

DISPUTE REVIEW BOARD RECOMMENDATION

August 1, 2002

Mr. Wayne Perdue
Metric Engineering, Inc.
PO Box 608
Freeport, FL. 32439

Mr. Luther White III
White Construction Company, Inc.
PO Drawer 790
Chiefland, FL. 32644

Re: FIN No. 220642-1-52-01
Walton County SR 30 (US 98)
Dispute Review Board Recommendation
Mack Bayou Wetland Delay Claim

Dear Sirs:

The Florida Department of Transportation (Department) and White Construction Company, Inc. (WCCI) requested a hearing concerning entitlement to a delay which occurred on the project. Summaries of the Department's and WCCI's positions were forwarded to the Disputes Review Board (DRB), and a hearing was held on July 30, 2002.

ISSUE: Is the contractor entitled to delay damages and a time extension due to having had operations shut down to a controlling operation of work by DEP (Florida Department of Environmental Protection)?



Contractor's Position

White Construction Company, Inc. (WCCI) intended to clear and grub the left (north) side

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of the project, beginning at the western end and working toward the east end, in order to accommodate the utility companies need to access these areas for utility relocation. WCCI planned to commence phase I stormwater drainage system installation once the utility companies sufficiently relocated their facilities in accordance with the utility relocation schedules contained within the contract documents. The utility relocation schedules indicated that the relocation of the utilities in the area of the Mack Bayou stormwater drainage system would be completed in January 2001

Because of the other areas of utility relocation through out the project and based on the expected date that the Mack Bayou Area would be clear of utility conflicts, WCCI planned to commence the installation of the Mack Bayou Pond stormwater drainage system in January 2001 - starting with the low point of the piping system at the pond and working south along Mack Bayou Road toward SR 30. Upon reaching SR 30, installation would continue along SR 30 towards the west end of the project. The excavation of the Mack Bayou Pond and the installation of the drainage system feeding into the pond were planned to be constructed concurrently. Both the pond excavation and the drainage system were to be completed prior to the placement of base material between station 1084+46 L (west end) and 1096+34 L (Mack Bayou Rd / SR 30 intersection) on the mainline roadway (SR 30).

The clearing and grubbing of the Mack Bayou Pond began on September 28, 2000, with the cutting of trees, and continued until October 29, 2000.

Work associated with the burning of stumps and dressing up of the pond area was performed during the period of December 7, 2000 through December 10, 2000.

The removal and storage of Top Soil began on December 11, 2000 and continued through December 20, 2000.

Delivery and storage of drainage structures and piping in the Mack Bayou Pond area occurred on December 20, 2000.

On January 9th and 10th (2001) a sock drain was installed at Mack Bayou Pond in preparation for deeper excavation to begin.

On January 10, 2001, an Army Corp of Engineers (ACE) representative visited the project site and commented that the work that had been performed at the Mack Bayou Pond had impacted wetlands in violation of the ACE permit for this project. Obtaining this permit was the sole responsibility of the Florida Department of Transportation (FDOT). At that time, based on the comments Made by the ACE representative, WCCI stopped work at the Mack Bayou Pond site.

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On January 23, 2001, WCCI received a CEASE AND DESIST ORDER from the ACE. This Order stated that some of the work that had been conducted in the Mack Bayou Pond (and 2 other ponds) was in wetlands that were not included in the ACE permit for this project. The Order went on to state that any further work in those sites may result in immediate legal action against WCCI by the ACE and could result in civil fines of up to \$25,000 per day, criminal fines of up to \$50,000 per day, and even possible imprisonment.

WCCI made immediate contact with Metric Engineering, Inc. (Metric), the FDOT's CEI for this project, about the CEASE AND DESIST ORDER and was told that the FDOT and the ACE were in the process of negotiating the wetland issue. WCCI noted that the Contract Documents did not designate the areas as wetlands and WCCI could not have been expected to have knowledge of such prior to notification by the ACE. WCCI went on to state that we would abide by the Order until a resolution between FDOT and ACE could be reached. Metric reinforced this by directing WCCI in writing to refrain from further work in the areas designated in the Order from the ACE until further notice from the FDOT.

In accordance with 5-12 of the Special Provisions, WCCI notified Metric of our Intent to File Claim for any damages (time and Money) that were a result of this issue and that were beyond the contractors control, within the control of FDOT, and unforeseeable at the time of bid. This written notification was delivered to Metric by WCCI letter dated January 25, 2001.

During the late afternoon of January 31, 2001, WCCI received written release from Metric and ACE that excavation in the Mack Bayou area could proceed with due care so as to disturb the remaining wetlands as little as possible. That same afternoon, WCCI received a telephone call from the Florida Department of Environmental Protection (FDEP) stating that the FDEP viewed the wetland issue differently than the ACE and the FDOT and they expressed their strong concerns with work continuing in the wetland areas. The FDEP also stated that it would hold WCCI responsible for further activity in these areas. The next Morning, WCCI notified Metric of the FDEP telephone call. Metric instructed WCCI to proceed with the Mack Bayou work. WCCI stated that we would proceed as directed, even though we were leery of the situation.

On February 2, 2001, WCCI, still concerned with the comments of FDEP, expressed to Metric that we were anxious to excavate in the Mack Bayou Pond and to begin the drainage system installation, however, WCCI was still unsure of the locations of the wetlands (as no revised plans had been drawn) and we requested that the FDOT locate and

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mark the wetlands prior to our proceeding with work in the area - this was necessary to assure protection of the remaining wetlands.

On February 6, 2001, Metric informed WCCI that work was to proceed with caution to preserve any remaining wetlands at the Mack Bayou Pond Area; nevertheless the FDOT was-refusing to mark out which areas were wetlands and which areas were not.

On February 7, 2001, WCCI cautiously proceeded with excavation and drainage activities. This work continued until February 20, 2001.

On February 20, 2001, WCCI received a letter from the FDEP stating that the work at the Mack Bayou Pond may be in violation Florida Statutes regarding wetlands and that work was to cease immediately.

After receiving the FDEP letter, WCCI made contact with Metric. Metric told WCCI that the FDEP had informed FDOT that it knew work had to be performed in the area and the FDEP was only directing that no additional damage be done to the wetlands. When WCCI asked Metric where the wetlands started and stopped, Metric replied that that was a matter of opinion. WCCI reminded Metric that the FDEP had the authority to pursue criminal charges, therefore WCCI would not work in the areas at issue until released by FDEP and FDOT and the wetlands were marked off.

The FDEP wrote the FDOT stating resolution of this situation could be achieved by restoration work and that the sites needed to have the wetland areas delineated with flags to assure the ponds were located on uplands in accordance with the permits.

On Friday, February 23, 2001, Metric wrote WCCI stating that the FDOT 'felt' that WCCI was released to work in the upland areas on the Mack Bayou Pond site. Even though the FDOT had marked the locations of the wetlands, as previously requested by WCCI and demanded by the FDEP, WCCI was told by the FDOT person installing the wetland area markings that the FDEP was going to change the markings. WCCI concluded that due to all the previous disagreements between the various agencies, WCCI needed concise and certain directions on how to proceed and the 'feelings' of the FDOT could not be relied on for this issue.

The FDEP's March 2, 2001 letter to WCCI stated that the FDOT had flagged the wetland areas and that WCCI could proceed with construction operations in the upland areas and those areas of wetlands authorized by the permit and the 48" intake stormwater pipeline could be installed from the Mack Bayou Pond through the wetlands to Mack Bayou Road. The FDEP also stated that the fill pile located in the wetlands was to be removed.

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On March 6, 2001, Metric informed WCCI in writing that work could proceed in accordance with FDEP's letter dated March 2, 2001 and that the restoration work requested by FDEP would have to be performed.

In response to the FDEP March 2nd letter and Metric's March 6th letter, WCCI noted that revised plan drawings had not yet been received. The revised drawings were again requested on March 13' and March 16th. The restoration work, under the direction of FDOT, began on March 14th. The revised plans were finally received by WCCI on March 16, 2001. Work proceeded on March 16h.

On March 23, 2001, WCCI notified Metric that during the survey process for the proposed Mack Bayou Pond, determination was made that a portion of the pond berm would be in the designated wetland area - that was off limits to construction. WCCI request direction on how to proceed and approval from the FDEP before it could construct the pond in accordance with the revised plans.

At a meeting held on March 28, 2001, the FDEP stated that WCCI was not responsible for damages to the wetlands and that the FDOT would be required to restore the damaged wetlands. On April 10, 2001, the FDEP officially rescinded the Warning Letter issued to WCCI in February. This letter further states that our actions were determined to be in accordance with permit drawings as well as written and verbal direction from the permittee (FDOT).

WCCI acted in accordance with the Contract Documents and was not responsible for damages to the wetlands at the Mack Bayou Area nor for the resulting delays or additional costs incurred for the associated work stoppages and restoration activities.

Department's Position

The Department determined that there is no compensation due to the contractor citing Article 8-7.3.2 which states in part:

"...Make a preliminary request for an extension of Contract Time in writing to the Engineer within ten calendar days after commencement of a delay to a controlling item of work. If the Contractor fails to provide this required notice, the Contractor waives any rights to an extension of the Contract Time for that delay. In the case of a continuing delay, the Engineer will require only one request. Include with each request for an extension of time a description of the dates and cause of the delay, a complete description of the magnitude of

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the delay, and a list of the controlling items of work affected by the delay. Within 30 days after the elimination of the delay or the receipt of a written request from the Engineer, submit all documentation of the delay and a request for the exact number of days justified to be added to the Contract Time. If claiming additional compensation in addition to a time extension, include with the documentation a detailed cost analysis of the claimed extra compensation. The Contractor's failure to deliver the required notice or documentation within the required period constitutes an irrevocable waiver of an extension to the Contract Time for that delay. The Contractor's failure to provide sufficient documentation, justification, records, etc., to support a request for additional Contract Time is a valid basis for the Department to deny the request either in part or entirely.”

The Department believes that they cannot grant time or money because WCCI did not submit their detailed time and monetary request within 30 days of the cessation of the delay.

White Rebuttal

White Construction Company, Inc. (WCCI) is in receipt of the Department's letter dated June 6, 2002 in which the Mack Bayou Wetland Claim is denied based on the Department's contention that WCCI failed to submit the package within the 30-day time frame.

By letter dated October 19, 2002, Metric Engineering directed WCCI to submit our claim package in accordance with 5-12.2.2 and 5-12.3 of the Special Provisions.

Although 8-7.3.2 of the FDOT specifications (1999) does set forth a 30-day time frame for contract time extension submittals, Article 5-12.2.2 of the Special Provisions allows for 180 calendar days after final acceptance to submit full and complete documentation of a claim in accordance with 512.3. Therefore, based on the contract documents, the Mack Bayou Wetland Claim was submitted well within the allowed time frame.

DRB Findings

During the Hearing, the Board pointed out that there appears to be a conflict between Article 8-7.3.2 in the Standard Specifications and Section 5-12 of the Special

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Provisions which states:

“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.

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 notify the Engineer in writing 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. If such notification is not given 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. Such notice by the Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor’s receipt of the Department’s final estimate.

Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing suit against the Department for the items and for the sums or time set forth in the Contractor’s written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request,

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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.

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. The timely providing of a written notice of intent or preliminary time extension request to the Engineer are each a condition precedent to any right on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request 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 that delay. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3. There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2(c), and then only to the extent the Contractor could not reasonably mitigate such idleness."

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The Department stated that they did not believe there was a conflict because Section 5-12 of the Special Provisions only modifies Section 5-12 of the Standard Specification, not Article 8-7.3.2 of the Standard Specifications. White believes otherwise; article 5-12 of the Special Provisions takes precedence.

Section 5-2 of the Specifications states:

“These Specifications, the plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in such pay items additional, incidental work, not specifically mentioned, when so shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items.

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

- 1. Special Provisions.*
- 2. Technical Special Provisions.*
- 3. Plans.*
- 4. Road Design, Structures, and Traffic Operations Standards.*
- 5. Developmental Specifications.*
- 6. Supplemental Specifications.*
- 7. Standard Specifications.*

Computed dimensions govern over scaled dimensions.”

DRB Recommendation

The Board finds that a discrepancy exists between Section 5-12 of the Special Provisions and Article 8-7.3.2 of the Standard Specifications. In cases of conflict the order of precedence is quite clear. The Special Provisions rule over the Standard Specifications. Therefore the board finds full entitlement to the Contractor’s position and recommends that the parties enter into immediate negotiations for time and money.

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It should be pointed out that even if the Board accepted the Department's argument that Article 8-7.3.2 was not modified by Section 5-12 of the Special Provisions it would not change this recommendation. Article 8-7.3.2 would then become equal in standing but a discrepancy would still exist, and in that case, the drafter of the document is liable.

During the hearing the parties agreed that they would endeavor to negotiate the quantum should the contractor prevail. However, the Board will be prepared to consider quantum on September 5th. The parties should have their quantum positions to the Board 15 days prior to September 5, 2002 even if they believe the issue might be settled prior to the hearing date.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in all of the meetings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board

Jim Vest, DRB Chairman

Rammy Cone, DRB Member

John Coxwell, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

DRB Member Rammy Cone for Jim Vest, Chairman



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August 14, 2002

Mr. Jim Vest
4460 Surrey Lane
Niceville, Florida 32578

RE: FPN#: 220642-1-52-01, 220637-1-52-01, and 220637-2-52-01
FAP No.: 4222-049-P, 42220-050-P, and 4222-053-P
County: Walton Contract No.: 20944
Description: SR 30 (US 98) From CR 30 A West to SR 83 (US 331) and
from a Point West of Mack Bayou to CR 30 A West

Dear Mr. Vest:

The Department is in receipt of the Disputes Review Board's recommendations concerning the DEP issue.

As per the recommendations, this is the Department's Notice of Rejection of the DRB's recommendation. In accordance with the DRB Third Party Agreement, this is not an appeal given that no new evidence is submitted.

The Department rejects the issue because we fully interpret the Specification as not to be in conflict. The Department still submits that Section 8-7.3.2 stands alone. Had White Construction Company, Inc. submitted the request for time and compensation within the thirty (30) days, as provided by the contract documents, and the Department reviewed the submittal denying or making offer of reduced amount, then Article 5-12 would have then been the contract provisions WCCI could follow in submission of a claim. However, the fact remains, WCCI did not submit the request for time and compensation within the thirty (30) days as allowed by the contract documents and thereby has irrevocably waived all rights to a contract time extension and costs associated with that extension.

The Department intends to continue a good faith effort of negotiation to equitably resolve this issue. However, since the Department rejects the recommendation, the Department will not participate in a quantum hearing on this issue.

Sincerely,
Metric Engineering, Inc.

Phillip Gainer, P.E.