

Dispute Review Board (DRB) Recommendation

For

LEAD Engineering Contractors vs. FDOT District 4

SR 9/I 95 Bridge Deck Replacement Over CR 709, FEC RR & Ten Mile Creek

FIN: 436617-1-52-01

Contract No. E4S21

County: St. Lucie

Date, Location and Time of (DRB) Hearing: September 6, 2017

FDOT Treasure Coast Operation Center
3601 Oleander Avenue, Ft. Pierce
9:30 am to 2:00 pm

Issue: **Is the Contractor entitled to additional time and cost to complete the contract work based on the TCP used in the Original Contract Plans?**

DRB Members:

- Edwin J. Mackiewicz III, Chairman
- Ron Klein, Member
- Matt Michalak, Member

(Note: Each Party was represented by Legal Counsel present at the Hearing. Although Counsel did not have an active role in the presentations, they were available to the Board for any legal questions)

Project Information:

- Design-Bid Build Contract with Incentive/Disincentive Based on Original Duration
- Prime Contractor - LEAD Engineering Contractor
- Original Bid Amount - \$13,456,789.10
- Original Duration – 660 Days

- Governing Specifications/Design Standard – 2017 Standard Specification for Road and Bridge Construction; FY2016-17 Design Standard.

OVERVIEW OF DISPUTE

LEAD Engineering Contractors (LEC) and the Florida Department of Transportation (Department) executed a construction contract on April 12, 2017, which comprised the following work: replacement of existing bridge deck superstructure (Bridges 940115 / 940116 over CR-709 & FEC railroad, and Bridges 940122 / 940123 over Ten Mile Creek), milling and resurfacing, temporary pavement, guardrail, rumble strips, and signing and pavement markings along State Road 9 (I-95) from south of Glades Cutoff Road 3.813 miles northerly to north of Okeechobee Road (Virginia Avenue) in the City of Port St. Lucie, St. Lucie County. The existing configuration of this section of I 95 is comprised of six 12' lanes (3 in each direction, NB & SB) with 10' paved shoulders both inside and outside in each direction along with grassed median.

The Contract Documents, namely the contract plans, contain Temporary Traffic Control Plans (TCP) showing the construction of temporary median cross-overs for replacing the bridge decks. The TCP calls for reducing both NB and SB to two lanes in each direction over the respective bridges, shifting NB traffic to the opposite side via the median cross-over and then replacing the NB bridge deck in its entirety, i.e. monolithic width. Upon completion of the NB bridge deck replacement, the median cross-overs are reconfigured such that SB traffic shifts to the NB side and the SB bridge deck is replaced in its entirety.

Upon award of the contract, LEC presented an Alternate Traffic Control Plan (ATCP) under Standard Specification 102-4 to the Department. The ATCP eliminated the temporary median cross-overs and instead shifted two lanes on the respective bridges in order to replace half the bridge deck at time. The ATCP then shifted the two lanes to the newly constructed portion of the bridge deck such that the other half can be replaced.

Upon presentation of the ATCP to the Department, the Department took the position this proposal was a Cost Savings Initiative (CSI) proposal and not an ATCP per section 102-4.

LEC re-submitted the proposal under the CSI Standard Specification, 4-3.9. After several meetings and reviews by the Department staff which resulted in comments provided to LEC for its response, the Department suddenly rejected the CSI.

LEC then resubmitted the proposal under the original submission as an ATCP pursuant to Standard Specification 102-4 at which time the Department rejected the ATCP. LEC then filed a Notice of Intent to Claim. LEC, in its Position Paper and Presentation stated the bid amount was based on constructing the project in accordance with the ATCP.

The dispute centers on the rejection of the ATCP by the Department under Standard Specification 102-4. LEC's position (discussed in more detail below) is it complied with all requirements of Standard Specification 102-4 for the submission of an ATCP and as such if the Department rejects the ATCP, LEC is entitled to additional compensation and/or time. The Department's position (discussed in more detail below) is it has the right to reject any ATCP without providing additional compensation and/or time to LEC.

LEC and the Department could not settle this dispute and as such the LEC brought the issue to the project's Dispute Review Board to provide a recommendation as to the following question:

Is the Contractor entitled to additional time and cost to complete the contract work based on the TCP used in the Original Contract Plans?

DRB RESPONSIBILITY

The role of the Dispute Review Board is to provide specialized expertise in technical areas and in administration of construction contracts to assist the Department and the Contractor in resolving disputes in a timely and equitable manner. In this effort, the Board makes a recommendation based on the Contract, information presented to the DRB in the Position Papers submitted by the Parties, the Parties' Rebuttal Statements, the Parties' PowerPoint/Oral Presentations and the response to the Board's questions posed to the Parties at the hearing.

CONTRACTOR'S POSITION (From Contractor's Position Paper)

The Contract Documents expressly allow the Contractor to formulate its bid using an alternative Traffic Control Plan as stipulated in Specifications Article 102-4. Lead Engineering Contractors ("LEC") prepared an alternative TCP before bid and priced the project bid proposal accordingly which is in accordance with the PPM and maintains the essential functions and characteristics of the original design, including quality and service life. In the absence of any restriction to submit an alternative TCP, and considering the competitive nature of the construction industry and the Department's encouragement of innovation through its specifications and offer of an incentive for early completion of the project, the Contractor is expressly entitled to prepare the bid considering an alternative Traffic Control Plan. As a result of LEC's consideration of an alternative TCP in its bid, the Department obtained from LEC the benefit of a significant lower price at bid time (\$2.77M or 21% lower than the second bidder). Therefore, LEC is entitled to receive compensation for the additional time and cost required to complete the contract because the FDOT improperly rejected LEC's alternative TCP and directed LEC to perform the work following the TCP included in the original Contract Plans.

The FDOT did not preclude bidders from preparing their bid materials utilizing an alternative TCP, as it has done on other projects, nor did the FDOT limit alternative TCPs to a certain design concept. Accordingly, LEC prepared its bid utilizing an alternative TCP based on a two-phase design, in compliance with the Contract Documents. LEC's alternative TCP resulted in over \$2.7 million in savings to FDOT and reduced construction time by 10 days. However, the FDOT improperly rejected LEC's alternative TCP, and has, to date, failed to provide a satisfactory explanation for its rejection. As a result of the rejection, FDOT has directed LEC to proceed with construction based on the original TCP contained in the Project Documents, resulting in additional costs and extended time for construction. The FDOT received the benefit of the time and cost savings in LEC's bid, and LEC is entitled to recover the additional time and costs associated with FDOT's directive to proceed with the original TCP.

Immediately after award of the Contract, LEC proactively presented the alternative TCP proposal it relied on in developing its bid to the FDOT, well in advance of the beginning of construction operations, in order to prevent any impact to the Project schedule. Several meetings were held between the FDOT and LEC regarding the proposal. Throughout this period, FDOT feedback to LEC was positive, and LEC believed its proposal would be approved. Internal FDOT communications also reveal that LEC's proposal was on-track to being approved at that time.

However, the FDOT, in a complete about-face, rejected LEC's proposal and alleged that implementation of the alternative TCP would result in reduced quality and service life of the Project. The FDOT has, to date, failed to provide a satisfactory explanation that is based on the Project requirements for its rejection. Moreover, the FDOT improperly based its rejection on its previous consideration of a similar (not identical) two-phase design concept during its internal pre-bid process. Now available internal FDOT communications reflect that the FDOT previously considered a two-phase design and rejected it in favor of the cross over design contained in the bid materials. However, the FDOT never informed the bidders of this fact. Had bidders been informed of the previous rejection of a two-phase TCP, or that the FDOT would not approve two-phase TCP proposals on this Project, then LEC would have prepared its bid accordingly. Instead, and with this superior knowledge, FDOT expressly advised bidders in the bid documents that alternative TCPs would be permitted without any qualification or limitation. The FDOT's reliance on its rejection of the previous two-phase design also demonstrates that it did not properly evaluate LEC's submittal. FDOT's previous rejection of the two-phased construction scheme was based on the assumption that a support beam would be needed to be installed from below the bridge given that the center line of existing beams at each span is not aligned with the deck saw cut line for removal. However, the temporary support beams are not present in LEC's signed and sealed proposal, which was submitted in full compliance with PPM and Design Standards.

Furthermore, LEC disputes the reasons provided by the FDOT for rejecting its alternative TCP, considering that phased construction is routinely performed throughout the state on FDOT

projects, it is allowed by the Design Standards and Plan Preparation Manual (PPM), and the FDOT did not expressly disallow or limit alternative TCPs on this Project. The FDOT has also taken issue with LEC's use of a longitudinal joint in its alternative TCP. However, here again, the FDOT did not inform bidders that they were precluded from developing an alternative TCP that incorporates a longitudinal joint, or that longitudinal joints are disallowed on this Project, especially since longitudinal joints are otherwise permitted in the Project Documents and Specifications.

LEC's proposal complies with the Contract requirements, maintains the essential functions and characteristics of the original design, including quality and service life. Thus, it was improperly rejected by the FDOT.

At issue is LEC's entitlement to additional time and compensation due to the FDOT's rejection of the alternative TCP and direction to perform the work using a different TCP than the one LEC used in formulating its bid. The FDOT has benefitted from the cost and time savings in LEC's bid, which was achieved by developing and timely submitting an alternate TCP. However, by improperly rejecting the alternative TCP, the FDOT has directed LEC to proceed with performing the Contract Work using a TCP that requires additional time and cost to complete. The FDOT should not be permitted to benefit from the time and cost savings of a proposal that it has improperly rejected and which LEC will not perform.

Included in the materials on which prospective bidders were to calculate their bids was a TCP selected by FDOT for use on the Project. Now available internal communications reflect that FDOT considered several TCP variations during the pre-bid, design phase of the Project. In deciding which design would ultimately be disseminated to the bidders, the FDOT considered three options: (1) cross over option, (2) two-phase option, and (3) three-phase option. Now available internal communications prepared by FDOT and its consultants reveal that FDOT ultimately decided on the cross over option because it was deemed the safest option considered and the lack of phased construction both expedited construction of the bridge deck and had the least impact to the railroad and traffic on adjoining roads. None of this information was provided to the bidders, which placed FDOT in the position of having superior knowledge.

Included in the materials provided to the bidders were Specifications governing the Project Work. The Project Documents provided an incentive for Contractors to complete the Contract Work early. The Project Specifications, Special Provisions, Article 8-13.1 states:

8-13.1 – Incentive – Disincentive: The Department desires to expedite construction on this Contract to minimize the inconvenience to the traveling public and to reduce the time of construction. In order to achieve this an incentive-disincentive provision is established for the Contract. The total “incentive payment” or disincentive deduction shall not exceed \$300,000.

Moreover, included in the Specification were sections that permitted the bidders to modify certain components of the work and to rely on their modified design in formulating their bids. Most notably, the documents permitted a bidder to develop an alternative TCP or Cost Savings Initiative Proposal (CSIP) in formulating its bid.

The Project Specifications, Article 102-4 – Alternative Traffic Control Plan states:

“The Contractor may propose an alternative traffic control plan (TCP) to the plan presented in the Contract Documents. The Contractor’s Engineer of Record must sign and seal the alternative plan and submit to the Engineer. Prepare the TCP in conformance with and in the form outlined in the current version of the Department’s Plan Preparation Manual. Indicate in the plan a TCP for each phase of activities. Take responsibility for identifying and assessing any potential impacts to a utility that may be caused by the alternate TCP proposed by the Contractor, and notify the Department in writing of any such potential impacts to utilities.”

The Project Specifications allowed for the development of an alternative TCP with no limitation other than compliance with the Contract Documents and Specifications. No further restrictions were placed on alternative TCP submissions, including a restriction that the alternative TCP could not include a two-phase option. Moreover, FDOT did not even disclose to bidders that it had previously considered several TCP variations and that only the cross over design it selected for inclusion in the bid materials would be acceptable for the Project. In failing to notify the bidders of this superior information, FDOT expressly represented to the bidders - through the specifications allowing bidders to utilize alternative TCPs - that they were free to develop and base its bid on an alternative TCP design, so long as the alternative TCP otherwise conformed to the Project Documents.

LEC’s bid was properly based, in part, on an alternative TCP that differed from the original TCP provided in the Project Documents. As stated above, the original TCP utilized a cross over concept, while LEC’s alternative TCP was based on a two-phase, sequenced construction concept. LEC’s two-phase concept differed significantly from the two-phase concept considered by FDOT in the undisclosed pre-bid, design phase of the Project. Most notably, LEC’s final alternative TCP signed and sealed design did not require the use of a temporary beam during construction. It also maintained desirable lane and shoulder widths and permitted a 70-mph speed limit throughout the work zone.

Timeline of Events (from Contractor’s Position Paper)

On April 4, 2017, LEC, CEI and FDOT District 4 personnel met at the Treasure Coast Operations Center in Fort Pierce, at the request of LEC, with the intent of introducing LEC’s Project Team to the FDOT and CEI. In an effort to be proactive and to avoid impacts to the

Project Schedule, LEC presented its alternative TCP concept at this meeting. (See Exhibit 18). During the alternative TCP presentation, LEC's team members, and their Design Consultants, emphasized that this alternative TCP would enhance mobility, quality, and safety within the work zone. LEC's team members also highlighted the efforts made during the concept development in favor of reducing the risk of exposure to the travelling public by eliminating the need to construct high speed detours with small radius and reverse curvatures on an interstate facility, a design which has resulted in major accidents and even fatalities on other FDOT District 4 Projects. During the presentation, no "fatal flaws" were observed in LEC's concept and recommendations were made by FDOT and CEI personnel to keep refining the concept in order to present it to FDOT's Design Project Manager, the Engineer of Record (EOR), and District Construction Engineer at a later date. The issue of whether to submit LEC's concept as a pure alternative TCP or as a CSIP was also discussed during the meeting. LEC's team members expressed that they had prepared the submission as an alternative TCP, per Project Specifications, Article 102-4, but that at the request of the FDOT, LEC would consider submitting it as a CSIP, in accordance with Project Specifications, Article 4-3.9.

On April 12, 2017, LEC and FDOT executed the Contract for construction of the Project. Remaining proactive, on April 20, 2017, LEC, CEI, and FDOT met again at the FDOT District 4 Headquarters in Fort Lauderdale with the objective of presenting LEC's alternative TCP/CSIP concept. During the meeting, LEC expressed its intent to follow the CSIP submittal process, as previously requested by the FDOT, and the meeting was treated as the required CSI Workshop. During the meeting, LEC received feedback from the FDOT, the EOR, and other Consultants regarding Structures, Roadway Geometry, Drainage, Environmental, and other disciplines. LEC team members responded to those comments at the meeting, and it was stated that, not only was LEC's submission in compliance with the latest version of the PPM, but that all pertaining revision sheets would be signed and sealed by professional engineers on LEC's consulting team. Likewise, LEC intended to address all raised concerns in its final CSIP submission. LEC was again informed that no "fatal flaws" in LEC's concept were found at this meeting. For reference, the April 20, 2017 Meeting Minutes are attached. (See Exhibit 19).

Remaining proactive, on April 26, 2017, LEC submitted its concept as a CSIP to FDOT, in accordance with FDOT's request to proceed in this manner; however, LEC reserved its right to submit the concept as an alternative TCP, per Section 102-4, should the CSIP be rejected by the FDOT. (See Exhibit 21 – letter LEC-FDOT 003). LEC's CSIP was provided for the purpose of both increasing cost effectiveness (Net Cost Savings to FDOT in the amount of \$347,524.47 or 2.6% of the overall contract amount) and significantly improving the safety of the traveling public.

Based on the repeated positive feedback regarding LEC's CSIP submission, LEC felt confident that the FDOT would approve its CSIP, and it proceeded with developing the design. Documents

obtained by LEC as a result of a public records request demonstrate that internal FDOT communications were favorable to LEC’s proposal and that it would likely be approved. For example, an email from FDOT District 4’s District Construction Engineer stated:

From: Lampley, Paul
Sent: Monday, April 24, 2017 9:21 AM
To: Hiden, Daniel; Kehres, Katherine; Ihsan, Deborah
Subject: FW: 436617-1-52-01 - I-95 Bridge Deck Replacement Project - ATCP/CSI Meeting Minutes
Attachments: I-95 MOT Enhancements 42017FINAL2.pdf; 4-20-17_CSI_Workshop_Meeting_Minutes.pdf

Katie: I think the proposal from Lead is a good idea and will be safer and less impact to traffic. Hopefully Lead can answer all the questions that came up at the meeting. Paul

Additional emails provide further examples of FDOT support for the proposal. For example, an April 28, 2017 email from Katherine Reyes, FDOT Construction Engineer, stated: “I have no objections to this CSI.” Similarly, an email on the same date from Shelley ChinQuee, another member of the FDOT team, provided: “In summary, I agree the proposal increases the work zone safety by maintaining traffic on its original alignment and reduced the environmental impacts.” (See Exhibit 23, pages 3, 6).

As late as May 8, 2017, there was still significant, internal FDOT support for LEC’s CSIP.

From: Bill Stuckey [<mailto:William.Stuckey@cardno.com>]
Sent: Monday, May 8, 2017 1:17 PM
To: Lampley, Paul; Ihsan, Deborah; Hiden, Daniel; Baker, Joshua; Kehres, Katherine
Cc: Hans Brain; Patrick Kennedy; George Denti; Munce, Melanie; Brock, Tim; Jacobs, Michael
Subject: RE: I-95 Bridge Deck Replacement Project - Cost Savings Initiative Proposal - Alternative Traffic Control Plan

All:

Tomorrow is the day LEAD requested to receive approval of their CSI Proposal such that they may continue working on the engineering and costing of it to include with their final submittal. Unless otherwise desired, it is our intent to inform LEAD that we have reviewed their proposal and accept the concepts presented with the understanding that final approval will only be granted once all questions and concerns have been addressed to the department’s satisfaction. Attached is language that we are working on to send to LEAD. Please provide any input necessary. Let me know if you need anything additional. Thank you.

From: Olson, John
Sent: Wednesday, May 10, 2017 2:05 PM
To: Hiden, Daniel
Cc: Kehres, Katherine
Subject: RE: I-95 Bridge Deck Replacement Project - Cost Savings Initiative Proposal - Alternative Traffic Control Plan

Dan –

As you know, we made the decision to invest in the crossover plan after much discussion and consideration by Design, Construction and Maintenance. I want to make sure that everyone who was involved in the original decision have all of their concerns addressed. I'm okay if we revisit the plan and arrive at a different position but we need to make that decision for the right reasons. I think we discussed most of the issues that I'm aware of in the workshop. I believe that the EOR made some technical comments but I don't know where we stand on addressing those. I apologize for taking a long time to get back to you. If you have any questions we can discuss more. Thanks.

Despite initial positive feedback from the FDOT team when LEC presented its design in April 2017, beginning around May 10, 2017, unbeknownst to LEC, something changed and the FDOT was looking for a basis to reject LEC's CSIP.

From: Hiden, Daniel <daniel.hiden@dot.state.fl.us>
Sent: Tuesday, May 9, 2017 1:47 PM
Subject: RE: I-95 Bridge Deck Replacement Project - Cost Savings Initiative Proposal - Alternative Traffic Control Plan
To: Jasmin, Kenzot <kenzot.jasmin@dot.state.fl.us>
Cc: Kehres, Katherine <katherine.kehres@dot.state.fl.us>, Olson, John <john.olson@dot.state.fl.us>, Jacobs, Michael <michael.jacobs@dot.state.fl.us>, Oaikhena, Henry <henry.oaikhena@dot.state.fl.us>, Baker, Joshua <joshua.baker@dot.state.fl.us>

Kenzot – Thanks. I met with our construction team, (Katie, Josh, Michael, others) this morning and they have the same concerns. We intend to tell the contractor that we do not support this CSI concept and would recommend against spending more time/resources trying to finalize a CSI proposal. We would still like your comments and any other information you have that documents discussions that led to the original crossover decision.

From: Braun, Steve
Sent: Wednesday, May 10, 2017 4:08:47 PM
To: Kehres, Katherine
Cc: Olson, John; Hiden, Daniel; Jasmin, Kenzot; Oaikhena, Henry; Otero, Ramon; Donegan, Joseph; Lampley, Paul; Braun, Steve
Subject: RE: I-95 Bridge Deck Replacement Project - Cost Savings Initiative Proposal - Alternative Traffic Control Plan

Per our phone conversation, I concur with the recommendations from Construction to reject the CSI request and proceed with the original design. The FDOT's design is the result of extensive coordination and evaluation that considered maintenance of traffic, the bridge deck work-zone, project costs, and the long term service life of the completed bridge deck. Although Kenzot has provided comments on the CSI, I do not believe that responses to these comments will necessarily alter our above position.

From: Lampley, Paul
Sent: Wednesday, May 10, 2017 8:56:12 PM
To: Kehres, Katherine; Hiden, Daniel
Cc: Ihsan, Deborah
Subject: CSI language

Katie: I took a look at the January 2017 spec to see if it addressed your concern and found the following language:

"The Engineer is the sole judge of the acceptability of a Proposal and of the estimated net savings in construction costs from the adoption of all or any part of such proposal."

In the CSI Procedure it delegates "Engineer" to the Director of Operations so I do not see a loophole in our ability to reject a CSI. I think our rejection should use language out of the spec such as: reduction in quality, impairing the essential function, reduced service life, reduced reliability, etc. Thanks, Paul

From: Ihsan, Deborah
Sent: Friday, May 12, 2017 7:00 AM
To: Granados, Grace
Subject: FW: 436617-1-52-01 - I-95 Deck Replacement - CSI Proposal from LEAD Engineering
Attachments: Lampley_Memo.pdf; Howard_Memo.doc; 4-26-17_LEAD CSI Proposal E4S21 I-95 Deck Replacement.pdf

This one will be a rejection.

Deb

Much of the now available internal FDOT discussion supporting rejection of LEC's submission centers on the fact that FDOT previously considered a two-phase option and rejected it in favor of the cross over design that was ultimately included in the bid materials. However, the fact remains that the FDOT never informed the bidders that a two-phase approach would not be considered, that CSIPs or alternative TCPs incorporating a two-phase design would not be permitted, even if they conformed with the Project Documents, and/or that only designs utilizing the cross over design would be accepted.

On May 16, 2017, in a complete reversal from its previous representations to LEC, FDOT sent an email to LEC containing a Memorandum dated May 11, 2017 rejecting LEC's submitted CSIP. (See Exhibit 24). Although the FDOT conceded that LEC's proposed design maintained the essential function and characteristics of the original design, the FDOT's Memorandum stated, summarily and without any support, that the proposed phasing of the bridge deck construction would result in a reduction in quality and a reduced service life of the Project. However, no further explanation, data or basis for reaching this conclusion was provided, nor was contractual support for that statement provided by the FDOT.

On May 18, 2017, LEC sent a letter requesting that the FDOT reconsider its decision to reject LEC's CSIP. (See Exhibit 26). LEC stated that it believes the FDOT's determination that LEC's CSIP proposal would reduce quality and service life was improper and not based on the Contract Requirements. LEC further requested that the FDOT reconsider its decision and offered the following clarifications:

1. LEC's CSI Proposal was initiated by the Contractor in compliance with Specifications Section 4-3.9 for the purpose of both increasing cost effectiveness and significantly improving the safety of the traveling public. The FDOT encourages both contractors and subcontractors to submit these proposals as evidenced by Section 4-3.9 and 4-3.9.2.

2. LEC's CSI Proposal contained no deficiencies that can adversely affect the essential functions and characteristics of the project such as safety, service, life, reliability, economy of operation, ease of maintenance, aesthetics, and necessary standard design features. The Memorandum received from FDOT, while rejecting the CSI, it confirms that "The essential functions and characteristics of the original design would remain unchanged...".
3. LEC's CSI Proposal was not introducing a change to the pavement system design nor will it require any additional right-of-way.
4. LEC's CSI Proposal is in compliance with the current version of the Plans Preparation Manual.
5. The CSI Proposal eliminates the temporary diversion and reverse curvatures, which have produced increased traffic accident rates and fatalities on recent FDOT projects along I-95 within District 4, following the type of high speed detours through work zones similar to the ones proposed in the Contract Plans. The Contract Plans include the use of a TCP requiring a reduction in speed from the posted limit of 70 MPH to 60 MPH. Alternatively, the CSI Proposal proposes to use alignments that comply with the 70 MPH existing posted speed limit.

On June 2, 2017, LEC received a letter from FDOT refusing to accept LEC's CSIP and confirming its decision to reject it. (See Exhibit 27). On June 6, 2017, LEC responded to FDOT's rejection by providing a rebuttal to the rejection of the CSIP. LEC set forth why FDOT's decision was improper. (See Exhibit 28).

On June 7, 2017, LEC re-submitted its concept as an alternative TCP in full conformance with Specifications Article 102-4 (See Exhibit 29). LEC's alternative TCP:

1. Was signed and sealed by both Contractor's Engineers of Record (Roadway and Structural Portion)
2. Conformed with the current version of the FDOT's Plan Preparation Manual
3. Indicated a TCP for each phase of activities
4. Contained no potential impact to utilities

On June 9, 2017, FDOT rejected LEC's alternative TCP. In its letter, the FDOT explained that the rejection was based on the inclusion of a longitudinal joint, a design that, unbeknownst to LEC, was previously considered and rejected by the FDOT. (See Exhibit 30). Here again FDOT makes reference to superior knowledge it had from the pre-bid, design period of the Project that it did not share with the bidders. The FDOT should have informed bidders that alternative TCPs which were compliant with the Contract Documents, but which contained a longitudinal joint, would not be approved for use on the Project. On June 13, 2017, LEC submitted a letter

providing a Notice of Claim in compliance with Sections 5-12.2 and 8-7.3.2 for the additional time and costs it would incur to complete the Contract Work utilizing the TCP included in the Contract Plans as directed by FDOT. (See Exhibit 31). As a result, these DRB proceedings were initiated.

Now available internal FDOT communications clearly reveal that the FDOT rejected LEC's alternative TCP for improper reasons. No support for the rejection was provided, despite LEC's request for such information. (See Exhibit 25). Under the Contract, the FDOT's ability to reject a CSIP is different from its ability to reject an alternative TCP. With regard to CSIPs, the FDOT has sole discretion to reject such a proposal. However, an alternative TCP, like any other Project submittal, must be approved by the FDOT if it is in accordance with the Project Documents. Despite being told that the essential functions and characteristics of the Project remain unchanged, FDOT's June 2, 2017 letter raises, for the first time, the issue of the inclusion of the longitudinal joint as a factor in FDOT's claim that LEC's proposal results in reduced quality and service life of the Project. (See Exhibit 27). Nowhere in the Contract Documents does it say that LEC was precluded from introducing a longitudinal joint, even if such a submission is otherwise in accordance with the Project Documents. Notably, this rejection is a 180-degree change from, and is completely out of step with, what LEC was told in the April meetings and what is contained in contemporaneous internal FDOT emails.

Points To Support Entitlement (from Contractor's Position Paper)

- LEC is entitled to formulate its bid using an alternate TCP
- The express terms of the Contract allow LEC to submit an alternative TCP as stipulated in Project Specifications, Article 102-4.
- On other FDOT projects, the FDOT specifically precludes Contractors from utilizing alternate TCPs
- Approval of the alternative TCP by the FDOT must follow the requirements established in the Contract. To the extent the Contract Requirements are met, the Contractor is entitled to formulate its bid using an alternative TCP.
- LEC'S alternate TCP does not change the essential functions of the design and complies with all contract
- The FDOT is obliged to approve an alternative TCP that otherwise complies with the Contract Requirements
- The use of longitudinal joints is allowed by the FDOT Structural Design Guidelines and does not reduce the quality of the Project
- The use of longitudinal joints is allowed by the FDOT Structural Design Guidelines and does not reduce the service life of the Project

- Quality or service life were never an FDOT consideration during the design phase when selecting the cross over MOT option
- FDOT received significant cost savings as a result of LEC formulating its bid based on its alternative TCP
- LEC is entitled to receive compensation for the additional time and costs required to complete the contract work because the FDOT improperly rejected LEC's alternative TCP and directed LEC to perform the work following the original TCP.

DEPARTMENT'S POSITION (From Department's Position Paper)

The Department contends that rejecting the Contractor's proposed ATCP does not entitle them to receive additional compensation for time and money to construct the project per the contract MOT Plans in lieu of their ATCP for the following reasons:

1. The Department worked diligently and in good faith in providing the documents, communications and information contained in the Proposal and ultimately in Construction Contract E4S21 – I-95 Bridge Deck Replacement over CR-709 and Ten-Mile Creek. Per Specification 4-1 - Scope of the Work, "The intent of the Contract is to provide for the construction and completion in every detail of the work described in the Contract" (Attachment S). The pay items provided for this project include 4 Special Detours which are clearly detailed in the plans. These items as provided and detailed, constitute the basis for and are the Department's expectation of that which was to be bid and constructed as part of the project. Barring approval from the department and/or a formalized contract change, the composition of the contract and the details of these items of work remain unchanged. The Department contends that any deviation from the bid set of plans prior to their approval, for any reason (bid formulation, construction or other), is without the Department's consent and is solely at the contractor's risk.

2. The Department considered multiple MOT scenarios in developing Contract E4S21 and constructing the project by utilizing median crossovers was decided upon early in the design phase of the project. The summary of this decision can be seen in the document "MOT Report" dated January 2016. Subsequent to this determination, extensive effort and coordination was spent by the Department to design, detail and obtain the permits necessary to construct the project utilizing crossovers. The end result of these efforts was a comprehensive set of Plans that was provided to all bidders and constitute what is now the contract MOT Plans. These plans clearly identify constructing temporary crossovers as part of the contract. Per Specification 1-3, Extra Work is defined as work "which is not otherwise covered or included in the project by the

existing contract documents” (Attachment U). Based on this definition, constructing the temporary crossovers per the contract MOT Plans is clearly not extra work.

3. The Department’s bid solicitation included pay items for constructing 4 Special Detours. These special detours were fully and intricately detailed in the contract plans provided to all bidders for use in formulation of their bid. The Contractor included a price for constructing each of these 4 Special Detours in their bid (Attachment V) and specifically acknowledged that “they have carefully and to our full satisfaction examined...the Plans...and that we will fully complete all necessary work in accordance with the Plans and Specifications...” (Attachment W).

4. The Contractor’s claim that they are due additional time and compensation to construct the project in accordance with the contract MOT plans because they based their bid on constructing the project via their ATCP is declaring a contract change that was not agreed to by the Department. This argument from the Contractor asserts that the Contractor has the ability to unilaterally change its contract with the Department. Changes such as this, which are not agreed to by both parties and are not executed within the parameters of the contract, are not binding. The Department contends that it can not and should not be held liable for such changes.

5. The Department provides a question and answer process by which clarification and/or additional information can be solicited by contractors while formulating their bid. It is noted that there were no questions posed as to not constructing the Special Detours depicted in the contract MOT Plans (Attachment X).

6. The Department acknowledges that the project specifications allows the Contractor to present a CSI Proposal. Per Specification 4-3.9.1, “This Subarticle applies to any cost reduction proposal (herein referred to as a Proposal) that the Contractor initiates and develops for the purpose of refining the contract to increase the cost effectiveness or significantly improve the quality of the end result”. Per Specification 4-3.9.2, Such proposals “must result in savings without impairing essential functions and characteristics such as safety, service, life, reliability, economy of operation, ease of maintenance and necessary standard design features”. As the Contractor’s proposal called for constructing each of the bridge decks in 2 phases thereby necessitating a longitudinal construction joint in each, the Department contends that their proposal changes the end product and that service life and ease of maintenance is diminished. Per Specification 4-3.9.4, “The Engineer is the sole judge of the acceptability of a Proposal”

(Attachment Y). As the project specifications clearly state that the department is the sole judge in determining the acceptability of such proposals, the Department does not agree with the contractor's assertion that their rejection was arbitrary and without contractual basis. The Department contends that it acted within its contractual authority in reviewing and rejecting the Contractor's CSI Proposal.

7. The Department acknowledges that the project specifications allow for the Contractor to formulate and propose an ATCP however, the Department maintains that the approval authority of any such proposal lies solely with the Department. Reference Specification 102-4 (Attachment Z) which includes the following language "The Department reserves the right to reject any alternative TCP". As the project specifications clearly state that the department reserves the right to reject any alternative TCP, the Department does not agree with the contractor's assertion that their rejection was arbitrary and without contractual basis. The Department contends that it acted within its contractual authority in reviewing and rejecting the Contractor's ATCP Proposal. Furthermore, the Department also contends that unless an ATCP is approved, the original contract requirements are unchanged. It is noted that the Contractor's ATCP submittal in this instance changed more than just the temporary scheme by which traffic was to be maintained. In this instance, the Contractor's proposal also changed the design and construction methodology of the primary permanent feature being constructed on the project, the bridge decks.

8. The Department encourages innovative thinking and strives to be receptive to all such proposals and submittals including Cost Savings Initiatives as well as Alternate Traffic Control Plans. That being said however, it is an extraordinary risk for a contractor to assume that such a proposal will be accepted without first discussing it with the Department. It is noted that the Contractor's proposal had many positive aspects however, the owner's perspective should never be assumed as the full understanding and appreciation of their obligation to design and construct projects as efficiently and as problem free as possible is unique and subjective.

9. Regardless of the full knowledge of the history regarding the development of the project's MOT Plans, the Department was obligated to dutifully consider the Contractor's CSI/ATCP Proposals when they were presented. To the maximum extent practical, consideration of the Contractor's proposals and the project's overall MOT scheme was solicited by the appropriate personnel within the Department. Much of the feedback received posed similar questions and concerns that were identified early in the design implementation when the crossover option was originally chosen. In addition to the factors that led to the original decision to utilize temporary crossovers however, consideration was given this time to the Department's

experience on a similar I-95 bridge re-decking project being administered by the Department and ongoing at the time of the Contractor's proposal. This project was the SR 9/I-95 Bridge Deck Replacements over Gatlin Blvd and CR 712/Midway Rd, Financial Project ID 436646-1-52-01. Similar to both the Contractor's CSI and ATCP Proposals, this project did not utilize temporary crossovers and each of the 4 bridge decks on it were constructed in 2 phases. Consideration was given to the issues experienced on Project 436646-1-52-01 and it is the Department's perspective that utilizing crossovers would have prevented many of the difficulties encountered. It is noted that crossovers were the preferred option for Project 436646-1-52-01 but, do to environmental constraints, this option was not feasible.

10. The department seeks to partner with the contractor on all of its construction projects and the I-95 Bridge Deck Replacement Project over CR 709 & Ten-Mile Creek is no different. As we were reminded at the project partnering meeting that was held on Thursday, July 6, 2017, one of the basic tenets of partnering is follow through. The department simply wants the contractor to follow through on its contractual obligations. It is unfortunate that the contractor did not formulate their bid on the documents provided by the department for that stated purpose. As unfortunate as it is however, the contractor is solely responsible for this action and it is the department's contention that it should not be held accountable for this decision.

CONTRACTOR'S REBUTTAL (From Contractor's Rebuttal Paper)

The Department's Position Paper suffers from a fatal flaw. The Department has improperly presumed that it has the unbridled discretion to reject any ATCP submitted by a Contractor. This is simply not the case.

The fundamental question is the amount of discretion the Department is permitted under Specification Article 102-4 (set forth below) in rejecting an Alternative Traffic Control Plan ("ATCP"): "102-4 Alternative Traffic Control Plan.

The Contractor may propose an alternative traffic control plan (TCP) to the plan presented in the Contract Document. The Contractor's Engineer of Record must sign and seal the alternative plan and submit to the Engineer. Prepare the TCP in conformance with and in the form outlined in the current version of the Department's Plans Preparation Manual. Indicate in the plan a TCP for each phase of activities. Take responsibility for identifying and assessing any potential impacts to a utility that may be caused by the alternate TCP proposed by the Contractor, and notify the Department in writing of any such potential impacts to utilities.

Engineer's approval of the alternate TCP does not relieve the Contractor of sole responsibility of all utility impacts, costs, delay or damages, whether direct or indirect, resulting from Contractor initiated changes in the design or construction activities from those in the original Contract Specifications...

The Department reserves the right to reject any alternative TCP. Obtain the Engineer's written approval before beginning work using an alternative TCP."

The Department contends this Specification provides it absolute and unfettered discretion to reject an ATCP without any consequence. Lead Engineering Contractors ("LEC") disagrees. There are three separate and independent entitlement theories under which LEC is entitled to time and compensation for the Department's rejection of a compliant ATCP.

1. The Department does not have the absolute discretion to reject an ATCP
 - If the ATCP complies with the Contract requirements, then the Department must approve the ATCP because the Department expressly allowed the submission of ATCPs without any limitation other than that they must comply with the Department's Plans Preparation Manual and the Department did not reserve to itself the "sole discretion" on such approval as it did in other sections of the Standard Specifications with other issues such as the CSIP.

2. The Department has the authority to reject an ATCP that complies with the Contract requirements, but only if the Department provides appropriate adjustments to the Contract price and time
 - The Department has the authority to reject a compliant ATCP if it prefers a certain TCP over a compliant ATCP submitted in accordance with the Contract.
 - But doing so represents a change to the Contract
 - The Contract provides specific and detailed provisions on compensating a Contractor for any such changes.
 - A Contractor cannot enforce specific performance of the Contract to force the Department to accept the ATCP; however, the Contractor is only entitled to compensation that results from any change such as the rejection of a compliant ATCP which was submitted in accordance with the contract ATCP provision.

3. If the Department has determined prior to the bid that certain ATCPs will not be considered, or that certain elements of a ATCP will not be permitted, then the Department must include this superior knowledge in the bid documents

- The Department cannot withhold such superior knowledge from bidders while still authorizing bidders to submit unlimited ATCPs under the Contract Documents.

LEC believes that the above appropriately frames the Parties' rights and obligations as to ATCPs under the Contract.

DEPARTMENT'S REBUTTAL (From Department's Rebuttal Paper)

1. The Contractor contends that the Department's Rejection of their ATCP Proposal was improper and not supported by the contract.

The Contractor's premise that they are entitled to submit an ATCP and the Department is required to accept the ATCP ignores the contractual reality that the ATCP is a "proposal" and not a binding condition. Section 102-4 of the contract Specifications states that "The Department reserves the right to reject any Alternative TCP." This statement clearly reiterates that a proposal is a mere offer that requires acceptance and it further provides the explicit contractual authority to the Department to reject any proposed ATCP. The Department's letter providing the rejection of the ATCP states "The ATCP proposal does not provide the same end product as provided by the as-bid plans and is therefore rejected in accordance with Standard Specification 102-4." This statement is the Department's position regarding the Contractor's proposed ATCP. The Contractor may not agree with the Department's position, nevertheless, the contract clearly provides the Department this decision authority.

2. The Contractor formulated their bid based on a proposed ATCP and contends that the specification language included in the contract permits them to do so.

The Department included pay items and a detailed set of plans that set forth the work required to be completed for this project. The Contractor included prices for each of these pay items however, because it priced an ATCP that eliminated the crossovers, its prices neglected to include all quantities and work that was described for each of them. By neglecting to include all quantities and work required for this project in the bid, the Contractor undertook an enormous risk in the event the proposed CSI/ATCP was rejected.

It is the Contractor's perspective and deduction that the contract documents permit bidding an ATCP however, the Department does not acknowledge or condone this practice. Prior to an ATCP being approved, it is not a contract document. The Department spent considerable time and money to develop the Contract Plans with the intention of providing all contract work for the project, including the MOT. Prior to approval of a proposed change, bidders should prepare bids based on the contract as they agreed to do.

To allow the Contractor to bid on an ATCP that changes the design and final product would effectively convert a bid-build project into a design-build project. On bid-build projects, the Department is entitled to receive bids based on the Department's design and is entitled to a final product in accordance with the provided Plans and Specifications.

3. The Contractor asserts that a satisfactory explanation has not been provided for the rejection of their ATCP Proposal.

On multiple occasions, the Department has provided the basis of its rejection for both the CSI and the ATCP Proposals (Attachments G, I & L from the Department's position paper). The Contractor simply does not agree with the Department's position that the end product is changed and that quality and service life are impacted by the introduction of longitudinal joints and therefore do not acknowledge or give credence to the reasons provided.

4. The Contractor contends that the proposal does not alter the essential functions and characteristics of the original design and this information is agreed to and provided by the Department.

Numerous times in the Contractor's position paper, the Contractor includes excerpts from correspondence the Department provided regarding the rejection of their proposals. However, the Contractor disingenuously do not include the entire communication from the correspondence. By truncating the communication and providing it piecemeal, the Contractor is misrepresenting the intent of the written communication. Included in the CSI rejection letter is the following sentence: "The essential functions and characteristics of the original design would remain unchanged however, phasing of the bridge deck construction as proposed would result in a reduction in quality and a reduced service life."

5. The Contractor contends that quality and service life of the bridge decks are not impacted by their proposed ATCP.

The term "service life" and "design life" are actually quite different as the term "service life" is much broader and encompasses the entire lifespan of a bridge. As defined by the AASHTO LRFD specifications, design life is "the period of time on which the statistical derivation of transient loads is based." This timeframe is established and accepted to be 75 years based on the current specifications. This definition is also provided in the Contractor's position paper. In addition, AASHTO LRFD defines the term "service life" as simply "the period of time that the

bridge is expected to be in operation.” The definition provided below is taken from the AASHTO LRFD Bridge Design Specifications.

As the term “service life” encompasses the complete lifespan of a bridge, it considers many factors including but not limited to environmental, design, materials, construction and maintenance. Given these differences, the AASHTO LRFD definition for “design life” does not represent a basis for “service life.” In fact, there quite a bit of discussion amongst designers and owners regarding these terms and they are often used interchangeably. The term “design service life” is also used but, this has been said to be “confusing and misguided” and that a better term to describe design life is “target service life.” The presentation of the terminology herein is provided in effort to clarify the Department’s statements and position regarding the Contractor’s proposals in that they present a reduction in quality and “service life,” not “design life,” “target service life,” or “design service life.”

It is universally accepted that a primary deterioration mechanism of concrete bridge decks is the migration of water and chlorides down to the reinforcing steel which leads to corrosion. The fact that cracks propagate in phase-constructed bridge decks at the phase-interface is also well documented. Although phased bridge deck construction when designed and constructed properly can perform satisfactorily, it is undeniable that increased cracking is experienced in comparison to monolithically constructed bridge decks. Although proper design and construction of the reinforcement across the phase line/construction joint serves to limit and control cracking, it does not eliminate it.

6. The use of longitudinal joints is allowed by FDOT Structures Design Guidelines

The fact that the longitudinal joints is permitted by the Structures Design Guidelines is uncontested. The Department acknowledges this and stated in Attachment I that “longitudinal joints are sometimes unavoidable however, it is not believed that this project constitutes one of those circumstances.” In subsequent correspondence, the Contractor agreed that longitudinal joints are not a necessity for this project.

Numerous times in the Contractor’s position paper they take issue with the original decision to construct this project using crossovers. It is noted however, that the original decision is not at issue before the board and the fact remains that the Department exercised its prerogative in making that decision and then developing the contract plans for the project. The only bearing the original decision to incorporate crossovers on this project has on the issue at hand is that the contract plans were a factor in rejecting the Contractor’s proposals because they provided the means by which the project could be constructed without incorporating a phased construction scheme. Given the Department’s preference for constructing bridge decks monolithically where feasible, and the fact that the Department already had a set of plans in hand that provided the means to do this, the Department did not wish to entertain an ATCP that changed this aspect of the original design and therefore rejected the Contractor’s ATCP Proposal.

7. The Contractor asserts that the Department had “Superior Knowledge” developed from the pre-bid phase and that it did not share this with the bidders.

The Department is not obligated nor does it typically provide all correspondence regarding the decisions made during the design evolution of a project. As this project is not design/build, the Department, not the Contractor, was responsible to provide the design. Design was neither identified nor included in the scope of work for this construction contract. The Department developed and provided a complete set of plans that described the quantities and work required for the project. These plans represented its expectation of what was to be bid on and constructed and these plans were provided to all bidders for use in formulating their bids.

CONTRACT SPECIFICATIONS

The Board finds the following contractual requirements to govern the matter at issue. The parts of the Contract below are excerpts in pertinent parts.

102-4 Alternative Traffic Control Plan.

*The Contractor may propose an alternative traffic control plan (TCP) to the plan presented in the Contract Documents. The Contractor’s Engineer of Record must sign and seal the alternative plan and submit to the Engineer. Prepare the TCP in conformance with and in the form outlined in the current version of the Department’s Plans Preparation Manual. Indicate in the plan a TCP for each phase of activities. Take responsibility for identifying and assessing any potential impacts to a utility that may be caused by the alternate TCP proposed by the Contractor, and notify the Department in writing of any such potential impacts to utilities. Engineer’s approval of the alternate TCP does not relieve the Contractor of sole responsibility for all utility impacts, costs, delays or damages, whether direct or indirect, resulting from Contractor initiated changes in the design or construction activities from those in 110 the original Contract Specifications, Design Plans (including TCPs) or other Contract Documents and which effect a change in utility work different from that shown in the Utility Plans, joint project agreements or utility relocation schedules. **The Department reserves the right to reject any alternative TCP.** Obtain the Engineer’s written approval before beginning work using an alternate TCP. The Engineer’s written approval is required for all modifications to the TCP. The Engineer will only allow changes to the TCP in an emergency without the proper documentation.*

4-3.9 Cost Savings Initiative Proposal:

4-3.9.1 Intent and Objective:

1. This Subarticle applies to any cost reduction proposal (hereinafter referred to as a Proposal) that the Contractor initiates and develops for the purpose of refining the Contract to increase cost effectiveness or significantly improve the quality of the end result. A mandatory Cost

Savings Initiative Workshop will be held prior to Contract Time beginning for the Contractor and Department to discuss potential Proposals. This Subarticle does not, however, apply to any such proposal unless the Contractor identifies it at the time of its submission to the Department as a proposal submitted pursuant to this Subarticle.

2. The Department will consider Proposals that would result in net savings to the Department by providing a decrease in the cost of the Contract. Proposals must result in savings without impairing essential functions and characteristics such as safety, service, life, reliability, economy of operation, ease of maintenance, aesthetics and necessary standard design features. However, nothing herein prohibits the Contractor from submitting Proposals when the required functions and characteristics can be combined, reduced or eliminated because they are nonessential or excessive. The Department will not recognize the Contractor's correction of plan errors that result in a cost reduction, as a Proposal.

3. The Department reserves the right to reject at its discretion any Proposal submitted that proposes a change in the design of the pavement system or that would require additional right-of-way. Pending the Department's execution of a formal supplemental agreement implementing an approved Proposal, the Contractor shall remain obligated to perform the work in accordance with the terms of the existing Contract. The Department may grant time extensions to allow for the time required to develop and review a Proposal.

1-3 Extra Work.

Any "work" which is required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents, whether it be in the nature of additional work, altered work, deleted work, work due to differing site conditions, or otherwise. This term does not include a "delay".

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

4-3.1 General: *The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both,*

as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract.

4-3.2 Increase, Decrease or Alteration in the Work:

The Engineer reserves the right to make alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance. Such alteration shall not constitute a breach of Contract, shall not invalidate the Contract or release the Surety.

4-3.2.1 Allowable Costs for Extra Work:

The Engineer may direct in writing that extra work be done and, at the Engineer's sole discretion, the Contractor will be paid pursuant to an agreed Supplemental Agreement or in the following manner.

8-7.3.2 Contract Time Extensions:

The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period. When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling items of work, the Department will consider such delays as a basis for granting a time extension to the Contract.

BOARDS ANALYSIS OF THE FACTS AND THE CONTRACT

There are several facts which are undisputed by each party in this case. These include:

- The contract specifications permit the Contractor to submit an ATCP
- There are no contract provisions precluding or limiting an ATCP
- The ATCP as submitted by the Contractor is signed and sealed by its Engineer of Record (EOR)
- The ATCP was prepared in conformance with and in the form outlined in the current version of the Department's Plans Preparation Manual
- LEC prepared its bid using the ATCP as a basis for the bid price
- Both the Department's Engineer and the LEC believe the ATCP is safer and less traffic impact than the original TCP
- The essential functions and characteristics of the original design would remain unchanged
- The ATCP results in a longitudinal deck joint where the original design had no longitudinal deck joint

There is however disagreement related to contract specification language, namely the discretion the Department has in its reasoning for rejecting an ATCP under Standard Specification 102-4, in the sentence - ***The Department reserves the right to reject any alternative TCP.***

LEC believes there are limitations to the discretion the Department must exercise in its reasoning to reject an ATCP. LEC asserts that if the contract documents do not prohibit, or otherwise limit the scope of an ATCP then as long as it meets the criteria stated in Standard Specification Section 102-4, - i.e. signed and sealed by its EOR, prepared in conformance with the Department's Plan Preparation Manual (PPM), indicates a TCP for each phase of activities, contemplates and takes responsibility for utility impacts - any rejection by the Department is without merit and unsupported. This, LEC asserts opens the door to recover additional cost or time.

When the Department was asked to provide its interpretation of that particular sentence and to what extent, if any, discretion exists related to the reason for rejection, the Board received mixed messages. When the Department's CEI representative was asked in the hearing if there is any limitation on the reasons the Department must have he stated they need to be "valid". Upon making this statement, a follow-up comment was made by a Department employee present at the hearing who indicated, based on his interpretation of the language in that sentence, the Department has no limitations on its discretion and can reject any ATCP for any reason.

When the ATCP was submitted as a CSI, the Department indicated the essential functions and characteristics of the original design were unchanged, however the proposal was rejected due to the longitudinal joint resulting in "reduction in quality and a reduced service life" of the bridge. When the proposal was resubmitted by the Contractor under Standard Specification Section 102-4, the Department rejected it stating it does not provide the same "end product as provided in the as-bid plan".

As part of the Board's deliberation of this dispute, we must first reconcile the sentence under 102-4: "***The Department reserves the right to reject any alternative TCP***" and the discretion, if any, it affords the Department for having a reason to reject. There was no contract language provided to the Board by either party, nor can the Board find any contract language that speaks to whether or not there are any limitations on the Department's reasons contained in that sentence.

Board's Interpretation of 102-4

As stated above, LEC contends the discretion given the Department when rejecting an ATCP is contained within the criteria of the submittal requirements in 102-4. LEC asserts that its failing to meet the listed criteria is the only contractual reasons the Department may reject an ATCP. The Board views this as a very narrow restriction in the Department's discretion. The Board

believes as the owner, the Department's discretion is much broader than the strict interpretation of few items contained in Standard Specification Section 102-4. The items listed, in the Board's view, are procedural in nature and are simply a threshold in which the Contractor must meet in order to get the ATCP reviewed and not necessarily approved. Such review by the Department, common sense would dictate, would go deeper than ensuring the Contractor met the procedural requirements of Standard Specification Section 102-4.

The Department stated its rejection of LEC's ATCP is based on the undisputed fact a longitudinal joint is introduced into the bridge decks as a result of the Contractor's ATCP. What is disputed is the effect of that longitudinal joint on the bridge deck. The Department contends it results in a reduction in service life and increased maintenance costs. The Department asserts this was a determining factor considered in the design phase as to why the cross-overs were decided upon.

The Contractor provided a third party engineering analysis to show longitudinal joints do not reduce service life and provided several examples of bridges where the Department has used longitudinal joints even in areas where median cross-overs could have been constructed.

The Contractor also provided copies, via a Public Records Request, of design phase correspondence between and among the Department's staff and the EOR. A review of the design correspondence shows no indication the Department or its EOR ever made any consideration of reduced service life or increased maintenance cost as a result of a longitudinal joint during the several months of design phase.

The Department, in both its Position Paper and Rebuttal offered no analysis to support its statement that the service life is reduced as a result of longitudinal joints; provided no documentation showing a comparison of maintenance costs for bridges with longitudinal joints vs. monolithic decks; and presented no correspondence to back up its assertion that during the design phase the reason cross overs were chosen was to eliminate the deck joints.

LEC brought its initial proposal of an ATCP to the Department upon award of the contract in a project kick-off meeting on April 4, 2017. There are no meeting minutes contained in either Parties Position Paper so it is unknown if any Department Design staff or Consultant Designers were in attendance. The Department indicated at the April 4th meeting since the proposal changed many aspects of the project it was likely more appropriate to consider it a Cost Savings Initiative (CSI). The Department and LEC met again on April 14, 2017, where the Department provided additional feedback on the proposal to LEC.

LEC then submitted the proposal as a CSI along with the requisite cost savings estimate and preliminary design information. Another meeting was held April 20, 2017, where Department construction, maintenance and design professionals were present and again the proposal was not dismissed. The questions that came up during the April 20th meeting were reduced to writing, consisting of four pages, and sent to LEC on May 10, 2017.

On April 24, 2017, the Department's District Construction Engineer wrote an internal email he believed the proposal was a good idea and hopefully LEC can answer all the questions that came up in the April 20th meeting. However, internal Department emails show prior to allowing the Contractor to reply to the questions/comments the Department suddenly changed course and decided they were going to reject the proposal.

The Department emphasized at the DRB hearing the same ATCP concept to which was being proposed by LEC was rejected during the design phase due to the resulting longitudinal joint. As late as the April 20th meeting, which is the first date to which documentation shows attendance by the Department Design Project Manager and Consultant Structural Design Engineer, the Department knew the proposal would result in a longitudinal joint but continued to lead LEC to believe it was being considered positively, pending responses to questions. Even after sending questions to LEC as an indication of further consideration by the Department, but prior to LEC responding, the Department rejected the proposal.

However, the project is a bid-build project, not a design-build project. The Contract Documents clearly indicate what the Department wants, a monolithic bridge deck. The Contract Documents does not give LEC the right to change the Department's design of the bridge deck without the Department's approval and acceptance. LEC's proposed bridge deck design change was submitted by LEC as a Cost Savings Initiative and was not accepted by the Department. LEC has acknowledged that the Department is the "sole judge" of accepting or rejecting LEC's proposed Cost Savings Initiative to change the design of the bridge deck. Thus whether or not LEC's proposed change in design of the bridge deck does or does not change the essential functions or characteristics of the original design of the bridge deck is not relevant. Furthermore, without a change in the original design of the bridge deck, which LEC acknowledges the Department is the sole judge to accept or reject a proposed bridge deck design change, LEC's proposed two-phase ATCP is not viable.

BOARD'S FINDINGS

The question before the Board is:

Is the Contractor entitled to additional time and cost to complete the contract work based on the TCP used in the Original Contract Plans?

Contract Specification Section 102-4 states "The Department reserves the right to reject any alternate TCP" and no limit or conditions are established by the wording of Section 102-4 that prevents the Department from being the sole judge or requires the Department to provide any reason for rejecting **any** alternate TCP¹.

¹ See Below - ALTERNATE FINDING BY MINORITY BOARD MEMBER

The wording of Contract Specification Section 4-3.9.4, “Engineer is the sole judge”, does not place limits on the Department rejecting any proposed alternate TCP nor prevent the Department, under Contract Specification Section 102-4, from rejecting any alternate TCP or requiring the Department to provide any reason for rejecting any alternate TCP.

What LEC was actually proposing was a change to the design of the bridge deck structure and to achieve that design change, an ATCP would have to be utilized. This project is a bid-build project, not a design-build project. The Contract Documents clearly indicate what the Department wants, a monolithic bridge deck without a longitudinal joint. LEC does not have the right to change the Department’s design of the bridge deck. LEC’s proposed bridge deck design change was submitted by LEC as a Cost Savings Initiative and was not accepted by the Department. LEC has acknowledged that the Department is the “sole judge” of accepting or rejecting LEC’s proposed Cost Savings Initiative. If LEC’s bridge deck design change was not accepted, then LEC’s proposed two-phase ATCP would not work. There is not superior knowledge by the Department that LEC’s proposed two-phase ATCP would not work based on the Contract Documents which clearly show a monolithic bridge deck without a longitudinal joint. A reasonable contractor (LEC) would clearly know prior to bid that LEC’s proposed two-phase ATCP would not work based on the original design of the bridge deck which clearly show a monolithic bridge deck without a longitudinal joint.

LEC’s position that its change in design of the bride deck does not change the essential functions or characteristics of the original design of the bridge deck is not relevant. Again, this project is a bid-build project, not a design-build project. The Contract Documents clearly indicate what the Department wants, a monolithic bridge deck without a longitudinal joint. The Contract Documents does not give LEC the right to change the Department’s design of the bridge deck without the Department’s approval and acceptance. LEC’s proposed bridge deck design change was submitted by LEC as a Cost Savings Initiative and was not accepted by the Department. LEC has acknowledged that the Department is the “sole judge” of accepting or rejecting LEC’s proposed Cost Savings Initiative to change the design of the bridge deck.

Specification 4-3 governs the conditions and manner the Contractor can obtain additional compensation for changes in the work. Specification 8-7 governs the condition and manner the Contractor can obtain additional contract time.

Specification 4-3 predicates additional compensation on acts of the Engineer, i.e. increasing quantities, altering the plans or directing extra work. Constructing the project in accordance with the original plan does not fall into any of these categories. The fact LEC took the risk at time of bid to reduce the bid price commensurate with the savings from an ATCP is insufficient basis for additional compensation.

LEC also took the position that had the Department decided no longitudinal joint would be allowed therefore should have been a deletion of the specification which allows an ATCP. The Board does not agree with this position as there could be other ATCP concepts that could still maintain the cross over and thus the monolithic deck.

Specification 8-7 requires a time extension to be based on a delay not caused by the Contractor to an activity on the Critical Path. The Original Contract Time was established by the Department in the advertisement as 660 days. A time extension for performing work as shown in the original plan is not supported by the specification. Also, a potential time savings anticipated by the Contractor from an ATCP is insufficient basis for contract time adjustment, even considering the Incentive clause in this contract. .

ALTERNATE FINDING BY MINORITY BOARD MEMBER

Contract Specification Section 102-4 states “The Department reserves the right to reject any alternate TCP”. This sentence stops short of saying “for any reason”. There is a distinct difference between a “right” to do something and the “reason” for doing something.

LEC, the CEI Sr. Project Engineer and the Department employee have three different interpretations of this sentence as related to the reason for rejection. Each of these individuals is experienced in road and bridge construction in Florida and on Florida Department of Transportation projects. Since each have differing interpretations to the same specification, a minority of the Board concludes, as far as the “reason” aspect, the sentence is ambiguous.

A minority of the Board does not agree with the majority that the Department has discretion so broad that any reason is within its right under the subject sentence. Since there is ambiguity in the subject sentence as related to reason, consideration is made to a response to a question asked by the Board to each party’s respective legal counsel who were present at the hearing. The question was as follows:

Does this construction contract contain an implied covenant of good faith and fair dealing?

Each party’s counsel answered “Yes”. Therefore, since this covenant is within the four corners of the contract, this covenant is considered.

As such a minority of the Board agrees with the CEI Sr. Project Engineer when he answered the Board’s question as to what if any limitations the Department has on the reasons for basing its rejection, and he answered - there needs to be a “valid” reason. This makes sense to this minority Board member because a reason that isn’t “valid” by definition would be “invalid” and thus, by virtue, would be counter to fair dealing and good faith practices.

As stated above, as the owner the Department is granted latitude when determining the reason to reject an ATCP. There is no deadline as to when a valid reason needs to be born. Even if the Department did not document during the design phase that one of the reasons to have cross overs is to avoid having a longitudinal joint, does not make it any less a valid reason. Even absent cost studies related to maintenance of monolithic decks vs. decks with joints, it is intuitive that joints in decks are more prone to spalling, chipping and cracking than continuous width decks. As the owner and maintainer of the bridge there are certain benefits-of-the-doubt afforded the Department when it comes to validity of their reason. Even if the “validity” of the reason is not expressly proven via analysis or studies, it is believed empirical evidence can be used to support the basis of the reason.

As such, a minority of the Board has determined that the Department’s reason for rejection, although not limitless, in this particular case is not violative of any Contract Document.

BOARD’S RECOMMENDATION

The Board unanimously finds no entitlement for the Contractor to receive additional compensation or time as a result of constructing the project in accordance with the Original Contract Plan. The majority of the Board finds no limit or conditions are established by the wording of Section 102-4 that requires the Department to provide any reason for rejecting.

A minority of the Board finds Section 102-4 limited to good faith reasons which Department has met in its rejecting the ATCP.

As an observation, based on the events leading to the rejection of both the CSI and ATCP submittals the Department might closely consider their list of reviewers. If the appropriate decision makers are given the earliest opportunity to review time and effort might be reduced for both parties.

The Board sincerely appreciates the cooperation of the parties and the information presented for our review in making this recommendation.

The Board reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Edwin J. Mackiewicz III, Chairman

Ron Klein, Member

Matt Michalak, Member

Signed for and with concurrence of all members

October 2, 2017

A handwritten signature in cursive script, reading "Edwin J. Mackiewicz III". The signature is written in black ink and includes a horizontal line at the end.

Edwin J. Mackiewicz III

Via: email