

RECOMMENDATION No. 4

November 12, 2007

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Astaldi Construction Corporation
1701 Lake Worth Road
Lake Worth, FL. 33460

Eduardo Perez de Morales, P.E.
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The Corradino Group
321 South Dixie Highway.
West Palm Beach, FL. 33401

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) 12th Avenue South to 10th
Avenue North

Subject: Convene Dispute Review Board and Conduct a
Hearing for Entitlement Regarding Contractors Request for
Additional Time and Compensation for Ramp 2B-1 Special
Shoulder Profile

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: Ramp 2B 1 Plan Error

ISSUE:

Is Astaldi entitled to a delay claim due to plan error at ramp 2B-1?

HISTORY:

On September 20th 2007 Astaldi issue RFI 235 indicating that using plan sheets 84. 110, 324, 325,341 thru 354 and W-37 we believe there is a conflict. Please verify if profile grades, vertical curves and transitions are correct (see pages 4-26). On Friday September 21, 2007 @ 3:30 an email was sent with revised grades for the shoulder of ramp 2B-1 from the Engineer of record. (See pages 22-24)

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THE CORRADINO GROUP

Astaldi Construction's Position:

Astaldi position is that they are entitled to a delay for this impact.

By definition a controlling item of work is *“The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity”* (see Page48). The finishing of base rock at this location was interrelated to the paving of the 10th avenue exit ramp as well the phase IV traffic shift. As such the finishing of this base rock 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 49) In accordance with article 5-12 Astaldi notified the Department of its intent to claim for this impact on September 22nd, 2007 and followed up with preliminary request for time extension as required (see page 3, 27-28). The Engineer of Record by his response to the RFI acknowledged the plan error and consequently recognized that at a minimum Astaldi was impacted from September 20th until Astaldi received the corrected grades and was able to stake out and restart the work on the shoulder area. The issue is: are the critical items of work impacted? The answer is yes. Astaldi could not set blue tops on the shoulder on September 20th and could not work the entire ramp while finishing the base rock. This extended the contractors performance in this area. Which by definition is a “Delay”, and consequently Astaldi is entitled to claim a delay under article 5-12 of the contract. This can be demonstrated by reviewing the matrix on page 46, which shows that the impact did change the completion date of phase 3 and consequently the completion of the project. It is evident by comparing the September update to the October update that the phase 3 completion date pushed from September 28th 2007 to October 10th, 2007 some 12 days. (see pages 31-45). Reviewing the September schedule update it is clear that activity ID 3C-2B1070 construct base rock at ramp 2B-1 was on the critical path with -190days

of negative float. Based on the above, it is clear that Astaldi suffered a delay due to this plan error and is entitled to claim for this delay.

Corradino Group Position Paper

Issue

Ramp 2B1 is the northbound off-ramp to 10th Avenue N, and it was reconstructed east under this project as I-95 was widened. MSE Wall 7 supports the ramp on the east side and was built first, to correctly calculated elevations as specified in wall plansheets W-37 and W-38. Part of a "Special Shoulder Profile" in plansheet 110, for a portion of the Ramp 2B1 outside shoulder only, from approximate Ramp Sta 200+75 to Sta 203+25, was higher and did not match the wall's plan and as-built elevations. This discrepancy between a portion of the Ramp 2B1 special shoulder profile and the Wall 7 plans was an error. The Contractor alerted TCG to the problem while setting blue-tops and grading the limerock base in this general area; TCG and the EOR provided corrected grades to the Contractor in less than 24 hours, while the Contractor continued grading and finishing limerock base north of the Viaduct. We do not dispute the plan error; at issue is whether this plan error caused damage or delay to the Contractor as claimed. Except for a minor re-surveying cost, we maintain it did not.

Background and References

On the afternoon of September 20, 2007, while grading rock in the northbound widening areas north of the Viaduct, Astaldi Construction Company (ACC) submitted a cryptic Request for Information (RFI 235, attached as Exhibit 1) alerting us to a potential conflict in the plans. Our requests for clarification from the Contractor were not fruitful that day. However, we immediately notified the EOR and began our own review.

The following morning, Friday September 21, we went to the site and spoke with the Contractor's surveyor, who was setting blue tops for auxiliary lanes in the general area, and who explained the issue with the ramp shoulder profile not matching the MSE wall grades for a portion of Ramp 2B1. Pictures of the shoulder rock in that specific area, from that day, are attached as Exhibit 2. It was clear then as it is now that the rock was not finished, that it would need to be graded lower for a short stretch of shoulder along the wall in the normal course of work, and that this was a spot-issue which did not affect the broader and obvious critical work to finish the rock base in all the widening areas north of the Viaduct. An aerial photograph is attached in Exhibit 3 to help put this in its proper context.

We instructed the Contractor not to add any more rock to the shoulder in this area, and provided corrected ramp shoulder grades within hours the same day, September 21, 2007. Nobody was idled or delayed by this direction or by the corrected grades. Throughout the day, the Contractor's surveyor continued setting blue tops on auxiliary lanes and mainline north, the Contractor continued spreading, grading and finishing rock north of the Viaduct, and the Contractor's paving sub continued paving south of the Viaduct. No additional work or re-work resulted from this plan error, except for the surveying cost to re-stake blue tops for a few hundred feet along the ramp shoulder, which we do not dispute and are prepared to pay. No additional time or material was required to grade or finish the rock; the rock was graded, finished and primed no different from the rest.

A copy of our e-mail correspondence with the Contractor from September 21 is attached as Exhibit 4. It should be clear from these e-mails that we made every effort to mitigate and indeed eliminate any impact from the plan error, to the point where we even offered to pay any overtime for the Contractor's surveyors to re-stake the shoulder grades the same day. In separate e-mail and by phone we also offered to send our own surveyors the following day. On the other hand, the Contractor's lack of urgency to re-stake the corrected shoulder grades, which is evident in their e-mail and by their lack of response to our offer of providing surveyors, can only mean there was no need for urgency because there was no real delay. That, or the Contractor harmed himself by not taking appropriate actions under his control to mitigate damages and delays...

We do not believe, however, that the Contractor delayed himself by waiting until Monday September 24 to re-stake the Ramp 2B1 shoulder grades. We maintain that the change in grades for this shoulder was insignificant and delayed nothing. Finishing the limerock base for *all* of the northbound widening areas north of the Viaduct, including the ramp, was indeed the critical and controlling item of work at the time, as the Contractor's schedule and work plans show. However, the work to spread, grade, finish and prime the base, for *all* of the areas north of the Viaduct, is not broken down in sufficient detail in the schedule to illustrate the fact that *the Contractor had other and plenty of areas available to continue with critical work, as he did*, including I-95 mainline lanes R3, R4, R5, Ramp 2B1 inside shoulder, and ramp or auxiliary lanes R6 and R7 for about 3,700 feet from the north end of the Viaduct to the end of the project, *none of which were changed or affected by the change in ramp 2B1 outside shoulder grades*. This fact is clearly illustrated in the aerial photograph in Exhibit 3, which shows the Contractor still working on large areas of rock north of the Viaduct a week later. Indeed the Contractor would not finish, prime and pave the northbound widening areas until earlier this month. In other words, the critical Phase 4 Traffic Switch never sat delayed and waiting for direction, changes or action on this piece of shoulder. That simply did not happen. (And if it had ever

gotten even close to doing that, we would have directed the Contractor to proceed with the Traffic Switch without delay and finish the shoulder behind a few pieces of temporary barrier wall.)

The limerock base north of the Viaduct, and the Phase 4 Traffic Switch which depended on it, were indeed delayed by something beyond the Contractor's and the Department's control, namely the weather. Our records and the Contractor's own claims, which are the subject of a separate dispute before the DRB, indicate approximately 14 days of adverse weather or weather impacts affecting the Contractor's production on the critical and controlling item of work, limerock base north of the Viaduct, from September 14, 2007 through the date of the traffic switch, October 10, 2007. (The weather dispute is not about the weather impacts themselves, but about granting time after the contract time has expired, and the September 14 starting point in this case is simply to coincide with the date of the Contractor's September schedule update for comparison purposes.) Exhibit 5 shows excerpts from the Contractor's schedule updates for September and October, which show the Phase 4 Traffic Switch slipping approximately 12 days in the time between schedule updates, roughly coinciding with the observed and claimed weather impacts. (Weather days observed or claimed, but not granted since the Contract time has expired, are listed in Exhibit 6.) To be clear: we are not saying weather was a concurrent delay or not a delay, we are saying *weather was the only delay* to the limerock base north of the Viaduct, and the ramp shoulder grade plan error caused no delay whatsoever.

Interestingly and perhaps significantly, the same schedule updates that show the critical Phase 4 Traffic Switch slipping 12 days, also show the projected completion date slipping 28 days in 33. Since nothing has delayed Phase 4, this additional slippage after the traffic switch appears to indicate the Contractor is presently considering and adjusting his Phase 4 plan, and finding he needs even more time than he previously anticipated. Considering this latest estimate also places ACC 241 calendar days late, while facing liquidated damages approaching \$20 thousand per day, we believe this financial concern is the real impetus behind the Contractor's sudden turn to baseless or far-fetched claims. The facts, the records and common sense do not support the Contractor's claim.

To date the Contractor has not submitted a Notice of Intent to Claim clearly indicating what part of the contract he believes entitles him to additional time or compensation for our correction of the ramp shoulder grades. His preliminary request for a time extension dated September 27, 2007 (Exhibit 7) indicates "Plan/Design Error" as the type of delay, "7 days min" with "unknown impact continuing" for a duration, and states: "Rains commenced on 9/21/07 and have continued to 9/26, but rock to [sic] wet to finish so impact is continuing to date." The latter should not be allowed to confuse the issue; weather days are not at issue here. Granting weather days after the Contract time has expired is a

separate issue for a separate hearing, and needs to be separated completely from this hearing. At issue here is whether the plan error admitted and described caused any damages or delays. For any error in the plans to do that, the error would have to result in added work or re-work, or it would have to idle and delay the Contractor. By promptly correcting the error, we avoided any of these impacts, with the sole exception being a nominal cost for the Contractor's surveyor to reset the shoulder profile grades in two hours or less.

Supplemental Specification Article 4-3 (Exhibit 8) allows the Engineer to modify the plans during construction, including grade changes, whether significant or not, and provides a method for compensating the Contractor if such alterations amount to a substantial change. We do not consider correcting the grades for a portion of Ramp 2B1's outside shoulder, while critical work was ongoing and continued all around it, to be neither a "significant change" as defined in "A" and "B" of the sub-article, nor a "substantial change." We do not believe—and the Contractor has not demonstrated—that the change resulted in any additional work, re-work or delay, other than resetting a few blue tops as previously stated.

4-3 Alteration of Plans or of Character of Work.

4-3.1 General: *The Engineer reserves the right to make*, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such *alterations in the details of construction, whether a substantial change or not, including* but not limited to *alterations in the grade or alignment of the road* or structure or both, as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. *The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract.*

The term "significant change" applies only when:

(A) The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or

(B) A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity, or in case of a decrease below 75% to the actual amount of work performed, such allowance to be determined in accordance with 4-3.2, below.

In the instance of (A) above, the determination by the Engineer shall be conclusive and shall not subject to challenge by the Contractor in any forum, except upon the Contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and good-faith basis. *[Emphasis added]*

Department's Position

1. The plans contained an error in the "Special Shoulder Profile" for Ramp 2B1, from approximate Sta 200+75 to 203+25. This plan error is not disputed.
2. No damage to the Contractor is apparent or has been demonstrated as a result of the plan error, save for the Contractor's additional surveying cost to re-stake the shoulder grades in the affected area, which the Department does not dispute and will pay upon proper submittal.
3. No delay to the Contractor is apparent or has been demonstrated as a result of the plan error. Critical work was not delayed. The error was corrected in time to prevent any impact to the project schedule.

Contractors Rebuttal

Subject: Ramp 2B 1 Plan Error

ISSUE: Is Astaldi entitled to a delay claim due to plan error at ramp 2B-1?

Departments Position: The Department responded to the RFI 235 on Friday September 21st at 3:30 PM. Which the Department claims did not delay the work.

Astaldi's Rebuttal: The plan error was discovered the morning of September 20th and the RFI sent on the September 20th. The response sent on Friday at 3:30 PM on the 21st was at quitting time for the project. Consequently the information and the recalculation and blue topping of the shoulder could not be done until Monday September 24th as the surveyors do not work on the weekends. During the 20th, 21st, 22nd and 24th Astaldi impacted by an unanticipated event, action, force or factor which extended Astaldi's time of performance of Activity ID 3C-2B1070 which is a critical item of work. The Department's states in their position paper that on the 21st they were on site, instructing the workers and disruption the work.

Department's Position: The Department states "*the Contractor had other and plenty of areas available to continue with critical work, as he did, including I-95 main lanes R3, R4, R5 Ramp 2B inside shoulder, auxiliary lanes R6 and R7 for about 3,700 feet from the north end of the Viaduct to the end of the project, none of which were affected by the change in ramp 2B-1 outside shoulder grades.*" And reference aerial photos.

Astaldi's Rebuttal: Astaldi has utilized The Departments exhibit 3, which is an aerial photo and added text only not shading as The Department did (see page5) Along with the base rock inspection report to clearly demonstrate that all base rock was finished, primed

and sanded from the north end of the Viaduct to the end of the main line required for the traffic shift September 21st actually the 20th, but base inspection took place on the 21st [see pages 6-21] It is clearly evident in the September 28th photo the only remaining work was the Ramp 2B-1. Based on the rock inspection reports, Astaldi was finishing 3 lanes of the roadway and shoulder at a rate of 600 to 700 lf per day and the 2 auxiliary lanes and shoulder at a rate of 900 LF a day. Refer to base rock inspection reports. The entire length of ramp 2B-1 to be constructed is 1400 LF Astaldi should have finished the entire ramp in two days. Astaldi began work on the ramp on September 20th and should have had the entire base rock finished and inspected by the 22nd. That did not happen why because we were delayed.

Departments Position: The Department states that “The limerock base north of the viaduct and phase 4 Traffic switch which depended on it were indeed delayed by something beyond the Contractors and departments control, namely the weather”

Astaldi’s Rebuttal: While the weather played a roll in the delay, the plan error which prevented Astaldi from working productively and efficiently on finishing the base rock was the start of the delay and consequently the weather days added to it and may in fact be compensable for the days that were directly involved. According to The Corradino Group letter dated October 16, 2007 after the September schedule update on September 14th which showed the Phase 4 traffic shift schedule for September 28th , they only recognize 5 weather days Sept. 22nd, 24th, 25th, 26th, and 27th. [See page22]. The traffic shift took place on October 10th, the math does not add up. The only conclusion is that the project was in fact delayed.

The Departments Position: Again the Department refers to 4-3.1 General and is trying to classify a delay as a Significant change.

Astaldi’s Rebuttal: This is not a significant change, but rather a delay and by definition qualifies as such and is governed by 5-12.2 Claims for Delay.

Summary: Activity ID 3C-2B1070 was a controlling item of work. By definition a Delay is “*Any unanticipated event, action, force, or factor which extends the Contractor’s time of performance of any controlling work item under the contract.*” The plan error was an unanticipated event that delayed the work. The Engineer claims it was weather, but his records indicate only five days of weather, the traffic shift was pushed 12 days from the September schedule update minus the weather days the Engineer recognizes leaves **7 days of impact**. The Engineers letter dated October 5, 2007 Pursuit of the work clearly indicates that Astaldi pursued the work 19 out 19 available work days [see page23]. Based on the production levels achieved from the Via-duct to Sta. 1130+00 the entire ramp base rock should have been completed in two days. Clearly Astaldi was impacted and is entitled to submit a claim for delay.

Corradino Group Rebuttal

ACC’s Position: Plan Error Resulted in Impact to Controlling Items of Work

ACC claims that by acknowledging the plan error in the outside shoulder grades for a portion of Ramp 2B1, the Engineer recognized that “at a minimum Astaldi was impacted from September 20th until Astaldi received the corrected grades and was able to stake out and restart the work on the shoulder area.” The Contractor then asserts the critical items of work were impacted.

FDOT Rebuttal

The Contractor’s statement above is flawed in two ways: First, it presumes the limerock base in the specific area affected by the plan error was critical, when it was not; and second, it extends the alleged impact from a plan error well beyond the Engineer’s correction of the error, into that portion of the schedule that only ACC controlled, which is improper.

The critical work was *not* impacted by this plan error, contrary to the Contractor’s assertion, because the work that was critical to the Phase 4 Traffic Switch, at the time this issue was brought up, was not this small piece of rock on the side of a ramp on the side of the road, which could be done anytime before project completion, even months from today. The critical work was the base for that area of the northbound lanes necessary to switch traffic into Phase 4, as we have already explained. The Contractor was not prevented from working on the controlling item of work, limerock base for northbound mainline, nor even the Ramp 2B1 base, and indeed he continued working the limerock base uninterrupted in the single day between the time ACC submitted RFI 235, at 4:46 pm on September 20th, and the time we submitted corrected grades for this short stretch of ramp shoulder, at 3:26 pm on September 21st. Therefore, the

critical items of work were not impacted and the project was not delayed by this plan error.

The second part of the Contractor's statement would have the end of the delay to the Ramp 2B1 shoulder (which was not a delay to the project or the traffic switch) end not with correction of the plan error, but with the Contractor re-staking and returning to work on the shoulder base. This is not appropriate, because the Contractor alone controlled when he would return to work on this shoulder base, and evidently he was in no hurry to return to it, since his surveyor and base crew were in fact not delayed, but actively engaged in constructing critical rock base north of the Viaduct. This should be clear to the Board by the Contractor's failure to even acknowledge our offer of assistance to restake the grades immediately after providing them.

ACC's Position: Schedule impact was 12 days

ACC claims that comparing their October schedule update to their September schedule update shows the Traffic Switch to Phase 4 slipping 12 days, that the Ramp 2B1 limerock base was critical and therefore that the 12-day delay in the schedule is attributable to the Ramp 2B1 shoulder plan error.

FDOT Rebuttal

We agree ACC's October schedule update shows the critical Phase 4 Traffic Switch slipping 12 days relative to their September schedule update. It also shows the project schedule as a whole slipping 28 days in the same time period, which indicates the duration of Phase 4 also increased with whatever changes to the schedule the Contractor has made and not explained with their latest transmittal. We do not, however, dispute a schedule impact of approximately 12 days in the time frame between the two schedule updates. We simply maintain that this impact is the result of weather, as the Contractor himself is claiming in a separate issue before the Board. The plan error had no impact on the schedule; it delayed nothing.

Summary

The Department's position remains unchanged. The plan error in the "Special Shoulder Profile" for Ramp 2B1 is not disputed, only its impact to the project. No damage to the Contractor is apparent or has been demonstrated, other than a minor surveying cost to re-stake the shoulder grades in the affected area, and no delay to the Contractor occurred as a result of this plan error. We hope the Board will agree and rule accordingly.

The Boards Findings

The Board heard testimony and raised questions as well as making a trip to the jobsite to view the area in question.

Investigation showed the area was outside the travel lanes of the ramp and approximately 250' long.

The RFI was sent on September 20, 2007 and the response was issued on September 21, 2007.

The Departments representative, The Corradino Group, admits the plan was in error however, from what the Board witnessed on the project after the hearing and another jobsite visit two weeks after the hearing the area in question had not caused a delay of any kind.

Board Recommendation

The Board finds the only thing the Contractor would be **entitled** to is the extra cost of reworking or replacing the grades in the area in question. The Contractor is **not entitled** to additional time for the alleged delay.

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



DRB Chairman