

# DRB Recommendation

## NOI 34

For the Contract between

Morrison-Cobalt Joint Venture (MCJV) & FDOT District Four

For Project

CR-712 (Midway Road) Reconstruction from West of 25<sup>th</sup> Street to  
East of SR-5 (US-1)

FPID: 231440-2-52-01

Federal Aid Number: 8886-777-A

Contract No. T-4434

County: Saint Lucie (SLC)

### Hearing location, Date and time:

3601 Oleander Ave. Date December 5, 2022 from 9:00 am to 4:00 p.m.  
Held at the Treasure Coast Operations Center Fort Pierce, FL

### Members of the Dispute Review Board

Pat McCann P.E., Member

Rick Espino P.E., Member

Ronnie Klein, Chairman

## Project Information

**Type:** Bid Build **Contractor:** Morrison-Cobalt Joint Venture (MCJV)

**Original Duration:** 1,213 days **Original Contract amount:** \$28,848,291.55

**Scope of work:** The improvements on this project include reconstructing the existing two-lane Midway Road to a four-lane, divided highway with a raised median; installing a new signal at Sunrise Boulevard; constructing a new bridge over the North Fork St. Lucie River; constructing a 6-foot sidewalk on the north side and a 12-foot multi-purpose trail on the south side Midway Road; constructing 4-foot bike lanes on both sides of the roadway; reconstruction of S. 25th Street approximately 1000' to the south & north of Midway Road; reconstruction of Sunrise Boulevard from W. 1st Street to Charlotta Street; reconstruction of Oleander Avenue from W. 2nd Street to Merritt's Ditch; drainage improvements, including constructing 6 retention ponds at 5 locations; and signage, signalization, and lighting improvements.

## Table of contents

1. Issue Statement
2. Summary of the Parties Positions
  - 2.1 Contractors Position
  - 2.2 Departments Position
3. Summary of the Parties Rebuttals
  - 3.1 Contractors Rebuttal
  - 3.2 Departments Rebuttal
4. Relevant Specifications
5. Key findings and Analysis of facts
6. Recommendation

## **1. Issue Statement**

### **DRB Issue Statement for NOI 34 – FPL CONC. POLE CONFLICT WITH RETAINING WALL 7**

Please accept this correspondence as Morrison-Cobalt JV's (MCJV) Issue Statement regarding the adverse impacts and disruption caused by the Department's failure to provide the necessary arrangements with utility owners for the removal or adjustment of utilities and failure to fulfill its obligations under Utility Work Schedule affecting the caused by the conflict between FPL utilities and Retaining Wall 7. This issue was originally identified under our Notice of Intent (NOI) #34. The Board is being asked to make a recommendation as to entitlement only.

The Department failed to perform its obligations under the Contract Specification 7-11.5.1 and provide the necessary arrangements with utility owners for the removal or adjustment of utilities in accordance with the Utility Work Schedule and the "Utility Adjustments" shown within the Contract Plan. The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the contract documents.

The Department and the utility companies did not perform the work in accordance with Utility Work Schedule. The necessary utility work was not performed properly and delayed the Contractor's activities. As such, the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled, anticipated and approved.

Since the utility companies failed to complete their work in accordance with Utility Work Schedules and the Contract Documents, MCJV's performance was impacted and delayed by these unforeseen conditions. Therefore, in accordance with the contract specifications, MCJV is clearly entitled and the Department is required to compensate the Contractor according to Specification 4-3.

## **2. Summary of the Parties Positions**

### **2.1 Summary of the Contractors position**

Morrison-Cobalt JV's (MCJV) Position is that a disruption to the contract was caused by the Department's failure to fulfill its obligations under the Utility Work Schedule (UWS) affecting the project's construction of Retaining Wall 7 during Phase 2.

This issue was identified under their Notice of Intent (NOI) #34.

The Department and MCJV have been unable to resolve the significant impacts and disruptions to the project. The Board has been asked to make a recommendation as to entitlement.

MCJV maintains the Department failed to perform its obligations under the contract Specification Article 7-11.5 and Special Provisions under Utility Schedules. The Department failed to timely provide the necessary arrangements with utility owners for the removal or adjustment of utilities in accordance with the UWS and the “Utility Adjustments” shown within the Contract Plan Sheet 519. The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the Contract Documents.

The Department and the utility companies did not perform the work in accordance with the UWS for the area affecting Retaining Wall 7 shown on Plan Sheets BW-15 and BW-17.

The UWS identified the utility work to be performed during “Phase 1A” contract work as follows:

Florida Power & Light, page 4 of 9, Sta 49+15 (58Rt) to Sta 55+85(55Rt) , Phase 1A Plan sheet 519

The dependent activity was to provide the Right-of-Way (ROW) location staked, which was done. The UWS activity was to be performed within Phase 1A well in advance of the Wall 7 construction which was performed in Phase 2.

Of note for this area, the original utility adjustments planned a new FPL poles and overhead electrical lines crossing the river. During the Preconstruction Meeting, MCJV alerted the Department and FPL that these overhead electrical lines cantilevered towards the bridge would conflict with the bridge construction. FPL subsequently revised their plan to directionally bore the electrical across the river. Unfortunately, the newly installed concrete pole just before the river was not installed at the ROW and was later found to encroach on the Wall 7 construction.

On October 24, 2019, MCJV notified the Department of their Intent to Claim via NOI #34 for the adverse effects caused by the Department’s failure to properly perform the utility adjustments. As stated within the NOI, MCJV had intended to commence operations in the affected area on October 24, 2019 until they realized the issue posed a safety risk.

MCJV mitigated the impacts caused by this issue by seeking and mobilizing to other areas of the project to work, albeit out of sequence and inefficiently. In fact, few areas of this project were performed within sequence and without multiple disruptions, a situation with compounding and rippling effects of decreased productivity and increased inefficiencies.

On October 28, 2019, the Department and EOR proposed a solution. However, this proposed solution was found to require the pole to be stabilized or relocated as shown within an update email on November 5, 2019. FPL determined that relocating the pole was appropriate and completed relocated the conflict pole on January 16, 2020.

The utility work was not performed properly and disrupted the Contractor’s activities in Phase 2 of Wall 7 along with all the successor activities. As such, the Department interfered with the Contractor’s work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV’s crews and operations as originally scheduled, anticipated and approved within the Original Baseline Schedule. Since the Department failed to perform its obligations and the utility companies failed to complete their work in accordance with the UWSs, MCJV’s performance was impacted and extended.

In accordance with the Contract Specifications 4-3, the Department is required to compensate MCJV for unforeseen work. The Department failed in recognizing its obligations under the Contract to perform the utility adjustments in accordance with the UWS. The Department also failed to investigate the conditions

and determine that these conditions differs materially from the conditions presented in the original Contract Documents.

Based on these failures, the Department and its consultant did not recognize or understand MCJV's entitlement in this matter.

Starting with the April 8, 2021 Dispute Review Board (DRB) Meeting and every subsequent DRB meeting, the Department and its consultant were asked by the DRB to state if they found entitlement in this issue (and others). Each time the Department and its consultant stated that entitlement was determined but that no additional costs were observed. Additional costs are a matter of quantum, not entitlement.

The Department, and its consultant's, inability to recognize conditions materially different from the original conditions presented and their inability to determine how these differed conditions impact and disrupt the Contractor's operations are plainly evident.

MCJV developed its original bid and project schedule in accordance with the Contract documents issued by the Department, who warranted that the Contract Documents were complete, accurate, and buildable. However, MCJV's planned schedule and cost of performance were adversely affected by the Department's repeated failures and deficiencies. These Contract deficiencies caused disruptions in performance and inefficiencies in MCJV's work. By failing to adhere to the UWS, the Department caused and MCJV encountered a changed condition. With MCJV unable to proceed with its planned methods of construction, MCJV's performance was adversely impacted, its crews were on the project longer than anticipated, and its cost of performance was increased as a direct result of the unforeseen conflicts.

As of the November 2019 schedule update, the number of scheduled workdays remaining for the earthwork crews and base grading crews were 238 and 154, respectively. With the disruptions and inefficiencies caused by, but not limited to, this unforeseen conflict, the actual crew days on the project after November 2019 for the earthwork and base grading crews were 377 and 366, respectively.

As such, the following represents the extended crew days used on the project as of November 2019:

Maintenance of Traffic 325 472 147 (Planned, Actual, Extended)  
Earthwork 238 377 139  
Base Grading 154 366 212

Since the Department failed to complete its obligation in accordance with the UWS in the Contract, MCJV suffered unforeseen conflicts, extended crew days and increases in its cost of performance.

MCJV was impacted by Utility Conflicts that could not have been reasonably anticipated or foreseeable at the time of bid. These conflicts were created by the Department's own failure to properly adhere to the UWS provided within the original and deficient Contract Documents. The effects of deficient documents, unknown failures by the Department, and unforeseen conflicts impacted MCJV's sequence, means, methods, and durations of performance on the project. Therefore, MCJV is entitled to receive a fair and equitable adjustment as compensation for increased costs caused by unforeseen conflicts. Additionally, the Department and its consultant had previously determined entitlement as mentioned previously above and within the DRB Meeting Minutes.

## 2.2 Summary of the Departments Position

### EXECUTIVE SUMMARY

As presented in the position paper below, the Department has reviewed the Contractor's NOI, Certified Claim package, and Issue Statement related to NOI No. 034 and determined conclusively that the **Contractor is not entitled** to indirect costs and disruption as supported by the following contractual documents:

- **There were no impacts to controlling work items as required by Specification 5-12.2.2**
- **Contractor failed to meet the requirements of Specification 8-7.3.2 regarding Time Extension Requests**
- **Conditions did not differ materially as required by Specification 4-3, nor was there any notice of differing site conditions provided**
- **No compensation due during Holidays and Special Events per Specification 8-6.4**
- **Contractor failed to meet the requirements of Specification 5-12.7 regarding Mandatory Claim Records**

### DEPARTMENT'S POSITION

The Contractor's Certified Claim Package, submitted on 06.06.2022, claims for additional compensation of **indirect labor and equipment costs** and damages unforeseen at bid time caused by disruption. The backup provided includes a personnel ledger with Regular Hours for Indirect Labor and an equipment list with Operating and Standby Hours for equipment beginning on 12.09.2019 and extending through 01.17.2020. Note, all personnel and equipment noted in the certified claim supporting documents apply only to Morrison-Cobalt JV.

While the Contractor's NOI, Certified Claim, and DRB Issue Statement lack any details, locations, or contractual provisions, the original Contract Plans required the Contractor to construct Retaining Wall No. 7 on the south side of the roadway and east side of the new bridge as shown on Structure Plans Sheet No. BW-01.

As shown in the FPL Utility Work Schedule, and Utility Adjustments Plan Sheet No. 519 this area of the project also required FPL to relocate their overhead electric and corresponding utility poles closer to the Right of Way. FPL relocated the pole in question from the NOI; however, it ended up being in conflict with the proposed footer of Retaining Wall 7 by approximately 2" taken from a sketch in the Contractor's NOI submittal. It should be noted that while the relocation of the FPL pole was in conflict with Retaining Wall 7, there were no impacts to MCJV as they were working on Retaining Wall 1, Retaining Wall 5, Phase 2 Bridge construction, and numerous additional controlling items of work as shown in the Daily Work Reports, as will be outlined later in the position paper

The following timeline shows the sequence of events from NOI No. 34 receipt to issue resolution.

- 10.24.2019: NOI No. 34 Received. (Exhibit No. 27)
- 11.04.2019: Initial Field Meeting with Department, Contractor and FPL.
- 01.16.2020: FPL removed the existing pole. Conflict resolved.

During resolution of this NOI, the Contractor was actively working on numerous structural improvements on the project, including existing structure removal, Retaining Wall No. 5, and Retaining Wall No. 1. These activities like the construction of Retaining Wall 7, were all non-controlling work items based on the logic of the schedule and the respective float derived from this logic at the time of NOI No. 34 and shown in the accepted October 2019 CPM Schedule Update. This table also shows the work on retaining wall No. 7 was not scheduled to begin until 03.20.2020, roughly 2 months after the utility conflict was resolved. The total float will be discussed later in the position paper to show how there were no impacts to any controlling items of work and the negative float was related to other delays resolved by the global claim settlement.

Activity ID	Activity Description	Total Float	Scheduled Start Date
A70360	Retaining Wall Construction: No. 1	-127	14-NOV-19
A70400	Retaining Wall Construction: No. 5	-127	12-AUG-19 (Actual)
A70420	Retaining Wall Construction: No. 7	-90	12-MAR-20
A72000	Barriers and Superstructure Removal (south side)	-147	12-JUN-19 (Actual)

Identification of Controlling Items of Work is critical in analyzing delays to a project. This will be discussed in detail below. The following Controlling Items of Work were clearly shown in the Contractor’s accepted CPM Schedule Updates and noted in their schedule narratives for the update periods noted below. The Controlling Items of Work that were identified by the Contractor in the narratives were future controlling items of work (outside of the schedule update period) that the Contractor intended on progressing to keep the project on schedule. As you can see, Activity A70420: Retaining Wall Construction: No. 7 was not determined to be controlling and therefore no delay to the overall contract due to the utility conflict in question.

**Controlling Items of Work (CIOW) from Accepted CPM Schedule Updates during NOI 34  
Timeframe: Controlling Items of Work (CIOW) from Accepted CPM Schedule Updates during  
NOI 34 Timeframe:**

**OCT 21st, 2019 - NOV 10th, 2019:**

- A30130: Excavation, Embankment, and Stabilization 1B East of Oleander Avenue.
- A30180: Base East of Oleander Avenue.
- A30220: Asphalt Pavement: Midway East of Oleander
- A30300: Marking and Signing: Midway East of Oleander
- A72000: Barriers and Superstructure Removal (south side)
- A72025: Existing Piles removal: West Phase 2 Bridge (South side) (from the narrative, separate Activity from Retaining Wall 7)

**NOV 11th, 2019 - DEC 15th, 2019:**

**DEC 16th, 2019 - JAN 19th, 2020:**

- A30130: Excavation, Embankment, and Stabilization 1B East of Oleander Avenue.

A30180: Base East of Oleander Avenue.

A30220: Asphalt Pavement: Midway East of Oleander

A30300: Marking and Signing: Midway East of Oleander

Phase 2 Bridge (South side) (from the narrative, separate Activity from Retaining Wall 7)

Retaining Wall's 1 and 2 (from the narrative)

The daily site source records (Daily Work Reports (DWRs)) (Exhibit No. 28), further detail how the Contractor was progressing Controlling Items of Work, including stabilization, base, and paving east of Oleander Avenue, Phase 2 existing bridge structure removal and new bridge construction, including pile driving, bent construction, Retaining Wall No(s). 1 & 2 construction, etc. As an example, see snippet below from 12.16.2019 DWR that clearly identifies there were no impacts to the Controlling Items of Work, Personnel, Equipment, or Material. This was consistent throughout the NOI No. 34 time period, 10.24.2019 to 01.16.2020.

Over the next several sections the Department will outline Specifications, and provide other information which further proves the Contractor's Controlling Items of Work were not affected by the utility relocations. Impacts to Controlling Items of Work are required to consider project delays and therefore consider compensation for indirect costs as outlined in the definition and Specifications below.

In the Issue Statement from MCJV, the Contractor states "... the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled". Furthermore, MCJV continues by stating, "Since the utility companies failed to complete their work in accordance with Utility Work Schedules and the Contract Documents, MCJV's performance was impacted and delayed by these unforeseen conditions." The Contractor is claiming the Department delayed their work.

Per Specification 1-3 Definitions, Delay is defined as follows:

***Delay.***

*Any unanticipated event, action, force or factor which extends the Contractor's time of performance of any controlling work item under the Contract. The term "delay" is intended to cover all such events, actions, forces or factors, whether styled "delay", "disruption", "interference", "impedance", "hindrance", or otherwise, which are beyond the control of and not caused by the Contractor, or the Contractor's subcontractors, material, suppliers or other agents. This term does not include "extra work".*

The definition is clear, that the event, action, force or factor must **extend the Contractor's time of performance of a controlling work item under the Contract**. Controlling Items of Work prior to and during the timeframe this alleged utility conflict was addressed were as shown above, derived from MCJV's accepted CPM Schedule submittals with Narratives and discussed in all Progress Meetings during this timeframe

None of these Controlling Items of Work were impacted due to the utility conflict referenced in NOI No. 34. As demonstrated in the site source documents, Daily Work Reports (DWR's) (Exhibit No. 28), the Contractor was pursuing roadway work around Oleander Ave. and east to US-1, Phase 2 bridge removal and new construction, and Retaining Wall No(s). 1 and 2 construction. These locations were separated from the utility conflict noted in the NOI. Additionally, zero (0) non-pursuit days were observed or documented in the Contractor's Past Performance Rating (CPR) (Exhibit No.



**30). There were zero (0) controlling and zero (0) non-controlling activities impacted by the utility conflicts and therefore no indirect costs or impacts to the Contractor.**

The accepted October 2019 CPM Schedule Update clearly shows that the Activity A70420: Retaining Wall Construction: No. 7 was non-controlling at the time of receiving the NOI (green bars in the Contractor's monthly CPM updates indicate non-controlling work activities for this specific project as they indicate activities that are not on the critical path).

The Contractor's accepted January 2020 CPM Schedule Update reflected the updated schedule data after the conclusion of the potential utility conflicts for NOI No. 34. Note, there were no impacts to the schedule and the activities remained with positive float and it **showed the previously mentioned activity (A70420: Retaining Wall Construction: No. 7) as still non-controlling**. In fact, the Total Float for Retaining Wall No. 7 increased from (-) 90 days from the accepted October 2019 CPM Schedule Update to (+) 91 days from the accepted January 2020 CPM Schedule Update. The Contractor's January 2020 CPM Schedule Update Narrative also indicated the project was on schedule. This was due to the Department providing a global claim settlement for previous NOI's in the amount of \$3,287,359.08 and granting 209 days of time (including compensable costs), providing adequate contract time to complete these non-controlling items of work, and within the Contractor's accepted schedule.

As you see above, the Department clearly shows that controlling and non-controlling activities were not delayed or impacted. The negative float in the October 2019 CPM Update was not due to this NOI as the October 2019 CPM Update preceded the NOI submittal. Additionally, the positive float in the January 2020 CPM Update (covered time of NOI No. 034 resolution) was due to the Department executing the previously mentioned global claim settlement. As there was no delay to a controlling item of work, the contractor is not entitled to any compensation per Specification 5-12.2.2, as listed below.

Per Specification 5-12.2.2 Claims for Delay, **there shall be no Contractor entitlement to any monetary compensation or time extensions for any delays or delay impacts, whatsoever, that are not to a controlling work item**, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2.1(1) and (3), and then only to the extent the Contractor could not reasonably mitigate such idleness. The Department did not observe any idle labor or equipment associated with the referenced NOI. Daily Work Reports (DWR's) demonstrate the Contractor's, and Subcontractor's, forces working on other project activities. This proved the Contractor's ability to reasonably mitigate, as required by Specification, as they continued working on similar scope project activities, such as Retaining Wall 1, Retaining Wall 5, and Phase 2 Bridge construction, and efficiently progressing the project.

*5-12.2.2 Claims for Delay: Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a*

*reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay, and a request for Contract Time extension pursuant to 8-7.3.2 within thirty calendar days after the elimination of the delay. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3 and duly certified pursuant to 5-12.9.*

*If the Contractor fails to submit a certificate of claim as described in 5-12.9, the Department will so notify the Contractor in writing. The Contractor shall have ten calendar days from receipt of the notice to resubmit the claim documentation, without change, with a certificate of claim as described in 5-12.9, without regard to whether the resubmission is within the applicable 90 or 180 calendar day deadline for submission of full and complete claim documentation. Failure by the Contractor to comply with the ten calendar day notice shall constitute a waiver of the claim.*

*There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2.1(1) and (3), and then only to the extent the Contractor could not reasonably mitigate such idleness.*

Pursuant to the Contract Specifications Package, Submission of a Working Schedule, Specification 8-3.2.5 Float, further defines float as the **amount of time the finish of an activity can be delayed**. It also clearly states that **negative float shall not be a basis for requesting time extensions**. Special Provision 8-3.2 continues regarding Time Extensions that an extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule. The utility conflict alleged in NOI No. 34 did not delay an activity exceeding the total float along any project critical paths.

**8-3.2.5 Float:** *Float is defined as the amount of time the finish of an activity can be delayed. Two kinds of float are possible: Total float is how much an activity can be delayed without affecting the finish date of the project or an intermediate deadline (constraint); it is the difference between the late finish date and the early finish date. Free float is how much an activity can be delayed without affecting its earliest successor.*

*Float is not for the exclusive use or benefit of either the Department or the Contractor.*

*Use of float suppression techniques, such as preferential sequencing (arranging critical path through activities more susceptible to Department caused delay), special lead/lag logic restraints, zero total or free float constraints, extended activity times, or imposing constraint dates other than as required by the contract, shall be cause for rejection of the project schedule or its updates. The use of Resource Leveling (or similar software features) used for the purpose of artificially adjusting activity durations to consume float and influence the critical path is expressly prohibited.*

*Negative float shall not be a basis for requesting time extensions. Any extension of time shall be addressed in accordance with 8-3.2.6 Time Extensions. Scheduled completion date(s) that extend beyond the contract completion date (evidenced by negative float) may be used in computations for assessment of payment withholdings. The use of this computation is not to be construed as a means of acceleration.*

**8-3.2.6 Time Extensions:** *The Contractor is responsible for submitting a request for Contract Time extension in accordance with 8-7.3.2 of the standard specifications. An extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule.*

*As a minimum, time extension requests shall contain:*

- 1. A descriptive summary of the changes*
- 2. An analysis of project impact*
- 3. A fragnet that shows the impacted activities before the change*
- 4. A fragnet that shows the impacted activities after the change*

*Time extensions shall not be considered for proposals that do not include full documentation for the schedule change. Once a change has been approved by the Engineer, the specific activities and the overall schedule must be updated.*

As previously described, the Department has shown there were no delays or impacts to the controlling and non-controlling activities. The negative float at the time of NOI No. 34 submittal was not due to the alleged utility conflict with Retaining Wall 7, but rather related to other NOIs that were closed out through the Department executing the previously mentioned global claim settlement. Through this settlement, the activities went from negative float to positive float and did not affect the overall schedule.

Per Specification 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 will also consider the effect of utility relocation and adjustment work on job progress as the basis for granting a time extension if **all** criteria are met. These utility relocations and adjustments did not meet **Criteria 2 related to controlling work items** and **sufficient evidence of coordination efforts required in Criteria 3**, such as advanced notification to utility companies to coordinate Contractor's operations to avoid delays, **was not provided.**

**8-7.3.2 Contract Time Extensions:** *The Department will consider the effect of utility relocation and adjustment work on job progress as the basis for granting a time extension only if all the following criteria are met:*

- 1. Delays are the result of either utility work that was not detailed in the Plans, or utility work that was detailed in the Plans but was not accomplished in reasonably close accordance with the schedule included in the Contract Documents.*
- 2. Utility work actually affected progress toward completion of controlling work items.*
- 3. The Contractor took all reasonable measures to minimize the effect of utility work on job progress, including cooperative scheduling of the Contractor's operations with the scheduled utility work at the preconstruction conference and providing adequate advance notification to utility companies as to the dates to coordinate their operations with the Contractor's operations to avoid delays.*

Additionally, this Specification outlines the requirements for an extension of Contract Time which includes a preliminary request for an extension of Contract Time that must be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. No request was made by the Contractor and no controlling items of work were delayed as previously outlined.

*As a condition precedent to an extension of Contract Time the Contractor must submit to the Engineer:*

*A preliminary request for an extension of Contract Time must be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. If the Contractor fails to submit this required preliminary request for an extension of Contract Time, the Contractor fully, completely, absolutely and irrevocably waives any entitlement to an extension of Contract Time for that delay. In the case of a continuing delay only a single preliminary request for an extension of Contract Time will be required. Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement date of the delay, the cause of the delay, and the controlling item of work affected by the delay.*

In the Issue Statement, the Contractor states that the *Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the contract documents.* Pursuant to Specification 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. The Specification further details that a “significant change” applies only when the Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction. **This determination by the Engineer shall be conclusive. In these instances, the Engineer determined that there were no significant changes or substantial changes to the contract documents.** The work was shown on FPL’s approved Utility Work Schedule and therefore the utility work was anticipated as contract adjustments necessary to complete the project and the scope of work did not change. The Contractor used the same manpower and equipment to complete the work as originally bid.

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

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

*The term “significant change” applies only when:*

- 1. The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or*
- 2. A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity*

*only to that portion in excess of 125% of the original Contract item quantity in accordance with 4-3.2 below. In the case of a decrease below 75% the Department will only apply a price adjustment for the additional costs that are a direct result of the reduction in quantity.*

*In (1) above, the determination by the Engineer shall be conclusive. If the determination is challenged by the Contractor in any proceeding, the Contractor must establish by clear and convincing proof that the determination by the Engineer was without any reasonable basis.*

Per Specification 4-3.7 Differing Site Conditions, upon receipt of written notification of differing site conditions from the Contractor, **the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, and adjustment will be made, excluding loss of anticipated profits**, and the Contract will be modified in writing accordingly. The Contractor did not provide notification of differing site conditions, including within the NOI, until submission of their Issue Statement to the board on 10.31.2022. Upon receipt of the NOI, the Engineer reviewed the field conditions and did not identify any conditions that were not materially different from the work anticipated in the contract documents and that no increase in cost or time would be required. The conditions were as shown in the original contract plans, UWS, and scope of the project and required coordination efforts with FPL as outlined in the Specifications and contract documents. The necessary work to complete the project required the same type of equipment and manpower as originally bid.

**4-3.7 Differing Site Conditions:** *During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work.*

*Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. The Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.*

*The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice.*

*The Engineer will not allow a Contract adjustment under this clause for any effects caused to any other Department or non-Department projects on which the Contractor may be working.*

#### **Review of Contractor's Certified Claim**

The Contractor's Certified Claim Package (Exhibit No. 25), submitted on 06.06.2022, claims for additional compensation of **indirect labor and equipment costs** and damages unforeseen at bid time caused by disruption. From a review of the certified claim the indirect costs were calculated utilizing personnel and equipment that were performing work on the project. The daily site source records (Daily Work Reports (DWRs) clearly outline the Contractor's personnel and equipment in their claim were used to effectively progress controlling and non-controlling items of work on the project. The labor and equipment changed but nevertheless was effectively utilized to complete project activities including stabilization, base, and paving east of Oleander Avenue, Phase 2 existing bridge structure removal and new bridge construction, including pile driving, bent construction, Retaining Wall No(s). 1 & 2 construction, etc.

Additionally, the indirect costs, from the Certified Claim, calculated in the equipment list assumed an 8-hour day for each piece of equipment with the standby hours being 8 hours minus the operating

hours shown. Even though that column in the spreadsheet is blank for most of the entries, the cost is calculated based on these assumptions. As an example, please see sample entries below.

**Snippet from Contractor's Certified Claim Package dated 06.06.2022**

*MCJV - NOI 34 - Indirect Equipment*

12.09.2019: ROLLER-VIB SMOOTH, 2 Operating Hours

8 Hours/Day – 2 Operating Hours = 6 Standby Hours

6 Standby Hours \* \$5.26/Standby Rate = \$31.57 Standby Cost

From this information and for this specific example, the Contractor has certified that the equipment was delayed by the issues identified in the NOI for 6 hours; however, it operated for 2 hours that is also compensable as indirect costs. **No additional detailed backup, justification, or explanation for these indirect costs were provided in the Certified Claim, the original NOI, project correspondence, or the DRB Issue Statement to support this claim.** Furthermore, as discussed in a previous DRB Hearing, but relevant to this discussion, the Contractor submitted the exact same indirect cost calculations for NOI No. 033 – exact same equipment, rates, and hours on the exact same dates. This overlapping correlation continued throughout the Certified Claim Package for **both personnel and equipment** as seen in Exhibit No. 25. The backup for indirect costs in the Contractor's Certified Claim Package even included personnel and equipment on days that were granted as weather and holiday time throughout the NOI period. As an example T4434 CALFILE - Markup for NOI 34, the month of December 2019 can be seen with "X" marking days that personnel and equipment were noted in the Certified Claim package for indirect costs, yet Weather and Holiday time were clearly granted.

Per Specification 8-6.4 Suspension of Contractor's Operations – Holidays and Special Events, the Contractor is not entitled to any additional compensation beyond any allowed Contract Time adjustment for suspension of operations during such Holiday and Special Event periods. From the calendar file, it is clear the Contractor is requesting compensation during Holiday time periods where time was granted and our Site Source Documents clearly show that no work was performed on the project, therefore no indirect costs were incurred.

**8-6.4 Suspension of Contractor's Operations - Holidays and Special Events:** *Unless the Contractor submits a written request to work during one or more days of a Holiday or Special Event at least ten calendar days in advance of the beginning date of the Holiday or Special Event and receives written approval from the Engineer, the Contractor shall not work on the following days: Martin Luther King, Jr. Day; Memorial Day; the Saturday and Sunday immediately preceding Memorial Day; Independence Day; Independence Day (Observed); Labor Day; the Friday, Saturday, and Sunday immediately preceding Labor Day; Veterans Day; Veterans Day (Observed); the Wednesday immediately preceding Thanksgiving Day; Thanksgiving Day; the Friday, Saturday and Sunday immediately following Thanksgiving Day; December 24 through January 2, inclusive; and Special Events noted in the Plans. Contract Time will be charged during these Holiday and Special Event periods. Contract Time will be adjusted in accordance with 8-7.3.2. The Contractor is not entitled to any additional compensation beyond any allowed Contract Time adjustment for suspension of operations during such Holiday and Special Event periods.*

*During such suspensions, remove all equipment and materials from the clear zone, except those required for the safety of the traveling public and retain sufficient personnel at the job site to properly meet the requirements of Sections 102 and 104. The Contractor is not entitled to any additional compensation for removal of equipment from clear zones or for compliance with Section 102 and Section 104 during such Holiday and Special Event periods.*

Additionally, per Specification 5-12.7 Mandatory Claim Records, the Contract **shall**, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, **provide the Engineer a copy of the Contractor's daily records** and be likewise entitled to receive

a copy of the Department's daily records. **These daily records were never provided to the Department as required by Specification.**

**5-12.7 Mandatory Claim Records:** *After giving the Engineer notice of intent to file a claim for extra work or delay, the Contractor must keep daily records of all labor, material and equipment costs incurred for operations affected by the extra work or delay. These daily records must identify each operation affected by the extra work or delay and the specific locations where work is affected by the extra work or delay, as nearly as possible. The Engineer may also keep records of all labor, material and equipment used on the operations affected by the extra work or delay. The Contractor shall, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, provide the Engineer a copy of the Contractor's daily records and be likewise entitled to receive a copy of the Department's daily records. The copies of daily records to be provided hereunder shall be provided at no cost to the recipient.*

Per Specification 5-12.10 Non-Recoverable Items, the **Department will not have liability for any claim for other than extra work or delay.** As outlined above, this NOI does not reference any extra work, nor was there a delay impact to the Contractor; therefore, there is no entitlement.

**5-12.10 Non-Recoverable Items:** *The parties agree that for any claim the Department will not have liability for the following items of damages or expense:*

1. *Loss of profit, incentives or bonuses;*
2. *Any claim for other than extra work or delay;*
3. *Consequential damages, including, but not limited to, loss of bonding capacity, loss of bidding opportunities, loss of credit standing, cost of financing, interest paid, loss of other work or insolvency;*
4. *Acceleration costs and expenses, except where the Department has expressly and specifically directed the Contractor in writing "to accelerate at the Department's expense"; nor*
5. *Attorney fees, claims preparation expenses and costs of litigation.*

## **SUMMARY**

As clearly indicated above and supported by the Contract, the Contractor's Controlling Items of Work were not impacted by the utility conflicts as required by Specification 5.12.2.2 which is a clear precedent for considering indirect costs. Additionally, the Contractor failed to submit any Time Extension Requests for the alleged delays as required by Specification 8-7.3.2 and that the material did not differ material from that at the time of bid. We have clearly proven that the Contractor did not meet the contractual requirements that would entitle him to indirect compensation.

**Therefore, the Board must conclude that the Contractor is not entitled to additional compensation for utility conflicts at Retaining Wall 7.**

## **3. Summary of the Parties Rebuttals**

### **3.1 Summary of the Contractors Rebuttal**

MCJV provides the following additional information in rebuttal to the Department's position on NOI #34.

As expected, the Department has not recognized how failing to fulfill its obligations causes adverse impacts and leads to extra work not expressly provided for in the Contract. Also, as expected, the

Department ignored the reality that its failure to perform its obligations within the Utility Work Schedule (UWS) differs materially from the original conditions presented in the Contract Documents. Finally, the Department wrongly believes that it can disrupt progress, cause unlimited inefficiencies, extend the durations of crews needed on the project without causing impacts and additional work and without compensation for that extra work.

The Department has determined zero entitlement by wrongfully interpreting this issue as a “claim for delay” under Specification of 5-12.2.2 even though MCJV did not claim for delay of a controlling item of work on this issue nor file a time extension request related to this issue. In fact, this is a Claim for Extra Work as described in Specification 5-12.2.1. MCJV is requesting additional compensation for work not expressly provided for in the Contract. By failing to fulfill its obligations under the Utility Work Schedule (UWS), the Department caused extra work not expressly provided for in the Contract including but not limited to additional survey work and unnecessary crew movements around the project leading to inefficiencies affecting the total number of days crews needed on the project.

MCJV is not requesting additional time or a delay to any controlling work item under the Contract related to this issue. However, MCJV is requesting compensation for additional labor and equipment costs as a result of the extra work not expressly provided for in the Contract.

Per Specification 1-3 Definitions, Extra Work is defined as follows:

***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”.*

Per Specification 1-3 Definitions, Delay is defined as follows:

***Delay.***

*Any unanticipated event, action, force or factor which extends the Contractor’s time of performance of any controlling work item under the Contract. The term “delay” is intended to cover all such events, actions, forces or factors, whether styled “delay”, “disruption”, “interference”, “impedance”, “hindrance”, or otherwise, which are beyond the control of and not caused by the Contractor, or the Contractor’s subcontractors, material, suppliers or other agents. This term does not include “extra work”.*

Per Specification 5-12 Claims by Contractor please note below the differences between the Specifications 5-12.2.1 and 5-12.2.2 below:

***5-12.2.1 Claims For Extra Work:*** *Where the Contractor deems that **additional compensation or a time extension is due for work or materials not expressly provided for in the Contract**.....*

***5-12.2.2 Claims For Delay:*** *Where the Contractor deems that **additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work)**.....*

The Department “determined conclusively” that the Contractor is not entitled because “there were no impacts to controlling work items as required by Specification 5-12.2.2.” In fact, MCJV did not claim this issue to have delayed a controlling work item. The stated Specification is not appropriately attributed.



Also, the Department “determined conclusively” that the Contractor is not entitled because the “Contractor failed to meet the requirements of Specification 8-7.3.2 regarding Time Extension Requests.” In fact, MCJV did not submit a Time Extension Request nor claim this issue to require a time extension, another requirement under Specification 5-12.2.2 inappropriately attributed.

The Department “determined conclusively” that the Contractor is not entitled because “conditions did not differ materially as required by Specification 4-3, nor was there any notice of differing site conditions provided.” In fact, MCJV did not claim a differing site conditions.

In Specification 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.*

We acknowledge the Engineer reserves the right to make such increases or decreases in quantities and such alterations in the details of construction as may be found necessary or desirable by the Engineer. Although these types of changes were made in this instance, these changes did not result in the extra work being claimed within this issue. Under this issue of NOI#33, MCJV has claimed for “Extra Work” that was not expressly provided for in the Contract in accordance with 5-12.2.1. MCJV has claimed for the Extra Work caused by the Department’s failure to fulfil its obligations and the extra work that could not have been reasonably anticipated at the time of bid. As a result of this and other repeated failures by the Department, MCJV’s sequence, means, methods, and durations of performance on the project on the project were affected causing extra work.

With the Department’s Position Paper, a snippet of our work plan is shown with choreographed crew usage as originally contemplated at bid. In reality, review of the final schedule filtered for specific tasks, such as base rock, will reveal that MCJV’s crews were forced to jump from activity to activity with continuous impacts and without opportunity to complete any specific area as originally intended. Project personnel and equipment were moving back and forth between no less than 7 areas as shown within the schedule snippet from the Final Schedule

On this project, the Department has wrongly and unjustly determined that it can continuously and repeatedly cause extra work via directives, impacts, inefficiencies, and extended performance times without recourse unless that impact is a delay to a controlling work item. The extra work described herein is compensable under the specifications and MCJV is entitled to receive a fair and equitable adjustment as compensation for the extra work.

### **3.2 Summary of the Departments Rebuttal**

**Contractor’s DRB Position Paper for NOI 34 (FPL CONC. POLE CONFLICT WITH RETAINING WALL 7) copied in black text below. Department’s subsequent rebuttal response written in Italic’s.**

Please accept this correspondence as Morrison-Cobalt N's (MCJV) Position Paper regarding the adverse impacts and disruption caused by the Department's failure to fulfill its obligations under Utility Work Schedule (UWS) affecting the project's construction of Retaining Wall 7 during Phase 2. This issue was originally identified under our Notice of Intent (NOI) #34. The Department and MCJV have been unable

to resolve significant impacts and disruptions to the project. The Board has been asked to make a recommendation as to entitlement only.

The Department failed to perform its obligations under the contract Specification Article 7-11.5 and Special Provision Article under Utility Schedules. The Department failed to timely provide the necessary arrangements with utility owners for the removal or adjustment of utilities in accordance with the UWS and the "Utility Adjustments" shown within the Contract Plan Sheet 519. The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the Contract Documents.

**DEPARTMENT REBUTTAL RESPONSE:** *The Department did not fail to perform its obligations under the Contract as stated above by MCJV. The utility relocation was completed during Phase 1A per the UWS; however, the relocated location encroached into the footprint of Retaining Wall 7. Subsequently, FPL was required to remove the conflict, which took place prior to MCJV's initiation of work on Retaining Wall 7 and prior to any delay to the Contractor, meeting the intent of the UWS. As outlined in the Department's position paper, the Contractor was actively pursuing controlling items of work on the project and Retaining Wall 7 was not a controlling item of work. The attached pictures are representative of the project activities (controlling and non-controlling) that were occurring during the timeframe from receipt of the NOI until the conflict was resolved that clearly show the Contractor's personnel and equipment progressing contract work. (Exhibit 01) At no time was the Contractor's staff idle or delayed related to this NOI. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

The Department and the utility companies did not perform the work in accordance with the UWS for the area affecting Retaining Wall 7 shown on Plan Sheets BW-15 and BW-17. The UWS identified the utility work to be performed during "Phase 1A" contract work as follows;

UWS	UWS Page	Project Location	Scheduled Plan Sheets
Florida Power & Light	4 of 9	Sta 49+15 (58Rt) to Sta 55+85(55Rt)	Phase IA 519

The dependent activity was to provide the Right-of-Way (ROW) location staked, which was done. The UWS activity was to be performed within Phase 1A well in advance of the Wall 7 construction which was performed in Phase 2. Of note for this area, the original utility adjustments planned a new FPL poles and overhead electrical lines crossing the river. During the Preconstruction Meeting, we alerted the Department and FPL that these overhead electrical lines cantilevered towards the bridge would conflict with the bridge construction. FPL subsequently revised their plan to directionally bore the electrical across the river. Unfortunately, the newly installed concrete pole just before the river was not installed at the ROW and was later found to encroach on the Wall 7 construction.

**DEPARTMENT REBUTTAL RESPONSE:** *As mentioned above, the utility relocation was completed during Phase 1A per the UWS; however, the relocated location encroached into the footprint of Retaining Wall 7. Subsequently, FPL was required to remove the conflict, which took place prior to MCJV's initiation of work on Retaining Wall 7 and prior to any delay to the Contractor, meeting the intent of the UWS. As discussed in the Department's position paper, the Contractor was still working on activities at Oleander Avenue, Phase 2 bridge activities, and Retaining Walls 1 and 5. Per Specification 5-12.2.2 from the Department's position paper (Page 14), there were no impacts to controlling items of work and there*

*were no direct idle labor impacts to non-controlling items of work. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

On October 24, 2019, we notified the Department of our Intent to Claim via NOI #34 for the adverse effects caused by the Department's failure to properly perform the utility adjustments. As stated within the NOI, we had intended **to commence operations** in the affected area on October 24, 2019 until we realized the issue posed a safety risk. As with many other ongoing issues on this project, MCJV mitigated the impacts caused by this issue by seeking and mobilizing to other areas of the project to work, albeit out of sequence and inefficiently. In fact, few areas of this project were performed within sequence and without multiple disruptions, a situation with compounding and rippling effects of decreased productivity and increased inefficiencies. On October 28, 2019, the Department and FOR proposed a solution. However, this proposed solution was found to require the pole to be stabilized or relocated as shown within an update email on November 5, 2019. FPL determined that relocating the pole was appropriate and completed relocating the conflict pole on January 16, 2020.

***DEPARTMENT REBUTTAL RESPONSE:*** *According to the Contractor's submitted and accepted schedules, there were no impacts to Retaining Wall 7 as referenced in the NOI. While the NOI and Contractor's position paper indicate that MCJV was intending to commence work in the area, this is not true as documented in the Contractor's accepted Schedule Updates (Department's position paper, Exhibits 12-15). Per Special Provision 8-3.2.7 Performance of Work, the Contractor is required to "Prosecute the work in accordance with the latest accepted Working Schedule." The accepted Schedule Updates did not indicate the Contractor beginning work at Retaining Wall 7 until 03.12.2020 – the FPL pole was removed on 01.16.2020, approximately 2 months prior to MCJV's scheduled Start Date for Retaining Wall 7. As discussed in the Department's position paper, there was no need for the Contractor to mitigate any impacts, as they just needed to continue constructing the project per their accepted schedules. The activities they continued working on during resolution included existing structure removal in Phase 2, Retaining Wall 1 and Retaining Wall 5, which followed the sequencing of their accepted schedules as required by Specification 8-3.2.7. The attached pictures are representative of the project activities (controlling and non-controlling) that were occurring during the timeframe from receipt of the NOI until the conflict was resolved that clearly show the Contractor's personnel and equipment progressing contract work. (Exhibit 01) Additionally, per Specification 5-12.6.2.1, the "Contractor shall be entitled to monetary compensation for the actual idle labor and equipment, and indirect costs, expenses, and profit thereon, as provided for in 4-3.2.1(4) and solely for costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken." Per Specification 5-12.2.2 from the Department's position paper (Page 14), there was no impact to a controlling item of work and there was no direct idle labor impact to a non-controlling item of work. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

The utility work was not performed properly and disrupted the Contractor's activities in Phase 2 of Wall 7 along with all the successor activities. As such, the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled, anticipated and approved within the Original Baseline Schedule. Since the Department failed to perform its obligations and the utility companies failed to complete their work in accordance with UWSs, MCJV's performance was impacted and extended.

***DEPARTMENT REBUTTAL RESPONSE:*** *MCJV activities for Retaining Wall 7 were not delayed as the Contractor was actively pursuing work on Bridge Phase 2 and Retaining Walls 1 and 5. As documented in the Daily Work Reports, and the submitted and accepted schedules/narratives, the*

*Contractor's crews and operations were not extended and therefore not impacted. Per Special Provision 8-3.2.2, the Contractor is required, and complied, to submit monthly schedule updates and narratives that include and describe the critical path of the project and any logic changes from the previous update. MCJV's narratives never indicated the work at Retaining Wall 7 as being critical, which was supported by the logic in their schedule. As documented in the accepted schedules, there were no impacts to the activity of Retaining Wall 7 and the wall was completed well in advance of any delays or disruption to the overall schedule. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

In accordance with the Contract Specifications 4-3 (Tab 10), the Department is required to compensate MCJV for unforeseen work. The Department failed in recognizing its obligations under the Contract to perform the utility adjustments in accordance with the UWS. The Department also failed to investigate the conditions and determine that these conditions differs materially from the conditions presented in the original Contract Documents. Based on these failures, the Department and its consultant did not recognize or understand MCJV's entitlement in this matter.

**DEPARTMENT REBUTTAL RESPONSE:** *As outlined in the Department's position paper and as stated in the Department's rebuttal above, there were no impacts and no unforeseen work. The Contractor claims that the work differs materially but fails to acknowledge that at no time did they notify the Department of any differing site condition as required in Specification 4-3.7. Further, and more importantly, there was no differing site condition for the utility issue in dispute. The utility relocation was performed during "Phase 1A" as required by the UWS; however, the relocation still resulted in a conflict. FPL was able to fully remove the conflict prior to impacting the Contractor. Additionally, as the Contractor failed to notify the Department of a differing site condition and as there was no differing site condition, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

Yet, starting with the April 8, 2021 Dispute Review Board (DRB) Meeting and every subsequent DRB meeting, the Department and its consultant were asked by the DRB to state if they found entitlement in this issue (and others). Each time the Department and its consultant stated that entitlement was determined but that no additional costs were observed. (See DRB Meeting Minutes Tab 11). Additional costs are a matter of quantum, not entitlement. The Department's, and its consultant's, inability to recognize conditions materially different from the original conditions presented and their inability to determine how these differed conditions impact and disrupt the Contractor's operations are plainly evident.

**DEPARTMENT REBUTTAL RESPONSE:** *The Contractor references meeting minutes over a year after the conclusion of the alleged utility impact to indicate the Department established entitlement. It is clear that the Department indicated that there was "no additional costs or impacts observed". To determine entitlement for the delay issue raised to the Board, the Contractor and Department must refer to Specification 5-12.2.2 Claims for Delay. In this Specification, as captured in the Department's position paper, the Contractor would need to prove 1 of 2 things. First, the Contractor would need to prove that there was an impact to a controlling item of work. The Contractor's own accepted schedules, clearly outlines that there were no impacts to controlling items of work. Second, the Contractor must prove that there was a direct impact to a non-controlling item of work with idle labor and equipment. As outlined in the Department's position paper, not only were there no impacts to controlling items of work, but there was also no idle labor or equipment related to a non-controlling item of work. The Contractor was pursuing controlling items of work at Phase 2 Bridge construction, Retaining Wall 1 and Retaining Wall 5. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034. MCJV developed its original bid and project schedule in accordance with the Contract Documents issued by the Department, who warranted that the Contract Documents were complete, accurate, and*

*buildable. However, MCJV's planned schedule and cost of performance were adversely affected by the Department's repeated failures and deficiencies. These Contract deficiencies caused disruptions in performance and inefficiencies in the MCJV's work. By failing to adhere to the UWS, the Department caused and MCJV encountered a changed condition. With MCJV unable to proceed with its planned methods of construction, MCJV's performance was adversely impacted, its crews were on the project longer than anticipated, and its cost of performance was increased as a direct result of the unforeseen conflicts.*

*DEPARTMENT REBUTTAL RESPONSE: As stated in the Department's position paper and stated above, any reference to disruptions, repeated failures, compounding and rippling effects of decreased productivity and increased inefficiencies are irrelevant to this dispute. The Department negotiated with MCJV a global claim settlement in the amount of \$3,287,359.08 and 209 days. (Exhibit 02) The global claim settlement resolved any indirect costs for NOI No. 034 and per the certified claim by MCJV, the Contractor is pursuing indirect costs and therefore not entitled. The claim settlement only left open any direct costs related to NOI No. 034. As was discussed in the Department's position paper and within this rebuttal paper, the Contractor was not delayed to a non-controlling item of work and there was no idle labor or equipment as the Contractor was actively pursuing controlling items of work on the project and therefore not entitled to any direct costs. According to the Contractor's submitted and accepted schedules, there was no impact to the activities referenced in the NOI. MCJV was not ready to begin the work on Retaining Wall 7 as they were pursuing controlling items of work at the Phase 2 Bridge removal, Retaining Wall 1 and Retaining Wall 5. The Contractor mentions that the crews were on the project longer than anticipated; however, as there were no impacts to controlling items of work and no impacts to non-controlling items of work, the crews included in the certified claim were not on the project longer than anticipated related to this NOI. While this is only an entitlement dispute, it should be noted that MCJV has a certified claim requesting stand-by and direct labor costs from the period of 12.09.2019 to 01.17.2020. During this period, it is clear by the Daily Work Reports that the MCJV crews were not working in this area and were directly working on contract work on the project. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

As of the November 2019 schedule update (Tab 12), the number of scheduled workdays remaining for the earthwork crews and base grading crews were 238 and 154, respectively. With the disruptions and inefficiencies caused by, but not limited to, this unforeseen conflict, the actual crew days on the project after November 2019 for the earthwork and base grading crews were 377 and 366, respectively. As such, the following represents the extended crew days used on the project:

<b>Crew</b>	<b>Planned Crew Days As of November 2019</b>	<b>Actual Crew Days</b>	<b>Extended Crew Days</b>
<b>Maintenance of Traffic</b>	325	472	147
Earthwork	238	377	139
Base Grading	154	366	212

**DEPARTMENT REBUTTAL RESPONSE:** *MCJV attempts to attribute any extended crew days directly to NOI No. 034 without any backup documentation or support in the certified claim or in the position paper exhibits. The Contractor attempts to calculate all of the MOT, earthwork and base grading crew days on the project directly to this issue without recognizing or acknowledging that this time was included as part*

*of the global claim settlement. As stated, any extended crew days or impacts to the schedule are directly correlated with the global claim settlement for \$3,287,359.08 and 209 days. (Exhibit 02) Additionally, the Contractor never complied with the requirements of requesting a Time Extension per Specification 8-7.3.2 and if they had, the supporting documentation, including the submitted and accepted schedules from MCJV do not support that there was any impact to the project or extended crew days as outlined above. The period in question is between 12.09.2019 and 01.17.2020. There is no indication that any extended crew time was directly related to this NOI, therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

Since the Department failed to complete its obligation in accordance with the UWS in the Contract, MCJV suffered unforeseen conflicts, extended crew days and increases in its cost of performance. Therefore, in accordance with the following Specification Article:

*4-3.4 Conditions Requiring a Supplemental Agreement or Unilateral Payment: A Supplemental Agreement or Unilateral Payment will be used to clarify the Plans and Specifications of the Contract; to provide for unforeseen work grade changes, or alterations in the Plans which could not reasonably have been contemplated or foreseen in the original Plans and Specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims; to make the project functionally operational in accordance with the intent of the original Contract and subsequent amendments thereto.*

**DEPARTMENT REBUTTAL RESPONSE:** *The Department did not fail to complete its obligations on the Contract. The utility work was relocated prior to construction activities in the area which is the intent of the utility work schedule. There was no impact to the project and the crew was not impacted or delayed. There was no unforeseen work, and the relocation was contemplated in the original plans. The only change is the timeframe between the original utility work schedule and the time the work was completed. As previously stated, the work was completed prior to any work in that phase of the Contract. As there was no unforeseen work and no alterations that impacted the Contractor's schedule or crews, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

MCJV was impacted by Utility Conflicts that could not have been reasonably anticipated or foreseeable at the time of bid. These conflicts were created by the Department's own failure to properly adhere to the UWS provided within the original and deficient Contract Documents. The effects of deficient documents, unknown failures by the Department, and unforeseen conflicts impacted MCJV's sequence, means, methods, and durations of performance on the project. Therefore, MCJV is entitled to receive a fair and equitable adjustment as compensation for increased costs caused by unforeseen conflicts. Additionally, the Department and its consultant had previously determined entitlement as mentioned previously above and within the DRB Meeting Minutes. MCJV sincerely appreciates the consideration given by the Board on the above detailed issues.

**DEPARTMENT REBUTTAL RESPONSE:** *The Contractor makes statements in their position paper without any contractual basis to support their statements. Their position is based upon the utility work not being completed according to the UWS without acknowledging that their own submitted and accepted schedules reflect no impact to their schedule or to the completion of the Contract. Per Specification 5-12.2.2, there was no impact to a controlling item of work and no impact to a non-controlling item of work. Per Specification 8-7.3.2, the Contractor failed to provide a supported time extension request and more importantly, the accepted schedules proves that that utility relocation was completed well before any impacts to the Contract and without any delays to the MCJV crews. There was no differing site conditions or materially different conditions as the Contractor claims per Specification 4-3. Any*

*reference to the Department indicating “entitlement” in previous DRB meetings was only that there could have been if there were impacts and it was clearly noted that no additional costs or impacts were observed. Furthermore, the executed global claim settlement resolved any indirect costs associated with NOI No. 034. Since MCJV is pursuing additional indirect costs as part of their certified claim, they are therefore not entitled. Additionally, the Department met their obligations for the utility work to be relocated prior to work in Phase 2 and prior to any impacts to a controlling or non-controlling item of work, thus meeting the intent of the UWS. As outlined in the Department’s position paper and in the Department’s rebuttals in this paper, the Contractor is not entitled to any impacts or disruptions related to NOI No. 034.*

Sincerely,  
Digitally signed by Luis F Porro  
Luis F Porr0 Date: 2022.11.10 16:24:09  
-05'00'  
Project Manager  
Morrison-Cobalt JV

#### **4. Relevant Specifications**

1. Division I Specifications §1-3 Definitions
2. Division I Specifications §4-3 Alteration of Plans or of Character of Work
3. Division I Specifications §5-12 Claims by Contractor
4. Division I Specifications §7-11.5 Utilities
5. Division I Specifications §8-6.4 Suspension of Contractor’s Operations – Holiday and Special Events
6. Division I Specifications §8-7.3.2 Contract Time Extensions

#### **5. Key findings and Analysis of facts**

1. The UWS included relocation of existing FPL pole line during Phase 1A of construction. The poles at the St. Lucie River Bridge were relocated.
2. FP&L pole was in conflict with the footer for Wall 7.
3. FP&L relocated the conflict pole on January 16, 2020.
4. The contractor is requesting determination of entitlement to the cost of extra work (sequence, means and methods and durations not contemplated at time of bid).
5. Supplemental Agreement (SA) 87 was executed on 1/7/2020.
6. SA 87 settled all disputes of any kind as of Dec 6, 2019. Exceptions to this SA included direct costs associated with NOI 34.

7. **Specification 5-12.7 Mandatory Claim Records**, The Contractor once a Notice has been timely filed must keep daily claim records and provide a copy to the Engineer no less than weekly. This was not done for this NOI.
8. **Daily Work Reports (DWR's)**, The DWR's for the time frame in question do not contain documentation in support of this claim.
9. **Monthly CPM update's**, With the exception of a general comment noting Utility Conflicts, the monthly CPM updates for the time frame in question do not contain documentation in support of this claim.

The Board has relied on contract specifications and all evidence presented in the submitted documents and the Hearing conducted December 5, 2022 for NOI-34, relevant to this claim.

## 6. DRB Recommendation

The Contractor brought fourth this claim under Specification **4-3 Alteration of Plans or of Character of Work**. In their claim the Contractor points out the work in question took significantly longer than originally estimated in their bid. They ask for additional costs related to the extra work required during the time difference between their original estimate and the as built, as described in the Hearing.

They explained that additional work effort, both Manpower and Equipment was due to extra work required by the Department's failure to follow their original UWS. MCJV stated they were continually disrupted leading to inefficiencies and an inability to level resources and efficiently workflow the project as intended resulting in extra work.

The Board understands and acknowledges the Contractors Position associated with the progress of the UWS, however based on the lack of depth of the supporting material submitted we are not able to conclusively attribute direct impact to this NOI.

The Board recommends **No Entitlement** to this issue.

**Submitted by and for**

Date of Recommendation: 12/16/2022

**Ronnie Klein, Chairman**

Pat McCann P.E., Member

Rick Espino P.E., Member