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Frank DiGilio
Kiewit Project Manager
1510 SW 17th St – Unit 301
Ocala, FL 34471

Harold Dubon, PE
DMJM Harris Sr Project Engineer
1320 SE 25th Loop, Suite 103
Ocala, FL 34471

Contract E5L60
FAP No. 411665-2-582-01

RE: SR 464 over CSX DRB Hearing

The Dispute Review Board held a hearing March 20, 2009 at the Ocala Operations center. The hearing involved a dispute between the Contractor and the Department of Transportation regarding a request for compensation for furnishing and installing temporary poles and a signal at SW 12th Ave.

This is a Design/Build Project with a two step bonus for completion within the parameters outlined in the Contract. The Temporary Signal System was not anticipated in the proposed work. The design standard was changed from Type N poles, as the contract called for, to a Type P pole after work began on the project.

CONTRACTOR'S POSITION

KSC was given a conceptual plan to base our design upon. This plan necessitated the moving of traffic to the frontage roads, which required removal of the existing traffic signal at SW 7th Avenue and installation of a new permanent traffic signal at SW 12 Avenue. This traffic switch was a controlling item of work.

KSC relied upon the RFP documents that stated an approved supplier on the QPL must be used to furnish the Type N concrete strain poles.

At the time of bid, the installation of temporary signal poles was not planned, nor was it possible to be foreseen.

The Design-Build firm was required to prepare traffic signal plans in accordance with the latest design standards and practice. KSC was required by addendum #2 to use Type N poles from a manufacturer on the Qualified Producer list. The producer was to supply the poles by February 20, 2008 per the Baseline Construction schedule. The Contractor believes the Department forced the supplier to cease production of Type N poles on 12/21/07 and the approval process for the Type P poles was started. This information was not shared with KSC. KSC had no knowledge of how long this process would take, or when the new poles would be available. KSC presented alternatives and asked for direction from FDOT and received none. KSC heard time and time again that production would begin next week. Actual production began in May.

Without direction from FDOT, KCS was bound by its contractual obligation to mitigate the delay and potential claim by installing temporary signals at a cost of \$29,000. This action removed the concrete strain poles from the controlling work and allowed FDOT time to complete their specification change. The permanent pole production began in May and they were installed in June. This would have resulted in a 118 day delay to the project and a potential \$890,000 claim issue.

The State benefited from KSC acting as a responsible contractor as the law requires.

KSC is entitled to compensation for its mitigating efforts: compensation for the unforeseen work of installing the temporary signal poles.

Florida law provides that public owners must provide reasonable cooperation to facilitate the Contractor's performance and to avoid hindering or obstructing the Contractor's efforts. At bid time, KSC placed reliance on the permanent Type N poles would be available. The specification change which switched the poles from Type N to Type P was unforeseeable.

Under the implied mutual duty of cooperation, in the event of a potential delay on a construction project, both the owner and the contractor must exercise reasonable diligence to mitigate the consequences of any potential delay.

Section 5-12.6.2.1 of FDOT specifications requires the Contractor to utilize "reasonable mitigation" to minimize the consequences and cost of any delay. If Kiewit had failed to utilize temporary wooden poles and the work was further delayed as a result, the FDOT would likely contend that Kiewit was to blame for failing to reasonably mitigate.

DEPARTMENT'S POSITION

The Department's position is that the Contractor is not entitled to additional compensation. The lack of signal pole availability for the project is not unforeseeable work. Section 4-4 "Unforeseeable Work" of the Design Build Specifications states: "When the Department requires work that is not covered by a price in the contract and such work does not constitute a significant change as defined in 4-3.1, and the Department finds that such work is essential to the satisfactory completion of the contract within the intended scope, the Department will make an adjustment to the contract". The signal work that was to be performed at 12th Avenue was in the original contract. KSC chose to install signals at SW 12th Avenue so as to remove the signals at SW 7th Avenue to facilitate their construction. The Department is not responsible for changes that affect their proposed switch from phase 1A to phase 1B of the Design Build MOT plans for this contract. The switch occurred March 20, 2008.

KSC made a good business decision to install the temporary poles so as not to jeopardize attaining the bonus and incentive money. This does not mean that the Department is responsible for the additional costs incurred by KSC as stated in Section 8-13 of the Design Build Specifications.

Under section 8-7.3.2, the Department will consider request for the delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the Contractor or supplier. Also, no additional

compensation will be made for delays caused by delivery of material or component equipment.

Any and all cost 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 by the "Bonus Completion Date", regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

BOARD FINDINGS

The Board has carefully reviewed the submittals of both parties and heard the oral arguments supporting the respective positions. The Contractor was required to use Type N signal poles and secure them from a Department approved supplier. The Contractor followed normal industry procedure and arranged purchase from Dura- Stress, a long time supplier for Department projects. The poles were to be delivered by February 20, 2008. Prior to manufacture and delivery, the Department changed Design standards to a Type P pole effective January 1, 2008. The Contractor was told at the progress meeting February 20, 2008 that production should begin next week. The actual production began in May. The Contractor installed a temporary signal to mitigate the delay. The Board believes the Contractor's decision was prudent in taking unilateral action without any advice or input offered by the owner. Modification of Design standards and specifications are a normal occurrence in the industry, however, if adopted on an existing contract it is normally handled by a change order. This unilateral change by the owner had the possibility to foil the owner and Contractor plans for achievement of early completion, the chief objective of utilizing design build.

The Board finds that the change from Type N poles to Type P poles was instituted by the Department in conjunction with the pole supplier, this change of poles posed an unacceptable delay in the Contractor's schedule which the Contractor was duty bound to mitigate. The change in the type of pole to be used on the project, after the project was already underway, was indeed "unforeseeable". Neither the Department nor the Contractor contemplated the need for temporary signals when the contract was executed. The use of temporary poles was essential to keep the project progressing satisfactorily. Therefore, the Board finds entitlement for the Contractor.

Signed by the Chairman with concurrence of all



Robert D. Buser, Chairman