

## RECOMMENDATION No. 2

November 12, 2007

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Re: Financial Project ID: 231918-1-52-01 / 02  
Federal Aid Project Number: 0951 568 I  
Contract ID: T4039  
County: Palm Beach,  
Description: SR-9 ( I-95 ) 12<sup>th</sup> Avenue South to 10<sup>th</sup>  
Avenue North

Subject: Convene Dispute Review Board and Conduct a Hearing for Entitlement  
Regarding Contractors Request for Additional Time and Compensation for  
Northbound Outside Lane Cross Slope between Bridges

The Dispute Review Board was convened for a hearing requested by The  
Corradino Group. The Hearing was conducted on November 5, 2007 in the  
Conference Room at 321 South Dixie Highway , West Palm Beach, FL.

Packages of information and position statements were presented to the Board by both  
parties and excerpts are included in this recommendation.

### Astaldi Construction's Position:

Subject: Typical Section @ Sta. 1084+00 NB

### ISSUE:

Is Astaldi entitled to a delay claim due to plan error between the 6<sup>th</sup> avenue Bridge and the  
Viaduct?

### HISTORY:

There was a plan error between the 6<sup>th</sup> Avenue Bridge and the Via-duct. The Typical section  
drawing sheet no. 16 (see page 31) indicates the outside travel lane to have a 3 % cross slope and  
the 12' shoulder to have 6 % cross slope. The vertical profiles drawings no. 81 & 82 (see Pages  
32 & 33) indicates that at station 1079 + 46.34 that the outside shoulder begins a transition from  
a - 2% cross slope to a - 6% cross slope at station 1080+46.34. The problem is that the 6<sup>th</sup>  
Avenue bridge and approach slab has a 2% cross slope. The outside travel lane at a 3% cross

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slope would create a drop off situation. On the North end at station 1084 + 63.52 the approach slab has a cross slope of approximately 2%. Again the vertical profiles fail to indicate a transition in the outside travel lane and the shoulder creating a speed bump and a 6" reveal on the precast traffic railing on top of MSE wall 4. Astaldi notified the Engineer immediately on September 13<sup>th</sup> that there was a conflict in the plans and that the solution was to build the outside travel lane at a 2% cross slope and transition the outside shoulder at the viaduct approach slab. Note that Astaldi had already blue topped this section of roadway on September 10<sup>th</sup> and on the 11<sup>th</sup> & 12<sup>th</sup> had graded the rock when the conflict became apparent. (see pages 23-30) The Morning of the 13<sup>th</sup> is when we figured out the problem and corrected the blue tops accordingly. On September 14<sup>th</sup> the Engineer of Record confirmed in his response that "After verifying the profiles and wall control elevations the outside travel lane in this area was designed to be at a 2% slope. So we concurred with the request as it is in agreement with the proposed plan (see page 6). On September 19, 2007 The Corradino Group sent a letter offering Astaldi \$ 377.00 to resolve this issue with no time; and stating that an asphalt wedge on the outside travel lane would solve the problem, they did not address the shoulder that has no transition on the South end of the Via-duct.( see pages 7-9)

**Astaldi Construction's Position:**

Astaldi is entitled to a delay for this impact. In accordance with the special provisions a controlling item of work is "*The activity of work item on the critical path having the least amount of total float.*"(See Page 60) The finishing of base rock at this location was interrelated with the finishing of base rock north of the viaduct, the finishing of base rock on the 10<sup>th</sup> avenue exit ramp along with the asphalt paving of these areas, which all influenced the phase IV traffic shift. As such the finishing of this base rock and or paving wedges as the Corradino Group contends would extend the contractors time or performance at this area. Delay is defined as "*Any unanticipated event, action, force or factor which extends the Contractor's time of performance of any controlling item of work under the contract. The term "delay" is intended to cover all such events, actions, forces or factors, whether styled "delay", "disruption", "interference", "impedance", "hindrance", or other wise, which is beyond the control of the Contractor, or the Contractor's subcontractors, materialmen, suppliers or agents.*"(See page 61) In accordance with article 5-12 Astaldi notified the Department of its intent to claim for this impact on September 14<sup>th</sup>, 2007 and followed up with preliminary request for time extension as

required.(see pages 5,10&11) The issue is not how the plan error was resolved either correcting the base rock or asphalt wedges. The issue is: were the critical items of work impacted? The answer is yes. The department can argue that the asphalt wedge may have had less of an impact, but it still would have impacted the controlling items of work. In discussions with Ranger South (Asphalt Subcontractor) a wedge of asphalt transitioning from 2% to 3% on the outside travel lane and from 6% to approximately 2% on the shoulder is not the preferred solution. It can be done, but with the tolerances of the specifications the cross slope control on their paver does not give them the sufficient control to put transitions on grade within the specified tolerances and usually requires profile milling to pass the straightedge testing requirements. The bottom line is that time was lost due to this plan error. In accordance with the August 17 schedule update the completion of phase 3 traffic shift activity ID 4-I95-0000 was to be completed on **September 20<sup>th</sup> 2007** (see Page40-45) The schedule update of September 14<sup>th</sup> 2007 shows completion of phase 3 traffic shift occurring on **September 28<sup>th</sup>, 2007** indicating an impact to the schedule.(see page46-53) The schedule update dated October 16<sup>th</sup> 2007 indicates that the completion of phase 3 traffic shift did not occur until **October 10<sup>th</sup> 2007**. (See page54-57). By definition the controlling items of work is *“The activity or work item on the critical path having the least amount of total float. The Controlling items of work will also be referred to as a Critical Activity”* (see page 60). Based on the August schedule Activity 3C-I952060 base rock does not have the least amount of total float due to the flawed logic in the schedule. Astaldi’s position on this matter is that while activity ID 3C- I952060 in august had a negative float of -168 days and Activity ID 4-I95-0000 complete phase 3 had a negative float of -190 this is solely due to the logic errors in the schedule. The actual start dates of activities already progressed in July where not verified and more than likely were flawed as well.(base rock activities starting on July 20<sup>th</sup>). Consequently the logic of the schedule clearly indicated building from the South to the North and completion of phase 3 was in fact shown as an item with the most negative float, obviously you can not complete phase 3 with out completing the roadway. This can be demonstrated by reviewing the matrix on page 58, which shows that the impact did change the completion date of phase 3 and consequently the completion of the project. Of course with unlimited resource one could argue that these areas could be worked simultaneously, but the reality is Astaldi only has one finish grader operator Mr. John Hall and as such cannot finish base rock in more than one location at a time. Astaldi is working where ever possible and pulling activities in the schedule forward while trying to accelerate the project and therefore the September 14 update did not

reflect the pushing of the project completion date as phase 4 work was proceeding. But as evident by comparing the August update to the October update the project completion date has been pushed 28 days from February 22, 2008 to March 19, 2008 and phase 3 completion date pushed from September 20<sup>th</sup> 2007 to October 10<sup>th</sup> 2007 some 20 days.

Astaldi corrected the logic in the schedule pertaining to phase 3 work and linked all base rock activities and paving activities. With the corrected logic activity ID 3C-I952060 does in fact end up being the activity with the least float and thus is a controlling item of work (see page 62-68). As a controlling item of work this impact qualifies as a delay and Astaldi is entitled to claim for this delay.

Astaldi in accordance with Supplemental Special Provisions sub article 5-12, on September 14<sup>th</sup> issued the required notice and subsequent preliminary request for time. (See pages 5,10&11)

### **The Corradino Group Position Paper**

#### **Issue**

On September 13, 2007, while grading rock in the northbound widening areas north, south and between the 6<sup>th</sup> Avenue and Viaduct bridges, Astaldi Construction Company (ACC) alerted us to an issue with the proposed grades for the limerock base on the northbound outside lane (R5), from approximate Sta 1079+46 to Sta 1084+84. The proposed and as-built cross slope for lane R5 on both the 6<sup>th</sup> Avenue and Viaduct bridges is 2%; the proposed cross slope for the same lane between the two bridges is shown as 3% in the typical sections, and the plans did not include a special profile to show the desired cross slope transition for this lane. This was an omission. The Contractor stated at the time that he had already graded the lane to a 2% cross slope to match as-built grades on the adjacent traffic barrier and bridges, and he asked for our concurrence. We gave him our concurrence the following morning, agreeing with the cross slope and grades as-built to avoid re-work. ACC finished and primed the rock the same day, September 14, 2007. Subsequently, the Contractor submitted a Notice of Intent to Claim and a Preliminary Time Extension Request for 36 days in connection with the cross slope for lane R5 in this specific area, claiming damages and delays from alleged re-work prior to his notice. We do not dispute the plan omission; at issue is the Contractor's failure to provide us timely notice, and whether the Contractor was harmed at all.

#### **Background and References**

The contractor first notified the Project Administrator on the afternoon of September 13, 2007, that there was a problem with the grade of the outside lane. The Contractor stated he wanted to avoid a rejection of the base at the inspection scheduled for

September 14, 2007, for not complying with the typical cross section for this area. The Contractor stated he constructed the lane at a 2% grade to match the gutter line of the adjacent MSE wall, rather than the 3% cross slope identified in the typical section, plansheet 16, from Sta 1079+46 to Sta 1084+84. We immediately contacted and submitted an RFI to the Designer of Record, and promptly on September 14, 2007, advised Astaldi that we had no issue with leaving the lane at 2% in this short area, to avoid re-work and consistent with lane R5 cross slopes on the adjacent bridges. The base was inspected and accepted by the QC technician the same day, on September 14, 2007, and primed the same day (See Inspector Daily Report in Exhibit 1.)

Subsequently, still on September 14, the Contractor submitted a Notice of Intent to Claim for "Revised Grades at Northbound Roadway Sta 1079 to 1085," (Exhibit 2) and began to allege that ACC incurred damages and delays from re-working the base prior to their notice. Our response is attached in Exhibit 2. In the spirit of Partnering, we estimated what it would have cost in asphalt, which is more expensive than rock, to make up the small difference in R5 between the two bridges, if the Contractor had indeed graded the base to 3% instead of 2%, or if he had simply raised the question timely, instead of after-the-fact as he now claimed. The cost we estimated was \$377 worth of asphalt, which we offered to the Contractor to give him the benefit of the doubt. That offer is no longer on the table, as we found ACC's subsequent assertions contradictory.

On September 21, 2007, ACC submitted a "Preliminary Time Extension Request" for 36 days, in which Mike Nash, of ACC wrote: "While constructing the roadway base between Sta 1079 to 1085, the base rock was blue top per plans and graded. It was evident the profile grade did not work with MSE wall drawing. Astaldi determine the typical section outside drive lane cross slope to be the problem and lack of transition on shoulder at the north to viaduct. ***Astaldi restaked blue tops and advise CEI immediately...***" [Emphasis added.] (See Exhibit 3.) If ACC advised CEI immediately, as Mr. Nash wrote, and we responded within hours on September 14 to leave the R5 cross slope as built, and the rock was accepted and primed the same day, when did the alleged re-work and delays take place? ACC is either mistaken about the facts, or misstating them.

We do not believe, and we cannot verify, that ACC re-worked the grades for lane R5 in this area, as they now claim, because they did not provide timely notice as required by Article 5-12.2.1 of the Contract specifications. By the time ACC advised us there might be a problem, the work was already done.

Article 5-12.2.1 states, in part:

**"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.” [Emphasis added.]*

The Contractor is not entitled to additional time or compensation in connection with this issue because he failed to comply with the Contract specification above. While we could end this statement about our position here, and nothing further is necessary to reject the Contractor’s request, we feel it is important to provide the Board some additional comment, because we do not want to leave the Contractor’s claim of a 36-day delay unchallenged.

Our response to the Contractor’s preliminary request for a 36-day time extension is attached as Exhibit 5. It basically states the Contractor’s own schedule and the facts do not support the Contractor’s contention of any impact, let alone 36 days. In fact, the Contractor’s schedule update dated September 14, 2007, the day after they contacted us regarding the cross slope issue and the same day the base for the area in question was finished, inspected and primed, that schedule update showed the Contractor gaining a day relative to the previous month’s schedule. (Excerpts from both schedule updates are attached in Exhibits 6 and 7.) More to the point, we do not see how it is possible for the Contractor to lose 36 days in the hours between the time they told us they might have a problem on September 13 and the time the base was finished, accepted and primed on September 14. That the Contractor could make such a claim, and then hold fast to it, speaks volumes.

Aerial photographs of the area before and after the Contractor’s notice (Exhibit 8) also show how the roadway widening between the 6<sup>th</sup> Avenue and Viaduct bridges was ready and paved before the Contractor was ready to switch traffic, because the northbound mainline roadway widening north of the viaduct was not ready until later; in other words, the mainline roadway base north of the Viaduct was critical. The base for lane R5 between the two bridges was not the controlling item of work and did not delay the Contractor’s traffic switch to Phase 4. The Contractor finished base and paved from south to north. He started paving at the south end of the project on September 12, 2007 and paving proceeded north without delay. The rock in this area sat primed and ready from September 14 until the paving subcontractor got to it without delay, on September 21. The paving sub continued paving north of the Viaduct, as the Contractor completed sections of the base in that area, with some delays to rock and paving due to weather, until all northbound widening paving operations were complete on October 8. The Contractor was then able to switch traffic on the night of October 9, into the morning of October 10.

### **Department's Position**

1. The plans did not contain sufficient detail to clearly identify the desired cross slope or cross slope transitions for lane R5 from Sta 1079+46 to Sta 1084+84. This omission is not disputed.
2. No damage or delay to the Contractor is apparent or has been demonstrated as a result of the plan omission.
3. ACC did not provide timely notice of the plan omission, or of any work or re-work requiring additional time or compensation as a result of this omission, thereby denying the Department the opportunity to track or to mitigate damages or delays. By failing to comply with this Contract requirement, the Contractor waived his present claim.

### **Contractors Rebuttal**

**ISSUE:** Is Astaldi entitled to a delay claim due to plan error between the 6<sup>th</sup> avenue Bridge and Via-duct?

**Departments Position:** The Departments position is that Astaldi did not comply with Article 5-12.2.1 Claims for Extra Work, for timely notice. And as such did not afford the Engineer the opportunity for keeping strict accounting.

**Astaldi's Rebuttal:** Astaldi agrees that Article 5-12.2.1 Claims for Extra work was not adhered to as Astaldi is claiming Delay and the appropriate Article is 5-12.2.2 Claims for Delay. Which states "*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,***" [Emphasis added] [see page3]. Astaldi complied with these conditions see notification and preliminary request for time extension [pages 4-6]. As all items of work affected were already expressly provided for in the contract this would not qualify as EXTRA WORK.

**Departments Position:** Goes on about 36 day delay and other opinions that do not address the issue.

**Astaldi's Rebuttal:** The preliminary request for time is just that preliminary and as stated on the preliminary request for time to be verified during preparation of claim package.

**Summary:** The Engineer did not dispute that the grading of base rock was a controlling item of work in his position paper. Astaldi has demonstrated with the corrected logic schedule that in fact activity ID 3C-I952060 Construct Road Base at Sta. 1078 to Sta.1085 was a controlling item of work. Astaldi provided in there position paper daily reports and survey field notes documenting that in fact the blue tops were set per plan and rock graded on September 10<sup>th</sup>, 11<sup>th</sup> & 12<sup>th</sup> . And then reset and notification to the engineer on September 13<sup>th</sup>, which the Engineer acknowledges. Therefore in accordance with the specifications Astaldi is entitled to claim for delay.

### **Corradino Group Rebuttal**

#### **Astaldi Construction Company's (ACC) Position: History**

Astaldi's timeline claims they set blue tops for the specific area in question (NB lane R5 between the 6<sup>th</sup> Avenue and Viaduct Bridges) on September 10, 2007, graded the limerock base the following two days, reset blue tops on September 13<sup>th</sup>, alerted us to the problem the same day and gave Notice of Intent to Claim on September 14<sup>th</sup>.

#### **FDOT Rebuttal**

ACC's timeline confirms the fact they did not provide notice of intent to claim until September 14, 2007. Our records confirm they spread, graded and finished the limerock base in this area before September 14<sup>th</sup>, but we cannot confirm if this included any re-work before receiving the Contractor's notice of intent to claim, because the notice was not timely. We can, however, confirm the fact that the Contractor did not re-work the rock after he provided notice, since it was finished, primed and accepted the same day (September 14, 2007), which is the day it was scheduled for inspection. Therefore, there was no delay to this work as ACCs own timeline and the project records show.

#### **ACC's Position: Impact to Controlling Items of Work**

ACC claims the limerock base at this specific location was "interrelated" with the finishing of limerock base north of the Viaduct and on the exit ramp, and that all base



rock was therefore critical. Astaldi then asks: "Were the critical items of work impacted?" and affirms that they were.

### **FDOT Rebuttal**

The critical work was not impacted, contrary to the Contractor's assertion, not just because it is impossible to compute a delay from September 14<sup>th</sup> when we received notice to September 14<sup>th</sup> when the base in this area was done, but because the base that was critical was not this small piece. We maintain, as explained in our position paper, that the limerock base north of the viaduct, in the area of the NB lanes necessary for the Phase 4 Traffic Switch, was the critical and controlling item of work. This is demonstrated by the fact the NB lane R5, between the two bridges in the area of the plan error or omission, was primed and ready by September 14 (the same day of the Contractor's Notice of Intent to Claim), and that indeed all the lanes between the two bridges were paved by September 21, and then waited nearly three weeks on the Contractor to finish the rock north of the Viaduct before he could pave that area and switch traffic.

Moreover, while we do not believe any delay occurred as a result of this plan omission, if the Contractor had really encountered a delay, it could have been mitigated with a few tons of asphalt as we described in our position paper. We were not afforded the opportunity to make that choice by the Contractor's failure to provide timely notice. Nevertheless, it appears the Contractor was effective in mitigating any delay from the plan error through the method he chose, which was to simply move over a few feet and continue with the work necessary to spread, grade, compact, finish and prime limerock base elsewhere throughout the job. The Contractor was not prevented from working limerock base throughout the job, by the cross slope omission in the NB Lane R5, from Station 1079+46 to 1084+84. The NB Lane R5 cross slope was accepted as-built, without the need for re-work, promptly upon notice it did not match the typical section cross slope.

### **ACC's Position: Schedule impact was 36 days...or 8 days...or 28 days...or maybe 20 days**

ACC claims their August schedule update showed the Phase 4 traffic switch scheduled for September 20, 2007, and then the September 14 schedule update (same date rock in question was finished and same date of notice) showed the traffic switch had slipped to September 28 (a difference of 8 days). Some tap dancing follows describing "corrections to the schedule's flawed logic" to show the base rock as critical, and how this yields, based on a revised and updated schedule dated October 16<sup>th</sup>, a delay of 28 days to the project, and 20 days to the traffic switch.

### **FDOT Rebuttal**

ACC does not explain the basis of their 36-day preliminary time extension request in their position paper, so it appears they no longer claim 36 days. It is unclear to us if they are now claiming 8, 20, or 28 days, or if any of these same days are included in ACC's other claims before the Board. What is clear, however, is that there was no

delay, and the Contractor's clumsy attempt to prove a delay by manipulating the schedule falls far short.

**Summary**

The Department's position remains unchanged. The plan error or omission is not disputed, only its impact to the project. No damage or delay to the Contractor is apparent or has been demonstrated. ACC did not provide timely notice of the plan omission, or of any work or re-work requiring additional time or compensation as a result of this omission, thereby denying the Department the opportunity to track or to mitigate damages or delays, if any damages or delays occurred at all. By failing to comply with this Contract requirement, the Contractor waived his present claim. We ask the Board to rule accordingly based on the clear and explicit terms of the Contract.

**Boards Findings**

At time of hearing the Board heard testimony from both parties. The Notice to Claim was submitted September 14, 2007. The base material in question was finished and primed on September 15, 2007. Project diary sheets shown to all parties for September 17 & 18 shows asphalt surface course being installed at the location in question. The Board has not been provided enough information to ascertain the validity of the claim for 36 calendar days.

**Board Recommendation**

After reviewing all submittals and hearing testimony from all parties. The Board finds **no entitlement** regarding this issue.

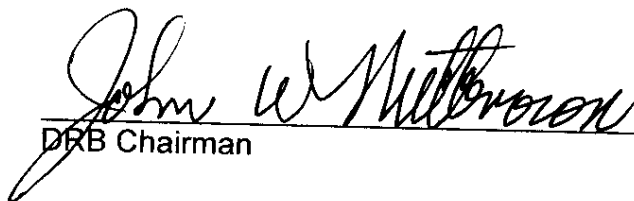
The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance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

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

Respectfully submitted,

Dispute Review Board

John W. Nutbrown, Chairman  
Rammy Cone, Member  
Jimmie Lairscey, Member

  
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DRB Chairman