

DISPUTE REVIEW BOARD RECOMMENDATION

October 27, 2008

E-Mailed October 27, 2008

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RE: SR 60 FROM YEEHAW JUNCTION TO A PT E OF INDIAN RIVER CO. LINE
FIN No.: 239685-2-52-01
Contract No: T4078
County: Osceola
Disputes Review Board

Issue No. 1: MSE Wall No. 1
2: Mass Concrete Delay

Dear Gentlepersons:

The Owner, Florida Department of Transportation (Department) and Contractor, Elmo Greer & Sons, LLC (EGS) requested a hearing to determine **entitlement** of Greer to **time** and **compensation** on the above two issues. Should entitlement be established, the Dispute Review Board (Board) was not to decide the quantum of such entitlement at this time, as the parties would attempt to negotiate the value of entitlement.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on October 13th 2008.

CONTRACTOR'S POSITION:

EGS is requesting that the Board consider the following information and render a recommendation concerning its **entitlement** to an extension of contract time and compensation for the following items: (i) directed extra work removing/replacing MSE Wall No. 1, and (ii) Mass Concrete Delay.

MSE Wall No. 1

History

Construction of MSE Wall No.1 and bridge activities related to its construction were discontinued in December 2006 due to concerns raised by PBS&J. In January, a meeting was held between EGS, PBS&J, DOT, and Reinforced Earth Co (RECo) representatives to discuss concerns of Wall 1. During the meeting, DOT requested that RECo analyze the integrity of Wall 1 and forward their findings for review. RECo's analysis was submitted to PBS&J on February 26, 2007. In their findings, RECo concluded that "[t]here are no signs that the internal stability of the wall has been compromised in any way." and "[t]he concerns of the panel joint dimensions do not affect the internal stability of the wall but are an aesthetic issue and may be field repaired." A copy of RECo's report is attached as "Exhibit A"¹.

¹ See original position papers for exhibits.

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On March 6, 2007, after review of RECo.'s report PBS&J rejected Wall 1 and instructed EGS to remove and reconstruct Wall No. 1. After direction by PBS&J to remove and reconstruct Wall 1 (at EGS' own expense), EGS contracted a division of Universal Engineering Sciences, an independent engineering firm, which specializes in reinforced earth wall systems to analyze as-built Wall 1. Universal Engineering completed their analysis on May 1, 2007. Universal Engineering concluded that they were in an agreement with RECo that Wall 1 had not lost any of its structural integrity. A copy Universal Engineering's report is attached as "Exhibit B".

On May 3, 2007, PBS&J rejected Universal Engineering's recommendation and directed EGS to remove and reconstruct Wall 1. EGS responded on May 4, 2007 with the "Notice of Intent" to claim for extra work.

EGS provided two (2) independent opinions, performed by engineering firms specializing in reinforced earth wall systems, both concluding that the structural integrity of Wall 1 was not jeopardized in any way. Stated differently, Wall 1 was constructed in "reasonably close conformity with the Contract Documents" and should have been accepted by DOT. The decision by PBS&J and the Department was contrary to the expert engineering opinions, was unnecessary, constituted economic waste, and delayed the completion of the project significantly. Correspondence exchanges between PBS&J and EGS are attached as Exhibit "C".

Additional Contract Time

Although the quantum of the time extension is not currently before the Board, EGS calculated the delay based upon the following analysis. Schedule 499I (data date 12/11/06) was in effect when the delay began, and MSE Wall No. 1 was activity #70000 with a remaining duration of 1 work day. The wall was on the critical path. The gross extent of the delay associated with the FDOT decision to have the wall torn down and replaced was from 12/11/06 to 7/26/07, or 227 calendar days. This duration was calculated from the day schedule 499L indicates Greer would be finished with MSE Wall #1 to the day MSE Wall No. 1 was actually completed, i.e. placement of coping.

Schedule 499I was copied as 49II to perform this schedule analysis. In order to impact the schedule, the number of workdays to be added to this activity after 12/11/06 through 7/26/07 had to be determined. The result was a total of 155 extra workdays. Schedule 49II was impacted by increasing the remaining duration of the activity from 1 workday to 156 workdays.

Running the schedule with this change adjusted the project early finish from 1/25/08 to 8/22/08 or 210 calendar days. Seven weather days were granted during this time: 1/25/07; 2/2, 12/07; 7/2, 3, 5, 6/07. The net delay to the completion of the Project was therefore **203** calendar days.

Additional Compensation

Although the quantum of the additional compensation is not currently before the Board, EGS calculated its request in the following manner. The 8% formula per section 5-12 equates to \$2,005.37 per day on this Project. Thus, EGS incurred \$407,089.16 in indirect costs (203 days X \$2,005.37/day). In addition, EGS incurred actual direct costs totaling \$150,341.66 when it tore down, and rebuilt, MSE Wall No. 1. Overhead and direct costs combine for a total entitlement of **\$557,430.81**, and EGS has requested additional compensation in this amount.

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Mass Concrete Delay

Article I. History

On October 16, 2006, the Quality Control Plan for the Project was revised to include the Mass Concrete portion of the Plan. On December 16, 2006 just days prior to scheduled concrete placement, EGS received an email from PBS&J with an attachment rejecting the “Mass Concrete Plan”. The review period between October 16 and December 16 (42 workdays or 60 calendar days) is substantially greater than set fourth in Standard Specification 346-3.3, which provides:

The Engineer will review the submittal for acceptance within ten working days of receipt.

A copy of 346-3.3 is attached as Exhibit “D”.

After receiving rejection of the plan, EGS submitted the additional information requested and received approval on January 17, 2007. Per specification 346-3.3, the plan should have been reviewed within (10) days. The fact that the specifications were not followed during the review process of the Mass Concrete Plan caused a direct delay to the Project and was beyond the control of EGS. Correspondence exchanges between PBS&J and EGS are attached as Exhibit “E”.

Additional Contract Time

Although the quantum of the time extension is not currently before the Board, EGS calculated the delay based upon the following analysis. Schedule 499I (data date 12/11/06) was in effect at the time of the delay, and construction of the intermediate pier was shown as one activity (#20044) with an original duration of 15 workdays. Remaining duration for this activity was 12 workdays when the delay occurred. The gross extent of the delay was 58 calendar days: from 12/18/06, the day EGS planned on placing the intermediate pier footing for the eastbound turnpike bridge, to 2/14/07, the day the footing was actually placed.

To impact the schedule, the number of workdays to be added to this activity was determined. After accounting for scheduled non-work (holiday) days, there were 36 workdays between 12/18/06 and 2/14/07 after the activity reached the critical path. The schedule was impacted by increasing the remaining duration of the activity from 12 workdays to 48 workdays.

Running the schedule with this change delayed early finish from 1/25/08 to 2/22/08, or 28 calendar days. Three weather days were granted during this time: 1/25/07, 2/2 and 12/07. The net delay was therefore 25 calendar days.

Additional Compensation

Although the quantum of the additional compensation is not currently before the Board, EGS calculated its request in the following manner. The 8% formula per section 5-12 equates to \$2,005.37 per day. EGS incurred a total of **\$50,134.25** in indirect costs (25 days X \$2005.37/day).

EGS sincerely appreciates the consideration of the Board and respectfully requests that the Board render its opinion on the issue presented.

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DEPARTMENT'S POSITION:

Position Paper– MSE Wall No. 1– Entitlement to Additional Contract Time and Money Compensation

In the August 18, 2008 Progress Meeting the DRB set an October 13, 2008 for hearing a dispute raised in EGS' email request date August 8, 2008 on the issue of entitlement to time and money compensation arising out of MSE Wall No. 1 reconstruction. The issue of quantum of time or money compensation is not an issue being considered by the DRB, even though CEI's July 11, 2008 letter EGS202 (in Tab C) responding to EGS' June 11, 2008 letter (in Tab C) has objected to quantum related matters.

As background, Contract T4078 requires construction of a MSE Wall at the SR60 bridges over Florida's Turnpike. The drawings sheets are W-1 through W-4 and TW-1-TW-2 are in Tab A1. The Specification Section is 548 "Retaining Wall Systems" (Tab A1). Shop Drawings of the Reinforced Earth Company (RECo) signed 1/5/06 was approved by FDOT 1/19/06 is in TabA2 along with the temporary wall shop drawing.

Panels were placed at the west abutment of the eastbound SR60 Bridge on 10/10/06 to 11/4/06. Daily Reports (in Tab B) note the following:

Panel defects (10/10/06, 10/11/06) in violation of Supplemental Specifications 548-4 "Rejection of Precast Components" in Tab A1.

Unauthorized field repair of panels (10/20/06) in violation of Supplemental Specifications 548-4 "Rejection of Precast Components" Tab A1.

Inadequate backfill drainage precautions (10/16/06, 10/17/06, 11/8/06) in violation of Supplemental Specifications 548-6.5 "Backfill Placement" in Tab A1 and RECo shop drawing 1/7 General Note 23 in TabA2.

Installation of incorrect panel (10/31/06, 11/1/06) from those shown on RECo shop drawing 2/7 in Tab A2.

Installation of damaged panel (10/31/06) in violation of Supplemental Specifications 548-4 "Rejection of Precast Components" in Tab A1.

No panels were placed from 11/5/06 to 12/14/06 when replacements for broken panels were received and set. On 12/12/07 EGS submitted CPM schedule update 499I.PRX (in Tab S), showing as critical Activity 20053 Eastbound Cow Log Branch Bridge – Construct Substructures.

On 1/15/07 Contractor submitted a 1/16/07 update schedule 499J.PRX (in Tab S), showing as critical activities 20043 and 20044 end bents and intermediate piers for the eastbound bridge over the Turnpike. Scheduler Skeen's schedule review comments (in Tab S)notified EGS that Cow Log Branch false work drawings had not been submitted and that once some FDOT review time was factored in, the Cow Log Bridge was actually the critical path.

The 1/17/07 Daily Report (in Tab B) states "1) Contractor was called back to straighten wall panels that they had previously installed. Walls sloping and out of tolerance at wall #1 bridge 920200. 2) Inspection of wall #1 top panels has 2-1/2" bow in top panels after replacement of panels. Contractor Wall crew left for Kentucky with panel problems. Also, wall has excessive gaps in wall spacing due to panels bowing at the top. Teresa advised. All gaps were measured and measurements given to our engineer." Photographs between initial construction and panel

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removal are in Tab E1. Alignment and gap tolerances is set out in Supplemental Specifications Article 548-6.4.1 “Tolerances for Permanent Walls”

By email of 1/22/07 to the CEI (in Tab C), 4:53PM Mr. Hamm states “As per our conversations of last week and today, EGS will not place any concrete in the abutments until issues with the MSE wall are resolved. Apparently, the FDOT has concerns with walls 1 & 2 and has discussed reconstruction of the walls. EGS has constructed the walls and backfill as per the plans, specifications and designer’s recommendations. This email serves as notification that the delay to the Project continues until the issue is resolved and EGS intends to seek recovery of time and additional monies expended due to the delay.”

At the January 23, 2007 Progress Meeting (in Tab D) “Mr. Wedeman stated that the CEI had not stopped the Contractor.” On 1/24/07 he followed up with letter EGS091 (in Tab C) “MSE Wall Operations”, stating “... At no time has direction been given to EGS to cease or continue operations. Ceasing MSE wall operations may be in the best interest of EGS until EGS confirms the status of the walls ... but no direction has been provided. Once this review is completed, EGS’ next course of action should be provided to the FDOT for review and acceptance as applicable.” At the 1/30/07 Progress Meeting (in Tab D) “... Mr. Wedeman said the CEI was not stopping the wall work, no time extension was due, and that the specifications obligated the Contractor/wall constructor to provide quality control/assurance...”

On January 31, 2007 a site meeting was held with Reinforced Earth Co (the designer) and FDOT people present. At the 2/6/07 Progress Meeting (Tab D) “Mr. Hamm expected to get (RE Wall letter) by 2/9/07...Mr. Wedeman said that the CEI was not stopping the wall work.” On 2/12/07 EGS submitted schedule update 499K.PRX (data date 2/12/07 in Tab S), which showed as critical Activity 20044 Eastbound SR60 Bridge over Turnpike Intermediate Pier. Scheduler Skeen’s schedule review comments in Tab S noted that Cow Log Branch false work drawings had not been submitted to FDOT until 2/19/07 and again noted that when some FDOT review time was factored in, the Cow Log Bridge was actually critical. At the 2/13/07 Progress Meeting (in Tab D), “Mr. Hamm was expecting RE Wall’s report and recommendations 2/13/07”. At the 2/20/07 Progress Meeting (in Tab D) “Mr. Hamm is waiting for RE Wall’s report and recommendations”.

On February 26, 2007 by letter EGS97 in Tab C, CEI recited past activities regarding the MSE wall, noting that RE Walls report had been promised as late as 2/20/07 but not received, and requested the report by 3/2/07. By letter dated 2/26/07 (in Tab C received by PBSJ 2/27/07) EGS forwarded RECo’s 2/22/07 report saying that the “there were no signs that the internal stability had been compromised, that panel joint dimensions “are an aesthetic issue” and that “... lateral movement is up to conjecture” Mr. Hamm said “.. (‘Construction of End Bent 1 will resume on March 1st unless otherwise directed in writing that any portion of the previously constructed wall is deemed unacceptable by PBSJ...”

On February 28, 2007 by letter EGS098 in Tab C CEI replied, “...There are still serious concerns with the construction of Wall number 1 and that this wall does not meet contract requirements for acceptance. Until the Wall Number 1 meets the contract requirements or repair procedure is accepted by the Department...any work adjacent/above or built in conjunction with this wall that may require removal and reconstruction at a later date due to efforts to bring the wall into acceptable condition is at the sole risk of EGS and will not be compensated”.

On March 6, 2007 by letter EGS099 in Tab C CEI stated “The Department has completed its review of the information provided in the Reinforced Earth Company’s letter of 2/26/07. Based on the contract provisions and acceptance criteria, the wall is rejected and is to be reconstructed

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at EGS expense. No compensation of either time or money will be provided for this required rework as stated in Supplemental Specification 548. [New paragraph] Removal of the rejected wall shall be conducted in such a manner that all elements of construction will be exposed in their current positions to enable inspection of the current condition... [New paragraph] Please provide a date upon which EGS will begin this rework.”

On March 13, 2007 EGS submitted schedule update 499L (data date 3/13/07 in Tab S), which showed as critical Activity 70000 eastbound SR60 Turnpike bridge MSE Wall No.1. On March 15, 2007 (in Tab C) EGS requested “the basis of your direction to remove and reconstruct the previously constructed wall... and explain the shortcomings of Reinforced Earth’s analysis...” At the 3/20/07 Progress Meeting (in Tab D), “Mr. Hamm said he was preparing a response to (the 3/6/07 CEI letter). Ms Driskell wanted it said on the record that by waiting to remove and reconstruct the wall, the Contractor is delaying itself and acting at its own risk.”

On March 28, 2007 by letter EGS 100 in Tab C, CEI cited Supplemental Specification 548-6.4.1 (in Tab A1) that out of tolerance wall needed to be removed, that EGS has been provided field measurements, that under Standard Specification 5-1.6 (in Tab A1) Reinforced Earth had not met CEI’s concerns, again directed removal and reconstruction of wall, beginning no later than April 2, 2007, and requested EGS’ schedule. “If you intend to claim costs, keep and submit labor, material and equipments records as required by Specifications 5-12.7 “Mandatory Claim Records”. (In Tab A1)

Noted at the 4/3/07 Progress Meeting (see Tab D), “The Contractor was investigating to prepare a response to CEI’s 3/28/07 letter.” On 4/5/07 by letter EGS104 in Tab C, CEI sent a Performance Deficiency Warning Letter, “EGS is again directed to remove and reconstruct this wall. This rework is to begin no later than April 9, 2007. Please provide your schedule for removal so that all aspects of the removal may be document by CEI/FDOT...”

On 4/12/07 EGS submitted CPM update 499M.PRX (data date 4/11/07 in Tab S) showing as critical Activity 70000 SR60 EB Bridge over the Turnpike - MSE Wall No. 1. At the 4/24/07 Progress Meeting (see Tab D), “Mr. Hamm expected to submit a response (to CEI’s 3/28/07 letter) in a day or two.”

On 4/30/07 by letter EGS111 (in Tab C) CEI sent a Performance Deficiency Letter for failure to comply with its 4/3/07 Performance Deficiency Warning Letter, stating “EGS is again directed to remove and reconstruct the wall and provide a schedule for removal. This work is to begin no later than May 4, 2007. Lack of pursuit of this work is delaying completion of this contract and is the sole responsibility of EGS.” At the May 1, 2007 Progress Meeting (see Tab D) “Mr. Hamm expected to submit a response (to the CEI’s 3/28/07 letter on) 5/1/07 or 5/2/07...”

On 5/1/07 EGS forwarded Universal Engineering’s (EGS’s QC consultant) 5/1/07 letter (in Tab C) stating, “...1. Based on the density data, no apparent signs of settlement, and no excessive outward rotation of the wall, we believe there are no outwardly visible signs that would indicate the stability of the wall has been compromised...2. We believe that the excessive lateral separation of the panels is due to movement in the temporary wall...3. We believe no additional lateral movement of the panels has occurred... [New paragraph]. We have the following recommendations...1. One option available would be to perform only the caulking of the cracks...Although we believe that the chance of additional movement is small, this option... would not prevent any additional movement... [New paragraph] 2. In order to limit further movement, we recommend steps be taken to stabilize the temporary wall... which could include removal of the top two or three panels...” EGS concludes, “...As stated in (Universal Engineering’s) letter, it is recommended that the wall remain in place with sealing of the

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excessive joints... the ultimate structural integrity of the wall remains as required by plans and specifications and to remove the wall is a needless effort and expense...Based on this information EGS is prepared to resume construction of End Bent 1 immediately.”

On 5/3/07 by letter EGS112 in Tab C, CEI responded to EGS’s 5/1/07 letter “... It is my decision that the recommendation of Universal Engineering is not accepted and the previous direction to EGS that the wall be removed and reconstructed stands.... First, the proposal does not meet the requirements of Specification 5-1.6 ... a recommendation on structural matters ... is not signed and sealed by Professional Engineer... (EGS and UE are inconsistent on remedial work) Our continuing rejection of the wall is based not only on structural concerns but also on the undisputed out-of-tolerance panel gap and alignment, which does not meet the requirements of Supplemental Specification 548-6.4.1 “Tolerances of Permanent Walls” ... (which states) ‘Walls which do not meet the tolerances will not be accepted by the Department and must be removed and reconstructed at no cost to the Department ... [new paragraph] Five months have passed since the deficiencies in the wall were brought to your attention... This wall has been on the critical path for several months. Therefore the completion of the contract is delayed day for day for every day that you postpone reconstruction ... (which is) unacceptable and is not compensable to the Contractor in either time or money...” (All referenced specifications can be found in Tab A1)

By letter dated 5/4/07 (in Tab C) EGS responded to CEI’s 5/3/07 letter by asserting that the wall “was constructed in accordance with plans and specification... (Inspected by EGS’ QC) ... and verified by PBS&J...the panels were inspected for line, grade and joint dimensions by EGS and PBSJ. All of the above was within tolerance and verified by PBSJ prior to proceeding with the next vertical lift... [New paragraph] “(EGS’) experts concluded that the structural integrity of the wall has not been compromised and that the structure can be repaired cosmetically. [New paragraph]... the direction given by PBSJ/FDOT to remove and reconstruct the wall is incorrect and constitutes economic waste... Standard Specification 4-3.5 ... states that extra work directed by the engineer will be paid in accordance with Standard Specification 4-3.2. The extra work is required due to actions that are the responsibility of (FDOT) and not the responsibility of EGS ... [new paragraph] Pursuant to Standard Specification 5-12.2.1, Claims for Extra Work and Standard Specification 8-7.3.2 EGS hereby gives written notice of its intent to make claim for additional compensation and additional time for the performance of extra work ordered and related items needed to complete the extra work. Work has not yet begun on the extra work ordered by FDOT, and as such, EGS cannot identify the dates of delay at this time. The controlling items of work will ... include MSE Wall bent 1, construction of end bent 1, set beams over the southbound Turnpike and other activities related to completion of the eastbound State Route 60 Bridge over the Turnpike. EGS plans to mobilize and begin removing said MSE Wall, per your directive, the week of May 7, 2007.” (All referenced specifications can be found in Tab A1.)

On 5/7/07 by letter EGS115 in Tab C, CEI responded to EGS’s 5/4/07 letter noting “thorough documentation of construction means and method (would take place)... your claim will require support of detail cost records as described in 5-12-3(e) and 5-12.7, copies of which must be submitted to the Engineer weekly...” The letter discussed removal, reuse of material. “...CEI inspectors performed earthwork density verification testing as described in Standard Specifications 548-7.2 and referenced section 120. The CEI’s inspection does not lessen responsibility of the Contractor under Standard 5-6 and 5-9.2...” The letter questions “third party” characterization of RE Wall and Universal Engineering which were advising and inspecting the original wall construction for EGS. “ ...We object to your characterization of removal and replacement of the wall as ‘extra work’ Standard Specifications 548-6.4.1 states

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“Walls which do not meet these specifications will not be accepted by the Department and must be removed and constructed at no cost to the Department.” (All referenced specifications can be found in Tab A1.)

At the 5/8/07 Progress Meeting in Tab D, “Mr. Hamm said that EGS was getting equipment and would begin taking down the wall 5/9/07.” Daily Reports in Tab B show MSE Wall No. 1 removed between 5/9/07 and 5/15/07. Observations are discussed in CEI’s position on Issue 1, below. Pictures of conditions noted are found in Tab E2.

On 5/15/07 EGS submitted CPM update 499N.PRX (data date 5/14/07 in Tab S) showing as critical new activity 70050 “Remove/Replace Wall 1 as directed by PBSJ”. At the 6/5/07 Progress Meeting (see Tab D) it was noted that EGS was awaiting delivery of 4 panels “after which wall construction would resume 6/5/07 or 6/6/07. Mr. Hamm expected the wall to be complete in two weeks. At the 6/12/07 Progress Meeting (see Tab D), “Panels have been delivered. Reconstruction will resume today 6/12/07...”

On 6/13/07 EGS submitted CPM update 499O.PRX (data date 6/12/07 in Tab S) showing as critical Activity 70050 “Remove/Replace Wall 1 as directed by PBSJ”. It was noted at the 6/19/07 Progress Meeting that “Field reconstruction resumes today 6/19/07. Mr. Watts confirmed that they have all materials needed with exception of geo- fabric at the temporary wall, which he expects to receive on time. Mr. Hamm projected the wall would be complete in two weeks except for coping. Daily Reports (in Tab B) show panels replaced from 6/19/07 to 6/29/07.

At the 7/3/07 Progress Meeting (see Tab D), “Mr. Hamm stated that ... a claim will be submitted after the wall is done” At the 7/10/07 Progress Meeting (see Tab D), “Mr. Hamm stated that a claim will be submitted after the coping is placed.” On 7/16/07 EGS submitted CPM schedule update 499P.PRX (data date 7/16/07 in Tab S) showing as critical, renumbered Activity 20084 “Construct Endbent 1” At the 7/17/07 Progress Meeting (see Tab D), “Mr. Hamm noted that MSE Wall has reached the state it was when the Contractor directed it be removed.” Mr. Hamm in effect is saying the schedule impacted ended by that time.

For the period of 5/9 to 5/15/07 when the existing wall was removed and 5/16/07 and 6/19 to 6/29/07 when panels were being constructed, none of the required and previously requested time and material records has ever been submitted by the Contractor.

In its 6/11/08 letter (in Tab C), EGS claimed a time extension of 203 calendar days between 12/11/06 and 7/26/07, \$150,341.66 in direct cost and \$407,089.16 in indirect cost (calculated on the claimed 203 day time extension). No daily time, material and equipment records were submitted then or ever. Copies of foreman’s daily diaries were attached for some days between 5/9/07 and 6/28/07. These foreman’s daily reports do not show hours, identify people, particular equipment, quantities of materials or any costs, and are not in compliance with Standard Specification 5-12.7

In CEI letter dated 7/11/08 EGS 202 (in Tab C) CEI responded to EGS’ 6/11/08 stating that there was no merit because during removal of the panels, non-compliant construction was observed, that the time extension was not calculated according to requirements of Special Provision 8-3.2 and Standard Specification 8-7.3.2 , the claim was not certified under Standard Specifications 4-3.2.1 and 5-12.9, that the claim contents did not comply with Standard Specification 5-12.3, that a referenced scheduling data file had not been received and therefore could not be reviewed, and that the time extension claim notices and requests were late under the requirements of Standard Specification 8-7.3.2. (All cited specifications can be found in Tab A1). None of the comments or objections in CEI’s 7/11/08 letter have ever been responded to or

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addressed by EGS. Nonetheless on 8/8/08 EGS requested the DRB hear “entitlement to the time extension and entitlement to compensation.”

Based on the above background information and particularly EGS’ letters dated 5/4/07 and 6/11/08 and CEI’ letters dated 5/7/07 and 7/11/08 (all in Tab C), the CEI identifies the following four issues.

Issue 1: Is the CEI/FDOT responsible for the out of tolerance condition in panels at MSE Wall No. 1?

EGS’ Position: Yes. (1) MSE Wall No. 1 was built in compliance with contract requirements. If panels shifted out of tolerance FDOT/CEI is responsible. (2) FDOT inspector’s verified that wall was built in compliance.

CEI Position: No. For the following reasons:

- (a) EGS is responsible for any costs it has incurred in removing and replacing the wall and for any delays during the deliberations over removing the wall, its actual removal and its replacement. CEI observations as wall was removed, confirmed that there had been deviation from construction requirements as follows:

Void in backfill placed, a probable result of failure to maintain drainage as required by Supplemental Specification 548-6.5 “Backfill Placement” in Tab A1,

Missing straps from that shown on temporary shop drawing in Tab A2.

Use of straps smaller than those specified in temporary wall shop drawings in Tab A2.

Placing straps at skew angles beyond the 15 degrees specified in Contract Drawing W-1 General Note 10 in Tab A1. Reinforced Earth Co’s letter of 6/11/07 (in Tab C) raised allowable skew to 19 degrees, with 25 degrees for a single strip around a pile. Straps were noted with skew angles of 30 degrees.

Wood shims left in place in violation of Supplemental Specification 548-6.4 Wall Erection” in Tab A1.

See Tab E3 for reports of violations as well as photographs taken during panel removal.

During the wall removal there was nothing observed which would suggest or point to the wall design as being the cause or a contributing cause of the out of tolerance condition. The Contractor has not identified any aspects of the wall design which would have caused the uncontested out-of-tolerance condition of the panels. There are three other wall sections which have been placed in this project without exhibiting out-of-tolerance panels, which strongly supports that design requirements were adequate, had they been followed. Also MSE walls have been used throughout the state for years.

There was nothing observed which would suggest or point to differing site conditions under Standard Specification 4-3.7 (see Tab A1) as causing or contributing to the condition. The Contractor has not identified any differing site conditions, and after the wall began reconstruction on 6/16/07, any such conditions would have been disturbed. Therefore the Contractor would be foreclosed from arguing a differing site condition.

The Contractor is claiming extra compensation and time and has the burden of establishing a fault that makes the FDOT responsible, but has failed to do so

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Standard Specification 8-7.3.2 (in Tab A1) Contract Time Extensions states “The Department will not grant time extensions to the Contractor for delays due to the fault or negligence of the Contractor. The observations made while removing the panels establish that the out-of-tolerance panels were the result of Contractor’s deviation from contract requirements.

- (b) The CEI furnished inspection services for the project construction. However regarding the reinforced earth walls, the earthwork QC densities tests in this project were performed by Contractor’s technical consultant Universal Engineering under Supplemental Specifications 120-10 “Acceptance Program” (see Tab A1). CEI PBSJ performs only the verification density tests under Supplemental Specifications 120-10.1.5. A wall was not “accepted” by FDOT or by the CEI inspectors subsequent to completion, in levels or in phases as EGS alleged in its 5/4/07 letter. The CEI does not measure gaps or alignment on each row prior to the placement of the next row as alleged by EGS in its 5/4/7 letter in Tab C. The inspectors’ observations were not continuous and do not encompass every location or aspect of every backfilled course. The observations of straps were not continuous and not of all straps general condition.

Furthermore Supplemental Specification 548-6.1 (in Tab A1) requires the Contract to “procure from the Wall Supplier ...technical instructions...and on-site technical assistance during construction” Daily reports (in Tab B) show Reinforced Earth Wall Company’s representative was on site during the first installation of the panels on 10/10/06 and 10/11/06.

The fact that construction flaws were observed upon removing the constructed wall does not establish that the PBSJ inspector had not done what was expected of him when the wall was constructed the first time. Again, Standard Specification section 105 places the burden of inspection on the Contractor. Furthermore, Standard Specification 5-9.2 (in Tab A1) Failure of the Engineer to Reject Work During Construction: states, “If, during or prior to construction operations, the Engineer fails to reject defective work or materials, whether from lack of discovery of such defect or any other reason, such initial failure to reject in no way prevents the later rejection when such defect is discovered, or obligates the Department to final acceptance. The Department is not responsible for losses suffered due to necessary removals and repairs of such defects.”

Issue 2. Certification of Claim under Standard Specification 5-12.9

EGS’ Position: not known.

CEI’s Position: The claim is required to be certified under 5-12.9 (in Tab A1), but is not certified at all. Standard Specification 5-12.9 states “When submitting any claim, the Contractor shall certify under oath in writing, in accordance with the formalities required by Florida law, that the claim is made in good faith, that the supportive data are accurate and complete to the Contractor’s best knowledge and belief, and that the amount of the claim accurately reflects what the Contractor in good faith believes to be the Department’s liability. Such certification must be made by an officer or director of the Contractor with authority to bind the Contractor.”

Since EGS’s 6/11/08 claim is not so certified, it should be rejected.

Issue 3. Compliance with Standard Specification 5-12.3 “Contents of a Written Claim” and Special Provision 8-3.2.5 “Float”

EGS’ Position: Not known.

CEI’s Position: CEI Position. Yes.

Supplemental Specification 5-12.3 “Content of Written Claim” (in Tab A1) states,

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“As a condition precedent to the Contractor being entitled to additional compensation ... for any claim, the Contractor will include for each individual claim, at a minimum, the following information:

- (a) A detail factual statement of the claim providing all necessary dates, locations, and items of work affected and included in each claim:
- (b) The date or dates on which actions resulted in the claim occurred or conditions resulting in the claim became evident:
- (c) Identification of pertinent documents and the substance of any material oral communications relating to such claim and the name of the person making such oral communications;
- (d) Identification of the provisions of the Contract which support the claim and the statement of the reasons why such provisions support the claim, or alternatively, the provisions of the contract which allegedly have been breached and the actions constituting such breach.;
- (f) A detailed compilation of the specific dates and the exact number of calendar days sought for a time extension, the basis for entitlement to time for each day, all documentation of the delay, and the breakout of the number of days for each identified event, circumstance or occurrence.”

The Contractor’s June 11, 2008 letter (in Tab C) “Request for Time Extension...”, regarding the cause of delay, it is said only that “FDOT decision to have the wall torn down and replaced was 12/11/06 to 7/26/07” By inappropriately and gratuitously incorporating into the claim, allegations made in EGS’ May 4, 2007 “written notice of intent to claim” (in Tab C) the cause of the claim is alleged to be the direction to remove and replace a wall which was “constructed in accordance with the plans and specifications” whose “structural integrity has not been compromised and ...can be repaired cosmetically” so that “the direction given by PBSJ/FDOT to remove the wall is incorrect and constitutes economic waste.” It is further stated that this is “extra work directed by the engineer citing Standard specifications 4-3.5 an 4-3.2”.

Regarding Standard Specification 5-12 (c), there is no identification in EGS’ 6/11/08 claim of pertinent documents, or communications or persons, except that EGS’ 5/4/07 letter (referenced in the 6/11/08 claim) responded to CEI’s 5/3/07 letter not to accept Universal Engineering’s recommendation not to remove the wall. Nothing deals with an earlier removal decision alleged to have occurred 12/11/06, which would be expected, since the 6/11/08 letter calculates its 203 days delay from an alleged 12/11/06 FDOT direction to remove the wall. A review of the background section of this proposal shows that CEI first directed the removal of the wall on March 6, 2007, after giving EGS from 1/17/07 to provide engineering alternate proposals. Then even after the March 6, 2007 direction, EGS chose not to comply with the direction until May 9, 2007 when EGS first began to remove the panels.

In EGS’ 6/11/08 claim letter there are no references to specifications or grounds for relief as required by Standard Specification 5-12.3(d). EGS’ 5/4/07 letter (in Tab C) identifies itself as written notice of intent to claim, and is discussed herein in the CEI position to Issue # 4. In this 5/4/07 letter notice of claim is made citing Standard Specifications 4-3.5 and 4-3.2 as a result of CEI’s incorrectly claiming that the direction to remove the concededly out-of-tolerance wall structure was “extra work”. However there is no specification reference to show why performing this remedial work is extra work. There is nothing in the specification requiring FDOT to accept non-conforming work. On the contrary with regard to walls, Standard Specification 548-6.4.1 states “Walls which do not meet (specified) tolerances will not be accepted by the Department and must be removed at no cost to the Department.” (All specifications can be found in Tab A1.)

In regard to requirements of time extension claim requirements in Standard Specification 5-12-3 (f), EGS’ June 11, 2008 claim letter requests 203 calendar days occurring some time between 12/11/06 through 7/26/07 without identifying the particular dates, as required by Standard Specification 5-12.3(f). There is no “basis for entitlement to time for each day” claimed. The scheduling schemes in EGS’ June 11, 2008 letter do not address what is the critical path or what impact the delay had on the critical path, as required

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by Special Provision 8-3.2.5 “Float”, which states “...The Engineer will grant time extensions only to the extent that time adjustments to the affected activities exceed the total float along the affected paths of the current accepted schedule at the time of the delay...”. (All specifications can be found in Tab A1.)

There are no references to impacts to MSE Wall 1 as the critical path on the EGS’ submitted schedule updates of 499H.PRX through 499P.PRX (in Tab S) as Special Provision 8-3.2.5 requires. In fact, as stated in the “background” herein, the first schedule update submitted by EGS showing MSE Wall 1 as critical was dated 3/13/07, and the last was dated 6/12/07. There is no “documentation of the delay” provided complying with Special Provision 8-3.2.5 “Float”, which states “...Submit a network diagram , total float report and narrative report to support any request for additional Contract time”

Since the contractor’s claim does not meet the requirements of Standard Specification 5-12.3 and Special Provision 8-3.2.5, entitlement to time and money should be denied.

Issue 4. Did the claim comply with Standard Specification 8-7.3.2, and 5-12.2.2 time submission requirements?

EGS’ Position: Not known.

CEI Position: No, for the following reasons:

- (a) Standard Specification 8-7.3.2 states, “A preliminary request for an extension of Contract Time in writing must be given within ten calendar delays after commencement to a delay to the controlling item of work... Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement of the delay, the cause of the delay and the controlling item of work affected by the delay.” This same requirement is referenced in Standard Specification 5-12.2.1 “Claims for Extra Work” and 5-12.2.2 “Claims for Delay”. A 1/22/07 email from Mike Hamm states “...This email serves as notification that delay to the Project continues until the issue (MSE Wall conditions) is resolved and EGS intends to seek recovery of time and additional money expended due to the delay.” The 1/22/07 email is not identified as a preliminary request for a time extension and does not contain the information required by Standard Specification 8-7.3.2 for a preliminary request for a time extension. (All specifications can be found in Tab A1.)

The first writing which attempts to supply the information required by Standard Specifications 8-7.3.2 for the “preliminary request” is EGS’ 5/4/07 letter (in Tab C) calling itself a “written notice of intent to claim for additional compensation and additional time for performance of extra work”, “pursuant to Standard Specification 5-12.2.1 Claims for Extra Work and Standard Specification 8-7.3.2.”. As far as extra work cost, this 5/4/07 would be timely for costs claimed after the notice 5/4/07. However the CEI disputes there is extra work involved, as discussed in CEI’s position to issue 1 herein. Therefore the notice requirements of Standard Specification 5-12.2.2 apply. However Standard Specification 5-12.2.2 notice requirements have not been complied so far as time or additional compensation for delay. See CEI comments in the previous paragraph of this position paper. In its June 11, 2008 letter EGS claims \$407,089.16 in indirect delay costs under Standard Specification paragraph 5-12.6.2.1 as well as a 203 day time extension.

Also with regard to time EGS’ 5/4/07 letter expressly states that delay has not started. All three cited specifications require that the notice be filed within 10 days after commencement of the delay. Since the last panel for Wall 1 was placed on 6/29/07, since there has been no preliminary request for time extension filed, Standard Specification 5-12.2.2 concludes that the failure to provide notice of intent to seek additional compensation and the preliminary request for time extension “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.”

- (b) Standard Specification 8-7.3.2 states “...(T)he Contractor must submit to the Engineer a request for a Contract Time extension in writing within 30 days after elimination of the delay to the controlling item of work identified in the preliminary request for an extension of Contract Time. Each request shall include as a minimum all documentation that the Contractor wishes the Department to consider

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related to the delay and the exact number of days to be added to the Contract Time..." Standard Specification 8-3.2.5, discussed in issue 3, also sets out submittals required for a time request.

According to EGS' June 11, 2008 claim letter, the delay ended on 7/26/07 when EGS states the wall was replaced. However the request for 203 days time was not made until June 11, 2008, eleven months after the 7/26/07 alleged end of delay, which exceeds the 30 days restriction. The June 11, 2008 request also did not meet the content and documentation requirements of Standard Specification 8-7.3.2 and Special Provision 8-3.2.5 as discussed in issue 3 above. For these reasons, the claim must be denied.

The CEI has not addressed the time and money quantum aspects of EGS' 6/11/08 claim, because quantum is not an issue being heard by the DRB. However the CEI has objections to the quantum calculation and documentation, for example in the failure of EGS to submit Standard Specification 5-12.7 Mandatory Claim Records. The CEI/FDOT reserves its rights to raise any and all objections to the quantum aspects of this claim.

We respectfully request the Dispute Review Board determine that the Contractor is not entitled to a time extension or extra costs on the MSE Wall No. 1 removal and reconstruction issue (entitlement only).

Attached you will find backup correspondence, meeting minutes, cited specifications and related documents.

Position Paper– Mass Concrete Delay – Entitlement to a Time Extension

In the August 18, 2008 Progress Meeting the DRB set an October 13, 2008 for hearing a dispute raised in EGS' email request date August 8, 2008 on the issue of entitlement to time arising out of a Mass Concrete Quality Control Plan approval. The issue of quantum of time is not an issue being considered by the DRB, even though CEI's July 11, 2008 letter EGS202 (in Tab C) responding to EGS' June 11, 2008 letter (in Tab C) does object to the way contractor calculates the 23 days of time. Entitlement to dollars is not an issue before the Board, even though CEI's July 11, 2008 letter EGS202 responding to EGS' June 11, 2008 claim does object to the Contractor's entitlement to dollar compensation and the filing of timely notices to claim dollars.

As background, Contract T4078 Standard Specification Article 6-8 "Quality Control Program", Section 105 "Contractor Quality Control General Requirements" and Article 346-3.3 "Mass Concrete" (all in Tab A1), specify a Concrete Quality Control Plan and requirements for supervising and inspecting personnel. Although the Contractor first submitted a plan on August 2, 2005, which was sent to District Materials (in Tab A3), that plan and a subsequent plan incorrectly indicated that Mass Concrete was "inapplicable". Mr. Skeen notified Aaron Watts of this omission 8/29/05 (email in Tab C), but the 11/05/05 resubmitted plan (in Tab A3) still reflected Mass Concrete as "non-applicable".

On 7/10/06 CEI sent a letter (in Tab C) stating to date the EGS Quality Control Plan was incomplete. A Quality Control Plan finally addressing mass concrete was submitted 10/16/06 to FDOT/CEI (in Tabs A3 and C), naming Mr. Hamm as one of the responsible personnel, but not providing qualifications for all listed personnel as late as 1/9/07.

At the 11/28/06 Progress Meeting (in Tab D), EGS did not call for a mass concrete pour in the next two weeks (to 12/12/06). 12/7/06 daily reports (in Tab B) show pile driving template removed and piles cutoff at the intermediate pier footing. By 12/7/06 letter EGS86 (in Tab C), CEI requested resumes of concrete supervisory people which were required by Standard Specifications 105-5.8.3 (in Tab A1).

At the 12/8/06 Progress Meeting (see Tab D), Mr. Wedeman said that the critical path was MSE Wall #2 and Mr. Hamm said the intermediate pile cap footer would be placed in the next two weeks (by 12/22/06). On 12/11/06 (see Tab B) the form work on the footer began. At the

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12/12/06 Progress Meeting (see Tab D), “Mr. Hamm predicted that the Turnpike eastbound intermediate pier pile/cap/footer would have concrete placed within the next two weeks (by 12/26/06). Mr. Wedeman noted that the approval of the mass concrete QC plan was awaiting resumes of the bridge superintendent and Mr. Hamm.”

On 12/13/06, FDOT reviewer raised problems with temperature control data and repeated the need for Mike Hamm’s resume (in Tab C). (Mr. Hamm’s 12/18/06 letter (Tab C) implies that EGS received FDOT’s 12/13/06 continued objections to the Mass Concrete Plan on 12/16/06.) Rebar work was taking place at the intermediate pier footer on 12/14/06 (see Tab B). On 12/18/06, Donald VanWhervin, P.E, FDOT Acting District Construction Engineer noted unresolved personnel certification problems (in Tab C). The same day EGS sent what was purported to be a “notice of delay pursuant to 8-7.3.2 and 5-12” on account of not being able to pour concrete because of the QC plan’s non-approval (see Tab C).

On 12/19/06 EGS submitted competency/experience resumes for Superintendent S.B. Gambrel and for Mike Hamm (see Tab C). On 12/22/06 EGS submitted for review a revised temperature control plan (see Tabs A3 and C), indicated Mr. Hamm would not be involved, and a resume of Aaron Watts would be forwarded. Mr. Watts’ resume had not been forwarded as of the 1/9/07 Progress Meeting (see Tab D).

On 1/12/07 EGS submitted a revised temperature control plan addressing only the endbents (See Tabs A3 and C). On 1/16/07 FDOT gave the QC plan approval regarding the endbent caps (See Tab C). By email (Tab C) dated 1/17/07 CEI reminded EGS that a training session stipulated in the accepted plan needed to occur before the first mass concrete pour. However, even though Endbent 3 was ready for concrete, the pour did not take place until 2/1/07 (see Tab B) for reasons only known to EGS. .

After resubmittal of calculations by EGS on 1/25/07 (see Tab A3 and C), and review by FDOT, on 2/8/07 (Tab C) FDOT gave approval to the mass concrete plan for the intermediate pier, and the pier/footer was poured 2/14/07 (see Tab B).

On 6/11/08 (in Tab C) EGS submitted a “Request for Time Extension and Dispute Review Board Hearing seeking 25 days of time extension and \$50,134.25 of indirect cost. By letter of July 11, 2008 EGS202 (in Tab C), the CEI rejected the claim because any delay there might have been was caused by EGS. The CEI further noted the time extension was not calculated according to specification requirements, was not certified, did not meet specification requirements for claims, and was late under the specification requirements. EGS has not addressed any of CEI’s responses, objections and comments which were made by CEI in its July 11, 2008 reply letter to EGS. Instead, by letter dated 8/8/08 (in Tab C) EGS requested a hearing on the “Mass Concrete Delay – Entitlement to a Time Extension”.

Based on the above correspondence and particularly EGS’ letters dated December 18, 2006 and June 11, 2008, and CEI’s letter EGS202 dated July 14, 2008, the CEI sees the following five issues:

Issue 1: Did the FDOT/CEI comply with the Contract and specifications in review the Contractor’s Mass Concrete Quality Control Plan Submittals?

EGS’ Position: No. A plan related to mass concrete temperature control was submitted October 16, 2006, and no objections were noted until the 12/12/06 Progress Meeting by Mr. Wedeman.

CEI Position: Yes for the following reasons:

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- (a) The initial proposed project quality control plan was submitted 8/3/05 (Tabs A3 and C) at the preconstruction conference. On 8/29/05 (in Tab C), CEI forwarded FDOT review comments and noted mass concrete had not been addressed. The response was only 5 days later than the 21 days which Standard Specification 105-4 first paragraph (Tab A1) requires for a response to the initial proposed QC plan. Contract time did not start to run until 1/21/06, so that there was no impact on schedule and the Contract completion.

The Mass Concrete aspect of the plan was not even addressed by EGS until letter 10/16/06 (see Tabs A3 and C). An 11/6/06 revised QC plan (Tab A3) was submitted by EGS on 11/15/06 (Tab C). On 12/7/06 by letter EGS86, the experience record of bridge construction personnel was requested, but the requested records were not yet received as late as the 1/9/07 progress meeting. On 12/13/06, the FDOT reviewer (in Tab C) had problems with the temperature control EGS submittal, which EGS' engineer addressed in a revised temperature control calculations dated 12/20/06 (Tabs A3 and C) forwarded to the CEI on 12/22/06 (see Tab B). The Contractor submitted two other revisions until the plan for the intermediate pier was finally approved by FDOT on 2/8/07 (see Tab C).

The temperature control aspect was only one aspect of the plan. Providing qualified supervisory personnel was another. Considering that Contractor's November 6, 2006 CPM update (in Tab S) did not show formwork on the intermediate pier could begin before 12/8/06, and considering during the 11/28/06 Progress Meeting (Tab D), a concrete pour was not mentioned in the two week look-ahead schedule (to 12/12/06), CEI's 12/7/06 request (in Tab C) for experience records for supervisory personnel was not out of line, and would not be expected to delay any planned mass concrete pour. During the 12/12/06 progress meeting (Tab D), Mr. Hamm stated that concrete would be poured within two weeks (by 12/26/06). At the same meeting Mr. Wedeman again noted approval of the mass concrete QC plan awaited resumes of the bridge superintendent and Mike Hamm (who was proposed to monitor the mass concrete temperatures).

- (b) It was Contractor's obligation to assure that an approved Concrete QC plan addressing mass concrete was in place before structural concrete was cast on the project. See Standard Specification 105-1 in Tab A1. The CEI was not kept aware by EGS (and CEI is not as of now aware) of communications directly between EGS' engineer Kenneth H. Roush of E & L Support Services, Inc. and FDOT reviewing structural engineers, in order to help get the plan together for approval. If, during the period between the October 16, 2006 submittal of temperature data and 12/18/06 when EGS claimed time extension, either Mr. Roush or EGS felt that FDOT's review might delay a concrete pour, EGS should have alerted CEI and given the CEI an opportunity to try to avoid or mitigate any impact on the mass concrete pour. EGS' schedule updates and two week look-ahead schedules did not alert CEI to an imminent mass concrete pour until the 12/8/06 Progress Meeting when Mr. Hamm said that the pile footer would be poured in the next two weeks.

Standard Specification 8-7.3.2 (in Tab A1) states, "A preliminary request for an extension of Contract Time in writing must be given within ten calendar days after commencement to a delay to the controlling item of work... Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement of the delay, the cause of the delay and the controlling item of work affected by the delay. This same requirement is referenced in Standard Specification 5-12.2.3 Claims for Delay (in Tab A1). EGS' 12/18/06 letter (in Tab C) with subject "Mass Concrete Analysis" asserts that it is a "notice of delay pursuant to section 8-7.3.2..." If it can be considered "a preliminary request for a time extension" at all (which CEI contends it cannot for reasons stated in comments to issue #5 herein, it would only be effective for delays occurring 12/8/06 (ten days prior to the date of the 12/18/06 letter). At any rate, the day before, 12/7/06, the CEI by letter EGS86 (in Tab C) had requested missing resumes of supervisory personnel required by the same plan, so that the QC

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requirements of Standard Specification 105 (in Tab A1) had not been met regardless of the temperature control data review raised in EGS' 12/18/06 letter.

Issue 2. Certification of Claim under Standard Specification 5-12.9

EGS' Position: not known.

CEI's Position: The claim is required to be certified under 5-12.9 (in Tab A1), but is not certified at all. Standard Specification 5-12.9 states "When submitting any claim, the Contractor shall certify under oath in writing, in accordance with the formalities required by Florida law, that the claim is made in good faith, that the supportive data are accurate and complete to the Contractor's best knowledge and belief, and that the amount of the claim accurately reflects what the Contractor in good faith believes to be the Department's liability. Such certification must be made by an officer or director of the Contractor with authority to bind the Contractor."

Since no certified claim has been submitted, the uncertified claim submitted must be denied.

Issue 3. Compliance with Standard Specification 5-12.3 "Contents of a Written Claim"

EGS's Position: Not known.

CEI's Position: CEI Position. Yes. Supplemental Specification 5-12.3 "Content of Written Claim" (in Tab A1) states,

"As a condition precedent to the Contractor being entitled to additional compensation ... for any claim, the Contractor will include for each individual claim, at a minimum, the following information:

- (a) A detail factual statement of the claim providing all necessary dates, locations, and items of work affected and included in each claim;
- (b) The date or dates on which actions resulted in the claim occurred or conditions resulting in the claim became evident;
- (c) Identification of pertinent documents and the substance of any material oral communications relating to such claim and the name of the person making such oral communications;
- (d) Identification of the provisions of the Contract which support the claim and the statement of the reasons why such provisions support the claim, or alternatively, the provisions of the contract which allegedly have been breached and the actions constituting such breach.;
- (f) A detailed compilation of the specific dates and the exact number of calendar days sought for a time extension, the basis for entitlement to time for each day, all documentation of the delay, and the breakout of the number of days for each identified event, circumstance or occurrence."

The Contractor's June 11, 2008 letter "Request for Time Extension..." (in Tab C) regarding the cause of delay asserts only that EGS planned to place footing on 12/18/06, and actual placed footing on 2/14/07. There is nothing description of the cause of delay. Even considering EGS's 12/18/06 letter (which is not part of or referenced in the June 11, 2008 claim), the only allegation is that the temperature control analysis sent to CEI on 10/16/06 was not responded to until 12/16/06. There is no explanation anywhere on how this request for additional technical data on 12/16/06 impacted the placing of the pier footing until 2/17/07, as required by 5-12-3(a) and (f).

There are no dates identified when claim occurred or condition be came evident, as required by Standard Specification 5-12.3(b). Even considering EGS' 12/18/06 letter (which is not part of or referenced in the claim) states "...On December 16, 2006... EGS received notification that the plan was rejected and further information was required..." EGS fails to mention CEI's 12/7/06 letter #EGS86 (in Tab C) identifying missing supervisory personnel information related to the Concrete QC plan.

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There are no “pertinent documents” and “oral communications” required by Standard Specification 5-12.3 (c) to be identified that are in fact identified, except for a reference to update Schedule 499I.PRX (in Tab S). Even considering EGS’ 12/18/06 letter in Tab C (not part of or referenced in the June 11, 2008 EGS claim letter) the only contract references are to specifications 346-3.3 “Mass Concrete” (which sets the requirement for a temperature control procedure in the Concrete QC plan), 8-7.3.2 “Adjusting Contract Time” (relative to “notice of delay”) and 5-12 “Claims by the Contractor” (relative to notice of delay). These three specifications can be found in Tab A1. There is nothing to indicate how these three specifications support entitlement to the time extension sought here as required by Standard Specification 5-12.3(d), and no other specifications are cited.

EGS’ June 11, 2008 letter claim requests 25 calendar days between 12/18/06 and 2/14/07, without identifying the particular dates, as required by Standard Specification 5-12.3(f). There is no “basis for entitlement to time for each day” claimed. There is no explanation at all for why it is CEI’s responsible, considering that there is no dispute that the 10/16/06 submission did not comply with Standard Specification 346-3.3 requirements. (See Tab A1)

The revised temperature control plan was submitted to FDOT 12/22/06 (See Tabs A3 and C) and again rejected 1/9/08 (a 4 day turn-around after considering intervening holiday period). Another revision was submitted by EGS 1/12/08 (See Tabs A3 and C) and returned as accepted for endbent pier caps on 1/16/07 (a one day turnaround considering the intervening weekend and holiday). A revised temperature control plan for the center pier was not submitted by EGS until 1/25/07 (see Tab A3 and C), and accepted by FDOT on 2/8/07 (a 9 day turn-around). The pier was not cast until 2/14/07 (see Tab B) seven days later. These dates do not show delays on the Department’s part, and there is nothing from EGS pointing to a Department fault.

Furthermore, the scheduling schemes in EGS’ June 11, 2008 letter do not address what is the critical path or what impact the delay had on the critical path, as required by Special Provision 8-3.2.5 “Float” (in Tab A1), which states “...The Engineer will grant time extensions only to the extent that time adjustments to the affected activities exceed the total float along the affected paths of the current accepted schedule at the time of the delay...”

Issue 4. Was there compliance with Special Provisions 8-3.2.5 so far as the submittals required to support a request for time?

EGS’ Position: Not known

CEI Position: No. Special Provision 8-3.2.5 “Float” (in Tab A1) states “...The Engineer will grant time extensions only to the extent the time adjustments to the affected activities exceed the total float along the affected paths of the current accepted schedule at the time of the delay. Submit a network diagram, total float and narrative report to support any request for additional time.”

Standard Specification 8-7.3.2 “Contract Time Extensions” (in Tab A1) states, “The Department may grant an extension of Contract Time when a controlling item of work is delayed ... (going on to state limitations)”

Standard Specifications 1-3 “Definitions” (in Tab A1) states “Controlling Work Items. 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.”

EGS’ June 11, 2008 letter claim (in Tab C) does not include the required network diagram, total float report and narrative report to support the time extension. Furthermore, the scheduling schemes in EGS’ June 11, 2008 letter do not address the critical path or what impact delayed the critical path as required by Special Provision 8-3.2.5 or Standard Specification 8-7.3.2.

Since the Contractor has not complied with the submittal requirements of Special Provision 8-3.2.5, the time extension claim should be denied.

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Issue 5. Did the claim comply with Standard Specification 8-7.3.2 time submission requirements?

EGS' Position: Yes

CEI Position: No, for the following reasons:

- (a) Standard Specification 8-7.3.2 (in Tab A1) states, "A preliminary request for an extension of Contract Time in writing must be given within ten calendar days after commencement to a delay to the controlling item of work... Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement of the delay, the cause of the delay and the controlling item of work affected by the delay." This same requirement is referenced in Standard Specification 5-12.2.2 "Claims for Delay" (in Tab A1). Nothing has been submitted designated as a "preliminary request for contract time, identifying the commencement of the delay or controlling item of work."

EGS' 12/18/06 letter "Mass Concrete Analysis" (in Tab C) asserts that it is a "notice of delay pursuant to section 8-7.3.2..." If it can be considered "a preliminary request for a time extension", it would only be effective for delays occurring 12/8/06 (ten days prior to the date of the letter). EGS' 12/18/06 letter does not identify the controlling item of work (critical path). In fact, the critical path according to EGS' then last submitted schedule update 499I.PRX (data date 12/11/06 in Tab S) was Activity 20053 "Eastbound Cow Log Branch Bridge Substructure" The Cow Log Branch substructures are not mass concrete and were unaffected by approval of the mass concrete plan, and formwork had not even begun.

- (b) Standard Specification 8-7.3.2 (in Tab A1) states "...The Contractor must submit to the Engineer a request for a Contract Time extension in writing within 30 days after elimination of the delay to the controlling item of work identified in the preliminary request for an extension of Contract Time. Each request shall include as a minimum all documentation that the Contractor wishes the Department to consider related to the delay and the exact number of days to be added to the Contract Time..." Standard Specification 8-3.2.5, discussed in issue 4, also sets out submittals required for a time request.

According to EGS' June 11, 2008 claim letter (in Tab C), the delay ended with the casting of mass concrete at the intermediate pier in Florida's Turnpike on 2/14/07. However the request for 25 days time was not made until June 11, 2008, sixteen months after the 2/14/07 alleged end of delay, which is more than the 30 days restriction. The June 11, 2008 request also did not meet the requirements of Standard Specification 8-7.3.2 and Special Provision 8-3.2.5 as discussed in issues 3 and 4 above. For these reasons, the claim must be denied.

We respectfully request the Dispute Review Board determine that the Contractor is not entitled to a time extension on account the Mass Concrete Plan approval.

Attached you will find backup correspondence, meeting minutes, cited specifications and related documents.

CONTRACTOR'S'S REBUTTAL:

Elmo Greer & Sons, LLC ("EGS") responds to the CEI's September 26, 2008 position paper concerning the referenced issues set for hearing by the Board on October 13, 2008. EGS offers the following as rebuttal.

Section 1.01 MSE Wall No. 1

The CEI misstates (or misunderstands) EGS' position. EGS does not claim that the CEI or FDOT, through a design defect or otherwise, caused the panels on MSE Wall No. 1 (the "wall") to shift out of strict tolerance with the project design. Rather, EGS claims that FDOT wrongfully directed that EGS completely demolish the wall and construct a new wall.

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Standard Specification 5-3 provides as follows:

Perform all work . . . in reasonably close conformity with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances, as specified in the Contract Documents.

In the event that the Engineer finds that the Contractor has . . . produced a finished product that is not in reasonably close conformity with the Contract Documents, but that the Contractor has produced reasonably acceptable work, the Engineer will determine if [FDOT] will accept the work. In this event, the Engineer will document the basis of acceptance by Contract modification, which provides for an appropriate reduction in the Contract price

In the event that the Engineer finds that the Contractor has . . . produced a finished product that is not in reasonably close conformity with the Contract Documents, and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace **or otherwise correct** the work or materials at no cost to [FDOT].

EGS performed work that was in reasonably close conformity with the design for the wall, and FDOT ignored two separate expert engineering analyses EGS obtained at its own expense. FDOT should have accepted – and considered accepting – the first wall with the minor irregularities corrected and had the ability to adjust the EGS’ contract amount accordingly. Instead, FDOT directed that EGS remove and replace the wall. Even if EGS’ work was “inferior or unsatisfactory,” FDOT inappropriately rejected EGS’ more economical repair proposals (at no cost to FDOT) that were based on independent engineering recommendations. To date, FDOT has not (or cannot) refuted these recommendations, having presented no opposing engineering viewpoint, so the Board should consider EGS’ position as unopposed.

The CEI claims, in the last paragraph of page 6 of the CEI’s position paper, that “[t]here are three other wall sections which have been placed in this project without exhibiting out-of-tolerance panels” This is not accurate. Wall No. 2 experienced out-of-tolerance panels on two occasions, and the CEI allowed repairs based on a “Speciality Engineer’s” recommendation. Copies of the two submittals are attached as “Exhibit F”.

In summary, EGS does not dispute FDOT’s right to demand strict technical compliance with the plans and specifications. But FDOT cannot direct the destruction of valuable, substantially-compliant work without compensating EGS. Adding insult to injury, FDOT has not paid for the unnecessarily rebuilt wall and it has assessed over 200 days of liquidated damages – or \$_____ - as a result of its decision. This simply was economic waste, and EGS is entitled to an equitable adjustment to the contract of both time and money.

(a) Mass Concrete

EGS submitted its mass concrete temperature control plan on October 16, 2006. The CEI should have reviewed this submittal within ten working days, per Standard Specification 346-3.3. EGS’ October 16, 2006 plan submittal was not rejected until December 16, 2006 (42 workdays or 60 calendar days). EGS apprised the CEI of the necessity for timely mass concrete plan review per the progress meeting minutes attached as “Exhibit G”.

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EGS anticipates the following to be in attendance at the Hearing: Jerry Greer (EGS), Elmo Lee Greer (EGS), Todd Greer (EGS), Jeff Vanhook (EGS), Aaron Watts (EGS), and EGS Counsel.

EGS sincerely appreciates the consideration of the Board and respectfully requests that the Board render its opinion on the issue presented.

DEPARTMENT'S REBUTTAL:

In the August 18, 2008 Progress Meeting the DRB set an October 13, 2008 date for hearing a dispute raised in EGS' email request date August 8, 2008 on the issue of entitlement to time and money compensation arising out of MSE Wall No. 1 reconstruction. The CEI submitted its Position Paper to the DRB on September 26, 2008.

This letter is a Rebuttal to EGS' September 26, 2008 Position Paper. Quantum of time or money compensation issues are not being considered by the DRB.

(1) MSE Wall No.1 – Entitlement to Additional Time and Money – Entitlement Only

(A). In the "History" section, first paragraph, and the "Additional Contract Time" section, first paragraph, EGS argues that the FDOT decided the wall should be torn down on 12/11/06. In fact, the first direction to tear the wall down was March 6, 2007 (CEI Position Paper exhibit C-35). The first inspector report advising of out of tolerance panels was not made until 1/17/07 (CEI Position Paper exhibit B12). The ensuing time to the March 6, 2007 direction was taken up waiting for EGS to submit an engineering proposal regarding the unquestioned non-conforming panels. The CEI Position Paper discussed this matter in the background/chronology section pages 2 and 3..

(B). In the "History" section, second paragraph, EGS alleges that Universal Engineering Services (UES) is "an independent engineering firm". In fact, UES has performed the density testing behind the MSE Wall and temporary wall No. 1. See CEI Position Paper exhibit C-40).

(C). In the "History" section, second paragraph, EGS states "Universal Engineering concluded that they were in agreement with RE Wall Co that the Wall No.1 had not lost any structural integrity. UES's 5/1/07 report actually says, "Based on density data, no apparent signs of settlement, and no outward rotation of the wall, we believe there are no outwardly visible signs that would indicate that the wall had been compromised." UES goes on (CEI Position Paper exhibit C-42) to advise EGS to take steps to "limit further movement" including the option of removing panels and stabilizing the temporary wall.

Also, although UES may have concluded that there were no "outwardly visible signs.." apparent to UES at the time of its 5/1/07 report, numerous structural non-conformities became apparent upon removing the permanent and temporary walls, as discussed in CEI's Position Paper Issue 1(a).

(D) In the "History" section, third paragraph, EGS notes its 5/4/07 letter was a "Notice of Intent to claim extra work". As stated in the CEI's position Paper in Issue 3, remedial work is not extra work, as is expressly with regard to wall's by virtue of Supplemental Specification 548-6.4.1 and 548-6.4.2 (CEI Position Paper Exhibit A1-45). Also, as discussed in the CEI's Position Paper in Issue 4, the 5/4/07 letter fails to meet the notice requirements of Standard Specification 8-7.4.2, 5-12.2.1 (regarding delay) and 5-12.2.2 (CEI Position Paper exhibits letter A1-12, A1-13).

(E). In the "History" section, last paragraph, EGS states that it provided two opinions that "both concluded that the structural integrity was not jeopardized in any way" and was in reasonably close conformity with the Contract Documents." As to structural integrity, UES's report is refuted by its own recommendation, as previously discussed in Comment "(C)" herein.

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However RE Wall Co's 2/27/07 report (CEI's Position Paper exhibit C31 and C32), states only that "There are no signs that the internal stability of the wall has been compromised in any way, Could either {sheetpiling or temporary wall} have displaced thereby causing the backfill behind the wall to shift? " Photographs Exhibit E1-1 taken before the wall removal shows a bulge in the temporary wall and Photograph E1-15 shows exposed reinforcing steel and a sizable void behind the MSE Wall. Furthermore numerous structural non-conformities became apparent on removing the permanent and temporary walls, as discussed in the CEI's Position Paper Issue 1(a) and Exhibit E2-1 through E2-13.

RE Wall Co.'s report seems aimed to absolve RE Wall Co. from fault by pointing to the temporary wall and the temporary sheet pile as real or potential failures. However this does not help EGS. Sheet pile went in on 8/22/06, before the wall started on 10/10/06. Furthermore both the temporary wall and sheet pile were constructed by EGS, and with regard to the permanent and temporary wall, inspections and tests are the responsibility of EGS under Supplemental Specifications 548-2.6 and 548-7. (See CEI Position Paper exhibits A1-42 and A1-46 and CEI arguments on Issue 1(b))

(F). In the "History" section, last paragraph, EGS states that the CEI/FDOT direction to remove the wall was "unnecessary". On the contrary, the structural deficiencies noted and photographed in CEI Position Paper Exhibit E2-1 through E2-12 demonstrated that the removal was necessary and appropriate as discussed in CEI's Position Paper Issue 1(a). Furthermore the wall panels and temporary wall alignment was undisputedly out of tolerance according to the requirements of Supplemental Specifications 548-6.4.1 and 548-6.4.2 (CEI Position Paper Exhibit A1-45). Both cited specifications state "...Walls which do not meet these tolerances will not be accepted by the Department and must be removed and reconstructed at no cost to the Department". UES report of 5/1/07 does address the bulge in the temporary wall and recommends removal of panels (CEI Position Paper Exhibit C42).

RE Wall Co.'s 2/27/06 report, characterizes panel joint dimension as "an aesthetic issue and may be field repaired" (CEI Position Paper Exhibit C28), and their report does not address alignment tolerance at all. In conclusion, for tolerance and structural reasons it was clearly necessary that the wall be removed.

(G). In the "History" section, last paragraph, EGS argues that the CEI/FDOT required removal of the wall constituted "economic waste". The Contract Documents do not provide relief for "economic waste". FDOT has a right to approve work conforming to the contract requirements. Standard Specifications 5-3 "Conformity of Work with Contract Documents" states, "In the event that the Engineer finds that the Contractor has produced a finished product that is not in reasonably close conformity to the Contract Documents and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace or otherwise correct the work at no expense to the Department" (Tab A), Supplemental Specifications 548-6.4.1 and 548-6.4.2 quoted in Comment "(G)" herein explicitly require removal of the wall for failure to meet tolerances. Also as stated in Comments "(C)" and "(E)" herein and CEI Position Paper Exhibit E1, E2 and Issue 1(a), the wall was, both before and after removal, found to be structurally deficient, so that its removal was necessary, appropriate and not waste.

(H). In the "History" section, last paragraph, EGS argues that the Contractor "delayed the completion of the project significantly" . The quantum issue of time is not an issue before the Board, however, the time extension calculation method, analysis and documentation used by EGS does not comply with the requirements of Special Provisions 8-3.2.5 CEI Position Paper Exhibit A1-24 and Standard Specification 5-12.12.3 (f) Exhibit A1-14, as discussed in CEI Position Paper Issue 3. There needs to be a showing of an impact on the then critical path of the

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current CPM update. EGS' CPM schedule updates do not show MSE No. 1 as critical until March 13, 2007 (CEI Position Paper Exhibit S-22 to S-27), even though delay is claimed starting 12/11/06 in the "Additional Contract Time" part of EGS' Position Paper.

(I) Regarding EGS' "Additional Compensation" section, the quantum dollar amounts are not issues before the DRB. However, the delay impact portion of the claim must comply with Supplemental Specification 5-12.6.2 and referenced Supplemental Specification 4-3.2.1(d)(2), which states that "delay of the controlling work item [be] caused solely by the Department". In this case, any delay from removal and replacement of the wall is caused by the Contractor's defective construction of the temporary and permanent MSE Wall No.1, while the Department/CEI acted responsively and responsibly as demonstrated in the "Background" section of CEI's Position Paper and its discussion in Comment "(A)" of this rebuttal.

Secondly the delay costs are calculated based on a 203 day time extension, which time extension has not been, and cannot be, established as discussed in Comment "(H)" of this rebuttal and CEI's Position Paper regarding Issues 3, 4(a) and 4(b). Finally, the presentation of the costs and documentation do not meet the requirements of Standard Specification 5-12.3 "Content of Written Claim" and 5-12.7 "Mandatory Claim Record" (CEI Position Paper Exhibits A1-13, A1-15 and A1-17) as discussed Issue 3 of the CEI's Position Paper.

(2) Mass Concrete Plan Approval – Time – Entitlement Only

(A). In the "History" section, first paragraph, EGS incorrectly states "On October 16, 2006, the Quality Control Plan was revised [emphasis supplied] to include the Mass Concrete portion of the plan." From the time the initial plan was reviewed in 2005 it was noted that the plan was incomplete in not addressing Mass Concrete despite the fact that the plans showed there was mass concrete (See CEI Position Paper Exhibit C-3). The Initial and follow up QC plan proposals submitted to CEI both incorrectly stated, "Mass Concrete – NA".

One part of the plan – the temperature differential requirements of Standard Specification 346-3.3 "Mass Concrete" (Exhibit A1-39) - was not submitted (for the first time) until 10/16/06. Other requirements of the QC plan are set out in Standard Specification Section 105 "Contractor Quality Control General Requirements". In particular, there are requirements dealing with experience documentation and training for the supervisor and monitoring technician which had not been complied with, as shown by CEI Position Paper Exhibits C-8, C-9, C-10, C-18, and C-22.

The DRB is referred to CEI Position Paper background/chronology section pages 1 and 2 and Issue 1(a) and 1(b), discussing the fact that it was not until the 12/8/06 Progress Meeting (CEI Position Paper exhibit D-4) that the Contractor indicated it would be placing mass concrete within the next two weeks. Furthermore, EGS and its engineer were dealing directly with FDOT's engineers regarding technical matters, so that the CEI would not be aware of schedule impacts. If EGS felt it was being delayed by FDOT's review, it could and should have notified the CEI, in order to afford the CEI an opportunity to move things along. After two months of not receiving a written response on its 10/16/06 temperature submittal, no request to expedite was made by EGS. The CEI had no reason to know of any schedule impact since the December 11, 2006 CPM update (CEI Progress Paper Exhibit S6 to S10) showed the Cow Log Branch substructure as the critical path. This same argument is made in Issue 5(a) of CEI's Position Paper.

(B). In the "History" section, first paragraph, EGS states that "On December 16, 2006 just days prior to scheduled concrete placement, EGS received an email with an attachment rejecting the "Mass Concrete Plan" On the contrary, by CEI letter dated 12/7/06 , and Progress Meeting of

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12/8/06 (CEI Position Paper exhibit C-8 and D-4) EGS was aware that experience documentation was needed in order to complete the plan. However a partial submittal of this information was not even made until 12/19/06 (CEI Position Paper exhibit C-12 through C-16), three work days before Christmas. Daily reports show no bridge construction activity between 12/15/06 and 1/6/07, obviously due to the Christmas/New Years holidays (Standard Specifications 8-6.4 “Suspension of Contractor’s Operations – Holidays” (Tab A1) calls for 12/24/6 through 1/2/07 inclusive to be a holiday suspension of work. The Contractor could not pour mass concrete until the missing personnel documentation was received and reviewed by FDOT. Therefore, the Contractor could not realistically schedule a pour prior to January 2007, even being optimistic about the resolution of open QC plan matters.

(C) In the “History” section, last paragraph, EGS states that plan approval was not received until 1/17/07 implying that the entire time between October 26, 2006 and January 17, 2007 was a delay caused by FDOT QC plan reviews. First, since the intermediate pier was not critical, there was no delay to the contract completion and no time extension is due .See CEI Position Paper Exhibits S-6 through S-15. Secondly, the failure to supply personnel documentation postponed the time of a concrete pour, regardless of any concurrent ongoing review of the temperature differential plan. Thirdly, after the 10/16/06 temperature differential plan was rejected on 12/16/06, a revised plan was not submitted until 12/22/06. This revised plan was rejected in time for a second partial revision limited to end bents to be submitted 1/12/08. This second revision was accepted 1/25/08, but a third partial revision for the intermediate pier was not submitted until 1/25/07 and approved 2/8/07. EGS was at fault for not submitting a compliant plan the first time, thereby requiring multiple resubmittals and reviews. The FDOT QC Plan submittal turnaround times after 12/22/06 was reasonable considering intervening holiday suspensions.

(D). In the “History” section, last paragraph, EGS states that “delay to the Project” was “beyond the control of the Contractor “. First there was no delay to the project since the intermediate pier was never on the critical path. See CEI Position Paper Exhibits S-6 through S-15. Secondly, any delay there might have been was not beyond the Contractor’s control, because any such delay would arise from EGS’ delay in submitting temperature differential plans and experience documentation meeting the requirements of the specifications as discussed in CEI Position Paper Issue 1(a).

(E). Regarding EGS’ “Additional Contract Time” section,, the quantum of time is not an issue before the DRB. However, as noted in CEI’s Position Paper Issue 4, the time extension approach, analysis and documentation used by EGS in its Position Paper, does not comply with the requirements of Special Provisions 8-3.2.5 (CEI Position Paper Exhibit A1-24) and Standard Specification 5-12.12.3 (f) (Exhibit A1-14) as discussed in CEI Position Paper Issues 3 and 4. There needs to be a showing of an impact on the then critical path of the current CPM update. EGS’s CPM schedule updates (as corrected for the Cow Log Branch Bridge status) do not show the Turnpike Intermediate Pier as ever critical (See CEI Position Paper Exhibits S-6 through S-15

(F). Regarding EGS’ “Additional Compensation” section, neither entitlement nor quantum of monetary compensation are issues before the DRB. However the delay portion under Supplemental Specification 5-12.6.2 requires that “delay of the controlling work item (be) caused solely by the Department”. In this case, any delay from submittal, resubmittal and review of required mass concrete QC plan information is caused by the Contractor’s delay in submitting information complying with contract requirements, while the Department/CEI acted responsively and responsibly as shown in the “Background” section of CEI’s Position Paper and its discussion

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in Issue 1(a). Secondly the delay costs are calculated based on a 25 day time extension, but no time extension has been established as asserted in the CEI's Position Paper Issue 3b.

Based on the arguments set out above, and those in CEI's September 26, 2008 Position Paper, the CEI respectfully requests that the Dispute Review Board determine that the Contractor is not entitled to a time extension or extra costs on the MSE Wall No. 1 removal and reconstruction issue (entitlement only) and the Mass Concrete Quality Control Plan – Time Only, Entitlement Only.

Attached to this paper and to the CEI's September 26, 2008 Position Paper you will find backup contract references, correspondence, meeting minutes and related documents cited in this rebuttal.

At the October 13, 2008 DRB hearing, the CEI proposes to have in attendance Peter Nissen, P.E. Carolyn Gish, P.E., Bill Vignier, P.E., Calvin Johnson, Esquire and Michael Kelly all of FDOT; Teresa Driskell, P.E., Tim Wedeman, Barry Ritchey, and Bill Skeen, P.E.. If you have any questions feel free to call me (772) 778-3035.

BOARD FINDINGS/EXPLANATION:

Issue No. 1: MSE Wall No. 1 Removal/Replacement

Originally, the Department had concerns about the quality of the precast wall panels furnished and their installation. The Contractor had the wall supplier (RECo) who is also the EOR for his respective designed wall, examine the wall. RECo's analysis contains the caveat:

“Assuming that the wall was built as per the specifications and as shown in the construction manual, the following has been concluded:

...

The concerns of the panel joint dimensions do not affect the internal stability of the wall but are an aesthetic issue and may be field repaired.

...

Again, though the cause of the joints being out of tolerance is open to discussion, I'm certain that from the test data presented to me that our wall is structurally stable and will perform to established parameters.”

Ultimately, the Department directed the Contractor remove and reconstruct the wall due to movement of the panels in a lateral direction, excessive gapping between wall panels and their concern for its integrity. This direction prior to removal did not convince the Board that the need to do so at the time was for anything other than cosmetic reasons.

However, during removal of the wall, the Department enumerated numerous construction issues with MSE Wall 1. These issues, while not noted or observed during construction, became apparent to the Department and were discovered during the removal of the originally constructed wall. Construction issues noted included:

- Void in backfill materials placed
- Missing bottom row of straps in the adjoining and adjacent Temporary MSE Wall
- Use of smaller MSE Wall straps than size specified by wall EOR
- Placement of MSE Wall straps with a skew angle exceeding than allowable deflection amount per the wall EOR
- Allowing wood shims to be left in place within the wall area in disregard for specification 548-6.4
- Misplacement of geogrid fabric within the adjoining and adjacent Temporary MSE Wall

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While the Department did not unequivocally state any one of these wall deficiencies caused the problems associated with this wall, it was their contention that each of the wall construction issues contributed to the overall need to remove and replace the wall in its entirety. EGS representatives did not refute the identified wall construction issues, but noted the Department failed to immediately direct removal and reconstruction and therefore delayed completion of the project. The Department countered that any time elapsed between when EGS was originally notified of their concerns and when EGS started removal/reconstruction resulted from FDOT allowing EGS specialty engineer to review and assess the wall conditions.

Based on the wall construction issues noted by the Department during removal of the wall and the lack of an Engineering report from the Contractor refuting the discrepancies discovered were non-structural in nature and would not affect the expected service life of the wall, the Board finds that the wall contained latent defects that were discovered upon removal of the wall. The discovery of such and correction of same are non compensable to the Contractor.

Issue No. 2: Mass Concrete Delay

EGS request for entitlement for time based on Department delay in reviewing the Mass Concrete Plan was also discussed in detail. While this Board does believe Department failed to review and respond to EGS Mass Concrete Plan in accordance with the ten (10) days required by the contract documents, this item was not a critical activity due to the related MSE Wall 1 construction issues. The overall time for completion of the project was controlled by the construction, removal and reconstruction of Wall 1.

EGS originally submitted their Quality Control Plan on August 2, 2005. A review of this plan by both PBS&J and FDOT noted that EGS did not identify the need to address the project Mass Concrete requirements. EGS was advised of the need to include their Mass Concrete Plan on August 29, 2005 and again on July 10, 2006.

Subsequently, EGS submitted a Mass Concrete Plan on October 16, 2006 for review and approval. During the review and approval process, PBS&J and FDOT noted additional information was required for final approval. While PBS&J failed to provide written notification of the unacceptable portions of EGS Mass Concrete Plan within the ten (10) days required of receipt, PBS&J maintains they did communicate this information verbally.

Further review of the Contractor's schedule shows that this activity was not critical at the time EGS alleges the delay. During the time of the EGS delay period, the MSE Wall 1 construction issues became apparent (per EGS on 12/11/06). Since, the overall time for completion of the project was controlled by the removal and reconstruction of MSE Wall 1 and based on the fact that this activity was not a critical activity at the time of the delay, the Board does not find entitlement for the Contractor for this issue.

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...²**

² DRBF Practices and Procedures Section 1 – Chapter 6

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BOARD RECOMMENDATION:

Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, the Board does not find entitlement of Greer to time or compensation for Issue 1 and Issue 2 on the above referenced project.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

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 this recommendation by the non-responding party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted
Disputes Review Board

John H. Duke Sr.; DRB Chairman
Mark Puckett; DRB Member
John Swengel; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "JH Duke", with a stylized flourish at the end.

John H. Duke, Sr.
DRB Chairman