

**Choctawhatchee Bay Bridge
FDOT Contract No. E3L23
FIN No. 220664-2-52-01**

**Dispute Review Board Recommendation
NOI # 8
October 18, 2017**

INTRODUCTION:

Skanska USA Civil Southeast Inc. (Skanska) is the contractor for the Florida Department of Transportation's (Department) Choctawhatchee Bay Bridge Expansion project (Project).

The RFP and awarded contract states that the Design-Build Firm shall be responsible for acquisition of all permits not acquired by the Department and any required modification of permits acquired by the Department. Skanska and the Department disagree as to the impact to the contract of the Department assuming control of the permitting process related to the Gulf Sturgeon as required by the Contract Documents and subsequent modifications recommended by the US Fish and Wildlife Service (FWS).

The difference between the planned baseline schedule presented by Skanska and the ultimate timeline for the FWS process equates to 275 days and a claimed cost of \$9 million, more or less.

Skanska and the Department requested a Dispute Review Board (DRB) Hearing and DRB recommendation regarding changes made to the permitting process as required by the Contract Documents.

The question put forth to the DRB for a recommendation is:

Is Skanska entitled to compensation for costs associated with the 275-day delay which resulted from a change that FDOT made to the contract by issuing new requirements related to the project permitting?

The DRB hearing was held on October 6, 2017, at the FDOT Operations Center located in Ponce de Leon, Florida. Representatives of the Department and Skanska in attendance were:

Department:

Ed Hudec, P.E., District 3 Construction Engineer
Bryan Estock, P.E. – HDR, CEI Senior Project Engineer
Fred Brown, P.E. – Volkert, CEI Project Administrator
Billy Robinson, Construction Project Manager
Kellie Harrell, P.E., Design Program Manager
Joy Swanson, Environmental Administrator

Skanska:

John Toombs, P.E., Assistant Project Manager
Jay Erwin Jr., Vice-President of Operations
Sal Taddeo, Executive Vice-President
Marion Mauro, Vice-President, Treviicos South Inc.

POSITIONS OF THE PARTIES:

SKANSKA POSITION STATEMENTS TO THE DRB:

- Skanska complied with RFP requirements to perform project permitting by providing a qualified team to deliver required permits for the FWS utilizing previously collected data to assemble the requisite documents.
- The Department's assumption of the FWS permitting document preparation and agreement to perform a noise study for FWS in connection with the protection of gulf sturgeon ruined Skanska's plan.
- The Department's actions were unjustified because: 1) all parties knew about the presence of gulf sturgeon during the bidding process; 2) the NEPA Reevaluation Process had made findings of no impact to the gulf sturgeon; and 3) the contract contained no requirement for a noise study.
- The Department imposed the study after issuing the Notice to Proceed and without consulting Skanska.
- The Department advised in the RFP that previous coordination with FWS obtained a "concurrence of no adverse effects" for this project (Type II Categorical Exclusion approved February 7, 2000 and subsequent Reevaluation approved August 29, 2012).
- Skanska's environmental consultant, Scheda, anticipated that certain design changes could trigger a Formal Section 7 Consultation as included in the Skanska response to the RFP. Such anticipated

design changes included alterations to the landing points, the bridge alignment, and the amount of fill necessary to construct the park.

- The Notice to Proceed was issued on August 14, 2013. The Department advised Skanska on August 30, 2013 that “HDR was working through a separate contract and will complete the Biological Assessment (BA) document that is submitted to the agencies.”
- Skanska learned subsequently through documents received from a public records request, that the Department had made a change to the project by deciding to conduct an unanticipated noise study regarding impacts to gulf sturgeon.
- The August 26, 2013 FWS letter to FHWA “recommended” that FHWA and the Department consider funding studies both to collect basic data on sound generation from pile driving and to determine the effects of sound on sturgeon.
- Meeting minutes of a September 30, 2013, meeting in the Ponce de Leon Operations Center reveal that the Department had agreed to the new noise monitoring requirement without including Skanska in any discussions regarding such a requirement.
- The September 30, 2013 meeting minutes reflect that the federal agencies involved “agreed to push the test pile permit application non-formal (Section 7) based on the fact that the Department agreed to perform this acoustic study.”
- With the Department controlling the noise study and permit preparation, Skanska lost control of the application process.
- Skanska’s baseline schedule assumed no link between the test pile permit process and the dredge and fill permit processes. The new requirement by the Department to perform noise monitoring during the test pile process, linked the two.
- On December 3, 2013, the Department informed Skanska that Skanska was required to submit noise data with the BA and that some pile driving would have to be completed to have this noise data. This could not have been anticipated based on the contract documents or published Section 7 Consultation information available when preparing their proposal.
- Skanska submitted the United States Army Corps of Engineers (USACE) Dredge and Fill Permit application on December 23, 2013 without the BA because the Department had not completed the BA.
- The Department did not submit the required BA until March 13, 2014.

- Skanska's schedule was based on having completed the FWS permitting process by May 7, 2014. This would have allowed pile driving to occur during the fish window identified by the RFP contract documents.
- The final Biological Opinion (BO) was not provided to the USACE until December 8, 2014. And the Bridge Permit was not issued until March 17, 2015. Pile driving could not begin until May 1, 2015 because of another fish window as identified by the RFP and contract documents.

DEPARTMENT'S POSITION STATEMENTS TO THE DRB:

- The Department requests the DRB find no entitlement for additional time or compensation associated with Skanska's Notice of Intent to file claim for Noise Study Impacts on Biological Assessment (NOI #8 dated May 16, 2014).
- There are two distinct processes - NEPA and Permitting. Permitting cannot occur until NEPA is complete.
- The 2012 Re-evaluation designated Choctawhatchee Bay as critical habitat for gulf sturgeon as evidenced by Attachments 3 A, B and C of the Department's position paper.
- Skanska acknowledged Section 7 Consultation in response to the RFP. Section 7 Consultation is required when the permitting agency determines that there may be adverse effect on listed species.
- Section 7 Consultation is NEPA (The BA and BO).
- FWS recommended the noise study and the Department agreed. Attachment # 10 discussion addresses that once the determination was made to do the noise study the game changed. The Department has sole control over the HDR preparation of the NEPA document BA.
- FWS wanted Florida sturgeon information due to the number of bridge projects coming up.
- Attachments # 15 and 16 state Department control over NEPA Document preparation and the Design/Build Firm (Skanska) cannot prepare NEPA documents for this contract.
- RFP section 5-D is clear—the DCE has authoritarian control for a non-compensable time extension due to any impacts on Skanska beyond the reasonable control of Skanska in securing permits.
- Skanska was notified by letter from DCE Ed Hudec dated February 19, 2016, that the Department was granting 199 days non-compensable time extension due to delay in issuing Federal permits.

The time granted was determined by the fact that the USACE dredge and fill permit was approved on Feb 3, 2015. This was 304 days after the anticipated approval date within the initial acceptable schedule of April 5, 2014. The difference less concurrent delays for weather, holidays or other delays represents the maximum impact. (50 weather, 29 holidays, and a share of 53 day delay for requested date of permit submittal- October 2013 and actual submittal December 23, 2013—Ed Hudec assigned 26 days of delay to Skanska). Net is 304 less (50 weather, 29 holidays, and 26 shared delay) for total of 199 days.

- The BA is controlled by the Department—which has sole discretion on who prepares it.
- Once the BO is complete, the permitting process begins. The BO is a NEPA document.

DRB ANALYSIS:

The DRB asked questions of the parties to clarify the statements made during their respective position presentations. These questions were to help the DRB with specific technical issues regarding the NEPA and ESA permitting parameters spelled out in the RFP and accompanying Federal Code, 23 CFR 636.109.

Skanska presented information addressing the RFP requirements regarding the notices from the Department which included designation of Choctawhatchee Bay as critical habitat for the Gulf Sturgeon. This was known prior to award of the contract and was addressed by Skanska in Skanska's Technical Proposal. Knowledge of the NEPA and Endangered Species Act (ESA) codes was addressed by the Technical Proposal as well.

The NEPA document was a Type 2, Categorical Exclusion that included known fish species that were on the endangered or threatened list, listed species, which are known to inhabit Choctawhatchee Bay waters. The FWS is a permitting agency tasked with the identification and protection regulations for listed species. The Department, through its numerous environmental documents and manuals, provides guidance to Design/Build teams on how to develop permit packages to submit to the FWS and other agencies. The crux of the issue with this project is how this was handled after award of the contract as the process relates to a new requirement to conduct noise studies for pile driving.

The Department presented statements that directed attention to the post award process that conflict with the processes identified by the RFP, particularly Department Attachment 18- "Section D. Environmental Permits: All applicable data shall be prepared in accordance with...and parts 114 and 115, Title 33, Code of Federal Regulations. Acquisition of all applicable permits will be the responsibility of the Design-Build Firm. If any agency rejects or denies...it is the Design-Build Firm's responsibility to make whatever changes necessary to ensure the permit is approved. The Design-Build Firm will be required to

submit all permit packages and responses to permitting agencies to the Department for review and approval prior to submitting to the permitting agency. The Design-Build Firm will be required to obtain appropriate signatures from the Department for the permit(s) prior to submitting to the permitting agency”.

The Department’s interpretation presented to the DRB states that the preparation of the BA, by HDR, and the BO, by National Marine Fisheries Service (NMFS), are both NEPA documents. The Department further emphasized that these documents were the result of changes proposed by Skanska that required a revised NEPA document (Reevaluation). This interpretation is not supported by the many environmental guideline documents referenced by the Department. The changes highlighted for the DRB include those which were identified by Skanska’s technical proposal in response to the Department’s RFP, i.e. “alterations to the landing points, the bridge alignment, and the amount of fill necessary to construct the park.”

The Department’s PD&E Manual, Part 1, Chapter 5 explains the Type 2 Categorical Exclusion procedure.

PD&E Manual, Part 1, Chapter 12 explains the Environmental Permit process begins after the NEPA document, i.e. Type 2 Categorical Exclusion, is completed and approved.

Neither of these references has co-dependence on the other, aside from Permitting following NEPA. The NEPA process includes appropriate re-evaluations at major project development junctures, e.g. design, construction, and the Environmental Permitting process includes appropriate guidelines for procuring applicable permits that are project specific. The Type 2 Cat Ex concludes with preparation of the document and reevaluations as appropriate before construction begins.

Between the project Notice-to-Proceed date of August 13, 2013, and the direction given to Skanska in a meeting at PDL Operations Center on August 30, 2013 (which changed the anticipated schedule of construction permitting and pile driving) the Department agreed to require a noise study to provide data to NMFS and FWS for the effects of pile driving on Gulf Sturgeon and other species. This agreement to conduct the noise study was in response to a recommendation contained in a letter from FWS to FHWA dated August 26, 2013. Skanska was not advised of this change prior to the August 30, 2013 meeting.

DRB RECOMMENDATION:

This DRB recommendation is based upon the information presented to the DRB by both parties in their position papers, by their testimony at the DRB Hearing, and the DRB's analysis and corroboration of that information. This DRB recommendation is a unanimous recommendation of the DRB members: Bill Deyo, P.E., DRB Chairman, James Weeks, P.E., DRB Member, and Dr. Edward Minchin, P.E., DRB Member.

The DRB finding is that in accordance with the RFP and executed contract provisions, Skanska was required to prepare permits for the project to be submitted by the Department to the resource agencies. The Department accepted the baseline schedule presented by Skanska which established the anticipated timeline for securing permits for the contract. The Department did not include Skanska in discussions to make the contract change to provide for noise studies of pile driving effects on the Gulf sturgeon nor to have another party prepare contract permitting document, BA, identified by Skanska's accepted project proposal as being Skanska's responsibility. This contract change did clearly impact Skanska's ability to adhere to a reasonable schedule to secure permits for the pile driving operation.

The DRB recommendation is that Skanska is entitled to compensation for costs associated with the delay which resulted from a change made to the contract by the Department. Specifically, Skanska is entitled to a compensable time extension under Section 8-7.3.2 for the change directed by the Department and the Department's failure to adhere to its obligation under terms of the contract that resulted in delays to Skanska's controlling items of work and the corresponding provisions of 5-12 and 4-3.2.1.

Submitted by and for the DRB

Bill Deyo

Bill Deyo, P.E. DRB Chairman