

# DISPUTE REVIEW BOARD RECOMMENDATION

April 15, 2002

E-Mailed April 15, 2002

Joseph M. Chao, Jr. PE  
Senior Project Engineer  
KCCS, Inc.  
5264 State Road 54  
New Port Richey, Florida 34653  
jchao@kcaeng.com

Kevin B. Carbonelli  
Project Manager  
David Nelson Construction Co.  
3483 Alternate 19  
Palm Harbor, Florida 34683  
kcarbonelli@nelson-construction.com

RE: FIN: 256338-1-52-01  
SPN: 14570-3519  
Contract No.: 21198  
County: Pasco  
District 7  
SR-54 from SR 55 (US-19) to East of Madison St.

Dear Sirs:

The Owner, Florida Department of Transportation (Department), requested a hearing to provide a recommendation to both parties on whether

the Contractor is entitled under the terms of the Contract to modification of the Incentive portion of the Incentive-Disincentive Completion dates for Milestones I and II.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on April 04, 2002.

## **DEPARTMENT'S POSITION:**

### *Section 8-13.1: Incentive - Disincentive*

#### **INTRODUCTION**

*The S.R. 54 Project (256338-1-52-01) contains three Incentive-Disincentive Completion dates in accordance with Section 8-13.1 Incentive-Disincentive, of the Special Provisions for this project. There are two interim milestones associated with the installation of the 60" outfall storm sewer pipe along U.S. 19 and one completion milestone. Milestone I consists of the installation of the 60" outfall storm sewer pipe from the outfall headwall at Leverock's to the south side of Trouble Creek Rd. with an Incentive-Disincentive Completion Date of 50 calendar days from the date of commencement of Work. Milestone II consists of the installation of the 60" outfall storm sewer pipe from the south side of Trouble Creek Rd. to the south side of the intersection of S.R. 54/U.S. 19 with an Incentive-Disincentive Completion Date of 85 calendar days from the date of commencement of Work. Final Acceptance is the Contract completion with an Incentive-Disincentive Completion Date of 350 calendar days from the date of commencement of Work. Each Milestone has an Incentive-Disincentive daily amount of \$10,000/Day with a total amount of \$250,000 for Milestone I, \$300,000 for Milestone II and \$240,000 for Final Acceptance. The Contractor is seeking to have the Milestone Incentive Completion Dates extended for the purposes of calculation of the incentive payment due to the presence of more limestone rock than what was shown in the plans or any other circumstances that have occurred on this project to date.*

**DAVID NELSON CONSTRUCTION CO.'S POSITION:** *The milestone dates can and should be extended due to the numerous and varied acts and omissions by the Department that virtually denied to DNCC their vested rights to benefit from the incentive clause, and did so without regard to DNCC's*

## DISPUTE REVIEW BOARD RECOMMENDATION

clear and expressed reliance on and ability to achieve the benefits that were available to them under this clause.

**DEPARTMENT'S POSITION:** The Contract is clear that the risk of any such time impacts and impediment or possibility of achieving any of the Incentive are clearly assumed on behalf of the Contractor, in that the Contract provides that the Incentive-Disincentive Completion Date will not be extended for any reason other than a catastrophic event (i.e., hurricane or a declared state of emergency) as set forth in Section 8-13.1, Incentive – Disincentive, of the Special Provisions for this project.

The Disputes Review Board is requested to review this dispute and provide a recommendation to both parties on whether the Contractor is entitled under the terms of the Contract to modification of the Incentive-Disincentive Completion Date(s) for Milestones I and II.

### **SUPPORTING INFORMATION**

#### **1. Article 8-13: Alternative Bidding**

##### **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 time of construction. In order to achieve this, incentive – disincentive provisions are established for the Contract Work Items described below. The combined total incentive payment(s) or disincentive deduction(s) shall not exceed \$790,000.00. Contract Work Items, Incentive-Disincentive Completion Dates, Incentive-Disincentive Daily Amounts and Incentive-Disincentive Total Amounts are established in accordance with the following: (Chart in contract)

The Department will pay the Contractor an incentive payment in the amount of the Incentive-Disincentive Daily Amount for each calendar day the actual completion date of the Contract Work Item precedes the Incentive-Disincentive Completion Date and subject to the conditions precedent set forth below. The term "Incentive-Disincentive Completion Date" as used in this Article will mean the number of calendar days established for completion of the Contract Work Item. The term "calendar day" as used in this Article will mean every day shown on the calendar. Calendar days will be consecutively counted from commencement of contract time regardless of weather, weekends, holidays, suspensions of Contractor's operations, delays or other events as described herein. For purposes of the calculation and the determination of entitlement to the incentive payment stated above, the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event (i.e., hurricane or a declared state of emergency).

The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the Incentive-Disincentive Completion Date so that such extended Incentive-Disincentive Completion Date will be used in calculation of the incentive payment. In the event the Contractor and Department are unable to agree to the number of Calendar Days to extend the Incentive-Disincentive Completion Date, the Department

## DISPUTE REVIEW BOARD RECOMMENDATION

*will unilaterally determine the number of calendar days to extend the Incentive-Disincentive Completion Date reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department were arbitrary or without any reasonable basis.*

*The Contractor shall have no rights under the Contract to make any claim arising out of this incentive payment provision except as is expressly set forth in this Article.*

*As conditions precedent to the Contractor's entitlement to any incentive the Contractor must:*

- (1) Actually complete the Contract Work Item and obtain written verification of the actual completion date from the Department prior to the Incentive-Disincentive Completion Date.*
- (2) The Contractor shall notify the Department in writing, within 30 days after written verification of the actual completion date of the Contract Work Item by the Department, that the Contractor elects to be paid the incentive payment which the Contractor is eligible to be paid based on the actual completion date, and such written notice shall constitute a full and complete waiver, release and acknowledgment of satisfaction by the Contractor of any and all claims, causes of action, issues, demands, disputes, matters or controversies, of any nature or kind whatsoever, known or unknown, against the Department, its employees, officers, agents, representatives, consultants, and their respective employees, officers and representatives, the Contractor has or may have, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers or Sub-contractors or other Contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contract Time, extended or unabsorbed home office or job site overhead, lump sum maintenance of traffic adjustments, lost profits, prime mark-up on Subcontractor work, acceleration costs, any and all direct and indirect costs, any other adverse impacts, events, conditions, circumstances or potential damages, on or pertaining to, or as to or arising out of the Contract. This waiver, release and acknowledgment of satisfaction shall be all-inclusive and absolute, same and except any routine Department final estimating quantity adjustments.*

*Should the Contractor fail to actually complete the Contract Work Item and obtain written verification of the actual completion date from the Department prior to the Incentive-Disincentive Completion Date, or should the Contractor, having timely completed the Contract Work Item and obtained written verification of the actual completion date from the Department prior to the Incentive-Disincentive Completion Date but having failed to timely request the incentive payment for any reason, and including but not limited to the Contractor choosing not to fully waive, release and acknowledge satisfaction as set forth in (2) above, the Contractor shall have no right to any payment whatsoever under this Article. Notwithstanding the Contractor's election or non-election of the incentive under this provision, the disincentive provision applies to all circumstances where the work in the Contract is not verified as completed by the Engineer in writing by the Incentive-Disincentive Completion Date.*

*Completion and verification of the actual completion date of the Contract Work Item for purpose of this Article shall be in accordance with written notice by the Engineer to the Contractor.*

*Should the Contractor fail to complete the Contract Work Item on or before the Allowable Incentive-Disincentive Completion Date, as adjusted in accordance with the provisions of 8-7.3, the Department shall deduct the Incentive-Disincentive Daily Amount for each calendar day completion exceeds the Allowable Incentive-Disincentive Completion Date, from the monies otherwise due the Contractor. The term "Allowable Incentive-Disincentive Completion Date" as used in this Article shall mean the Incentive-Disincentive Completion Date plus adjustments pursuant to 8-7.3. This deduction shall be the disincentive for the Contractor's failing to timely complete the Contract Work Item. Article 8-10 relating to liquidated damages remains in effect and is applicable.*

*In the event the Contractor elects to exercise this incentive payment provision, should this provision conflict with any other provision of the Contract, the Contract shall be interpreted in accordance with this provision.*

## DISPUTE REVIEW BOARD RECOMMENDATION

*As to any Contract Work Item or Milestone provided for herein, the Contractor will remain responsible for all such work and the continued maintenance thereof until such date as the Department final accepts all Work under the Contract in accordance with 5-11, and without regard to whether the Department has provided written verification of the actual completion date or not, and without regard to whether any incentive was earned or elected hereunder.*

### **1. David Nelson Construction Co.'s Position Statement:**

*David Nelson Construction Co. contends that the milestone dates can and should be extended due to the numerous and varied acts and omissions by the Department that virtually denied to DNCC their vested rights to benefit from the incentive clause...etc.*

*The Department agrees the milestone date can be extended so that disincentive deductions are not applied, but the contract language is very clear in that the date will not be extended for the purpose of calculation of the incentive payment. The contract language is also very clear in stating that any such delays or events (as listed in Section 8-13.1) and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties entering into this contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment. David Nelson Construction Co. was aware at the time of bid, award and execution of the Contract of their rights and assumed responsibilities as to the potential incentive payment(s) as described in the Contract documents for this project.*

### **SUMMARY / CONCLUSION**

*The Department desired to expedite construction on this Contract to minimize inconvenience to the traveling public and to reduce time of construction. In order to achieve this, incentive - disincentive provisions were established for the Contract Work Items described for Milestones I and II. The Department did not dictate to David Nelson Construction Co. on how to pursue the achievement of these two milestones and allowed them the opportunity to earn the incentive payment as depicted in the Contract Documents for this project.*

*The Contract Documents for this project did not misrepresent to the Contractor as to what was required to achieve the incentive payment for Milestones I and II. Furthermore, the Contract language is very clear on what events the Contractor should anticipate that may cause delays during the course of the Contract. Therefore, for purposes of calculation of the incentive payment, the Contractor has no contractual right to the Incentive-Disincentive Completion Date being extended for any reason other than a catastrophic event (i.e., hurricane or a declared state of emergency) as set forth in Section 8-13.1, Incentive – Disincentive, of the Special Provisions for this project.*

## **CONTRACTOR'S REBUTTAL:**

### **Opening Statement:**

*The Departments opening statement includes:*

*"The Contractor is seeking to have the Milestone Incentive Completion Dates extended for the purposes of calculation of the incentive payment due to the presence of more limestone rock than what was shown in the plans or any other circumstances that have occurred on this project to date. "*

*This statement seems to downplay the significance of the rock, and broad brushes the "other circumstances on this project to date". First, the fact that there is "more limestone rock than what was shown in the plans" is perhaps an understatement. Referring to DNCC DRB Document Exhibits 5 and 6, these clearly show that the extent of rock encountered was entirely different than what the contract documents indicated should be present.*

*Second, the "other circumstances that have occurred on this project to date" is assumed to be those indicated as Items of Damage #1 through #7 in the DNCC DRB document. Clearly these "circumstances" were significant, unanticipated and unidentified errors in the Contract Documents.*

### **Department's Position:**

*The Contract is clear that the risk of any such time impacts and impediment or possibility of achieving any of the Incentive are clearly assumed on behalf of the Contractor, in that the Contract provides that*

## DISPUTE REVIEW BOARD RECOMMENDATION

*the Incentive-Disincentive Completion Date will not be extended for any reason other than a catastrophic event (i.e., hurricane or a declared state of emergency) as set forth in Section 8-13.1 Incentive - Disincentive, of the Special Provisions for this Project.*

*In rebuttal, while the letter of the specification taken at face value certainly seems to indicate that the risk is all upon the Contractor, the Department nevertheless has failed to recognize the general premise of Florida law that the Department has an implied duty to not interfere in a contractor's ability to perform. (DNCC DRB pg. 1)*

*Referring to the DNCC DRB page 15 "Justification for Milestone Adjustment", the controlling principles of law present a compelling argument that DNCC has a right to rely on the accuracy of the Contract Documents in preparing its bid and assessment of the Incentive program risks. As shown in the DNCC DRB Items of Damage, the Contract Documents were clearly flawed to the extent that they completely misrepresented the nature, character and extent of the actual work to be performed in Milestones I and II.*

### **Supporting Information:**

#### *1. Article 8-13 Alternative Bidding*

*Our rebuttal to this is simply to refer back to the DNCC DRB Supporting Information under "Justification for Milestone Adjustment" (page 15).*

#### *2. DNCC's Position Statement (Department's Response):*

*The Department states that it agrees the milestone date can be extended so that disincentive deductions are not applied. However, it has failed to do this despite being in receipt of reasonable and compelling documentation requesting and supporting due and appropriate extensions of time.*

*Referring to the section which states*

*"The contract language is also very clear in stating that any such delays or events (as listed in Section 8-13.1) and their potential impacts on performance by the Contractor are **specifically contemplated and acknowledged by the parties entering into this contract, and shall not extend the Incentive Disincentive Completion Date for purposes of calculation of the incentive payment.** David Nelson Construction Co. was aware at the time of bid, award and execution of the Contract of their rights and assumed responsibilities as to the potential incentive payments(s) as described in the Contract documents for this Project."*

*This was not a negotiated contract. In fact, the bidding documents specifically state that we must not provide any sort of conditions or modifications with our bid lest it be rejected as non-responsive. Therefore, the bidder must rely only on what is represented in the documents, and the preparer of the bidding documents indeed has an even greater obligation to provide reasonably accurate information upon which the bidder can prepare a non-conditional bid.*

*There must be some degree of reason as to what potential impacts are "**specifically contemplated and acknowledged by the parties...**". David Nelson Construction was aware at the time of bid, award and execution, only of what could have reasonably been specifically contemplated and acknowledged from the Contract Documents. The changed conditions DNCC encountered on the Project were not, nor could not have been reasonably specifically contemplated.*

### **Summary /Conclusion:**

*The Department claims that it desired to expedite construction on this Contract to minimize inconvenience to the traveling public and to reduce time of construction. It further states that in order to achieve this, the incentive-disincentive was established.*

*Upon reviewing the DNCC DRB Position documents, there should be no doubt that Construction was expedited and **the stated goal of the Department was met.** To reiterate, DNCC:*

- Created a better temporary sheeting solution to expedite work- at a savings to the Department.*
- Worked essentially 24 hours per day, and seven days per week to meet the goal of expediting construction.*

## DISPUTE REVIEW BOARD RECOMMENDATION

- *Worked diligently above and beyond contractual responsibility to assist the Department in resolving incorrect plans.*
- *By virtue of the above, DNCC constructed Milestones I & II as fast as reasonably possible.*

*The Department states that it allowed DNCC the opportunity to earn the incentive payment as depicted in the Contract Documents for this project. However, the Department has elected to ignore that it:*

- *Initially provided confusing direction to DNCC regarding the changed condition at the US 19 Jack & Bore (EXHIBIT 8)*
- *Refused to act promptly to allow DNCC to mitigate damages by proceeding into Milestone 11 work (Item of Damage #4 pg 10)*
- *Initially refused to acknowledge the changed condition of the Rock/Water Issue (Item of Damage #2 pg 8)*
- *Refused to extend the Milestones I & II dates due to the impact of Tropical Storm Gabrielle, though duly requested.*
- *Led DNCC to believe that the Milestone II location would be adjusted during the negotiations for the SR 54/US 19 Jack & Bore/Forcemain conflict, then refused to honor that caveat once the direct costs were agreed to and work commenced. (Item of Damage #6 pg. 12)*

*The Department states that the Contract Documents did not misrepresent to the Contractor as to what was required to achieve the incentive payment for Milestones I & II. Please refer to all Items of Damage in the DNCC DRB Document as a rebuttal.*

*The Department states that **the Contractor has no contractual right to the Incentive/Disincentive Completion Date being extended for any reason...***

*DNCC believes and contends that it has earned the right to an extension of all milestones as shown in its DRB Position Document. DNCC thus reiterates its request for equitable adjustment therein.*

### **CONTRACTOR'S POSITION:**

*David Nelson Construction believes and contends that the milestone dates can and should be extended due to the numerous and varied acts and omissions by the Department that virtually denied to DNCC their vested rights to benefit from the incentive clause, and did so without regard to DNCC's clear and expressed reliance on and ability to achieve the benefits that were available to them under this clause.*

*S.R. 54 PROJECT - (256338-1-52-01) David Nelson Construction Issue and Position Document DRB Hearing - April 4, 2002*

*The S.R. 54 Project (256338-1-52-01) contains three Incentive-Disincentive Completion dates (Milestones) in accordance with Section 8-13.1 Incentive/Disincentive, of the Special Provisions for this project. Milestone I consists of the installation of the 60" outfall storm sewer pipe from the outfall headwall at Leverock's to the south side of Trouble Creek Rd. with an Incentive-Disincentive Completion Date of 50 calendar days from the date of commencement of Work. Milestone II consists of the installation of the 60" outfall storm sewer pipe from the south side of Trouble Creek Rd. to the south side of the intersection of S.R. 54/U.S. 19 with an Incentive-Disincentive Completion Date of 85 calendar days from the date of commencement of Work. For this presentation, it is assumed that the DRB members have a set of Project plans and specs (including special provisions) at their disposal.*

*DNCC now seeks an adjustment to the Milestone dates caused by suspension of work incurred by Nelson as the result of acts or conditions for which FDOT (the Department) is responsible. As discussed below, the department has breached various duties owed by the Department to DNCC. But for the acts, conditions or breaches of the Department outlined below, Nelson would have achieved each of the Milestone dates and earned significant incentive bonuses. While the incentive clause states that an adjustment can not be obtained by a contractor except for catastrophic events, such clause must be interpreted in consideration of Department's duty to not hinder or otherwise delay a contractor from expeditiously performing its work. FDOT has previously acknowledged that an adjustment in Milestone dates is proper when a contractor has been denied the opportunity to achieve milestones as the result of acts or conditions which are the*

## DISPUTE REVIEW BOARD RECOMMENDATION

responsibility of FDOT. See FDOT letter of 5/25/2000 in **EXHIBIT 23**<sup>1</sup> regarding adjustments to incentive milestone dates for Hubbard Construction Company on State Project Number 77010-3533 and the underlying decision of the Dispute Review Board. This acknowledgement and Dispute Review Board decision are consistent with the general premise of Florida law that the Department has an implied duty to not interfere in a contractor's ability to perform.

As outlined below, the Department provided inadequate and erroneous plans and specifications. The Department provided inaccurate site conditions. The Department failed to disclose known underground conflicts. The Department further spent prolonged periods in making decisions to address the design documents deficiencies. It further refused to allow Nelson to undertake alternative actions to mitigate the delays caused by the Department. These actions and conditions denied DNCC the benefits of the incentive bonus for Milestones I and II which it would have otherwise earned. Likewise, according to the approved CPM, Milestone III has been impacted in kind.

The events and conditions upon which DNCC seeks an adjustment to the Milestone dates are summarized as follows:

### **Milestone I**

1. The design bid documents provided for a 2135mm diameter Jack and Bore casing for a 1500mm storm sewer across U.S. 19. The Department redesigned the installation of the proposed jack and bore system to remove the possibility that this method of installation of the sewer line might result in a catastrophe by exposing the traveling public to a sudden collapse of portions of heavily traveled U.S. 19 during or after its installation. This decision was made by the Department more than thirty days after DNCC's work on this portion of the project was effectively suspended for more than thirty days after it gave notice to the Department of existing site conditions which created the risk of collapse. While the Department evaluated and prepared an alternative design, the impact on DNCC's critical path for this change alone was 39 days.
2. Rock strata and subsequent water boils in and above the flow line of the proposed outfall pipe along a significant portion of Milestone I work was not disclosed in the bid design documents or geotechnical data. These concealed conditions created both massive spring flows of water which could not be controlled by dewatering and conditions rock and voids which had to be remove/filled. These conditions should have been addressed in the design documents and the geotechnical data of the Department. The failure to provide accurate and reasonably complete information impacted DNCC's performance. The delay however, is partially concurrent with the impact of the conditions identified in Item 1. If Item 1 were not on the critical path the impact of the conditions described in this Item 2 alone was 22 days.
3. The Department provided inaccurate plan and detail information related to the construction of the outfall structure S316. This outfall structure was designed to be built as part of an existing seawall structure which the Department knew or should have known did not exist as indicated on the design documents. This condition materially interfered, hindered, and impeded DNCC's ability to complete the S316 structure.
4. In order to mitigate the delays and damages caused by these conditions DNCC sought to proceed with Milestone II work concurrently with the changed condition work in Milestone I. The Department unreasonably delayed approval of DNCC's request to mitigate delays and damages to proceed with Milestone II work concurrently with the changed condition work in Milestone I.

### **Milestone II**

5. The Department failed to disclose and/or remedy known (or what should have been known) design and phasing errors related to the construction of S-302 which is the

---

<sup>1</sup> Refer to the submittal papers for all exhibits.

## DISPUTE REVIEW BOARD RECOMMENDATION

identified endpoint of Milestone II. S302 as designed was in conflict with an existing water line.

6. The Department failed to disclose and/ or remedy known (or what should have been known) design errors related to the installation of the Jack & Bore at US 19 and SR 54 which were in conflict with an forcemain under SR 54. This, in effect was the final straw in denying DNCC the benefit of any remaining Incentive Bonus opportunity as defined by the letter of the specification. The conditions noted in Item 5 above and this Item 6 independently of the other changes impacted DNCC's critical path by 19 days.
7. DNCC further was subject to emergency conditions caused by Tropical Storm Gabrielle. This storm brought high winds and rain causing delays to the Project. These conditions impacted the Project 3 days.

### **Milestone III**

Based on the Approved Project CPM, Milestone III work is directly and logically tied to the Milestone I and II work, and has been impacted to the same degree.

#### **The following presentation will:**

- Show that DNCC's original approved CPM was reasonable and achievable.
- Indicate the details, nature, and extent of the above referenced problems which support our contention that the actual work was substantially different in character than that shown in the Contract Documents
- Show that but for the above noted issues, DNCC would have completed its MI and MII work as planned and earned the incentives.
- Provide further justification for the Department to adjust the incentive dates as requested. This will include outlining the legal duties of the Department.

#### **Baseline CPM- Reasonable and Practical**

DNCC's approved CPM Schedule (**EXHIBIT 1**) indicates that it intended to complete Milestone I in 23 Calendar Days (27 days ahead of Milestone I completion date), and Milestone II in 31 days, (31 days ahead of Milestone II completion date). This would result in early completion of the milestone work 58 days ahead of the milestones earning an incentive payment based on 55 days (maximum available).

The DNCC game plan was to start in three locations on the project: At the outfall pipe @ Structure 316, for the construction of the headwall and subsequent pipe eastward to US 19; At Structure 314 (thereabouts) with 24 hour/day pipe crews heading south; and a Jack and Bore Crew working at the south end of Milestone I (Trouble Creek Rd) and overlapping at US 19. Working in concert, the plan was to have this setup hit the ground running at 12:00AM on Day 1 of Milestone I. **EXHIBIT 2** shows the starting lineup for the work and the sequencing thru Milestone I.

Once Milestone I was complete, the operation would proceed to Milestone II with the Pipe Crews proceeding south from Trouble Creek Road, while the Jack and Bore Crew mobilized down to SR 54/US 19.

In our opinion, the approved CPM is reasonable and achievable based on the information as presented in the bidding documents. **EXHIBIT 3** shows the FDOT's CPM schedule indicating how they arrived at the Milestones I and II completion dates, along with a comparison table of the durations for the mainline pipe runs showing that DNCC schedule clearly was reasonable. The only discernible difference is the installation of the proposed temporary sheet pile. It further seems to indicate that the FDOT had no idea at all the rock would be significant impact to the pipe production- especially the section from S316 through the US 19 Jack & Bore.



## DISPUTE REVIEW BOARD RECOMMENDATION

*EXHIBIT 4 is the as-built CPM for the Milestone I and Milestone II sections of the Project. It is this exhibit to which we will refer in the following pages to document the impacts to the Baseline CPM. Allowing for concurrency between the respective impact items, the Milestones were impacted overall as follows:*

**Milestone I:** Original completion date was September 12 (Day 23). Actual completion was October 19 (Day 60). This is 37 days past the original completion date.

**Milestone II:** Original completion date was October 13 (Day 54) if the Department accepts DNCC contention that the Milestone location should be relocated to the North end of the SR 54 Jack & Bore Conflict area, and that the completion date should be November 7 (Day 79), which is 25 days past DNCC's original Milestone II completion date. If the Department maintains that the Milestone II location remains at S302, then the completion date would be November 20 (Day 92) which is 38 days past the original Milestone II completion.

**Milestone III:** Original completion date was August 4, 2002. As a result of the following, the Project Approved CPM has been impacted by 46 Days. This virtually eliminates the possibility of DNCC earning any Milestone III incentive bonus.

### **Specifics on How DNCC was Delayed**

*The majority of the problems encountered are related to the presence of a rock strata and major boulders neither of which are indicated properly on the plans. This problem was prevalent from the seawall tie-in, across US 19, and south to Structure S309. The borings provided with the contract documents show this rock stratum significantly below the proposed pipeline in all areas except an area of approx. 100 meters near station 171. EXHIBIT 5 indicates where the rock should have been according to the numerous borings, versus where is actually was. EXHIBIT 6 contains pictures of these areas.*

*In order to expedite production on the changed rock condition, DNCC took several steps; first, we employed two Hoe-rams to jackhammer rock. In addition, to expedite work at the S316 to US 19 Jack & Bore corridor, DNCC mobilized a Terex Mining RH-30 Hydraulic Excavator, which is a 90 TON track excavator (EXHIBIT 7). The Hoe-rams were effective, but slow, and the RH-30 proved to be unable to expedite the excavation of the rock.*

*The following pages will provide information on the above noted events and the their details.*

### **Item of Damage #1:**

#### **US 19 Jack and Bore Design Change**

#### **Problem Description:**

*The first major impact took place at the US 19 Jack and Bore three days before Contract Day 1, the Jack and Bore Subcontractor began pre-work investigation, for the US pit. He immediately struck huge rock boulders about 6 feet down. The Department was notified and a meeting requested. Again on Day 1 of the Contract time, the Subcontractor hit more rock strata. This prompted DNCC to file a claim for unforeseen conditions. EXHIBIT 8 contains a chronology of events related to this change, as well as various correspondence related to this notification, and the subsequent resolution. Please note the Department's response which indicates DNCC should provide pricing for alternative methods of installation (i.e. micro tunneling, open cut) but that we should proceed with the original scope of work. At this point, the Department directed DNCC in conflicting ways: Continue with Jack and Bore work, but find alternatives for the Jack and Bore work.*

#### **Resolution:**

*Off the record, however, the Dept. acknowledged that Jack and Bore work should not proceed and that changes were necessary. DNCC responded with alternative pricing on Day One. It was not until Day 25 (Sept 14) that the full scope and price was set on the change from a Jack and Bore to Open Cut of US 19. At this point, DNCC was embroiled in another major unforeseen condition, and was working 24/7 trying to mitigate further damages. However, as agreed, DNCC submitted an Engineered M.O.T. Design showing traffic being relocated from one side to the other on US 19 while the open cut work took place. This work was limited to night work only, giving DNCC only 8 hours to set up Maintenance of Traffic, excavate thru the temporary pavement to the previous night's work, install a few sections of pipe, backfill*

# DISPUTE REVIEW BOARD RECOMMENDATION

and rebuild the roadway, and then remove the M.O.T. This resulted in about 4 hours of productive work per night.

The Department and DNCC have reached a tentative agreement as to how the direct cost for this work is to be compensated, but the issue of time extension and milestone extension remains unresolved.

## **Impact on the CPM (Refer to EXHIBIT 9: PCF006 activities):**

To put this in perspective, DNCC went from a 24-hour per day Jack & Bore operation which was to start Day 1 of Notice to Proceed, to a completely redesigned M.O.T. and open cut pipe laying operation which took nearly 30 days to implement, and then another 15 (approx.) to execute.

The original duration for the US 19 Jack and Bore work was 18 WD. The changed condition, from start to finish required 55 Working Days. This represents a 311 % increase in the overall duration for this Critical Path work, and a 224 % increase in the Milestone I duration. In addition, instead of DNCC being able to rely on the resources of its Jack and Bore Subcontractor, it was now faced with having to add an entire M.O.T. phase, perform this work with its own forces, creating an additional unanticipated strain on DNCC resources, and greatly impacting the overall schedule for MI and MII.

EXHIBIT 9 offers another perspective on the CPM impact by analyzing it in absence of any of the other items of damage. Comparing the Milestone II end date with that shown in the original approved CPM (EXHIBIT 1) this change by itself impacted the overall schedule by 39 days.

## **Item of Damage #2: Rock/Water Claim**

### **Problem Description:**

The second major impact started also on Day 1 at (or near) structure 314. This is the point at which the DNCC 24 hour/day pipe laying operation commenced. Immediately the Crew struck major Boulders and Rock formations, which included water boils strong enough to actually undermine and move the 1500mm (60") diameter reinforced concrete pipe. The Dept. was notified of the changed condition, and the response was that this was not considered a changed condition. However, off the record, the Department seemed to acknowledge the problem. (Refer to EXHIBIT 10 for documents pertaining to this)

Please refer back to EXHIBIT 6 to review the extent of the rock and unsuitable material removed from the pipe corridor. According to our calculations, this amounted to approx. 10,000 to 15,000 CY of material, not including the piles of Boulders.

### **Resolution:**

This is the area where DNCC first utilized the Hoe-Rams noted above. In addition, the Project site was a sea of major 6" pumps, hoses, and other equipment, all competing for space along a R.O.W. corridor about 30 feet wide bordered by US 19 on one side, and businesses on the other. The extent of this area covered 1671 LF of the 2480 LF of Milestone I Pipe corridor, or about 67%.

DNCC crews worked 24 hours per day for 5 days, and then single 12-hour shifts for two days of the week. Thus, DNCC effectively worked nonstop except for Friday night and Saturday night.

The Department has since acknowledged responsibility in the matter, and has been negotiating the direct costs with DNCC. However, the costs, time extension and impact to the Milestones are yet unresolved.

### **Impact on the CPM:**

The Activities impacted by this work are shown as the PCF007 series activities in EXHIBIT 11. This changed condition by itself extended our work in this area by 22 working days, adding 91% to the Milestone I CPM Duration. In addition, it caused major disruption to our secondary activities such as cross-drain installation and miscellaneous concrete work, as well as stress on DNCC's resources. It also had a resonating effect on other areas of the Project, including but not limited to the ability to perform the above noted change to Open Cut on US 19.

Measuring this changed condition in the absence of the others, this by itself impacted the critical path by 21 days.

## DISPUTE REVIEW BOARD RECOMMENDATION

### **Item of Damage #3: Outfall S316 Problems**

#### **Problem Description:**

The third changed condition also started on near Day 1 at the Outfall structure 316 area. Contract plans called required that a cofferdam system be designed by the Contractor to allow for the installation of a footing/headwall system down to about 5 ft. below sea level. Subsequently, five major design problems surfaced and were as follows (EXHIBIT 12):

1. The existing 24" FM adjacent the proposed headwall/footing system was supposed to be 12 feet from the proposed CL of the proposed headwall. Instead, it was 7 feet, creating a conflict with the wall and causing a redesign of the cofferdam system.
2. The seawall at this 24" FM area stopped at the shoreline, and had no embedment in the sea floor.
3. The existing seawall beyond the construction zone was not constructed as indicated on plans, and actually leaked water around DNCC's cofferdam system and into the work zone.
4. The Plans contained erroneous and misleading information indicating the footing system to be installed approx. 9 ft below the top of the existing wall. It was subsequently discovered, after numerous problems and delays, that the elevation information was substantially in error, and the footing was subsequently reinstalled at a point only 6 feet (approx) down from the exiting seawall top.
5. As in the above Items, the area from the seawall up to the Jack & Bore area was essentially solid rock, and was not shown as such on the plans. DNCC's efforts to jackhammer this rock out, caused excessive vibration and exacerbated the above problems, and as well caused substantial delays in pipe installation in this area. This issue is more thoroughly covered in Item of Damage #2.

#### **Resolution:**

DNCC spent substantial additional time and resources reworking the cofferdam to accommodate the problems with the existing seawall, and performing work which would not have been necessary had the plan details and soil borings been reasonably accurate.

#### **Impact to the CPM:**

Referring to EXHIBIT 4, The Baseline CPM showed DNCC installing the cofferdam/headwall system in 10 working days. Under the changed conditions, this actually took 26 working days (see Activity PCF011). Following this, the installation of the storm pipe to the Jack & Bore should have taken 2 WD. This actually required 8 WD (see Activity PCF007.2)

The conditions at the headwall limited access to the S316 to US 19 pipe corridor. DNCC was able to perform only a small amount of pre-pipework rock jack hammering, as the vibration only made the existing seawall leak more. The problems at the headwall essentially inhibited our ability to mitigate delays, and were a problematic drain on our resources.

#### **Item of Damage #4:**

#### **Department's Failure to Mitigate in a Timely Manner**

#### **Description:**

It soon became apparent to DNCC that the problems noted above were substantially impacting its ability to achieve the Milestone I goals, and the Department was not entertaining adjusting the dates. Therefore, it seemed the reasonable solution would be to proceed with Milestone II work, albeit at a slower pace, as the DNCC resources were already taxed significantly. However, this would perhaps allow the salvaging of some sort of incentive bonus.

This idea was presented by DNCC to the Department during the negotiations for the US 19 Open Cut change. The Department was willing to consider this only if DNCC dropped its claim for additional direct costs as a result of Item 3 above, which at the time was estimated at around

## DISPUTE REVIEW BOARD RECOMMENDATION

\$200,000.00. This was not an option for DNCC, but obviously the Department had the ability and, in our opinion, the obligation to mitigate delays and damages.

### **Resolution (EXHIBIT 13):**

DNCC subsequently requested this again in writing but was denied by the Department. However, on or about October 1, DNCC's pipe crews working down on SR 54 encountered conflicts at station 107+70 Rt and 114+00 between the proposed storm line and the existing Verizon ducts, and were essentially stopped. Facing a claim for downtime, and costs, the Dept. suggested that DNCC not charge down time, and they would be allowed to proceed with Milestone II work. DNCC agreed, and thus its request was approved. DNCC proceeded with Milestone II work on October 8, 2001

### **Impact on CPM:**

Had DNCC been able to proceed as originally requested, this would have saved approx 16WD on the overall Critical Path. EXHIBIT 14 is the As-Built CPM modified to show Milestone II starting as requested by DNCC. This indicates that the Construction on US 19 would have potentially been reduced by 19 Days. Thus, the action, or failure thereof by the Department cost DNCC 19 days against the Milestone II deadline.

### **Item of Damage #5:**

#### **Design Changes at S-302: The Endpoint of Milestone 11**

##### **Description:**

As DNCC prepared to set Structure S-302, which is the end of Milestone II, it was discovered that an existing 762 WM was in conflict with the box. This waterline was indicated on the plans to be substantially clear of the proposed S302 location (EXHIBIT 15).

##### **Resolution:**

As a result, DNCC was required to build in place an oversized conflict box. This required substantial additional time and cost, as DNCC bid the Project using precast concrete structures.

##### **Impact to CPM:**

The impact of this change is as indicated in EXHIBIT 2-Schematic and EXHIBIT 4- As-Built CPM (see Activity series PCF026). The original CPM showed DNCC installing the run from the Jack & Bore Casing to S302 in one day. This included setting the structure, which was a precast unit. Instead, to Resolve the S302 Conflict, and build the new Conflict manhole in place of S302 took 12 Days. This conflict ran somewhat concurrently with Item of Damage #6.

### **Item of Damage #6:**

#### **Design Changes at SR54/US 19 Jack & Bore**

##### **Description:**

In preparation for the 1500 mm Jack and Bore at SR54/US 19, it was discovered that the existing forcemain under the asphalt of State Road 54 was in substantial conflict with the proposed Jack & Bore (ref. EXHIBIT 16).

##### **Resolution:**

The only viable option was to Jack & Bore to the Conflict area, add a conflict box in the middle of SR 54, and continue laying storm south via open cut. To expedite the fix, DNCC immediately provided suggestions and cost parameters to the Dept for review and approval (EXHIBIT 17). In this proposal, DNCC provided what it considered and advised was relatively inexpensive pricing, based on the proposal the Department change the M2 location from the now non-existent S-302 location to the north end of the Jack and Bore pit. The logic for this included, but was not limited to the following:

- By virtue of the above Item 5 change, S302 no longer existed as the endpoint of M2.
- The Milestone II specification called for construction to be completed to S302, including, but not limited to restoration, regarding, etc. This was impossible and

## DISPUTE REVIEW BOARD RECOMMENDATION

*pointless because Phase II of the Project called for the last 150 meters (approx) to be torn up and reconstructed later on.*

*During the negotiations for the cost of this change, DNCC was essentially told that this sort of Milestone II adjustment would likely not be a problem at all, and the parties should thus agree on the direct cost of the work. Referring to EXHIBIT 17, the DNCC cost backup clearly shows the nature of this pending agreement.*

*This was done, the price was set, and the work was commenced. At approx. this point, the Dept advised that it would not agree to move the M2 location as it previously had said it would consider. Had it done so, DNCC would have earned approx. \$70,000.00 in incentive bonuses for Milestone 2.*

### **Impact on CPM:**

*Our Baseline CPM indicates the Jack and Bore to be installed sufficiently in advance of the DNCC pipe work to allow for the pipe crew to install from S303 directly to the Jack & Bore north end, and then jump State Road 54 and make the connection from the J & B South end to S302. With the Jack and Bore work complete, the remaining pipe work should have taken 1 Day (ref EXHIBIT 1- Activity 01231). However, this actually required 19 Days to redesign, price, and perform the changed work (ref EXHIBIT 4 Activity series PCF028).*

*As an alternative perspective, EXHIBIT 18 shows the impact of this change independent of the other items of damage. Comparing the Milestone II completion date with the Baseline CPM in EXHIBIT 1, the Milestone is impacted 19 days.*

*However, it is important to understand that under the reasonable assumption that the intent of M2 is met at the north end of phase II construction, DNCC had this complete by Nov. 7. (Day 79).*

### **Item of Damage #7:**

#### **Impact of Tropical Storm Gabrielle**

*Around September 14, 2002, the west coast of Florida was threatened by a Tropical Storm which eventually passed just south of the Tampa Bay area. The area in the vicinity of the Project was under a Hurricane watch, and the resulting heavy rains and high winds stopped production on controlling items of work for 3 days on the Project.*

*EXHIBIT 19 contains information on the storm as well as correspondence between DNCC and the Department whereas the Department has acknowledged and granted 3 rain days for the Project, but has not authorized an extension of the Milestone 1 and 11 completion dates though duly requested by DNCC.*

#### **Could DNCC Have Earned Incentive Bonus?**

*As stated previously, DNCC believes and contends that it's original Approved Baseline CPM was reasonable and achievable, and but for the plan errors and misleading information presented on the plans, the goal of maximum Incentive was attainable.*

*Please refer back to EXHIBIT 1, the approved DNCC Baseline CPM. We have previously established that, at least as compared to the Departments CPM, our plan was reasonable.*

*However, since the majority of the M1 & M2 work involves pipe installation by DNCC forces, and since the majority of the M1 area was impacted by the Rock and Water issue, more convincing proof lies in the actual production rates achieved in the non-impact areas. Please refer to EXHIBIT 20. In order to achieve the maximum incentive benefit, it would be necessary to install an average of 100 LF of pipe per day. EXHIBIT 20 indicates that when working in the rock/water impact areas, we achieved an average production of 62 LF per day. When working in the non-impact areas, our production jumped to 144 LF per day, substantially above the average required.*

*From another perspective, we took the as-built CPM, as resequenced to accommodate the changes and analyzed what the case would be if we deleted all the direct impacts to pipe laying operation (EXHIBIT 21). We also left all actual durations in place on Critical Items. The result was our calculations indicate that we would have completed Milestone 1 on Sept 19 (Day 30) and Milestone 2 on Oct 21 (Day 62). Thus, even with the impacts of activity resequencing, and leaving the indirect effects of these impacts (i.e. longer actual durations on several activities), we logically could have still finished within 7 days of our goal.*

# DISPUTE REVIEW BOARD RECOMMENDATION

## *Justification for Milestone Adjustment*

### **1. Controlling Principles of Law**

Section 8-13 of the contract provides for incentives and for disincentives of \$10,000 per day for early and late completion. Article 8-13.1 Incentive-Disincentive. On its face, these clauses provide that they will not be adjusted for any reason and that

*The parties anticipate delays may be caused by or arise from any number of events during the course of the Contract, including but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors, or other contractors, ... weather, weekends, holidays, suspensions of Contractor's operations or other events such events, forces or factors sometimes experienced in highway construction work. Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by parties in entering in this Contract and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above.*

*Such language was not the result of any negotiated terms but terms dictated solely by the department. Courts have consistently held that such self serving contract terms are not enforceable when they violate existing public policies*

*For instance, the \$10,000 disincentive is in addition in the contractual liquidated damages. Courts have held that the use of such disincentive clauses is an unenforceable penalty. In Milton Construction Company v. State of Alabama Highway Department, 568 So.2d 784 (Alabama 1990) a contractor sued to declare that the state's disincentive payment provisions were unenforceable. The terms of the clauses were similar to the current Florida provisions. The Court held that the state had a liquidated damages clauses (sic) to compensate for delays and that the disincentive clause was a double recovery for the same damages and thus an unenforceable penalty.*

*The incentive clauses similarly violate basic public policies and implied duties of the Department. The violation of these public policies and implied duties, render the provisions of the incentive clauses which attempt to exculpate the Department from its own wrongful acts or omissions inoperable.*

*In any contract there is an implied duty to act in good faith. As part of this duty of good faith, there is, in every construction contract, an implied term that no party or their agent will hinder, or otherwise delay another party from expeditiously performing its obligations under a contract. When a party such as an owner does impede progress of a project, its actions may be a breach of contract. See C.A. Davis v. City of Miami, 400 So.2d 536 (Fla. 3d DCA 1981) reh. den. 411 So.2d 380; Harry Pepper & Associates v. Hardrives Co., 528 So.2d 72 (Fla. 4th DCA 1988); Capital Electric Co. v. United States, 729 F.2d 743 (D.C. Cir. 1984); and Savoy Construction Company, Inc. v. United States, 732 F.2d 167 (D.C. Cir. 1984).*

*In Champagne-Webber, Inc. v. City of Ft. Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988), the Fourth District Court of Appeals in consideration of a contractor's claim against a city for extra compensation arising from the City's failure to provide accurate information on a site's soil conditions stated:*

*"Virtually every contract contains implied covenants and conditions. For example, every contract includes an implied covenant that the parties will perform in good faith. In construction contract law an owner has (a) an implied obligation not to do anything to hinder or obstruct performance by the other person. Gulf American Land Corporation v. Wain, 166 So.2d 763, 764 (Fla. 3d DCA 1964), (b) an implied obligation not to knowingly delay unreasonably the performance of duties assumed under the contract, Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458, 459 (Fla. 2d DCA 1970), cert. denied, 240 So.2d 813 (Fla. 1970), and (c) an implied obligation to furnish information which would not mislead prospective bidders, Jacksonville Port Authority v. Parkhill-Goodloe Co. Inc., 362 So.2d 1009 (Fla. 1st DCA 1978).*

## DISPUTE REVIEW BOARD RECOMMENDATION

*In County of Brevard v. Miorelli Engineering, Inc.*, 703 So.2d 1049 (Fla. 1997), the Florida Supreme Court expressly agreed with the holding of *Champagne Webber*. EXHIBIT 22 contains numerous cases which, along with the above, serve to establish that an owner has the following duties in every construction project:

A. **The owner has a duty to provide plans without errors or omissions.** See *Bradford Buildings, Inc. v. Sears Roebuck Co.*, 270 F.2d 649, 655 (5th Cir. 1959), where the court, applying Florida law, recognized:

If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

See also, *United States v. Spearin*, 248 U.S. 132 (1918); *Dewey Jordan, Inc. v. Maryland National Capitol Park*, 265 A.2d 882 (Md. 1970); *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973), where the court stated that an architect was an agent of the Owner and that the contractor was entitled to recover extra costs resulting from deficiencies in the architect's plans; *City of Miami v. Nat Harrison & Associates, Inc.*, *supra*; *Ajax Paving Industries v. Charlotte County*; *Triple R Paving, Inc. v. Broward County*, *supra*; and *Town of Palm Beach v. Ryan, Inc. Eastern*, *supra*.

B. **The owner has a duty to provide site condition reports that are accurate.** See e.g. *Miami-Dade Water & Sewer v. Inman*, *supra*; *Jacksonville Port Authority v. Parkhill Goodloe Co. Inc.*, *supra*; *Town of Longboat Key v. Carl E. Widell & Son*, *supra*; *Champagne-Webber, Inc. v. City of Ft. Lauderdale*, *supra*; and *Ajax Paving Industries v. Charlotte County*, *supra*.

C. **The owner has a duty to disclose known underground obstructions.** See *State Department of Trans. v. Southern Bell Telephone & Telegraph Co.*, 635 So.2d 74 (Fla. 1st DCA 1994).

D. **The owner or its agent, the architect, has a duty to timely approve change orders.** *A. R. Moyer*, *supra*; *Harry Pepper*, *supra*.

In this Project, the Department has breached its duties by

1. Providing DNCC plans with errors or omissions;
2. Providing DNCC site condition reports that were inaccurate;
3. Failing to disclose to DNCC known underground obstructions; and
4. Failing to timely approving change orders regarding the open cut system in place of the jack and bore.

The Department can not rely on the exculpatory provisions of the incentive clauses to avoid responsibility for the breach of its duties just as other owners have been unable to rely on similar exculpatory provisions contained in "no damage for delay" clauses or "concealed condition" clauses.

DNCC had a vested right to obtain the incentive payments as part of its contract price. The Department cannot preclude DNCC from obtaining this portion of its contract price by the Department's own acts or omissions.

### 2. **The Hubbard Construction vs. District 5 DRB Case**

The Department has implicitly recognized the limits of the exculpatory terms in the incentive clause in its acceptance of the decision of the Dispute Review Board regarding Hubbard Construction (April 2, 2000) and attached as EXHIBIT 23 and detailed in the following.

The specifications related to the Hubbard case are very similar to ours with one apparent exception: Great latitude has been offered and taken in the definition of what constitutes contract time, thus allowing for apparent adjustment based on suspension of contractor activities. In addition, the DRB decision has allowed for milestone date extensions for items completely unrelated to suspensions of time. These are as follows:

## DISPUTE REVIEW BOARD RECOMMENDATION

- *Increase of Traffic Maintenance by adding a Complete phase to Project* 36 Calendar Days  
*Very similar to the US 19 Jack and Bore change to open cut whereas DNCC was required to institute an entire phase of M. O. T. for the change in scope.*
- *Tropical Storm Harvey* 6 Calendar Days  
*This is the same as DNCC's position requesting 3 days' milestone extension for Tropical Storm Gabrielle.*
- *Delays Caused by Truckers Strike* 6 Calendar Days  
*Extension of Milestone date based on criteria other than that noted in the letter of the specification.*

*The bottom line in the Hubbard vs. District 5 DRB Case is that a recommendation was made to extend the Incentive Dates based on the fact that the impacts were numerous and substantial, and were beyond the reasonable comprehension of the Contractor. It is our opinion that we encountered very similar circumstances, which likewise merit the same consideration.*

*It is also clear in the FDOT response to the DRB Decision, that it has taken great strides to work with its contractor to hammer out a equitable agreement following that decision. We would suggest that this is a reasonable and fair example of the Partnering Concept at work.*

### **3. Inaccurate Contract Documents**

*The Department obviously had concern about the presence of rock in the Milestone I area. This is evidenced by their providing soil borings nearly every 25 meters, which showed only a small amount of potential rock in a 100 m area. Is it unreasonable for a bidder to anticipate that this information was not accurate. It is unreasonable for a bidder to assume that a majority of the borings would be completely inaccurate, and that a majority of the Milestone I pipe work was, in fact, to be installed under substantially different strata and conditions*

*It is apparent that the Department was misinformed by their own data, as we were at bid time. Referring back to EXHIBIT 3, the Departments own CPM showed that they believed the storm line from S316 through and including the Jack & Bore could be achieved in 4 WD, and the pipe in the rock/water area could be installed at an average rate similar to that bid by DNCC.*

*Even the SWFMWD Permit for the Project indicates that rock was not necessarily expected. EXHIBIT 24 indicates that if rock is encountered during excavation, construction shall cease.*

### **4. Inaccurate Site Information**

*Subsequent to the notice of changed conditions at the US 19 Jack & Bore the Department conducted ground penetrating radar analysis. The results are as provided in EXHIBIT 25. Clearly there is evidence of the possibility of rock in this area. We contend that this should have been provided pre-bid.*

*Also in EXHIBIT 25 is an excerpt (pg 11) from a document entitled "Quality Assurance Review Package" which is basically a constructability review. In this excerpt, there is a statement about excavation of limestone for US 19 Outfall. The response indicates that the Department performed additional borings to further investigate the limestone issue, but even then failed to provide proper, accurate information.*

### **5. Failure to Disclose Obstruction**

*It appears the Department did not provide all the information it knew, or should have known existed. EXHIBIT 26 is a photo of what appears to be soil boring patches in the asphalt near S316. It appears to us that several attempts were made to bore through the rock, but failed. None of these apparent failures show in the boring logs.*

*The State Road 54/US 19 Jack & Bore was specifically designed to go under the existing utilities. The Department knew or should have known that the Forcemain was in conflict with their design.*



## DISPUTE REVIEW BOARD RECOMMENDATION

### 6. Failure to Timely Approve the US 19 Open Cut Change Order

*The US 19 Jack & Bore was a critical activity on the Approved CPM. From the point that the change was identified (Aug 20), it took 4 weeks to agree on the design and cost (Sept 18 approx.), and another four weeks for the Department to produce the Supplemental Agreement (Oct 16).*

*Again, it is unreasonable for a Bidder to be expected to anticipate such a major design change in anticipation of whether or not an incentive bonus is achievable.*

### 7. Mitigation of Impact of Department Acts and Omissions

*DNCC provided the Department substantial time/problem saving alternatives to the temporary sheeting issue. The temporary sheeting plan devised by the FDOT would not work as intended based on the elevations of the rock as shown in the plans (let alone what was actually present). DNCC provided a temporary mobile sheeting option that actually saved the Department over \$8,000.00, and certainly expedited the Departments stated desire to expedite construction.*

*Along with the Department breach of its duties, it denied DNCC the opportunity to attempt to mitigate the impact of the Department's actions when it failed to expeditiously approve DNCC's request to proceed into Milestone II. Such arbitrary actions can not be allowed simply because exculpatory terms exist in the contract which would seemingly allow it.*

### 8. Alternative Analysis of Catastrophic Event

*The Sub article in 8-13 further describes what can influence the incentive dates:*

*"In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the Incentive-Disincentive Completion Date..."*

*"Catastrophe" in Webster's New World Dictionary is defined as `A disastrous end, bringing overthrow or ruin....Any great and sudden calamity, disaster, or misfortune....A total or ignominious (despicable, humiliating) failure.... Likewise, "i.e." (id est) is defined as "that is" or "to say".*

*In defining what can move the Milestone dates, The Specification does not limit the movement of the date to two specific items. On the contrary, it gives only examples of significant impact scenarios on the Milestone work. Both serve to illustrate a situation over which the contractor has absolutely no control or responsibility. This leaves open the ability to adjust milestones based on events or circumstances catastrophic to the Project CPM. In the case of this Project, the items described above impacted the CPM as follows:*

- *They were catastrophic relative to our operations, in that in the effort to meet our incentive goals, they created a total or ignominious failure.*
- *They were all completely beyond DNCC's control or responsibility.*
- *They were all beyond our comprehension, as the contract documents specifically provided information materially contrary to what really existed.*

### Summary

*To reiterate the major points from our document:*

- *The Approved CPM for Milestones I and II was reasonable and achievable*
  - *The Departments own CPM verifies DNCC's plan*
  - *DNCC production rates when not in impact areas show reasonable conformance with the durations of the Approved CPM*
- *There were substantial impacts to the Project and indeed the Milestone durations.*
  - *The US 19 Jack and Bore was a monumental Change in the Character of the work.*

## DISPUTE REVIEW BOARD RECOMMENDATION

- *The rock strata/boulders were substantially different than what the plans indicated, causing additional changes in the Character of the work.*
- *The water boils were substantial and not anticipated.*
- *The seawall issue added another layer of problems, hindrances.*
- *The SR 54/US 19 Jack and Bore Conflict caused yet another substantial change in the Character of the work.*
- *These impacts could not reasonably have been comprehended at bid time.*
  - *Information on existing conditions was very specific and detailed just wrong.*
  - *The Department's own CPM indicates that they didn't even comprehend or anticipate the problems.*
- *Had DNCC not encountered these impacts, we would most certainly have met all of the Incentive goals as planned.*
- *There is significant legal case law supporting a public owner's implied duty to act in good faith.*

*Finally, this case will most certainly set the tone for future consideration of the Incentive-Disincentive Program for the FDOT. This program is intended to provide incentive to expedite Projects. That is the goal. In this Project, it seems the goal has been transformed into an effort to avoid any reasonable consideration for what was achieved. While the parameters for achieving these incentives should be tough, and should be rigorously judged, they should not be allowed to be used as a guarantor against significant and material contract document errors.*

*By the documentation presented above, we respectfully request the DRB to recommend a favorable ruling by recommending reasonable re-establishment of the Milestone I, II, (and III) dates.*

### **DEPARTMENT'S REBUTTAL:**

*The following rebuttal statements are submitted in an effort to present the Department's position on the items contained in David Nelson Construction Co.'s (DNCC) submittal package. The Department's position on each subject matter will be presented in the order of DNCC's Table of Contents at the beginning of their presentation package. DNCC's major position statements will be noted with a diamond bullet and will reference the DNCC submittal package page number.*

- ◆ ***Baseline CPM - Reasonable and Practical (DNCC page 4):*** *The Department did not control DNCC's game plan nor did they control the scheduling and resources utilized to achieve the Milestone I and 11 completion dates. DNCC started with one concrete crew for the S-316 headwall (outfall at saltwater boat basin on west side of U.S. Hwy. 19), one night pipe laying crew, one day pipe laying crew and a subcontractor (Trujillo Construction, Inc.) for the jack & bore operations. The Department did not preclude DNCC from utilizing additional pipe crews or from utilizing subcontractors for additional pipe crews. These choices were made by DNCC who had sole control of the achievement of the Milestone I and 11 completion dates.*

*DNCC's reference to FDOT's CPM schedule is inaccurate. The Department utilizes production rates to prepare an Estimate of Construction Time. No attempt is made to create a sequenced construction schedule because it is impossible for the Department to anticipate the means and methods of all potential bidders to determine the effects of these production durations. What may take Contractor "A" 5 days to complete an activity may take Contractor "B" 10 days depending on resources and experience level.*

***Conclusion: DNCC's game plan and the reasonableness or practicality of DNCC's CPM schedule does not determine the achievement of Milestone I and 11 nor does it demonstrate any hindrance by the Department to DNCC in obtaining the milestone completion dates. The reasonableness and practicality of DNCC's CPM schedule or the Department's Estimate of Contract Time is not a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the***

## DISPUTE REVIEW BOARD RECOMMENDATION

instance of a catastrophic event". The Department's Estimate of Contract Time which is part of the project design is also excluded from modifying the Incentive-Disincentive Completion Date as stated in Article 8-13.1 page 5: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.**"

- ◆ **•Specifics on How DNCC was Delayed (DNCC page 5):** The Department acknowledges the presence of rock and made the Contractor very aware of the situation at the time of bid as depicted in the original contract plans in 5 locations.

Please refer to the following locations in the plans:

- Sheet No. 8, Pay Item Footnotes for Pay Item Nos. 2430-11-243..., (Pipe Pay items) which states: **"INCLUDES COST OF EXCAVATION OF ANY WEATHERED LIMESTONE/LIMEROCK ENCOUNTERED ALONG PATH OF U.S. 19 OUTFALL PIPE."**
- Sheet No. 8, Pay Item Footnotes for Pay Item Nos. 2730-76-225 and 2730-76-229 (Jack & Bore Pay Items) which states: **"INCLUDES COST FOR REMOVAL OF ANY WEATHERED LIMESTONE/LIMEROCK ENCOUNTERED ALONG PATH OF U.S. 19 OUTFALL PIPE."**
- Sheet No. 26 - General Note No. 13, which states: **"THE CONTRACTOR IS ALERTED TO THE FACT THAT WEATHERED LIMESTONE/LIMEROCK MAYBE ENCOUNTERED DURING CONSTRUCTION OF U.S. 19 OUTFALL PIPE."**
- Sheet Nos. 186 and 187 - Boring Note: **"WEATHERED LIMESTONE WAS ENCOUNTERED IN SEVERAL OF THE BORINGS PERFORMED. THIS MATERIAL MAY BE DIFFICULT TO EXCAVATE FOR THE INSTALLATION OF UTILITYAND DRAINAGE STRUCTURES...."**

Also, as is shown on the attached invoices from DNCC (Attachment 'A' & Attachment 'B') the two Hoe-rams were not brought on-site until August 30th and September 7th, 2001, 10 days and 18 days respectively after the job started on August 20, 2001. This issue of utilizing the Hoe-rams was discussed at the August 13, 2001 Partnering Meeting (Attachment R), and if DNCC was prepared in their endeavor to achieve the first milestone in 25 days as their package reiterates, this equipment should have been on-site on Contract day 1 and not midway through their anticipated completion date.

**Conclusion:** The Department was very vocal in the plans in alerting the Contractor to the presence of weathered limestone/limerock along the U.S. 19 outfall pipe. This is further illustrated in looking at SPT blow counts shown as 100 on the boring sheets in the original contract plans. A 100 blow count material is a very, very dense material. The utilization of the Hoe-rams and the 90 ton excavator by DNCC were slow because of mechanical problems of the Hoe-rams and improper teeth on the 90 ton excavator. Again, DNCC's means and methods of construction do not demonstrate any hindrance by the Department to DNCC in obtaining the milestone completion dates. However, the presence or non-presence of rock is not a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: **"the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever,**

## DISPUTE REVIEW BOARD RECOMMENDATION

*regardless of fault, save and except in the instance of a catastrophic event". The presence of rock was well documented in the construction plans as show above. Even if the presence of rock had not been so well exhibited in the plans, the discovery of rock cannot be a cause for which the Incentive-Disincentive Date may be delayed because Article 8-13.1 page 5 states: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.**"*

- ◆ ***Item of Damage #1 - U.S. 19 Jack and Bore Design Change (DNCC page 6):*** *The Department was very concerned about the U.S. 19 Jack and Bore because of the observed inability of the Contractor to successfully complete the jack & bore under Trouble Creek Road under ideal conditions (A-3 material, no rock, no water). Trouble Creek Road (a side road to US 19) repeatedly collapsed during the Trujillo jack and bore operation and the Department did not want to risk a possible failure of U.S. 19 under heavy traffic conditions. The change to open cut U.S. 19 was a mutual agreement to limit liability and provide DNCC a quicker means of completing this crossing as can be seen from the correspondence shown in DNCC's original package (Exhibit 8). There was a meeting to allow DNCC the opportunity to propose alternate methods and pricing on August 20, 2001 (the start of contract time). The pricing provided by DNCC was not received until September 4, 2001 (Attachment Q, two weeks later, demonstrating DNCC's lack of urgency).*

*Conclusion: The Department partnered with DNCC prior to the start of the contract to allow DNCC to present alternate methods to cross U.S. 19 in an effort to achieve the milestone completion dates. This partnering and quick response to change the method of construction demonstrates the Department's willingness to make every effort to assist DNCC in achieving the milestone completion dates and not hinder their efforts. The Department changed the method of construction to protect the public from potential roadway failure on U.S. 19 with the agreement of the Contractor who stated they could not perform the work with the originally intended construction method. The change in design or construction method is not a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". A change of design or construction method along with any delays or time extensions associated with the change are specifically contemplated in Article 8-13.1 page 5: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.**"*

## DISPUTE REVIEW BOARD RECOMMENDATION

- ◆ **Item of Damage #2 - Rock/Water Claim (DNCC page 8):** *The areas of limestone encountered in the Milestone 1 area was 1,280 LF of the 2,534 LF total or about 50% of the area as can be seen from the drawings depicted in DNCC's original package (Exhibit 6). There was no rock encountered from Structure S-309 through S-312 and very little across U.S. 19. All material excavated was not unsuitable as illustrated by DNCC's own test reports on the stockpiled material (Attachment 'C'). The majority of the material was just too wet to immediately utilize as backfill and this condition should have been expected by DNCC from looking at the soil boring profiles provided in the original contract plans.*

*Conclusion: The presence of rock and ground water is well documented in the plans. The Contractor could anticipate the requirement to accommodate ground water when excavating in limerock formations below sea level and adjacent to the Gulf of Mexico. However, even if the Contractor did not anticipate the actually encountered site conditions and considered these site conditions as unforeseen, the actual site conditions cannot be a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". The presence of rock and ground water was well documented in the construction plans as stated previously. Even if the presence of rock and ground water had not been so well exhibited in the plans, their discovery cannot be a cause for which the Incentive-Disincentive Date may be delayed because Article 8-13.1 page 5 states: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance".***

*The Department agrees that DNCC provided the crews and equipment as referenced in DNCC's original package, but was it effective or efficient? See attached Attachment 'D' through Attachment 'O' for a few examples of DNCC's problems where the Department did not control the actions of DNCC nor did they hinder their ability in achieving the Milestone dates.*

- ◆ **Item of Damage #3 - Outfall S-316 Problems (DNCC page 9):** *The Department disagrees that the plans were erroneous and provided misleading information in the details of the S-316 headwall. As DNCC pointed out in their original package, the footing system was shown as approximately 9 Ft. below the top, but the elevation for the footer was shown with an exact elevation of -1.495 as shown on the details on Sheet 182 of the original contract plans. DNCC did not survey or check the elevation prior to pouring the replacement footer, which resulted in removal and reinstallation of the replacement footer. Since DNCC poured the original replacement footer approximately 3 ft. below the plan elevation, this created most of the problems incurred by DNCC with the water and cofferdam system.*

*Conclusion: The Department did not misrepresent the details of the S-316 headwall nor did the plans misrepresent the condition of the existing seawall. This work on the headwall was performed by a concrete crew concurrently with the pipe work, which has no effect on the pipe laying operations; the major portion of the milestone work. This issue also illustrates that the Department did not hinder DNCC from achieving the milestone completion dates.*

*In any event, the circumstances for the removal and reconstruction of a headwall at S-316 cannot be a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive*

## DISPUTE REVIEW BOARD RECOMMENDATION

*Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". The presence of rock was well documented in the construction plans as show above. Even if the presence of rock had not been so well exhibited in the plans, the discovery of rock cannot be a cause for which the Incentive-Disincentive Date may be delayed because Article 8-13.1 page 5 states: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance."***

- ◆ **Item of Damage #4 - Department's Failure to Mitigate in a Timely Manner (DNCC page 10):** *Contract language requires the Contractor to fully complete Milestone I prior to the start of work on Milestone II. The Department allowed DNCC to proceed with Milestone II on October 8<sup>th</sup>, 2001, 11 days before the completion of Milestone I. This was a mutual agreement to assist DNCC in pursuing the Milestone work and not just an effort to prevent down time on a claim, because there were other controlling items of work on S.R. 54 that DNCC could have pursued with their pipe crew.*

*Conclusion: This issue further illustrates the Department's willingness to assist with DNCC in the pursuit of the completion of the contract and not just to avoid down time from claims. The Department's attempt to negotiate the list of claims on this project further demonstrates that claims are being addressed. Delays, utility conflicts or other disruptions to the work are not a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". Article 8-13.1 page 5 states: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance."***

- ◆ **Item of Damages # 5 & #6 - Design Changes at S-302, the Endpoint of Milestone II and Design Changes at S.R. 54/U.S. 19 Jack & Bore (DNCC pages 11 & 12):** *These two items were combined because they are similar issues that occurred in the same general area at the same time. The Department has agreed to the costs associated with these two changes, but have not agreed on any time impacts.*

*Conclusion: The Department acknowledges that there were extra costs associated with these two utility conflicts and has settled the monetary portion of these issues with DNCC. However, delays,*

## DISPUTE REVIEW BOARD RECOMMENDATION

utility conflicts, extra work, time extensions etc. cannot be a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". The presence of rock and utilities was well documented in the construction plans as show above. Even if the presence of rock and utilities had not been so well exhibited in the plans, the discovery of rock and/or utilities cannot be a cause for which the Incentive-Disincentive Date may be delayed because Article 8-13.1 page 5 states: **The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance."**

◆ **Item of Damage #7 - Impact of Tropical Storm Gabrielle (DNCC page 13):**

*Conclusion: The Department is granting an adjustment of one day for the extension of the Milestone I and II completion dates for Tropical Storm Gabrielle. DNCC was directed to suspend operations during the approach and passing of Gabrielle which occurred on Sept. 14, 2001. Note that DNCC completed Milestones I & II (Attachments Sand T), more than one day after the Milestone Completion Dates in the specifications, therefore, no Incentive amount is due DNCC for Milestone I & II.*

◆ **Could DNCC Have Earned Incentive Bonus? (DNCC page 14):** *As previously noted, the Department did not control DNCC's game plan or pursuit of the work. Just because a plan seems reasonable it does not guarantee execution. DNCC states that the majority of the Milestone I and II work involves pipe installation by DNCC forces, but what about subcontract forces? The Department's Estimate of Contract Time is based on production rates associated with contract quantities and is not based on number of crews, crew sizes, work methods, contractor schedule or equipment utilized. The Contractor's production rates are solely a function of his decisions to utilize resources at his disposal to obtain Incentive amounts shown in the Contract.*

*Conclusion: The Department did not hinder DNCC's ability to make adjustments in order to achieve the milestone completion dates. Whereas equipment was added as the work progressed, it was not utilized from day one of the contract. The Department agrees the production rates increased, but it was due to several factors beyond just the limerock encountered. This includes but is not limited to; decreased depth of pipe therefore less excavation and less water, employment of equipment capable of excavating the limerock 10 days into the contract, increased crew familiarity with the project and utilization of trench boxes instead of open cut (as predominantly experienced by pipe crews). These were the factors controlled by DNCC and not the Department.*

*The reasonableness and practicality of DNCC's CPM schedule or the Department's Estimate of Contract Time is not a cause for which the Incentive Completion Date may be delayed. The Contract Technical Special Provisions, Article 8-13.1 Incentive-Disincentive Page 4 states that: "the Incentive-Disincentive Completion Date will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event". The Department's Estimate of Contract Time which is part of the project design is also excluded from modifying the Incentive-Disincentive Completion Date as stated in Article 8-13.1 page 5: "The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way*

## DISPUTE REVIEW BOARD RECOMMENDATION

*issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance."*

◆ **Justification for Milestone Adjustment (DNCC page 15):**

1. **Controlling Principles of Law** - *The Department will not attempt to address each court case cited by DNCC. The majority of the cases cite where the owner was required to pay for extra work, unforeseen conditions or issues of that nature. As cited in Article 8-13.1 Incentive - Disincentive: Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this contract, and shall not extend the Incentive - Disincentive completion date for purpose of calculation of the incentive payment. ... The Department acknowledges that DNCC is due compensation for some of the issues on U.S. 19, but has not completed its negotiations with DNCC and/or its analysis of entitlement for each issue that has been presented, but the Incentive - Disincentive date can not be extended due to these issues.*

*Conclusion: The Department believes that it is not prudent to make a ruling based on court cases or other rulings from other projects without a complete set of contract documents, plans, specifications and the entire transcript of the court cases listed. Also, DNCC was unable to cite any court cases where the owner was bound to pay bonuses due to issues relevant to this project. The contract language on this project is very clear on the incentive payment for completion of the milestones and what the Contractor has to accomplish to achieve them.*

2. **FDOT District V / Hubbard Construction Company Ruling (DNCC page 17)**

*David Nelson Construction Co. has submitted the FDOT District V / Hubbard Construction Company ruling as part of their justification for the extension of the Incentive-Disincentive Completion Dates for purposes of calculation of the incentive payment. While District V did not reject the DRB recommendation in the Hubbard Construction Company instance, that ruling should not be relied upon as any kind of precedent by this DRB, as that recommendation is not consistent with the clear Incentive - Disincentive Specification contract language. Further, the Department disagrees with DNCC's assessment that the differences in the two specifications is the latitude offered and taken in the definition of what constitutes contract time. This contract is based on calendar days and makes no inference to contract time, which is very significant. At the time of the Hubbard Construction Project, time suspensions were allowed, but this Contract does not allow for contract suspensions. FDOT District V did not accept or grant time to the contract due to the Increase of Traffic Maintenance by adding a complete phase to the project. (See Attachment `P'). In fact, outside of "catastrophic events" the Department did not move the Incentive dates for anything other than time suspension related issues which are directly related to contract time. Again, note that the SR 54 Milestone specification is related to calendar days and not to contract time as was the specification for the District V project.*

*Conclusion:*

- *The Incentive-Disincentive Specification for the FDOT District V / Hubbard Construction Company project is different from the Specification on this project as depicted in the Special Provisions.*
- *It is not prudent to utilize this ruling as a means to apply to this project because the parties involved with this project do not have access to all of the facts involved with this ruling. Without being involved with the project, without having access to all of the pertinent information of the issues on the project and without a complete set of contract documents, Plans, Special Provisions, etc., it is impossible to determine the merits of the ruling.*



# DISPUTE REVIEW BOARD RECOMMENDATION

## Summary:

*It is very apparent from DNCC's submittal package that all of the issues presented were to be contemplated when entering this contract by both parties. This is very evident by DNCC's failure to provide any court cases citing incentive payment to a Contractor under the conditions presented. The Department did not hinder DNCC in any way from achieving the Milestone completion dates. DNCC completed Milestone I, 11 calendar days beyond the 50 calendar days allowed by the contract to achieve incentive payment. The Department believes DNCC could have achieved a portion of the incentive payment or all of the incentive payment by factors under the direct control of DNCC such as:*

- *Providing Hoe-rams from contract day one.*
- *Utilizing an additional pipe crew to start at the south end of Milestone I.*
- *Ensuring adequate supply of pipe materials.*
- *Utilizing reliable equipment or providing a mechanic during the night shift.*

*These are factors that are not controlled by the Department, and which could have aided in the achievement of the Milestone completion dates.*

## Rebuttal Conclusions:

*DNCC has failed to present any information to refute the Department's position, i.e. that the Milestones I & II Incentive Dates cannot and should not be changed for any of the issues and circumstances described in DNCC's presentation package. All DNCC's issues were contemplated in the language of the Milestone Specifications and are excluded as reasons for Milestone Incentive Date adjustment with the exception of hurricanes. The Department is granting one day of extension to the Milestone I & II Completion Dates for Tropical Storm Gabrielle. The Department has diligently sought to negotiate all of the issues or "damages" DNCC has incorporated in their DRB presentation package. The negotiations have been stymied principally because of DNCC's determination to collect all available Incentive amounts for Milestone I & II. DNCC has requested to reserve their legal rights to claim Incentive time at a later date in all their Supplemental Agreement negotiations. No Supplemental Agreements have been executed on the project. However, the issue before the DRB is not if any Contract adjustments should be made with regard to DNCC's issues, but rather do these issues warrant the adjustment of the Milestone I & II Incentive Dates. The Milestone Specification is clear that no adjustments can be made to the Incentive Dates except "In the event of a catastrophic event" such as hurricanes. Therefore, the Department requests that the DRB recommend: The outstanding issues as described in the DNCC presentation package do not warrant the adjustment of Incentive Milestone I & II Dates.*

## **BOARD FINDINGS:**

- The Board was not constituted until after the events happened. Consequently, it did not observe the work as it was performed and must rely more heavily on the presentations by the parties.
- The Specification 8-13.1 is draconian in nature and does say:  
*"The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such Delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Incentive-Disincentive Completion Date for purposes of calculation of the incentive payment set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such*

## DISPUTE REVIEW BOARD RECOMMENDATION

*delays or events in an effort to complete the Contract prior to expiration of the Incentive-Disincentive Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance."*

- Although the Contractor quotes court cases extensively, there does not appear to be one that is exactly on point. This is not to say that the specification language would survive (or not) legal challenge.
- It is incumbent on the Department, in its selection of the projects on which to use this specification, to select projects that are less likely to encounter obstacles that cannot be overcome. Otherwise, the specification will become meaningless and of no value.
- Likewise, it is incumbent on the Contractor to evaluate the risks of the project when submitting his bid and not assume that he has a vested right to achieve the milestones.
- The Department did additional soil borings along US-19 in an effort to provide adequate information to the Contractor in bidding the project.
- These borings did not reflect the conditions actually encountered. The Department did not refute the actual conditions encountered as represented by the Contractor. On projects containing this specification there is an elevated duty to provide accurate and timely information.
- The impacts encountered were numerous and substantial and were beyond the reasonable contemplation of the Contractor or the Department, arising to what may be termed by some as "catastrophic", but does not meet the meaning under the contract.
- In the interest of "partnering", the FDOT did consider modifying the stationing of the work that comprised Milestone II completion. Additionally, the Department did modify 8-13.1 by allowing the Contractor to proceed with Milestone II work prior to completion of Milestone I.
- 8.13.1 Incentive-Disincentive specification states:

*The Department desires to expedite construction on this Contract to minimize the inconvenience to the traveling public and to reduce time of construction. In order to achieve this, incentive – disincentive provisions are established for the Contract Work items described below...*
- In spite of the many obstacles encountered, the Contractor did reduce the time required for normal completion of the project.
- The Traveling Public did receive the benefit of those efforts.
- The Department has recognized the need to preserve the integrity of the Incentive-Disincentive specification by establishing "Alternate Milestones" on other Department projects due to extenuating circumstances (i.e. SR 5, Martin County, FIN 228801-1-52-01).
- The DRB Three Party Agreement states:

*... recommendations shall be based on the pertinent Contract provisions, and the facts and circumstances involved in the dispute.*

## DISPUTE REVIEW BOARD RECOMMENDATION

### **BOARD RECOMMENDATION:**

**Based on the materials supplied to the Board and presentations to the Board at the DRB hearing the Board recommends:**

while under the strictest interpretation of the Contract, the Contractor would not be entitled to any modification of the Incentive portion of the Incentive-Disincentive dates for Milestones I and II. However, given the enormity of the revisions in scope required to compete Milestone I and II, and the ultimate successful accomplishment of the intent of the Incentive-Disincentive specification,

**it would be proper and advisable for the Department to establish reasonable alternate Milestones for the results achieved by the Contractor.**

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


Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by that party.

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

Respectfully Submitted

Disputes Review Board  
John H. Duke, Sr.; DRB Chairman  
Tom Rice; DRB Member  
Roy Adams, Jr.; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.; DRB Chairman

EC: Joy Lukcic, (Joy.Lukcic@dot.state.fl.us)  
Jeff Nelson (JeffN@Nelson-Construction.com)  
Terry Jennings (Terence.Jennings@dot.state.fl.us)  
Jim Moulton (Jim.Moulton1@dot.state.fl.us)