

DISPUTES REVIEW BOARD RECOMMENDATION

HEARING DATE: MAY 1, 2017

Kevin Buchanan  
Anderson Columbia Co., Inc.  
2316 Highway 71  
Marianna, Fl. 32448

Lee Carter  
Parsons Brinckeroff  
3371 Sasser Rd.  
Vernon, Fl. 32217

RE: Financial Project Nos. 220772-9-52-01 & 56-01

Contract No. E3K68

SR Multi-Lane Improvements, Washington & Holmes County

Gentlemen:

Anderson Columbia, the Contractor, and Parsons Brinkerhoff, CEI for the Florida Department of Transportation, requested that the Disputes Review Board (DRB) meet to hear both parties' position regarding a dispute which arose during the construction of the referenced project. THE DRB was asked to make a recommendation regarding entitlement.

The DRB received Position Papers and Rebuttals from both parties and on May 1, 2017, the DRB heard both sides discuss the issue. Both parties summarized their positions which are paraphrased here.

## Contractor's Position

The Contractor (ACCI) asserts that they are entitled to monetary compensation for delays caused by AT&T, a utility company which had to perform work before ACCI could construct the new work. ACCI recognizes that as a Design Build project, the RFP and contract documents allow for "no compensation for delay ... granted for utility delays..." They further reason that this specification language is "based on the existence of a Design Build Utility Agreement being in place." And, since the Department did not enter into any Design Build Utility Agreements, therefore the "no compensation ...for utility delays" specification does not pertain.

The Contractor also contends that "it was determined that our (ACCI's) interpretation of the specification was correct..." And as evidence of that agreement between the parties, they cite that meeting(s) were held at which "the CEI and FDOT Project Manager were instructed to follow the CPAM in resolution of this claim."

The Contractor describes extensive efforts to coordinate with AT&T to get their relocation work accomplished without delaying the project. They describe their efforts being frustrated and "that ACCI had no method of enforcement to compel the utility to comply...".

Since there was no Utility Agreement in place with AT&T, and since they had no means to compel AT&T to perform on a timely manner, they reason that negotiations took place including the CEI and FDOT to compensate ACCI, and they should therefore be entitled to monetary compensation.

## Department's Position

The Department's position (as stated by the CEI) is that no monetary compensation is entitled to the Contractor for delays caused by Utilities, in this instance AT&T. The CEI cites a specification from the Design-Build specifications which states, "No payment, compensation or adjustment of any kind... shall be made to the Contractor for damages because of hindrances or delays arising out of or connected with the performance of utility work..." and "the Contractor will accept any extension of time ... as full satisfaction for such hindrances or delays...".

The CEI contends that "the Design-Build Firm is responsible for all utility coordination on the project".

## The Contractors Rebuttal

ACCI states that they were aware of the Contract language quoted by the CEI; however, the "Design Build Utility Agreement is the ONLY mechanism the Department has given the contractor as a means of compelling the utility company to complete their work in the time frame agreed to by the Utility, as referenced in their Utility Work Schedule. In the absence of that Design Build Utility Agreement the contractor is left with no method of recourse to compel the utility owner to perform." "...the only recourse ACCI has is to file a claim with the Department and the Department to look to the utility to reimburse the amount of compensation referenced in the claim, if they chose to do so."

ACCI contends that at a meeting on August 25, 2015, attended by representatives of the FDOT, ACCI and CEI, "clear direction was given to follow the CPAM in the resolution of this claim. Specifically, a 60 day period of time was given from the date the claim documentation was provided (Sept.24, 2015), according to the CPAM, to allow AT&T to negotiate directly with ACCI to resolve this claim. If AT&T failed to negotiate with ACCI direction was given for the Department to negotiate with ACCI on behalf of AT&T to resolve this claim. It was our understanding after leaving that meeting that a path to resolution had been set and the establishment of entitlement had been made."

ACCI contends that ATT worked in other phases, that did not help ACCI's work effort, to better benefit A&T upgrade their own system, including work permitted by FDOT. ACCI contends this out-of-phase work should not have been permitted until the Phase A work had been completed.

Utility schedules do not carry the clout that a Design-Build Utility Agreement would. And ACCI was unable to get utilities to sign such as Agreement, only the Utility Work Schedule.

## Department's Rebuttal

The CEI for the Department rebuts: "The absence of any Design-Build Agreements for this project does not default back to specification 5-12 for resolution of this issue..." They go on to reiterate that, "Specification 7-11.6.10 clearly states there will be no payment, compensation or adjustment of any kind except as a third-party beneficiary against a utility entity" and that specification "does not refer back to Specification 5-12 regarding utility delay claims...".

And 7-11.6.7 states: "The Department makes no representation that Design-Build Agreements have been executed..." and "the Design-Build Firm shall be responsible for performing or arranging for the performance of all utility work..."

When asked if the meeting referred to by ACCI had resulted in a Supplemental Agreement to resolve this issue, the Department stated: "No" Supplemental Agreement, only a "draft" Supplemental Agreement was prepared.

ACCI had signed Utility Work Schedules which satisfied Section 337.11(7)(a) of Fla Statutes to allow construction activities to begin.

## Finding of Facts

This board met regularly (monthly) during most, if not all of the time while this issue was developing, and regularly (now bi-monthly) since this issue was sent to Central Office for resolution. It was our understanding from these meetings that the Contractor and the CEI were working together to resolve the issue. We attended Utility Coordination Meetings, the Progress Meetings, and then held our (DRB) meeting. We heard at most all meetings about the utility delays, including ATT. When we did not hear about how the ATT claim was being handled, we asked. Many times we were told that it was being handled according CPAM.

This project is a Design-Build project. Therefore, the Contract is defined in the specification as "Contract Documents" as follows:

"The term "Contract Documents" includes: Advertisement, Request for Proposal (RFP), the Design and Construction Criteria Package, the Technical and Price Proposal, Certification as to Publication and Notice of Advertisement for Proposal, Appointment of Agent by Nonresident Contractors, Noncollusion Affidavit, Warranty Concerning Solicitation of the Contract by Others, Resolution of Award of Contract, Executed Form of Contractor, Performance Bond and Payment Bond, Design Liability Insurance, Specifications, plans (including revisions thereto issued during construction), Addenda, written statements or transcripts or minutes of oral representation by Design-Build Firm made at oral presentations or other information mailed or otherwise transmitted to the prospective bidders prior to the receipt of bids, work orders and supplemental agreements, all of which are to be treated as one instrument whether or not set forth at length in the form of contract."(Definitions Contract Documents)

The Contractor is responsible for coordination of Utility work which must occur for them to do their work:

“...The Design-Build Firm shall be responsible for coordinating with all existing utility companies that have facilities within the job limits or which will be affected in any way by the Project and for coordinating all utility work with the Project schedule.” (7-11.6.5 General Requirements)

“...The Department has entered into Design-Build Utility Agreements with certain utility companies that may have utility facilities located within the limits of the Project.” (7-11.6.6 Design Build Agreement)

“...The Design-Build Firm shall fully comply with all obligations of the Firm under those agreements.” (7-11.6.6 Design Build Agreements)

“...The Department makes no representation that a Design-Build Agreements have been executed with all utilities that have facilities located with the limits of the Project. For any utility that has not entered into a Design-Build Utility Agreement, the Design-Build Firm shall be responsible for performing or arranging for the performance of all utility work.”  
(7-11.6.7).

And, Claims relating to Utility work may be granted time, but not payment.

“...No payment, compensation or adjustment of any kind (other than extensions of time for completion as may be otherwise granted pursuant to other provisions of the (Contract Document) shall be made to the Contractor for damages because of hindrances or delays arising out of or connected with the performance of utility work for the project except as a third party beneficiary against a utility entity only as allowed pursuant to the terms and conditions of any Design-Build Utility Agreements that exist for the project, regardless of the cause of such hindrance or delays and whether such hindrances or delays be avoidable or unavoidable, and the Contractor agrees that it will make no claim for compensation, damages or

mitigation of liquidated damages for any such hindrance or delays and will accept any extension of time otherwise granted pursuant to other provisions of the Contract Document as full satisfaction for such hindrances or delays, except as a third party beneficiary against a utility entity only as allowed pursuant to the terms and conditions of any Design-Build Utility Agreements that may exist for the project; provided that nothing herein shall obligate the Department to grant an extension of time not otherwise due and the failure of the Contractor to be granted an extension of time shall not create any entitlement to compensation, damages or mitigation of liquidated damages.”(7-11.6.10 Claims Due to Utility Work)

No final evidence was produced showing any written agreement between the Contractor and the Department which changed the responsibility for Utility coordination.

The CPAM is not a Contract Document.

## Board Recommendation

Since the contract states that the responsibility for coordinating with Utilities is placed on the Contractor with no provision for added compensation for delays caused by utilities, and

Although the Contractor diligently tried to coordinate their work with the Utilities, and

Although the contractor tried to work around the Utility facilities in their way, and

Although the parties to the Contract tried to work together to find a mutually agreed upon just settlement,

No written agreement signed by both parties to the Contract was reached or produced.

Therefore, this Board determines that by the Contract, the Contractor is entitled to time being added to the Contract for delays caused by the Utility, but is not entitled to additional monetary compensation.

The above determination follows the letter of the Contract. However, the Board believes the draft Supplemental Agreement constituted a meeting of the minds between the Contractor and Department representatives. The Department could settle this claim with the Contractor and then the Department could lay claim to the Utility in the amount of the compensation to be returned to the Department. The Contractor does not have the wherewithal to lay claim to the utility, but the Department does.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of the recommendation by the non-responding party.

I certify that I participated in the Hearing of the DRB regarding the Dispute indicated above and concur with the findings and recommendation.

Respectfully submitted,

A handwritten signature in green ink, appearing to read 'J. Weeks', is written over the text 'Respectfully submitted,'.

Jim Weeks, P.E. Chairman

Bill Deyo, P.E., Member

Tom Shafer, P.E, Member