, Eglin AFB and all impacted environmental permitting agencies.”*

T3543 Bid Question ID: 11723 (Exhibit 25) asked the following question: ***“Can you please clarify the type clearing operations allowed in the area of the new bridge and work structure?”*** The Department responded as follows: ***“Clearing and grubbing operations will be necessary to construct the substructure of new bridge and work structure. Impacts to these and all wetlands are identified and quantified in the permits. A primary goal of this project is avoidance and minimization of impacts to wetlands. This is the purpose for the work structure.”*** Therefore, clearing and grubbing should be limited to only that which is required for the new bridge and temporary work structure.”

Section 2-2.1 (Obtaining Proposals) of the FDOT Standard Specifications (Exhibit 26) states

the following: ***“Obtain a proposal under the conditions stipulated in the Advertisement.....The Plans, Specifications and other documents designated in the proposal are part of the proposal, whether attached or not.”***

Special Provisions Section 2-4 (Examination of Contract Documents and Site of Work) of the Contract Specification Package (Exhibit 2) states the following: ***“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.”*** This Section concludes: ***“The bidder’s submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article.”***

The Department’s position is that the Contract Documents at the time of bid were clear that a ***Temporary Work Bridge was permitted to construct the new bridge***, and that ***construction means and methods will meet all environmental commitments contained in the contract documents***. The use of a temporary work bridge was an environmental commitment listed during the permitting process. GLF’s requested permit modification to utilize a temporary earthen fill road violated the environmental commitment requiring ***“a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands”*** as stated in **Special Provisions Article 4-1** of the **Contract Specifications Package** (Exhibit 2) and as stated in the **Bid Solicitation Notice** (Exhibit 3).

AGENCY RESPONSES

The Department received the following responses from agencies involved with the NEPA and Permitting processes for the project. **Eglin AFB (signatory authority on the NEPA Document)** – GLF’s Proposed Permit Modification will require ***“new NEPA analyses (and then ESA Section 7 Consultation)”*** for the temporary earthen fill road modification on the north side (non-Eglin) of the Yellow River. Moreover, we note that ***“a change, within a floodplain, from a trestle/bridge temporary work structure to a haul-road temporary work structure is such a significant change in design that the findings of our NEPA analyses would no longer be relevant.”*** (Exhibit 16)

FHWA (NEPA Document Cooperating Agency) – ***“FHWA is charged to avoid and minimize impacts to natural and human environments. The proposed method would necessitate a qualitative and quantitative assessment of impacts. Any CE COA determination is made because the FHWA and FDOT know, based on experience, that this type of project will not have significant environmental impacts. The proposed haul road will likely leave significant sediment in the floodplain of an Outstanding Florida Water. This probable impact would necessitate a COA of at least an EA, possibly an EIS. Average time to complete an EA is approximately 4 years.”.....“With that said, FHWA is charged to avoid and minimize impacts***

to natural and human environments, and a method to minimize impacts to those environments has been permitted and mitigation for unavoidable impacts has been accepted. In order to approve the haul road proposal it is reasonable that the contractor would need to prove that the proposed haul road would have less of an impact than what has been approved.” (Exhibit 20)

Agency responses from **Eglin AFB (signatory authority on the NEPA Document) and FHWA (NEPA Document Cooperating Agency)** state that GLF’s Proposed Permit Modification to construct a temporary earthen fill road **would require new NEPA analyses necessitating at least an Environmental Assessment (EA). An EA averages approximately 4 years (1460 days) to complete whereas the Contract includes 830 Contract Days. Due to the time constraints within the Contract, GLF’s Proposed Permit Modification is not practical.** The initial EA/FONSI/FONPA process took nearly 7 years.

Furthermore, **as stated in the FHWA email, GLF would have to prove that the proposed temporary earthen fill haul road achieves less environmental impact (is a more effective minimization measure) than a temporary pile supported structure as permitted.** These two factors alone are adequate justification to support the Department’s Denial of GLF’s Proposed Temporary Earthen Fill Permit Modification.

ADDITIONAL FACTORS SUPPORTING THE DEPARTMENT’S POSITION

During the vetting process, the Department considered numerous factors while reviewing GLF’s Proposed Permit Modification. **The Department’s Denial of GLF’s Proposed Permit Modification is further supported due to the increased likelihood of: sediment loss, hydraulic impacts and inundation resulting from GLF’s Proposed Permit Modification** to construct a temporary earthen fill road over approx. 3,440 linear feet of wetlands adjoining the Yellow and Dead Rivers which were permitted for construction of a temporary work bridge.

Without question a **temporary earthen fill road is much more susceptible to sediment loss than the permitted temporary work bridge. FDEP Permit 57-0329719-001-EI** (Exhibit 21) does not allow for any increase in turbidity above background levels (Zero (0) NTU allowance). GLF’s Proposed Permit Modification would increase the likelihood of sediment loss into the Yellow River Outstanding Florida Waterway (OFW) and Yellow River Marsh Aquatic Preserve both of which begin at the west side of the existing SR 87 Bridge over Yellow River (within the Project limits). **Any increase in turbidity above background levels would result in a FDEP Permit Violation.**

A temporary earthen fill road would have a greater impact on hydraulics than the permitted temporary work bridge. GLF’s proposed temporary earthen fill road would create

a dam situation across the approx. 0.90 mile floodplain (with contributing 1,340 square mile watershed). GLF's proposed temporary earthen fill road would **increase flow volume and velocities at openings thus creating scour** on the temporary earthen fill road and likely create greater scour depths on existing FDOT Bridge 580094. The temporary earthen fill road could **potentially impact the established 100-year flood elevation of 13.4 NAVD as stated in the effective Flood Insurance Rate Map (12113C0460G; December 19, 2006)**. GLF's Temporary earthen fill road would have to be hydraulically modeled (as requested by the Department in 12/08/15 email correspondence (Exhibits 9-11) in order to maintain compliance with the FDOT Drainage Manual. Section 4.3.2 for Temporary Facilities states *"temporary traversing works shall be designed accounting for the permitted duration of the traversing work. Temporary traversing work shall cause no more than a 1 foot increase in the Design Storm Frequency (DSF) flood elevation immediately upstream and no more than one tenth of a foot increase in the DSF flood elevation 500 feet upstream."* This criteria would be very difficult to achieve with GLF's proposed temporary earthen fill road.

GLF's proposed **temporary earthen fill road top elevation of 7.0 NAVD 88 is very susceptible to inundation and the resulting effects of high water conditions (i.e. increased probability of scour issues and sediment loss)**. On **12/29/15** water levels at the existing **SR 87 over Yellow River Bridge reached approx. elevation 8.6 NAVD 88 (44.5' gage elevation as stated on the SR 87 USGS Gage)** (Exhibit 27).

Per the USGS link below, the water level increased approx. 6.5 feet with only 4.0 inches of rainfall the week ending 12/26/15 and approx. 3.0 inches of rainfall the week ending 01/02/16 (on-site USGS gage off of the SR 87 over Yellow River Bridge). If a more localized event occurred before or after this event the water level increase would be substantially more.

http://nwis.waterdata.usgs.gov/nwis/uv?cb_00045=on&cb_00060=on&cb_00065=on&format=gif_default&site_no=02369600&period=&begin_date=2015-12-21&end_date=2016-01-07.

Ground level project photos taken on 12/30/15 (Exhibits 28-31) and **aerial project photos taken on 01/04/16** (Exhibits 32-35) document the on-site conditions during the event described above.

SUMMARY

The Department's position is that the Engineer's denial of GLF's proposed permit modification is fully warranted due to the numerous factors listed previously in this DRB Position Paper:

- 1. The Department expedited the reviews and vetted GLF's proposal through the appropriate agencies in a timely manner to determine the practicality of GLF's Proposed Permit Modification. The Department denied GLF's requested Permit Modification on January 12th, 2016 (Contract Day #9).**

2. The Contract Documents at the time of bid were clear that a **Temporary Work Bridge was permitted to construct the new bridge**, and that **construction means and methods will meet all environmental commitments contained in the contract documents**. The use of a Temporary Work Bridge was an environmental commitment listed during the permitting process. GLF's requested permit modification to utilize a temporary earthen fill road violated the environmental commitment requiring "**a temporary work bridge to be constructed along the east side of the construction area to minimize impacts to wetlands**" as stated in **Special Provisions Article 4-1** of the **Contract Specifications Package** (Exhibit 2) and as stated in the **Bid Solicitation Notice** (Exhibit 3).
3. Agency responses from **Eglin AFB (signatory authority on the NEPA Document) and FHWA (NEPA Document Cooperating Agency)** state that GLF's Proposed Permit Modification to construct a temporary earthen fill road **would require new NEPA analyses necessitating at least an Environmental Assessment (EA)**. An EA averages approximately 4 years (1460 days) to complete whereas the Contract includes 830 Contract Days. Due to the time constraints within the Contract, GLF's Proposed Permit Modification is not practical.
4. The increased likelihood of: sediment loss, hydraulic impacts and inundation also support the Department's position to deny GLF's Proposed Permit Modification.

The Department's position is that GLF is not due entitlement resulting from the Department's Denial of GLF's Proposed Permit Modification to replace portions of the temporary work bridge shown in the Contract Documents with a temporary earthen fill road within the wetlands adjoining the Yellow and Dead Rivers.

DESIRED RULING

The Department respectfully asks the Board to find no entitlement as it pertains to this issue.

DRB Responsibility:

As agreed to by the Contractor, GLF Construction Corporation, and the FDOT, the DRB convened a hearing on November 10, 2016, to determine entitlement for impacts related to the denial of environmental permit modifications encountered on the project (NOI # 2).

DRB Findings:

1. The DRB recognizes the requirements of the plan notes on sheet B1-12 of the Plans, and specifically Plan notes 1, 3 and 4

Note 1. Schematic construction sequence shown is one possible method to construct the

proposed bridge. Contractor is to develop his own means and methods.

Note. 3. Contractor is to obtain the permits required for the proposed construction method.

Note. 4. Construction means and methods will meet all environmental commitments contained in the contract documents

2. The DRB recognizes the requirements of Specification 103_1.1

Scope of work: Construct the temporary work structure used solely to support construction equipment. Temporary structures include but are not limited to work bridges, elevated platforms and rail systems. Items such as barges, mats or items such as falsework or scaffolding are not included in this Section. If a temporary structure type other than the structure type shown in the plans is chosen, assume all responsibility for obtaining all necessary permit revisions and the Engineer's approval. Conform to any limitations contained in the plans and permits....

3. The DRB recognizes that both GLF Construction Corporation and the FDOT are in agreement that a permit modification is necessary for the Contractor's proposed Temporary Work Structure and that GLF allowed six (6) months for permit modification in its CPM, Haul Road Activities.

4. The DRB has reviewed submittals, and heard the presentations of both GFL Construction and FDOT and is aware of their respective positions.

5. Evidence shows that GLF's proposal for a Temporary Work Structure was submitted to FDOT and processed in a timely manner. During the review of the proposal by FDOT, the permitting Agencies and the permit Signators , it was determined that a permit modification would require a revised Environmental Assessment (EA) and possibly a new Environmental Impact Statement (ESI). Evidence shows that a revised EA would require approximately 4 years to complete (1460 days). No evidence was presented to indicate that GLF contacted the permitting agencies to obtain the permitting agencies approval for a permit modification or that the GLF estimate of 6 months for a permit modification was adequate.

DRB Recommendation:

The DRB concludes that, due to the disparity between the time required to prepare a revised permit that requires a new Environmental Assessment document and the time allowed for construction of the project, the time required for a permit modification would unreasonably delay the construction of the project

After thorough consideration of the position papers and contract documents, the DRB agrees with the FDOT position that GLF Construction Corporation is not entitled to the time and cost associated with the denial of a proposed permit modification (NOI #2) for this project.

The DRB recommendation is the majority decision of the Dispute Review Board Members. A minority opinion is attached.

Respectfully submitted with the consent of all DRB members,

Tom Shafer, P.E.
/T.P.Shafer/

Chairperson

DISSENTING OPINION

This Board Member does not agree with the Majority Recommendation. The reasoning is based on the following Contract Documents and the Minority DRB Members Interpretation of those documents:

Plan Sheet B1-12

- Note #1: Schematic construction sequence shown is one possible method to construct the proposed bridge. Contractor is to develop his own means and methods.
- Note #3: Contractor is to obtain permits required for proposed construction method.
- Note #4: Construction means and methods will meet all environmental commitments contained in the contract documents.

Minority DRB Member Interpretation:

- The FDOT directed the contractor to develop their own means and methods.
- The contractor is to obtain permits required, without any limitations being set on the permit parameters.

Regional General Permit SAJ-92

- Page 4, Paragraph 11: "...If the proposed activity requires re-initiation of Section 7 consultation under the Endangered Species Act with the USFWS on those or any other listed or candidate species or designated critical habitat, the proposed activity cannot be authorized under SAJ-92 until the consultation is concluded."

Minority DRB Member Interpretation:

- Re-initiation of a Section 7 Consultation is allowed.
- Work not specifically covered by the proposed activity can be started while the Section 7 consultation is underway.

Contractor Original Baseline CPM

- Haul Road and Temporary Work Structure construction activities are shown to start on June 25, 2016. (attachment 18 to the contractors rebuttal)

Minority DRM Member Interpretation:

- Notice to proceed was in January of 2016.
- The contractor had planned for over 6 months to acquire the required Permit Modifications needed to build the haul roads.

Eisman & Russo Letter Dated 1/12/2016

(GLF's Proposed Environmental Permit Modification Denial)

- 2nd Paragraph: "Section 103-1.1 of the Specifications states "If a Temporary structure other than the structure type shown in the plans is chosen, assume responsibility for obtaining all necessary permit revisions and the Engineer's approval."
- 3rd Paragraph: "... the Department is not willing to re-open the NEPA Document due to the duration of the initial review and approval, the commitment made during that process and the anticipated length of time required for the revision. GLF's proposal is denied because the NEPA Document will require new analysis."

Minority DRB Member Interpretation:

- 103-1.1 indicates that Engineer approval is required, but this is superseded by the plan notes contained on Plan Sheet B1-12 that state that the "Contractor is to develop his own means and methods"
- Plan Sheet B1-12 also states that "Contractor is to obtain permits required for proposed construction method." There is no mention of Engineer Approval.
- The Department chose to Deny the Proposed Permit Modification based on the 'anticipated length of time' for the review. The Contractor could not reasonably know that Permit Modification could

take as long as 5 years, as was stated by the Department during the DRB Hearing.

- The contractor anticipated a 6 month Permit Modification Process, as is indicated in their CPM Haul Road Activities not starting unit 6+ months into the project. Six months is a reasonable length of time to expect a Permit Modification to take, based on their past experiences, the industry norm, and that there is no permit modification time frames included within the Contract Documents.

Minority DRB Member Recommendation

When the Department denied the Contractors ability to seek a Permit Modification based on the 'anticipated length of time' the review would take, they essentially voided the plan notes on sheet B1-12 and substantially changed the means and methods the contractor had planned for at the time of bid. The outcome of any Permit Modifications is irrelevant now because, although the Contract Documents specifically instruct the Contractor to acquire the permits for their means and methods, they were denied the opportunity to seek those Permit Modifications.

The Minority DRB Member believes that the Contractor is ENTITLED to additional compensation and contract time for this issue. It is recommended that the two parties enter into negotiations for settlement.